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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

DOE BRANDEIS; FIREARMS POLICY COALITION, INC.; SECOND AMENDMENT FOUNDATION; CALIFORNIA GUN RIGHTS FOUNDATION; SAN DIEGO COUNTY GUN OWNERS PAC; ORANGE COUNTY GUN OWNERS PAC; and INLAND EMPIRE GUN OWNERS PAC,

Plaintiffs,

v.

ROB BONTA, in his official capacity as Attorney General of California,

Defendant.

Case No.: 37-2022-00003676-CU-CR-CTL

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Hearing Date: May 6, 2022
Hearing Time: 11:00 a.m.
Judge: Hon. Katherine A. Bacal
Department: C-69

Hearing reservation 2491558

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REPLY MEMORANDUM

The State's opposition boils down to the following themes: (1) yes, there are privacy issues here, but (2) we had been sharing gun owners' private data for years before the "prior Attorney General" stopped sharing it based on the very same privacy concerns at issue in this case, and (3) because the privacy rights of so many people (nearly 2 million) are at issue, it would just be too cumbersome and expensive to change course now. AB 173 is an unprecedented law: It *mandates* the sharing of every California gun owner's PII to private institutions for research into their lives, without their consent, and contrary to the law's assurances about the limitations on any such disclosures before AB 173. The legislative and exective branches have no regard for gun owners' expressly enumerated rights under the California Constitution. The judicial branch must protect California's citizens from this privacy invasion. Plaintiffs reply as follows:

1. AB 173's Information-Sharing Regime Is Subject To A Facial Constitutional Challenge.

DOJ argues that plaintiffs face an "exceptionally challenging" burden to establish a likelihood of success on a facial challenge to AB 173 because they must demonstrate that the challenged provisions "inevitably pose a present total and fatal conflict" with the constitution, and that "a facial challenge must be rejected unless no set of circumstances exists in which the statute can be constitutionally applied." Opp. 17:27–18:6 (quoting *Tobe v. City of Santa Ana*, 9 Cal.4th 1069, 1084 (1995); and *People v. Hsu*, 82 Cal.App.4th 976, 982 (2000)).

This misstates (and inverts) the standard for facial challenges governing the fundamental constitutional right to privacy, which requires only that a law be unconstitutional in the "vast majority of its applications." *Am. Acad. of Pediatrics v. Lungren*, 16 Cal.4th 307, 343 (1997) (plurality op. of George, C.J.). In *Lungren*, the Court considered and rejected precisely the same argument when DOJ asserted it in a constitutional privacy challenge to an abortion parental-consent law. *Id.* at 342–48. Specifically, the Court held that when a law "imposes substantial burdens on fundamental privacy rights with regard to a large class of persons," a facial challenge "may not be defeated simply by showing that there may be some circumstances in which the statute constitutionally could be applied." *Id.* at 343. Thus, "when a statute broadly and directly

impinges upon the fundamental constitutional privacy rights of a substantial portion of those persons to whom the statute applies, the statute can be upheld only if those defending the statute can establish that, considering the statute's general and normal application, the compelling justifications for the statute outweigh the statute's impingement on constitutional privacy rights and cannot be achieved by less intrusive means." *Id.* at 348; *see also E. Bay Asian Loc. Dev. Corp. v. State of Cal.*, 24 Cal.4th 693, 708–09 (2000) (recognizing that a facial challenge is appropriate when a law "broadly impinges upon an individual's exercise of a fundamental constitutional right or that in its general and ordinary application it does so").

Lungren's standard applies here: the "general and normal" application of AB 173 "broadly and directly impinges upon the fundamental constitutional privacy rights" of millions of Californians. 16 Cal.4th at 348. A facial challenge is appropriate.

2. Likelihood Of Success: The Opposition Does Not Seriously Dispute That Plaintiffs Have Established The Three *Hill* Factors.

The three *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal.4th 1 (1994), factors are "threshold elements" that are used to "screen" or "weed out claims that involve so insignificant or de minimis an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification by the defendant." *Loder v. City of Glendale*, 14 Cal.4th 846, 893 (1997) (lead op. of George, C.J.). Plaintiffs have met their burden, and the opposition offers little resistance.

a. The opposition does not even dispute that plaintiffs have a legally protected privacy interest in their PII. The opposition does not address the first *Hill* factor, and therefore concedes that plaintiffs have established that AB 173's information-sharing regime impinges on a legally protected privacy interest.

b. Plaintiffs plainly have a reasonable expectation of privacy in their PII. Case law and the statutory structure preceding AB 173 confirm that plaintiffs have a reasonable expectation of privacy that their PII would not be used or shared for a purpose other than for which it was provided, and no community practice or norms overcome this expectation. *Hill*, 7 Cal.4th at 36, 37 (the "customs, practices, and physical setting surrounding particular activities" bear on whether an expectation of privacy is "reasonable," which is ultimately "an objective entitlement

founded on broadly based and widely accepted community norms"); PI Br. 13:13–14:12. And Californians in DOJ's databases were not given notice of or an opportunity to consent or refuse before their PII was shared with researchers. *See Hill*, 7 Cal.4th at 37 (the "presence or absence of opportunities to consent voluntarily" affects privacy expectations).

The State's examples of the supposed "public" nature of gun ownership cannot overcome the expectation that gun owners' PII would not be shared for "research":

- The state claims it's significant that "[p]eople buy guns in stores in the public eye, and they practice at shooting ranges open to the public," Opp. 18:19–20, but this is not a serious argument. People also wait in doctor's offices – including specialists like cancer doctors or heart surgeons – "in the public eye." They show up to the pharmacy and ask for medications "in the public eye." But no one thinks this means they lose their expectation that their complete medical file and PII will not be turned over to "researchers" without their consent.
- That concealed carry licenses are public records (Opp. 18:23–25) says nothing about the expectation of privacy in PII for the millions of firearm owners who do not take the additional step of getting a concealed carry permit.
- The opposition claims (at 18:27–28) that 2016's California Firearms Violence Research Act "required the Department to provide records to the Research Center," but the opposition separately acknowledges that this law obviously did no such thing, since "the former Attorney General refused to provide" gun owners' PII to the Center. Opp. 11:3–4. Rather than sue Attorney General Becerra, Dr. Wintemute lobbied the Legislature to change the law.

The opposition's remaining arguments are no more convincing. The DOJ's claim that it had a "longstanding practice" of sharing PII with researchers, Opp. 18:28–19:3, does not diminish plaintiffs' expectation of privacy. For one thing, DOJ does not respond to the point that plaintiffs' expectation of privacy is confirmed by the longstanding statutory restriction limiting DOJ's disclosure of AFS information except for sharing within the government for criminal and civil law enforcement purposes. So to the extent it was in fact DOJ's practice to share PII from AFS, it was done without statutory authorization, not to mention without notifying gun owners. And in any event, DOJ's past policy of sharing of PII cannot override plaintiffs' constitutional rights. "[I]t

plainly would defeat the voters' fundamental purpose in establishing a *constitutional* right of privacy if a defendant could defeat a constitutional claim simply by maintaining that statutory provisions or past practices that are inconsistent with the constitutionally protected right eliminate any 'reasonable expectation of privacy' with regard to the constitutionally protected right." *Lungren*, 16 Cal.4th at 339 (plurality op. of George, C.J.).

The opposition also asserts that, to the extent gun owners expected their PII would only be used for "law enforcement purposes," those expectations aren't being dashed because the research here supposedly "is a law enforcement purpose." Opp. 19:4–24. This is wrong. First, the opposition conspicuously fails to address the text of the prior versions of Penal Code § 11106 that assured California gun owners that their data in AFS would only be used for such purposes. PI Br. 4, 13–14. The Legislature never included the Center in the list of "law enforcement" recipients that could lawfully receive such data. *See* Penal Code § 11105.

The State likewise cannot bootstrap (or embellish) alleged "collaboration with law enforcement" in the studies to transform the Center into law enforcement. The support for this claim (Wintemute Decl., ¶ 33, which refers to "[w]orking with CA DOJ, and with startup funding from them," in a single study) comes nowhere close to establishing that the Center is engaged in "law enforcement." When firearm purchasers submit their private data to DOJ, they have an expectation that the information would be used for the law enforcement purposes set forth by statute, *i.e.*, "to assist in the investigation of crime, the prosecution of civil actions . . . , [and] the arrest and prosecution of criminals." Penal Code § 11106(a)(1).

In sum, plaintiffs have a reasonable expectation that PII provided to and collected by DOJ would not be used for purposes unrelated to law enforcement or disclosed to a third party.

c. Plaintiffs have demonstrated "a serious invasion of privacy." The "seriousness" "'element is intended simply to screen out intrusions on privacy that are de minimis or insignificant.'" *Lungren*, 16 Cal.4th at 339 (plurality op. of George, C.J.) (citation omitted). The opposition confirms that disclosure of PII for non-law-enforcement purposes is sufficiently "serious" to state a constitutional privacy claim: The vast amount of PII in the databases allows researchers to "link" individuals to other datasets and "follow" them for years. *See*, *e.g.*,

Wintemute Decl., ¶ 17. Such "sophisticated analyses of curated information as to a particular person" constitutes a serious invasion of privacy. *Lewis v. Super. Ct.*, 3 Cal.5th 561, 581 (2017) (Liu, J., joined by Kruger, J., concurring); *see also Cty. of Los Angeles v. Los Angeles Cty. Emp. Relations Comm'n*, 56 Cal.4th 905, 929–30 (2013) (disclosure of contact information alone is a "serious" invasion of privacy).

The opposition's other counterargument (at 20:7–12) is that "only a few researchers" on each team have access to PII and that those researchers use data-protection protocols. But the privacy violation occurs with the disclosure, stockpiling, and manipulation of the information – not to mention the "following" of individuals for years based on the original disclosure – regardless of how many researchers see it. Furthermore, the number of researchers or internal controls "do not obviate constitutional concerns as privacy interests are still implicated when the government accesses personal information without disseminating it." *Lewis*, 3 Cal.5th at 577.

Finally, the opposition dismisses plaintiffs' concerns that disclosure of their contact information could lead researchers to contact them for survey research or to otherwise contact firearm purchasers, claiming that this is "purely hypothetical." Opp. 20:19–21:8. But DOJ only goes so far as to say that its two researchers have not used the data to conduct survey research in the past, it does not deny that they could perform such research or that other research projects could be designed that involve contacting firearm purchasers. Denial of relief here will doubtless be viewed as a green light to push the envelope of plaintiffs' privacy rights.

3. The State Cannot Defend Its Privacy Violation Based On The Alleged Importance Of The Private Research Being Conducted.

The State argues (Opp. 21–23) that, even if it loses on all three *Hill* factors, it should nevertheless be allowed to keep disclosing gun owners' personal information to researchers under *Hill*'s balancing test because, it believes, the Center's research is so important. But this is wrong.

As the opposition recites, "[l]egitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is *determined by their proximity to the central functions of a particular public or private enterprise*." *Hill*, 7 Cal.4th at 38 (emphasis added). Here, the State is disclosing millions of Californians' PII in

the name of "research," but the State cannot (and does not) claim that social science research is remotely "proximate" to a "central function" of the State government. The State Constitution does enumerate an individual right of privacy in in Article I, § 1. But the State Constitution nowhere identifies "research" as a function of either the Legislature (in Article III), or the executive branch (in Article IV, including the Attorney General's powers in § 13). Indeed, the State itself is not even doing the research here; rather, it's handing the PII over to private researchers who are using it to make money doing their research projects. Wintemute Decl., ¶ 46 (noting need for "[g]ranting agencies" to "transfer funds" before work starts); Webster Decl., Ex. 1, pp. 27–38 (describing projects with several million dollars of funding). Dr. Wintemute even admits that *AB 173 was his idea* – he went to the Legislature and demanded a change in law when DOJ refused to continue providing PII over the very privacy concerns giving rise to this case. Wintemute Decl., ¶ 14.

The flow of information from the government to private researchers here is important. *Hill* stressed that "[j]udicial assessment of the relative strength and importance of privacy norms and countervailing interests may differ in cases of private, as opposed to government, action." 7 Cal.4th at 38. Importantly, "the pervasive presence of coercive government power in basic areas of human life typically poses greater dangers to the freedoms of the citizenry than actions by private persons." *Id*. So where, as here, "a public or private entity *controls access to a vitally necessary item*, it may have a correspondingly greater impact on the privacy rights of those with whom it deals." *Id*. at 39 (emphasis added). California conditions exercise of the fundamental constitutional right to purchase firearms on disclosing this PII to the DOJ – and now that data is being distributed to private researchers (opposed to the gun owners' choices) with no opportunity to consent.[1] Plaintiffs are not "able to choose freely among competing public or private entities in obtaining access," *id.*, to the exercise of this right, so *Hill* instructs that the government faces a steeper burden in the balancing test.

[1] Just as the court in *White v. Davis*, 13 Cal.3d 757, 775 (1975), required the government to establish a compelling interest to justify the invasion of privacy associated with First Amendment activity, that standard should apply to this exercise of a fundamental right. And there is no argument that promoting third party research is "compelling."

And although the State spends countless pages touting the alleged importance of the "research" being conducted at the expense of gun owners' privacy, it's worth noting that nowhere in these materials does the State claim that any tangible policy or other real-world benefits (other than millions of dollars of research grants being pocketed by the research institutions) actually flowed from the research. This simple point should weigh heavily in the Court's balancing.

The opposition's analogy (at 22:13–27) to *Lewis v. Super. Ct.*, 3 Cal.5th 561 (2017), is inapt. In *Lewis*, the California Supreme Court rejected a privacy challenge to a state law permitting the Medical Board to access data from patients' prescription records in a statewide drug-monitoring database when investigating a physician for misconduct. The circumstances in *Lewis* were quite different than the situation here. Most important, the government's use of the information there – to investigate unsafe medical practices – was directly tied to the reason the prescription database was created, and that interest was directly advanced by the government's limited access to patients' information. 3 Cal.5th at 566 (noting that the prescription-drug database was designed in part "to help 'law enforcement and regulatory agencies in their efforts to control the diversion and resultant abuse of [Schedule II-IV] controlled substances'") (citation omitted). Here, as we have repeatedly stressed, plaintiffs are not challenging the intragovernmental use of PII for criminal or civil investigations (the purpose for which the PII was collected), but rather DOJ's disclosure of their PII to outside researchers for another purpose altogether.[2]

But the opposition conspicuously fails to address plaintiffs' argument that disclosing PII for "research" is a different purpose than the purpose for which the sensitive information was collected. *See Hill*, 7 Cal.4th at 54 (NCAA was upfront about the reason for its invasive drug testing, rather than gathering information "for one purpose in order to serve other purposes"); *Lewis*, 3 Cal.5th at 569 (Privacy Initiative was aimed at the "improper use of information properly obtained for a specific purpose" by "us[ing] of it for another purpose," or "disclos[ing] it to some third party"); *White*, 13 Cal.3d at 774 (citing ballot argument; right of privacy "prevents

[2] And notwithstanding *Lewis*' decision to uphold the board's power to access patient information, the Court nevertheless noted that anonymizing patient-level data was a potential alternative practice that would limit the privacy intrusion. 3 Cal.5th at 576. The same alternative exists here.

government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes"). State law assured firearm purchasers for 25 years before AB 173 that DOJ would collect the information in AFS and the ammunition database for use in criminal or civil investigations. *See* PI Br. at 4:7–5:22 (summarizing law enforcement limitations on disclosure). This type of bait-and-switch is exactly what the Privacy Initiative was meant to protect against.

The opposition also tries to sidestep the question posed in the motion (if this research is so vitally important, why isn't the DOJ hiring its own researchers to conduct it, thereby at least reducing, if not avoiding, the privacy violation?) by claiming plaintiffs must show such a scenario would work as well as outsourcing the research to third parties. Opp. 25:8–15. But it is the government's burden under *Hill* to justify this unprecedented wholesale disclosure of millions of gun owners' PII to private parties, 7 Cal.4th at 40, which it has failed to do here.

Finally, the opposition glosses over the motion's reliance on three privacy cases as counter-examples.[3] *Cf*. PI Br. 17–18; Opp. 23:14–20. The reason the courts in those cases said they tolerated privacy invasions to further consumer protection, labor policy, and wage-and-hour disputes is that the disclosure of PII also furthered the interests of the individuals whose data was being disclosed. PI Br. 17–18. In each case, there was a nexus between the individual and the purpose of the disclosure that reduced the magnitude of the privacy violation (e.g., a consumer or employee relationship), and the private information was either voluntarily provided or the individuals had notice and the opportunity to opt-out. *Id*. The State doesn't address this, because the facts here are entirely different.

4. There Are Effective Alternative Means To Accommodate The State's Research Interest That Reduce The Extent Of The Privacy Invasion.

The Court need not reach the question whether plaintiffs have proposed viable alternatives when, as here, the government's asserted interest does not justify the privacy invasion. *Hill*, 7

[3] *Pioneer Elecs. (USA), Inc. v. Super. Ct.*, 40 Cal.4th 360 (2007); *Cty. of Los Angeles v. Los Angeles Cty. Emp. Relations Comm'n*, 56 Cal.4th 905 (2013); *Williams v. Super. Ct.*, 3 Cal.5th 531 (2017).

Cal.4th at 40 (plaintiff "may rebut" defendant's showing at balancing stage with alternatives). But plaintiffs have nevertheless identified two alternatives that fit neatly within the Supreme Court's privacy jurisprudence: (1) individuals should be given an opportunity to opt out of having their information shared with researchers; and (2) DOJ could restrict sharing of PII by implementing protective procedures that anonymize or de-identify data shared with researchers. PI Br. 16:7–18.

DOJ rejects both of these proposed alternatives out of hand. The oppositon's response boils down to this: Researchers want as much data as possible, and research will be marginally more difficult and less robust if researchers do not get all of the information that the government has. But that will always be the case with research: Unlike other situations where private information fulfills a narrow purpose,[4] public policy researchers will always want to gather as much data as possible to conduct ever more research. Indeed, the opposition's reliance on the huge number of studies already conducted – and the limitless appetitie for more studies – proves plaintiffs' point: There is no limiting principle to the State's theory. Activist gun researchers would surely like to gather government data about gun owners' financial condition and health too; if all that was required to justify a law compelling such disclosures is a declaration from a Ph.D. that his research would be worse without the data, the constitutional right to privacy is meaningless.

Setting aside the constitutional framework, the opposition fails to demonstrate that the proposed alternatives are not feasible. DOJ's experts claim in general terms that providing notice and an opt-out mechanism would adversely impact their firearms research. *E.g.*, Wintemute Decl., ¶ 57 (allowing for opt outs would "reduce the validity of [a study's] findings," but would not make it invalid). But they do not explain why their research requires PII from *all* of the roughly 2 million California firearm owners in the databases, or why they could not control for any bias introduced through the opt-out procedure. (This is, after all, a massive sample.)

[4] *Pioneer Electronics*, 40 Cal.4th at 372 (disclosure of voluntarily provided contact information furthered consumers' interests in resolving complaints about defective products); *Cty. of Los Angeles*, 56 Cal.4th at 931–32 (sharing nonmembers' contact information with union promoted the employees' interests); *Williams*, 3 Cal.5th at 553–54 (permitting discovery of employees' contact information in wage-and-hour class action cases furthered absent employees' interst in vindicating their legal rights).

And while the opposition asserts that this alternative is a "practical impossibility," mainly because all of the 2 million individuals at issue are not stationary but change residences, *e.g.* Wintemute Decl., ¶ 58, the central premise about the supposed value of the research here is that the researchers are able to "follow" individuals forever. *E.g.,* Opp. at 12 (PII is "necessary to 'follow' people," and "[a]n important part of following study subjects is determining who is no longer a subject, for example because the person has moved out of the state or no longer has a firearm in the home"). The State cannot have it both ways: It cannot claim the value of tracking people's movements as license to violate their privacy rights and at the same time claim it's impossible to find them when it comes to limiting the invasion.

Even if the opposition is correct that research is "regularly conducted on other health problems" without an opt-out mechanism (24:20–23), that does not mean that notice and the opportunity to consent is inappropriate in this very different setting. The opposition does not explain under what circumstances such research is conducted; how subjects are identified; what records are released; or whether patients were at any point put on notice that their information could be used for research purposes without further disclosure. In any event, that health research does not condition privacy invasion on the exercise of a fundamental constitutional right. AB 173 mandates the disclosure of *all information* for *every firearm purchaser* in DOJ's databases.

Finally, DOJ claims that anonymizing or de-identifying PII will make their researchers' work "impossible." Opp. Br. 25:5–7. But if DOJ employs a notice and opt-out (or opt-in) regime, researchers would still be able to conduct research with PII from the portion of firearms owners who consent – likely a still-massive sample. Beyond that, researchers can adjust their research methods or conduct different studies. But the fact that researchers want certain information for their projects does not mean they are entitled to it. The balance strongly favors plaintiffs here.

5. Plaintiffs Are Suffering Irreparable And Ongoing Constitutional Harm, And Are Threatened By Further Disclosures.

The opposition claims (at 17:3-15) that plaintiffs cannot establish irreparable harm because DOJ has previously made disclosures of PII. Injunctive relief is nevertheless appropriate to remedy the consequences of DOJ's disclosure and to ensure that further disclosures do not occur.

Plaintiffs are suffering an active, ongoing privacy violation. Several factors show that injunctive relief is necessary to remedy that violation and prevent additional violations while this case is pending. First, while DOJ's initial disclosure of PII is a privacy violation, the violation continues so long as researchers use PII and mine it for their projects. The constitutional violation is not simply "complete" at the moment the data is sent. Second, even if there are no active data requests, a new request could come at any time – and the Center or another research institution could ask DOJ to refresh their data. Given the volume of DROS transactions – nearly 1.2 million firearm transactions were processed through the system in 2020[5] – there are surely hundreds of thousands of records that have not yet been transmitted to researchers, and more records are generated every day. Injunctive relief is appropriate to preserve plaintiffs' constitutional rights. *Rosicrucian Fellowship v. Rosicrucian Fellowship Nonsectarian Church*, 39 Cal.2d 121, 144 (1952) (injunctive relief is available when conduct "will probably recur"); *Prof'l Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal.2d 276, 286 (1963) (where a defendant's "past actions were illegal, and circumstances show that they are likely to reoccur, injunction (or mandate) is a proper remedy").

And while the opposition claims it is dispositive that the disclosures have already occurred, DOJ does not – and cannot – deny that it has previously told the Center to delete PII based on privacy concerns. Wiley, *Gun violence researchers fight California Department of Justice's plan to withhold data*, Sacramento Bee (March 15, 2021). Researchers' use of DOJ data is subject to DOJ's oversight and approval. Penal Code § 14240; *see also* Civil Code § 1798.24(t). The Court can protect plaintiffs' privacy rights by ordering DOJ to direct researchers to delete PII again – or to instruct researchers to discontinue using the data pending the final outcome on the merits here. On that score, it is "common practice" for an injunction to "run . . . to classes of persons through whom the enjoined party may act" in order "to prevent the prohibited action." *Ross v. Super. Ct.*, 19 Cal.3d 899, 906 (1977) (quoting *Berger v. Super. Ct.*, 175 Cal. 719, 721 (1917)).

[5] Cal. Dep't of Justice, *Gun Sales in California, 1996–2020*, https://openjustice.doj.ca.gov/data-stories/gunsales-2020.

The opposition also claims (at 17:16-20) that plaintiffs cannot establish irreparable harm because they have not asked the Court to enjoin sharing information "maintained in the DROS system." This is incorrect. The preliminary injunction motion specifically targets DOJ's sharing of DROS data, which is housed in AFS, *see* Penal Code § 11106(a)(1)(D), and is one of the core sources of PII within the database. PI Br. at 3:21–4:6 (detailing AFS' collection of information through DROS data); Compl., ¶¶ 19–20 (same). DOJ's sharing of PII from the DROS system is mandated by AB 173 and is covered by plaintiffs' request for injunctive relief. Aside from Section 11106(d), plaintiffs are unaware of any statutory authorization permitting DOJ to share PII from DROS with researchers.

* * *

For the reasons set forth above and in the moving papers, the Court should grant plaintiffs' motion for a preliminary injunction.

Dated: April 29, 2022

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By _____
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