No. D081194

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

ASHLEYMARIE BARBA, et al.,
Plaintiffs and Appellees,

v.

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

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

RESPONDENTS' BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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

Dated: March 23, 2023

By: s/ Bradley A. Benbrook
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INTRODUCTION

This case arises out of the Legislature's unprecedented requirement that the private information of millions of California firearm owners be disclosed for "research." After 25 years of telling Californians that the personal identifying information (PII) they had to disclose in order to buy a firearm would only be provided by the Department of Justice (DOJ) to other government officials for law enforcement purposes, the Legislature went back on those legislative assurances. At the urging of private researchers at UC Davis, the Legislature enacted AB 173 to now *require* that all of gun purchasers' private information *must* be disclosed to social scientists at UC Davis (and may be shared with countless other researchers) for a very different reason than the PII was collected—to conduct research into firearms violence by using their confidential data to "follow" California gun owners for years. The victims of this disclosure weren't even informed, let alone offered an opportunity to consent.

Plaintiffs moved below for a preliminary injunction, and the superior court enjoined *future* disclosure of this PII to researchers for *future* research projects while the case is pending. It is undisputed that all existing research projects will continue pending a final decision on the merits, since the trial court denied Plaintiffs' request that such projects be halted. Despite this, DOJ has appealed the preliminary injunction order, claiming that research contemplated by AB 173 will "come[] to a halt as a result of the trial court's injunction." Appellant's Opening Brief ("AOB") at 40. This is simply wrong.

To succeed on appeal, DOJ must "make a clear showing of an abuse of discretion," and "[a] trial court will be found to have abused its discretion only when it has 'exceeded the bounds of reason or contravened the uncontradicted evidence.'" *IT Corp. v. Cnty. of Imperial* (1983) 35 Cal.3d 63, 69 (citation omitted). DOJ cannot possibly meet this burden here.

1. DOJ's lead argument—that the trial court inadequately supported its ruling—ignores the presumption of correctness that attaches to the preliminary injunction. And a review of the oral argument transcript and the ruling itself confirms that the trial court in fact understood the preliminary injunction test and made a reasoned decision consistent with that legal standard.

2. Next, DOJ tries to shift its burden by stating that Plaintiffs face a high burden because they have asserted a facial constitutional challenge. DOJ follows this up by pleading for deference to the Legislature. But DOJ has tried both of these arguments in past privacy cases—and the Supreme Court has rejected them every time. The Supreme Court's work has left no room to relitigate those discredited points here.

3. There is a good reason that DOJ seeks refuge through these tactics: The trial court correctly found that Plaintiffs established a likelihood of success on their constitutional privacy claim. The threshold elements, set forth by the California Supreme Court in *Hill v. Nat'l Collegiate Athletic Ass'n* (1994) 7 Cal.4th 1, designed to weed out "de minimis" claims, are readily satisfied by the egregious bait and switch here:

- Plaintiffs have a legally protected privacy interest in the detailed personal information (including home address, fingerprints, and driver's license numbers) collected by DOJ during firearms and ammunition transactions; this point is not disputed.

- Individuals purchasing firearms and ammunition have an objectively reasonable expectation that the confidential information they had to turn over to DOJ would not be used for purposes unrelated to law enforcement, much less be disclosed to a private third party, hostile to their interests, for "research" on them. Among other things, California Penal Code § 11106 assured them for 25 years that this confidential data could only be transferred within the government for law enforcement purposes.

- The disclosure is a serious invasion of privacy—the test requires only that it be "nontrivial"—as AB 173 deprives millions of Californians of control over their personal information, which will be actively used, mined, and manipulated without their knowledge or consent.

Nor did the trial court abuse its broad discretion in holding that Plaintiffs' privacy interest outweighed the State's purported interest in having private social scientists use citizens' confidential data for "research." Plaintiffs established a serious privacy invasion and provided several alternatives for the State to achieve its purported research interests—most notably, providing notice and the opportunity to opt out of having PII shared, or sharing anonymized or de-identified data to researchers—that have a lesser impact on privacy interests. The State's arguments in response boil down to reweighing the evidence presented to the trial court, which is improper in a preliminary injunction appeal.

Finally, given the trial court's preservation of the status quo—existing projects will continue during the litigation but no new data transfers will be made for new research—DOJ has suffered no harm whatsoever from the injunction.

In short, DOJ cannot possibly show that the court abused its discretion in granting the preliminary injunction. This Court should affirm.

STATEMENT OF THE CASE

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

In order to buy a firearm or ammunition in California, a purchaser must provide extensive personal identifying information to the vendor, who in turn provides that information to DOJ at the time of the transaction. Various provisions of California law require the Department of Justice to collect a wide array of data related to firearms ownership, and to maintain such information to assist in criminal and civil investigations. Principal

among the DOJ's databases is California's Automated Firearms System ("AFS"), an omnibus repository of firearm records established by Penal Code section 11106. *See also* Cal. Dep't of Justice, *Automated Firearms System Personal Information Update*, https://oag.ca.gov/firearms/afspi. AFS is the state's most comprehensive database of information about the purchase, sale, transfer, and use of firearms and ammunition.

The database includes the following identifying information (and more) for California gun owners:

- Fingerprints
- Driver's license or identification card number
- Home addresses
- Date and place of birth
- Citizenship status and immigration information
- Race
- Sex
- Height, weight, hair color, and eye color.

See Penal Code §§ 11106(a)(1)(A) (fingerprints) & (D) (Dealers' Records of Sale of firearms); 11 CCR § 4283 (information required for basic ammunition eligibility check); *see generally* Cal. Dep't of Justice Bureau of Firearms, *Dealer's Record of Sale (DROS) Worksheet*, https://des.doj.ca.gov/forms/DROS_Worksheet_BOF-929.pdf. AFS also includes all firearm and ammunition transactions associated with each subject. *See* Penal Code § 28160 (content of register of firearm transfers). And for private-party sales or transfers, AFS includes collects all of this information for the seller as well. *See* Penal Code § 28160(a)(36).

In addition to compiling all information obtained in connection with every firearm and ammunition transaction conducted through a dealer, AFS collects records related to the possession or use of firearms, including: copies of licenses to carry firearms and carry applications; firearm records transmitted to the DOJ outside of the electronic DROS process; reports of stolen, lost, or found property; records relating to the ownership of

manufactured or assembled firearms; and a registry of private-party firearm loans. Penal Code § 11106(a)(1)(B), (C), (E)–(G), (I), (b)(2).

Californians have been required to disclose this personal information to the government in order to purchase a handgun since 1996.[1] The Legislature expanded AFS to include long guns beginning January 1, 2014. *See* Assem. Bill 809 (2011-2012 Reg. Sess.). Over the past 25 years, AFS has amassed information covering over 7 million handgun transactions and over 3 million long gun transactions from Dealer Record of Sale ("DROS") data alone. Cal. Dep't of Justice, *Gun Sales in California, 1996–2020*, https://openjustice.doj.ca.gov/data-stories/gunsales-2020.

II. Until AB 173, California Law Assured Gun Owners That Their Private Information Would Remain Confidential And Could Only Be Used Strictly For Law Enforcement Purposes.

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

Consistent with this purpose, Section 11106 had always imposed strict conditions on sharing information from within the database. Specifically, it provides that the Attorney General "shall furnish the information" in AFS "upon proper application" to specified state officers for criminal or civil law

[1] As enacted, Section 11106 limited DOJ's retention of AFS records to "pistols, revolvers, or other firearms capable of being concealed upon the person." Penal Code § 11106(a), (b)(1), (b)(2), (c)(1) (West 1997).

enforcement purposes, including peace officers, district attorneys and prosecutors, city attorneys pursuing civil law enforcement actions, probation and parole officers, public defenders, correctional officers, and welfare officers. Penal Code § 11106(a)(2); *see* Penal Code § 11105. Despite several intervening amendments to Section 11106, this limitation on sharing PII remained consistent from 1996 until the passage of AB 173.[2]

DOJ's privacy disclosures have likewise assured Californians that when they submit their PII to DOJ, it will be treated confidentially and generally used for law enforcement purposes or otherwise only shared with government agencies:

> **Possible Disclosure of Personal Information:** In order to process a request for firearm records, we may need to share the information you provide us with any Bureau of Firearms representative or any other person designated by the Attorney General upon request. The information you provide may also be disclosed in the following circumstances:
>
> - With other persons or agencies when necessary to perform their legal duties, and their use of your information is compatible and complies with state law, such as for investigations, licensing, certification, or regulatory purposes;
>
> - To another government agency as required by state or federal law.

Respondents' Appendix ("RA") at 21 (privacy notice for Request for Firearm Records); *see id.* at 26 (privacy notice for Personal Firearm Eligibility Check

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[2] *See* Penal Code § 11106(a) (West 1997) ("In order to assist in the investigation of crime, the arrest and prosecution of criminals, and the recovery of lost, stolen, or found property, the Attorney General shall keep and properly file" AFS records, "and shall, upon proper application therefor, furnish to the officers mentioned in Section 11105 . . .").

Application);[3] *see also* Appellant's Appendix ("AA") at 13:1–11 (citing privacy disclosures).

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

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

The California Legislature drastically altered the landscape when it passed Assembly Bill 173 in 2021. The new law requires DOJ to share firearm-related information with the recently-established California Firearm Violence Research Center at UC Davis (the "Center"), and it permits DOJ to share the same information with an unlimited number of other research institutions. AB 173's private-information-disclosure provisions are codified at Penal Code sections 11106(d) and 30352(b)(2).

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[3] The Respondents' Appendix contains evidence that was submitted in support of Plaintiffs' motion for preliminary injunction but was not included in Appellant's appendix. RA 3–294 (compendium of evidence); RA 295–297 (request for judicial notice).

The Legislature established the Center in 2016. Assem. Bill 1602 (2015-2016 Reg. Sess.).[4] While the legislation authorizing the Center used neutral-sounding language to describe its work, there can be no question that the Center's social scientists are not neutral on the subject of gun rights and gun owners. The Center's Director is Dr. Garen Wintemute. Wintemute is one of America's leading voices in favor of stricter gun control laws. UC Davis Health, *Wintemute Biography*, https://health.ucdavis.edu/vprp/UCFC/Personnel.html (describing Wintemute as "a renowned expert on the public health crisis of gun violence"); *see also* AA at 14 (citing article in which Wintemute claimed that the increase in gun purchases during the pandemic posed a threat to American democracy (RA at 33)); AA at 14–15 (citing Center "investigator" Amy Barnhorst's hostility to gun rights (RA at 41–42)). This context is important in a case where gun owners' PII must now be handed over—without their consent—to "researchers" who oppose their rights.

In fact, AB 173 was spurred by a dispute between the Center and DOJ over DOJ's refusal to share the very same PII at issue in this case *based on DOJ's concerns that sharing this data violated gun owners' privacy rights*. *See, e.g.*, RA at 44, Wiley, *Gun violence researchers fight California Department of Justice's plan to withhold data*, Sacramento Bee (March 15, 2021)[5]; RA at 52, Beckett, TheGuardian.com, *California attorney general cuts off researchers' access to gun violence data* (March 11, 2021). In the

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

[5] Dr. Wintemute vouched for the assertions in this article in his declaration below. AA at 214 (Wintemute Decl. ¶¶ 12–13).

past, DOJ had provided the Center with confidential gun owner PII in violation of California law: Multiple research papers affirm that the Center obtained and used gun owner PII in violation of Section 11106. AA at 13 (identifying articles); *see also* AA at 213–215 (Wintemute Decl., ¶¶ 9–14).

In 2020 and 2021, however, DOJ advised the Center that it was going to start complying with the law and no longer provide gun owners' PII for the Center's research. RA at 46, Wiley, *supra* (DOJ spokesman stating "[w]e . . . take seriously our duty to protect Californians' sensitive personally identifying information, and must follow the letter of the law regarding disclosures of the personal information in the data we collect and maintain"); RA at 53–54, Beckett, *supra* ("it's precisely this more detailed personal information . . . that Becerra's justice department is telling some researchers that it will not provide"; DOJ "cited privacy concerns as a justification for the data restrictions, and has said it believes current California law does not permit the agency to release certain kinds of data to researchers"). DOJ acknowledged euphemistically below that "the former Attorney General refused to provide researchers with certain data in the Department's possession." AA at 68:3–4. DOJ also instructed the Center to *delete* the PII it possessed from prior disclosures. RA at 46, Beckett, *supra*.

Dr. Wintemute lashed out against DOJ's change in position, and he dismissed DOJ's view at the time that disclosing gun owners' PII raised serious privacy issues: "People have started to wonder what other reasons there might be for which privacy is a fig leaf." Beckett, *supra*. He rallied the Legislature to change the law. AA at 214–215 (Wintemute Decl., ¶14).[6]

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

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

PROCEDURAL HISTORY

Plaintiffs filed this lawsuit challenging the constitutionality of AB 173 in January 2022. Plaintiffs filed a First Amended Complaint in June 2022. ("FAC"), AA at 366–386. Plaintiff Ashleymarie Barba is a San Diego County resident who has completed multiple firearm and ammunition transactions (purchase, loan, sale, or transfer) through a firearms dealership in California since 2020. Accordingly, Barba is informed and believes that her personal identifying information is contained in AFS and the Ammunition Purchase Records File. AA at 369 (FAC, ¶ 9). Plaintiffs 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 are organizations with members and supporters who live in California and who have personal identifying information in AFS and the Ammunition Purchase Records File. AA at 369–371 (FAC, ¶¶ 10–15).

Plaintiffs filed a motion for a preliminary injunction in March 2022 based solely on their claim that AB 173's mandatory data-sharing provisions

violate plaintiffs' right to privacy under Article 1, § 1 of the California Constitution.[7] AA at 4–28. On March 24, 2022, DOJ filed a demurrer. AA at 30–56.

On October 14, 2022, the trial court held a consolidated hearing on the preliminary injunction and demurrer. *See* AA at 420–425 (Minute Order). On November 1, 2022, the trial court entered an order on the motions; as relevant here, the court granted a preliminary injunction and overruled the demurrer to Plaintiffs' constitutional privacy claim. AA at 427–438. The order enjoins DOJ "from transferring to researchers (1) personal identifying information collected in the Automated Firearms System pursuant to Penal Code section 11106(d) and (2) personal identifying information collected in the Ammunition Purchase Records File pursuant to Penal Code section 30352(b)(2), until further notice and order by the Court." AA at 431.

THE FEDERAL *DOE* CASE HAS NO BEARING ON THIS APPEAL

The Opening Brief's introduction dangles the prospect that a federal court's dismissal of a *federal* privacy claim over AB 173's mandatory PII sharing somehow helps DOJ here. AOB 9 & 16 (referring to *Doe v. Bonta*, Case No. 3:22-cv-00010-LAB-DEB, 2023 WL 187574 (S.D. Cal. Jan. 12, 2023)). It does not.

The Opening Brief conspicuously fails to acknowledge that a federal privacy claim, based on an unenumerated privacy right arising under the Due Process Clause, poses a far lower threshold for the government compared to the test arising from the California Constitution's enumerated privacy right. Indeed, the United States Supreme Court has cast doubt on whether the federal constitution protects a right to informational privacy at all. *See Nat'l Aeronautics & Space Admin. v. Nelson* (2011) 562 U.S. 134, 138, 146–47. And the California Supreme Court has repeatedly made clear that because

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

California's Constitution enumerates a right to privacy, the state constitutional right is "broader and more protective of privacy" than the implied, unenumerated federal right. *Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326 (plurality op. of George, C.J.); *see also Mathews v. Becerra* (2019) 8 Cal.5th 756, 768–69; *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 892–83 (lead op. of George, C.J.); *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 130 n.3.

STANDARD OF REVIEW

"[W]hether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." *White v. Davis* (2003) 30 Cal.4th 528, 554. "[T]he more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue. This is especially true when the requested injunction maintains, rather than alters, the status quo." *King v. Meese* (1987) 43 Cal.3d 1217, 1227. In considering a request for a preliminary injunction, a trial court "must exercise its discretion in favor of the party most likely to be injured." *Robbins v. Super. Ct.* (1985) 38 Cal.3d 199, 205 (internal quote and citation omitted).

"Generally, the ruling on an application for a preliminary injunction rests in the sound discretion of the trial court. The exercise of that discretion will not be disturbed on appeal absent a showing that it has been abused." *Hunt v. Super. Ct.* (1999) 21 Cal.4th 984, 999 (citation omitted). To succeed on appeal, DOJ must "make a clear showing of an abuse of discretion," and "[a] trial court will be found to have abused its discretion only when it has 'exceeded the bounds of reason or contravened the uncontradicted evidence.'" *IT Corp. v. Cnty. of Imperial* (1983) 35 Cal.3d 63, 69 (citation omitted). To that end, there is a heavy presumption in favor of the trial court's

ruling that mandates deference notwithstanding any defects in the reasoning set forth in a preliminary injunction order. This Court "review[s] the trial court's order, not its reasoning, and affirm[s] [a preliminary injunction] order if it is correct on any theory apparent from the record." *Olson v. Hornbrook Cmty. Servs. Dist.* (2021) 68 Cal.App.5th 260, 268 (citation omitted); *see also Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1049 (the principle that appellate courts "review the correctness of the trial court's ruling, not its reasoning" "is particularly applicable to rulings granting or denying preliminary injunctions").

ARGUMENT

At the outset, it is important to emphasize the scope and impact of the preliminary injunction giving rise to this appeal. The trial court enjoined DOJ from making *new* transfers of PII to researchers while the case is pending. The trial court denied Plaintiffs' request that the Attorney General be ordered to *retrieve* the millions of records of PII it had already disclosed to researchers. As a result, it cannot be disputed that all existing research projects using gun owners' PII will continue during the pendency of the case. The status quo has thus been preserved. These simple points take most of the wind out of the Opening Brief's sails and underscore that the trial court did not abuse its discretion in granting the preliminary injunction.

I. DOJ Ignores The Presumption Of Correctness That Attaches To The Preliminary Injunction—And The Trial Court Applied The Correct Legal Standard In Any Event.

DOJ's lead argument is that the trial court applied the wrong legal standard because the preliminary injunction ruling cross-referenced the court's demurrer analysis, and therefore did not adequately state the reason for its conclusion that Plaintiffs established a likelihood of success on the merits of their constitutional privacy claim. *See* AOB 21 (arguing that "[t]he trial court provided no further analysis, except that 'Defendant's arguments

do not compel a different outcome'"); *id.* at 22 (claiming that the trial court "only consider[ed] whether Plaintiffs' claim should survive at the pleadings stage" and failed to conduct the preliminary injunction analysis). This argument fails for two independent reasons.

First, California law has long held that the presumption in favor of a preliminary injunction holds even where a trial court issues a ruling in summary fashion or fails to make express rulings on each element of the preliminary injunction test. *See, e.g.*, *City of Los Altos v. Barnes* (1992) 3 Cal.App.4th 1193, 1198 ("the fact that the court's conclusion is set forth in summary fashion does not mean the court failed to engage in the requisite analysis, or that its analysis was incorrect"); *MCA Recs., Inc. v. Newton-John* (1979) 90 Cal.App.3d 18, 23 ("we can presume from the trial court's order granting the preliminary injunction that the court did in fact find that irreparable injury would be imminent unless the injunction were granted"); *14859 Moorpark Homeowner's Ass'n v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1402–03 (where "the trial court is presented with evidence . . . but fails to make express findings, [appellate courts] presume that the trial court made appropriate factual findings and review the record for substantial evidence to support the rulings") (citations omitted).

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

This leads to the second reason DOJ's argument fails. While the presumption of correctness alone would suffice to rebut DOJ's argument, the Court has more than just deference to fall back on here: The transcript confirms at every turn that the trial court understood the preliminary injunction test and made a reasoned decision consistent with that legal standard. Reporter's Transcript ("RT") 8:23–25 (noting that a "constitutional violation" is harm as "a matter of law"); RT 11:3–11 (discussing the balance of harms in the context of a preliminary injunction); RT 11:28–12:8 (noting that a DOJ data breach disclosing personal identifying information weighed in favor of an injunction "because it shows likelihood of a constitutional violation"); RT 15:28 (directing DOJ's counsel to discuss interest balancing); RT 17:16–21 (asking Plaintiffs' counsel to respond to DOJ's interest-balancing argument). This evidence confirms that the Attorney General's claims about the supposed insufficiency of the trial court's ruling are hollow.

Indeed, the scope of the trial court's injunction (which enjoined only future transfers of PII but did not order DOJ to retrieve data already provided) and the court's balance-of-harms analysis confirms that it considered the parties' arguments and evidence under the correct legal standard. AA at 437 (explaining that DOJ's claim that Plaintiffs failed to show sufficient interim harm "does not account for the potential ongoing and future harms that could occur by continuous use of" their PII, and that "future requests for data" may occur while the case is pending).

The trial court did not abuse its discretion when applying the preliminary injunction test.

II. The California Supreme Court Has Rejected DOJ's Various Attempts To Raise Plaintiffs' Burden On The Merits Every Time The Attorney General Has Tried Them In The Past.

Before turning to the merits of Plaintiffs' constitutional privacy claim, Plaintiffs must address two legal points raised by DOJ in an effort to tilt the

scales in the State's favor. Both of these arguments have been raised by the Attorney General in past privacy cases—and the Supreme Court has rejected them every time.

DOJ first argues that Plaintiffs face a "heavy burden" to establish a likelihood of success on a facial challenge to AB 173. AOB 22–23. But this misstates (and inverts) the standard for facial challenges governing the fundamental constitutional right to privacy, which requires only that a law be unconstitutional in the "vast majority of its applications." *Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 343 (plurality op. of George, C.J.). In *Lungren*, the Court considered and rejected precisely the same argument when DOJ asserted it in a constitutional privacy challenge to an abortion parental-consent law. *Id.* at 342–48. Specifically, the Court held that when a law "imposes substantial burdens on fundamental privacy rights with regard to a large class of persons," a facial challenge "may not be defeated simply by showing that there may be some circumstances in which the statute constitutionally could be applied." *Id.* at 343. Thus, "when a statute broadly and directly impinges upon the fundamental constitutional privacy rights of a substantial portion of those persons to whom the statute applies, the statute can be upheld only if those defending the statute can establish that, considering the statute's general and normal application, the compelling justifications for the statute outweigh the statute's impingement on constitutional privacy rights and cannot be achieved by less intrusive means." *Id.* at 348; *see also E. Bay Asian Loc. Dev. Corp. v. State of Cal.* (2000) 24 Cal.4th 693, 708–09 (recognizing that a facial challenge is appropriate when a law "broadly impinges upon an individual's exercise of a fundamental constitutional right or that in its general and ordinary application it does so").

Lungren's standard applies here: the "general and normal" application of AB 173 "broadly and directly impinges upon the fundamental

constitutional privacy rights" of millions of Californians. 16 Cal.4th at 348. A facial challenge is appropriate.

DOJ next contends that the general presumption that legislative acts are constitutional weighs in the State's favor here. *See* AOB 23–24 (claiming that "it is clear that the Legislature bore privacy interests in mind when enacting AB 173"). The general principles DOJ cites, however, do not apply in a constitutional challenge. Rather, the California Supreme Court has long recognized that "the ordinary deference a court owes to any legislative action vanishes when constitutionally protected rights are threatened." *Spiritual Psychic Science Church v. City of Azusa* (1985) 39 Cal.3d 501, 514.

DOJ knows better. On two separate occasions, the Attorney General asked the California Supreme Court for legislative deference in constitutional privacy cases—and the Court swatted away the argument both times. In *Lungren*, the Court rejected the Attorney General's argument that the lower court "failed to give proper deference to the legislative findings accompanying the statute," explaining that "[w]hen an enactment intrudes upon a constitutional right . . . greater judicial scrutiny is required." 16 Cal.4th at 348–49 (plurality op. of George, C.J.); *see also id.* at 349–50 (emphasizing that "[n]umerous decisions establish that when a statute impinges upon a constitutional right, legislative findings with regard to the need for, or probable effect of, the statutory provision cannot be considered determinative for constitutional purposes").[8]

The Supreme Court rejected this tactic a second time just a few years ago in *Mathews v. Becerra*, when DOJ asked the Court to defer to the

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[8] The California Supreme Court's jurisprudence in this regard is consistent with the United States Supreme Court's approach in the First Amendment context. *Landmark Comm'ns, Inc. v. Virginia* (1978) 435 U.S. 829, 843–44; *Sable Commc'ns of Cal., Inc. v. F.C.C.* (1989) 492 U.S. 115, 129; *Holder v. Humanitarian L. Project* (2010) 561 U.S. 1, 34.

Legislature's policymaking judgment in another constitutional privacy case. (2019) 8 Cal.5th 756, 786–87. After noting that "[a] similar argument urging deference to the Legislature's policy judgment was considered and rejected in" *Lungren*, the Court reiterated that no deference is due: "[W]hen a statute intrudes on a privacy interest protected by the state Constitution, it is our duty to independently examine the relationship between the statute's means and ends." *Id.*

Lungren and *Mathews* leave no daylight for legislative deference when considering Plaintiffs' constitutional privacy claim.

III. Plaintiffs Are Likely To Prevail On Their Constitutional Privacy Claim.

"Unlike the federal Constitution, the California Constitution expressly recognizes a right to privacy." *Mathews*, 8 Cal.5th at 768. In 1972, California voters passed the Privacy Initiative, which added "privacy" to the enumerated rights set forth in Article I, Section 1 of the California Constitution. In *Lewis v. Super. Ct.*, the California Supreme Court recounted the "principal 'mischiefs' that the Privacy Initiative addressed" in language that bears heavily on this case; those mischiefs included: "(1) 'government snooping' and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; [and] (3) the improper use of information properly obtained for a specific purpose" which is then used "for another purpose" or "disclos[ed] . . . to some third party." (2017) 3 Cal.5th 561, 569 (citation omitted). Central to the right of privacy "is the ability to control circulation of personal information." *Mathews*, 8 Cal.5th at 769 (citation omitted).

The Court set the current framework for litigating a constitutional privacy claim in *Hill v. Nat'l Collegiate Athletic Ass'n* (1994) 7 Cal.4th 1. Under *Hill*, a privacy claim involves three essential elements: (1) the claimant must possess a legally protected privacy interest; (2) the claimant's

expectation of privacy must be objectively reasonable; and (3) the invasion of privacy complained of must be serious in both its nature and scope. *Id.* at 35–37. If a claimant establishes all three elements, the strength of that privacy interest is balanced against countervailing interests. *Id.* at 37–38. Specifically, "the party seeking information may raise in response whatever legitimate and important countervailing interests disclosure serves, while the party seeking protection may identify feasible alternatives that serve the same interests or protective measures that would diminish the loss of privacy." *Williams v. Super. Ct.* (2017) 3 Cal.5th 531, 552.

AB 173's mandatory data-sharing provisions violate Plaintiffs' right to privacy under the California Constitution. AB 173 requires DOJ to hand over the complete AFS and Ammunition Purchase Records File datasets to the Center upon request, and it does so without notice to or consent from the millions of Californians whose private information is being compromised. This disclosure, standing alone, is a substantial privacy violation. The Privacy Initiative's proponents were attuned to the unique harm arising from the government's compilation of personal information. *See White v. Davis* (1975) 13 Cal.3d 757, 774 ("The proliferation of government snooping and data collecting is threatening to destroy our traditional freedoms. Government agencies seem to be competing to compile the most extensive sets of dossiers of American Citizens.") (quoting ballot argument). Even then, Californians recognized that technology compounded the threat to privacy: "Computerization of records makes it possible to create 'cradle-to-grave' profiles of every American." *Id.*

But the privacy violation does not end with the initial disclosure. The Center (and other researchers) compounds the privacy violation by using the data to "link" individuals to other datasets and "follow" them for years, which enables researchers to dig up additional information on gun owners and peer even further into their lives. *See* AA at 15 (preliminary injunction

brief; identifying articles); *see also* AA at 213–215 (Wintemute Decl., ¶¶ 9–14). As Justices Liu and Kruger recognized in *Lewis*, the concerns motivating the Privacy Initiative are "even more pressing today because advances in data science have enabled sophisticated analyses of curated information as to a particular person." 3 Cal.5th at 581–82 (Liu, J., joined by Kruger, J., concurring).

AB 173's mandatory information-sharing regime violates the constitutional right to privacy. DOJ cannot possibly show that the trial court's preliminary injunction "falls outside the bounds of reason under the applicable law and the relevant facts." *Roth v. Plikaytis* (2017) 15 Cal.App.5th 283, 290 (quoting *People v. Giordano* (2007) 42 Cal.4th 644, 663 (cleaned up)) (explaining abuse of discretion standard). Indeed, the trial court's decision was manifestly correct.

A. DOJ's Disclosure Of Plaintiffs' PII Violates Their Right To Privacy Under The California Constitution.

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

1. Plaintiffs Have A Legally Protected Privacy Interest In The PII Collected In AFS and the Ammunition Purchase Records File.

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

and telephone numbers" and "a substantial interest in the privacy of their home"). The Opening Brief does not dispute this.

2. Plaintiffs Have A Reasonable Expectation Of Privacy In Their PII Transmitted To DOJ For Law Enforcement Purposes.

Plaintiffs have an objectively reasonable expectation of privacy in the PII they must turn over to DOJ for confidential storage in AFS and the Ammunition Purchase Records File. Individuals purchasing or transferring firearms and ammunition had a reasonable expectation that the information provided to and collected by DOJ in the course of a transaction would not be disclosed outside the government or used for non-law-enforcement purposes. AFS includes a wealth of information that most Californians undoubtedly consider highly personal (like fingerprints, home addresses, and driver's license numbers). But AFS goes beyond just capturing a snapshot of such personal information, it represents a compilation of information over time: An individual's AFS record contains their entire history of firearm and ammunition transactions—so disclosure also reveals the subject's past addresses and, to a certain extent, their associations (by showing the personal information of every person who engaged in a firearm or ammunition transaction with the subject).

Under *Hill*, a "privacy claimant must possess a reasonable expectation of privacy under the particular circumstances," and a "'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms." *Pioneer Elecs. (USA), Inc. v. Super. Ct.* (2007) 40 Cal.4th 360, 370–71 (quoting *Hill*, 7 Cal.4th at 36, 37). "The reasonableness of a privacy expectation depends on the surrounding context," and "'customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy.'" *Cnty. of Los Angeles*, 56 Cal. 4th at 927 (quoting *Hill*, 7 Cal.4th at

36). And "the presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant." *Hill*, 7 Cal.4th at 37. Finally, the California Supreme Court has observed that, while a longstanding practice of disclosure may diminish an expectation of privacy where such practice "was clear and served to put individuals on notice," the Court has "never held 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*, 8 Cal.5th at 777–78.

a. The California Supreme Court's Decisions Show The Reasonableness Bar Is Low When It Comes To Sharing PII.

Three of the California Supreme Court's leading privacy cases permitting the disclosure of personal contact information offer a useful contrast to AB 173's mandatory disclosure-for-research regime. The first is *Pioneer Electronics*, where the Court considered the discoverability of nonparty contact information in a consumer class action case. 40 Cal.4th 360 (2007). Plaintiffs sought discovery of other customers who had filed complaints with the company about defective DVD players. *Id.* at 363–65. The Court concluded that, under the circumstances, the complaining customers did not have a reasonable expectation that their information would be shielded from discovery in the class action absent their affirmative consent:

> Pioneer's complaining customers might reasonably expect to be notified of, and given an opportunity to object to, the release of their identifying information to third persons. Yet it seems unlikely that these customers, having already voluntarily disclosed their identifying information to that company in the hope of obtaining some form of relief, would have a reasonable expectation that such information would be kept private and withheld from a class action plaintiff who possibly seeks similar relief for other Pioneer customers, *unless the customer*

> *expressly consented to such disclosure.* If anything, these complainants might reasonably expect, and even hope, that their names and addresses would be given to any such class action plaintiff.

Id. at 372 (italics in original).

Next, in *County of Los Angeles*, *supra*, the Court considered the disclosure of public employees' contact information to a public employee union that the employees had refused to join. 56 Cal.4th 905. After concluding that "home contact information is generally considered private," the Court held that nonmembers had a reasonable but "reduced" expectation of privacy because of the "common practice" of public employers to share contact information with unions in particular circumstances. 56 Cal.4th at 927, 928–29. The Court observed that nonmembers provided their information "for the limited purpose of securing employment," and therefore could "reasonably expect that the employer will not divulge the information outside the entity except in very limited circumstances." *Id.* at 927–28; *see id.* at 928 (noting that employers may be required to share contact information with government agencies or to "banks or insurance companies" concerning employee benefits).[9] The Court also remarked that the disclosure posed a "more significant privacy invasion" than in *Pioneer* because nonmembers had "chosen not to join [the union] and have declined in the past to give their contact information." *Id.* at 930; *see also id.* (highlighting

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[9] The Court ultimately held that the union's duty of fair representation to all employees (including nonmembers) justified the privacy invasion because direct communication with nonmembers was essential. 56 Cal.4th at 931. Following *Pioneer*, the Court assumed that sharing nonmembers' contact information with the union promoted their interests, while nonmembers suffered only a "mild" privacy intrusion based on the "common practice of disclosure [of home contact information to unions] in other settings." *Id.* at 932. But the Court was careful to highlight that the "balance might, in some cases, tip in favor of privacy when an individual employee objects and demands that home contact information be withheld." *Id.* at 932.

the notice and opt-out procedure in *Pioneer* that "mitigated any privacy invasion").

Finally, in *Williams* the Court extended *Pioneer*'s logic to permit discovery of employee contact information in wage-and-hour class action cases, concluding that employees did not have a reasonable expectation that their home contact information would not be shared in that particular context. 3 Cal. 5th at 554–55. The Court acknowledged that "absent employees have a bona fide interest in the confidentiality of their contact information," but then stressed that, as in *Pioneer*, it was unlikely that "employees would expect that information to be withheld from a plaintiff seeking to prove labor law violations committed against them and to recover civil penalties on their behalf." *Id.* at 554. In other words, it was objectively reasonable to conclude that people don't expect their contact information to be kept private when disclosure enhanced the opportunity for them to recover money.

b. Plaintiffs Easily Satisfy The Low Reasonableness Bar.

The principles in these cases cut precisely the opposite way here to confirm that Plaintiffs' expectation of privacy in far more than just their contact information is objectively reasonable. Unlike a consumer who complained about a defective product and stood to gain in a consumer class action, or an aggrieved employee who might profit from class-action litigation, the circumstances here show that gun owners would not possibly have an expectation that their private data would be shared with these research institutions. Disclosure does not directly benefit them (as in a class action settling like *Pioneer* and *Williams*, or in a collective bargaining setting like *County of Los Angeles*); disclosure is being made for a purpose different from why it was collected; and in any event, there is zero basis in law or logic to think that firearm owners would expect their confidential data would be used to make them research subjects to promote reduced access to firearms.

Plaintiffs obviously have a reasonable expectation that their private information would not be disclosed in these circumstances.

Beyond these big-picture points, the reasonableness of Plaintiffs' expectation that their private information will be kept private by DOJ is confirmed by 25 years of assurances in Penal Code section 11106 that their data would, in fact, be kept confidential by DOJ and could only be shared within the government for law enforcement purposes only. DOJ itself doubled down on these assurances in their privacy disclosures. RA at 21 & 26. This expectation was bolstered by the voters' enactment of Proposition 63 in 2016, which explicitly provided that personal information collected by DOJ for ammunition transactions "shall remain confidential and may be used . . . only for law enforcement purposes." Penal Code § 30352(b)(2). This "long-standing and consistent practice" restricting the use of PII collected for firearm and ammunition transactions to law enforcement purposes supports Plaintiffs' reasonable expectation that their information would *not* be used for unrelated purposes. *Cnty. of Los Angeles*, 56 Cal.4th at 927–28.

And the fact that Plaintiffs were given no notice or opportunity to consent or refuse before their PII was shared with researchers further underscores the reasonableness of their expectation. *See Hill*, 7 Cal.4th at 37 (the "presence or absence of opportunities to consent voluntarily" affects privacy expectations). Notice and consent are key to ameliorating privacy concerns and provide context to evaluate privacy expectations in a given setting. *See, e.g.*, *Pioneer*, 40 Cal.4th at 372 (evaluating consumers' privacy expectations and observing that "complaining customers might reasonably expect to be notified of, and given an opportunity to object to, the release of their identifying information to third persons"); *Cnty. Of Los Angeles*, 56 Cal.4th at 930 (highlighting the notice and opt-out procedure in *Pioneer* that "mitigated any privacy invasion"); *id.* at 932 (noting that the privacy balance might tip against disclosure "when an individual employee objects and

demands that home contact information be withheld"). But here, there were no safeguards in place to provide affected individuals of notice that their PII would be shared, let alone an opportunity to consent or object. This fact heightens Plaintiffs' expectation of privacy in a setting where the government requires the submission of PII as a condition on exercising a constitutionally protected right.

In sum, case law, the statutory structure preceding AB 173, the lack of notice and opportunity to consent, and the drastically different use of the data compared to the purpose for which it was collected, all confirm that Plaintiffs have a reasonable expectation of privacy in their PII.

c. DOJ's Arguments Cannot Undermine The Reasonable Expectation Of Privacy Here.

DOJ advances two related arguments as to why Plaintiffs' expectation of privacy in their PII is supposedly unreasonable. *First*, DOJ argues that it had "already provided information" to researchers before the passage of AB 173. AOB 25. But DOJ's past practice—which was done without statutory authorization and without notice to gun owners—cannot override Plaintiffs' constitutional rights.[10] "[I]t plainly would defeat the voters' fundamental purpose in establishing a *constitutional* right of privacy if a defendant could defeat a constitutional claim simply by maintaining that statutory provisions or past practices that are inconsistent with the constitutionally protected right eliminate any 'reasonable expectation of privacy' with regard to the constitutionally protected right." *Lungren*, 16 Cal.4th at 339 (plurality op. of George, C.J.) (emphasis in original); *accord Mathews*, 8 Cal.5th at 778 (the Court "[has] never held that the existence of a long-standing practice or

[10] DOJ feigns a straight face by acknowledging that "[t]here is some dispute over whether the law as it existed before AB 173 authorized (and required)" DOJ to provide PII to researchers. AOB 25. Even if the Court indulges DOJ on this point, *Lungren* confirms that it is immaterial.

requirement of disclosure can, by itself, defeat a reasonable expectation of privacy in the circumstances.").

In any event, the 2016 legislation establishing the Center plainly did not require DOJ to share all information in AFS with researchers. As originally enacted, the law explicitly tied agencies' data-sharing obligations to existing statutory restrictions:

> Subject to the conditions and requirements established elsewhere in statute, state agencies, including, but not limited to, the Department of Justice, the State Department of Public Health, the State Department of Health Care Services, the Office of Statewide Health Planning and Development, and the Department of Motor Vehicles, shall provide to the center, upon proper request, the data necessary for the center to conduct its research.

Penal Code § 14231(c) (West 2016). Contrary to DOJ's position in this appeal, then, this restriction necessarily included the pre-existing limitation on using AFS for law enforcement purposes as set forth above. This express limitation provides context for DOJ's refusal to provide PII in AFS to the Center, which sparked the dispute that culminated in AB 173.

Second, DOJ argues that gun owners can't have a reasonable expectation of privacy because "massive amounts of information regarding firearm use and ownership" has, for years, been "collected, maintained, and used by various government agents for various purposes in the service of public safety." AOB 26–27. DOJ asserts that this "custom" and "practice" of collecting confidential information "for use by state and local government agents" provides context that "'inhibit[s] reasonable expectations of privacy' here." *Id*. at 27 (citing *Hill*, 7 Cal.4th at 36).

This gloss on the 25-year legal regime wholly ignores that the collection of gun owners' private data had always been made with the assurance in the law that the confidential information would *not* be used for whatever "public safety" purpose the Legislature might someday think of.

Rather, it was collected with the express assurance in the law that it would be shared only for law enforcement purposes. Penal Code § 11106(a)(1). And the "government agents" that could receive and "use" the private information were law enforcement personnel *within the government*, not third party "researchers." Penal Code § 11105 (identifying state law enforcement officials who may request AFS information).

The supposed examples DOJ cites to support its "custom" and "practice" argument prove Plaintiffs' point. DOJ cites the statutes governing the Armed Prohibited Person System's Prohibited Armed Persons File (Penal Code § 30000, AOB 12), a government database maintained for a quintessential law enforcement purpose: It is "a highly sophisticated investigative tool that provides law enforcement agencies" a method "to identify criminals who are prohibited from possessing firearms."[11] DOJ also cites a similar statute establishing a database of individuals who are prohibited from possessing firearms based on their mental health records (Welf. & Inst. Code § 8105, AOB 13). This database likewise aids law enforcement in tracking the possession of firearms by unauthorized persons. Finally, DOJ cites the State's compilation and tracing of firearms that are "illegally possessed" or are tied to criminal activity (Penal Code § 11108.3, AOB 13). This database, too, is explicitly tied to criminal law enforcement. None of these examples aid DOJ's argument that responsible, law-abiding Californians lack an expectation of privacy in the PII they must hand over to the DOJ when purchasing a firearm.

DOJ concludes by downplaying AB 173 for imposing "only an incremental change" to the government's information-sharing practices. AOB 27. But of course it would defy the plain intent of the constitutional

[11] Cal. Dep't of Justice, Bureau of Firearms, https://oag.ca.gov/careers/descriptions/firearms.

right to privacy to allow the government to overcome privacy expectations by engaging in precisely the sort of conduct that the Privacy Initiative sought to protect against. As explained above, the Supreme Court has rejected this sort of reasoning. *Lungren*; 16 Cal.4th at 339; *Mathews*, 8 Cal. 5th at 778.

Indeed, DOJ's litigation position that Plaintiffs had no reasonable expectation of privacy in their PII cannot be squared with its statements of regret following the June 2022 data breach of virtually identical personal information for holders of concealed carry permits. Attorney General Bonta acknowledged that the "unauthorized release of personal information was unacceptable," and that it "was more than an exposure of data, it was a breach of trust that falls far short of my expectations and the expectations Californians have of our department." Cal. Dep't of Justice, Press Release, *California Department of Justice Releases Results of Independent Investigation of Firearms Dashboard Data Exposure* (Nov. 30, 2022), https://bit.ly/41UrPOu. Five months after the breach, the Attorney General said he "remain[ed] deeply angered that this incident occurred and extend[ed his] deepest apologies . . . to those who were affected." *Id*.

If, as DOJ now argues, Plaintiffs have no reasonable expectation in the privacy of the same type of PII, what was there to apologize for? Here, the forced disclosure of Plaintiffs' PII to make them the research subjects of hostile social scientists for years to come is far *worse* than an accidental data leak. It hardly "falls outside the bounds of reason under the applicable law" to conclude that Plaintiffs have a reasonable expectation of privacy in the PII they had to disclose to DOJ.

3. Sharing Personal Identifying Information In AFS And The Ammunition Purchase Records File Is A Serious Invasion Of Plaintiffs' Privacy.

AB 173 mandates a serious privacy invasion. Researchers now get access to PII that they actively use, mine, manipulate, and link to other

databases to develop dossiers about gun owners—and then "follow" them for years. Strangers at the Center—and other "bona fide" researchers—will now know intimate details about millions of law-abiding Californians who were given no advance notice that their personal information would be used to make them research subjects; to the contrary, they were assured by California law that their private information could only be used for law enforcement purposes. Adding insult to injury, the lack of advance notice is paired with no opportunity to opt out. This is a serious privacy invasion.

The Opening Brief tries to diminish the privacy violation by arguing that the PII is "only" being shared with researchers and those researchers must follow certain procedures when using the data. AOB 28. This argument fails for several reasons:

- First, the "seriousness" "'element is intended simply to screen out intrusions on privacy that are de minimis or insignificant.'" *Lungren*, 16 Cal.4th at 339 (plurality op. of George, C.J.) (citation omitted); *Lewis*, 3 Cal.5th at 571 (same). *Hill*'s "elements do not eliminate the necessity for weighing and balancing the justification for the conduct in question against the intrusion on privacy resulting from the conduct in any case that raises a genuine, *nontrivial* invasion of a protected privacy interest." *Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 999 (citation omitted) (emphasis added). For the many reasons shown above, Plaintiffs' interest in shielding disclosure to the social science researchers here cannot possibly be dismissed as de minimis or "trivial."

- Furthermore, Justices Liu and Kruger rejected DOJ's argument when they explained that internal protocols limiting public disclosure do not eliminate the "seriousness" of disclosure and use of private information: "Although such protective measures may limit the extent of privacy invasion, they do not render an intrusion de minimis for purposes of this threshold inquiry." *Lewis*, 3 Cal.5th at 581 (Liu, J., joined by Kruger, J., concurring).

- While DOJ's initial disclosure of PII is a privacy violation, the constitutional violation is not simply "complete" at the moment the data is sent. Plaintiffs are suffering an ongoing privacy violation so long as researchers use PII and mine it for their projects. The researchers' active use of the data to "follow" the research subjects for years strongly confirms the "seriousness" of the privacy invasion. Such "sophisticated analyses of curated information as to a particular person" constitutes a serious invasion of privacy. *Lewis*, 3 Cal.5th at 581 (Liu, J., joined by Kruger, J., concurring); *see also U.S. Dep't of Just. v. Reps. Comm. For Freedom of Press* (1989) 489 U.S. 749, 766, 765 (noting in the FOIA context "that a strong privacy interest inheres in the nondisclosure of compiled computerized information" because of the "power of compilations to affect personal privacy that outstrips the combined power of the bits of information contained within").

- DOJ downplays the seriousness of the privacy violation by emphasizing that researchers are careful to safeguard the PII they are provided. AOB 31–32. The number of researchers or internal controls "do not obviate constitutional concerns as privacy interests are still implicated when the government accesses personal information without disseminating it." *Lewis*, 3 Cal.5th at 577; *see id.* at 581 (Liu, J., joined by Kruger, J., concurring) ("Although . . . protective measures may limit the extent of privacy invasion, they do not render an intrusion de minimis for purposes of this threshold inquiry.").

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

unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes").

- DOJ spends an entire page of their brief bolstering the credentials of Dr. Wintemute and Dr. Barnhorst and objecting to Plaintiffs' "denigrating" them for accurately describing them as "anti-gun activists" who seek to limit gun rights. AOB 29–30; *cf*. AA at 14–15, RA at 33 and 41–42.[12] It should go without saying that handing Plaintiffs' PII to social scientists who oppose their rights is a "nontrivial" invasion of privacy. Even when dealing solely with home contact information, the California Supreme Court has held that disclosure is a "serious" invasion of privacy when the disclosure is inconsistent with the purpose a party supplied the information in the first place and does not clearly further the party's interest. *Cnty. Of Los Angeles*, 56 Cal.4th at 929–30. The absence of notice and the opportunity to opt out only cements this conclusion. *See id.* at 930; *Pioneer Electronics*, 40 Cal.4th at 372–73.

- DOJ dismisses Plaintiffs' concerns that disclosure could lead to "unwanted contact" by researchers as "hypothetical." AOB 30–31. This cannot be squared with the California Supreme Court's approach in *County of Los Angeles*, where it recognized the "privacy interest in avoiding unwanted communication," 56 Cal.4th at 927, and held that the disclosure of just contact information is sufficiently "serious" to support a constitutional claim. *Id.* at 929–30 (citing and quoting *U.S. Dep't of Def. v. Fed. Labor Relations Auth.* (1994) 510 U.S. 487, 501 (non-union employees "have some

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[12] Dr. Barnhorst, for instance, took to Twitter following the Kyle Rittenhouse trial to attack gun owners as violent people who blindly believe "pervasive myths that guns keep people safer" and follow "vigilante / militia culture that encourages ordinary citizens to take up arms to 'protect' themselves and others." RA at 42, https://bit.ly/3v3Emkq. Dr. Wintemute's "research" has claimed that the increase in gun purchases during the pandemic posed a threat to American democracy. RA at 33.

nontrivial privacy interest in nondisclosure, and in avoiding the influx of union-related mail, and, perhaps, union-related telephone calls or visits, that would follow disclosure")). The same prospect of unwanted contact exists here: Contacting individuals is entirely consistent with the broad statutory mandate of "research." DOJ's claim that researchers have not yet done so, AOB 30–31, does not eliminate the concern recognized in *County of Los Angeles*.[13]

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

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

Because Plaintiffs have satisfied the threshold inquiry, the Court must engage in a balancing test that weighs DOJ's asserted countervailing interest against the magnitude of the privacy invasion. "The party seeking information may raise . . . whatever legitimate and important countervailing interests disclosure serves, while the party seeking protection may identify feasible alternatives that serve the same interests or protective measures that would diminish the loss of privacy." *Williams*, 3 Cal. 5th at 552. The Court then "balance[s] these competing considerations." *Id.* Under this test, the question here is only whether the trial court abused its "broad discretion," *Pioneer Electronics*, 40 Cal.4th at 371, with its balancing decision.

By its very nature, the abuse-of-discretion review of a preliminary injunction ruling precludes DOJ's effort to rehash evidence that was presented to the trial court: Arguments that "reweigh" evidence are "irrelevant" in a preliminary injunction appeal. *Am. Acad. of Pediatrics v. Van de Kamp* (1989) 214 Cal.App.3d 831, 839; *Loy v. Kenney* (2022) 85

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[13] Dr. Wintemute refused to rule it out below. He stated only that the Center "has never conducted this sort of research," and oddly went on to state that "to my knowledge, neither I nor any other researcher at the center has any intention to do so." AA at 226 (Wintemute Decl., ¶ 61).

Cal.App.5th 403, 406 (an appellate court "draw[s] inferences in favor of the [preliminary injunction] order" and "do[es] not reweigh evidence"). Specifically, "[w]here the evidence with respect to the right to a preliminary injunction is conflicting, the reviewing court must 'interpret the facts in the light most favorable to the prevailing party and indulge in all reasonable inferences in support of the trial court's order.'" *Van de Kamp*, 214 Cal.App.3d at 838 (citation omitted). And "[w]here . . . there is evidence which supports the trial court's determination, it is of no import that there is evidence which conflicts with it." *Id.* at 839.[14]

Remarkably, DOJ makes a second plea for legislative deference in the balancing test. AOB 34–35. This is doomed by controlling Supreme Court precedent as explained in Section I. *See Lungren*, 16 Cal.4th at 348–50 (plurality op. of George, C.J.); *Mathews*, 8 Cal.5th at 786–87.[15]

Even if the Court reviews the competing evidence in the balance here, it is not possible to conclude that the trial court's decision "falls outside the bounds of reason under the applicable law and the relevant facts." *Roth*, 15 Cal.App.5th at 290.

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[14] On this point, the scope of the injunction (AA at 431) and the ruling itself (AA at 436–37) confirms that the trial court reviewed DOJ's and Plaintiffs' competing evidence and arguments and entered an injunction directed at minimizing the interim harm to Plaintiffs' privacy interests.

[15] The Court's analysis in both *Lungren* and *Mathews* expressly considered and rejected the same line of authority DOJ repeats in its Opening Brief here, when it argues that courts should not "reweigh legislative facts." AOB 34 (quoting *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, and citing *Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676).

1. AB 173 Takes PII Shared For One Purpose And Requires It To Be Shared For A Different Purpose Altogether—A Purpose That Plaintiffs Actively Oppose.

The California Supreme Court stressed in *Hill* that "[t]he right of privacy . . . prevents government . . . from misusing information gathered for one purpose in order to serve other purposes." 7 Cal.4th at 17 (quoting ballot argument). That is exactly what is happening here: As shown above, DOJ collects the information in AFS and the ammunition database for use in criminal or civil investigations. *See* Penal Code § 11106(a)(1) (AFS information compiled "to assist in the investigation of crime, the prosecution of civil actions . . . , [and] the arrest and prosecution of criminals"); Penal Code § 30352(b)(1) (ammunition records database "shall remain confidential" and "may be used . . . only for law enforcement purposes"). Yet AB 173 requires DOJ to share this information for another purpose (research) and directs DOJ to share it with private third parties for that different use. This strikes at the heart of one of the "principal mischiefs" the Privacy Initiative sought to address: "the improper use of information properly obtained for a specific purpose" and then used "for another purpose" or disclosed to "some third party." *White*, 13 Cal.3d at 775; *accord Lewis*, 3 Cal.5th at 569.

Again, compare this disclosure to the disclosures of contact information that survived the balancing tests in *Pioneer Electronics*, *County of Los Angeles*, and *Williams*. In each of those cases, the Supreme Court tolerated privacy invasions principally because they *furthered* the interests of the individuals whose data was being disclosed. *Pioneer Electronics*, 40 Cal.4th at 372 (disclosure furthered consumers' interests in resolving complaints about defective products); *Cnty. of Los Angeles*, 56 Cal.4th at 931–32 (sharing nonmembers' contact information with union promoted the employees' interests); *Williams*, 3 Cal.5th at 553–54 (permitting discovery

of employees' contact information in wage-and-hour class action that could benefit them financially). And in each case, there was a nexus between the individual and the purpose of the disclosure that reduced the magnitude of the privacy invasion (*e.g.*, a consumer or employee relationship), and the private information was either voluntarily provided or the individuals had notice and the opportunity to opt-out.

This case is radically different. The millions of gun owners in AFS have no connection whatsoever to the social scientists who want to use their PII to make them research subjects. And that use is entirely divorced from the purpose it was provided to DOJ in the first place. Whereas the Court concluded in *Pioneer* and *Williams* that the facts suggested the plaintiffs would have *wanted* their information disclosed, here the Plaintiffs actively and vigorously oppose having their confidential information used in an effort to justify limitations on firearms rights.

And of course, there are a host of subsidiary issues that mark this case as different from the limited disclosures of private information the California Supreme Court has tolerated in the past: The privacy intrusion is far more severe than sharing just contact information. There is no analogous program or other custom or practice that could have possibly caused Plaintiffs to suspect that their personal data could be disclosed for these purposes. And Plaintiffs were not notified of the potential disclosure or given the opportunity to opt out. In short, the core factors that mitigated privacy concerns in the Court's previous cases are absent here.

2. AB 173's Privacy Intrusion Is Significant And Compounded By Researchers' Ongoing Use Of Plaintiffs' PII.

The scope of a privacy violation is significant. AFS and the Ammunition Purchase Records File contain a vast amount of detailed PII that AB 173 requires DOJ to share with outside researchers who compound the

privacy violation by linking it with other data and then "following" gun owners for years. *Lewis*, 3 Cal.5th at 581 (Liu, J., joined by Kruger, J., concurring); *accord U.S. Dep't of Just. v. Reps. Comm. For Freedom of Press*, 489 U.S. at 765–66. The aggregation and compilation of PII and its subsequent use by researchers compounds the privacy violation mandated by AB 173.

3. The Government's Involvement Tilts The Scales In Plaintiffs' Favor.

The flow of information from the government to private researchers here is important. *Hill* stressed that "[j]udicial assessment of the relative strength and importance of privacy norms and countervailing interests may differ in cases of private, as opposed to government, action." 7 Cal.4th at 38. Importantly, "the pervasive presence of coercive government power in basic areas of human life typically poses greater dangers to the freedoms of the citizenry than actions by private persons." *Id*. So where, as here, "a public or private entity *controls access to a vitally necessary item*, it may have a correspondingly greater impact on the privacy rights of those with whom it deals." *Id*. at 39 (emphasis added). California conditions exercise of the fundamental constitutional right to purchase firearms on disclosing PII to DOJ—and now that data is being distributed to private researchers (opposed to the gun owners' choices) with no opportunity to consent. Plaintiffs are not "able to choose freely among competing public or private entities in obtaining access" to the exercise of this right, so *Hill* instructs that the government faces a steeper burden in the balancing test. *Id.* at 39.

4. DOJ's Claim That This Private Research Is Socially Important Cannot Outweigh The Social Importance Of Promoting The Constitutional Right To Privacy.

DOJ's sole argument on its side of the balance is that firearms research is an important social good. AOB 40–43. It spends several pages arguing that

researchers have already conducted multiple studies using gun owners' PII, that this research has spawned more research, and the researchers desperately want that flow of information to continue for future (as-yet-unidentified) research projects. A closer look at AB 173's regime, however, demonstrates why the balance cannot tip in favor of continued disclosure here.

DOJ acknowledged below that "[l]egitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is *determined by their proximity to the central functions of a particular public or private enterprise*." AA 47 (Prelim. Inj. Opp., 18:23–26 (citing *Hill*, 7 Cal.4th at 38 (emphasis added))). Here, DOJ is disclosing millions of Californians' private data in the name of "research," but DOJ cannot (and does not) claim that social science research is remotely "proximate" to a "central function" of the State government. The State Constitution does enumerate an individual right of privacy in in Article I, § 1. But the State Constitution nowhere identifies "research" as a function of either the Legislature (in Article III), or the executive branch (in Article IV, including the Attorney General's powers in § 13). Indeed, the State itself is not even doing the research here; rather, it's handing Plaintiffs' confidential data over to third-party researchers for private projects.

The private nature of AB 173's research regime is fatal to the interest-balancing for a related reason: The record reveals that these private researchers are using Plaintiffs' private data to make millions of dollars. *See*, *e.g.*, AA at 127–138 (Webster Decl., Ex. 1, pp. 27–38 (describing projects with several million dollars of funding)); AA at 223 (Wintemute Decl., ¶ 46 (noting need for "[g]ranting agencies" to "transfer funds" before work starts)). Indeed, Dr. Wintemute admits that *AB 173 was his idea*—he went to the Legislature and demanded a change in law when DOJ refused to continue providing PII over the very privacy concerns giving rise to this case. AA at 214–15 (Wintemute Decl., ¶ 14). Even if Dr. Wintemute is to be believed

that he is entirely neutral when it comes to gun-rights ideology, he does not (and cannot) deny that millions of dollars of funding for his Center's research hinge on the future flow of the private information at issue here. The researchers' undisputed commercial interest cannot possibly overcome the enumerated constitutional right to privacy.

Finally, for all of DOJ's urging that this research is critically important, it must be stressed that there is no evidence in the record that any of the past studies using PII have resulted in a single tangible public policy change or otherwise enhanced public safety.[16] These putative—but still wholly-unrealized—public policy gains cannot suffice to outweigh the tangible harm to the privacy interests of millions of California gun owners.

5. There Are Feasible Alternatives That Could Reduce Or Avoid The Privacy Intrusion.

Although this Court does not need to reach the question whether Plaintiffs have proposed viable alternatives when, as here, the government's asserted interest does not justify the privacy invasion, Plaintiffs nevertheless identified two alternatives below for the State to achieve its interests that have a lesser impact on privacy interests. *Sheehan*, 45 Cal.4th at 998 (plaintiff can rebut an intruder's justification by "demonstrating the availability and use of protective measures, safeguards, and alternatives . . .

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[16] DOJ claims based on Professor Webster's declaration that DOJ's providing individual-level information has helped answer "many important research questions." AOB 39. The core relevant conclusion in Professor Webster's declaration is that collecting individual-level data through surveys is costly and complicates research efforts (because surveys are less accurate than the information compiled by the government). AA at 89–90 (Webster Decl., ¶ 14). Survey data is only one method of obtaining information: Plaintiffs have proposed that individuals be given notice and the opportunity to opt out of (or opt in to) disclosure, an alternative Professor Webster dismisses in part because this privacy-preserving method would be "widely promoted by opponents of gun regulations." AA at 96 (Webster Decl., ¶ 27).

that would minimize the intrusion on privacy interests") (quoting *Hill*, 7 Cal.4th at 38). At the very least, individuals should be given notice of each data request and provided an opportunity to opt out of (or opt in to) having their information shared with researchers. *See Hill*, 7 Cal.4th at 36, 37; *Pioneer*, 40 Cal.4th at 373–74; *Williams*, 3 Cal.5th at 555. In addition, DOJ could restrict sharing of PII by implementing protective procedures that anonymize or de-identify data shared with researchers.[17] This could include, for example, assigning subject codes in lieu of sharing names, driver's license or identification card numbers, or using other unique identifiers; and using higher-level geographic data (such as ZIP Codes or city- or county-level data) in lieu of home addresses.

DOJ responded below that these alternatives don't work because researchers want as much data as possible, and research will be marginally more difficult and less robust if they don't get all of this information. AA at 81–82. But that will always be the case with policy research (especially for-profit policy research): Unlike other situations where private information fulfills a narrow purpose,[18] public policy researchers will always want to gather as much data as possible to conduct ever more research. Indeed, there is no limiting principle to the State's theory. DOJ's reliance on the huge number of studies already conducted—and the limitless appetite for more studies—proves Plaintiffs' point: Activist gun researchers would surely like to gather government data about gun owners' financial condition and health

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[17] *See, e.g.*, RA 166, Garfinkel, U.S. Dep't of Commerce, Nat'l Inst. of Standards & Tech., *De-Identification of Personal Information* 15–16, 19–21 (2015) (discussing methods of deidentifying structured datasets).

[18] *E.g.*, *Pioneer*, 40 Cal.4th at 372 (disclosure of voluntarily provided contact information furthered consumers' interests in resolving complaints about defective products); *Cnty. of Los Angeles*, 56 Cal.4th at 931–32 (sharing nonmembers' contact information with union promoted the employees' interests).

too. If all that was required to justify a law compelling such disclosures is a declaration from a Ph.D. that his research would be worse without the data, the constitutional right to privacy is meaningless.

Finally, if the State believes this research is important, the Legislature could authorize DOJ's Bureau of Firearms to hire its own researchers to conduct studies in house, thereby at least reducing the scope of the privacy violation here.[19] The State's efficiency interest in offloading this research to an outside organization cannot justify the privacy incursion.

IV. The Balance Of Harms Favors Preserving Plaintiffs' Constitutional Rights.

The trial court correctly determined that the balance of harms favored Plaintiffs when granting injunctive relief. Plaintiffs face a certain, significant, imminent, and repeated privacy intrusion by DOJ's sharing of personal identifying information with the Center and other researchers. Such disclosure deprives millions of Californians of "the ability to control circulation of personal information," which is "[f]undamental to our privacy." *Mathews*, 8 Cal.5th at 769.

Precisely because the disclosure of personal information cannot be compensated by monetary damages, courts across the country have long recognized that such privacy violations constitute irreparable harm justifying injunctive relief.[20] To that same end, the federal courts recognize that "an

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

[20] *See, e.g.*, *Airbnb, Inc. v. City of New York* (S.D.N.Y. 2019) 373 F.Supp.3d 467, 499 ("disclosure of private, confidential information 'is the quintessential type of irreparable harm that cannot be compensated or undone by money damages'"); *Maxcrest Ltd. v. United States* (N.D. Cal. Nov. 7, 2016) 2016 WL 6599463 at *4 (harm to plaintiff's "privacy interests would be irreparable . . . once that information has already been divulged");

alleged constitutional infringement will often alone constitute irreparable harm." *Monterey Mech. Co. v. Wilson* (9th Cir. 1997) 125 F.3d 702, 715 (citation and quotation marks omitted).

The prospect of harm over and above the harm associated with the initial disclosure and use is all the more evident given the DOJ's recent history of mishandling similar confidential information. The United States Supreme Court's decision in *Americans for Prosperity Foundation v. Bonta* (2021) 141 S.Ct. 2373, highlighted these risks. In *Bonta*, charitable donors argued that mandated disclosure *to the DOJ itself* (not a third party) of their name, contact information, and donation amounts violated their First Amendment associational rights. The State's vague law enforcement justifications for collecting the information did not justify the disclosure requirements' chilling effect, and DOJ's assurances that it could keep the information confidential "r[a]ng hollow" in light of several data breaches. *Id.* at 2388 n.*.

And of course, DOJ caused a massive data breach that leaked PII from the state's firearm databases. DOJ tries to minimize this "data exposure incident," and spin it into a positive by claiming that the resulting investigation will somehow "strengthen" DOJ's data security practices. AOB 41–42. But this ignores the fundamental privacy issues at stake: Even if DOJ didn't have a history of significant data leaks, Plaintiffs' privacy—and the privacy of millions of Californians—is violated by the disclosure of their PII to researchers and the researchers' use of that information, even when those researchers do not leak the PII to the public.

On the other side of the balance, the interim harm to the government's research interest is nonexistent, particularly given the scope of the injunction:

McDonell v. Hunter (8th Cir.1984) 746 F.2d 785, 787 (recognizing that violation of federal privacy rights constitutes irreparable harm).

The trial court rejected Plaintiffs' request that DOJ retrieve PII from prior disclosures to researchers. The preliminary injunction order does not impact ongoing research projects. DOJ is only barred during the case from disclosing PII for potential new projects, if any even come to fruition (the record reveals that only two such potential projects are "in . . . discussion." AA at 221 (Wintemute Decl., ¶ 40). The record contains no evidence that new research projects are ready and waiting to commence but have been put on hold because of the injunction. Indeed, the record reveals that many of the research projects last for several years. *See* AA at 215–216 (Wintemute Decl., ¶ 17 (describing "linking" records and "following" individuals over time)), AA at 152–153 (Studdert Decl., ¶¶ 6–9 (describing background of the LongSHOT study)). These long-term research projects do not spring up every few weeks or even months.

Thus, DOJ's lone balance-of-harms argument—that "crucial research" will "come[] to a halt as a result of the trial court's injunction," AOB 40—is flat wrong. The ongoing research projects will not be disrupted or damaged in the slightest, because all of the PII previously transferred remains with the researchers. All existing research projects using previously-disclosed PII are continuing. And because the injunction maintained, rather than upset, the status quo, disturbing that state of affairs while the case continues would jeopardize the privacy rights of the millions of Californians with PII in AFS and the Ammunition Purchase Records File.

Given the disparity in potential harm between the parties, the trial court was required to grant an injunction to preserve Plaintiffs' privacy interests: Courts "must exercise [their] discretion 'in favor of the party most likely to be injured,'" and "[i]f the denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction." *Robbins*, 38 Cal.3d at 205 (citation omitted).

CONCLUSION

For the reasons stated above, the Court should affirm the trial court's order granting a preliminary injunction.

Respectfully submitted,

Dated: March 23, 2023

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CERTIFICATE OF COMPLIANCE

Pursuant to rules 8.204(c)(1) of the California Rules of Court, I certify that the text of this brief consists of 13,308 words as counted by the Microsoft Word program used to generate the brief.

Dated: March 23, 2023

By: s/ Bradley A. Benbrook
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DECLARATION OF SERVICE

I am over the age of 18 and not a party to this cause. I am employed in the county where the mailing occurred. The following facts are within my first-hand and personal knowledge and if called as a witness, I could and would testify thereto. My business address is 701 University Avenue, Suite 106, Sacramento, CA 95825. On March 23, 2023, I served the foregoing documents entitled:

1. Respondents' Brief
2. Respondents' Appendix

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

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

Executed on March 23, 2023.

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