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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

DOE BRANDEIS, et al., Plaintiffs, **v.** **ROB BONTA, in his official capacity as Attorney General of California,** Defendant.	Case No. 37-2022-00003676 **DEFENDANT'S DEMURRER TO PLAINTIFFS' VERIFIED COMPLAINT FOR DECLARATORY, INJUNCTIVE OR OTHER RELIEF** **(1) Notice of Demurrer and Demurrer** **(2) CCP 430.41 Declaration Regarding Parties Meeting and Conferring;** **(3) Memorandum of Points and Authorities in Support of Demurrer;** **(4) Request for Judicial Notice [Filed Under Separate Cover]** Date: September 9, 2022 Time: 11:00 a.m. Dept: C-69 Judge: The Hon. Katherine A. Bacal Action Filed: January 28, 2022

NOTICE OF DEMURRER AND DEMURRER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE NOTICE THAT Defendant Rob Bonta, in is official capacity as the Attorney General of the State of California, demurs to Plaintiffs' Verified Complaint for Declaratory, Injunctive or Other Relief and to each and every cause of action alleged therein. The hearing on the demurrer will take place on **September 9, 2022, at 11:00 a.m.**, or as soon thereafter as the matter may be heard, in Department C-69 of the Civil Division of the Superior Court for the County of San Diego, located at 330 West Broadway, San Diego, California, 92101.

The demurrer shall be based on this notice of demurrer and demurrer, the accompanying memorandum of points and authorities, the request for judicial notice filed under separate cover, and upon such further evidence, both oral and documentary, as may be offered at the time of hearing. The Attorney General demurs generally to the entire Complaint and specifically to each and every cause of action on the following grounds:

1. The First Cause of Action alleging that Assembly Bill 173 (2021-2022 Reg. Sess.; 2021 Cal. Stat., ch. 253) (AB 173) violates the privacy protections in article I, section 1 of the California Constitution fails to state any cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

2. The Second Cause of Action alleging that AB 173 violates article II, section 10, subdivision (c), of the California Constitution fails to state any cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

3. The Third Cause of Action alleging that AB 173 violates the Second Amendment of the United States Constitution fails to state any cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

Dated: March 24, 2022

ROB BONTA
Attorney General of California
ANTHONY R. HAKL
Supervising Deputy Attorney General

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Attorneys for Defendant Rob Bonta, in his official Capacity as the Attorney General of the State of California

CCP 430.41 DECLARATION REGARDING PARTIES MEETING AND CONFERRING

I, NELSON R. RICHARDS, declare as follows:

1. I am a Deputy Attorney General with the California Department of Justice, Office of the Attorney General, and attorney of record in this matter for Defendant Rob Bonta, in his official capacity as the Attorney General of the State of California. I am an attorney at law duly licensed to practice before all courts of the State of California. I have personal knowledge of the facts set forth below and, if called as a witness, I could and would competently testify to them.

2. This declaration is made pursuant to Code of Civil Procedure section 430.41, subdivision (a)(3), and in support of Defendant's concurrently filed demurrer.

3. On March 22, 2022, Stephen Duvernay, counsel for Plaintiffs, and I met and conferred telephonically about the Attorney General's objections to the Verified Complaint for Declaratory, Injunctive or Other Relief raised in the demurrer filed along with this declaration.

4. The parties were unable to reach an agreement resolving the Attorney General's objections to the Verified Complaint for Declaratory, Injunctive or Other Relief raised in the demurrer.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own personal knowledge, and that this declaration is executed this 24th day of March, 2022.

NELSON R. RICHARDS

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MEMORANDUM OF POINTS & AUTHORITIES

INTRODUCTION

Firearm-related crimes, suicides, and accidents pose persistent and grave problems for Californians. In 2016, California established a Firearm Violence Research Center at the University of California to help understand and address those problems. Several state agencies, including the Department of Justice (the Department), were required to provide the Research Center with information in their records. Among those agencies, the Department maintains records containing uniquely rich firearms information. It has records of criminal histories, mental health adjudications, domestic violence restraining orders, firearms and ammunition transactions, and more. Last year, the Legislature enacted Assembly Bill 173 (AB 173) (2021-2022 Reg. Sess.; 2021 Cal. Stat., ch. 253) to clarify the 2016 information-sharing requirement and formalize how the Department may provide information to other researchers. Plaintiffs contend that AB 173 is unconstitutional. Each of the three claims alleged in the Complaint fails as a matter of law.

1. Right to Privacy. The Complaint alleges that sharing records containing Plaintiffs' personal information with researchers violates their right to privacy under the California Constitution. But disclosing information with a cohort researchers who may use that data only for their research does not constitute a serious invasion of privacy. Even if it did, the State's interest in learning more about firearm-related violence outweighs Plaintiffs' minimal privacy interests.

2. Proposition 63. The Complaint alleges that AB 173 amends Proposition 63 in violation of article II, section 10, subdivision (c), of the California Constitution. But AB 173 did not amend Proposition 63. It did not authorize anything Proposition 63 prohibited or prohibit anything Proposition 63 authorized—it simply clarified existing law. Even if it were an amendment, it is consistent with and furthers Proposition 63's purpose of addressing firearm violence.

3. Second Amendment. The Complaint alleges that AB 173 violates the Second Amendment. But the claim is entirely derivative of the privacy claim, and fails for the same reasons. Moreover, AB 173 does not burden any Second Amendment related activity, and it is reasonably related to the California's legitimate interest in reducing firearm-related violence.

This Court should therefore sustain the Attorney General's demurrer.

BACKGROUND

I. CALIFORNIA HAS DATA-RICH FIREARMS RECORDS THAT IT USES FOR MULTIPLE PURPOSES

This country has a problem with firearm violence, and California is no exception. (See, e.g., *District of Columbia v. Heller* (2008) 554 U.S. 570, 636 ["We are aware of the problem of handgun violence in this country"].) From 2002 to 2013, more than 35,000 Californians lost their lives to gun violence. (Def.'s Req. for Judicial Notice in Supp. of Demurrer (Def.'s RJN), Ex. 1 at p. 163 [Prop. 63] § 2.3.) To help alleviate that tragic state of affairs, California "has led the nation in gun safety laws." (*Id.* § 2.5.) One set of those laws directs the Department to collect and maintain information about firearms and ammunitions transactions. That process originated in the early 1900s when the State started requiring firearms dealers to maintain records. (1917 Stats. 221.) The requirement now serves as the central component of background checks, which keep criminals, the dangerously mentally ill, and other prohibited people from purchasing firearms.

Under current law governing firearms sales, the record-keeping process starts with a firearms dealer filling out a Dealer Record of Sale (DROS) form. (§ 26905; Compl. ¶ 19.) That form records information about the firearm, such as make, model, and serial number, and records information about the purchaser, including name, date of birth, address, physical description, and identification card number. (Compl. ¶ 19.) Once completed, and before the purchaser can take possession of the gun, the firearms dealer must electronically submit the DROS form to the Department using the DROS Entry System.(§§ 28100, 28205; Cal. Code Regs., tit. 11, § 4200 et seq.) Submitting the DROS form creates an entry in a separate system, called the DROS System, and initiates the background check process. That process compares the prospective purchaser's information against numerous databases to determine whether the buyer is prohibited from possessing a firearm. These databases include the federal National Instant Criminal Background Check System (NICS) as well as various databases maintained by the Department (e.g., the Automated Criminal History System). (§ 28220; 18 U.S.C. § 922(t).)

Once a purchaser passes the background check and the firearms dealer reports the delivery of the firearm in the DROS Entry System, the transaction and details are uploaded into the

Department's Automated Firearms System (AFS). (§ 11106; Cal. Code Regs., tit. 11, § 4350.) The system stores the purchaser's identifying information, including name, address, and identification card number (but not physical description), as well as information on other firearms transfers (if any). (§ 11106, subd. (b)(2)(A).) Similar information for ammunition purchases is stored in the Ammunition Purchase Records File. (*Id.* § 30352, subd. (b)(1).) The Department uses data in these systems in numerous ways. A non-exhaustive list of examples includes: investigating crimes, (§ 11106(a)); identifying people who lawfully purchased firearms but who later become prohibited, (*id.* § 30005); making reports to the Legislature about firearms crime and policies,(see, e.g., § 11108.3, subd. (f)); and reporting information to the public on the Department's Open Justice website, https://openjustice.doj.ca.gov/. The Department has also long provided data to researchers who study firearm violence and crime. (Compl. ¶ 26, citing Beckett, TheGuardian.com, *California Attorney General Cuts Off Researchers' Access to Gun Violence Data* at p. 3 (March 11, 2021) [hereafter, Beckett].)

II. THE CALIFORNIA FIREARM VIOLENCE RESEARCH CENTER IS FOUNDED

In 2016, the Legislature enacted the California Firearm Violence Research Act because "[t]oo little is known about firearm violence and its prevention . . . because too little research has been done." (2016 Stats., ch. 24, § 30, § 14230, subd. (e).) The Legislature concluded that research and public discourse was integral to addressing the "significant public health and public safety problem" posed by firearm violence. (§ 14230, subds. (a), (g).) And it found that "[n]ationally, rates of fatal firearm violence have remained essentially unchanged for more than a decade, as declines in homicide have been offset by increases in suicide." (*Id.* § 14230, subd. (a).) It also found that suicide and accidental deaths exceeded the death toll of mass shootings, and that half the costs of hospitalizations from firearm violence came from "unintentional injuries" and "deliberate self-harm." (*Id.* § 14230, subds. (b), (c).) The Legislature called for "more research and more sophisticated research." (*Id.* § 14230, subd. (e).)

To achieve this goal, the Legislature created the California Firearm Violence Research Center (Research Center). (§ 14231.) Eventually housed at UC Davis, the Research Center has a broad mandate to "conduct basic, translational, and transformative research with a mission to

provide the scientific evidence on which sound firearm violence prevention policies and programs can be based." (*Ibid.*) The Legislature provided that state agencies, including the Department, "shall provide to the center, upon proper request, the data necessary for the center to conduct its research." (2016 Stat., ch. 24, § 30, former § 14231, subd. (c).)

III. PROPOSITION 63 REQUIRES THE DEPARTMENT TO MAINTAIN RECORDS OF AMMUNITION TRANSACTIONS

The same year the Legislature established the Research Center, the voters enacted Proposition 63, the Safety for All Act of 2016. Among other reforms, the voters decided that there should be "background checks for ammunition sales just like gun sales." (Prop. 63 §§ 2.7, 8-9.)[1] As part of that requirement, new Penal Code section 30352(b) required ammunition vendors to transmit information about ammunition purchasers to the Department for a background check and for retention in a database called the Ammunition Purchase Records File. (Prop. 63 § 8.13, amending Pen. Code, § 30352.) That provision also provided that the information "shall remain confidential and may be used by the department . . . only for law enforcement purposes." (*Ibid.*) Proposition 63 contained an amendment provision allowing the Legislature to amend it by a 55% vote of both houses "so long as such amendments are consistent with and further the intent of this act." (Prop. 63 § 13.)

IV. AB 173 REITERATES THE DEPARTMENT'S OBLIGATION TO SHARE AFS RECORDS AND OTHER RECORDS WITH THE RESEARCH CENTER

Notwithstanding the directive in the California Firearm Violence Research Act, the former Attorney General refused to provide researchers with certain data in the Department's possession. (Compl. ¶ 26; Beckett, *supra*, at pp. 2-5.) In response, the Legislature enacted AB 173 in 2021 to "[c]lairif[y] the process and parameters of disclosure" of information by the Department to the Center and other researchers. (Def.'s RJN Ex. 2 [Senate Budget and Fiscal Review Committee Report on Assembly Bill 173].) The law amended several Penal Code sections, including:

[1] Before the November 2016 election, the California Legislature enacted Senate Bill 1235. (2016 Stats., ch. 55.) That law amended aspects of the ammunition background check program placed before the voters. (Def.'s RJN Ex. 1 at pp. 85-86 [informing voters that the State had "enacted legislation in July 2016"—i.e., SB 1235—"to replace the above provisions with alternative ones if Proposition 63 is approved by the voters"].)

- Codifying a new finding in section 14230(e) that "California's uniquely rich data related to firearm violence have made possible important, timely, policy-relevant research that cannot be conducted elsewhere." (2021 Stats., ch. 253, § 4.)

- Expanding the data-sharing provision in section 14231 into three subdivisions. The new addition clarified that data would be provided subject to approval by the Research Center's "governing institutional review board when required." (2021 Stats., ch. 253, § 5.) It also made clear that "[m]aterial identifying individuals shall only be provided for research or statistical activities and shall not be transferred, revealed, or used for purposes other than research or statistical activities, and reports or publications derived therefrom shall not identify specific individuals." (*Ibid.*)

- Adding a new provision to section 11106 clarifying that information maintained in various Department databases, including the DROS System and Automated Firearms System, must be provided to the Research Center and, at the Department's discretion, to other researchers. (2021 Stats., ch. 253, § 2.5.) The new provision contained the same limitation as amended section 14231 on the use of individual data. (*Ibid.*)

- Adding a similar provision to the ammunition background check law in section 30352. (2021 Stats., ch. 253, § 11.)

V. ALLEGATIONS OF THE COMPLAINT

Plaintiffs are an anonymous individual and several political organizations who believe AB 173 is unconstitutional. (Compl. ¶¶ 1, 9-15.) The Complaint alleges that AB 173 "marked a radical and sweeping change to the privacy afforded to all California firearm and ammunition owners." (*Id.* ¶ 27.) That change, it alleges, violates three constitutional rights. First, the Complaint alleges that AB 173 violates the right to privacy under article I, section 1 of the California Constitution. (*Id.* ¶¶ 29-43, 55-56.) Second, it alleges that AB 173's change to section 30352(b) regarding how the Department may use information in the Ammunition Purchase Records File is an unlawful amendment of Proposition 63 in violation of article II, section 10, subdivision (c), of the California Constitution (article II, section 10(c)). (*Id.* ¶¶ 44-48, 57-58.) Third, it alleges that AB 173 violates the Second Amendment of the United States Constitution by "forcing citizens to sacrifice one constitutional right (privacy) in order to exercise another (the right to keep and bear arms)." (*Id.* ¶¶ 49-52, 59-61.)

LEGAL STANDARD

When reviewing a demurrer, courts treat "all material facts" as admitted, "but not contentions, deductions or conclusions of fact or law." (*Centinela Freeman Emergency Medical*

Associates v. Health Net of California, Inc. (2016) 1 Cal.5th 994, 1010 [quotation marks omitted].) Courts may "also consider matters which may be judicially noticed" (*Ibid.*, quotation marks omitted), and "material documents referred to in the allegations of the complaint" (*City of Port Hueneme v. Oxnard Harbor District* (2007) 146 Cal.App.4th 511, 514). They "give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Centinela*, *supra*, 1 Cal.5th at p. 1010, quotation marks omitted].)

ARGUMENT

The Complaint asserts a facial challenge to AB 173. "A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) "To support a determination of facial unconstitutionality, voiding the statute as a whole, [plaintiffs] cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute." (*Ibid.*, quotation marks omitted.) "Rather, [plaintiffs] must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." (*Ibid.*, quotation marks omitted.) "In short, a facial challenge must be rejected unless no set of circumstances exists in which the statute can be constitutionally applied." (*People v. Hsu* (2000) 82 Cal.App.4th 976, 982.) None of the claims alleged in the Complaint can satisfy that standard.

I. THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER ARTICLE I, SECTION 1, OF THE CALIFORNIA CONSTITUTION

A plaintiff asserting a privacy claim under article I, section 1, of the California Constitution must demonstrate "'(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.'" (*Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 42-43, quoting *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 39-40.) Even if a plaintiff establishes those three elements, a defendant may prevail by showing "that the invasion of privacy is justified because it substantively furthers one or more countervailing interests." (*Id.* at p. 43, quotation marks omitted.) And the plaintiff may then "rebut a defendant's assertion of countervailing

interests by showing there are feasible and effective alternatives to defendant's conduct having a lesser impact on privacy interests." (*Ibid.*, quotation marks omitted.) "[I]n cases where material facts are undisputed, adjudication as a matter of law may be appropriate." (*Ibid.*, quotation marks omitted)

A. Plaintiffs Do Not Have a Reasonable Expectation of Privacy Given the Circumstances

The Complaint alleges that Plaintiffs have a reasonable expectation of privacy in the information in the AFS and the Ammunition Purchase Records File. (Compl. ¶¶ 35-36.) But ownership and use of firearms has a long history of being public. People buy guns in stores in the public eye, and they practice at shooting ranges open to the public. Gun dealers keep records that state and federal officials may inspect without a warrant. (§ 28480; 18 U.S.C. § 923(g)(1)(B); *United States v. Biswell* (1972) 406 U.S. 311, 316.) People litigate Second Amendment issues using their true names. (See, e.g., *Silvester v. Harris* (9th Cir. 2016) 843 F.3d 816.) Concealed carry licenses and license applications have been public records for over half a century. (*CBS Inc. v. Block* (1986) 42 Cal.3d 646, 649.) And the Department already uses information in its possession to inform the Legislature and the public about firearms issues. (See, e.g., § 11108.3, subd. (f)); https://openjustice.doj.ca.gov/.) It is therefore not reasonable for firearms owners to expect that the State will not use information in its records, including personally identifying information, to help address firearm-related crimes, suicides, accidents, and other similar issues.

Five years before AB 173 took effect, the California Firearm Violence Research Act required the Department to provide records to the Research Center. (2016 Stats., ch. 24, § 30.) AB 173 thus did not change the law; it confirmed longstanding practices. What is more, Plaintiffs' claim relates to information in the AFS and Ammunition Purchase Records File. It does not address the nearly identical information—at least with regard to firearms—stored in the DROS System. (Compl. ¶ 19; see also §§ 28100, 28205; Cal. Code Regs., tit. 11, § 4200 et seq.) The Complaint does not allege that DROS System information—which has been provided to researchers for decades—cannot be provided to researchers. Given these circumstances, Plaintiffs do not have any reasonable expectation in not having their information shared with researchers.

(See *Heller*, *supra*, 8 Cal.4th at p. 43 [affirming order sustaining demurrer to constitutional privacy claim where plaintiff had alleged no facts showing a reasonable expectation of privacy in not having medical records shared with insurer].)

B. Providing Personally Identifying Information in Firearm-Related Records to Researchers Does Not Constitute a Serious Invasion of Privacy

Even if the Complaint did allege that Plaintiffs have a reasonable expectation of privacy in firearms records that covers limited disclosures to researchers, any "[a]ctionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." (*Heller*, *supra*, 8 Cal.4th at p. 44, quotation marks omitted.) The nature and scope of the disclosure of personal information here is very narrow and is plainly not egregious. Only researchers at the Research Center and other researchers who meet certain criteria will be able to request the information. (§ 11106, subd. (d); § 30352, subd. (b)(2).) And those researchers who apply and receive it may use the information for "research and statistical activity" only; they are prohibited from transferring, revealing, or using the information for purposes other than research and statistical activities and from publishing information that "identif[ies] specific individuals." (§ 14231, subd. (c)(3); § 11106, subd. (d); § 30352, subd. (b)(2).)

The Complaint alleges there is a serious invasion of privacy because a "prospect exists" that disclosure of personal information may lead "to unwanted contact from a third party." (Compl. ¶ 37.) The Complaint quotes from legislative materials to hypothesize about how researchers might use information obtained from the Department to contact firearms owners. (*Id.* ¶ 38, quoting Assem. Bill No. 1237 (Reg. Sess. 2021–2022), Response to Background Information Request at p. 4, Assembly Committee on Privacy and Consumer Protection [AB 1237 Report].) But those very materials (which is included as exhibit 16 in support of Plaintiffs' pending motion for preliminary injunction) notes that the Department "has a 30 year history of sharing data related to firearms with bona fide research institutions for the study of gun violence." (AB 1237 Report, *supra*, at p. 80.) Despite that 30-year history, Plaintiffs do not identify a single example of researchers ever using information in this way. Their argument is the sort of "suggest[ion] that in

some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute" that courts recognize as insufficient to state claim that the statute is invalid on its face. (*Coffman Specialties, Inc. v. Department of Transportation* (2009) 176 Cal.App.4th 1135, 1145, quotation marks omitted.)

The Complaint's reliance on *County of Los Angeles v. Los Angeles County Employment Relations Commission* (2013) 56 Cal. 4th 905, is therefore misplaced. (Compl. ¶ 37.) In that case, the Supreme Court recognized a serious invasion of privacy would occur if county employees' information was shared with "a union the employees ha[d] chosen not to join and ha[d] declined in the past to give their contact information" and when the union would use that information to contact the employees. (*County of Los Angeles*, *supra*¸ 56 Cal.4th at p. 930.) But that sort of unwanted contact is not inherent in AB 173. The Complaint thus does not allege an egregious breach of the social norms underlying the privacy right. (See *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 372 ["The limited disclosure to plaintiff of mere contact information regarding possible class action members would not appear to unduly interfere with either form of privacy, given that the affected persons readily may submit objections if they choose"]; *Folgerstrom v. Lamps Plus, Inc.* (2011) 195 Cal.App.4th 986, 992 ["the supposed invasion of privacy essentially consisted of Lamps Plus obtaining plaintiff's address without his knowledge or permission, and using it to mail him coupons and other advertisements. This conduct is not an egregious breach of social norms, but routine commercial behavior"].)

C. Any Invasion of Privacy Is Justified Because It Substantively Furthers California's Interest in Reducing Firearms Violence

"Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest." (*Hill*, *supra*, 7 Cal.4th at p. 38.) "Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities." (*Ibid.*) "Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise." (*Ibid.*) "Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests." (*Ibid.*) Where a privacy claim does not "implicate an obvious invasion of an

interest fundamental to personal autonomy," courts apply "a general balancing test without requiring the [government's] asserted countervailing interest to be compelling." (*Lewis v. Superior Court* (2017) 3 Cal.5th 561, 572-573.) Here, the Complaint alleges no interest fundamental to personal autonomy, and the balance of interests favors disclosure.

Firearm-related crimes, suicides, and accidents take a devastating toll on society. (§ 14230; Prop. 63 § 2.) The Legislature found that "[t]oo little is known about firearm violence and its prevention. . . . in substantial part because too little research has been done." (§ 14230, subd. (e).) Providing researchers with access to the Department's "uniquely rich data related to firearm violence" will continue to make "possible important, timely, policy-relevant research that cannot be conducted elsewhere." (*Ibid.*) Researchers may only use that data for "research and statistical activities" and they may not disclose information identifying individuals. (§ 14231, subd. (c)(3); § 11106, subd. (d); § 30352, subd. (b)(2).) "Failure to abide by these limitations may trigger criminal and civil liability [under the] Information Practices Act." (*Lewis*, *supra*, 3 Cal.5th at p. 577, citing Civ. Code, §§ 1798.57, 1798.48.) While not dispositive of the constitutional issue, these "safeguards . . . limit the degree to which [firearms owners'] privacy is invaded." (*Ibid.*)

In that regard, the provision is similar to the Department's Controlled Substance Utilization Review and Evaluation System, which the Supreme Court upheld against a privacy challenge in *Lewis*. That system recorded "every prescription of a Schedule II, III, or IV controlled substance must be logged in CURES, along with the patient's name, address, telephone number, gender, date of birth, drug name, quantity, number of refills, and information about the prescribing physician and pharmacy." (*Id.* at p. 565.) Various entities, "including licensed health care prescribers, pharmacists, law enforcement, and regulatory boards," could access that information. (*Id.* at p. 566.) In the context of a disciplinary proceeding, a physician argued that the Medical Board's ability to access the information violated his patients' privacy rights. (*Id.* at pp. 571-577.) The Court rejected the claim because "the Board's interests in protecting the public from unlawful use and diversion of a particularly dangerous class of prescription drugs and protecting patients from negligent or incompetent physicians" outweighed the patients' privacy interests in their prescription and personally identifying information. (*Id.* at p. 577.)

The Complaint offers three considerations on their side of the scale. First, they allege that "there is an insufficient fit between the government's interest in researching firearm violence and the disclosure of personal identifying information in AFS and the Ammunition Purchase Record File." (Compl. ¶ 40.) But this argument does not articulate a privacy interest, and there is no constitutional "fit" analysis required in privacy claims. (See, e.g., *Lewis*, 3 Cal.5th at pp. 571-572.) Moreover, the Legislature has concluded that the information is necessary. (§ 14230.) Second, the Complaint alleges that the "scope of the potential privacy interest is significant." (Compl. ¶ 41.) That argument turns on the view that researchers use or access personal information "without reason." (*Id.* ¶ 41, quotation marks omitted.) Researchers have very good reasons to access this data. (§ 14320.) It will help better understand and address firearm-related violence. (*Ibid.*) Indeed, legislative history material cited in the Complaint confirms that the very data that Plaintiffs contend researchers access without reason, in fact, "leads to evidence based policies and programs that reduce deaths and injuries from gun crime" and the data must be shared in order for California "to continue to improve [the State's] firearms policies and reduce gun violence." (AB 1237 Report, *supra*, at p. 80.)

Finally, the Complaint alleges that the State "has several equally effective and feasible alternatives to achieve its interests that have a lesser impact on Plaintiffs' privacy interests." (Compl. ¶ 42.) But the Complaint alleges no facts showing that their proposed safeguards are always effective and feasible for research, as they must do to prevail on their facial challenge. (See *Tobe*, *supra*, 9 Cal.4th at p. 1084.) The Complaint suggests that the Department could "anonymize or de-identify data shared with researchers." (Compl. ¶ 42.) At the same time, the Complaint acknowledges that "eliminating personal identifying information is not feasible for [some] research project[s]" (*ibid.*), essentially conceding their proposed solution does not meet the standard for facial challenges. Under AB 173 (and prior law), researchers may obtain data from several different agencies, "including, but not limited to, the Department of Justice, the State Department of Public Health, the State Department of Health Care Services, the Office of Statewide Health Planning and Development, and the Department of Motor Vehicles." (§ 14231,

subd. (c)(2).) If the Department were to anonymize the data from it provides, the researchers could not link it to data received from other agencies, making certain research impossible.

Recognizing that the proposed solution cannot meet Plaintiffs' burden, the Complaint then suggests the Department should give people notice and allow them to opt out. (Compl. ¶ 42.) This generic argument could apply to any privacy claim. Some information sharing regimes can tolerate opting out, for example, where opting out will allow people to avoid harassment and interactions that will be fruitless. (See, e.g., *County of Los Angeles*, *supra*, 56 Cal.4th at p. 932 [suggesting an opt-out procedure could be used if a union who received employees' contact information from county employer harassed employees].) Harassment is not a concern here. More importantly, large-scale social science research of the sort contemplated by AB 173 would be impractical or less reliable if people could opt out. The dataset researchers received would no longer be representative of all firearm owners. Again, on a facial challenge, a complaint must allege facts showing that opt-out requirements would be feasible and effective in all scenarios. The Complaint falls far short of meeting that burden.

II. THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER ARTICLE II, SECTION 10(C), OF THE CALIFORNIA CONSTITUTION

The Complaint alleges that because AB 173 is an invalid amendment to Proposition 63 because it "eviscerat[es] Proposition 63's voter-mandated privacy restrictions and amending the statute to make personal information . . . available to researchers on the same terms as AFS data." (Compl. ¶ 47.) This claim fails because AB 173 did not amend Proposition 63, and, even if it did, the amendment was permissible under article II, section 10(c).

A. AB 173 Does Not Amend Proposition 63

A statute amends an initiative when it is "'designed to change the . . . initiative by adding or taking from it some particular provision'" or by "prohibit[ing] what the initiative authorizes, or authoriz[ing] what the initiative prohibits." (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571, quoting *People v. Cooper* (2002) 27 Cal.4th 38, 44.) As discussed above, AB 173 clarified Proposition 63. When the voters enacted Proposition 63, the California Firearm Violence Research Act required the Department to provide records to the Research Center. (2016

Stats., ch. 24, § 30, enacting § 14231.) Voters are presumed to be "aware of existing laws." (*People v. Valencia* (2017) 3 Cal.5th 347, 369, quotation marks omitted.) Thus, when Proposition 63 provided that information in the Ammunition Purchase Records File could be used "only for law enforcement purposes," the voters would have understood that those purposes included sending the information to the Research Center. (See Prop. 63 § 8.13, former § 30352.) Providing firearms researchers with information in Department databases is self-evidently a law enforcement purpose. Thus, by clarifying what the law authorized, AB 173 neither authorized what Proposition 63 prohibited nor prohibited what Proposition 63 authorized. (See *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 280-282 [holding that law changing the punishment for a crime did not amend initiative statute establishing the elements of the crime].) There is therefore no amendment, and Plaintiffs' claim fails for that reason.

B. Even If AB 173 Amends Proposition 63, It Is a Permissible Amendment

Proposition 63 authorized legislative amendments that are "consistent with and further the intent of [the] Act." (Prop. 63 § 13.) Where an initiative statute expressly allows for amendment, amendments enacted by the Legislature receive the same "strong presumption of constitutionality" that generally accompanies legislation. (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1253.) A conflict with article II, section 10(c) must be "clear and unquestionable" before a court will invalidate a legislative statute. (*Id.* at p. 1252.) Courts apply a "highly deferential standard" of review. (*O.G. v. Superior Court* (2021) 11 Cal.5th 82, 91.) They "presume the Legislature acted within its authority and uphold [an amending statute] if, by any reasonable construction, it can be said that the statute is consistent with and furthers the intent of [the initiative]." (*Id.* at p. 87.) When "the initiative's conditions for making amendments involve the requirement that any amendment 'furthers the purposes of the Proposition' or words of similar effect," courts "are guided by, but are not limited to, the general statement of purpose found in the initiative." (*Ibid.*, brackets and ellipsis omitted.) In discerning an initiative's purpose, courts will consider "many sources, including the historical context of the amendment, . . . the ballot arguments favoring the measure[, and] [l]egislative findings." (*Ibid.*) Courts will uphold a law

"even if" a party challenging it "is able to proffer other, plausible interpretations of the purpose and intent of [the initiative]." (*Id.* at p. 91.)

In enacting Proposition 63, the voters found that "[g]un violence destroys lives" and kills thousands of Californians. (*Id.* § 2.1.) They relied on "[r]esearch[]" estimating that "gun violence costs the economy "$229 billion every year," including "$83 million in medical costs and $4.24 billion in lost productivity" in California. (*Id.* § 2.4.) They found that "common-sense gun laws reduce gun deaths and injuries[.]" (*Id.* § 2.5.) Proponents of the initiative argued the law would help address "gun violence" and take "a historic and unprecedented step forward for gun safety." (Def.'s RJN. Ex. 1 at p. 88.) Taken "as a whole," the fundamental purpose and intent of Proposition 63 was to address firearms violence. (See *O.G.*, *supra*, 11 Cal.5th at p. 100.) The Complaint ignores that intent and those purposes instead reading "voter-mandated privacy restrictions" into the law as a purpose and intent. (See Compl. ¶ 47.) But neither Proposition 63's express declaration of intent and purpose nor the ballot arguments mention privacy as a concern. (See generally Def.'s RJN Ex. 1.)

AB 173 is consistent with and furthers both the express purposes and intent and the overarching purpose and intent of Proposition 63. Like Proposition 63, AB 173 targets "firearm violence." (§ 14230, subd. (a).) The Legislature concluded that more research into firearm-related crimes, suicides, and accidents, would help promote understanding of those complex problems. It found that "[t]oo little is known about firearm violence and its prevention. . . . The need for more research and more sophisticated research has repeatedly been emphasized. California's uniquely rich data related to firearm violence have made possible important, timely, policy-relevant research that cannot be conducted elsewhere." (§ 1420, subd. (e).) That research is the exact sort of research the voters relied on in enacting Proposition 63, and that research will help lawmakers in California and elsewhere develop the exact sort of "common-sense gun laws" that the voters determined are necessary to "reduce gun deaths and injuries." (See Prop. 63 § 2.5.) Amending section 30352 to clarify that the Department can provide information in the Ammunition Purchase Records File to researchers who study firearms violence is thus consistent with and furthers Proposition 63's purpose and intent.

III. THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER THE SECOND AMENDMENT OF THE UNITED STATES CONSTITUTION

Plaintiffs' Second Amendment claim turns on their privacy claim. (See Compl. ¶¶ 49-51.) The Complaint alleges that making the exercise of their Second Amendment rights contingent on sacrificing Plaintiffs' constitutional right to privacy is itself a violation of the Second Amendment. (*Id.* ¶ 51.) Under this theory, their Second Amendment claim turns on the success of their privacy claim. If the privacy claim fails, then the Second Amendment claim also must fail. Generally speaking, courts do not approve of nesting constitutional claims. For instance, the Ninth Circuit has held that where an "equal protection challenge is no more than a Second Amendment claim dressed in equal protection clothing, it is subsumed by, and coextensive with the former, and therefore not cognizable under the Equal Protection Clause." *Teixeira v. County of Alameda* (9th Cir.) 822 F.3d 1047, 1052 [quotations marks, brackets, and internal citation omitted], reh'g en banc, (9th Cir. 2017) 873 F.3d 670;[2] *Midway Venture LLC v. County of San Diego* (2021) 60 Cal.App.5th 58, 91 fn. 9 [equal protection claim that was "coextensive with . . . First Amendment claims" failed for the same reason as the First Amendment claims].) That is essentially how the Second Amendment Claim works here, and it should fail for that reason.

The Second Amendment Claim also fails because AB 173 imposes no burden, or a de minimis burden, on the right to bear arms. (See, e.g., *Heller v. District of Columbia* (D.C. Cir. 2011) 670 F.3d 1244, 1254-55 (*Heller II*); *Nordyke v. King* (9th Cir. 2012) 681 F.3d 1041 (en banc).) The Attorney General is unaware of any case challenging a law that imposes as little a burden on the right to bear arms as AB 173. The closest case would be *Nordyke*, where the Ninth Circuit upheld a law requiring firearms on display at gun shows be secured. (681 F.3d at p. 1044.) But even that case involved a restriction on how firearms were sold. AB 173, by contrast, places no limits on how guns or ammunition may be sold or purchased, on what guns or ammunition may be sold or purchased, on how guns or ammunition may be stored or used, or on who may purchase or possess them. Any burden, if there even is one, is de minimis.

[2] Under Ninth Circuit Rule 35-3, the reasoning of the three-judge panel decision is citable because the en banc court adopted it. (*Teixeira*, *supra*, 873 F.3d at p. 676 fn. 7.)

Even assuming that AB 173 places more than a de minimis burden on Second Amendment rights, the highest level of scrutiny that could apply is intermediate scrutiny. (*Bauer v. Becerra* (9th Cir. 2017) 858 F.3d 1216, 1221-1222.) Intermediate scrutiny requires that "the government's statutory objective must be significant, substantial, or important," and that there "be a reasonable fit between the challenged law and that objective." (*Duncan v. Bonta* (9th Cir. 2021) 19 F.4th 1087, 1108 (en banc), quotation marks omitted.) Here, the Legislature made extensive findings on the need for the research into firearm-related crimes, suicides, and accidents—what the Legislature referred to as "firearm violence"—and the importance of the data in the Department's system to advancing that research. (§ 14230.) That is unquestionably an important governmental interest. (See, e.g., *Bauer*, *supra*, 858 F.3d at p. 1223 ["'it is self-evident that public safety is an important government interest, and reducing gun-related injury and death promotes public safety," quotation marks omitted.)

The fit between AB 173 and its objective is analogous to numerous other cases where courts have upheld firearms laws against Second Amendment challenges. To give a handful of examples: the connection between reducing gun-related injuries and deaths and San Francisco's handgun storage law, *Jackson v. City and County of San Francisco* (9th Cir. 2014) 746 F.3d 953, 965-966; the connection between promoting safety and reducing gun violence and the 10-day waiting period, even as applied to current firearms owners and concealed carry license holders who has passed background checks, *Silvester*, *supra*, 843 F.3d at pp. 827-828; the connection between reducing handgun accidents and chamber load indicators magazine detachment mechanisms, *Pena v. Lindley* (9th Cir. 2018) 898 F.3d 969, 979-981; and the connection between banning possession of large-capacity magazines and reducing the harm caused by mass shootings, *Duncan*, *supra*, 19 F.4th at pp. 1109-1111. This Court should follow those cases and sustain the Attorney General's demurrer to the Second Amendment claim.

CONCLUSION

For the foregoing reasons, this Court should sustain the demurrer.

Dated: March 24, 2022

Respectfully Submitted,

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DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **Brandeis, Doe, et al. v. Rob Bonta**
No.: **37-2022-00003676**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 24, 2022, I served the attached **DEFENDANT'S DEMURRER TO PLAINTIFFS' VERIFIED COMPLAINT FOR DECLARATORY, INJUNCTIVE OR OTHER RELIEF** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on March 24, 2022, at Sacramento, California.

Eileen A. Ennis
Declarant

Eileen A. Ennis
Signature

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