STAY REQUESTED

No. D081194

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

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 and Appellees,

v.

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

Defendant and Appellant.

San Diego Superior Court, Case No. 37-2022-00003676-CU-CR-CTL
The Honorable Katherine A. Bacal, Dept. C-69
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VERIFIED PETITION FOR WRIT OF SUPERSEDEAS

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

Case Name: *Barba, et al. v. Bonta* Court of Appeal No.: D081194

CERTIFICATE OF INTERESTED PARTIES OR ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

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[ ] Interested entities or persons are listed below:

Full Name of Interested Entity or Party	Party *Check One*	Non-Party *Check One*	Nature of Interest *(Explain)*
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The undersigned certifies that the above listed persons or entities (corporations, partnerships, firms or any other association, but not including government entities or their agencies), have either (i) an ownership interest of 10 percent or more in the party if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

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INTRODUCTION

The Attorney General requests a stay of the trial court's preliminary injunction enjoining the Department of Justice from providing firearms data to researchers at the California Firearm Violence Research Center at the University of California, at Davis, Stanford University, and other institutions, and thus disrupting critical research into firearms violence. The injunction, which the trial court issued only after applying the wrong legal standard—by deciding that Plaintiffs had adequately pled their constitutional privacy claim and then concluding *on that basis alone* that Plaintiffs had shown a likelihood of success on the merits—has serious consequences. By preventing the Attorney General from providing researchers with the data necessary for legislatively mandated research designed to identify means to stem firearms violence, the trial court's order impedes the Legislature's goals and halts progress necessary to protect Californians from one of society's most pressing problems.

In 2016, the California Legislature concluded that "[t]oo little is known about firearm violence and its prevention [and] [t]his is in substantial part because too little research has been done." (Pen. Code § 14230 subd. (e), enacted by Assembly Bill 1602 (2015-2016 Reg. Sess.).)[1] To address the problem, the Legislature created the California Firearm Violence Research Center (Research Center), now housed at the University of

[1] All statutory citations are to the California Penal Code unless otherwise indicated.

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California, at Davis (UC Davis) and gave the Research Center the mandate to "conduct basic, translational, and transformative research with a mission to provide the scientific evidence on which sound firearm violence prevention policies and programs can be based." (§ 14231, subd. (a)(1)(C)(2).) The Legislature further directed that state agencies, including the Department of Justice (Department) "shall provide to the center, upon proper request, the data necessary for the center to conduct its research." (*Id.*, subd. (c).)

In 2021, the Legislature enacted Assembly Bill 173 (2021-2022 Reg. Sess.) (AB 173) to specify the categories of information the Department should provide to researchers, which includes data from firearms and ammunition databases that the Department maintains in accordance with Penal Code sections 11106 and 30352. As explained below, the research that the statutes contemplate ("on which sound firearm violence prevention policies and programs can be based") cannot be conducted unless the Department provides researchers with data that includes personal identifying information (PII). In recognition of this fact, the law as amended by AB 173 specifies that "[m]aterial identifying individuals shall only be provided for research or statistical activities and shall not be transferred, revealed, or used for purposes other than research or statistical activities, and reports or publications derived therefrom shall not identify specific individuals." (§§ 11106, subd. (d), 30352, subd. (b)(2).)

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Plaintiffs filed suit, seeking declaratory and injunctive relief, alleging that AB 173, on its face (not as applied to anyone or any circumstance in particular), violates the right to privacy under the California Constitution.[2] On that basis, Plaintiffs moved for a preliminary injunction, which the trial court granted, enjoining the Department "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." (Ex. L, 478 [Order ¶ 2].)[3]

On the day of the hearing on the preliminary injunction motion, the trial court also considered a demurrer filed by Defendant and Appellant Rob Bonta, Attorney General of the State of California. In support of his demurrer to Plaintiffs' constitutional privacy claim, the Attorney General argued that

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[2] As explained *infra*, in the Statement of the Case, Plaintiffs also alleged that AB 173 amounted to an improper amendment of a voter initiative and that the law violates the Second Amendment to the United State Constitution. The trial court sustained a demurrer to the former claim and the latter has been stayed pending action in a separate federal case involving a similar claim. Only Plaintiffs' privacy claim is at issue here.

[3] All exhibits in support of this Petition have been filed concurrently. The citation to each lettered exhibit is followed by a reference to the three-digit number of the cited page(s). The title of the document cited and, if applicable, paragraph citations, follow in brackets. For example, a reference to the first paragraph of Plaintiffs' complaint would read as follows: (Ex. E, 365 [Compl. ¶ 1].)

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Plaintiffs' claim fails as a matter of law. There is no need to settle factual disputes in order to reject Plaintiffs' facial challenge because the law, as written, does not create a "serious invasion of privacy," which the California Supreme defines 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 v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 35-38.) Moreover, it is readily apparent—again, even without factual development—that any implication of privacy rights by AB 173 is "justified by a competing interest," namely, reducing firearms violence. (*Id.* at p. 38.) The trial court rejected these arguments and overruled the demurrer based on its conclusions that "the question of whether or not there can be a serious invasion of privacy" is "a factual matter not resolvable on demurrer," and that the issue of the state's countervailing interests "is beyond the scope of demurrer." (Ex. H, 420 [Min. Order].)

When ruling on the preliminary injunction motion, however, the trial court concluded as follows: "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." (Ex. H, 422 [Min. Order], emphasis added.) The trial court provided no further analysis, only stating that "Defendant's arguments do not compel a different outcome." (*Ibid.*) As noted above, the only reason that the trial court provided for overruling the demurrer

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was that Plaintiffs' claim presents "a factual matter" that goes "beyond the scope of demurrer." (*Id.*, 420.) That reason has no bearing on the likelihood that Plaintiffs will ultimately succeed on the merits of their claim. As counsel explained at the hearing on October 14, 2022, in responding to the trial court's reasoning, "[T]he issues presented by the two motions and the governing standards are different . . . [T]hat there are factual issues and that they are not appropriate for resolution at the pleading stage is not itself reason to enjoin AB 173." (Ex. I, 434-435 [RT].)

Moreover, in assessing the balance of harms relevant to the injunction, the trial court inappropriately relied on an incident where there was an exposure of PII related to firearms on a *public-facing* website—separate and apart from the secure research by qualified researchers here. (Ex. H, 422 [Min. Order].) The trial court was referring to a June 27, 2022 incident at the Department involving the exposure of PII through DOJ's Firearms Dashboard Portal—a resource available to the public that is meant to provide summary data but inadvertently and temporarily allowed access to underlying PII. The Attorney General has brought in outside counsel and an outside forensic cyber expert to conduct an independent review of this serious incident and will take strong corrective measures. But this incident was entirely unrelated to AB 173's mandated sharing of firearms-violence data with qualified researchers. As the undisputed evidence has demonstrated throughout this case, the Department has a long history of sharing information with researchers from the University of California, Stanford, and other

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institutions, and those researchers have safeguarded PII using the best available methods. Plaintiffs have not even alleged, let alone supported with evidence, that PII will be shared with anyone except as contemplated by the laws amended by AB 173, which is to say, with bona fide and accredited researchers and only "for research or statistical activities." (§§ 11106, subd. (d), 30352, subd. (b)(2).)

Even while granting the preliminary injunction, the trial court judge stated that she recognized the "seriousness and importance" of her decision and that if the Attorney General requested a stay pending appeal, she "would probably consider it." (Ex. I, 446 [RT].) Indeed, at the hearing on the Attorney General's ex parte application for a stay of the injunction, the trial court expressed that she had been inclined to grant the stay, but then rejected the Attorney General's application based on an unstated expectation that any stay would be requested *before* the court issued its written order. (Ex. M, 491 [RT].) The court concluded by noting, "Certainly, if you take the matter up to the Court of Appeal, the Court of Appeal knows how to issue its own stay if it think it's appropriate." (*Id.*, 491.)

As further explained below, there are substantial questions regarding the merits of the trial court's decision. In deciding that Plaintiffs made a sufficient showing to justify a preliminary injunction, the trial court erred in concluding that Plaintiffs had shown a likelihood of success on the merits of their claim "for the same reasons" that Plaintiffs' cause of action should proceed beyond the pleadings stage, i.e., because Plaintiffs' claim presents

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"a factual matter" that goes "beyond the scope of demurrer." (Ex. H, 420, 422 [Min. Order].) That is not an adequate basis on which to impose a preliminary injunction. The trial court also apparently ruled in part based on an information security incident that is unrelated to the sharing of information permitted under AB 173 or the issues presented in this case. A writ of supersedeas, or similar such relief, should issue to stay enforcement of the preliminary injunction pending the resolution of this appeal.

A stay is appropriate and necessary to avoid the substantial harms that will result if critical, legislatively-mandated research is prevented from going forward. The preliminary injunction should be stayed to prevent such harm while the Attorney General pursues the appellate review to which he is entitled. (See Code Civ. Proc. § 904.1, subd. (a)(6).)

PETITION FOR WRIT OF SUPERSEDEAS

The Attorney General respectfully petitions this Court for a writ of supersedeas staying throughout the pendency of his appeal the trial court's order granting a preliminary injunction. In support, the Attorney General alleges the following:

I. THE PARTIES

1. Plaintiff and Appellee Ashleymarie Barba is a San Diego County resident who has completed multiple firearm and ammunition transactions through a firearms dealership in California since 2020; Plaintiffs and Appellees Firearms Policy Coalition, Second Amendment Foundation, Inc., California Gun Rights Foundation, San Diego County Gun Owners PAC, Orange

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County Gun Owners PAC, and Inland Empire Gun Owners PAC, are all organizations that engage in educational and/or political activities concerning firearms. Ms. Barba and the listed organizations are referred to herein as "Plaintiffs."

2. Petitioner Rob Bonta is the Attorney General for the State of California.

II. STATEMENT OF THE CASE

A. Summary of Material Facts

3. The Department maintains substantial information regarding firearms and ammunition.

4. The record-keeping process starts with a firearms dealer filling out a Dealer Record of Sale (DROS) form. (§ 26905.) That form records information about the firearm, such as make, model, and serial number, and records information about the purchaser, including name, date of birth, address, physical description, and identification card number. Once completed, and before the purchaser can take possession of the gun, the firearms dealer must electronically submit the DROS form to the Department using the DROS Entry System. (§§ 28100, 28205; Cal. Code Regs., tit. 11, § 4200 et seq.) Submitting the DROS form creates an entry in a separate system, called the DROS System, and initiates the background check process. That process compares the prospective purchaser's information against numerous databases to determine whether the buyer is prohibited from possessing a firearm. These databases include the federal National Instant Criminal Background Check System (NICS) as well as various databases maintained by the Department (e.g.,

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the Automated Criminal History System). (§ 28220; 18 U.S.C. § 922(t).)

5. Once a purchaser passes the background check and the firearms dealer reports the delivery of the firearm in the DROS Entry System, the transaction and details are uploaded into the Department's Automated Firearms System (AFS). (§ 11106; Cal. Code Regs., tit. 11, § 4350.) The system stores the purchaser's identifying information, including name, address, and identification card number (but not physical description), as well as information on other firearms transfers (if any). (§ 11106, subd. (b)(2)(A).) Similar information for ammunition purchases is stored in the Ammunition Purchase Records File. (§ 30352, subd. (b)(1).) The Department uses data in these systems in numerous ways. A non-exhaustive list of examples includes: investigating crimes, (§ 11106(a)); identifying people who lawfully purchased firearms but who later become prohibited, (§ 30005); making reports to the Legislature about firearms crime and policies, (see, e.g., § 11108.3, subd. (f)); and reporting information to the public on the Department's Open Justice website, https://openjustice.doj.ca.gov/. The Department has also long provided data to researchers who study firearm violence and crime. (Ex. E, 373 [Compl. ¶ 26], citing Beckett, TheGuardian.com, *California Attorney General Cuts Off Researchers' Access to Gun Violence Data* at p. 3 (March 11, 2021).)

6. In 2016, the Legislature enacted the California Firearm Violence Research Act, recognizing that "[t]oo little is known

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

7. To achieve this goal, the Legislature created the Research Center, housed at UC Davis, and gave it the broad mandate to "conduct basic, translational, and transformative research with a mission to provide the scientific evidence on which sound firearm violence prevention policies and programs can be based." (§ 14231.) The Legislature provided that state agencies, including the Department, "shall provide to the center, upon proper request, the data necessary for the center to conduct its research." (2016 Stat., ch. 24, § 30, enacting former § 14231, subd. (c).) In 2021, the Legislature enacted AB 173 to clarify the 2016 information-sharing requirement and how the Department may provide information to other researchers.

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8. AB 173 amended several Penal Code sections. It codified a new finding in section 14230, subdivision (e), that "California's uniquely rich data related to firearm violence have made possible important, timely, policy-relevant research that cannot be conducted elsewhere." It added a new provision to section 11106 clarifying that information maintained in various Department databases, including the DROS System and Automated Firearms System, must be provided to the Research Center and, at the Department's discretion, to other researchers. (2021 Stats., ch. 253, § 2.5.) And it added a similar provision to the ammunition background check law in section 30352. (2021 Stats., ch. 253, § 11.)

9. Regarding PII, all of the relevant statutes specify that "[m]aterial identifying individuals shall only be provided for research or statistical activities and shall not be transferred, revealed, or used for purposes other than research or statistical activities, and reports or publications derived therefrom shall not identify specific individuals." (§§ 11106, subd. (d), 14231, subd. (c)(3), 30352, subd. (b)(2).)

10. Professor Garen Wintemute is the Director of the Research Center. (Ex. C, 210 [Wintemute Decl. ¶ 1].) He provided a declaration in support of the Attorney General's opposition to the preliminary injunction to "explain why obtaining records from CA DOJ containing identified individual-level data [PII] about firearms purchases and transactions is necessary to the research" that he and his colleagues conduct at the Research Center. (*Id.*, 211 [¶ 8].) He has compiled a list of 43

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peer-reviewed articles and six in pre-publication based on firearm records containing individual identifying information obtained from the Department. (*Id.*, 213 [¶ 15 & Ex. 2].) He compares this work "to research on other major causes of death, such as cancer and heart disease, where individual risk factors are very important, identified individual-level data linked across multiple datasets are frequently essential, and much of the epidemiologic research is done without the knowledge or consent of those who are studied." (*Id.*, 216 [¶ 27].)

11. In his declaration, Professor Wintemute explains how PII in Department records is necessary to "link" records across data sets received from different sources, such as firearms records from the Department of Justice with mortality records from the Department of Public Health. (See *id.*, 213, 216 [¶¶ 15, 26].) Records containing PII are also necessary to "follow" people with specified characteristics over time, such as seeing whether a firearm in a given year is associated with some event in the future, such as arrest for a violent crime or suicide. (*Id.*, 213-214 [¶ 17].) An 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 died. (See *ibid.*)

12. Professor Wintemute discusses six specific examples of publications that could not have been conducted without records containing PII. (*Id.*, 216 [¶¶ 26-28].) One early study he authored and published in the Journal of the American Medical Association found that lawful firearm purchasers with non-disqualifying prior criminal convictions were significantly more

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likely to be arrested for violent crime in the future. (*Id.*, 215 [¶¶ 22-23 & Ex. 4].) Another study looked at the association between alcohol use, firearm ownership, and increased risk for future arrests for violent crime. (*Id.*, 217 [¶¶ 31-32 & Ex. 6].) The study found that "having a DUI conviction," a type of non-disqualifying conviction, "was associated with a 2.8-fold increase in risk of arrest for a violent crime involving firearms." (*Id.*, 217 [¶ 32].) The others looked at the efficacy of a law restricting firearms purchasers who had prior violent-misdemeanor convictions, the efficacy of the Armed Prohibited Persons System, and criminal gun markets. (*Id.*, 216 [¶¶ 29-30, 33-34, Exs. 5, 7].)

13. Professor David Studdert of Stanford University also provided a declaration that "explains why firearms transaction data, including data that contain individually identifying information (e.g., names, dates of birth, addresses) are essential to conducting certain types of firearm violence research." (Ex. C, 149 [Studdert Decl. ¶ 5].) He describes how he and his team have used DROS System and AFS data to study "the nature of the relationship between access to firearms and risks of firearm-related mortality, including suicide and accidental deaths." (*Id.*, 150 [¶ 6].) In 2016, he launched the Longitudinal Study of Handgun Ownership and Transfer (LongSHOT). (*Ibid.*) That "large, population-level cohort study . . . is only the second cohort study ever conducted of the mortality risks and benefits associated with access to firearms." (*Ibid.*) The study focuses on whether access to a firearm "increases or decreases risks of firearm suicide, accidental death, [or] homicide." (*Ibid.*) Without

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records containing PII "the LongSHOT cohort study would not have been possible." (*Id.* 153-154 [¶ 15].)

14. Professor Studdert explains that the LongSHOT study, "like most other cohort studies, necessitates use of data at the individual level for several reasons." (*Id.*, 152 ¶ 14.) Having that information allows for more accurate results because it allows for more accurate quantification of "time at risk." (*Ibid.*) It allows for better comparisons, by ensuring the study group and control group are "as similar as possible," and "systematic differences between people in the comparison groups" do not create uncertainty in the results. (*Ibid.*) Professor Studdert, like Professor Wintemute, also emphasizes the importance of PII for linking data sets and "to follow individuals over time." (*Id.*, 154 [¶ 15].) Linking is so important that Professor Studdert and his colleagues published a paper on the methodology they used for the LongSHOT study. (*Id.*, 155 [¶ 18 & Ex. 2].)

15. The LongSHOT study has yielded several published papers in addition to the paper on linking methodology. Two of those papers, in particular, highlight the need for records containing PII. The first paper, published in the New England Journal of Medicine, examined the relationship between handgun ownership and suicide. (*Id.*, 155 [¶ 19 & Ex. 3].) It found increases in the rate of suicide by handgun owners. (*Ibid.*) The second paper examined the mortality risks experienced by people who live with gun owners but how are not themselves gun owners. (*Id.*, 156 [¶ 21 & Ex. 5].) That study found "that overall rates of homicide were more than twice as high among

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cohabitants of handgun owners, and that rates of homicide by firearm were nearly 3 times higher." (*Ibid.*)

16. Professor Daniel Webster has studied firearm-related violence for over 30 years. (Ex. C, 83 [Webster Report ¶ 1].) He provided a report in which he surveys the literature and concludes that "many important research questions" relating to firearm homicide, suicide, and accident have been answered because of access to Department information with individual identifying information disclosed. (*Id.*, 84-85 [¶¶ 6-7].) He explains how research in the field focuses on informing the "development of effective laws, law enforcement practices, . . . and individual decisions[.]" (*Id.*, 86-87 [¶ 13].) Research that advances those goals needs "very large amounts of individual-identifiable data." (*Ibid.*) Without that data, research is not as reliable; for instance, it can suffer from the "weakness of ecological fallacy – an incorrect assumption or inference about individuals based on aggregate data for a group." (*Ibid.*, footnote omitted.) Research using individual identifying information is better. (*Id.*, 87-92 [¶¶ 14-21].) It allows for a clearer understanding of firearm-related problems so that firearms laws are more "fair and effective." (*Id.*, 89 [¶ 17].)

17. The Department takes three general steps to prevent PII in data provided to researchers from being publicly disclosed. At the first step, applicants requesting criminal justice information submit an application to the Department's Data Access and Analysis Section. (Ex. C, 292 [Simmons Decl. ¶¶ 6-7].) Researchers who request access to individual-level criminal

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justice information must submit proof of identity and pass a background check. (*Id.*, 292-293 [¶¶ 8, 12].) They must also submit documentation showing that they comply with the security measures outlined in the Federal Bureau of Investigation Criminal Justice Information Services Security Policy (FBI Security Policy). (*Ibid.*) In the second step, the Department's Network Information Security Unit reviews documentation of an applicant's compliance with information security requirements. (Ex. C, 288-299 [Mangat Decl. ¶ 7].) That review ensures that the applicant's information technology systems meet minimum security criteria. (*Id.*, 288 [¶ 5].) The third step occurs after the research has concluded, before publication. Applicants must submit pre-publication manuscripts of their research to the Data Access and Analysis Section for review to ensure that the publication does not include information that could be used to identify specific people. (Ex. C, 293 [Simmons Decl. ¶ 14.)

18. The Research Center complies with the strict security protocols established by the Department. (Ex. C, 221-222 [Wintemute Decl. ¶¶ 46-53].) Taken together, the policies and procedures it employs, "[a]s a practical matter," provide "security . . . comparable to or greater than that provided for protected health information used in medical research or clinical care." (*Id.*, 221 [¶ 46].) UC Davis's Institutional Review Board, "which is charged with protecting the privacy of research subjects," reviews all projects, and grant funding is often contingent on that approval. (*Id.*, 221 [¶ 46].) Only those researchers on a team

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who "require access to perform [their] duties" may view data containing PII. (*Id.*, 221 [¶ 47].) Once the identifying information has been used for its purpose, such as linking data across data sets, the responsible team member will strip the data and replace it "with a unique but non-informative identifier." (*Id.*, 221 [¶ 48].) Identifying information is destroyed when the project is completed. (*Ibid.*) To Professor Wintemute's knowledge, "there has never been a data breach where information received from the California Department of Justice was stolen or publicly disclosed." (*Id.*, 222 [¶ 52].)

19. Researchers at Stanford University employ similarly strict procedures "modeled on those applied to clinical studies that involve storage and analysis of individual-level private health information." (Ex. C, 158-159 [Studdert Decl. ¶ 25].) The researchers have received approval from the university's Institutional Review Board. (*Ibid.*) They have undergone the requisite background checks and trainings. (*Ibid.*) And their computer systems and storage protocols limit access to the information. (*Ibid.*) Access to information identifying individuals in the data set is also limited; most coinvestigators do not have access to that information. (*Id.*, 150-151 [¶ 8].) Professor Studdert reports that "data privacy and security is a fundamental principle in my research team's use of DROS and AFS data," and that in his "25 years of conducting empirical research with dozens of data," he has never had a data security breach. (*Id.*, 159 [¶¶ 26-27].)

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20. Professor Webster's report confirms that firearms researchers take steps to protect the identifying information that appears in the data sets they use. (Ex. C, 92-93 [Webster Report ¶¶ 23-25].) He also details the role that institutional review boards play in protecting information. (*Ibid.*) He states that institutional review boards "have a great stake in assuring that researchers adhere to guidelines for protecting the release of personally identifying information" and that they can "suffer serious consequences for researchers violating protocols to protect human subjects," including costly litigation. (*Id.*, 93 [¶ 24].)

21. On January 28, 2022, Plaintiffs filed the lawsuit underlying this petition. On June 17, 2022, Plaintiffs filed the operative complaint, the First Amended Verified Complaint for Declaratory, Injunctive, or Other Relief, asserting a facial challenge to AB 173 and alleging 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. (Ex. E, 363-384 [Compl.].)

22. On March 3, 2022, Plaintiffs filed a motion for preliminary injunction based entirely on their claim regarding the constitutional right to privacy. (Ex. A, 1-26 [Motion for Prelim. Inj.].) Plaintiffs asked the trial court to issuing an injunction "enjoining DOJ from sharing PII collected in AFS pursuant to Penal Code section 11106(d) and the Ammunition Purchase Records File pursuant to Penal Code section

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30352(b)(2) and ordering DOJ to retrieve all PII previously transferred to the [Research] Center or any other organization." (*Id.*, 26.)

23. The Attorney General opposed the preliminary injunction and supported his opposition with the declarations from Professors Garen Wintemute and David Studdert described above, both of which have obtained data from the Department for purposes of firearms-violence research under AB 173, and an additional report by Professor Daniel Webster, an expert with decades of relevant research experience. (Ex. 55-285 [Opp. to Motion for Prelim. Inj.].) The Attorney General also submitted declarations from Department staff, including Sanjeev Mangat and Trent Simmons, who explained the steps the Department takes to ensure information security when providing researchers with data in accordance with AB 173. (Ex. 286-296 [Opp. to Motion for Prelim. Inj.].)

24. On March 24, 2022, the Attorney General filed a demurrer, which was deemed to pertain to the amended complaint (because the only change from the original complaint to the amended complaint was to name a previously anonymous plaintiff). (Ex. B, 27-54 [Demurrer].) The Attorney General argued that all three claims in the amended complaint fail as a matter of law. Regarding Plaintiffs' privacy claim in particular, the Attorney General argued that Plaintiffs had failed to state a cause of action based on the elements of a constitutional privacy claim set forth in *Hill*, *supra*, 7 Cal.4th at pp. 35-38. The Attorney General argued, for example, that Plaintiffs' facial

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challenge fails because AB 173, *as written*, with protections to PII explicitly provided by law, does not create a serious invasion of privacy. (Ex. B, 45 [Demurrer]; Ex. G, 409-411 [Reply re: Demurrer].) The Attorney General also argued that any invasion of privacy is clearly justified by California's interest in reducing firearms violence. (Ex. B, 45-48 [Demurrer.) Although the balancing of interests in the analysis of a constitutional privacy claim is not always appropriate at the pleadings stage, it is appropriate in this case because (1) there is no need to speculate about the government's competing interest since it is readily apparently from the law itself, and (2) Plaintiffs have only brought a facial challenge, so there is nothing that factual development could possibly add to their side of the ledger. (See Ex. G, 411-412 [Reply re: Demurrer].)

25. On September 30, 2022, pursuant to a stipulation by the parties and a finding of good cause, the trial court stayed the Attorney General's demurrer and all other proceedings with respect to Plaintiffs' third cause of action, alleging a violation of the Second Amendment, because the same issue is pending in federal court in *Doe v. Bonta*, No. 3:22-cv-00010-LAB-DEB (S.D. Cal. Jan. 10, 2022).

26. On October 14, 2022, the trial court sustained the Attorney General's demurrer to Plaintiffs' second cause of action. (Ex. H, 422 [Min. Order].) The trial court overruled the demurrer to Plaintiffs' first cause of action, the privacy claim, after rejecting the Attorney General's arguments based on its conclusions that "the question of whether or not there can be a

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serious invasion of privacy" is "a factual matter not resolvable on demurrer," and that the issue of the state's countervailing interests "is beyond the scope of demurrer." (*Id.*, 420.)

27. Also on October 14, 2022, the trial court granted in part Plaintiffs' motion for a preliminary injunction. The trial court denied Plaintiffs' request for a mandatory preliminary injunction requiring the Department to retrieve personal identifying information previously transferred to researchers (*Id.*, 422), but granted a prohibitory preliminary injunction enjoining the Department "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)." (*Id.*, 423.)

28. When ruling on the preliminary injunction motion, the trial court concluded as follows: "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." (*Id.*, 422, emphasis added.) In assessing the balance of harms with respect to the injunction, the trial court referred to a June 27, 2022 incident at Department involving the exposure of PII through DOJ's Firearms Dashboard Portal, which is unrelated to the sharing of information with researchers permitted under AB 173. (*Ibid.*)

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29. The trial court directed Plaintiffs to serve notice and a proposed preliminary injunction on all parties within five days of the court's ruling. (*Id.*, 423.) Plaintiffs submitted a proposed order on October 19, 2022.

30. When granting the preliminary injunction, the trial court judge stated that she recognized the "seriousness and importance" of her decision and that if the Attorney General requested a stay pending appeal, she "would probably consider it." (Ex. I, 446 [RT].) Following the hearing, the undersigned counsel conferred with his office and determined that the Attorney General would appeal. Counsel initially waited for the trial court to issue the written order, which the trial court did not immediately sign, before filing a Notice of Appeal or a request for a stay. When counsel called to inquire on October, 24, 2022, and again on October 27, 222, the trial court's clerk responded that the proposed order had not yet been signed. On October 28, 2022, to avoid further delay, the undersigned counsel filed an ex parte application requesting the trial court stay the preliminary injunction pending review on appeal. On November 2, 2022, the day before the hearing on the ex parte application, counsel received a voicemail from the trial court's clerk informing counsel that the order had been signed the previous day, on November 1, 2022.

31. At the hearing on the ex parte application on November 3, 2022, the trial court judge stated as follows: "I did note at the hearing [on October 14, 2022] that *I would be inclined, if there were requests for a stay, to grant it*, but I didn't see the request. I

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didn't get a request. I haven't seen a requested appeal." (Ex. M, 491 [RT], emphasis added.) The trial court judge further explained, "At this point, not having seen anything further or that a writ or appeal was taken, noting two weeks have gone by, the Court has issued the injunction . . . Certainly, if you take the matter up to the Court of Appeal, the Court of Appeal knows how to issue its own stay if it think it's appropriate." (*Ibid.*)

32. On November 3, 2022, the Attorney General filed the Notice of Appeal. (Ex. N, 499 [Not. of Appeal].)

B. Issues that Are Likely to Be Raised on Appeal

33. The trial court abused its discretion by failing to apply the correct legal standards in ruling on Plaintiffs' motion for a preliminary injunction. As explained above and in the attached memorandum, the trial court erroneously concluded that Plaintiffs had shown a likelihood of success on the merits of their claim "for the same reasons" that Plaintiffs' cause of action should proceed beyond the pleadings stage, merely because Plaintiffs' claim presents "a factual matter" that goes "beyond the scope of demurrer." (Ex. H, 420, 422 [Min. Order].)

34. The trial court abused its discretion in granting the preliminary injunction because Plaintiffs failed to establish any reasonable likelihood that they will ultimately prevail on the merits of their constitutional privacy claim or that the balance of harms weighs in favor of enjoining the Department from providing firearms data with researchers, upsetting the Legislature's considered judgment regarding state law and policy, and preventing critical research into firearms violence (including

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its causes, consequences, and how to prevent it) from going forward.

III. AUTHORITY TO GRANT THE REQUESTED RELIEF

35. A preliminary injunction is an appealable order. (Code Civ. Proc., § 904.1(a)(6); *Right Site Coalition v. Los Angeles Unified School Dist.* (2008) 160 Cal.App.4th 336, 338 fn. 1.) The Attorney General has filed a Notice of Appeal relating to the preliminary injunction the trial court imposed in the written order that it signed on November 1, 2022. (Ex. N, 499 [Not. of Appeal.)

36. Under section 923 of the Code of Civil Procedure, a reviewing court has authority "to stay proceedings during the pendency of an appeal or to issue a writ of supersedeas or to suspend or modify an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction." (Code Civ. Proc., § 923; accord, Cal. Rules of Court, rules 8.68, 8.112, 8.116.)

IV. NECESSITY OF THE WRIT

37. This verified petition is supported by the following memorandum of points and authorities, which further discusses the significant questions that will be presented on appeal and that are likely to result in the preliminary injunction being overturned. The appeal is an inadequate remedy, however, because the injunction upsets the status quo. Here, the status quo is for the law enacted by the Legislature to remain in effect. The critical research envisioned by the Legislature when it

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created the Research Center in 2016, and when it clarified the information-sharing provisions with AB 173 in 2021, is already underway. That research is meant to inform the Legislature's policy choices as it attempts to grapples with one of the most serious public safety and public health problems facing the United States—and California in particular. In order for that research to continue, and for additional research projects to begin, researchers must be provided with data. The trial court's injunction requires the Department to withhold the data that only the Department can provide, thus undermining the researchers' efforts and causing irreparable harm to the public interest.

V. AUTHENTICITY OF EXHIBITS

38. The exhibits accompanying this petition in the concurrently-filed Appendix of Exhibits consist either of true and correct copies of original documents on file with the Superior Court for the County of San Diego in Case No. 37-2022-00003676-CU-CR-CTL, or a certified reporter's transcript of the hearing on Plaintiffs' motion for a preliminary injunction. The exhibits are in one volume, consisting of 500 pages.

PRAYER

The Attorney General prays that this Court:

1. Grant this Petition and issue a writ of supersedeas staying throughout the pendency of this appeal the trial court's November 1, 2022 order, in order to preserve the status quo in aid of this Court's jurisdiction, and to prevent irreparable harm to the Attorney General and the residents of California; and

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2. Grant such other relief as may be just and proper.

Dated: November 22, 2022

Respectfully submitted,

ROB BONTA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
R. MATTHEW WISE
Supervising Deputy Attorney General
JOHN W. KILLEEN
Deputy Attorney General

/s/ Ryan R. Davis

RYAN R. DAVIS
Deputy Attorney General
Attorneys for Defendant Attorney General Rob Bonta

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VERIFICATION

I, Ryan R. Davis, declare:

I am a Deputy Attorney General with the California Department of Justice, Office of the Attorney General, and attorney of record in this matter for Defendant Rob Bonta, in his official capacity as the Attorney General of the State of California. I have personal knowledge of the facts alleged in the foregoing Petition based on personal participation or on examination copies of original documents I believe to be true and correct, and the contents of the Petition are true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed in Davis, California, on November 22, 2022.

_[s] Ryan R. Davis_____
Ryan R. Davis
Deputy Attorney General

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MEMORANDUM OF POINTS AND AUTHORITIES

The Attorney General has filed a Notice of Appeal as to the preliminary injunction the trial court imposed in the written order it signed on November 1, 2022, and will demonstrate in the appellate proceedings that the trial court abused its discretion in enjoining the Department from carrying out its legislative mandate to provide researchers with the information they need to inform public policy through careful study of firearms violence. Because the prohibitory injunction at issue here "is self-executing and its operation is not stayed by the appeal," the Attorney General requests that this Court exercise its "inherent power" to issue the writ of supersedeas as both "necessary [and] proper to the complete exercise of its appellate jurisdiction." (*Food & Grocery Bureau of S. Cal. v. Garfield* (1941) 18 Cal.2d 174, 176–177.)

I. LEGAL STANDARD

A writ of supersedeas maintains the status quo until an appeal is resolved. (*McFarland v. City of Sausalito* (1990) 218 Cal.App.3d 909, 912; *Reed v. Super. Ct.* (2001) 92 Cal.App.4th 448, 454.) It is appropriate for an appellate court to grant such a writ "where the appellant has shown sufficient merit in the appeal and a stay is necessary to preserve to an appellant the fruits of a meritorious appeal." (*Daly v. San Bernardino County* (2021) 11 Cal.5th 1030, 1039, citing *Deepwell Homeowners' Protective Assn. v. City Council* (1965) 239 Cal.App.2d 63, 66, internal quotation marks omitted.) In other words, to obtain the writ, a party "must convincingly show that substantial questions

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will be raised on appeal and must demonstrate it would suffer irreparable harm outweighing the harm that would be suffered by the other party." (*Smith v. Selma Community Hospital* (2010) 188 Cal.App.4th 1, 18 (*Smith*).)

II. THE ATTORNEY GENERAL'S APPEAL PRESENTS SUBSTANTIAL QUESTIONS ON WHICH THE ATTORNEY GENERAL IS LIKELY TO PREVAIL

The trial court abused its discretion for at least two reasons. First, the trial court failed to apply the correct legal standard by concluding that Plaintiffs had shown a likelihood of success on the merits of their claim "for the same reasons" that Plaintiffs' cause of action survive the Attorney General's demurrer, merely because Plaintiffs' claim presents "a factual matter" that goes "beyond the scope of demurrer." (Ex. H, 420, 422 [Min. Order].) Second, even apart from its failure to apply the correct legal standard, the trial court abused its discretion in granting the preliminary injunction because Plaintiffs failed to establish any reasonable likelihood that they will ultimately prevail on the merits of their constitutional privacy claim. Accordingly, although this Court need not conclusively decide the issues to be presented in the Attorney General's appeal, it is clear there are at least "substantial questions" as to whether the preliminary injunction should be overturned. (*Smith*, *supra*, 188 Cal.App.4th at p. 18.)

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A. The trial court abused its discretion in finding that Plaintiffs are likely to succeed on the merits based entirely on the legal standard applicable to the Attorney General's demurrer

"A trial court abuses its discretion when it applies the wrong legal standards applicable to the issue at hand." (*Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1493-1494, internal quotation marks omitted, citing *Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1517 [abuse of discretion where the trial court applied wrong standard on claim of clergy-penitent privilege; writ relief granted], and *Venture Law Group v. Superior Court* (2004) 118 Cal.App.4th 96 [writ relief granted where discovery order erroneously ordered attorney to violate attorney-client privilege in answering deposition questions].) The legal standard applicable to preliminary injunctions is clearly established. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109 (*Gallo*).) "The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm the defendant is likely to suffer if the preliminary injunction were issued." (*Ibid.*, quotation marks omitted.)

Because the question is whether plaintiffs are likely to prevail on the merits at *trial*, it is clearly distinct from the analysis pertaining to a demurrer, in which the issue is merely "whether the complaint states facts sufficient to constitute a cause of action." (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994,

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1010, quotation marks omitted.) In ruling on a demurrer, courts decide whether there are legitimate factual issues to be determined, but do not consider the likelihood that a plaintiff will ultimately establish the facts necessary to support their claim. Instead, courts "treat the demurrer as *admitting* all material facts properly pleaded[.]" (*Ibid.*, emphasis added.)

In this case, the Attorney General disagrees with the trial court's analysis of his demurrer to Plaintiffs' privacy claim. As he explained, Plaintiffs fail to state a cause of action because they have only brought a facial challenge to AB 173 and it is clear as a matter of law that the law as written does not constitute a serious invasion into any reasonable expectation of privacy, and that any invasion of privacy is justified by countervailing interests. (See *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 39-40 (*Hill*) [articulating the elements of a privacy claim under the California Constitution].) The Attorney General acknowledges, however, that the trial court analyzed the demurrer with reference to the proper legal standards. The court rejected the Attorney General's arguments, and overruled the demurrer, because it concluded that it could not determine as a matter of law that "there is no reasonable expectation of privacy for all [firearms] owners' private identifying information, that "the question of whether or not there can be a serious invasion of privacy" is "a factual matter not resolvable on demurrer," and that the issue of the state's countervailing interests "is beyond the scope of demurrer." (Ex. H, 419-420 [Min. Order].)

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When ruling on the preliminary injunction motion, however, the trial court concluded as follows: "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." (Ex. H, 422 [Min. Order], emphasis added.) The trial court provided no further analysis, merely stating that "Defendant's arguments do not compel a different outcome." (*Ibid.*) Those reasons simply have no bearing on the likelihood that Plaintiffs will ultimately succeed on the merits of their claim. As counsel explained at the hearing on October 14, 2022, in responding to the trial court's reasoning, "[T]he issues presented by the two motions and the governing standards are different . . . [T]hat there are factual issues and that they are not appropriate for resolution at the pleading stage is not itself reason to enjoin AB 173." (Ex. I, 434-435 [RT].)

By failing to go beyond whether Plaintiffs' claim should survive at the pleadings stage to determine the likelihood that Plaintiffs will ultimately prevail on the merits at trial, the trial failed to consider Plaintiffs' motion for a preliminary injunction in accordance with the appropriate legal standard and therefore abused its discretion. The court's failure in this regard presents a substantial question to be determined in the Attorney General's appeal.

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B. The trial court abused its discretion because Plaintiffs did not establish that they are likely to succeed on the merits

Even if the trial court *had* applied the correct legal standard, it still would have abused its discretion by granting Plaintiffs' motion for a preliminary injunction because Plaintiffs failed to establish any likelihood that they will succeed on the merits of their claim.

To prevail on a privacy claim under article I, section 1, of the California Constitution, Plaintiffs must demonstrate "'(l) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.'" *(Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 42-43, quoting *Hill*, *supra*, 7 Cal.4th 1, 39-40.) Even if Plaintiffs establish those three elements, the Attorney General may prevail by showing "that the invasion of privacy is justified because it substantively furthers one or more countervailing interests." *(Id.* at p. 43, quotation marks omitted.) Especially because Plaintiffs have only brought a facial challenge to AB 173, it is clear even without factual development that Plaintiffs' claim will ultimately fail on its merits.

First, Plaintiffs will not be able to establish a reasonable expectation of privacy. Even before AB 173 became law, the Department already provided information to the Research Center. The same legislation that created the Research Center 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

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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 Ex. E, 373 [Compl.] [citing newspaper articles describing a dispute that began after the Department discontinued its practice of providing PII to researchers].)

Plaintiffs argued before the trial court, in responding to the Attorney General's demurrer, that the Department's previous practices can be disregarded because "[a]ny prior sharing by DOJ of PII was done without statutory authorization." (Ex. F, 397 [Opp. to Demurrer].) 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

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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." (Ex. E, 370 [Compl.]; see also *id.*, 369 ["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

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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"].)

***Second*,** even if Plaintiffs managed to establish a reasonable expectation of privacy in firearms records that covers limited disclosures to researchers, any "[a]ctionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." (*Heller*, *supra*, 8 Cal.4th at p. 44, quotation marks omitted.) The nature and scope of the disclosure of personal information here is very narrow and is plainly not egregious. Only researchers at the Research Center and other researchers who meet certain criteria will be able to request the information. (§ 11106, subd. (d); § 30352, subd. (b)(2).)

The Complaint alleges that there is a serious invasion of privacy because a "prospect exists" that disclosure of personal information may lead "to unwanted contact from a third party." (Ex. E, 377 [Compl. ¶ 37].) The Complaint quotes from legislative materials to hypothesize about how researchers might use information obtained from the Department to contact firearms owners. (*Id.*, 377-378 [¶ 38], quoting Assem. Bill No. 1237 (Reg. Sess. 2021–2022), Response to Background Information Request at p. 4, Assembly Committee on Privacy and Consumer Protection [AB 1237 Report].) But those very materials note that the Department "has a 30 year history of sharing data related to

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firearms with bona fide research institutions for the study of gun violence." (AB 1237 Report, *supra*, at p. 80.) Despite that 30-year history, Plaintiffs do not identify a single example of researchers ever using information in this way. Their argument is the sort of "suggest[ion] that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute" that courts recognize as insufficient to support a claim that the statute is invalid on its face. (*Coffman Specialties, Inc. v. Dept. of Transportation* (2009) 176 Cal.App.4th 1135, 1145, quotation marks omitted.)

In requiring the Department to disclose PII to the Research Center, 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 suggested to the trial court below. 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."

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(*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.) No factual record would change what matters here: the law on its face. 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.

Third, Plaintiffs cannot establish a likelihood that California's interest in reducing firearms violence does not justify the invasion of privacy allegedly caused by AB 173. "Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest." (*Hill*, *supra*, 7 Cal.4th at p. 38.) "Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities." (*Ibid.*) "Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise." (*Ibid.*) "Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests." (*Ibid.*) Where a privacy claim does not "implicate an obvious invasion of an interest fundamental to personal autonomy," courts apply "a general balancing test without requiring the [government's] asserted countervailing interest to be compelling." (*Lewis v. Superior*

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Court (2017) 3 Cal.5th 561, 572-573 (*Lewis*).) Here, the Complaint alleges no interest fundamental to personal autonomy, and the balance of interests favors disclosure.

The countervailing interests at stake here are explicitly stated in the Penal Code. Section 14230, subdivision (a) provides that "Firearm violence is a significant public health and public safety problem in California and nationwide" and that "[n]ationally, rates of fatal firearm violence have remained essentially unchanged for more than a decade, as declines in homicide have been offset by increases in suicide." Besides the horror of mass shootings like those listed in section 14230, subdivision (b), there is also the "annual societal cost of firearm violence," which in 2012 was estimated at $229,000,000,000. (§ 14230, subd. (c).) Part of the problem, the Legislature found, is that "[t]oo little is known about firearm violence and its prevention. This is in substantial part because too little research has been done." (§ 14230(e).) That is why the Legislature established the Research Center: to address "[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," "[t]he individual, community, and societal consequences of firearm violence," and "[p]revention and treatment of firearm violence at the individual, community, and societal levels." (§ 4231(a)(1)(A)-(C).)

Even a cursory review of the work that Professors Garen Wintemute and David Studdert have performed confirms the importance and value of their research. They have produced

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important research on the risk of firearm ownership or having a firearm in the home (Ex. C, 214 [Wintemute Decl. ¶ 20 & Ex. 3]; Ex. C, 156 [Studdert Decl. ¶ 21 & Ex. 5]); firearm ownership and suicide (*Id.*, 155 [¶ 19 & Ex. 3]); alcohol abuse, firearm ownership, and subsequent arrest for a violent offense involving a firearm (Ex. C, 217 [Wintemute Decl. ¶ 32 & Ex. 6]); criminal gun markets (*Id.*, 218 [¶ 34 & Ex. 8]); and the effectiveness of firearms regulations (*Id.*, 216 [¶ 29 & Ex. 5]; *id.*, 217-218 [¶ 33 & Ex. 7].) None of this research could have been done without Department records containing PII. (*Id.*, 216, 219-220 [¶¶ 26, 28, 41]; Ex. C, 153-154, 157 [Studdert Decl. ¶¶ 15, 23].) And a multitude of similarly important questions needs answering. (Ex. C, 240 [Wintemute Decl. ¶ 40] [describing research projects in discussion]; Ex. C, 154 [Studdert Decl. ¶ 16] [noting that LongSHOT study has produced six of an anticipated 12 to 15 published manuscripts]; Ex. C, 91-92 [Webster Decl. ¶ 21] ["It is important for these data to continue to be accessible for research purposes because there are other important research questions that could be examined with the data"].) Providing researchers with access to the Department's "uniquely rich data related to firearm violence" will continue to make "possible important, timely, policy-relevant research that cannot be conducted elsewhere." (*Ibid.*)

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III. FAILURE TO GRANT SUPERSEDEAS WILL CAUSE SIGNIFICANT HARM TO THE GENERAL PUBLIC, OUTWEIGHING ANY HARM TO PLAINTIFFS FROM A STAY OF THE PRELIMINARY INJUNCTION

The same countervailing interests that undermine the merits of Plaintiffs' privacy claim demonstrate the irreparable harm that Californians will suffer if crucial research into an extraordinarily pressing problem comes to a halt as result of the trial court's injunction. The declarations from researchers at the Research Center at UC Davis and at Stanford University also show the critical importance of allowing AB 173 to continue to have its intended effect. The balance of harms analysis thus underscores not only that the trial court abused its discretion by imposing the preliminary injunction, but why this Court should grant the writ of supersedeas.

Professor Wintemute explains in detail why the Department's data is so critical to his research. He has compiled a list of dozens of articles based on firearms information obtained from the Department. (Ex. C, 213 [Wintemute Decl.¶ 15 and Ex. 2]). And he specifically explains, with reference to six examples, why his research cannot go on without access to PII. (See *id.*, 213-214, 216 [¶¶ 15-17, 26-28].) Professor Studdert has also provided a declaration that "explains why firearms transaction data, including data that contain individually identifying information (e.g., names, dates of birth, addresses) are essential to conducting certain types of firearm violence research." (Ex. C, 149 [Studdert Decl. ¶ 5].) Professor Studdert further describes how he and his team have used Department-provided data to

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launch the Longitudinal Study of Handgun Ownership and Transfer (LongSHOT), a "large, population-level cohort study . . . [and] only the second cohort study ever conducted of the mortality risks and benefits associated with access to firearms." (*Id.*, 150 [¶ 6].)

The Attorney General also provided an expert report to bolster the accounts of the researchers who have personally gained access to Department information. Professor Daniel Webster has studied firearm-related violence for over 30 years. (Ex. C, 83 [Webster Decl. ¶ 1].) His report surveys the literature and concludes that "many important research questions" relating to firearm homicide, suicide, and accident have been answered because of access to Department information with personally identifying information disclosed. (*Id.*, 84-85 [¶¶ 6-7].) Plaintiffs have not attempted to counter any of Professor Webster's conclusions in this regard.

Even if they were trying to preserve the status quo, Plaintiffs cannot establish irreparable harm. Plaintiffs' alleged irreparable harm is coextensive with their argument for likelihood of success on the merits, making balancing the harms in this case straightforward. On Plaintiffs' side of the scale is a constitutional claim that fails as a matter of law. On the Attorney General's side is a practice going back three decades and important ongoing research projects. Granting Plaintiffs' motion would severely disrupt, and potentially permanently damage, those projects, which have the potential to literally save lives. (See, e.g., Ex. C, 219-220 [Wintemute Decl. ¶¶ 41-42]; Ex. C, 157

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[Studdert Decl. ¶ 23].) That, in turn, would deprive Californians of the benefit of crucial research into one of the society's most devastating public safety problems. Californians should not have to bear that harm before the Attorney General has the opportunity for appellate review.

IV. ALTHOUGH THE TRIAL COURT DECLINED TO STAY THE PRELIMINARY INJUNCTION, IT ACKNOWLEDGED THAT A STAY IS APPROPRIATE

An application for a stay of a judgment should, wherever possible, be made first in the superior court." *Veyna v. Orange Cnty. Nursery, Inc.* (2009) 170 Cal. App. 4th 146, 157, citing *Nuckolls v. Bank of California, Nat. Assn.* (1936) 7 Cal.2d 574, 577.) "A trial court's familiarity with the evolving circumstances of a case normally constitutes it the appropriate forum to weigh the relative hardships on the parties, including the likelihood that substantial questions will be raised on appeal, and its refusal to grant or to continue an injunction during appeal is entitled to great weight." (*People ex rel. S.F. Bay etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 537.)

In this case, the trial court judge stated on the record that she was inclined to stay the preliminary injunction that she imposed. As explained in the verified petition, the trial court judge first stated that she recognized the "seriousness and importance" of her decision and that if the Attorney General requested a stay pending appeal, she "would probably consider it." (Ex. I, 446 [RT].) Then, at the hearing on the ex parte application on November 3, 2022, the trial court stated as follows: "I did note at the hearing [on October 14, 2022] that *I would be*

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inclined, if there were requests for a stay, to grant it, but I didn't see the request. I didn't get a request. I haven't seen a requested appeal." (Ex. M, 491 [RT], emphasis added.)

Accordingly, it is clear from the record that the trial court did not deny the Attorney General's stay application because it concluded a stay should not be granted. The court only declined to grant the stay because the Attorney General did not file his request *before* the trial court issued the written order from which the Attorney General has appealed. As further explained in the verified petition, the undersigned counsel initially waited for the trial court to issue the written order. Counsel did so to allow the Attorney General's stay request to come to the trial court in logical order, after there was (1) an order in place to be stayed and (2) a pending appeal. On October 28, 2022, to avoid further delay, counsel filed an ex parte application requesting that the trial court stay its forthcoming order.

The Attorney General submits that counsel's approach was consistent with the California Rules of Court, Rule 8.104, subdivision (c)(2), which provides that "[t]he entry date of an appealable order that is entered in the minutes is the date it is entered in the permanent minutes. But if [as here] the minute order directs that a written order be prepared, the entry date is the date the signed order is filed." Counsel reasonably waited to file the Notice of Appeal until after the trial court's clerk informed counsel on November 2, 2022, that Plaintiffs' proposed order was signed on November 1, 2022. For the same reason, counsel initially waited to seek a stay of the trial court's order

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pending appeal on the good-faith understanding that the request should come once the appeal had been initiated.

In any event, the upshot is that the trial court was inclined to grant the stay if only the request had arrived before she signed the order imposing the preliminary injunction. The trial court's inclination to grant a stay was correct, and this Court should do so here.

CONCLUSION

This Court should issue a writ of supersedeas staying throughout the pendency of this appeal the trial court's November 1, 2022 order.

Dated: November 22, 2022

Respectfully submitted,

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/s/ Ryan R. Davis

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CERTIFICATE OF COMPLIANCE

I certify that the attached VERIFIED PETITION FOR WRIT OF SUPERSEDEAS uses a 13 point Century Schoolbook and contains 11,236 words.

ROB BONTA
Attorney General of California

/s/ Ryan R. Davis

RYAN DAVIS
Deputy Attorney General
Attorney for Defendant Rob Bonta

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DECLARATION OF ELECTRONIC SERVICE

Case Name: **Barba, Ashleymarie, et al. v. Rob Bonta**
No.: D081194

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 collecting and processing electronic and physical correspondence. 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. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On November 22, 2022, I electronically served the attached **VERIFIED PETITION FOR WRIT OF SUPERSEDEAS** by transmitting a true copy via this Court's TrueFiling system as follows:

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(Via U.S. Mail)

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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 November 22, 2022, at Sacramento, California.

Eileen A. Ennis
Declarant

Eileen A. Ennis
Signature

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