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 County Superior Court, Case No. 37-2022-00003676-CU-CR-CTL, The Honorable Katherine A. Bacal, Judge

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APPELLANT'S OPENING BRIEF

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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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Please check the applicable box:

[X] There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d).

[ ] Interested entities or persons are listed below:

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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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November 22, 2022
(Date)

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INTRODUCTION

The Legislature has recognized for years that "[f]irearm violence is a significant public health and public safety problem in California." (Pen. Code § 14230, subd. (a).)[1] Yet "[t]oo little is known about firearm violence and its prevention . . . in substantial part because too little research has been done." (*Id.*, subd. (e).) To correct for that deficiency, the Legislature established the California Firearm Violence Research Center (Research Center), now housed at the University of California, at Davis, and tasked it with "conduct[ing] 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, subds. (a)(1)–(2).) This appeal concerns a preliminary injunction that prevents the Research Center and other researchers from obtaining the information they need to continue their important work. (Notice of Entry of Order, Ex. A, Appellant's Appendix [AA] at 430-31.)

In 2021, the Legislature enacted Assembly Bill 173 (AB 173) to (1) identify the categories of information the Department must provide to the Research Center and may provide to other bona fide research institutions, and (2) protect individuals' privacy interests by codifying in several places the rule that personal

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

identifying information (PII)[2] cannot be used or revealed for any other purpose than "research or statistical activities." (See §§ 11106, subd. (d), 14231, subd. (c)(3), 14231.5, subd. (a), 30000, subd. (c), 30352, subd. (b)(2); Welf. & Inst. Code § 8106.) Plaintiffs contend that two of the statutory provisions enacted by AB 173, insofar as they require or permit the Department to disclose to researchers information containing PII, violate the state constitutional right to privacy. On that basis, Plaintiffs moved for a preliminary injunction enjoining the Department from providing researchers with data containing PII collected in the Automated Firearms System pursuant to section 11106, subdivision (d), and the Ammunition Purchase Records File pursuant to section 30352, subdivision (b)(2). In contrast to a recent federal court order rejecting similar arguments and so dismissing a federal constitutional privacy claim regarding AB 173 (see *infra*, p. 16), the trial court granted the injunction.

Even if the trial court had applied the correct legal standard in granting the injunction, which it did not (see *infra*, pp. 20-22),

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[2] The parties and the trial court, including in the order at issue in this appeal, use the term PII to refer to information that could be used to identify individuals, such as name, date of birth, address, and telephone numbers. The statutes at issue here refer to "material identifying individuals." (See, e.g., § 14231.5.) No distinction is intended. Researchers use such information, for example, to "link" records across data sets received from different sources such as firearms records from the Department of Justice with records from other state agencies. The reasons researchers need access to information containing PII, and the ways in which they use it to study firearm violence, are further described below. (See *infra*, pp. 36-40.)

the trial court abused its discretion. Plaintiffs challenge the statutory provisions at issue on their face, not as applied to any person or any circumstance in particular, yet they hardly attempted in their preliminary injunction motion to show that the provisions as written "inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, internal quotation marks omitted.) Rather than addressing the statutory language itself, which is all that is relevant, Plaintiffs referred to present staff at the Research Center as "so-called 'researchers'" who might someday use PII to contact or harass firearm owners. (Mot. for Prelim. Inj. at pp. 1, 12, 18, AA at 9, 20, 26.) These allegations were refuted in the trial court by the Attorney General's unrebutted evidence, and in any event, a facial challenge cannot be supported with allegations that "in some future hypothetical situation constitutional problems may possibly arise as to [a] particular application of the statute.'" (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 278.) Even if Plaintiffs could establish the threshold elements of their constitutional privacy claim, the State's paramount interest in addressing firearm violence and protecting lives is more than sufficient to justify the law. The same countervailing interests underscore why the balance of harms weighs overwhelmingly in favor of allowing the Department, in keeping with the Legislature's considered judgment and policy goals, to continue providing researchers with the information

they need to conduct their research and help protect Californians from firearm violence.

STATEMENT OF APPEALABILITY

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 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. (Notice of Appeal, AA at 440.)

BACKGROUND

I. STATUTORY BACKGROUND

A. Laws governing the Attorney General's collection and use of firearms information

Section 11106 has long required the Attorney General to "keep and properly file" information pertaining to sales and transfers, lost or stolen weapons, public-carry licenses, individuals prohibited from owning or possessing firearms, and more. In keeping with the Attorney General's obligations under section 11106, as well as numerous other statutes cross-referenced by section 11106, the Attorney General maintains a database called the Automated Firearm System (AFS). Among other things, the AFS is populated with data collected by firearm dealers when they fill out a Dealer Record of Sale (DROS) form, including information about the firearm being sold or transferred, and the individual taking possession, including name, date of birth, address, and other identifying information. (*See* § 11106, subds. (a)(1)(D), (b)(2).) The Attorney General is required to maintain the AFS "[i]n order to assist in the

investigation of crime, the prosecution of civil actions by city attorneys . . . , the arrest and prosecution of criminals, and the recovery of lost, stolen, or found property . . . ." (§ 11106, subd. (a)(1).) Under specified conditions, the Department is also required to provide information in the AFS to courts, peace officers, district attorneys, city attorneys, probation and parole officers, public defenders, other state and city officials when needed to implement statutes or regulations, health officers, correctional officers, officers addressing animal cruelty, welfare personnel, and more. (§ 11106, subd. (b)(3) [cross-referencing § 11105].)

Section 30352 requires vendors to submit information to the Department pertaining to sales and transfers of ammunition. (§ 30352, subds. (a) and (b).) The Department is required to retain that information in a database known as the Ammunition Purchase Records File. (§ 30352, subd. (b)(1).) The information collected and maintained under section 30352 is confidential but may be used "for law enforcement purposes" by the same officers partially listed above, i.e., "those entities specified in, and pursuant to subdivision (b) or (c) of Section 11105." (§ 30352, subd. (b)(1).)

Other statutes not at issue in this litigation also require the Attorney General to collect and maintain extensive information related to firearms and to use that information in the service of public safety. Section 30000, subdivision (a), for example, requires the Attorney General to "establish and maintain an online database to be known as the Prohibited Armed Persons

File," the purpose of which is to "cross-reference persons who have ownership or possession of a firearm on or after January 1, 1996, [the date the AFS was established], and who, subsequent to the date of that ownership or possession of a firearm, fall within a class of persons who are prohibited from owning or possessing a firearm." Welfare and Institutions Code section 8105 requires the Department to keep information obtained from "each public and private mental hospital, sanitarium, and institution" concerning individuals who are prohibited from possessing firearms due to mental health concerns "in order to carry out its duties in relation to firearms, destructive devices, and explosives."

As Plaintiffs acknowledge, it has long been the case 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." (Compl. at p. 6, AA at 372.) But the Department does not only use the information in its custody to assist in individual investigations. Section 11108.3, subdivision (e), for example, also requires the Department to receive from law enforcement agencies "all available information necessary to identify and trace the history of all recovered firearms that are illegally possessed, have been used in a crime, or are suspected of having been used in a crime" and to "on an ongoing basis, analyze the information . . . for patterns and trends . . . ." The Department is then required to report its analysis, on an annual basis, to the Legislature. (§ 11108.3, subd. (f)(1).)

B. The California Firearm Violence Research Center and Assembly Bill 173

In 2016, the Legislature enacted the California Firearm Violence Research Act in recognition of the fact that "[t]oo little is known 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 thus called for "more research and more sophisticated research." (§ 14230, subd. (e).)

To achieve its goal, the Legislature created the Research Center 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 Stats., 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. 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.)

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).)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Plaintiffs' complaint

On January 28, 2022, Plaintiffs filed the lawsuit at issue here, and on June 17, 2022, filed the operative complaint, alleging that sections 11106, subdivision (d), and 30352, subdivision (b)(2), as amended by AB 173 (1) violate the right to

privacy under article I, section 1, of the California Constitution; (2) amount to an invalid amendment to a voter initiative under article II, section 10(c); and (3) violate the right to keep and bear arms under the Second Amendment to the United States Constitution. (Compl., AA at 366-86.)

The Attorney General filed a demurrer, arguing that all three of Plaintiffs' claims fail as a matter of law. (Demurrer, AA at 30-51.) 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 claim (alleging a violation of the Second Amendment) because the same issue was pending in federal court in *Doe v. Bonta*, No. 3:22-cv-00010-LAB-DEB (S.D. Cal. Jan. 10, 2022).[3]

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[3] The federal case involves different plaintiffs who alleged that AB 173 (1) violates the Second Amendment, (2) violates the right to informational privacy under the federal Constitution, (3) violates due process by retroactively expanding access to PII, and (4) is preempted by federal law to the extent AB 173 requires or authorizes disclosure of social security numbers (which it does not). On January 12, 2023, the federal district court granted the Attorney General's' claim to dismiss the complaint in its entirety. (*Doe v. Bonta* (Jan. 12, 2023, S.D. Cal.), 2023 WL 187574. In its analysis of the privacy claim, the district court addressed several issues that are relevant under both federal and state law standards, concluding that the plaintiffs' concerns are largely hypothetical, that the Attorney General has already mitigated the risk of unauthorized disclosure to the extent reasonably possible, and that the disclosure of PII to researchers serves the Legislature's legitimate interest in preventing gun violence. (*Id.* at pp. *8-*10.)

On October 14, 2022, the trial court sustained the Attorney General's demurrer to Plaintiffs' second cause of action, but overruled the demurrer regarding Plaintiff's constitutional privacy claim. (Min. Order, AA at 420-25.) Regarding the latter, the Attorney General had argued that Plaintiffs failed to state a cause of action based on the elements of a constitutional privacy claim set forth in *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35-38, including because the challenged statutes do not create a serious invasion of privacy and because any invasion of privacy is clearly justified by California's interest in reducing firearms violence. The trial court overruled the demurrer because it concluded 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." (Min. Order at pp. 4-5, AA at 422, 424.)

B. The preliminary injunction motion

On March 3, 2022, Plaintiffs filed a motion for preliminary injunction based entirely on the constitutional privacy claim, asking the trial court to issue a preliminary 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 30352(b)(2) and ordering DOJ to retrieve all PII previously transferred to the [Research] Center or any other organization." (Mot. for Prelim. Inj. at p. 20, AA at 28.)

The Attorney General opposed the preliminary injunction with declarations from the director of the Research Center, Garen

Wintemute, M.D., and David Studdert, Professor of Law and Health Policy at Stanford University. (Wintemute Decl., AA at 211-29; Studdert Decl., AA at 150-64.) Both are established experts in their field and have obtained data from the Department for purposes of firearms-violence research under AB 173. The Attorney General also submitted an expert report from Daniel Webster, the Bloomberg Professor of American Health at the Johns Hopkins Center for Gun Violence Solutions, who has decades of relevant research experience. (Webster Report, AA at 84-99.) In addition, the Attorney General submitted declarations from Department staff who explained the steps the Department takes to ensure information security when providing researchers with data in accordance with AB 173. (Mangat Decl., AA at 298-291; Simmons Decl., AA at 292-98.)

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 injunction requiring the Department to retrieve personal identifying information previously transferred to researchers but granted a preliminary prohibitory 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)." (Min. Order at p. 6, AA at 425, Notice of Entry of Order, Ex. A, AA at 431.)

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." (Min. Order at p. 5, AA at 424.)

On November 3, 2022, the Attorney General filed the Notice of Appeal. (Notice of Appeal, AA at 440.)

STANDARD OF REVIEW

An appellate court's review of an order granting a preliminary injunction is generally conducted under an abuse of discretion standard. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109 (*Gallo*).) In other words, the issue on appeal is whether the trial court abused its discretion in evaluating two interrelated factors: (1) "the likelihood that the plaintiff will prevail on the merits at trial"; and (2) "the interim harm that the plaintiff is likely to sustain if the injunction is denied as compared to the harm the defendant is likely to suffer if the preliminary injunction were issued." (*Ibid.*, internal quotations omitted.)

ARGUMENT

The trial court abused its discretion for two reasons. First, the trial court failed to apply the correct legal standard when assessing whether Plaintiffs showed a likelihood that their privacy claim will succeed on the merits. Second, the motion for a preliminary injunction should not have been granted because

Plaintiffs' facial challenge is not likely to succeed and the balance of harms weighs overwhelmingly against disrupting critical research into firearm violence.

I. THE TRIAL COURT ABUSED ITS DISCRETION BY APPLYING THE WRONG LEGAL STANDARD

"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].) There are two clearly established interrelated factors applicable to preliminary injunctions; as noted above, "[t]he first is the likelihood that the plaintiff will prevail on the merits at trial." (*Gallo*, *supra*, 14 Cal.4th at 1109, quotation marks omitted.)

The analysis required in deciding whether a plaintiff is likely to prevail on the merits is clearly distinct from the analysis pertaining to a demurrer, in which the issue is "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, 1010, quotation marks omitted.) In ruling on a demurrer, courts decide whether there are legitimate factual issues, but do not consider the likelihood

that a plaintiff will ultimately prove the facts necessary to support their claim. Instead, courts "treat the demurrer as admitting all material facts properly pleaded[.]" (*Ibid*.) In ruling on the demurrer to Plaintiffs' constitutional privacy claim, the trial court 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." (Min. Order at pp. 2-3, AA at 421-22.) The Attorney General disagrees with the trial court's analysis of his demurrer on this claim, but acknowledges that the court analyzed the demurrer with reference to the proper legal standards.

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." (Min. Order at 5, AA at 424, emphasis added.) The trial court provided no further analysis except that "Defendant's arguments do not compel a different outcome." (*Ibid*.) But as counsel explained at the hearing on October 14, 2022, "[T]he issues presented by the [demurrer and preliminary injunction] 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." (1 RT 11.) By only considering whether Plaintiffs' claim should survive at the pleadings stage, without going on to determine the likelihood that Plaintiffs will ultimately prevail on the merits at trial, the trial court failed to consider Plaintiffs' motion for a preliminary injunction in accordance with the appropriate legal standard and therefore abused its discretion.

II. UNDER THE APPLICABLE LEGAL STANDARDS, IT WAS AN ABUSE OF DISCRETION TO GRANT THE PRELIMINARY INJUNCTION

Even had the trial court applied the right standard, the relevant factors—the likelihood of success and the balance of relative harms—both cut decisively against Plaintiffs' motion. The trial court's decision to issue a preliminary injunction thus "falls outside the bounds of reason under the applicable law and the relevant facts" and is an abuse of discretion. (*Roth v. Plikaytis* (2017) 15 Cal.App.5th 283, 290, citing *People v. Giordano* (2007) 42 Cal.4th 644, 663, internal quotation marks omitted.)

A. Plaintiffs' privacy claim is not likely to succeed on the merits

Plaintiffs' preliminary injunction motion was based entirely on their constitutional privacy claim. Because they seek injunctive relief that reaches beyond the parties, including an order directing the Attorney General to "cease providing *any* [PII] . . . to the California Firearm Violence Research Center or any other research center pursuant to Penal Code § 11106(d) or Penal Code section 30352(b)(2)," (Compl. at 19-20, emphasis added; AA

385-86), Plaintiffs' privacy claim is a facial challenge, not as applied to anyone or any circumstance in particular. (See Reply re: Prelim. Inj. Mot., at pp. 1-2, AA at 353-54 [opening with an argument that "[a] facial challenge is appropriate."].) Accordingly, Plaintiffs must establish "that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions" to state a valid claim. (*Tobe*, *supra*, 9 Cal.4th at p. 1084, internal quotation marks omitted.) At a minimum, they must demonstrate that the law is invalid in the "'vast majority'" of potential applications or the "generality of cases." (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 502.)[4] The Court considers "only the text of the [law] itself, not its application to the particular circumstances of an individual." (*Tobe*, *supra*, at p. 1084.) It is not sufficient to allege that, "in some future hypothetical situation constitutional problems may possibly arise as to [a] particular application of the statute.'" (*California Redevelopment Assn. v. Matosantos*, *supra*, 53 Cal.4th at 278.)

The heavy burden associated with facial challenges is overlaid by the well-established "general rule [that] statutes are

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[4] The California Supreme Court has alternatively articulated this standard as requiring a challenger to "'establish that no set of circumstances exists under which the Act would be valid.'" (*California Redevelopment Assn.*, *supra*, 53 Cal.4th at 278.) This Court need not resolve which standard applies because Plaintiffs' claim fails under either. (See *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 218.)

presumed to be constitutional." (*Property Reserve, Inc., v. Superior Court* (2016) 1 Cal.5th 151, 192." Moreover, "when the Legislature has enacted a statute with constitutional constraints in mind there is a strong presumption in favor of the Legislature's interpretation of a provision of the Constitution." (*Ibid.*, internal quotations and alterations omitted; see also Cal. Const. art. XX, § 3 [legislators' oath includes affirmation to uphold the California Constitution].) Here, it is clear that the Legislature bore privacy interests in mind when enacting AB 173. The bill's summary digest section confirms that AB 173 aligns with "[e]xisting law" providing "the procedures for agencies to follow in the collection, maintenance, and dissemination of personal information, as defined, in order to protect the privacy of individuals." (Legis. Counsel's Dig., AB 173, 2021 Stats., ch. 253; see also §§ 11106, subd. (d), 14231, subd. (c)(3), 14231.5, subd. (a), 30000, subd. (c), 30352, subd. (b)(2); Welf. & Inst. Code, § 8106 [specifying 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."].)

To prevail on their privacy claim under article I, section 1, of the California Constitution, Plaintiffs must overcome their heavy burden to show, from the face of the challenged statutes, "'(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 at 39-40.) They cannot satisfy any of these elements here. Even if Plaintiffs were to establish those threshold elements, the Attorney General may still 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.)

1. Plaintiffs do not have a reasonable expectation of privacy

Plaintiffs cannot show that the statutory provisions at issue interfere with a reasonable expectation of privacy, which the California Supreme Court has defined as "an objective entitlement founded on broadly based and widely accepted community norms." (*Hill*, *supra*, 7 Cal.4th at p. 37.) Even before AB 173 became law, the Department already provided information within its firearms databases to the Research Center. The same legislation that created the Research Center explicitly required the Department to do so. (2016 Stats., ch. 24, § 30, former § 14231, subd. (c).) Moreover, 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.

There is some dispute over whether the law as it existed before AB 173 authorized (and required) the Department to provide researchers with PII. Section 14231, subdivision (c) includes a provision, which has been in place since 2016 and is not subject to challenge in this litigation, providing that state agencies "shall provide to the center, upon proper request, the

data necessary for [the Research Center] to conduct its research."[5] This Court need not settle that dispute. Although 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" (Opp. to Demurrer at p. 8, AA at 399), they cited no authority providing that reasonable expectations of privacy can be defined only by existing statutory law. 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* expressly authorize information-sharing of the exact same kind.

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

[5] The prior lack of clarity on that point, which AB 173 resolved, likely explains why the Department paused its practice of providing researchers with PII. (See Compl. at p. 9, AA at 375 [citing newspaper articles describing a dispute that began after the Department discontinued its practice of providing PII to researchers].)

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." (Compl. at p. 6, AA at 372; see also *id.* at p. 7, AA at 373 ["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 in the service of public safety. Given that context, AB 173 does not violate anyone's reasonable expectations of privacy. It is only an incremental change (assuming AB 173 did change, and not just clarify, the law) to provide a strictly defined set of people with access to information, already accessible to government agents of all sorts, for a very limited purpose, and with information security protections in place. (See *Hill*, *supra*, 7 Cal.4th at p. 38 ["if intrusion is limited and confidential information is carefully shielded from disclosure

except to those who have a legitimate need to know, privacy concerns are assuaged"].)

2. Plaintiffs cannot establish a serious invasion of privacy

Even if Plaintiffs could establish a reasonable expectation of privacy in records pertaining to firearms, despite the context described above, 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.) As noted above, to prevail on their facial challenge, Plaintiffs would have to show that the serious invasion of privacy arises from the statutory language itself, without reference to hypothetical or speculative possibilities. (*See Tobe*, *supra*, 9 Cal.4th at p. 1084; *California Redevelopment Assn. v. Matosantos*, *supra*, 53 Cal.4th at p. 278.) Plaintiffs cannot do so.

First, the challenged statutes *only* allow the Department to disclose PII to the Research Center and other researchers at "nonprofit bona fide research institution[s] accredited . . . for the study of the prevention of violence." (§ 11106, subd. (d); § 30352, subd. (b)(2).) Second, the statutes explicitly guard against intrusions into privacy by providing that "[m]aterial identifying individuals shall *only* be provided for research or statistical activities." (*Ibid.*, emphasis added) Third, the statutes explicitly state that such material "shall not be transferred, revealed, or used for purposes other than research or statistical activities." (*Ibid.*) And fourth, the statutes specify that "reports or

publications derived therefrom shall not identify specific individuals." (§ 11106, subd. (d); § 30352, subd. (b)(2).)

Rather than addressing this statutory language, Plaintiffs attempted to draw the trial court's attention away from it. For example, Plaintiffs referred to the Research Center's current director, Garen Wintemute, M.D., and at least one if its staff members, Amy Barnhorst, M.D., as "so-called 'researchers" and "anti-gun activists" who "openly disfavor and seek to limit" individual choice. (Mot. for Prelim. Inj. at p. 1, AA at 9.) There are at least two problems with these ad hominem attacks. First, they are false. Dr. Wintemute is a Professor and Attending Physician in the Emergency Department at the UC Davis Medical Center who holds degrees from Yale University, UC Davis, and Johns Hopkins University. (Wintemute Decl., ¶ 1, AA at 212.) For 40 years, Dr. Wintemute's primary research focus has been firearm violence and he has more than 100 peer-reviewed publications in the field.[6] (*Id.*, ¶ 3, AA at 212.) Second, they are irrelevant. Plaintiffs' claim is not that PII should be withheld from Dr. Wintemute or any other researcher in particular, but that sections 11106, subdivision (d), and 30352, subdivision (b)(2), neither of which refer to individual researchers by name, *are invalid on their face*. Denigrating the Research

[6] Dr. Wintemute is also a member of the National Rifle Association who learned to shoot as a child, taught marksmanship to middle school students for the Young Men's Christian Association, and believes that "firearms are tools." (Wintemute Decl., ¶ 63, AA at 227.)

Center's staff does not even tend to suggest, let alone establish, that the statutory provisions "inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." (*Tobe*, *supra*, 9 Cal.4th at p. 1084, internal quotation marks omitted.)

Plaintiffs also alleged in their complaint and argued in their motion that a "prospect exists" that disclosure of personal information may lead "to unwanted contact from a third party." (Compl. at p 13, AA at 379; Mot. for Prelim. Inj. at p. 14, AA at 22.) This argument is precisely the sort of hypothetical suggestion that does not suffice to support a facial challenge. (*Coffman Specialties, Inc.* (2009) 176 Cal.App.4th 1135, 1145, quotation marks omitted.) Again, the statutory provisions at issue do not state that researchers can or should use PII to contact individuals, let alone "harass them," as Plaintiffs speculate that "hostile social scientist researchers" might do. (Mot. for Prelim. Inj. at 18, AA at 26.) Indeed, the Research Center has never used information obtained from the Department to contact or survey individuals, and there is no reason to believe that it would. (Wintemute Decl., ¶ 61, AA at 226 ["[The Research Center] has never conducted this sort of research, and, to my knowledge, neither I nor any other researcher at the center has any intention to do so"].) Nor has Professor Studdert. (Studdert Decl. ¶ 32, AA at 163; see also Webster Report, ¶ 22, AA at 94 ["I have never seen a study in which researchers used administrative data on firearm purchasers to subsequently contact those individuals for survey research of any kind"]; *id.* ¶ 14, AA at 89 [noting limitations of

survey-based research, including that people "do not always accurately report their histories of gun acquisition and criminal offending"].)

Even if it were appropriate or necessary to look beyond the statutory language at issue here, the evidence presented to the trial court demonstrates that both the Department and the researchers take all reasonable measures to ensure information security in this context, further undermining any notion that Plaintiffs have suffered a serious invasion of privacy. Consider the three steps the Department follows before PII is disclosed in connection with AB 173. First, researchers requesting information are required to apply, provide proof of identity, and submit to a background check. (Simmons Decl.) ¶¶ 6-8, 12; AA at 294-95.) Applicants are required to provide documentation showing that they have data security protocols in place and that they comply with the security measures outlined in the Federal Bureau of Investigation Criminal Justice Information Services Security Policy. (*Id.* ¶ 9, AA at 294-95.) Second, DOJ reviews the documentation of the applicant's compliance with information security requirements. (Mangat Decl., ¶¶ 5-7, AA at 290-91.) Third, after research has concluded, applicants must submit pre-publication manuscripts of their research to DOJ for review to ensure that the publication does not include PII. (Simmons Decl. ¶ 14, AA at 296.)

The researchers who have gained access to information from the Department, including before AB 173 passed or took effect, comply with the strict protocols established by the Department

and thus, "[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." (Wintemute Decl., ¶ 34, AA at 220; Studdert Decl., ¶ 25, AA at 160-61 [noting that researchers at Stanford University employ strict procedures "modeled on those applied to clinical studies that involve storage and analysis of individual-level private health information"].) To Dr. Wintemute's knowledge, "there has never been a data breach where information received [by the California Firearm Violence Research Center] from the California Department of Justice was stolen or publicly disclosed." (Wintemute Decl., ¶ 40, AA at 221.) Professor Studdert reports that in his "25 years of conducing empirical research with dozens of data," he has never had a security breach. (Studdert Decl., ¶¶ 27, AA at 161.)

Professor Webster's report also confirms that firearms researchers take steps to protect the identifying information that appears in the data sets they use. (Webster Report, ¶¶ 23-25, AA at 94-95.) In particular, he 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.*, ¶ 24, AA at 95.)

3. Any invasion of privacy is justified by California's interest in reducing firearms violence

Even if Plaintiffs could show that sections 11106, subdivision (d), and 30352, subdivision (b)(2), with their information security protections, and apart from irrelevant speculation, create a serious invasion of privacy, Plaintiffs still would not likely prevail on the merits because of the countervailing interests at stake. The California Supreme Court has recognized that an "[i]nvasion 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.) Accordingly, a defendant will prevail in a state constitutional privacy case if the claimed intrusion "substantively furthers one or more countervailing interests." (*Id.* at p. 40.) Conversely, an alleged interference with privacy interests may be unjustified if the claimant can point to "feasible and effective alternatives" with "a lesser impact on privacy interests." (*Ibid.*) "[E]xcept in the rare case in which a 'fundamental' right of personal autonomy is involved," the defendant "need not present a 'compelling' countervailing interest; only 'general balancing tests are employed.'" (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 288, quoting *Hill*, *supra*, 7 Cal.4th at p. 34.)

Two recent decisions from the California Supreme Court confirm that *Hill*'s general balancing test applies in this case. In *Williams v. Superior Court* (2017) 3 Cal.5th 531 and *Lewis v. Superior Court* (2017) 3 Cal.5th 561, the Court specifically rejected application of a compelling-interest standard, affirming that only "obvious invasions of interests fundamental to personal

autonomy must be supported by a compelling interest." (*Williams*, *supra*, at pp. 556-557; see also *Lewis*, *supra*, at pp. 572-573 [rejecting heightened standard of scrutiny in challenge to medical regulator's receipt of controlled substances prescription records because alleged privacy invasion did "not intrude on a fundamental autonomy right"].) *Lewis* also made clear that when a state measure does not infringe on fundamental autonomy rights, the State need not demonstrate that its chosen approach is the least intrusive means of addressing the problem. (*Supra*, 3 Cal.5th at p. 574.)

Moreover, "[i]t is not the judiciary's function . . . to reweigh the legislative facts underlying a legislative enactment." (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 510, internal quotation marks omitted.) This Court's review "must be cognizant that the factual determinations necessary to the performance of the legislative function are of a peculiarly legislative character." (*Id.* at p. 511, citing *Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 685.) "Accordingly, if the validity of a statute depends on the existence of a certain state of facts, it will be presumed that the Legislature has investigated and ascertained the existence of that state of facts before passing the law." (*Alfaro* at p. 511, internal quotation marks omitted.)

Here, the Legislature has codified both (1) the countervailing interest at stake, and (2) several findings that explain the Legislature's action. As noted above, section 14230, subdivision (a) provides that "[f]irearm 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." (§ 14231(a)(1)(A)-(C).)

In keeping with the deference owed to the Legislature, it is inappropriate to second-guess whether firearm violence is a significant public health problem *or* that research is needed to identify policies to mitigate the problem. It should be presumed, too, that the Legislature correctly determined that the needed research requires that researchers have access to data containing PII, which explains why the Legislature chose to explicitly codify the privacy protections identified above. Even without these presumptions, however, the evidence presented to the trial court clearly demonstrated the extraordinary value of the work that

researchers have already performed, which only supports the Legislature's judgment that additional research is worthwhile and that researchers need continued access to data containing PII in order to continue their important work.

In his declaration, Dr. Wintemute "explain[s] why obtaining records from [the California Department of Justice] 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. (Wintemute Decl., ¶ 8, AA at 213.) He has compiled a list of 43 peer-reviewed articles and six in pre-publication, which are based on research that could not have been completed without PII, although the articles themselves do not betray anyone's privacy. (*Id.*, ¶ 15 & Ex. 2, AA at 215, 234-38.) 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.*, ¶ 27, AA at 218.)

Dr. Wintemute explains that 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.*, ¶¶ 15, 26, AA at 215, 218.) 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.*, ¶ 17, AA at 215-16.) 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.*)

Dr. Wintemute discusses six specific examples of publications that could not have been conducted without records containing PII. (*Id.*, ¶¶ 26-28, AA at 218.) 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 likely to be arrested for violent crime in the future. (*Id.*, ¶¶ 22-23 & Ex. 4, AA at 217-18, 248-52.) Another study looked at the association between alcohol use, firearm ownership, and increased risk for future arrests for violent crime. (*Id.*, ¶¶ 31-32 & Ex. 6, AA at 219, 263-72.) 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.*, ¶ 32, AA at 219.) 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, AA at 218-20, 254-61, 273-78.)

Professor Studdert's declaration also "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." (Studdert Decl. ¶ 5, AA at 151.) 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.*,¶ 6, AA at 142.) 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 records containing PII "the LongSHOT cohort study would not have been possible." (*Id.* ¶ 15, AA at 155-56.)

Professor Studdert explains that the LongSHOT study, "like most other cohort studies, necessitates use of data at the individual level for several reasons." (*Id.*, ¶ 14, AA at 154-55.) 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 Dr. Wintemute, also emphasizes the importance of PII for linking data sets and "to follow individuals over time." (*Id.*, ¶ 15, AA at 155-56.) Linking is so important that Professor Studdert and his

colleagues published a paper on the methodology they used for the LongSHOT study. (*Id.*, ¶ 18 & Ex. 2, AA at 157.)

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.*, ¶ 19 & Ex. 3, AA at 155, 184-93.) 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 who are not themselves gun owners. (*Id.*, ¶ 21 & Ex. 5, AA at 158-59, 202-210.) That study found "that overall rates of homicide were more than twice as high among cohabitants of handgun owners, and that rates of homicide by firearm were nearly 3 times higher." (*Ibid.*)

Professor Webster's 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 individual identifying information disclosed. (Webster Report, ¶¶ 6-7, AA at 86-87.) He explains how research in the field focuses on informing the "development of effective laws, law enforcement practices . . . and individual decisions[.]" (*Id.*, ¶ 13, AA at 88-89.) 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 allows for a clearer understanding of firearm-related problems so that firearms laws are more "fair and effective." (*Id.*, ¶ 17, AA at 91.)

B. The balance of harms is in the State's favor

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 and the report of Professor Webster show the critical importance of allowing AB 173 to continue to have its intended effect.

As noted, Dr Wintemute's declaration, and his compilation of dozens of articles based on firearms information obtained from the Department, clearly demonstrates why the Department's data is so critical to his research. (Wintemute Decl., ¶ 15 and Ex. 2, AA at 215, 263-72). And he specifically explains, with reference to six examples, why his research cannot go on without access to PII. (See *id.*, ¶¶ 15-17, 26-28, AA at 215-16, 218.) Professor Studdert's declaration also "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." (Studdert Decl., ¶ 5, AA at 151.) And Professor Webster's report 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. (Webster's Report, ¶¶ 6-7, AA at 86-87.) Plaintiffs have not attempted to counter any of Professor Webster's conclusions in this regard.

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. (Min. Order at p. 5, AA at 424.) 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 explained at the time that the incident was serious but entirely unrelated to AB 173.

Since then, the Department released a document entitled, "Report of Investigative Findings and Recommendations," which was independently prepared by Morrison Foerster, LLP, and is available at https://oag.ca.gov/system/files/attachments/press-docs/ca-doj-report.pdf (the Report, last accessed February 21, 2023). The Report only supports the Attorney General's representation to the trial court that the data exposure incident "involved a public-facing platform that has nothing to do with sharing gun-violence data with qualified researchers for law enforcement purposes, as authorized by AB 173." (Report at p.

1.) The Report leaves nothing to guesswork or speculation: "Morrison Foerster had the mandate and autonomy to follow the facts and evidence wherever they led and to make independent findings and recommendations." (*Id.* at p. 16.) Based on an investigation that included review of "tens of thousands of DOJ documents" and "interviews by Morrison Foerster of 32 DOJ current and former employees" (*id.* at p. 19), the facts surrounding the data exposure incident have been thoroughly explained and are publicly available. There is nothing in the Report that suggests that the incident had any connection with AB 173 or the sharing of data with gun violence researchers. None of the relevant safeguards that described above failed or otherwise played a role in the incident.

The Report also provides "recommendations to help DOJ develop, implement, and employ practices and procedures that will more effectively prevent against future data exposure incidents," which are "in addition to steps DOJ already has taken to prevent future unintended public access to underlying datasets on OpenJustice dashboards." (*Id.* at 58.) Thus, although the data exposure incident was not related to AB 173, the Department's overall information security protocols will only be *strengthened* in light of the incident and the investigation that followed.

Plaintiffs' alleged irreparable harm is coextensive with their argument for likelihood of success on the merits, making balancing the harms in this case straightforward. Plaintiffs have brought a constitutional claim that fails as a matter of law, and

enjoining the challenged statutory provisions severely disrupts, and may permanently damage, research projects that have the potential to literally save lives. (Wintemute Decl., ¶¶ 41-42, AA at 221-22; Studdert Decl., ¶ 23, AA at 159.) That, in turn, deprives Californians of the benefit of crucial research into one of the society's most devastating public safety problems. The balance of harms weighs decisively in the Attorney General's favor.

CONCLUSION

For the foregoing reasons, the order granting a preliminary injunction should be reversed.

Dated: February 21, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Opening Brief uses a 13 point Century Schoolbook font and contains 9,672 words.

RYAN R. DAVIS
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February 21, 2023

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

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 February 21, 2023, I electronically served the attached **APPELLANT'S OPENING BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on February 21, 2023, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on February 21, 2023, at Sacramento, California.

Eileen A. Ennis
Declarant

Eileen A. Ennis
Signature

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