No. D081194

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

ASHLEYMARIE BARBA, et al.,
Respondents and Appellees,

v.

ROB BONTA, in his official capacity as Attorney General of California,
Petitioner and Appellant.

On Appeal From The Superior Court Of San Diego County
Case No. 37-2022-00003676-CU-CR-CTL
The Hon. Katherine A. Bacal, Judge Presiding (Dept. C-69)

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS AND ANSWER TO PETITION

BENBROOK LAW GROUP, PC
Bradley A. Benbrook (177786)
Stephen M. Duvernay (250957)
701 University Avenue, Suite 106
Sacramento, CA 95825
Telephone: (916) 447-4900
brad@benbrooklawgroup.com
steve@benbrooklawgroup.com

Attorneys for Respondents and Appellees Ashleymarie Barba, et al.

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Respondents hereby certify that they are not aware of any person or entity that must be listed under the provisions of California Rule of Court 8.208(e).

Dated: December 7, 2022

By: s/ Bradley A. Benbrook
Bradley A. Benbrook
Attorneys for Respondents

TABLE OF CONTENTS **Page No.**

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE FOURTH DISTRICT COURT OF APPEAL, DIVISION ONE:

Appellees-Respondents oppose Appellant Attorney General Rob Bonta's Petition for Writ of Supersedeas, as follows:

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This case arises out of the Legislature's unprecedented requirement that the private information of millions of California firearm owners be disclosed for "research." After 25 years of telling Californians that the personal identifying information (PII) they had to disclose in order to buy a firearm would only be provided by the Attorney General to other government officials for law enforcement purposes, the Legislature decided that PII would no longer be kept private. Under AB 173, all of gun purchasers' private information *must* now be disclosed to firearms "researchers" at UC Davis (and may be shared with countless other researchers) for a very different reason than the PII was collected—to conduct "research" into firearms violence. The victims of this disclosure weren't even informed, let alone offered an opportunity to consent.

Plaintiffs moved below for a preliminary injunction, and the superior court enjoined *future* disclosure of this PII to researchers for *future* research projects while the case is pending. The Petition's request to stay this injunction should be denied for at least three reasons:

First, the Department of Justice (DOJ) largely ignores Code of Civil Procedure § 923's governing standard and focuses instead on the arguments they want to make on appeal. Section 923 authorizes a stay or issuance of a writ of supersedeas "to preserve the status quo." "The purpose of the writ of supersedeas is to maintain the subject of the action in status quo until the final determination of the appeal, in order that the appellant may not lose the

fruits of a meritorious appeal." *Dry Cleaners & Dyers Inst. v. Reiss* (1936) 5 Cal.2d 306, 310.

The Petition is doomed because the status quo is *already* being maintained by the injunction: All existing research projects using previously-disclosed PII are continuing; DOJ is only barred during the case from disclosing PII for potential new projects, if any even come to fruition (the record reveals that only two such potential projects are "in discussion"). The trial court did not order the Attorney General to retrieve the millions of records of PII it had already disclosed to researchers, so the projects will continue. As a result, the injunction *maintained*, rather than upset, the status quo, and the Petition is wrong to assert that current research projects will "come[] to a halt as a result of the" preliminary injunction. Pet. 49. This simple reality demonstrates why the Petition must be denied.

Second, DOJ relatedly fails to show that a stay is necessary "to preserve . . . the effectiveness of the judgment subsequently to be entered" under Section 923. The petition comes nowhere close to making the required "strong showing" that both (1) "[t]he harm from not granting a stay [is] such that [DOJ] would lose the benefits of the appeal" if it prevails, and (2) that Respondents "would not be irreparably harmed by the grant of a stay" or at the very least that the prejudice to Respondents is outweighed by the harm to DOJ if a stay is not granted. Eisenberg, et al., Cal. Prac. Guide Civ. App. & Writs Ch. 7-E, ¶¶ 7:280–81 (Nov. 2021); 9 Witkin, Cal. Proc. 6th Appeal § 300 (2022).

The Petition cannot make this showing because, again, all of the ongoing research projects will manifestly *not* "come[] to a halt" as a result of the injunction. Pet. 49. Plaintiffs asked the superior court to order DOJ to retrieve all data containing personal identifying information previously transferred, but it declined to issue such a mandatory injunction. As a result, the ongoing research projects will not be disrupted or damaged in the

slightest, because all of the PII previously transferred remains with the researchers. And there is no evidence in the record that any new projects couldn't be completed at the conclusion of the case if DOJ wins. Given all of this, DOJ cannot show it would lose the benefit of an appeal if the stay is not granted, or that the harm of delaying the theoretical new projects outweighs the harm of further disclosures of PII without the consent of millions of firearms owners.

Third, even if DOJ could establish "irreparable harm," it has not demonstrated that the appeal also raises "substantial questions" sufficient to warrant supersedeas relief. The Petition's lead argument is that the trial court's ruling failed to adequately state the reason for its conclusion that Respondents established a likelihood of success on the merits of their privacy claim. This ignores the heavy presumption in favor of the trial court's decision that mandates deference notwithstanding any defects in the reasoning set forth in a preliminary injunction order. *Olson v. Hornbrook Cmty. Servs. Dist.* (2021) 68 Cal.App.5th 260, 268. A claim that the trial court's reasoning is flawed cannot justify supersedeas relief since it is immaterial to the legal analysis on appeal. And this presumption holds even where a trial court issues a ruling in summary fashion or fails to make express rulings on each element of the preliminary injunction test. *City of Los Altos v. Barnes* (1992) 3 Cal.App.4th 1193, 1198.

Beyond that, DOJ spends the bulk of the Petition relitigating the merits of the preliminary injunction. This is inappropriate in the context of petition for writ of supersedeas, which does not consider the merits of an appeal. *Smith v. Smith* (1941) 18 Cal.2d 462, 464–65. Moreover, this argument is entirely dependent on reweighing the evidence, which is also improper in a preliminary injunction appeal. *Am. Acad. of Pediatrics v. Van de Kamp* (1989) 214 Cal.App.3d 831, 838–39. At any rate, Respondents

demonstrated below—and reiterate in this opposition—that they are likely to succeed on the merits of their constitutional privacy claim.

The petition for writ of supersedeas should be denied.

BACKGROUND

A. California Law Requires Purchasers Of Firearms And Ammunition To Disclose Extensive Personal Information To DOJ.

In order to buy a firearm or ammunition in California, a purchaser must provide extensive personal identifying information to the vendor, who in turn provides that information to DOJ at the time of the transaction. Various provisions of California law require the Department of Justice to collect a wide array of data related to firearms ownership, and to maintain such information to assist in criminal and civil investigations. Principal among the DOJ's databases is California's Automated Firearms System ("AFS"), an omnibus repository of firearm records established by Penal Code section 11106. *See also* Cal. Dep't of Justice, *Automated Firearms System Personal Information Update*, https://oag.ca.gov/firearms/afspi. AFS is the state's most comprehensive database of information about the purchase, sale, transfer, and use of firearms and ammunition.

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

Purchasers of firearms have had to provide this information since 1996 (for handgun transactions) and 2014 (for long guns).[1] Over the past 25 years, AFS has amassed information covering over 7 million handgun transactions and over 3 million long gun transactions from Dealer Record of Sale ("DROS") data alone. Cal. Dep't of Justice, *Gun Sales in California, 1996–2020*, https://openjustice.doj.ca.gov/data-stories/gunsales-2020.

B. Until AB 173, DOJ Was Required To Maintain The Confidentiality Of Gun Owners' PII And Use It Strictly For Law Enforcement Purposes.

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

Consistent with this purpose, Section 11106 had always imposed strict conditions on sharing information from within the database. *See* § 11106(a)(2) (providing that the Attorney General "shall furnish the information" in AFS "upon proper application" to specified state officers for criminal or civil law enforcement purposes, including peace officers, district attorneys and prosecutors, city attorneys pursuing civil law enforcement actions, probation and parole officers, public defenders, correctional officers,

---

[1] As enacted, Section 11106 limited DOJ's retention of AFS records to "pistols, revolvers, or other firearms capable of being concealed upon the person." Penal Code § 11106(a), (b)(1), (b)(2), (c)(1) (West 1997). The Legislature expanded AFS to include long guns beginning January 1, 2014. *See* Assem. Bill 809 (2011-2012 Reg. Sess.).

and welfare officers). Despite several intervening amendments to Section 11106, this limitation on sharing PII had remained consistent since 1996.[2]

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

C. AB 173 Upended This Regime By Requiring DOJ To Disclose The PII Of Millions Of California Gun Owners To Non-Law-Enforcement "Researchers" Without Their Knowledge Or Consent.

The California Legislature drastically altered the landscape when it passed Assembly Bill 173 in 2021. The new law requires DOJ to share firearm-related information with the recently-established California Firearm Violence Research Center at UC Davis (the "Center"), and it permits DOJ to share the same information with an unlimited number of other research

---

[2] *See* Penal Code § 11106(a) (West 1997) ("In order to assist in the investigation of crime, the arrest and prosecution of criminals, and the recovery of lost, stolen, or found property, the Attorney General shall keep and properly file" AFS records, "and shall, upon proper application therefor, furnish to the officers mentioned in Section 11105 . . ."). DOJ's privacy disclosures have likewise assured Californians that when they submit their PII to DOJ, it will be treated confidentially and generally used for law enforcement purposes or otherwise only shared with government agencies. Ex. A, 11:1–11 (citing privacy disclosures (Ex. O, 519 & 524)).

institutions. AB 173's private-information-disclosure provisions are codified at Penal Code sections 11106(d) and 30352(b)(2).

The Legislature established the Center in 2016. Assem. Bill 1602 (2015-2016 Reg. Sess.).[3] While the legislation authorizing the Center used neutral-sounding language to describe its work, there can be no question that the Center's social scientists are not neutral on the subject of gun rights and gun owners. The Center's Director is Dr. Garen Wintemute. Wintemute is one of America's leading voices in favor of stricter gun control laws. UC Davis Health, *Wintemute Biography*, https://health.ucdavis.edu/vprp/UCFC/Personnel.html (describing Wintemute as "a renowned expert on the public health crisis of gun violence"); *see also* Ex. A, 12 (citing article in which Wintemute claimed that the increase in gun purchases during the pandemic posed a threat to American democracy (Ex. O, 531)); Ex. A, 12–13 (citing Center "investigator" Amy Barnhorst's hostility to gun rights (Ex. O, 540)).[4] This context is important in a case where gun owners' PII must now be handed over—without their consent—to "researchers" who oppose their rights.

In fact, AB 173 was spurred by a dispute between the Center and DOJ over DOJ's refusal to share the very same PII at issue in this case based on DOJ's concerns that sharing this data violated gun owners' privacy rights.

---

[3] The Center's three research mandates are studying (1) "[t]he nature of firearm violence, including individual and societal determinants of risk for involvement in firearm violence . . ."; (2) "[t]he individual, community, and societal consequences of firearm violence"; and (3) "[p]revention and treatment of firearm violence at the individual, community, and societal levels." Penal Code § 14231(a)(1)(A)–(C).

[4] Respondents have filed an appendix in conjunction with this opposition containing evidence that was submitted in support of their motion for preliminary injunction but was not included in Petitioner's appendix. Exs. O, 501–792 (compendium of evidence) & P, 793–795 (request for judicial notice). Respondents' appendix is paginated consecutively beginning with page 501, where Petitioner's appendix left off.

See, e.g., Ex. O, 542, Wiley, *Gun violence researchers fight California Department of Justice's plan to withhold data*, Sacramento Bee (March 15, 2021)[5]; Ex. O, 550, Beckett, TheGuardian.com, *California attorney general cuts off researchers' access to gun violence data* (March 11, 2021). In the past, DOJ had provided the Center with confidential gun owner PII in violation of California law: Multiple research papers affirm that the Center obtained and used gun owner PII in violation of Section 11106. Ex. A, 13 (identifying articles); *see also* Ex. C, 211–213 (Wintemute Decl., ¶¶ 9–14).

In 2020 and 2021, however, DOJ advised the Center that it was going to start complying with the law and no longer provide gun owners' PII for the Center's research. Wiley, *supra* (DOJ spokesman stating "[w]e . . . take seriously our duty to protect Californians' sensitive personally identifying information, and must follow the letter of the law regarding disclosures of the personal information in the data we collect and maintain"); Beckett, *supra* ("it's precisely this more detailed personal information . . . that Becerra's justice department is telling some researchers that it will not provide"; DOJ "cited privacy concerns as a justification for the data restrictions, and has said it believes current California law does not permit the agency to release certain kinds of data to researchers"). DOJ acknowledged euphemistically below that "the former Attorney General refused to provide researchers with certain data in the Department's possession." Ex. C, 66. DOJ also instructed the Center to *delete* the PII it possessed from prior disclosures. Wiley, *supra*.

Dr. Wintemute lashed out against DOJ's change in position, and he dismissed DOJ's view that disclosing gun owners' PII raised serious privacy issues: "People have started to wonder what other reasons there might be for

---

[5] Dr. Wintemute vouched for the assertions in this article in his declaration below. Ex. C, 212 (Wintemute Decl. ¶¶ 12–13).

which privacy is a fig leaf." Beckett, *supra*. He rallied the Legislature to change the law. Ex. C, 212–213 (Wintemute Decl., ¶14).[6]

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

PROCEDURAL HISTORY

Plaintiffs filed this lawsuit challenging the constitutionality of AB 173 in January 2022. Plaintiffs filed a First Amended Complaint in June 2022. Ex. E ("FAC"), 364–384. Plaintiff Ashleymarie Barba is a San Diego County resident who has completed multiple firearm and ammunition transactions (purchase, loan, sale, or transfer) through a firearms dealership in California since 2020. Accordingly, Barba is informed and believes that her personal identifying information is contained in AFS and the Ammunition Purchase Records File. Ex. E, 367 (FAC, ¶ 9). Plaintiffs Firearms Policy Coalition, Inc., Second Amendment Foundation, California Gun Rights Foundation,

---

[6] The Center took the position that it should have been provided PII under Penal Code § 14231(c)'s language directing DOJ to "provide to the center, upon proper request, the data necessary for the center to conduct its research," ignoring that such sharing was still "[s]ubject to the conditions and requirements established elsewhere in statute," including Penal Code § 11106.

San Diego County Gun Owners PAC, Orange County Gun Owners PAC, and Inland Empire Gun Owners PAC are organizations with members and supporters who live in California and who have personal identifying information in AFS and the Ammunition Purchase Records File. Ex. E, 367–369 (FAC, ¶¶ 10–15).

Plaintiffs filed a motion for a preliminary injunction in March 2022 based solely on their claim that AB 173's mandatory data-sharing provisions violate plaintiffs' right to privacy under Article 1, § 1 of the California Constitution.[7] Ex. A. On March 24, 2022, DOJ filed a demurrer. Ex. B.

On October 14, 2022, the trial court held a consolidated hearing on the preliminary injunction and demurrer. *See* Exs. H & I. On November 1, 2022, the trial court entered an order on the motions; as relevant here, the court granted a preliminary injunction and overruled the demurrer to Respondents' constitutional privacy claim. Ex. L. The order enjoins DOJ "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.

ARGUMENT

A. The Petition Cannot Satisfy Code Of Civil Procedure Section 923's Standard For Supersedeas Relief.

Code of Civil Procedure section 923 governs the Petition, yet the Points and Authorities devotes only two pages at the end of the brief to the showing Section 923 requires, focusing instead on the arguments DOJ will make in the appeal. Under the governing standard, this Court is authorized "to stay proceedings during the pendency of an appeal or to issue a writ of

[7] The FAC includes two additional claims that are not at issue here.

supersedeas . . . during the pendency of an appeal . . . to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction." Code of Civ. Proc. § 923.

"The purpose of the writ of supersedeas is to maintain the subject of the action in status quo until the final determination of the appeal, in order that the appellant may not lose the fruits of a meritorious appeal." *Dry Cleaners & Dyers Inst. v. Reiss* (1936) 5 Cal.2d 306, 310. The Court's power to issue the writ of supersedeas "should be sparingly employed and reserved for the exceptional situation." *People ex rel S.F. Bay Conservation and Development Comm.*, 69 Cal.2d at 537; *see also Bogart v. Bd. Of Med. Examiners* (1950) 99 Cal.App.2d 170, 172 (a writ of supersedeas is "to be made use of only in those cases where some unusual situation is presented which cannot well be handled otherwise"); *W. Coast Home Imp. Co. v. Contractors', Etc.* (1945) 68 Cal.App.2d 1, 6 (a writ of supersedeas should only issue if there is a "special reason" based on "exceptional circumstances"). "The writ is in no sense a matter of right," and it is "not the legitimate purpose of the writ" for it "to issue in every case where an appeal is pending and where appellant might possibly suffer injury due to the lapse of time or other reason," since "its use would become well nigh universal." *Bogart*, 99 Cal.App.2d at 172.

Under these circumstances, DOJ must make "a strong showing" to justify the "extraordinary relief" of a stay. 9 Witkin, Cal. Proc. 6th Appeal § 300 (2022). Accordingly, to obtain a stay, DOJ must show both that (1) "[t]he harm from not granting a stay must be such that [it] would lose the benefits of the appeal" if it prevails, and (2) that Plaintiffs "would not be irreparably harmed by the grant of a stay" or at the very least that the prejudice to Plaintiffs is outweighed by the harm to DOJ if a stay is not granted. Eisenberg, et al., Cal. Prac. Guide Civ. App. & Writs Ch. 7-E, ¶¶ 7:280–81 (Nov. 2021); *see also Smith v. Selma Cmty. Hosp.* (2010) 188 Cal.App.4th 1,

18 (the petitioner "must convincingly show that substantial questions will be raised on appeal and must demonstrate it would suffer irreparable harm outweighing the harm that would be suffered by the other party").

The Petition comes nowhere close to meeting its heavy burden.

1. The Preliminary Injunction Already Maintains The Status Quo By Allowing All Current Research Projects To Continue.

The trial court's injunction only prevents *new* disclosures of PII for *new* research projects. The trial court rejected Plaintiffs' request that DOJ retrieve PII from prior disclosures to researchers. As a result, all existing research projects using gun owners' PII will continue during the pendency of the case. The preliminary injunction order does not impact ongoing research projects. Accordingly, the trial court's order *already preserved the status quo*, so a stay (or supersedeas relief) is not authorized or appropriate under Section 923.

The Petition admits that the "trial court denied Plaintiff's request for a mandatory preliminary injunction requiring" DOJ to retrieve PII, "but granted a prohibitory preliminary injunction" prohibiting DOJ from transferring PII in the future. Pet. 29, ¶ 27. A prohibitory injunction "by its nature, operates to preserve the status quo; by definition such an injunction prevents the defendant from taking actions that would alter the parties' respective provisions." *Daly v. San Bernardino Cty. Bd. of Supervisors* (2021) 11 Cal.5th 1030, 1041.

Yet the Petition attempts to argue that the injunction upset the status quo by claiming that "the status quo is for the law enacted by the Legislature to remain in effect," Pet. 32, and thus for future requests for PII disclosures to be granted by the Attorney General. But *Daly* instructs that DOJ cannot claim an entitlement to continue disputed conduct by arguing that stopping its ongoing disclosures upsets the status quo. *Id*. ("an injunction preventing

the defendant from committing additional violations of the law may not be recharacterized as mandatory merely because it requires the defendant to abandon a course of repeated conduct as to which the defendant asserts a right of some sort"). And "[t]he fact that the defendant had for some time been enjoying its asserted right . . . does not change the character of the order. If this were not so, almost any injunction against the doing of repeated acts would be mandatory if the performance of the acts had begun and been carried on for any considerable time prior to the application for the injunction." *United Railroads of San Francisco v. Super. Ct.* (1916) 172 Cal. 80, 91 (Sloss, J., concurring), quoted with approval in *Daly*, 11 Cal.5th at 1045.

Daly further emphasizes that the "status quo" determination generally turns on the factual conditions between the parties when the trial court ruled on the preliminary injunction motion. 11 Cal.5th at 1041 (an injunction maintains the status quo if it "prevents the defendant from taking actions that would alter the parties' respective" positions). According to DOJ's declarations, at the time of the motion, there were no data requests pending for new research projects, and the Center (and Stanford) had research projects in progress using data provided by DOJ in early 2022 (and projects, such as the LongSHOT project, that commenced before Attorney General Becerra stopped providing new disclosures of PII). Ex. C, 294–295 (Simmons Decl., ¶¶ 15–22, describing DOJ's transfer of data and confirming there were no pending data requests); *see* Ex. C, 150–157 (Studdert Decl., describing current research work), 213–220 (Wintemute Decl., describing ongoing research projects). The trial court's injunction is tailored to preserve that status quo by protecting Respondents' privacy rights until the merits are

decided (*i.e.*, DOJ is enjoined from sharing any *additional* PII from California's firearm databases).[8]

In *Daly*, the California Supreme Court also explained the risk of disrupting a prohibitory injunction on appeal: "To stay enforcement of such an order pending appeal would not preserve the status quo but instead invite its destruction; a stay would leave the parties free to alter conditions during the appeal, with sometimes irreversible consequences." 11 Cal.5th at 1041. Thus, California caselaw consistently has recognized that injunctions designed to preserve the status quo by directing parties to cease offending conduct are appropriate. *Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1048 ("An injunction designed to preserve the status quo as between the parties and to restrain illegal conduct is prohibitory, not mandatory . . . ."); *People ex rel. Brown v. iMergent, Inc.* (2009) 170 Cal.App.4th 333, 342 ("The purpose of the injunction . . . is to restrain defendants' continued violation of" California law, and "[a]ny aspects of the injunctions that require defendants to engage in affirmative conduct are merely incidental to the injunction's objective to prohibit" further violations).

The preliminary injunction here preserves the status quo.

2. The Petition Likewise Cannot Show That A Stay Is Necessary To Preserve The Effectiveness Of A Judgment If DOJ Ends Up Winning.

Nor has the Petition shown that a stay is justified by Section 923's allowance for stays necessary to preserve "the effectiveness of the judgment

---

[8] Again, the trial court declined to issue a mandatory injunction directing DOJ to retrieve all PII it had previously transferred to researchers It is telling, however, that when Attorney General Becerra decided that the disclosure of PII for research violated gun owners' constitutional privacy rights, DOJ ordered the researchers to destroy the data. Ex. A, 13:27–28 (citing Ex. O, 542, Wiley, *Gun violence researchers fight California Department of Justice's plan to withhold data*, Sacramento Bee (March 15, 2021)).

subsequently to be entered" if DOJ wins. This Court may "weigh the relative hardships on the parties" and make an equitable decision designed to minimize interim harm during appeal. *People ex rel S.F. Bay Conservation and Development Comm.,* (1968) 69 Cal.2d 533, 537. "[T]he burden is on the petitioner . . . to establish the necessity of the writ," and the "presumption is in favor of the trial court's decision." *Saltonstall v. Saltonstall* (1957) 148 Cal.App.2d 109, 114. To that end, supersedeas relief is not warranted if a stay can be granted "only at the risk of destroying rights which would belong to the respondent if the judgment is affirmed," because "it cannot be said to be necessary or proper to the complete exercise of appellate jurisdiction." *Nuckolls v. Bank of Cal., Nat'l Ass'n* (1936) 7 Cal.2d 574, 578; *accord Sacramento Newspaper Guild v. Sacramento Cty. Bd. of Supervisors* (1967) 255 Cal.App.2d 51, 53 (supersedeas "will not be granted at the risk of destroying rights which will belong to the respondent if the decree is affirmed").

The Petition recites (and then repeats) that firearms research is "crucial" and that PII shared pursuant to AB 173 has "critical importance." Pet. 49–51. The Petition argues that the preliminary injunction "would severely disrupt, and potentially permanently damage" research projects that "have the potential to literally save lives." Pet. 50.

But it does not—and cannot—explain why or how the failure to issue a stay would cause this alleged damage or disruption. All of the existing research projects will continue. The record shows only that two potential research projects are "in discussion," with no evidence revealing when they might be ready. Ex. J, 462:14. That is, the record contains no evidence that new research projects are ready and waiting to commence, but for the failure to receive PII from the DOJ. Indeed, the record reveals that many of the research projects last for several years. *See* Ex. C, 213–214 (Wintemute Decl., ¶ 17 (describing "linking" records and "following" individuals over

time)), 150–151 (Studdert Decl., ¶¶ 6–9 (describing background of the LongSHOT study)). These long-term research projects do not spring up every few weeks or even months.

DOJ does not argue, moreover, that the many ongoing research projects are dependent on a continuous flow of new PII to augment the millions of records that researchers receive in response to a request for data used to populate a research project. The ongoing research projects will not be disrupted or damaged in the slightest because all of the private data previously transferred remains with the researchers.

Nor does the Petition even hint that any research project "in discussion" is likely to yield such blockbuster social benefits that future PII disclosures cannot wait until the end of the appeal (if DOJ prevails). Indeed, there is no evidence in the record that any of the past studies using PII have resulted in tangible change in public policy or otherwise enhanced public safety. (There are, however, multiple pieces of evidence revealing that the researchers racked up millions of dollars for the research. Ex. D, 456:5–9 (preliminary injunction reply, citing Ex. C, 221 (Wintemute Decl., ¶ 47), and 125–36 (Webster Decl., Ex. 1, describing projects with several million dollars of funding)).) If the State's speculation that "*ongoing* research projects" that "have the potential to literally save lives" is correct, Pet. 50 (emphasis added), those lives can still be saved because the "ongoing" research will continue (which reveals that DOJ's argument is simply attempted scaremongering). Given this, the State cannot possibly show that it would lose the benefit of an appeal if the stay is not granted.

The Court's skeptical review is thus all the more appropriate in the context of the "purely preventive injunction[]" issued in this case; otherwise DOJ "could renew or continue any destructive conduct during the period of appeal," which could "cause irreparable damage" and force Respondents to "'stand by . . . without possibility of redress'" and watch "'the subject-matter

of the litigation destroyed'" and reduced to "'a barren victory.'" *Daly*, 11 Cal.5th at 1041 (quoting *Heinlen v. Cross* (1883) 63 Cal. 44, 46); *see also Sun-Maid Raisin Growers of Cal. v. Paul* (1964) 229 Cal.App.2d 368, 377 (declining to issue supersedeas in part because a stay "would in practical effect be a decision contrary to the injunction and in favor of the appellants for most of the period involved"). This is not a case where the "fruits" of a successful appeal will be "irrevocably lost" if this Court does not grant a stay. *Daly*, 11 Cal.5th at 1039 (citations omitted).

Instead, a stay would disrupt that balance and permit the State to destroy the privacy rights Respondents seek to preserve in this case. The importance of the injunction is brought into focus by the large volume of DROS transactions—DOJ's own published data reveals that nearly 1.2 million firearm transactions were processed through the system in 2020.[9] At this rate, many tens (if not hundreds) of thousands of records have not yet been transmitted to researchers, and more records are generated every day. On the other hand, the injunction imposes only a slight burden on the State's research interest in future projects that might be ready to commence during the appeal. And, again, existing research projects will continue while the case is litigated because the trial court did not order the Center or other researchers to return the PII they have already obtained. In short, supersedeas relief is inappropriate because a stay would eviscerate the constitutional privacy rights Respondents are fighting to protect.

B. The Petition's "Substantial Questions" Arguments Ignore The Standards Of Review Here And On Appeal.

The Petition acknowledges, but then mostly ignores, that the merits of an appeal bear on a petition for supersedeas or stay *only* to the extent a petitioner must shows the appeal raises "substantial questions" *in addition to*

---

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

showing "a stay is necessary to preserve to an appellant the fruits of a meritorious appeal." Pet. 36 (quoting *Daly*, 11 Cal.5th at 1039). The bulk of the Petition is devoted to relitigating the merits of the preliminary injunction. This is inappropriate. The purpose a writ of supesedeas "is merely to suspend the enforcement of the judgment pending the appeal," "[i]t is not the function of such a writ to reverse, supersede or impair the force, of, or pass on the merits of the judgment or order from which the appeal is taken." *Smith v. Smith* (1941) 18 Cal.2d 462, 464–65. Put another way, "[t]he correctness of the trial court's ruling on the subject, and the question of what the ultimate decision should be, are not matters of concern" in deciding a petition for writ of supersedeas. *Food & Grocery Bureau of S. Cal. v. Garfield* (1941) 18 Cal. 2d 174, 178.

The Petition makes two "substantial questions" arguments. First, the Attorney General claims that the trial court applied the wrong legal standard because the preliminary injunction ruling cross-referenced the court's analysis overruling DOJ's demurrer to Respondents' constitutional privacy claim. Pet. 37, 38–40. Second, the Attorney General takes an early crack at the merits of the appeal by arguing that the Respondents failed to establish a likelihood of success. *Id.* at 37, 41–48. Neither of these arguments supports granting exceptional relief here.

1. The Petition Ignores The Presumption Of Correctness That Attaches To The Preliminary Injunction On Appeal.

The Petition argues first that, in granting the preliminary injunction, the trial court's order stated that Respondents showed a likelihood of success on the merits "for the same reasons" that their claim survived demurrer. Ex. H, 422. (The trial court also noted that the Attorney General's "arguments do not compel a different outcome" for purposes of a preliminary injunction. *Ibid.*) DOJ complains that this analysis is flawed because a demurrer and a preliminary injunction are judged by different legal standards. But a claim

that the trial court applied the wrong legal standard is foreclosed by hornbook case law governing appellate review of preliminary injunction rulings.

To succeed on appeal, DOJ must "make a clear showing of an abuse of discretion," and "[a] trial court will be found to have abused its discretion only when it has 'exceeded the bounds of reason or contravened the uncontradicted evidence.'" *IT Corp. v. Cty. of Imperial* (1983) 35 Cal.3d 63, 69 (citation omitted). To that end, there is a heavy presumption in favor of the trial court's ruling that mandates deference notwithstanding any defects in the reasoning set forth in a preliminary injunction order. This Court "review[s] the trial court's order, not its reasoning, and affirm[s] [a preliminary injunction] order if it is correct on any theory apparent from the record." *Olson v. Hornbrook Cmty. Servs. Dist.* (2021) 68 Cal.App.5th 260, 268 (citation omitted); *see also Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1049 (the principle that appellate courts "review the correctness of the trial court's ruling, not its reasoning" "is particularly applicable to rulings granting or denying preliminary injunctions"). Thus, a claim that the trial court's reasoning is flawed cannot justify supersedeas relief since it is immaterial to the legal analysis on appeal.

On closer inspection, the Petition's argument boils down to a complaint that the trial court's ruling did not adequately state the reason for its conclusion that Respondents established a likelihood of success on the merits of their constitutional privacy claim. *See* Pet. 40 (arguing that "[t]he trial court provided no further analysis, merely stating that 'Defendant's arguments do not compel a different outcome'"). But California law has long held that the presumption in favor of a preliminary injunction holds even where a trial court issues a ruling in summary fashion or fails to make express rulings on each element of the preliminary injunction test. *See, e.g.*, *City of Los Altos v. Barnes* (1992) 3 Cal.App.4th 1193, 1198 ("fact that the court's conclusion is set forth in summary fashion does not mean the court failed to

engage in the requisite analysis, or that its analysis was incorrect"); *MCA Recs., Inc. v. Newton-John* (1979) 90 Cal.App.3d 18, 23 ("we can presume from the trial court's order granting the preliminary injunction that the court did in fact find that irreparable injury would be imminent unless the injunction were granted"); *14859 Moorpark Homeowner's Ass'n v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1402–03 (where "the trial court is presented with evidence . . . but fails to make express findings, [appellate courts] presume that the trial court made appropriate factual findings and review the record for substantial evidence to support the rulings").

This Court must "presume the court considered every pertinent argument and resolved each one consistently with its minute order" on the preliminary injunction." *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1451. "Recognition of, and deference to, implied findings is derived from the principle that an appellate court must interpret the facts in the light most favorable to the prevailing party and indulge all reasonable inferences in support of the trial court's decision regarding the preliminary injunction." *Smith v. Adventist Health Sys./W.* (2010) 182 Cal.App.4th 729, 739.

And while this presumption alone would suffice to rebut DOJ's argument, the Court has more than just deference to fall back on here: The transcript confirms at every turn that the trial court understood the preliminary injunction test and made a reasoned decision consistent with that legal standard. Ex. I, 432:23–25 (noting that a "constitutional violation" is harm as "a matter of law"); 435:3–11 (discussing the balance of harms in the context of a preliminary injunction); 435:28–436:8 (noting that a DOJ data breach disclosing personal identifying information weighed in favor of an injunction "because it shows likelihood of a constitutional violation"); 439:28 (directing DOJ's counsel to discuss interest balancing); 441:16–21 (asking Respondents' counsel to respond to DOJ's interest-balancing

argument). This evidence shows that the Attorney General's claims about the supposed insufficiency of the trial court's ruling are hollow.

In short, the Attorney General's contention that the trial court's ruling is deficient does not raise a "substantial question."

2. Respondents Are Likely To Prevail On Their Constitutional Privacy Claim.

The Petition's main "substantial questions" argument is entirely dependent on reweighing the evidence presented below. This yet again ignores the legal standards governing appellate review of a preliminary injunction order. "Where the evidence with respect to the right to a preliminary injunction is conflicting, the reviewing court must 'interpret the facts in the light most favorable to the prevailing party and indulge in all reasonable inferences in support of the trial court's order.'" *Am. Acad. of Pediatrics v. Van de Kamp* (1989) 214 Cal.App.3d 831, 838 (citation omitted). Accordingly, [a]rguments which reweigh the evidence before the superior court are irrelevant," and "[w]here . . . there is evidence which supports the trial court's determination, it is of no import that there is evidence which conflicts with it." *Id.* at 838–39. At any rate, Respondents established at the trial court that they are likely to prevail on their constitutional privacy claim.

"Unlike the federal Constitution, the California Constitution expressly recognizes a right to privacy." *Mathews v. Becerra* (2019) 8 Cal.5th 756, 768. In 1972, California voters passed the Privacy Initiative, which added "privacy" to the enumerated rights set forth in Article I, Section 1 of the California Constitution. In *Lewis v. Super. Ct.*, the California Supreme Court recounted the "principal 'mischiefs' that the Privacy Initiative addressed" in language that bears heavily on this case; those mischiefs included: "(1) 'government snooping' and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information

by government and business interests; [and] (3) the improper use of information properly obtained for a specific purpose" which is then used "for another purpose" or "disclos[ed] . . . to some third party." (2017) 3 Cal.5th 561, 569 (citation omitted). Central to the right of privacy "is the ability to control circulation of personal information." *Mathews*, 8 Cal.5th at 769 (citation omitted).

The Court set the current framework for litigating a constitutional privacy claim in *Hill v. Nat'l Collegiate Athletic Ass'n* (1994) 7 Cal.4th 1. Under *Hill*, a privacy claim involves three essential elements: (1) the claimant must possess a legally protected privacy interest; (2) the claimant's expectation of privacy must be objectively reasonable; and (3) the invasion of privacy complained of must be serious in both its nature and scope. *Id.* at 35–37. If a claimant establishes all three elements, the strength of that privacy interest is balanced against countervailing interests. *Id.* at 37–38. Specifically, "the party seeking information may raise in response whatever legitimate and important countervailing interests disclosure serves, while the party seeking protection may identify feasible alternatives that serve the same interests or protective measures that would diminish the loss of privacy." *Williams v. Super. Ct.* (2017) 3 Cal.5th 531, 552; *see Hill*, 7 Cal.4th at 40 (privacy claimant "may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests").

AB 173's mandatory data-sharing provisions violate Respondents' right to privacy under the California Constitution. AB 173 requires DOJ to hand over the complete AFS and Ammunition Purchase Records File datasets to the Center upon request, and it does so without notice to or consent from the millions of Californians whose private information is being compromised. This disclosure, standing alone, is a substantial privacy violation. The Privacy Initiative's proponents were attuned to the unique

harm arising from the government's compilation of personal information. *See White v. Davis* (1975) 13 Cal.3d 757, 774 ("The proliferation of government snooping and data collecting is threatening to destroy our traditional freedoms. Government agencies seem to be competing to compile the most extensive sets of dossiers of American Citizens.") (quoting ballot argument). Even then, Californians recognized that technology compounded the threat to privacy: "Computerization of records makes it possible to create 'cradle-to-grave' profiles of every American." *Id.* .

But the privacy violation does not end with the initial disclosure. The Center (and other researchers) compounds the privacy violation by using the data to "link" individuals to other datasets and "follow" them for years, which enables researchers to dig up additional information on gun owners and peer even further into their lives. *See* Ex. A, 13 (preliminary injunction brief; identifying articles); *see also* Ex. C, 211–213 (Wintemute Decl., ¶¶ 9–14). As Justices Liu and Kruger recognized in *Lewis*, the concerns motivating the Privacy Initiative are "even more pressing today because advances in data science have enabled sophisticated analyses of curated information as to a particular person." 3 Cal.5th at 581–82 (Liu, J., joined by Kruger, J., concurring)

AB 173's mandatory information-sharing regime violates the constitutional right to privacy.

a. DOJ's Disclosure Of Respondents' PII Violates Respondents' Right To Privacy Under The California Constitution.

The trial court correctly found that Respondents satisfied the *Hill* test:

Respondents Have A Legally Protected Privacy Interest In The PII Collected In AFS and the Ammunition Purchase Records File. Respondent Barba and the organizational respondents' members have a protected privacy interest in the information collected in AFS and Ammunition Purchase

Records File, which includes detailed information about individuals, including their fingerprints, home addresses, phone numbers, driver's license information, and other identifying information—all of this along with comprehensive firearm and ammunition purchase-and-transfer history. The California Supreme Court has long recognized that individuals have a legally protected privacy interest in even a modest subset of this information. *Cty. of Los Angeles v. Los Angeles Cty. Emp. Relations Comm'n* (2013) 56 Cal. 4th 905, 927 (recognizing that individuals "have a legally protected privacy interest in their home addresses and telephone numbers" and "a substantial interest in the privacy of their home").

Respondents Have A Reasonable Expectation Of Privacy In Their PII Transmitted To DOJ For Law Enforcement Purposes. Respondents have an objectively reasonable expectation of privacy in the information contained in AFS and the Ammunition Purchase Records File, particularly in those records that are not otherwise subject to public disclosure.[10] Individuals purchasing or transferring firearms and ammunition have a reasonable expectation that the information provided to and collected by DOJ in the course of a transaction would not be used for purposes unrelated to law enforcement or disclosed to a third party. This strikes at the heart of one of the "principal mischiefs" the Privacy Initiative sought to address: "the improper use of information properly obtained for a specific purpose" and then used "for another purpose" or disclosed to "some third party." *White*, 13 Cal.3d at 775. AFS includes a wealth of information that most Californians undoubtedly consider highly personal (like fingerprints, home addresses, and driver's license numbers). But AFS goes beyond just capturing a snapshot of such personal information, it represents a compilation of information over

[10] Certain categories of information encompassed within AFS, such as concealed carry licenses or criminal record information, are subject to public disclosure separate and apart from Section 11106(d).

time: An individual's AFS record contains their entire history of firearm and ammunition transactions—so disclosure also reveals the subject's past addresses and, to a certain extent, their associations (by showing the personal information of every person who engaged in a firearm or ammunition transaction with the subject).

Respondents' expectation of privacy is confirmed by the longstanding statutory restriction in Section 11106 limiting DOJ's disclosure of AFS information except for sharing within the government for criminal and civil law enforcement purposes. This expectation was reaffirmed by the voters' enactment of Proposition 63 in 2016, which explicitly provided that personal information collected by DOJ for ammunition transactions "shall remain confidential and may be used . . . only for law enforcement purposes." Penal Code § 30352(b)(2). This "longstanding and consistent practice" restricting the use of PII collected for firearm and ammunition transactions to law enforcement purposes supports Respondents' reasonable expectation that their information would not be used for unrelated purposes. *Cty. of Los Angeles*, 56 Cal.4th at 927–28.

In sum, case law and the statutory structure preceding AB 173 (including 25 years of the law enforcement exception in Section 11106) confirm that Respondents have a reasonable expectation of privacy that their PII would not be used or shared for a purpose other than for which it was provided (that is, for ready access for law enforcement purposes), and no community practice or norms overcome this expectation. *Hill*, 7 Cal.4th at 36, 37; *see Pioneer Elecs. (USA), Inc. v. Super. Ct.* (2007) 40 Cal.4th 360; *Cty. of Los Angeles*, 56 Cal.4th 905; *Williams*, 3 Cal.5th 531. And Californians in DOJ's databases were not given notice of or an opportunity to consent or refuse before their PII was shared with researchers. *See Hill*, 7 Cal.4th at 37 (the "presence or absence of opportunities to consent voluntarily" affects privacy expectations).

The Petition argues that Respondents cannot establish a reasonable expectation of privacy because DOJ previously shared PII with the Center and similar researchers. Pet. 42. But DOJ's past practice—which was done without statutory authorization and without notice to gun owners—cannot override Respondents' constitutional rights. "[I]t plainly would defeat the voters' fundamental purpose in establishing a *constitutional* right of privacy if a defendant could defeat a constitutional claim simply by maintaining that statutory provisions or past practices that are inconsistent with the constitutionally protected right eliminate any 'reasonable expectation of privacy' with regard to the constitutionally protected right." *Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 339 (plurality op. of George, C.J.) (emphasis in original).

Sharing Personal Identifying Information In AFS and the Ammunition Purchase Records File Is A Serious Invasion Of Respondents' Privacy. AB 173 mandates a serious privacy invasion. Researchers now get access to PII that they actively use, mine, manipulate, and link to other databases to develop dossiers about—and "follow"—gun owners who have no opportunity to opt out of this new regime. Strangers at the Center—and other "bona fide" researchers—will now know intimate details about millions of law-abiding Californians who were given no advance notice that their personal information would be used in this manner.[11]

---

[11] The California Supreme Court has held that the mere disclosure of contact information is sufficiently "serious" to support a constitutional claim because it could lead to unwanted contact from a third party. *Cty. of Los Angeles*, 56 Cal.4th at 929–30. The same prospect exists here, as contacting individuals is entirely consistent with the broad statutory mandate of "research"—all the more so considering the legislative history's statements that the ultimate goal here is to support studies into the "prevention of violence."

The Petition tries to diminish the privacy violation by arguing that the PII is "only" being shared with researchers and those researchers must follow certain procedures when using the data. Pet. 44, 45. But this misses two core aspects of the constitutional right to privacy. For one thing, the "seriousness" "'element is intended simply to screen out intrusions on privacy that are de minimis or insignificant.'" *Lungren*, 16 Cal.4th at 339 (plurality op. of George, C.J.) (citation omitted); *Lewis*, 3 Cal. 5th at 571 (same). Second, the researchers' active use of the data to "follow" the (unknowing) research subjects for years confirms the "seriousness" of the privacy invasion. Such "sophisticated analyses of curated information as to a particular person" constitute a serious invasion of privacy. *Lewis*, 3 Cal.5th at 581 (Liu, J., joined by Kruger, J., concurring).

The Petition also ignores that disclosing PII for "research" is a different purpose than the purpose for which the sensitive information was collected. State law assured firearm purchasers for 25 years that DOJ would keep the private data confidential and use it for law enforcement purposes only. This bait and switch makes the disclosure "serious." *Cf. Lewis*, 3 Cal.5th at 569; *White*, 13 Cal.3d at 774 (right of privacy "prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes").

Finally, the Attorney General argues that Respondents face a heightened burden to mount a facial challenge to AB 173's information-sharing regime. Pet. 45–46. This misstates (and inverts) the standard for facial challenges governing the fundamental constitutional right to privacy, which requires only that a law be unconstitutional in the "vast majority of its applications." *Lungren*, 16 Cal.4th at 343 (plurality op. of George, C.J.). In *Lungren*, the Court considered and rejected precisely the same argument when DOJ asserted it in a constitutional privacy challenge to an abortion

parental-consent law. *Id.* at 342–48. Specifically, the Court held that when a law "imposes substantial burdens on fundamental privacy rights with regard to a large class of persons," a facial challenge "may not be defeated simply by showing that there may be some circumstances in which the statute constitutionally could be applied." *Id.* at 343. Thus, "when a statute broadly and directly impinges upon the fundamental constitutional privacy rights of a substantial portion of those persons to whom the statute applies, the statute can be upheld only if those defending the statute can establish that, considering the statute's general and normal application, the compelling justifications for the statute outweigh the statute's impingement on constitutional privacy rights and cannot be achieved by less intrusive means." *Id.* at 348; *see also E. Bay Asian Loc. Dev. Corp. v. State of Cal.* (2000) 24 Cal.4th 693, 708–09 (recognizing that a facial challenge is appropriate when a law "broadly impinges upon an individual's exercise of a fundamental constitutional right or that in its general and ordinary application it does so").

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

In sum, Respondents established all three of *Hill*'s threshold factors.

b. AB 173's Information-Sharing Regime Does Not Survive The Interest-Balancing Inquiry.

The Petition finally argues that AB 173's privacy invasion is justified by the alleged importance of the research being conducted. Pet. 46–48. In doing so, it rehashes evidence that was presented to the trial court. This is improper: Arguments that "reweigh" evidence are "irrelevant" in a preliminary injunction appeal. *Van de Kamp*, 214 Cal.App.3d at 838; *see also Loy v. Kenney* (Nov. 17, 2022) --- Cal.Rptr.3d ----, 2022 WL 17038677, at *1 (an appellate court "draw[s] inferences in favor of the [preliminary

injunction] order" and "do[es] not reweigh evidence"). Setting that aside, AB 173 will not survive the interest-balancing inquiry on the merits for several reasons.

First, the purpose of disclosing personal identifying information in AFS and the Ammunition Purchase Record File is at odds with the reason the sensitive information was collected. DOJ collects the information in AFS and the ammunition database for use in criminal or civil investigations. *See* Penal Code § 11106(a)(1) (AFS information compiled "to assist in the investigation of crime, the prosecution of civil actions . . . , [and] the arrest and prosecution of criminals"); Penal Code § 30352(b)(1) (ammunition records database "shall remain confidential" and "may be used . . . only for law enforcement purposes"). AB 173 requires DOJ to share this information for another purpose (research) and directs DOJ to share it with third parties (the Center and other "bona fide" researchers). This bait-and-switch strikes at the core of what the constitutional right to privacy is meant to protect against. *Lewis*, 3 Cal.5th at 569; *White*, 13 Cal.3d at 774.

Second, the scope of a privacy violation is significant. AFS and the Ammunition Purchase Records File contain a vast amount of detailed PII that AB 173 requires DOJ to share with outside researchers who compound the privacy violation by linking it with other data and then "following" gun owners for years. *Lewis*, 3 Cal.5th at 581 (Liu, J., joined by Kruger, J., concurring).

The flow of information from the government to private researchers here is important. *Hill* stressed that "[j]udicial assessment of the relative strength and importance of privacy norms and countervailing interests may differ in cases of private, as opposed to government, action." *Hill*, 7 Cal.4th at 38. Importantly, "the pervasive presence of coercive government power in basic areas of human life typically poses greater dangers to the freedoms of the citizenry than actions by private persons." *Id*. So where, as here, "a public

or private entity *controls access to a vitally necessary item*, it may have a correspondingly greater impact on the privacy rights of those with whom it deals." *Id*. at 39 (emphasis added). California conditions exercise of the fundamental constitutional right to purchase firearms on disclosing this PII to the DOJ—and now that data is being distributed to private researchers (opposed to the gun owners' choices) with no opportunity to consent. Respondents are not "able to choose freely among competing public or private entities in obtaining access" to the exercise of this right, so *Hill* instructs that the government faces a steeper burden in the balancing test.[12]

Third, although a court does not need to reach the question whether Respondents have proposed viable alternatives when, as here, the government's asserted interest does not justify the privacy invasion, Respondents nevertheless identified two alternatives to achieve its interests that have a lesser impact on privacy interests. *Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 998 (plaintiff can rebut an intruder's justification by "demonstrating the availability and use of protective measures, safeguards, and alternatives . . . that would minimize the intrusion on privacy interests") (quoting *Hill*, 7 Cal.4th at 28). At the very least, individuals should be given notice of each data request and provided an opportunity to opt out of (or opt in to) having their information shared with researchers. *See Hill*, 7 Cal.4th at 36, 37; *Pioneer*, 40 Cal.4th at 373–74; *Williams*, 3 Cal.5th at 555. In addition, DOJ could restrict sharing of PII by

---

[12] *Hill* emphasized that an intruder's "[l]egitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is *determined by their proximity to the central functions of a particular public or private enterprise*." 7 Cal.4th at 38 (emphasis added). Here, the State is disclosing millions of Californians' PII in the name of "research," but the State cannot (and does not) claim that social science research is remotely "proximate" to a "central function" of the State government.

implementing protective procedures that anonymize or de-identify data shared with researchers.[13] This could include, for example, assigning subject codes in lieu of sharing names, driver's license or identification card numbers, or other unique identifiers; and using higher-level geographic data (such as ZIP Codes or city- or county-level data) in lieu of home addresses. Each of these alternatives fits neatly within the California Supreme Court's privacy jurisprudence.

Fourth, if the State believes this research is important, the Legislature could authorize DOJ's Bureau of Firearms to hire its own researchers to conduct studies in house, thereby at least reducing the scope of the privacy violation here.[14] The State's efficiency interest in offloading this research to an outside organization cannot justify the privacy incursion.

CONCLUSION

For the reasons stated above, Appellant's petition for writ of supersedeas should be denied.

Respectfully submitted,

Dated: December 7, 2022

BENBROOK LAW GROUP, PC

By s/ Bradley A. Benbrook
BRADLEY A. BENBROOK
Attorneys for Respondents

---

[13] *See, e.g.*, Ex. O, 664, Garfinkel, U.S. Dep't of Commerce, Nat'l Inst. of Standards & Tech., *De-Identification of Personal Information* 15–16, 19–21 (2015) (discussing methods of deidentifying structured datasets).

[14] Respondents do not and need not concede that such an alternative regime raises no privacy concerns. We raise the prospect only to illustrate that the research can be conducted in a manner less harmful to Respondents' privacy interests.

ANSWER TO PETITION FOR WRIT OF SUPERSEDEAS

Respondents 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 answer Appellant Rob Bonta's Petition for Writ of Supersedeas as follows:

1. Respondents admit the allegations in Paragraph 1.

2. Respondents admit the allegations in Paragraph 2.

3. Respondents admit the allegations in Paragraph 3.

4. Respondents admit that Petitioner's summary of various statutory provisions set forth in Paragraph 4 appears to be accurate, however, the Penal Code speaks for itself.

5. Respondents admit that Petitioner's summary of various statutory provisions set forth in Paragraph 5 appears to be accurate, however, the Penal Code speaks for itself. Respondents lack information or belief sufficient to enable them to admit or deny the remaining allegations contained in this paragraph and, on that basis, deny them.

6. Respondents submit that the provisions of the Penal Code quoted and characterized in Paragraph 6 speak for themselves.

7. Respondents submit that the provisions of the Penal Code quoted and characterized in Paragraph 7 speak for themselves. Respondents deny that "the Legislature enacted AB 173 to clarify" the information-sharing regime; in fact, DOJ's disclosure of PII in the firearms databases was restricted by statute except when it was necessary to share such information with other government officers to further law-enforcement purposes. Respondents lack information or belief sufficient to enable them to admit or deny the remaining allegations contained in this paragraph and, on that basis, deny them.

8. Respondents submit that the provisions of the Penal Code quoted and characterized in Paragraph 8 speak for themselves. Respondents deny that AB 173 "clarif[ied]" the information-sharing regime; in fact, DOJ's disclosure of PII in the firearms databases was restricted by statute except when it was necessary to share such information with other government officers to further law-enforcement purposes. Respondents lack information or belief sufficient to enable them to admit or deny the remaining allegations contained in this paragraph and, on that basis, deny them.

9. Respondents submit that the provisions of the Penal Code quoted and characterized in Paragraph 9 speak for themselves.

10. Respondents admit that Professor Wintemute is the Director of the California Firearm Violence Research Center and that Dr. Wintemute provided a declaration in opposition to the motion for preliminary injunction in the trial court. Petitioner's summary and characterization of certain excerpts from Dr. Wintemute's declaration set forth in Paragraph 10 appears to be accurate, however, the declaration speaks for itself and must be considered as a whole. Respondents lack information or belief sufficient to enable them to admit or deny the remaining allegations contained in this paragraph and, on that basis, deny them.

11. Petitioner's summary and characterization of certain excerpts from Dr. Wintemute's declaration set forth in Paragraph 11 appears to be accurate, however, the declaration speaks for itself and must be considered as a whole. To the extent Petitioner simply characterizes statements in Dr. Wintemute's declaration or purports to recite Dr. Wintemute's conclusions and statements as facts, Respondents lack information or belief sufficient to admit or deny such alleged facts and, on that basis, deny them. Respondents lack information or belief sufficient to enable them to admit or deny the remaining allegations contained in this paragraph and, on that basis, deny them.

12. Petitioner's summary and characterization of certain excerpts from Dr. Wintemute's declaration set forth in Paragraph 12 appears to be accurate, however, the declaration speaks for itself and must be considered as a whole. To the extent Petitioner simply characterizes statements in Dr. Wintemute's declaration or purports to recite Dr. Wintemute's conclusions and statements as facts, Respondents lack information or belief sufficient to admit or deny such alleged facts and, on that basis, deny them. Respondents lack information or belief sufficient to enable them to admit or deny the remaining allegations contained in this paragraph and, on that basis, deny them.

13. Respondents admit that Professor David Studdert provided a declaration in opposition to the motion for preliminary injunction in the trial court. Petitioner's summary and characterization of certain excerpts from Professor Studdert's declaration set forth in Paragraph 13 appears to be accurate, however, the declaration speaks for itself and must be considered as a whole. To the extent Petitioner simply characterizes statements in Professor Studdert's declaration or purports to recite Professor Studdert's conclusions and statements as facts, Respondents lack information or belief sufficient to admit or deny such alleged facts and, on that basis, deny them. Respondents lack information or belief sufficient to enable them to admit or deny the remaining allegations contained in this paragraph and, on that basis, deny them.

14. Petitioner's summary and characterization of certain excerpts from Professor Studdert's declaration set forth in Paragraph 14 appears to be accurate, however, the declaration speaks for itself and must be considered as a whole. To the extent Petitioner simply characterizes statements in Professor Studdert's declaration or purports to recite Professor Studdert's conclusions and statements as facts, Respondents lack information or belief sufficient to admit or deny such alleged facts and, on that basis, deny them.

Respondents lack information or belief sufficient to enable them to admit or deny the remaining allegations contained in this paragraph and, on that basis, deny them.

15. Petitioner's characterization of material from Dr. Studdert's declaration purports to pass off his conclusions and statements as undisputed facts; Respondents lack information or belief sufficient to admit or deny such alleged facts and, on that basis, deny them. The declaration and exhibits speak for themselves. Respondents lack information or belief sufficient to enable them to admit or deny the remaining allegations contained in this paragraph and, on that basis, deny them.

16. Respondents admit that Professor Daniel Webster provided a report that was submitted in opposition to the motion for preliminary injunction in the trial court. Petitioner's characterization of material from Professor Webster's reports purports to pass off his conclusions and statements as undisputed facts; Respondents lack information or belief sufficient to admit or deny such alleged facts and, on that basis, deny them. Furthermore, the report speaks for itself and must be considered as a whole. Respondents lack information or belief sufficient to enable them to admit or deny the remaining allegations contained in this paragraph and, on that basis, deny them.

17. Respondents lack information or belief sufficient to enable them to admit or deny the allegations contained in Paragraph 17 and, on that basis, deny them.

18. Respondents lack information or belief sufficient to enable them to admit or deny the allegations contained in Paragraph 18 and, on that basis, deny them.

19. Respondents lack information or belief sufficient to enable them to admit or deny the allegations contained in Paragraph 19 and, on that basis, deny them.

20. Petitioner's characterization of material from Professor Webster's reports purports to pass off his conclusions and statements as undisputed facts; Respondents lack information or belief sufficient to admit or deny such alleged facts and, on that basis, deny them. Respondents lack information or belief sufficient to enable them to admit or deny the allegations contained in Paragraph 20 and, on that basis, deny them.

21. Respondents admit the allegations in Paragraph 21.

22. Respondents admit the allegations in Paragraph 22.

23. Respondents admit that the Attorney General opposed the preliminary injunction and supported the opposition with the declarations and report referenced in Paragraph 23. Respondents lack information or belief sufficient to enable them to admit or deny the remaining allegations contained in this paragraph and, on that basis, deny them.

24. Respondents admit that the Attorney General filed a demurrer as set forth in Paragraph 24, and that Petitioner's summary of the demurrer arguments appears to be accurate. The remaining allegations in Paragraph 24 contain Petitioner's legal arguments, to which no response is required. To the extent a response is required, Respondents deny the remaining allegations.

25. Respondents admit the allegations in Paragraph 25.

26. Respondents admit that Petitioner's partial summary of the trial court's ruling on the demurrer set forth in Paragraph 26 appears to be accurate, however, the ruling speaks for itself.

27. Respondents admit that Petitioner's partial summary of the trial court's ruling on the motion for preliminary injunction set forth in Paragraph 27 appears to be accurate, however, the ruling speaks for itself.

28. Respondents admit that Petitioner's partial summary of the trial court's ruling on the motion for preliminary injunction set forth in Paragraph 28 appears to be accurate, however, the ruling speaks for itself. To

the extent the allegations in Paragraph 28 reflect Petitioner's legal arguments, no response is required.

29. Respondents admit that Petitioner's partial summary of the trial court's ruling on the motion for preliminary injunction set forth in Paragraph 29 appears to be accurate, however, the ruling speaks for itself. Respondents admit that they submitted a proposed order on October 19, 2022.

30. Respondents admit that Petitioner's citation of the reporter's transcript from the October 14, 2022 motion hearing set forth in Paragraph 30 appears to be accurate, however, the transcript speaks for itself and the quoted statement should be considered in its full context. Respondents lack information or belief sufficient to enable them to admit or deny the remaining allegations contained in this paragraph and, on that basis, deny them.

31. Respondents admit that Petitioner's citation of the reporter's transcript from the November 3, 2022 *ex parte* hearing set forth in Paragraph 31 appears to be accurate, however, the transcript speaks for itself and the quoted statements should be considered in their full context.

32. Respondents admit the allegations in Paragraph 32.

33. Paragraph 33 contains Petitioner's legal arguments, to which no response is required. Respondents dispute the legal arguments contained in Paragraph 33.

34. Paragraph 34 contains Petitioner's legal arguments, to which no response is required. Respondents dispute the legal arguments contained in Paragraph 34.

35. Respondents admit that an order granting a preliminary injunction is appealable and that the Attorney General has filed a notice of appeal of the trial court's order granting a preliminary injunction.

36. Respondents submit that the provisions of the Code of Civil Procedure and the Rules of Court quoted and characterized in Paragraph 36 speak for themselves.

37. Paragraph 37 contains Petitioner's legal arguments, to which no response is required. Respondents deny the factual underpinnings of each of these legal arguments. For the reasons set forth in the Opposition above, Respondents deny that "significant questions . . . will be presented on appeal and . . . are likely to result in the preliminary injunction being overturned." Respondents likewise deny that the appeal is "inadequate" and that the injunction "upsets the status quo"—the prohibitory injunction is tailored to maintain the status quo. Respondents deny that the AB 173 "clarified" the information-sharing regime; in fact, DOJ's disclosure of PII in the firearms databases was restricted by statute except when it was necessary to share such information with other government officers to further law-enforcement purposes. Respondents likewise deny that any "critical research" will not "continue" while the injunction is in place: The trial court did not order the Attorney General to retrieve the millions of records of PII it had already disclosed to researchers, so the projects will continue. Respondents deny that the injunction will cause "irreparable harm to the public." By contrast, staying the injunction would subject Respondents—and the millions of Californians whose PII is contained in DOJ's firearms databases—to a certain, significant, imminent, and repeated privacy intrusion by DOJ's sharing of personal identifying information with the Center and other researchers.

38. Respondents do not dispute the authenticity of the exhibits accompanying the Petition.

WHEREFORE, Respondents pray that this Court:

1. Deny the petition for writ of supersedeas.

2. Grant other such and further relief as the Court may deem necessary.

Dated: December 7, 2022

BENBROOK LAW GROUP, PC

By s/ Bradley A. Benbrook
BRADLEY A. BENBROOK
Attorneys for Respondents

VERIFICATION

I, Bradley A. Benbrook, declare as follows:

I am one of the attorneys for Respondents in the trial court proceedings from which this petition for writ of supersedeas arises. *Barba v. Bonta*, San Diego Cty. Super. Ct. Case No. 37-2022-00003676-CU-CR-CTL. I have read the foregoing answer to the petition and know its contents. I am familiar with the records, files, and proceedings described above. The facts alleged in the answer are personally known to me, and I know these facts as stated to be true. Furthermore, all exhibits accompanying this brief are true and correct copies of original documents filed with the San Diego Superior Court.

I declare under penalty of perjury under the laws of the State of California and of the United States that the foregoing is true and correct.

Executed December 7, 2022

s/ Bradley A. Benbrook
Bradley A. Benbrook

CERTIFICATE OF COMPLIANCE

Pursuant to rules 8.204(c)(1), 8.484(a), and 8.486(a)(6) of the California Rules of Court, I certify that the text of this brief consists of 9,626 words as counted by the Microsoft Word program used to generate the brief..

Dated: December 7, 2022

By: s/ Bradley A. Benbrook
Bradley A. Benbrook
Attorneys for Respondents

DECLARATION OF SERVICE

I am over the age of 18 and not a party to this cause. I am employed in the county where the mailing occurred. The following facts are within my first-hand and personal knowledge and if called as a witness, I could and would testify thereto. My business address is 701 University Avenue, Suite 106, Sacramento, CA 95825. On December 7, 2022, I served the foregoing documents entitled:

1. Respondents' Opposition to Petition for Writ of Supersedeas and Answer to Petition
2. Appendix of Exhibits in Support of Respondents' Opposition to Petition for Writ of Supersedeas

Via TrueFiling Ryan R. Davis John W. Killeen Deputy Attorneys General Office of the Attorney General State of California Department of Justice John.Killeen@doj.ca.gov Ryan.Davis@doj.ca.gov	Attorneys for Defendant Attorney General Rob Bonta
Via U.S. Mail Court Clerk Superior Court of California, County of San Diego 330 West Broadway San Diego, CA 92101-3409	One copy of Respondents' opposition brief (California Rule of Court 8.212(c)(1))

I declare under penalty of perjury under the laws of the State of California and of the United States that the foregoing is true and correct.

Executed on December 7, 2022.

s/*Stephen M. Duvernay*
Stephen M. Duvernay