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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

ASHLEYMARIE BARBA, et al.,

Plaintiffs,

v.

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

Defendant.

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

REPLY IN SUPPORT OF DEFENDANT'S DEMURRER

Hearing Date: July 29, 2022
Dept: C-69
Judge: The Hon. Katherine A. Bacal
Action Filed: January 28, 2022

INTRODUCTION

Assembly Bill 173 (2021-2022 Reg. Sess.; 2021 Cal. Stat., ch. 253) (AB 173) requires the Department of Justice (Department) to provide the Firearm Violence Research Center (FVRC) at UC Davis with information, including personal identifying information (PII), that allows the FVRC 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" (Pen. Code, §§ 14230, subd. (c)[1]), and permits the Department to provide the same information to other researchers at accredited institutions "for the study of the prevention of violence" (§ 11106, subd. (d); § 30352, subd. (b)(2)). On June 17, 2022, Plaintiffs filed the First Amended Verified Complaint for Declaratory, Injunctive, or Other Relief (Complaint), asserting a facial challenge to AB 173 with allegations that AB 173 (1) violates their right to privacy under article I, section 1, of the California Constitution; (2) amounts to an invalid amendment to a voter initiative under article II, section 10(c); and (3) violates their right to keep and bear arms under the Second Amendment to the United States Constitution. As explained in Defendant's Demurrer to Plaintiffs' Verified Complaint for Declaratory, Injunctive, or Other Relief (Demurrer) and below, all three of Plaintiffs' claims fail to state a cause of action, and the Demurrer should be sustained.

ARGUMENT

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

Plaintiffs fail to adequately plead a facial challenge to AB 173 under the state constitutional right to privacy. In particular, the Complaint does not adequately allege a reasonable expectation of privacy or a serious invasion of privacy; and even without factual development, it is readily apparent that any invasion of privacy would be justified by California's interest in reducing firearms violence. (See *Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39-40 (*Hill*) [setting forth the elements of a constitutional privacy claim].)

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

A. Plaintiffs Fail to Adequately Plead a Reasonable Expectation of Privacy Under the Circumstances

Even before AB 173 became law, the Department already provided information to the FVRC. The same legislation that created the FVRC explicitly authorized the Department to do so. (2016 Stat., ch. 24, § 30, former § 14231, subd. (c) [providing that state agencies "shall provide to the center, upon proper request, the data necessary for the center to conduct its research."].) Moreover, as demonstrated by materials cited in the Complaint, it had been the Department's practice, at least for some length of time, to provide researchers with precisely the sort of PII at issue in this litigation. (See Complaint, p. 9 [citing newspaper articles describing a dispute that began after the Department discontinued its practice of providing PII to researchers].)

Plaintiffs now argue that the Department's previous practices should be disregarded because "[a]ny prior sharing by DOJ of PII was done without statutory authorization." (Opposition, p. 8.) Even if Plaintiffs were correct that the Department was not previously authorized to disclose PII to researchers, they cite no authority providing that reasonable expectations of privacy are defined by existing statutory law, or, to put it conversely, that any change in law necessarily upsets reasonable expectations of privacy for purposes of a constitutional privacy claim. Indeed, there is no authority for the proposition that the Legislature is constitutionally prohibited from authorizing information-sharing of a certain kind merely because it did not *previously* authorize information-sharing of the exact same kind.

Rather than focusing narrowly on what statutory law previously authorized, the Court should consider the context more generally. (*Hill*, *supra*, 7 Cal.4th 1, 36 ["advance notice of an impending action" is relevant to reasonable expectations of privacy, but so are "customs, practices, and physical settings surrounding particular activities"].) The relevant context includes, for example, the reality that massive amounts of information regarding firearm use and ownership is (and long has been) collected, maintained, and used by various government agents for various purposes. Plaintiffs concede this point, alleging that "[v]arious 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."

(Complaint, p. 6; see also *id.* at p. 7 ["Purchasers of firearms have had to provide this information since 1996"—the year in which the Automated Firearms System (AFS) was created].) The "custom" and "practice" of collecting an enormous amount of information pertaining to firearms and their owners, including PII, for use by state and local government agents is thus an important aspect of the relevant context that "inhibit[s] reasonable expectations of privacy" here. (*Hill*, *supra*, 7 Cal.4th at p. 36.)

Based on longstanding legal provisions that Plaintiffs do not challenge, everyone who owns or uses firearms in California must reasonably expect that their personal information will be collected, maintained, and used by various government agents and for various purposes. Given that context, AB 173 does not violate anyone's reasonable expectations of privacy. It is only an incremental change (assuming AB 173 did change, and not just clarify, the law) to provide a strictly defined set of people with access to information, already accessible to government agents of all sorts, for a very limited purpose, and with information security protections in place. (See *Hill*, *supra*, 7 Cal.4th at p. 38 ["if intrusion is limited and confidential information is carefully shielded from disclosure except to those who have a legitimate need to know, privacy concerns are assuaged"].)

B. Plaintiffs Fail to Adequately Plead a Serious Invasion of Privacy

The Complaint also fails to allege a "serious invasion of privacy," which the California Supreme Court has defined as an invasion "sufficiently serious in [its] nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." (*Hill*, *supra*, 7 Cal.4th at p. 37.) Plaintiffs seem to imply that Defendant misstates the relevant legal standard, noting that the elements in a constitutional privacy claim should be "utilized to screen out claims that do not involve a significant intrusion of privacy protected by the state constitutional privacy provision." (Opposition, p. 9, citing *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 895 fn. 22 (plur. opn. of George, C.J.); see also *Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 331 (plur. opn. of George, C.J.).) While that language, which traces back to two plurality opinions by Chief Justice George, has been repeated to identify the

purpose of the elements of a constitutional privacy claim (see, e.g., *Lewis v. Superior Court* (2017) 3 Cal.5th 561, 571), it has never replaced the legal standards articulated in *Hill*, *supra*, 7 Cal.4th at p. 37. As recently as 2019, for example, in *Mathews v. Becerra* (2019) 8 Cal.5th 756, the California Supreme Court quoted *Hill* and reiterated that an invasion of privacy is only actionable if it "constitute[s] an egregious breach of the social norms underlying the privacy right," and further noted that "the extent and gravity of the invasion [are] . . . indispensable consideration[s] . . . ." (*Id.* at 779, quotations omitted; see also *Pioneer Electronics (USA), Inc. v. Super. Ct.* (2007) 40 Cal.4th 360, 371.) This is still the operative legal standard.

Plaintiffs have not met that standard here. In requiring the Department to disclose PII to the FVRC, and permitting the Department to disclose such information to other researchers at a "nonprofit bona fide research institution accredited . . . for the study of the prevention of violence," AB 173 specifies, first, that "[m]aterial identifying individuals shall only be provided for research or statistical activities"; second, that such material "shall not be transferred, revealed for purposes other than research or statistical activities"; and third, that "reports or publications derived therefrom shall not identify specific individuals." (§ 11106, subd. (d); § 30352, subd. (b)(2).) These protections are not at all theoretical, as Plaintiffs suggest. (Opposition, p. 9.) They are written into the law.

Plaintiffs must carry a heavy burden because they have only brought a facial challenge to AB 173. Plaintiffs "have not alleged specific facts to show that a facially valid enactment is being, or has been, applied in a constitutionally impermissible manner." (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 509-510 (*Alfaro*), citing *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084-1085 (*Tobe*).) They "cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute." (*Tobe*, *supra*, 9 Cal.4th at p. 1084.) That is why Plaintiffs' argument, that the Court should overrule the Demurrer because there is no "factual record about the *nature and extent*" of the research and statistical activities authorized by AB 173, is misplaced. (Opposition, p. 9, emphasis in original.) No factual record would change what matters here: the law on its face. To be clear, the law as written does not provide what Plaintiffs would have the Court hypothesize about it—

that "researchers can use PII for any number of purposes, up to and including direct contact." (*Id.* at p. 10.) Indeed, nothing in the law itself suggests that anyone's PII will be inappropriately used or disclosed for any purpose other than studying violence and how to reduce it.

C. Any Invasion of Privacy Is Justified by California's Interest in Reducing Firearms Violence

The Complaint also fails to plead a cognizable privacy claim because it is readily apparent—even without factual development—that any invasion of privacy caused by AB 173 is "justified by a competing purpose," namely, reducing firearms violence. To overcome a constitutional privacy claim, it is generally not necessary that the government's countervailing interest be "compelling." (See *Lewis*, *supra*, 3 Cal.5th at p. 573 [noting that the Court has not required a compelling interest, and has only applied a general balancing test, in every constitutional privacy case except one involving parent consent for an abortion, which "unquestionably impinges upon an interest fundamental to personal autonomy," quotations omitted].) Because the interest in reducing firearms violence surely *is* compelling, however, Plaintiffs would have to establish an especially serious invasion of privacy to make out a viable claim. (*Hill*, *supra*, 7 Cal.4th at p. 38 ["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"].)

Plaintiffs do not attempt to suggest that reducing firearms violence is not a weighty competing interest. Instead, Plaintiffs argue that applying a balancing test without factual development would be premature. (Opposition, pp. 10-12.) To be sure, many run-of-the-mill privacy claims would not be suitable for resolution on a demurrer. (*Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 1103 (*Sheehan*) (con. opn. of Werdegar, J.) ["Because privacy claims typically involve a fact-dependent weighing, resolution of such claims on demurrer is rare"].) But there are two reasons to explain why no factual development is needed here.

First, there is no need to speculate about the government's competing interest at issue. As explained in the Demurrer at page 19, the Legislature's purpose in enacting AB 173 is readily apparent from the law itself. Accordingly, this case is not like *Sheehan*, *supra*, 45 Cal.4th at p. 1000, in which the Court considered a claim that an NFL team's policy of patting down spectators

as they arrived at the venue violated their privacy rights. The Court noted that it could *presume* that the team "adopted the policy to enhance spectator safety," but even that much was unknown. (*Ibid.*) Here, the competing interest belongs to the government, not a private entity, and the legislation in question (and the legislative history) is a matter of public record and subject to judicial notice.

Second, as noted, Plaintiffs have only brought a facial challenge. Accordingly, because "their complaint boils down to a contention that [AB 173] is unconstitutional *as written*" (*Alfaro*, 98 Cal.App.4th at p. 510, emphasis added), there is nothing that factual development could possibly add to their side of the ledger. The interests on *both* sides, then, are already before the Court; they are discernable as a matter of law.

In *Alfaro*, *supra*, 98 Cal.App. 492, for example, when death row inmates alleged that the collection of DNA pursuant to state law violated their constitutional privacy rights, the Court of Appeal rejected the plaintiffs' facial challenge and affirmed the trial court's decision to sustain a demurrer after concluding that the balancing test tilted in the state's favor. (*Id.* at pp. 509-510.) The Court concluded that no factual development was needed in part because the Court could not second-guess the factual basis on which the Legislature chose to act. (*Id.* at pp. 510-511 ["The scope of judicial review must be cognizant that the factual determinations necessary to the performance of the legislative function are of a peculiarly legislative character"]; see also *Donorovich-Odonnell v. Harris* (2015) 241 Cal.App.4th 1118, 1139 [affirming a trial court's decision to sustain a demurrer on a privacy claim based on its evaluation of competing interests].)

Plaintiffs suggest that the Court cannot engage in the requisite balancing test based on the Complaint alone in part because the Court will need to settle, as a factual matter, whether "the State has effective alternatives" to the disclosures required and authorized by AB 173. (Opposition, p. 10.) Not so. In *Lewis*, *supra*, 3 Cal.5th at p. 574, the California Supreme Court clarified that the government does not "bear the burden of showing it has adopted the least intrusive means" of meeting the interest in question, except in cases "involving government infringement of . . . fundamental freedom of expression and association"—which this case does not.

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

The Complaint also fails to state a cause of action that AB 173 unconstitutionally amended Proposition 63, for two reasons. First, AB 173 did not amend Proposition 63 at all. Second, even if it did, the amendment was permissible under the relevant law.

Plaintiffs contend that Proposition 63 only explicitly authorized the disclosure of information to those entities listed in Penal Code section 11105 (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) and only for "law enforcement purposes." (Opposition, p. 13.) But at the time that Proposition 63 was enacted, the statute creating the FVRC had already been enacted, and *that* law, of which the voters were presumably aware (see *People v. Valencia* (2017) 3 Cal.5th 347, 369), already required 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).) If the voters had intended to restrict the meaning of that provision as to records in the Ammunition Purchase Records File, they could and would have done so.

In any event, even if AB 173 amended Proposition 63, it did so lawfully. As explained in the Demurrer, AB 173 is entirely consistent with and furthers the purposes of the voters' initiative, which was not enacted to reign in the government's intrusion into their privacy but to allow for *more* data collection and use in an effort to "reduce gun deaths and injuries." (Def.'s Req. for Judicial Notice in Supp. of Demurrer, Ex. 1 at p. 163 [Prop. 63] § 2.5.) That, of course, is exactly what AB 173 is also meant to do. Plaintiffs claim that AB 173 "toss[ed] away the voter-mandated confidentiality provision" in Proposition 63, but AB 173 does not discard the Legislature's or voters' interest in protecting PII. It *only* allows certain researchers to access information, for a limited purpose, and specifies that PII is not to be transferred or used for any other purpose or included in any public materials. When taken "as a whole," AB 173 and Proposition 63 share the same fundamental purpose. (*O.G. v. Super. Ct.* (2011) 11 Cal.5th 82, 100.) Especially in light of the "highly deferential standard" that courts must apply in this context

to avoid interfering with legislative authority, it is clear that Plaintiffs have not stated a claim for relief. (See *id.* at p. 91.)

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

Plaintiffs' third cause of action—its claim that AB 173 violates the Second Amendment—also fails as a matter of law. Because Plaintiffs allege that AB 173 requires people to sacrifice their constitutional right to privacy in order to exercise their right to keep and bear arms, Plaintiffs' third claim is entirely "coextensive" with their first and thus fails to state a distinct cause of action. (See Demurrer, p. 24, citing, e.g., *Midway Venture LLC v. Cty. of San Diego* (2021) 60 Cal.App.5th 58, 91, fn. 9.) The third claim therefore fails along with the first for the same reasons: because Plaintiffs do not have a reasonable expectation of privacy, there is no serious invasion of privacy here, and any invasion of privacy is justified by California's interest in reducing firearms violence. (See Demurrer, pp. 15-21.) Plaintiffs do not respond to this point.

Moreover, and as further explained in Defendant's Memorandum of Points and Authorities Regarding Supplemental Authority, filed on July 18, 2022, Plaintiffs' third cause of action also fails because AB 173 does not burden anyone's Second Amendment rights. The Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen* (June 23, 2022) 142 S. Ct. 2111 (*Bruen*), with its special emphasis on the plain text of the Second Amendment, only supports Defendant's position. Plaintiffs cannot show that AB 173—which concerns data provided to firearms violence researchers under strict confidentiality protocols—does anything to prevent anyone from keeping or bearing arms of any sort. (Cf. *Bauer v. Becerra* (9th Cir. 2017) 858 F.3d 1216, 1222 [a $19 fee on firearms transfers does not "ha[ve] any impact on the plaintiffs' actual ability to obtain and possess a firearm"].) Stated differently, with the benefit of *Bruen*, the Second Amendment's plain text does not "cover[]" (*Bruen*, *supra*, 142 S. Ct. at p. 2126) the collection or sharing of information permitted by AB 173. Accordingly, under *Bruen*, the third claim in the First Amended Complaint fails to state a cause of action.

CONCLUSION

This Court should sustain Defendant's Demurrer.

Dated: July 22, 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 July 22, 2022, I served the attached **REPLY IN SUPPORT OF DEFENDANT'S DEMURRER** 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 July 22, 2022, at Sacramento, California.

Ritta Mashriqi	***/s/Ritta Mashriqi***
Declarant	Signature

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