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**SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF SAN DIEGO**

ASHLEYMARIE BARBA; 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

**PLAINTIFFS' OPPOSITION TO DEMURRER**

Hearing: July 29, 2022
Time: 1:30 p.m.
Judge: Hon. Katherine A. Bacal
Department: C-69

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## I. INTRODUCTION

The demurrer to Plaintiffs' First Amended Complaint must be overruled because Plaintiffs have adequately pleaded each of the three claims alleged in this case:

First, Plaintiffs have adequately stated a claim that AB 173's mandatory information-sharing regime violates the state constitutional right to privacy. DOJ's principal arguments rely on extra-record factual claims, which is inappropriate at the demurrer stage. In any event, the California Supreme Court's past cases establish that the fact-dependent nature of constitutional privacy claims make them unsuitable for resolution by demurrer.

Second, Plaintiffs have adequately pleaded that the Legislature exceeded its authority by amending Proposition 63 to remove the voter-imposed confidentiality limitations in the Ammunition Purchase Records File. Because AB 173 eviscerated one of Proposition 63's primary mandates by removing a key statutory component, the legislative amendment is invalid.

Third, the U.S. Supreme Court's recent decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), confirms that Plaintiffs' Second Amendment claim cannot be resolved at the demurrer stage. Under *Bruen*, the government bears the burden of "affirmatively prov[ing] that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127. DOJ's demurrer, filed months before *Bruen*, made no attempt to satisfy this standard. No amount of further briefing will conjure up a historical tradition that doesn't exist.

## II. BACKGROUND

### A. California Law Requires Purchasers Of Firearms And Ammunition To Disclose Extensive Personal Information To DOJ, Which, Until AB 173, Was Required To Maintain The Confidentiality Of This Data And Use It Strictly For Law Enforcement Purposes.

In order to buy a firearm or ammunition in California, a purchaser must provide extensive personal identifying information to the vendor, who in turn provides that information to DOJ at the time of the transaction. Various provisions of California law require the Department of Justice to collect a wide array of data related to firearms ownership, and to maintain such information to assist in criminal and civil investigations. Principal among the DOJ's databases is California's Automated Firearms System, an omnibus repository of firearm records established by Penal Code

section 11106.[1] AFS "is populated by way of firearm purchases or transfers at a California licensed firearm dealer, registration of assault weapons (during specified registration periods), an individual's report of firearm ownership to the Department, Carry Concealed Weapons Permit records, or records entered by law enforcement agencies." Cal. Dep't of Justice, *Automated Firearms System Personal Information Update*, https://oag.ca.gov/firearms/afspi; *see also* 11 CCR § 4281(d) (defining "Automated Firearms System"). AFS is the state's most comprehensive database of information about the purchase, sale, transfer, and use of firearms and ammunition. First Amended Complaint ("FAC"), ¶¶ 17–18.

AFS includes detailed identifying information (fingerprints, addresses, date and place of birth, driver's license or identification card number, citizenship status, immigration information, race, sex, height, weight, hair color, eye color) along with all firearm and ammunition transactions associated with each subject. §§ 11106(a)(1)(A) (fingerprints) & (D) (Dealers' Records of Sale of Firearms); 28160 (content of register of firearm transfers); 11 CCR § 4283 (information required for basic ammunition eligibility check). For private-party sales or transfers, AFS includes this information for the seller as well. *See* § 28160(a)(36). FAC, ¶ 19.

Purchasers of firearms have had to provide this information since 1996 (for handgun transactions) and 2014 (for long guns). Over the past 25 years, AFS has amassed information covering over 7 million handgun transactions and over 3 million long gun transactions from Dealer Record of Sale ("DROS") data alone. Cal. Dep't of Justice, *Gun Sales in California, 1996–2020*, https://openjustice.doj.ca.gov/data-stories/gunsales-2020. FAC, ¶ 20.

From the creation of AFS in 1996 until September 2021, California law treated AFS records as confidential and restricted DOJ's disclosure of PII in the database except when it was necessary to share such information with other government officers to further law-enforcement purposes. The explicit purpose of DOJ's collection of data in AFS is "to assist in the investigation of crime, the prosecution of civil actions by city attorneys . . ., the arrest and prosecution of criminals, and the recovery of lost, stolen, or found property." § 11106(a)(1). Consistent with this

[1] All further undesignated statutory references are to the Penal Code.

purpose, Section 11106 had always imposed strict conditions on sharing information from within the database. *See* § 11106(a)(2) (providing that the Attorney General "shall furnish the information" in AFS "upon proper application" to specified state officers for criminal or civil law enforcement purposes, including peace officers, district attorneys and prosecutors, city attorneys pursuing civil law enforcement actions, probation and parole officers, public defenders, correctional officers, and welfare officers). Despite several intervening amendments to Section 11106, this limitation on sharing PII had remained consistent since 1996. FAC, ¶ 22.

The expectation of privacy in firearm-related records was reaffirmed by the voters' enactment of Proposition 63 in 2016, which established a background-check requirement for ammunition transactions. As part of that process, ammunition vendors must collect personal information from each purchaser or transferee (including their driver's license or identification information, full name and signature, address, telephone number, and date of birth) and transfer that information to DOJ for collection in the "Ammunition Purchase Records File." § 30352(a), (b). Similar to Section 11106, Proposition 63 placed strict limits on the use and disclosure of personal information in the course of ammunition transactions: As enacted by the voters, information collected by DOJ "shall remain confidential and may be used by [DOJ and other law enforcement agencies in § 11105] only for law enforcement purposes." § 30352(b). FAC, ¶ 23.

**B. AB 173 Upended This Regime By Now Requiring DOJ To Disclose Detailed Personal Information Of Millions Of California Gun Owners To Non-Law-Enforcement "Researchers" Without Their Knowledge Or Consent.**

The California Legislature drastically altered the landscape when it passed Assembly Bill 173 in 2021. After 25 years of Section 11106's limitation on the disclosure of AFS's firearms data for law enforcement purposes, the new law requires DOJ to share firearm-related information with the recently-established California Firearm Violence Research Center at UC Davis (the "Center") for social science research. It also permits DOJ to share the same information with an unlimited number of other research institutions. FAC, ¶ 24. AB 173's private-information-disclosure provisions are codified at Penal Code sections 11106(d) and 30352(b)(2).

The Legislature established the Center in 2016 with the passage of the California Firearm Violence Research Act ("CFVRA"). (2016 Stats., ch. 24, § 30). The Center has three research

mandates: to study (1) "[t]he nature of firearm violence, including individual and societal determinants of risk for involvement in firearm violence, whether as a victim or a perpetrator"; (2) "[t]he individual, community, and societal consequences of firearm violence"; and (3) "[p]revention and treatment of firearm violence at the individual, community, and societal levels." § 14231(a)(1)(A)–(C). FAC, ¶ 25. The CFVRA instructed DOJ to provide the Center with "the data necessary for the [C]enter to conduct its research," "[s]ubject to the conditions and requirements established elsewhere in statute." Former § 14231(c).

AB 173 was spurred by a dispute between the Center and DOJ over DOJ's refusal to share the very same PII at issue in this case based on DOJ's concerns that sharing this data violated gun owners' privacy rights. *See, e.g.*, Wiley, *Gun violence researchers fight California Department of Justice's plan to withhold data*, Sacramento Bee (March 15, 2021); FAC, ¶ 26. That is, DOJ and the Center had a dispute over whether the CVRA required DOJ to provide PII.

AB 173 marked a sweeping change to the privacy afforded to all California firearm and ammunition owners. Among other provisions, AB 173 amended Section 11106(d) to require DOJ to give the Center access to "all information" in AFS "for academic and policy research purposes upon proper request and following approval by the center's governing institutional review board when required." And it similarly authorizes DOJ to share this PII with "*any other* nonprofit bona fide research institution accredited by the United States Department of Education or the Council for Higher Education Accreditation for the study of the prevention of violence." §§ 11106(d) & 14240(a) (emphasis added); *see* § 30352(b)(2) (providing same information-sharing arrangement for personal information in the Ammunition Purchase Records File). FAC, ¶ 27.

**C. Plaintiffs File Suit Challenging The Constitutionality Of AB 173.**

Plaintiffs filed this lawsuit to challenge the constitutionality of AB 173 with three claims: (1) the information-sharing regime in Penal Code sections 11106(d) and 30352(b)(2) violates Plaintiffs' right to privacy under the California Constitution; (2) the Legislature exceeded its authority by making personal information in the DOJ's statewide ammunition transaction database subject to the information-sharing arrangement; and (3) by forcing California gun owners to surrender their privacy rights as a condition to owning a firearm, AB 173 impermissibly burdens

the exercise of the Second Amendment right to keep and bear arms.

* * *

Since the filing of the demurrer, the DOJ caused a massive data breach that leaked PII from the state's firearm databases: It unlawfully disclosed the "names, dates of birth, gender, race, driver's license numbers, addresses and criminal histories" for all concealed-carry applicants from the ten-year period 2011–2021. Yee, *Leak of California concealed-carry permit data is larger than initially reported*, L.A. Times (June 29, 2022), https://lat.ms/3Pf3njS (leak also included "data on the Assault Weapon Registry, Handguns Certified for Sale, Dealer Record of Sale, Firearm Safety Certificate and Gun Violence Restraining Order dashboards were 'also impacted'"); Aguiano, *Leak of California gun owners' private data far wider than originally reported*, The Guardian (June 30, 2022), https://bit.ly/3yYLMad ("The California department of justice admitted it had exposed the personal information of as many as hundreds of thousands of gun owners in the state, in a controversial data breach that appears of a far broader scale than the agency first reported."). This serious data breach renders empty the DOJ's assurance (Demurrer Br. at 19:10–15) that the recipients of the data here are going to enact "safeguards" to protect the very same sort of data. Plaintiffs are reviewing a potential amendment of the Complaint to reflect the DOJ's unprecedented disclosures of firearm owners' PII.

## III. ARGUMENT

### A. Legal Standard.

The Court is familiar with the standards governing a demurrer. Courts "treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." *Blank v. Kirwan*, 39 Cal.3d 311, 318 (1985) (citation omitted). "Because a demurrer tests only the legal sufficiency of the pleading, the facts alleged in the pleading are deemed to be true." *Thompson v. Ioane*, 11 Cal.App.5th 1180, 1190 (2017). "[I]t is error for a . . . court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory." *Aubry v. Tri–City Hospital Dist.*, 2 Cal.4th 962, 967 (1992). "A demurrer tests the pleadings alone and not the evidence or other extrinsic matters." *Hahn v. Mirda*, 147 Cal.App.4th 740, 747 (2007) (citation omitted). "[C]ourts should [not] be distracted from . . . the only issue involved in a

demurrer hearing, namely, whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action." *McKenney v. Purepac Pharm. Co.*, 167 Cal.App.4th 72, 77 (2008) (citation omitted). To that end, "[i]t is well settled that evidentiary matters outside the complaint may not be considered" in ruling on a demurrer. *Big Valley Band of Pomo Indians v. Super. Ct.*, 133 Cal.App.4th 1185, 1190 (2005).

**B. Plaintiffs Have Adequately Stated A Constitutional Privacy Claim.**

**1. Plaintiffs Have Adequately Pleaded Each Element Of The *Hill* Test.**

"Unlike the federal Constitution, the California Constitution expressly recognizes a right to privacy." *Mathews v. Becerra*, 8 Cal.5th 756, 768 (2019). In 1972, California voters passed the Privacy Initiative, which added "privacy" to the enumerated rights set forth in Article I, Section 1 of the California Constitution. In *Lewis v. Super. Ct.*, the California Supreme Court recounted the "principal 'mischiefs' that the Privacy Initiative addressed" in language that bears heavily on this case; those mischiefs included: "(1) 'government snooping' and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; [and] (3) the improper use of information properly obtained for a specific purpose" which is then used "for another purpose" or "disclos[ed] . . . to some third party." 3 Cal.5th 561, 569 (2017) (citation omitted). Central to the right of privacy "is the ability to control circulation of personal information." *Mathews*, 8 Cal.5th at 769 (citation omitted).

The Court set the current framework for litigating a constitutional privacy claim in *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal.4th 1 (1994). Under *Hill*, a privacy claim involves three essential elements: (1) the claimant must possess a legally protected privacy interest; (2) the claimant's expectation of privacy must be objectively reasonable; and (3) the invasion of privacy complained of must be serious in both its nature and scope. *Id.* at 35–37. If a claimant establishes all three required elements, the strength of that privacy interest is balanced against countervailing interests. *Id.* at 37–38. Specifically, "the party seeking information may raise in response whatever legitimate and important countervailing interests disclosure serves, while the party seeking protection may identify feasible alternatives that serve the same interests or protective measures that would diminish the loss of privacy." *Williams v. Super. Ct.*, 3 Cal.5th 531, 552 (2017); *see*

*Hill*, 7 Cal.4th at 40 (a privacy claimant "may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests").

As set forth in detail in Plaintiffs' motion for preliminary injunction, AB 173's mandatory data-sharing provisions violate Plaintiffs' right to privacy under the California Constitution, and the post-disclosure use of the information by anti-gun researchers only compounds the violations. The FAC more than adequately alleges a claim under *Hill*:

1. Individuals have a legally protected privacy interest in the detailed personal information collected by DOJ during firearms and ammunition transactions. Prelim. Inj. Br. ("PI Br.") at 13:2–12; *see also* FAC, ¶ 34. The demurrer does not contest this.

2. Individuals purchasing or transferring firearms and ammunition have an objectively reasonable expectation that the information required to be provided to DOJ would not be used for purposes unrelated to law enforcement, much less be disclosed to a private third party, hostile to their interests, for "research" on them. PI Br. at 13:13–14:12; *see also* FAC, ¶ 35–36.

3. The disclosure is a serious invasion of privacy. AB 173 deprives millions of Californians of control over their personal information, which will be actively used, mined, and manipulated without their knowledge or consent. PI Br. at 14:13–15:1; *see also* FAC, ¶ 37–38.

4. These privacy interests cannot be outweighed when the Court ultimately balances the State's assserted interest in sharing this private data for "research" against citizens' privacy interests. PI Br. at 15:2–16:22; *see also* FAC, ¶ 39–42.

In short, Plaintiffs have adequately stated a constitutional privacy claim under *Hill*.

**2. DOJ's Demurrer Arguments Lack Merit And Improperly Rely On Extrinsic Facts And Contentions About What DOJ Will Supposedly Show At Trial.**

DOJ's demurrer makes several of the same arguments DOJ advanced in opposition to the preliminary injunction motion. Those arguments were not persuasive in the preliminary injunction context, and many of them cannot even be considered at the demurrer stage.

a. *Plaintiffs have a reasonable expectation of privacy in their PII*. Case law and the statutory structure preceding AB 173 (including 25 years of the law enforcement exception

in Section 11106) 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 (that is, for ready access for law enforcement purposes), and no community practice or norms overcome this expectation. *Hill*, 7 Cal.4th at 36, 37; *see 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). 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." *See* Demurrer Br. at 16:7–19. The fact that "[p]eople buy guns in stores in the public eye, and . . . practice at shooting ranges open to the public" has no bearing on whether they have an expectation of privacy in the detailed PII provided through DROS. People wait in doctor's offices and show up at pharmacies and ask for medications "in the public eye." But no one thinks this means they lose their expectation that their medical file and PII will remain private.

The DOJ's claim that it had a "longstanding practice" of sharing PII with researchers, Demurrer Br. at 16:20–23, does not diminish Plaintiffs' expectation of privacy. 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. Any prior sharing by DOJ of PII was done without statutory authorization, not to mention without notifying gun owners. And such past sharing cannot possibly support sustaining a demurrer given that the FAC specifically alleges as a factual matter that AB 173 was spurred over a dispute between DOJ and the Center when DOJ stopped providing this information based on the very privacy concerns at the heart of this case. FAC, ¶ 26. DOJ's public dispute with the Center over whether gun owners' PII could be shared also demonstrates that the demurrer is simply wrong to claim that AB 173 "did not change the law" because the CFVRA already "required the Department to provide records to the Center." *Some* "records" were indeed supposed

to be provided, but the Center and DOJ ultimately disagreed over whether that included PII, given CFVRA's limitation that such sharing was "[s]ubject to the conditions and requirements established elsewhere in statute," such as Section 11106. *See* Former § 14231(c).

In any event, DOJ's prior 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." *Am. Acad. of Pediatrics v. Lungren*, 16 Cal.4th 307, 339 (1997) (plurality op. of George, C.J.).[2]

b. *The disclosures here are "serious" privacy invasions*. The demurrer ignores that the "seriousness" "'element is intended simply to screen out intrusions on privacy that are de minimis or insignificant.'" *Am. Acad. of Pediatrics*, 16 Cal.4th at 339 (citation omitted); *Lewis*, 3 Cal. 5th at 571 (same). DOJ argues that researchers' use of Plaintiffs' PII is limited to "research and statistical activity" which, it claims, should be no big deal to gun owners. Of course, DOJ's arguments about alleged non-seriousness of the "research and statistical activity" are theoretical without a factual record about the *nature and extent* of those activities, which does not exist and cannot provide a basis for sustaining a demurrer. DOJ's preliminary injunction materials, however, confirmed that the intended use of the PII here is plenty "serious" to state a claim: The Center's researchers want to use individuals' PII to "link" them to other databases and "follow" them for years. *See*, *e.g.*, Wintemute Decl. Opp. Prelim. Inj., ¶ 17; Demurrer Br. at 21:1–2 (discussing researchers' purported need to "link" PII across datasets). 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).

[2] DOJ is incorrect to claim that Plaintiffs "do[] not allege that DROS System information . . . cannot be provided to researchers." Demurrer Br. at 16:23–27. The complaint and preliminary injunction motion specifically targets DOJ's sharing of DROS data, which is housed in AFS, *see* § 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); FAC, ¶¶ 19–20 (same). DOJ's sharing of PII from the DROS system is mandated by AB 173 and is challenged by Plaintiffs' allegations.

This argument further ignores that disclosing PII for "research" is a different purpose than the purpose for which the sensitive information was collected. State law assured firearm purchasers for 25 years that DOJ would collect the information in AFS and the ammunition database for law enforcement purposes only. FAC, ¶ 22. This bait and switch makes the disclosure "serious." *Cf. 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] it for another purpose," or "disclos[ing] it to some third party"); *White*, 13 Cal.3d at 774 (right of privacy "prevents 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").

Finally, DOJ's attempt to distinguish the Supreme Court's decision in *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), is unavailing. Even if it were so that direct contact were not "inherent" in AB 173's information-sharing requirements, that does not diminish the privacy violation from sharing PII. The fact remains that researchers can use PII for any number of purposes, up to and including direct contact. This is a severe intrusion on the core privacy interests of Plaintiffs – and the millions of California gun owners – who did not expect that their personal contact information would be shared with unknown researchers.

The FAC easily satisfies *Hill*'s low threshold for stating a claim.

c. *DOJ cannot possibly establish on demurrer the result of the Court's balancing test on the merits*. The State cannot establish at the demurrer stage that Plaintiffs have failed to state a privacy claim by arguing (at 18:20–21:14) that the interests justifying AB 173's information-sharing-research regime *outweighs* the privacy invasion. *Cf. Pioneer Elecs. (USA), Inc. v. Super. Ct.*, 40 Cal.4th 360, 371 (2007) ("Assuming that a claimant has met the . . . *Hill* criteria for invasion of a privacy interest, that interest must be measured against other competing or countervailing interests in a 'balancing test.'"). DOJ cites (at 19:5–10) the Legislature's contentions, for example, that research about firearm violence is important. It disputes Plaintiffs' allegations that the State has effective alternatives to these disclosures. *Id*. at 20:16–21:2 (claiming, for example, that anonymizing data would make "certain research impossible"). And it disputes

that giving individuals the choice to opt out of disclosures are inappropriate because "[h]arassment is [supposedly] not a concern here," and the research the Center wants to do would be "less reliable if people could opt out." *Id*. at 21:9–11. Plaintiffs have responded to these same arguments at length in the preliminary injunction briefing as to why we are likely to prevail *on the merits*. Prelim. Inj. Reply at 5:20–8:21. But DOJ misses the big picture in this multi-page argument that reads as if expert discovery has already taken place: DOJ's multiple *contentions* that it will prevail in the balancing test have no place in a demurrer.

Indeed, the California Supreme Court has left no doubt that *Hill*'s privacy test is ill-suited for resolution at the demurrer stage because the interest-balancing inquiry benefits from a developed factual record. In *Sheehan v. San Francisco 49ers, Ltd.*, 45 Cal.4th 992 (2009), 49ers ticketholders alleged that the NFL's patdown policy violated their privacy, and the trial court sustained the NFL's demurrer. The California Supreme Court reversed: "[G]iven the absence of an adequate factual record, we conclude that further inquiry is necessary to determine whether the challenged policy is reasonable in light of the [*Hill*] factors." *Id*. at 1003. "Because privacy claims typically involve a fact-dependent weighing, resolution of such claims on demurrer is rare." *Id.* at 1003 (Werdegar, J., joined by George, C.J., and Moreno, J., concurring). *Hill*, for example, involved a full-blown trial involving "sharp differences in professional opinions on a wide range of subjects." 7 Cal.4th at 9.

The decision in *Mathews v. Becerra*, 8 Cal.5th 756 (2019), drives the point home. In that case, the Court reversed the sustaining of a demurrer in a challenge to a statute requiring that psychotherapists report patients who disclosed having accessed child pornography. The Court repeatedly emphasized the need for factual development when considering constitutional privacy claims, and it criticized the dissent for "mak[ing] a series of factual claims" to support the trial court's ruling, because "[t]he standard of review on demurrer does not authorize us to supplement the complaint with our own factual claims." *Id.* at 778–79. The Court emphasized that it has "recognized the value of . . . factual development in . . . cases involving the state constitutional right to privacy," including in *Hill* and *Am. Acad. of Pediatrics*. *Id.* at 784–85. And it stressed the fact that it could not weigh the parties' competing claims without a factual record. *Id.* at 783

("With no facts developed at this stage of the litigation, we are unable to evaluate these competing claims as to whether the reporting requirement serves its intended purpose."); *id.* at 784 (noting that, "[o]n remand, the parties may develop evidence on a variety of relevant issues"). In the end, the Court remanded the matter "to proceed to factfinding on whether the [statute] furthers its intended purpose." *Id.* at 787.

These same principles apply here. The demurrer must be overruled so that the parties can proceed to develop an evidentiary record to support their claims on the merits.

### C. Plaintiffs Have Adequately Alleged A Claim That The Legislature Exceeded Its Authority By Amending Proposition 63.

The California Constitution provides that "[t]he Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval." Cal. Const., art. II, § 10(c). Accordingly, "[t]he Legislature may not amend an initiative statute without subsequent voter approval unless the initiative permits such amendment, 'and then only upon whatever conditions the voters attached to the Legislature's amendatory powers.'" *People v. Super. Ct. (Pearson)*, 48 Cal.4th 564, 568 (2010) (citation omitted). "The evident purpose of limiting the Legislature's power to amend an initiative statute is to protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent." *Cty. of San Diego v. Comm'n on State Mandates*, 6 Cal.5th 196, 211 (2018) (cleaned up). Put simply, when voters impose limitations on the legislature's power, those limits "must be strictly construed" and "must be given the effect the voters intended [that they] have." *Amwest Surety Ins. Co. v. Wilson*, 11 Cal.4th 1243, 1255–56 (1995).

In 2016, California voters passed Proposition 63, which, among other things, established a background-check requirement for ammunition transactions and required DOJ to maintain a registry of ammunition transactions. The initiative placed strict limits on the use and disclosure of personal information in the course of ammunition transactions: it "*shall* remain confidential and may be used by [DOJ and other law enforcement agencies] *only* for law enforcement purposes." § 30352(b) (emphasis added). The voters also restricted the Legislature's authority to amend

Proposition 63. In an uncodified amendment clause, the initiative provides that its provisions "may be amended by a vote of 55 percent of the members of each house of the Legislature and signed by the Governor so long as such amendments are consistent with and further the intent of th[e] Act." Voter Information Guide, Gen. Elec. (Nov. 8, 2016), text of Prop. 63, § 13, p. 178.

Through AB 173, the Legislature exceeded its power by eviscerating Proposition 63's voter-mandated privacy restrictions and amending the statute to make personal information in the Ammunition Purchase Records File available to researchers on the same terms as AFS data. *See* § 30352(b)(2). AB 173's requirement that this data be shared with researchers to study the "nature" and "consequences" of firearm violance is not "consistent with," nor does it further the purpose of, Proposition 63's requirement that ammunition background check data "remain confidential" for use by law enforcement "only for law enforcement purposes."

DOJ argues (at 22:2–7) that this significant change was simply a "clarification," and that "voters would have understood" that "law enforcement purposes" would include sharing the information with researchers. DOJ's argument ignores the scope and magnitude of AB 173's changes to Section 30352 and defies the original language of the statute the voters enacted. Section 30352(b)(1) provided that PII "shall remain confidential and may be used by [DOJ] and those entities specified in, and pursuant to, subdivision (b) or (c) of Section 11105 . . . only for law enforcement purposes." The "entities specified in" Penal Code section 11105 include peace officers, district attorneys and prosecutors, city attorneys pursuing civil law enforcement actions, probation and parole officers, public defenders, correctional officers, and welfare officers. Even then, the sharing of such information is strictly limited to where it is "needed in the course of their duties" (subd. (b)), or "upon a showing of compelling need" (subd. (c)).

Private researchers were not included within this list of "entities" that voters considered when approving limited information-sharing in Proposition 63. And DOJ's capacious interpretation of "law enforcement purposes" to reach private researchers conducting private research is at odds with any normal understanding of that phrase. Black's Law Dictionary (11th ed. 2019) (defining "law enforcement" as "the detection and punishment of violations of the law"). Language in voter-approved statutes must be given its "ordinary meaning," *People v. Buycks*, 5

Cal.5th 857, 880 (2018), and "[i]f the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent . . . of the voters . . . ." *Lungren v. Deukmejian*, 45 Cal.3d 727, 735 (1988). The plain language of the statute governs here.

The Legislature exceeded its authority by changing the scope of this restriction by requiring DOJ to share PII with researchers that were not authorized by Proposition 63's voters, who would then use their PII for purposes not specifically authorized by Proposition 63. DOJ's main argument (at 23:3–28) is that AB 173 serves the purpose of addressing gun violence, so AB 173's information-sharing requirement is consistent with the general purpose and intent of Proposition 63. This is far too deferential to the Legislature at the voters' expense. Although a "limitation on the Legislature's power must be strictly construed, 'it also must be given the effect the voters intended it to have.'" *Found. for Taxpayer & Consumer Rts. v. Garamendi*, 132 Cal.App.4th 1354, 1365 (2005) (quoting *Amwest*, 11 Cal.4th at 1255–56). This is for good reason: "Adoption of a deferential standard of review might cause the drafters of future initiatives to withhold authority to amend those initiatives from the Legislature completely, a result that would diminish both the initiative and the legislative processes." *Id.* (citing *Amwest*, 11 Cal.4th at 1256). Accordingly, even if an amendment furthers an inititiative's purposes in general, a legislative act is invalid if it "violate[s]" a "primary mandate" of the initiative. *Found. for Taxpayer & Consumer Rts.*, 132 Cal.App.4th at 1370, 1371; *Gardner v. Schwarzenegger*, 178 Cal.App.4th 1366, 1378–79 (2009) (legislation that serves the same general purpose of an initiative but violates its "specific rules" exceeds the Legislature's authority).

That is surely the case here. By tossing away the voter-mandated confidentiality provision, the Legislature "altered [Proposition 63's] terms in a significant respect." *Amwest*, 11 Cal.4th at 1261 (invalidating legislation and rejecting the State's argument that the Legislature merely "clarified" an initiative's language). It is no answer for DOJ to claim that the voter guide does not mention privacy as a concern. Demurrer Br. at 23:10–14. The inclusion of the statutory protection in Section 30352(b)(1) "itself manifests the voters' intent" that PII be confidential. *Found. for Taxpayer & Consumer Rts.*, 132 Cal.App.4th at 1370; *see also Howard Jarvis Taxpayers Ass'n v. Newsom*, 39 Cal.App.5th 158, 173 (2019) (observing that the voters' "mandate was set forth in a

particular provision" of an initiative). As in *Howard Jarvis*, 39 Cal.App.5th at 174, AB 173's mandatory information-sharing provision "removes a key component" of Proposition 63.

Because AB 173 altered a material and explicit term of Proposition 63, it is an invalid legislative amendment.

**D. Plaintiffs Have Adequately Alleged A Second Amendment Claim.**

The United States Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), clarified the historical test for considering Second Amendment claims first set out in *District of Columbia v. Heller*, 554 U.S. 570 (2008). Under *Bruen*, the government bears the burden of "affirmatively prov[ing] that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." 142 S. Ct. at 2127; *id*. at 2129–30 (reiterating that government must "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation"). Plaintiffs' Second Amendment claim thus cannot be resolved at the demurrer stage. And DOJ's demurrer, filed months before *Bruen*, made no attempt to satisfy this standard. While the parties have requested that the Court allow them to submit additional briefing in light of *Bruen*, no amount of further briefing will reveal a historical tradition that conditions firearm ownership on submission of private information for "research."

## IV. CONCLUSION

For the reasons set forth above, the Court should overrule the demurrer.

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