

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 10/14/2022

TIME: 02:00:00 PM

DEPT: C-69

JUDICIAL OFFICER PRESIDING: Katherine Bacal

CLERK: Calvin Beutler

REPORTER/ERM: Suzanne Tate CSR# 8120

BAILIFF/COURT ATTENDANT: D. Bumbar

CASE NO: 37-2022-00003676-CU-CR-CTL CASE INIT.DATE: 01/28/2022

CASE TITLE: **Brandeis vs Bonta [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Civil Rights

EVENT TYPE: Demurrer / Motion to Strike

EVENT TYPE: Motion Hearing (Civil)

EVENT TYPE: Civil Case Management Conference

APPEARANCES

Bradley Benbrook, counsel, present for Plaintiff(s) via remote video conference.

John William Killeen, counsel, present for Defendant(s) via remote video conference.

Steve Duvernay, counsel, present for Plaintiff(s) via remote video conference.

Ryan Davis, counsel, present for Defendant(s) via remote video conference.

Matthew Wise, counsel, present for Defendant(s) via remote video conference.

The Court hears oral argument and CONFIRMS AS MODIFIED the tentative ruling as follows:

Defendant's demurrer to plaintiffs' first amended complaint is **OVERRULED** as to the first cause of action and is **SUSTAINED** without leave to amend only as to the second cause of action. The Court defers ruling on defendant's demurrer to the third cause of action pursuant to the parties' stipulation and order thereon. See ROA # 113.

Plaintiffs' motion for preliminary injunction is **GRANTED**.

Preliminary Matters

Defendant Rob Bonta, in his official capacity as the Attorney General of the State of California, filed two

demurrers. ROA # 31, 33. Given that the earlier filing (ROA #33) was unsigned (the issue apparently remedied by the later filing), the Court considers only the demurrer filed an hour later (ROA # 31). The demurrer was deemed to be a demurrer to the subsequently filed first amended complaint ("FAC"). ROA # 77.

Defendant's request for judicial notice in support of the demurrer of exhibits 1 and 2 are granted. Defendant's exhibits apparently inadvertently included some additional pages that are not part of its request for judicial notice. See ROA # 32 at pp.5-8 (an RJN filing in the U.S. Dist. Court, Southern District of CA), and pp. 39-45 (portion of DOJ's website on certificates of eligibility). The Court does not take judicial notice as to those pages.

Plaintiffs' request for judicial notice in support of their preliminary injunction motion of the Wintemute Declaration, a record filed in federal court, is granted. The Court takes judicial notice of the existence of the declaration but not any contents subject to reasonable dispute.

Defendant's request for judicial notice of exhibits 1 and 2 in support of the opposition to the motion for preliminary injunction is granted.

Discussion

- Demurrer

Defendant demurred to all three causes of action in the FAC on the grounds that they fail to allege sufficient facts to state a cause of action under CCP section 430.10(e). Pursuant to the parties' stipulation, which was adopted by the Court (ROA # 99), both sides also filed supplemental briefing addressing the Supreme Court's opinion in *New York State Rifle & Pistol Ass'n v. Bruen* (2022) 142 S. Ct. 2111.

Right to Privacy - Cal. Const. Art. I § 1 (1st COA)

To maintain a cause of action for invasion of the state constitutional right of privacy, a plaintiff must prove (1) a legally protected privacy interest; (2) a reasonable expectation of privacy; and (3) a serious invasion of the privacy interest. *Hill v. National Collegiate Athletic Ass'n* (1994) 7 Cal.4th 1, 35-37. Here, plaintiffs allege they have a legally protected privacy interest in their personal information (e.g., fingerprints, home addresses, phone numbers, driver license and other identifying information) that the Department of Justice ("DOJ") collects during firearm and ammunition transactions. FAC ¶¶ 2, 34. They allege they have a reasonable expectation of privacy in this information not being disclosed for reasons other than law enforcement and not being disclosed to third parties who are hostile to their interests. *Id.* ¶¶ 35-36. They also allege such disclosure constitutes a serious invasion of their privacy, as their private information is being used and manipulated without their knowledge or consent. *Id.* ¶¶ 39-42. Plaintiffs' allegations suffice for pleading purposes to survive demurrer.

Whether or not it is not reasonable for firearms owners to expect that the State will not use personally identifying information "to help address firearm-related crimes, suicides, accidents, and other similar issues," (MPA at 16 [ROA # 31]) is a question of fact beyond the reach of this demurrer. The same is true as to whether or not plaintiffs have a reasonable expectation of privacy given the "long history" of firearms ownership and use being public. *Id.* Certainly not every firearms owner buys "guns in stores in the public eye," or "practice at shooting ranges open to the public." *Id.* The Court cannot conclude, as a matter of law, that because some firearms owner do some things in public there is no reasonable

expectation of privacy for all owners' private identifying information. Similarly, the question of whether or not there can be a serious invasion of privacy because the scope of the disclosure is very narrow (disclosure will be made only to approved researchers) is also a factual matter not resolvable on demurrer.

As to the argument that there can be no reasonable expectation of privacy because the DOJ already provided personal information to the research center under former Penal Code § 14231(c) years before AB 173 became law, defendant does not provide any authority that there can be no constitutional violation because violative acts were previously committed.

Finally, the balancing of plaintiffs' privacy interest against the state's interest in reducing firearms violence, is not an appropriate inquiry at the demurrer stage. The Court cannot conduct the asserted balancing without going beyond the complaint and judicially noticeable documents. Indeed, the cases cited by defendant were not looking at the issue at the pleading stage. See *Lewis v. Superior Court* (2017) 3 Cal. 5th 561 (affirming denial of petition for writ of mandate); *Hill v. National Collegiate Athletic Assn., supra*, 7 Cal.4th 1 (stating the elements of a cause of action for violation of the state constitutional right to privacy. As the California Supreme Court in *Hill* stated, "[w]hether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact." *Hill v. National Collegiate*, 7 Cal.4th at 40. While a Court might be able to adjudicate the question of invasion as a matter of law, *Hill* explains it can do so after finding "the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests...." *Id.* (also making clear that the extent of a privacy interest "is not independent of the circumstances"). This inquiry is beyond the scope of demurrer.

The demurrer to the first cause of action is overruled.

Legislative Amendment to Voter Initiative - Cal. Const. Art. II § 10 (2nd COA)

Plaintiffs' second cause of action in the FAC alleges the Legislature exceeded its authority by amending Proposition 63. The FAC alleges Prop. 63 placed strict limits on the circumstances in which the DOJ could disclose personal information, and that such information "shall" remain confidential and "used by [DOJ and other law enforcement agencies] only for law enforcement purposes." FAC ¶ 45, citing Pen. Code § 30352(b). The FAC alleges the Legislature exceeded its authority in passing Assembly Bill 173 because it resulted in removing Prop. 63's voter-mandated privacy restrictions, which violates the California Constitution. *Id.* ¶¶ 46, 47; Cal. Const. Art. II § 10 ("The 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"). Defendant presents several arguments in support of its demurrer to this cause of action, each of which are addressed below.

Defendant argues plaintiffs fail to state a cause of action because AB 173 did not amend Prop. 63, but merely clarified it because the voters would have understood "law enforcement purposes" would include "researchers." MPA at 22. To attempt to support this, they cite Prop. 63 § 8.13, former § 30352. *Id.* However, the prior version of section 30352 stated the information may only be used by the department and those entities specified in Penal Code Section 11105, which did not include researchers. See Pen. Code § 11105.

Defendant also argues the possibility that voters nonetheless could have been aware personal information would be disclosed because the California Firearm Violence Research Act had already been enacted, which would have required the DOJ to provide records to the research center. MPA at 21-22.

Defendant's argument, however, does not account for plaintiffs' allegation that despite the earlier passage of the California Firearm Violence Research Act, AB 173 was prompted by a dispute over whether the DOJ was required to share the personal information at issue. FAC ¶ 26.

Defendant next argues that even if AB 173 amended Prop. 63, the amendment is permissible because AB 173 served the same purpose of addressing gun violence. See Prop. 63 § 13 (authorizing legislative amendments that are "consistent with and further the intent of [the] Act."). Where the issue is whether the Legislature exceeded its authority in violation of article 11, section(c) of the California Constitution, the courts apply the general rule that "a strong presumption of constitutionality supports the Legislature's acts," though the initiative "must be given the effect the voter intended it to have." *O.G. v. Superior Court of Ventura County* (2021) 11 Cal.5th 82, 91, citing *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1253. The validity of the legislative amendment shall be upheld "if, by any reasonable construction [of the initiative], it can be said that the statute complies with the initiative's conditions for enacting legislative amendments." *O.G. v. Superior Court of Ventura County*, supra, 11 Cal.5th at 91. This is a "highly deferential standard" that presumes the Legislature acted within its authority if by any reasonable construction the amendments are consistent and further the intent. *Id.* Evidence of the purpose may be drawn from the amendment's historical context, ballot arguments and legislative findings. *Id.*

Here, under a reasonable construction, AB 173 is consistent with and furthers the goal of Prop. 63. Proponents of the initiative argued the law would help address "gun violence" and take a "historic and unprecedented step forward for gun safety." Def. RJN, Ex. 1, p.88. It appears the voters considered that "gun violence destroys lives," and that the purpose and intent was to address gun violence. Ex 1., pp.62-63, §§ 2, 3. Likewise, AB 173 also seeks to address firearm violence. Pen. Code § 14230(a)&(e) (Legislature finding and declaring that firearm violence is a significant public health and safety problem, and that the need for more research would help in addressing its prevention).

It is thus a reasonable construction, under the highly deferential standard, that the amendments by AB 173 to Prop.63 were both consistent with and furthered the intent to address gun violence. Moreover, plaintiffs' arguments that AB 173 violated Prop.63's specific rules of requiring personal information be kept confidential is not compelling, as AB 173 did not discard the Legislature's or voters' interest in protecting personal information.

Accordingly, the demurrer to the second cause of action is sustained. As plaintiffs have not explained how leave to amend could cure this defect, the demurrer is sustained without leave to amend.

- Preliminary Injunction Motion

Plaintiffs move for a preliminary injunction under CCP section 527. They seek to enjoin the DOJ from providing researchers with the personal identifying information collected in the automated firearms system and ammunition purchase records file pursuant to Penal Code section 11106(d) and 30352(b)(2). They also request the order direct the DOJ to retrieve all personal identifying information data previously transferred under those statutes to the CA firearm violence research center. ROA # 8. Plaintiffs base their motion on grounds that sharing this information violates the right to privacy under the California Constitution in article I, section 1. *Id.*

"In deciding whether to issue a preliminary injunction, a court must weigh two 'interrelated' factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction." *Butt v. State of California* (1992) 4 Cal.4th

668, 677-678. "The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." *Id.* at 678.

Likelihood of Success on the Merits

Plaintiffs argue that AB 173 violates plaintiffs' privacy rights under the California Constitution and that this is shown when assessing their privacy claims under the framework set forth in *Hill, supra*. Plaintiffs argue they have a legally protected privacy interest in their personal identifying information that is collected, and a reasonable expectation of privacy in that information. MPA at 13-14. They further argue AB 173's "information-sharing regime" does not survive the interest balancing inquiry. *Id.* at 15-19.

Just as plaintiffs' cause of action for violation of privacy under the California Constitution survived defendant's demurrer, for the same reasons plaintiffs have also shown a likelihood of success on the merits to satisfy the factor of the preliminary injunction inquiry. Defendant's arguments do not compel a different outcome.

Balance of Harms

Plaintiffs argue the interim harm weighs in favor of plaintiffs, given the significant repeated alleged privacy intrusion of sharing their information with researchers, which deprives them of being able to control the circulation of their information. They further argue the harms weigh in their favor given that the DOJ's assurances they will keep the information confidential will ring hollow when considering the several recent data breaches. MPA at 19-20.

Defendant responds plaintiffs cannot establish irreparable harm because the personal identifying information has already been shared with researchers as recently as November of 2021. Opp. at 17. Yet this does not account for the potential ongoing and future harms that could occur by continuous use of the information. Additionally, although the most recent sharing of plaintiffs' personal identifying information occurred in November of 2021, this does not necessarily mean that future requests for data would not occur in the interim. Furthermore, and while this motion has been pending, a massive data breach reportedly occurred that leaked personal identifying information from the firearm databases for concealed carry applicants in or about June of 2022. See ROA # 85 at 5. Accordingly, plaintiffs have shown that the balance of harms weighs in favor of issuing the injunction.

However, to the extent plaintiffs request a *mandatory* preliminary injunction, that request is denied. Plaintiffs have neither adequately argued nor shown a mandatory injunction, i.e., to mandate an affirmative act requiring the DOJ to retrieve all personal identifying information data previously transferred, would be warranted here. *People ex rel. Herrera v. Stender* (2012) 212 Cal.App.4th 614, 630 (mandatory injunctions are not permitted unless it is an extreme case where the right to it is clearly established).

Conclusion

For the reasons stated, defendant's demurrer to plaintiffs' first amended complaint is **OVERRULED** as to the first cause of action and is **SUSTAINED** without leave to amend only as to the second cause of action. Defendant has **30** days to answer.

Plaintiffs' motion for preliminary injunction is **GRANTED**. The California Department of Justice is enjoined from transferring to researchers (1) personal identifying information collected in the Automated Firearms System pursuant to Penal Code section 11106(d) and (2) personal identifying information collected in the Ammunition Purchase Records File pursuant to Penal Code section 30352(b)(2), until further notice and order by the Court.

Plaintiffs are directed to serve notice **and a proposed preliminary injunction** on all parties within **five** court days of this ruling.

IT IS SO ORDERED.

Court and counsel discuss the status of the case.

The Court continues the case management conference.

Civil Case Management Conference is continued pursuant to Court's motion to 12/02/2022 at 09:00AM before Judge Katherine Bacal.

Parties waive notice.



Judge Katherine Bacal