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.

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

APPELLANT'S REPLY BRIEF

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April 26, 2023

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

ARGUMENT

AB 173 reflects the Legislature's careful attempt to enable the research it deemed necessary to understand—and thus to address—the "significant public health and public safety problem" of "[f]irearm violence … in California." (Pen. Code, § 14230, subd. (a).)[1] Plaintiffs do not appear to contest the importance of the ends AB 173 serves. Nor could they. Nor do Plaintiffs make a serious effort to show, as they must, that AB 173 is unconstitutional *on its face*. Instead, their brief: (1) assigns to the Legislature secret motives in passing AB 173 (RB 31, 43); (2) references data exposures that have nothing to do with AB 173 (RB 36, 49); (3) speculates about the private views held by specific researchers who might gain access to their data (RB 39 & n.12, 45–46); and (4) asserts without evidence that these researchers are "mak[ing] millions of dollars" using Plaintiffs' data (RB 45). All of this is either highly speculative or patently false, and none of it is relevant to a facial challenge, which requires a showing that the statutory text, standing alone, "inevitably pose[s] 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.)

To the extent Plaintiffs address the merits of the appeal, their arguments fail. In the face of the heavily regulated context

[1] All subsequent statutory references are to the California Penal Code unless otherwise noted.

of gun sales and the long-standing practice of sharing the precise information at issue here, they base their reasonable expectation of privacy on a shaky interpretation of a single statutory provision and an analogy to the provision of personal information to private businesses. In spite of the stringent statutory controls on the sharing and use of the relevant data, Plaintiffs denigrate the individual researchers and cook up a farfetched scenario in which these researchers personally contact individual gun owners—something that the researchers themselves testified they could not do. And despite the paramount state interest in this crucial research, Plaintiffs postulate alternative means to conduct this research without offering any evidence to establish their effectiveness or rebutting the evidence Defendant has presented for why these alternatives would not work. Finally, after failing to establish a likelihood of success on the merits, Plaintiffs rely on inadvertent data exposure incidents entirely unrelated to AB 173 in an attempt to show that the balance of harms favors them.

As explained in Defendant's opening brief and in more detail below, this Court should vacate the preliminary injunction and rule, as a matter of law, that Plaintiffs have failed to state a viable privacy claim.

I. THE TRIAL COURT ABUSED ITS DISCRETION BY APPLYING THE INCORRECT STANDARD

Plaintiffs do not contest that demurrers are governed by different standards than motions for preliminary injunction. Demurrers test "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, internal quotation marks omitted.) A motion for a preliminary injunction, on the other hand, requires a trial court to evaluate, as relevant here, "the likelihood that the party seeking the injunction will ultimately prevail on the merits" of that claim. (*Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 441.) Here, as Defendant explained in his opening brief (AOB 20–22), the trial court conflated these two tests. In overruling Defendant's demurrer, it ruled that Plaintiffs had stated a potentially viable claim. Then, in granting the injunction, it ruled: "[j]ust 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." (AA 438, italics added.) By "appl[ying] the wrong legal standard," the trial court manifestly abused its discretion. (*Riskin v. Downtown L.A. Property Owners Assn.* (2022) 76 Cal.App.5th 438, 446.)

Plaintiffs seek to recast Defendant's argument on this point as a claim that the trial court "did not adequately state the reason for its conclusion that Plaintiffs established a likelihood of success on the merits of their constitutional privacy claim." (RB 20.) To rebut this claim, they invoke a series of cases where the Court of Appeal held that trial courts need not explain their reasoning on all aspects of the preliminary injunction analysis. (See RB 21, citing *See City of Los Altos v. Barnes* (1992) 3 Cal.App.4th 1193, 1198; *MCA Records, Inc. v. Newton-John* (1979) 90 Cal.App.3d 18, 23; *14859 Moorpark Homeowner's Assn.*

v. VRT Corp. (1998) 63 Cal.App.4th 1396, 1402–1403.) But these cases—and Plaintiffs' arguments—do not apply here, where the trial court *did* state its reasoning: namely, that the likelihood of success factor was met "for the same reasons" that the demurrer was overruled. (AA 438.) The problem is not that the trial court failed to state its reasons; the problem is that it gave legally incorrect (and irrelevant) ones.

Next, Plaintiffs urge the Court to simply ignore the trial court's actual ruling, and focus instead on the hearing transcript. The trial court must have applied the correct legal analysis, they assert, because it mentioned the likelihood of a constitutional violation and interest-balancing during the preliminary injunction hearing and balanced the parties' interests in crafting the scope of the preliminary injunction. (RB 22.) Plaintiffs again miss the point. Of course the trial court knew the two preliminary injunction factors. (See AA 437 [listing factors].) The abuse of discretion arises from the fact that the trial court "applie[d] the wrong legal standard" in assessing the first of those factors. (*Riskin*, *supra*, 76 Cal.App.5th at p. 446.)

II. PLAINTIFFS HAVE NOT MET EITHER PRELIMINARY INJUNCTION FACTOR

Plaintiffs did not and cannot establish a likelihood of success on the merits at trial or that they will suffer "irreparable injury or interim harm … if an injunction is not issued pending adjudication on the merits." (*Amgen Inc. v. Health Care Services* (2020) 47 Cal.App.5th 716, 731, internal quotation marks omitted.)

A. Plaintiffs Are Not Likely to Prevail on the Merits

As an initial matter, it is appropriate for this Court to assess the merits of Plaintiffs' claim under the proper standard in the first instance. Although appellate review of preliminary injunctions is generally narrow, "[o]ccasionally … the likelihood of prevailing on the merits depends upon a question of pure law rather than upon evidence to be introduced at a subsequent full trial … for example, when it is contended that an ordinance or statute is unconstitutional on its face and that no factual controversy remains to be tried." (*Hunter v. City of Whittier* (1989) 209 Cal.App.3d 588, 595–596.) "[W]here a case is clear and no fact questions are presented, a determination on the merits is appropriate and becomes law of the case." (*Citizens to Save California v. California Fair Political Pracs. Com.* (2006) 145 Cal.App.4th 736, 746.) Because Plaintiffs have brought a facial challenge to AB 173 (see RB 24) that necessarily turns on the law's "text and purpose," this is just such a case.[2] (*California School Bds. Assn. v. State of California* (2019) 8 Cal.5th 713,

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[2] Because Plaintiffs' claim is a facial challenge to AB 173, the California Supreme Court's statement in *Hill*—which did not address a facial challenge to a statute—that the reasonable expectation of privacy and seriousness of the privacy impingement elements are mixed questions of law and fact does not undermine this conclusion. (See *Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 40.) In any event, even accepting Plaintiffs' various factual assertions, they cannot establish that AB 173 is unconstitutional "in at least 'the generality' or 'vast majority' of cases." (*Today's Fresh Start, Inc. v. L.A. County Off. of Education* (2013) 57 Cal.4th 197, 218, citations omitted.)

724.) "'This court is in as good a position to resolve the issue now as the trial court would be after determination of this appeal.'" (*Citizens to Save California*, *supra*, 145 Cal.App.4th at p. 746, quoting *North Coast Coalition v. Woods* (1980) 110 Cal.App.3d 800, 805.) Moreover, in light of the likelihood that a renewed preliminary injunction issued by the trial court would again be appealed to this Court, resolving the issues now—when they have already been fully briefed—will conserve the resources of both the courts and the litigants.

Because Plaintiffs are bringing a facial challenge to AB 173, they must at a minimum show that AB 173 is unconstitutional "in at least 'the generality' or 'vast majority' of cases." (*Today's Fresh Start, Inc. v. L.A. County Off. of Education* (2013) 57 Cal.4th 197, 218, citations omitted; see AOB 23.) Plaintiffs have no real quibble with this. While they accuse Defendant of "misstat[ing] (and invert[ing]) the standard for facial challenges," they go on to offer the *same* standard: that a law must be "unconstitutional in the 'vast majority of its applications.'"[3] (RB

[3] Plaintiffs rely on *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 343 (plur. opn. of George, C.J.) (*Lungren*), for this statement of the test. They go on to cite several other passages from *Lungren* that are inapposite here. (See RB 23–24.) *Lungren* dealt with the heightened standard applied to a statute that impinges on "a fundamental, autonomy privacy interest." (16 Cal.4th at p. 341.) That case, which "involved a challenge to a statute requiring a pregnant minor to obtain parental consent or judicial authorization before having an abortion, an issue that 'unquestionably impinges upon an interest fundamental to personal autonomy,'" is "[t]he only case" that has applied this heightened standard. (*Lewis v. Superior Court*

(continued…)

23, citation omitted; accord AOB 23 ["At a minimum, [Plaintiffs] must demonstrate that the law is invalid in the 'vast majority' of potential applications or the 'generality of cases,'" citation omitted].) And it does not "misstate[] (and invert[]) the standard" to note that this is a "'heavy burden.'" (RB 23, quoting AOB 23.) Courts have described the standard in precisely these terms. (See *Coffman Specialties, Inc. v. Dept. of Transportation* (2009) 176 Cal.App.4th 1135, 1145 ["[T]he plaintiff has a heavy burden"]; see also *Today's Fresh Start, Inc.*, *supra*, 57 Cal.4th at p. 218 ["The standard for a facial constitutional challenge to a statute is exacting"].)

Judged against this standard, Plaintiffs' privacy claim fails several times over. They cannot establish a reasonable expectation of privacy in the data at issue here. Nor can they establish that sharing this data with a strictly cabined set of researchers subject to stringent privacy protections is a serious invasion of privacy. And even assuming they could, any invasion of privacy represented by AB 173 is justified by California's paramount interest in reducing firearms violence.

(…continued)

(2017) 3 Cal.5th 561, 573.) Because AB 173 does not "involve[] an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships," it is subject to a "general balancing test[]." (*Id.* at p. 572, internal quotation marks omitted; *see infra* pp. 23–31.)

1. Plaintiffs Do Not Have a Reasonable Expectation of Privacy

To establish their reasonable expectation of privacy, Plaintiffs mainly argue that people who provide their personal information to businesses and employers have a reasonable expectation of privacy in this information, and so Plaintiffs must have a reasonable expectation of privacy in the information they provided the Department of Justice (DOJ), too. (RB 29–33.) There are several flaws in this argument.

The first is that this analogy ignores that "[t]he reasonableness of a privacy expectation depends on the surrounding context." (*County of L.A. v. L.A County Employee Relations Com.* (2013) 56 Cal.4th 905, 927.) The ownership and use of firearms has a long history of being public. People purchase guns in public and practice at shooting ranges open to the public. The dealers they must purchase guns from must keep records that state and federal officials may inspect without a warrant. (§ 28480; 18 U.S.C. § 923(g)(1)(B); *United States v. Biswell* (1972) 406 U.S. 311, 316.) People litigate Second Amendment issues using their true names. (See, e.g., *Silvester v. Harris* (9th Cir. 2016) 843 F.3d 816.) DOJ already uses information in its possession to inform the Legislature and the public about firearms issues. (See, e.g., § 30012 [requiring annual report on Armed Prohibited Persons System] and https://oag.ca.gov/system/files/media/2022-apps-report.pdf ["Armed and Prohibited Persons System Report 2022"]; https://openjustice.doj.ca.gov/data [providing data about gun violence restraining orders].) And the California Supreme Court

has recognized that concealed carry licenses and applications in the possession of local law enforcement agencies that issue such licenses are disclosable as public records. (See *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 656–657.) Indeed, the California Supreme Court rejected a challenge to a local agency's public disclosure of such information—including the names, addresses, and reasons for requesting a concealed carry license—based on the same constitutional right to privacy Plaintiffs assert here, concluding that there were no "substantial privacy concerns implicated." (*Id.* at p. 654.) It is therefore not reasonable for firearms owners to expect that the state will not use information in its records, including personally identifying information (PII), to help address firearm-related crimes, suicides, accidents, and similar issues.

Beyond the broader public nature of gun purchases and use, gun and ammunition sales are also "'heavily regulated by Federal, State, and local laws.'" (*Ileto v. Glock, Inc.* (9th Cir. 2009) 565 F.3d 1126, 1136, quoting 15 U.S.C. § 7901(a)(4).) That is especially true for the information surrounding gun sales in California. To purchase a firearm in California, an individual must first provide various personal details in the form of a Dealer Record of Sale (DROS) to a private third party—the firearms dealer itself. (§ 28160.) This third party must then transmit this data to DOJ. (§ 28215.) DOJ must in turn transmit this information to the federal government. (§ 28220, subd. (b).) DOJ then adds this information to the Automated Firearm System (AFS), a database from which it may share certain information

with (in addition to researchers) a lengthy list of other officials in specified circumstances. (§§ 11105, 11106.) On top of this, the third-party dealers themselves must retain a copy of the DROS—which contains, among other information about the sale, the purchaser's full name, date of birth, address, identification, place of birth, telephone number, occupation, gender, and physical description.[4] (§ 28160; see § 28100, subd. (a).) In light of this context, Plaintiffs' attempted analogy to the courts' treatment of individuals' provision of personal information to their employers or other kinds of businesses is unavailing. (See, e.g., *420 Caregivers, LLC v. City of L.A.* (2012) 219 Cal.App.4th 1316, 1348, as modified (July 19, 2012), as modified (Sept. 25, 2013) [holding that, "given the heavily regulated area in which [medical marijuana businesses] operate," an ordinance requiring these businesses to retain records of their patients and make them available to police on request violated neither the businesses' privacy rights nor the privacy rights of their customers].)

Plaintiffs' argument is even weaker considering the "'customs [and] practices … surrounding'" the sharing of the specific information covered by AB 173. (*County of L.A.*, *supra*, 56 Cal.4th at p. 927, quoting *Hill*, *supra*, 7 Cal.4th at p. 36.) DOJ has been providing researchers with DROS and AFS data for decades. (See, e.g., AA 214 [DROS]; AA 154 [DROS and AFS].) Researchers have been publishing papers explicitly relying on

[4] Ammunition sales are subject to similar requirements. (See § 30352.)

this data for nearly as long. (See, e.g., AA 241–242 [1999 paper using "[a] roster of all persons who purchased handguns from licensed firearm dealers in California in 1991 … provided by the California Department of Justice"].)

Plaintiffs claim this Court should disregard this long-standing practice, but the cases they rely on do not support their argument. (RB 35–36.) The *Lungren* plurality stands only for the proposition that *general* laws and practices that may conflict with the claimed privacy right but do not *specifically* address that privacy right cannot by themselves undermine a reasonable expectation of privacy. (*Lungren*, *supra*, 16 Cal.4th at pp. 338–339 (plur. opn. of George, C.J.).) Here there is long-standing prior inconsistent practice as to the *precise* information in which Plaintiffs assert a privacy interest. And unlike in *Mathews*, Defendant is not asserting that "the existence of a long-standing practice or requirement of disclosure can, *by itself*, defeat a reasonable expectation of privacy in the circumstances." (*Mathews v. Becerra* (2019) 8 Cal.5th 756, 778, italics added; see RB 33–34.) In addition to the long-standing practice of sharing DROS and AFS information with researchers, the heavily regulated nature of firearm sales, the broader sharing of this information within government, and the public nature of firearms ownership and use generally also defeat Plaintiffs' asserted reasonable expectation of privacy.

Against this long-standing practice and broader backdrop, Plaintiffs argue that they had a reasonable expectation of privacy based on Penal Code section 11106. (See RB 32, 34–35.) But

Section 11106 contains no language limiting DOJ's ability to share data—a step the Legislature knows how to take when it wants to. (See § 11076 ["Criminal offender record information shall be disseminated, whether directly or through any intermediary, only to such agencies as are, or may subsequently be, authorized access to such records by statute"].) It was thus hardly an "assurance[]" (RB 32) that DOJ would not share this data with a limited set of researchers subject to stringent confidentiality protections.[5] Nor can Plaintiffs conjure a reasonable expectation of privacy in this data based on notices that DOJ issued with respect to entirely separate forms of data. (RB 32, citing RA 21, 26.) None of this approaches an "objective entitlement founded on broadly based and widely accepted community norms." (*Hill*, *supra*, 7 Cal.4th at p. 37.)

Finally, Plaintiffs argue about not having been given notice or the chance to opt out, but the precedent they cite does not support them here, either. *County of Los Angeles* addressed notice and opt-out with respect to the serious invasion factor, not reasonable expectation. (See *County of L.A.*, *supra*, 56 Cal.4th at p. 930.) The language in *Pioneer Electronics* Plaintiffs rely on was *dicta*, not a holding. (See *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 372.) And the language Plaintiffs quote from *Hill* stemmed from the opinion's earlier observation that, in the common law, "the plaintiff in an invasion

[5] This same infirmity undercuts Plaintiffs' reliance on the 2016 addition of Penal Code section 14231. (See RB 34.)

of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant." (*Hill*, *supra*, 7 Cal.4th at pp. 26, 37.) As a matter of basic logic, the fact that someone cannot have a reasonable expectation of privacy where they have consented to their information being shared does not somehow mean that the lack of affirmative consent necessarily means that there is a reasonable expectation of privacy.[6]

2. There Is No Serious Invasion of Privacy

In his opening brief, Defendant explained that Plaintiffs' facial challenge to AB 173 failed because the text of the statute does not create an "invasion[] of privacy . . . sufficiently serious in [its] nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right" (*Hill*, *supra*, 7 Cal.4th at p. 37), because of the limited, carefully controlled nature of the data transfers authorized by the law. (AOB 28–29.) The law authorizes sharing a narrow set of data with a narrow set of institutions: the legislatively created California Firearm Violence Research Center (Research Center)

[6] Plaintiffs close their argument on this point by referencing an inadvertent data exposure incident involving information regarding applicants for concealed carry licenses. (RB 36.) This incident has nothing to do with the statutorily authorized release of information to carefully selected institutions for limited purposes subject to stringent confidentiality controls.

and, at Defendant's discretion, other accredited "nonprofit bona fide research institution[s]" with approval of those institutions' institutional review boards. (§ 11106, subd. (d) [AFS]; § 30352, subd. (b)(2) [ammunition].) The data may only be shared for research purposes. The recipients may not "transfer[], reveal[], or use[] [the data] for purposes other than research or statistical activities." (§ 11106, subd. (d) [AFS]; § 30352, subd. (b)(2) [ammunition].) And any published research based on this data "shall not identify specific individuals." (§ 11106, subd. (d) [AFS]; § 30352, subd. (b)(2) [ammunition].)

Rather than confront AB 173's text, Plaintiffs claim there is a serious invasion of privacy because the information will be given to "social scientists who oppose their rights." (RB 39; see also RB 39 n.12.) But Plaintiffs are not challenging the sharing of their data with particular recipients; they are bringing a *facial* challenge to AB 173. That means this Court may "consider only the text and purpose of the statute." (*California School Bds. Assn.*, *supra*, 8 Cal.5th at p. 724.) Denigrating these particular researchers does not help Plaintiffs carry their burden of showing that AB 173's provisions, on their face, "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' hypothetical scenario of a researcher contacting an individual whose information was provided by DOJ—a proposition authorized nowhere in the text and rejected by researchers who have received data from DOJ (see AA 164 [Dr.

Studdert Declaration]; AA 227 [Dr. Wintemute Declaration])—also fails to show that AB 173 facially, as written, works a serious invasion of privacy.[7] Plaintiffs "cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute." (*California School Bds. Assn.*, *supra*, 8 Cal.5th at p. 724, internal quotation marks omitted.) Moreover, even if venturing beyond the text of AB 173 were appropriate, Plaintiffs still could not establish a serious invasion given the stringent controls and protections governing the sharing of the relevant data. (See AOB 31–32 [detailing protections for information at least as strong as those afforded medical information in medical research or clinical care].)

To the extent Plaintiffs offer arguments beyond particular, hypothetical applications of AB 173, they rest on a single concurring opinion from the California Supreme Court. (See RB 37–38.) But even that concurrence does not support Plaintiffs'

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[7] *County of Los Angeles*, which held that the county's provision of home contact information to a union would constitute a serious invasion of privacy where the union was *legally required* to contact these employees, is not to the contrary—no such legal requirement or even authorization exists here. (*County of L.A.*, *supra*, 56 Cal.4th at pp. 912–913, 929–930.) And even if it were relevant, the Court of Appeal has previously held that a defendant "obtaining plaintiff's address without his knowledge or permission, and using it to mail him coupons and other advertisements" was "not an egregious breach of social norms, but routine commercial behavior." (*Folgelstrom v. Lamps Plus, Inc.* (2011) 195 Cal.App.4th 986, 992, as modified (June 7, 2011).)

argument. In his *Lewis* concurrence, Justice Liu acknowledged that "protective measures [preventing public disclosure of information] may limit the extent of privacy invasion." (*Lewis*, *supra*, 3 Cal.5th at p. 581 (Liu, J., concurring); see also *People v. Buza* (2018) 4 Cal.5th 658, 690 ["our cases have also recognized that safeguards against the wrongful use or disclosure of sensitive information may minimize the privacy intrusion when the government accesses personal information"].) To be sure, Justice Liu concluded that the protective measures present in *Lewis* were not sufficient to prevent a serious invasion of privacy in that case. But that conclusion rested on the specific nature of the highly confidential information at issue there—prescription drug records which could readily be used to infer a patient's underlying medical conditions. (*Lewis*, *supra*, 3 Cal.5th at p. 581 ["Where, as here, one government agency discloses patients' *sensitive medical information* to another, the privacy intrusion cannot be dismissed as trivial," italics added]; see also *id.* at p. 579 [concluding patients had a reasonable expectation of privacy in their prescription records because "prescription drug records … can reveal their medical records"].) Justice Liu's concurrence also relied on the observation in *Hill*, *supra*, 7 Cal.4th at p. 27 n. 7, that "[p]articularly when professional or fiduciary relationships premised on confidentiality are at issue (such as doctor and patient or psychotherapist and client), the state constitutional right to privacy may be invaded by a less-than-public dissemination of information." (*Lewis*, *supra*, 3 Cal.5th at p. 581.)

This reasoning is consistent with other California Supreme Court precedent finding that the nature of an invasion of privacy is serious when it deals with information of a far more sensitive nature than that at issue here. In *Mathews v. Becerra* (2019) 8 Cal.5th 756, for example, the Supreme Court examined whether a cognizable privacy claim was implicated by a law that requires therapists to report patients who admit to downloading or accessing child pornography. The Court held that the law does implicate such a claim (thereby requiring further means-end scrutiny) because the law created "a severe invasion" of these patients' privacy—for "[i]f there is a quintessential zone of human privacy it is the mind." (*Id.* at p. 780, internal quotation marks omitted; see also *ibid.* ["As to the nature and gravity of the invasion, there is no question that revelations made by patients who seek psychotherapy to treat sexual disorders, including sexual attraction to children, concern the most intimate aspects of human thought and behavior, however noxious or depraved"].) Information about Plaintiffs' purchase of a gun or ammunition is not comparable to these types of information.

3. Any Intrusion Is Justified By the State's Interest

Even assuming that Plaintiffs were likely to establish that they had a reasonable expectation of privacy in the data they shared with DOJ, and that AB 173, by its very text, constitutes a "serious invasion" of their privacy, any such intrusion would be "justified because it substantively furthers one or more countervailing interests." (*Lewis*, *supra*, 3 Cal.5th at pp. 571–572, internal quotation marks omitted.) Because AB 173 "do[es]

not intrude on a fundamental autonomy right," a conclusion Plaintiffs do not contest, the justification for the intrusion must only satisfy "a general balancing test." (*Id.* at p. 573.)

As an initial matter, Plaintiffs claim that Defendant is asking this Court to "reweigh evidence" already weighed by the trial court. (RB 40, internal quotation marks omitted.) Not so. In holding that Plaintiffs were likely to succeed on this claim, the trial court did not conduct this general balancing test. As already noted, it merely incorporated the reasoning it employed in overruling Defendant's demurrer on Plaintiffs' constitutional claim. (AA 438 ["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"].) And in overruling the demurrer, the trial court explicitly did *not* conduct the general balancing test required, instead asserting that "[t]his inquiry is beyond the scope of the demurrer." (AA 436; see *ibid.* ["the balancing of plaintiffs' privacy interest against the state's interest in reducing firearms violence, is not an appropriate inquiry at the demurrer stage"].) Rather than asking this Court to *re*weigh the evidence, Defendant is asking this Court to weigh it in the first instance—a task that, given the facial nature of this challenge, this Court "is in as good a position to resolve … now as the trial court would be after determination of this appeal." (*Citizens to Save California*, *supra*, 145 Cal.App.4th at p. 746, internal quotation marks omitted.)

At the first step of the balancing test, Defendant has shown that the data-sharing mandated by AB 173 "substantively furthers one or more countervailing interests"—namely, informing legislation and policies aimed at preventing firearm violence. (*Hill*, *supra*, 7 Cal.4th at p. 40; see AOB 33–40.) And although Plaintiffs repeatedly assert that AB 173 has a different purpose, they do not appear to contest that preventing firearm violence is a "legitimate and important countervailing interest[]." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 552; see generally RB 40–48.) Plaintiffs' sole responsive argument on this front is that "social science research is [not] remotely 'proximate' to a 'central function' of the State government." (RB 45.) But "[t]he principal function of a legislature is 'to enact wise and well-formed and needful laws.'" (*Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 499, quoting *In re Battelle* (1929) 207 Cal. 227, 240.) And "[a] legislature cannot exercise sound judgment without information." (*Ibid.*) "Accordingly, 'the necessity of investigation of some sort must exist as an *indispensable incident and auxiliary* to the proper exercise of legislative power.'" (*Ibid.*, quoting *In re Battelle*, *supra*, at p. 241, italics added.) And "[t]he details of how this implied power is to be exercised are consigned to the Legislature's discretion in the first instance." (*Ibid.*)

Here, the Legislature authorized the information-sharing Plaintiffs challenge expressly in service of informing legislation and policies to address firearm violence. In 2016, the Legislature recognized that "[t]oo little is known about firearm violence and

its prevention … in substantial part because too little research has been done." (2016 Stats., ch. 24, § 30, codified at § 14230, subd. (e).) To address this deficiency, the Legislature created the Research Center to conduct research "to provide the scientific evidence on which sound firearm violence prevention policies and programs can be based." (*Id.*, codified at § 14231, subd. (a)(2).) AB 173 subsequently noted that California's "rich data related to firearm violence" enables "policy-relevant research" and clarified that the information in various DOJ databases must be provided to the Research Center and, at the Department's discretion, to other researchers. (2021 Stats., ch. 253, § 4, codified at § 14230, subd. (e); see also *id.*, § 2.5, codified at § 11106, subd. (d) [clarifying information-sharing obligations].) AB 173 thus "substantively furthers [a] countervailing interest[]."[8] (*Hill*, *supra*, 7 Cal.4th at p. 40.)

Plaintiffs' unsubstantiated reference to "viable alternatives" to the information-sharing authorized by AB 173 cannot overcome this strong countervailing interest. (RB 46.) Plaintiffs point to two alternatives that they assert would allow "the State to achieve its interests [with] a lesser impact on privacy

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[8] The fact that the research is conducted by non-state entities does not change this. (See *Howard Jarvis Taxpayers Assn.*, *supra*, 62 Cal.4th at p. 499 [noting that "the details of how this implied power [to gather information informing legislation] is to be exercised are consigned to the Legislature's discretion in the first instance"].) And Plaintiffs' further suggestion that academic researchers are "using Plaintiffs' private data to make millions of dollars" is absurd on its face. (RB 45.)

interests": (1) "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," and (2) "implementing protective procedures that anonymize or de-identify data shared with researchers." (RB 46–47.)

But Plaintiffs overlook that it is their burden to "*show*[] there are feasible and effective alternatives." (*Mathews*, *supra*, 8 Cal.5th at p. 769, italics added; see also *Hill*, *supra*, 7 Cal.4th at p. 38 ["plaintiff may undertake the burden of demonstrating the availability and use of protective measures, safeguards, and alternatives to defendant's conduct that would minimize the intrusion on privacy interests"].) Across all of their briefings in the trial court and their brief in this Court, they have not cited *any* evidence for the proposition that their notice and opt-out procedure is a feasible alternative. (RB 47; AA 025 [Mot. for Prelim. Inj.]; AA 361–363 [Reply ISO Mot. for Prelim. Inj.]; AA 382 [First Amd. Compl.]; AA 402–404 [Oppn. to Demurrer].) And they have cited only one piece of evidence purportedly supporting the feasibility of anonymizing or de-identifying the data before sharing it with researchers. (RB 47 n.17.) But this source merely "provides an overview of de-identification issues and terminology" and "summarizes significant publications to date involving de-identification and re-identification." (RA 174.) It does not address whether anonymization or de-identification would be a feasible alternative *in this context*. This despite the fact that Defendant submitted substantial evidence that these alternatives are *not* feasible. (See AOB 35–40 [recounting in detail evidence

that Plaintiffs' proposed alternatives are not feasible].) Thus, Plaintiffs have failed to establish that they are likely to succeed on their claim. (See *Hill*, *supra*, 7 Cal.4th at p. 51 ["Because plaintiffs failed to demonstrate with substantial evidence the presence of fully viable alternatives … they stopped short of proving their case"].)

Plaintiffs' broader efforts to tip the balance in their favor also fail. (See RB 42–44.) Plaintiffs argue that AB 173's privacy intrusion is "compound[ed]" by "outside researchers … linking [data shared under AB 173] with other data." (RB 43–44; see also RB 26, 38 [same argument].) But such "linking" is in no way contemplated by the text of AB 173 and so is not an appropriate basis for a facial challenge to the statute. And even if Plaintiffs were bringing an as-applied challenge to AB 173 on this basis, it is not clear how such a challenge could be premised on the use of *other* data on which AB 173 has no bearing whatsoever. Plaintiffs also seek to invoke the specter of "the pervasive presence of coercive government power" as a reason to find that AB 173 poses a more serious privacy invasion. (RB 44, internal quotation marks omitted.) But this argument is misplaced. AB 173 does not grant the government access to any more information than it would otherwise have; it involves sharing information the government *already has* with a limited, carefully regulated set of *private* organizations.

Next, Plaintiffs' argument that AB 173 effects a serious invasion because research on firearm violence is "entirely divorced" from the purpose for which the information was

originally compiled (RB 43) suffers from the same faulty interpretation of section 11106 already discussed (see *supra* at pp. 17–18), and, like much of their brief, veers away from the text of AB 173 into suppositions about what the Legislature might ultimately do based on the research enabled by AB 173. (RB 43 ["Plaintiffs actively and vigorously oppose having their confidential information used in an effort to justify limitations on firearms rights"].) Such speculation is not grounds for holding AB 173 facially unconstitutional.

Even taking these points at face value, though, they cannot outweigh the state's justification for its limited, controlled disclosure of this information. In a Public Records Act case, the California Supreme Court upheld—against the same constitutional privacy right asserted here—the disclosure of concealed-carry licenses and applications held by the local law enforcement agencies responsible for issuing such licenses to *the public at large*. (See *CBS, Inc.*, *supra*, 42 Cal.3d at pp. 653–657.) This included gun owners' names, addresses, and their stated reasons for needing a concealed carry license. (*Id.* at pp. 649, 656–657.) Balancing the owners' right of privacy against the public's need for the information (in that case, to determine whether law enforcement officials were properly exercising their discretion in issuing concealed carry licenses), the Supreme Court held: "While some of the holders of concealed weapons licenses may prefer anonymity, it is doubtful that such preferences outweigh" the public's right to the information—especially given the "clear and legislatively articulated justification for

disclosure." (*Id.* at p. 654.) Here, AB 173 rests on just such a clear and legislatively articulated justification for disclosure, but it authorizes only a strictly limited disclosure subject to stringent protections, whereas the Supreme Court upheld disclosure of gun owners' PII to the news media for widespread publication. (See AOB 28–29 [detailing AB 173's protections]; see also *Lewis*, *supra*, 3 Cal.5th at p. 576 ["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," quoting *Pioneer Electronics*, *supra*, 40 Cal.4th at p. 371].)

Given all this, the Court need not rely on deference to the Legislature to hold that any intrusion worked by AB 173 is sufficiently justified by a countervailing interest. But that consideration weighs in Defendant's favor, too. It is black-letter law that where, as here, "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." (*Property Reserve, Inc., v. Superior Court* (2016) 1 Cal.5th 151, 192, internal quotation marks and alterations omitted; see also AOB 24 [detailing Legislature's consideration of privacy concerns in passing AB 173].) And there is a broader "general rule [that] statutes are presumed to be constitutional." (*Property Reserve, Inc.*, *supra*, at p. 192.) Plaintiffs assert that *Lungren* and *Mathews* implicitly overturned this well-settled law and "leave no daylight for legislative deference", but they (again) misread those cases. (RB 24–25.)

These cases merely establish that a legislative judgment "cannot be considered determinative." (*Lungren*, *supra*, 16 Cal.4th at p. 349; see also *Mathews*, 8 Cal.5th at p. 787 [noting judicial "duty to independently examine" constitutional issue].) Defendant does not argue that the legislative judgments with respect to AB 173 are determinative, but rather that they are yet further confirmation that any privacy impingement created by AB 173 is justified.

B. The Balance of Harms Tips in Defendant's Favor

Because Plaintiffs have no likelihood of success on the merits, this Court need not address the balance of harms. (See, e.g., *Law School Admission Council, Inc. v. State of California* (2014) 222 Cal.App.4th 1265, 1280, as modified (Feb. 11, 2014) ["[a] trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim," internal quotation marks omitted].) But this balance also tips in Defendant's favor. Without the access to PII that AB 173 authorizes, researchers cannot conduct the crucial research the Legislature has directed. Even if some projects can continue in the interim, the injunction entered by the trial court has the effect of seriously hindering the research efforts that the Legislature has deemed crucial to addressing firearm violence in California. Because this is "a matter of significant public concern" and the trial court's injunction will "deter or delay [Defendant] in the performance of [his] duties" with respect to this matter, this injunction "necessarily entail[s] a significant

risk of harm to the public interest." (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1473; see *Maryland v. King* (2012) 567 U.S. 1301, 1303 (Roberts, C.J., in chambers) ["[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury," internal quotation marks omitted].)

To overcome this harm to the public interest and the "general rule against enjoining public officers or agencies from performing their duties," Plaintiffs "must make a significant showing of irreparable injury." (*Tahoe Keys Property Owners' Assn.*, *supra*, 23 Cal.App.4th at p. 1471.) Instead of even attempting to make this showing, Plaintiffs simply assume the merits. (See RB 48–49 [e.g., "privacy violations constitute irreparable harm"].) But because Plaintiffs cannot succeed on the merits, they do not and cannot show irreparable harm that outweighs the irreparable harm to the state. And even if they had some likelihood of success on the merits, the mere invocation of a threatened constitutional harm does not, as Plaintiffs suggest, automatically swing the balance in their favor. (See *Loder v. City of Glendale* (1989) 216 Cal.App.3d 777, 784, as modified (Jan. 4, 1990) [rejecting argument that so long as "'constitutional interests are threatened, irreparable injury exists which warrants injunctive relief'"].) Such alleged violations must still be balanced against the harm to the state, and where, as here, the constitutional intrusion is limited, courts readily find the state's interests carry the day. (See, e.g., *Sundance Saloon,*

Inc. v. City of San Diego (1989) 213 Cal.App.3d 807, 818 [affirming denial of preliminary injunction in First Amendment challenge to city ordinance where, although there was some burden on free expression, city council had found ordinance increased public safety].) The same conclusion is warranted here.

Plaintiffs also confusingly point to recent data exposures involving DOJ as a reason to continue enjoining AB 173, as did the trial court. (RB 49; see also AA 438.) First, this argument ignores the steps DOJ has taken to improve data security. (See AOB 41–42.) Second, Plaintiffs make no attempt to show that a similar incident is likely to happen during the pendency of this proceeding, as they must do to obtain injunctive relief.[9] (See *White v. Davis* (2003) 30 Cal.4th 528, 554 ["To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued *pending an adjudication of the merits*," italics added].) Finally, and more fundamentally, these exposures have nothing to do with AB 173. If Plaintiffs' concern is with DOJ's information security, enjoining AB 173 will do nothing to address this concern since AB 173 merely directs DOJ to share information that is already in its possession and

[9] By the same token, Plaintiffs have also failed to show that the various harms they speculate about throughout their brief—such as unauthorized contact by researchers or the passage of gun regulations with which they disagree—are likely to befall them during this case.

remains in its possession. The balance of harms therefore swings sharply in Defendant's favor.

CONCLUSION

For all of the foregoing reasons, the Court should vacate the preliminary injunction and rule, as a matter of law, that Plaintiffs have failed to state a viable privacy claim.

Respectfully submitted,

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April 26, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Reply Brief uses a 13 point Century Schoolbook font and contains 6,994 words.

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April 26, 2023

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

Case Name: ***Barba, Ashleymarie, et al. v. Rob Bonta***
Case 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 April 26, 2023, I electronically served the attached **APPELLANT'S REPLY 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 April 26, 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 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102, addressed as follows:

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Supreme Court of California
350 McAllister Street
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Via Electronic Submission
(Pursuant to Rule 8.212(c)(2))

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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 April 26, 2023, at San Francisco, California.

M. Mendiola	M. Mendiola
Declarant	Signature

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