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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JANE DOE, et al., Plaintiffs, **v.** **ROB BONTA, in his official capacity as Attorney General of the State of California,** Defendant.	3:22-cv-00010-AJB-DEB **DEFENDANT'S OPPOSITION TO PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER** Date: January 19, 2022 Time: 10:00 a.m. Courtroom: 4A Judge: The Hon. Larry A. Burns Action Filed: 1/5/2022

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INTRODUCTION

The California Legislature enacted Assembly Bill 173 (2021-2022 Reg. Sess.), 2021 Cal. Stat., ch. 253, to promote research into firearms violence and suicide. The law clarifies the process by which the California Department of Justice may provide criminal justice information to researchers. Without identifying any cause for urgency, five anonymous plaintiffs are asking to put that law on hold because they are concerned about public disclosure of their name, address, and date of birth. This Court should deny their unnecessary emergency request for the following reasons:

Undue Delay. Plaintiffs waited until 78 days after AB 173 went into effect to request a TRO. No reason for the delay is offered in their application. That ponderous filing suggests that Plaintiffs were more interested in gaining a litigation advantage than stopping any imminent irreparable harm.

No Irreparable Harm. Plaintiffs have identified no irreparable harm that they will experience unless the Court issues TRO. They purport to worry about public disclosure of their personal information. But AB 173 expressly prohibits public disclosure of information provided to researchers. And the Department has policies and procedures in place to vet recipients of information, making any such disclosures highly unlikely. Moreover, to the extent Plaintiffs are seeking to prevent the Department from providing researchers with information, data has already been shared safely and securely without public disclosure because of the strict security measures in place.

No Likelihood of Success on the Merits. All of Plaintiffs' claims turn on the mistaken belief that AB 173 will somehow result in their information becoming publicly available. That incorrect premise means they cannot establish a likelihood of success on any of their claims, all of which also suffer from numerous incurable defects that will justify dismissal when the Department responds to the Complaint.

AB 173 is an important law that should remain in effect while the case proceeds, and this Court should deny Plaintiffs' application for TRO.

BACKGROUND

I. THE LEGISLATURE CREATES THE CALIFORNIA FIREARM VIOLENCE RESEARCH CENTER

This Country has a problem with firearm violence and suicide, and California is no exception. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) ("We are aware of the problem of handgun violence in this country[.]"). "From 2002 to 2013, California lost 38,576 individuals to gun violence." Pls.' Req. for Judicial Notice (Pls.' RJN) at 48, Ex. 2 (Proposition 63 § 2.1), ECF No. 9-3. To help understand and combat this problem, in 2016, the State enacted the California Firearm Violence Research Act. 2016 Cal. Stat., ch. 24, § 30. Recognizing that "[f]irearm violence is a significant public health and public safety problem in California," the Legislature found that "[t]oo little is known about firearm violence and its prevention . . . because too little research has been done." Cal. Penal Code § 14230(e). This stemmed in large part from the Dickey Amendment, which effectively froze firearms research at the federal level for over two decades. *See id.* § 14230(g).[1] The Legislature found the need for "more research and more sophisticated research." *Id.*

To achieve this goal, the Legislature created the California Firearm Violence Research Center. Cal. Penal Code § 14231. Eventually housed at UC Davis, the Center has a broad mandate to "conduct basic, translational, and transformative research with a mission to provide the scientific evidence on which sound firearm violence prevention policies and programs can be based." *Id.* The Legislature directed state agencies, including the Department, to "provide to the center, upon

[1] The Dickey Amendment was named after the late former United States Representative from Arkansas, Jay Dickey. In 2012, Dickey recanted his former approach and, prefiguring the California Legislature, called for more scientific research into gun violence. *See* Jay Dickey & Mark Rosenberg, *We won't know the cause of gun violence until we look for it*, Wash. Post, July 27, 2012, *available at* https://www.washingtonpost.com/opinions/we-wont-know-the-cause-of-gun-violence-until-we-look-for-it/2012/07/27/gJQAPfenEX_print.html (last visited Jan. 14, 2022). Dickey recognized that his amendment had prevented answering "the most basic question: What works to prevent firearm injuries?" *Id.*

proper request, the data necessary for the center to conduct its research." 2016 Stat., ch. 24, § 30 (former Cal. Penal Code § 14231(c)).

II. THE LEGISLATURE ENACTS AB 173 TO CLARIFY THE PROCESS AND PARAMETERS FOR THE DEPARTMENT TO DISCLOSE INFORMATION TO THE CENTER

The Legislature enacted AB 173 to "[c]lairif[y] the process and parameters of disclosure" of information by the Department to the Center and other researchers. Cal. Senate Floor Analysis of AB 173 at 1-2 (Sept. 8, 2021) *available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB173 (last visited Jan. 14, 2022). The law amended several Penal Code sections, including:

- Codifying a new finding in section 14230(e) that "California's uniquely rich data related to firearm violence have made possible important, timely, policy-relevant research that cannot be conducted elsewhere." 2021 Cal. Stat., ch. 253, § 4.
- Expanding the data-sharing provision in section 14231 into three subdivisions. The new addition clarified that data would be provided subject to approval by the Center's "governing institutional review board when required." 2021 Cal. Stat., ch. 253, § 5. It also made clear that "[m]aterial identifying individuals shall only be provided for research or statistical activities and shall not be transferred, revealed, or used for purposes other than research or statistical activities, and reports or publications derived therefrom shall not identify specific individuals." *Id.*
- Adding a new provision to section 11106 clarifying that information maintained in various Department databases, including the Dealer Records of Sale (DROS) System and Automated Firearms System (AFS) are available to the Center and, at the Department's discretion, to other researchers. 2021 Cal. Stat., ch. 253, § 2.5. The new provision also clarified that "[m]aterial identifying individuals shall only be provided for

research or statistical activities and shall not be transferred, revealed, or used for purposes other than research or statistical activities, and reports or publications derived therefrom shall not identify specific individuals." *Id.*

- Adding a similar provision to the ammunition background check law in section 30352. 2021 Cal. Stat., ch. 253, § 11.

The Department has instituted three steps to ensure that the personal identifying information is not publicly disclosed. At the first step, applicants requesting criminal justice information submit an application to the Department's Data Access and Analysis Section. Decl. of Trent Simmons ISO Def.'s Opp'n to Pls.' Appl. for TRO (Simmons Decl.) ¶ 5. Researchers who request access to individual-level criminal justice information must submit proof of identity and pass a background check. *Id.* ¶ 7. Applicants must also submit documentation showing data security protocols are in place. *Id.*

In the second step, the Department's Network Information Security Unit reviews documentation of an applicant's compliance with information security requirements. Decl. of Sonny Mangat ISO Def.'s Opp'n to Pls.' Appl. for TRO (Mangat Decl.) ¶ 7. That review ensures that the applicant's information technology systems meet minimum security criteria. *Id.* ¶ 5. Those criteria include ensuring that access to the system is limited to people identified in the application, that the applicant has an information-security officer or similar professional, and that the applicant has certified that the system satisfies the Federal Bureau of Investigation's Criminal Justice Information Services (CJIS) Security Policy and guidance documents. *Id.* ¶ 6.

The third step occurs after the research has concluded, but before publication. Applicants must submit pre-publication manuscripts of their research to the Data Access and Analysis Section for review to ensure that the publication does not include information that could be used to identify specific people. Simmons Decl. ¶ 12.

III. THE DEPARTMENT HAS ALREADY PROVIDED DATA TO RESEARCHERS THAT LIKELY INCLUDES PLAINTIFFS' INFORMATION

State law has required the Department of Justice to share firearms data with the Firearm Violence Research Center for years, and disclosures also have been made under AB 173 specifically. In January 2021, the Center submitted an application for criminal justice information to the Department. Simmons Decl. ¶ 13. That application requested information in the Department's Automated Firearms System (AFS) and Dealer Record of Sale (DROS) System. *Id.* ¶ 14. The Department reviewed the application, approved it, and provided the Center with the information on November 29, 2021. *Id.* ¶ 15. The information provided included entries in AFS through May 11, 2021, and entries in the DROS System through November 1, 2021. *Id.* In July, 2021, while the Center's application was pending, researchers at Stanford University requested the same AFS and DROS System information. *Id.* ¶ 18. Their request was approved, and the AFS information was provided later that month, and the DROS System information was provided in November. *Id.* ¶ 20. If Plaintiffs purchased a firearm before November 2021, their information was likely provided to researchers at the Center and Stanford. *See id.* ¶ 16. Based on review by Department staff, neither the Center nor Stanford have ever had a data breach. *Id.* ¶ 21.

As of the date of this Opposition, there are no new applications for data pending. *Id.* ¶ 22. There is, however, a new pending application from the Center to authorize additional researchers to analyze the AFS and DROS data already provided. *Id.*

LEGAL STANDARD

"TROs are for emergencies only. The high hurdle plaintiffs must clear to obtain [relief] 'reflect[s] the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard

has been granted both sides of a dispute.'" *Stanchart Sec. Int'l, Inc. v. Galvadon*, No. 12cv2522-LAB (MDD), 2012 WL 5286952, at *1 (S.D. Cal. Oct. 24, 2012) (quoting *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 438 (1974)). "The TRO standard is the same as the preliminary injunction standard, with the additional requirement that the applicant show immediate relief is necessary." *Id.* Plaintiffs seeking an injunction must establish that: (1) their claims are likely to succeed on the merits; (2) they will likely suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Alternatively, an "injunction is appropriate when a plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (internal citation omitted). Plaintiffs must make a showing of all four *Winter* factors, even under the alternative sliding scale test. *Id.* at 1132, 1135.

ARGUMENT

I. THERE IS NO EMERGENCY HERE

AB 173 took effect on September 23, 2021, immediately after the Governor approved it and it was filed with the Secretary of State. 2021 Cal. Stat., ch. 253, § 16; Pls.' RJN at 8, Ex. 1, ECF No. 9-2. Plaintiffs waited 78 days to request a TRO. That "delay is reason enough to deny a TRO." *Devasahayam v. DMB Capital Grp.*, No.: 3:17-cv-02095-BEN-WVG, 2017 WL 6547897, at *4 (S.D. Cal. Dec. 20, 2017). Courts have denied TROs for much shorter delays. *See, e.g.*, *id.* (one-month delay); *Occupy Sacramento v. City of Sacramento*, No. 2:11-cv-02873-MCE-GGH, 2011 WL 5374748, at *4 (E.D. Cal. Nov. 4, 2011) (25-day delay). A delay this long demands some explanation. And even a "good and reasonable explanation" for delay is meaningless if "the TRO Motion doesn't give it." *Stanchart Secs.*, 2012 WL 5286952, at *2. Here, Plaintiffs have given none.

The moving papers suggest there is no good reason. To start, Plaintiffs have filed a preliminary-injunction-motion length brief, complete with full legal argument, exhibits, and declarations. One court denying a TRO observed that the plaintiffs "could have sought a preliminary injunction, without resorting to the extraordinary form of relief that is a TRO[.]" *Occupy Sacramento*, 2011 WL 5374748, at *4. Plaintiffs have done that in all but name. Yet they inexplicably have used the TRO procedure. One of their exhibits shows that Plaintiffs have been preparing papers since at least mid-December 2021. *See* Pls.' RJN at 129, Ex. 6, ECF No. 9-7 (header showing webpage was downloaded on December 14, 2021). What Plaintiffs appear to expect, then, is that they spend weeks or months preparing papers, which the Attorney General and this Court must address in a few days. Plaintiffs gave themselves so much extra time that they were able to file a lengthy ex parte application to proceed using pseudonyms that should have been a noticed motion. *See* Pls.' Appl. to Use Pseudonyms, ECF No. 11; Def.'s Opp'n at 1-2, ECF No. 16. This all bespeaks strategy, not urgency.

Despite extensive preparation, Plaintiffs have omitted one crucial element for TRO relief: they make no showing of why relief is necessary in the next 14 days. Fed. R. Civ. P. 65(b)(2). They have not shown how the status quo would change absent the relief they seek.

II. PLAINTIFFS HAVE NOT ESTABLISHED IRREPARABLE HARM

Even absent any showing of urgency or a good explanation for delay, Plaintiffs have not shown any irreparable harm. Plaintiffs argue that violations of constitutional rights are sufficient to establish irreparable harm. Pls.' TRO Appl. at 34:6-35:2, ECF No. 9. Assuming for the sake of argument that the rule they refer to applies to the constitutional claims they have raised, the effect of that argument is to merge this prong of the injunction analysis with the likelihood of success on the merits. For the reasons discussed below, Plaintiffs have no chance of succeeding on the merits because all their claims fail as a matter of law. But, before addressing the

likelihood of success on the merits, it is worth addressing the facts, such as they are, that form the basis of Plaintiffs' application.

As a threshold matter, the Department has already provided information from AFS and the DROS System to the Center and Stanford. Simmons Decl. ¶¶ 13-20. And that information likely included Plaintiffs' information in those systems. *Id.* ¶ 16. To the extent Plaintiffs contend that the purported harm their application for TRO seeks to avoid is the Department providing information to the Center or other researchers, the information has been provided, and Plaintiffs' request is moot.

To make matters worse, what Plaintiffs want is not clear. The application asserts that Plaintiffs "seek only to prevent *public dissemination* of their Personal Information to the CFVRC and other research institutions." Pls.' TRO Appl. at 17:27-28, ECF No. 9. But the meaning of public disclosure or public dissemination seems to shift throughout their papers. At some points, they use those or similar terms to mean providing the information to researchers. *See, e.g.*, *id*. But at other points, they use the term to mean something to the effect of making the information publicly and generally known. No other meaning could support their assertions that they "fear of violence, harassment," *id.* at 21:21-22. All of the Plaintiffs' declarations appear to use "public disclosure" in the sense of making information available to the public—for instance, when they assert that "public disclosure of [their] personal information and status as a handgun owner will subject [them] to unwanted public attention, harassment, threats, and physical violence." Decl. of Jane Doe No. 1 ¶ 13, ECF No. 9-10. They plainly do not mean disclosure to researchers at the Center or other bona fide research institutions. This lack of analytical clarity and consistency makes their arguments difficult to follow.

Ambiguity in Plaintiffs' reasoning notwithstanding, nothing in AB 173 authorizes Plaintiffs' information to be shared with the public or otherwise placed in the public domain. Just the opposite. The law expressly limits the use of information that can be used to identify individuals to "research or statistical

activities" and prohibits disclosure of that information "for purposes other than research or statistical activities." Cal. Penal Code § 11106(d). In addition to those limitations, the Department has robust policies and procedures in place to ensure that personally identifying information is not disclosed to the public. Researchers who receive that information must pass a background check, have computer system protocols that comply with FBI policy, submit pre-publication manuscripts to the Department, and notify the Department in the event of an unauthorized disclosure. *See* Simmons Decl. ¶¶ 6-17; Mangat Decl. ¶¶ 6-10.

Given that there has been no public disclosure—and Plaintiffs have made no showing that such disclosure is probable, let alone likely or imminent—Plaintiffs' vague assertions of fear of violence and harassment are hard to credit. Plaintiffs' papers further undermine their credibility. For instance, Doe No. 4's status as a firearms instructor, and by reasonable inference, a gun owner, is almost certainly public. *See* Decl. of Doe No. 4 ¶ 5, ECF No. 9-14. He also identifies himself as a holder of a concealed-carry license. *Id.* ¶ 7. To receive that license, however, he completed an application requiring him to "acknowledge that the information disclosed on this application"—the same information Doe No. 4 now claims he does not want publicly disclosed—"may be subject to public disclosure." Pls.' RJN at 116, Ex. 5, ECF No. 9-6. For over three decades, there has been no doubt that applications for concealed carry licenses are subject to disclosure under the California Public Records Act. *CBS Inc. v. Block*, 42 Cal. 3d 646, 652-53 (1986). Similarly, Doe No. 3 states that he is "dissuaded" from applying for a license to carry a concealed weapon by the prospect of his information being shared with researchers—but apparently not the prospect of actual public disclosure via a Public Records Act request. *See* Decl. of Doe No. 3 ¶ 17, ECF No. 9-13.

Plaintiffs also try to substantiate their concerns by reference to undisclosed "incidents" involving gun owners whose personal information was public. *See, e.g.*, Decl. of Jane Doe No. 1 ¶ 13, ECF No. 9-10. But they do not offer anything

concrete in their declarations. Their brief cites two articles, one eight years old from New York and one 15 years old from Virginia. Pls.' TRO Appl. at 15-16 n.6, ECF No. 9. Two old news reports from the other side of the Country are hardly sufficient to justify a reasonable fear for one's safety. And, again, concealed carry licenses and applications have been subject to Public Record Act requests in California for decades. *CBS*, 42 Cal. 3d at 652-53. Plaintiffs have offered no evidence that the public availability of those records has led to any issues, let alone a trend that would give a reasonable firearms owner cause for concern. In addition, other state laws require California firearms dealers are required to keep records of firearms and ammunition sales that contain much of the same information Plaintiffs do not want shared with researchers. *See* Cal. Penal Code §§ 28150, 30352(a). Yet Plaintiffs have cited no examples of that information becoming public and being used in the ways they worry about.

Finally, Plaintiffs contend that they have no recourse in the event of the unauthorized public disclosure of their information. Pls.' TRO Appl. at 23:4-23, ECF No. 9. But that is not accurate. Researchers who receive information from the Department assume liability for unlawful disclosures. Mangat Decl. ¶ 6. The recourse available in the event of a public disclosure would invariably depend on the facts. But to give one example, a person who knowingly accesses the data in a computer system for the purpose of unlawfully disclosing it may be guilty of a felony. *See* Cal. Penal Code § 502(c)(2)-(3); *cf. People v. Childs*, 220 Cal. App. 4th 1079, (2013) (affirming conviction of IT employee of San Francisco who violated section 502).

III. PLAINTIFFS HAVE NOT ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS ON ANY LEGAL THEORY

A. Plaintiffs Have Not Established a Likelihood of Success on the Merits of Their Privacy Claims

Plaintiffs argue that AB 173 violates their constitutional right to privacy in two ways. First, they contend that AB 173 violates their right to informational privacy

by authorizing disclosure of information including their name, address, and date of birth, to researchers. Pls.' TRO Appl. at 18:26-23:26, ECF No. 9. Second, they contend that the disclosure impermissibly chills their Second Amendment rights. *Id.* at 24:3-25:9. They cannot establish a likelihood of success on the merits under either theory.

1. Plaintiffs' Informational Privacy Claim Lacks Merit

Courts have recognized that people have a right of informational privacy concerning inherently sensitive or intimate information or information that may put them at risk of being a victim of a crime. *In re Crawford*, 194 F.3d 954, 959-60 (9th Cir. 1999). Plaintiffs cite no case where a court has held that merely making someone's name, address, and other identifying information public, let alone providing that information to a small number of researchers who have undergone extensive vetting, violates the right of informational privacy. Nor have they cited any case in which a court has held that being a firearm owner is inherently sensitive or intimate information. With no authority on point, they cannot establish a likelihood of success on the merits of their information privacy claim.

Even assuming that disclosing such information implicates a right to informational privacy, California's interest in researching firearms violence supersedes that interest. *See id.* at 959. The cases Plaintiffs rely on undermine their argument to the contrary. Plaintiffs cite *Crawford*. Pls.' TRO Appl. at 19-20, ECF No. 9. But in that case, the Ninth Circuit upheld a federal statute that required bankruptcy lawyers to include their social security numbers "on all documents filed with the bankruptcy court." 194 F.3d at 957. The court recognized that "indiscriminate disclosure" of social security numbers "may implicate the constitutional right of informational privacy." *Id.* at 958. But even though it credited the possibility of identity theft, the Court held that possibility "must be discounted by the probability of its occurrence." *Id.* It upheld the law because requiring filers to include their social security numbers was designed to reduce

fraud in the bankruptcy preparer industry and the plaintiff's concerns about identity theft were "speculative." *Id.* at 960.

Plaintiffs' claim differs from the claim in *Crawford* in ways that only weaken the claim here. AB 173 prohibits public disclosure, and the Department has an extensive vetting process for researchers to make sure that does not happen. *See* Simmons Decl. ¶¶ 6-17; Mangat Decl. ¶¶ 6-10. Plaintiffs have offered no convincing evidence that, when discounted by the probability of occurrence, the risk they are concerned about is anything more than imaginary. Moreover, AB 173 serves a governmental interest far more important than the one that the court recognized as compelling in *Crawford*: helping society understand firearms and better address violence. *See, e.g.*, Cal. Penal Code § 14230(e) ("Too little is known about firearm violence and its prevention. . . . The need for more research and more sophisticated research has repeatedly been emphasized.").

Plaintiffs also rely on *Varo v. Los Angeles County District Attorney's Office*, 473 F. Supp. 3d 1066 (C.D. Cal. 2019). Pls.' TRO Appl. at 19:10-13, ECF No. 9. There, two crime victims did not want to testify against a gang member who assaulted them for fear of retaliation. *Id.* at 1069-70. A deputy district attorney induced them to testify with a promise that only their first names would be disclosed in open court and court documents. *Id.* Their names and addresses were later disclosed in a publicly filed document, and the gang member threatened their lives, forcing them to go into protective custody. *Id.* They then sued the district attorney's office for violating their informational privacy rights. *Id.* The district court denied the district attorney's motion to dismiss the claim, reasoning that "the nonconsensual disclosure of information that exposes individuals to violent physical harm" implicates privacy rights. *Id.* at 1075.

Although *Varo* involved names and addresses, that disclosure was public. More importantly, it was made in the context of specifically articulable and identifiable threats. For that reason, *Varo* is of little assistance to Plaintiffs because

AB 173 does not involve public disclosures; nor have Plaintiffs identified a similar risk of violence directly traceable to the disclosure of information.

Many of the other cases Plaintiffs cite are inapposite. For instance, they cite *Orff v. City of Imperial*, No.: 17-CV-0116 W (AGS), 2017 WL 5569843 (S.D. Cal. Nov. 17, 2017). Pls.' TRO Appl. at 22:12-13, ECF No. 9. There, the district court held the constitutional right of privacy could overcome a claim of qualified immunity where the complaint alleged that "law enforcement tasked with investigating a sexual crime instead maliciously disclosed details of that crime to those with power over the employment of both the victim and her family[.]" *Orff*, 2017 WL 5569843, at *6. *Orff* is simply nothing like this case.

And that is the problem with Plaintiffs' theory. No case supports extending the right of informational privacy as far as they want. The closest case on point has rejected a similar theory in the context of an actual public disclosure. In *Doe No. 1 v. Putnam County*, 344 F. Supp. 3d 518 (S.D.N.Y 2018), the plaintiffs brought an informational privacy challenge to a New York law making the names and addresses of firearms purchasers public record. *Id.* at 523 (discussing N.Y. Penal Law § 400.00(5)(a)). The court granted the state's motion to dismiss the claim, reasoning that disclosure of "one's name, address, and status as a firearms license[e]" were not covered by the right to privacy. *Id.* at 541. Although the court there was applying Second Circuit precedent, the decision is nonetheless instructive. If public disclosure of identifying information did not violate the plaintiffs' right to informational privacy there, then AB 173's much narrower disclosure provisions do not violate that right here.

2. Plaintiffs' Chilling Claim Lacks Merit

Plaintiffs argue that AB 173 chills their Second Amendment rights. Pls.' TRO Appl. at 24:3-25:9, ECF No. 9. It is not clear whether they assert this as a Second Amendment claim or a right to privacy claim. Regardless, they contend that they "must either agree to the disclosure of their Personal information . . . or relinquish

their constitutionally protected right to purchase firearms and ammunition." *Id.* at 25:4-7. This assertion in the brief is unsupported by citation to evidence. And no Plaintiff says in a declaration that she or he will not purchase a firearm or ammunition as a result of AB 173. *See, e.g.*, Decl. of Jane Doe No. 1 ¶¶ 5-13, ECF No. 9-10. All Plaintiffs already have information entered in AFS, the DROS System, and potentially other systems. *See, e.g.*, *id.* ¶¶ 5, 7. Moreover, it is likely that the information has already been provided to researchers (although Plaintiffs' anonymity makes it impossible to say with certainty). *See* Simmons Decl. ¶¶ 13-20. Plaintiffs have thus not alleged any injury in fact, and as a result do not have standing to pursue a chilling theory. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (holding that, for article III standing purposes, an injury "must affect the plaintiff in a personal and individual way" (quotation marks omitted)); *see also Haynie v. Harris*, 658 F. App'x 834, 836 (9th Cir. 2016) (affirming district court's dismissal for lack of standing where plaintiff claimed that fear of future wrongful arrest for possession of legal firearms chilled his Second Amendment rights).

Nor have Plaintiffs established that this doctrine applies in the Second Amendment context. They cite First Amendment cases to support their theory. Pls.' TRO Appl. at 24, ECF No. 9. But courts have rejected attempts to extend that theory to the Second Amendment. *See, e.g.*, *Moustakas v. Margolis*, 154 F. Supp. 3d 719, 732 (N.D. Ill. 2016). Like the unsuccessful plaintiff *Moustakas*, Plaintiffs here have made "no argument for how the policy rationale behind the prohibition on prior restraint," which underlies the chilling effect theory, "might apply to Second Amendment rights." *Id.* (dismissing Second Amendment chilling effect claim).

B. Plaintiffs Have Not Established a Likelihood of Success on the Merits of Their Second Amendment Claim

The Second Amendment "protects the right to keep and bear arms for the purpose of self-defense." *See McDonald v. City of Chicago*, 561 U.S. 742, 749-50

(2010). When analyzing a Second Amendment claim, courts employ a two-step analysis. First, they ask whether "the challenged law affects conduct that is protected by the Second Amendment." *Duncan v. Bonta*, 19 F.4th 1087, 1100 (9th Cir. 2021) (en banc). If the law does not, then the "analysis ends." *Id.* "If, on the other hand, the law implicates the Second Amendment," courts must proceed to the second step and "choose and apply an appropriate level of scrutiny." *Id.*; *see also Teixeira v. County of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) (en banc). That approach reflects the Supreme Court's recognition that the Second Amendment right is "not unlimited," and does not call into question certain "presumptively lawful regulatory measures." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008). Plaintiffs do not have standing to assert a Second Amendment claim, and, even if they did, Second Amendment fails at either step.

1. Plaintiffs Do Not Have Standing to Pursue a Second Amendment Claim

Each of Plaintiff owns a firearm and purchases ammunition. Decl. of Jane Doe No. 1 ¶¶ 5, 7, ECF No. 9-10; Decl. of John Doe No. 1 ¶¶ 5, 7, ECF No. 9-11; Decl. of Doe No. 2 ¶¶ 5, 7, ECF No. 9-12; Decl. of Doe No. 3 ¶¶ 5, 7, ECF No. 9-13; Decl. of Doe No. 4 ¶¶ 5, 7, ECF No. 9-14. They thus have firearms and ammunition, have exercised their Second Amendment rights, and have not alleged that AB 173 will stop them from doing so in the future. It is not clear what they believe their Second Amendment injury to be. They have identified no injury in fact, which entails showing "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1039 (9th Cir. 2008).

The one possible exception is Doe No. 3, who contends that AB 173 has "dissuaded" him from applying for a concealed carry license out of fear that the Department will "publicly disclose [his] personal information and . . . status as a concealed carry licensee. Decl. of Doe No. 3 ¶ 14, ECF No. 9-13. But these

allegations of injury are conjectural or hypothetical on at least two counts. First, AB 173 does not authorize public disclosure of his information. *See, e.g.*, Cal. Penal Code § 11106(d). He cannot generate an injury in fact based on a misreading the law. Second, concealed carry license applications are subject to public disclosure for reasons other than AB 173. Pls.' RJN at 116, Ex. 5, ECF No. 9-6; *CBS*, 42 Cal. 3d at 652-53. So it cannot really be that AB 173 is dissuading Doe No. 3 from applying for a license. He thus lacks standing to bring a Second Amendment challenge to the law, just like the other Plaintiffs.

2. Plaintiffs' Second Amendment Claim Fails at Step One of the Analysis

AB 173 does not burden Second Amendment rights at all. It does not prevent, restrict, or in any way affect the ability to purchase, use, or do anything with firearms. Plaintiffs' claim is similar to those that courts have rejected at step one for imposing negligible or de minimis burdens. For example, in *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*), the court upheld the District of Columbia's handgun registration requirement because it was so "self-evidently de minimis" that it could not "reasonably be considered onerous." *Id.* at 1254-55. Similarly, in *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012) (en banc), the Ninth Circuit upheld an ordinance requiring gun show vendors to secure firearms using a "sturdy cable attaching the firearm to a fixture" " as a "minimal[]" imposition on firearms rights. *Id.* at 1044. And in *United States v. Decastro*, 682 F.3d 160 (2d Cir. 2012), the court upheld the federal statute prohibiting state residents from buying firearms outside their state and bringing them home because the law "only minimally affect[ed] the ability to acquire a firearm." *See id.* 164. Because AB 173 imposes no burden, Plaintiffs' claim therefore fails at the first step.

In the alternative, Plaintiffs' claim fails at the first step because AB 173 consistent with the history and tradition of firearms regulation, and is thus presumptively lawful. *See Jackson v. City & County of San Francisco*, 746 F.3d

953, 960 (9th Cir. 2014). Laws allowing third parties to maintain records containing identifying firearms owners are longstanding. At this step of the Second Amendment analysis, courts will consider history ranging from medieval England to the early of the 20th century. *See Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015) (concluding that "early twentieth century regulations might . . . demonstrate a history of longstanding regulation"); *Peruta v. County of San Diego*, 824 F.3d 919, 929 (9th Cir. 2016) (en banc) (considering history as early as 1299). Chief Judge Thomas relied on California's 1923 firearms law when he concluded that California's 10-day waiting period was longstanding, and thus presumptively lawful. *Silvester v. Harris*, 843 F.3d 816, 831 (9th Cir. 2016) (Thomas, C.J., concurring); *see also Pena v. Lindley*, 898 F.3d 969, 1003 (9th Cir. 2018) (Bybee, J., concurring in part and dissenting in part) (noting that laws from the early 20th century can be longstanding); *Heller II*, 670 F.3d at 1253-54 (looking to New York's 1911 Sullivan Law and laws enacted across the nation in the 1920s when upholding the District of Columbia's basic handgun registration requirement as longstanding.).

In California, non-governmental parties have maintained records containing the personal information of firearms purchasers for over one hundred years. California's 1917 firearms law required vendors to "keep a register" listing the time and date of the sale, information about the firearm, and information about the purchaser, including name, address, age, physical characteristics, occupation, and signature. *See* 1917 Cal. Stat. 221, 222-23; *see also* 1923 Cal. Stat. 695, 699-700 (same). These types of requirements were not unique to California. *See, e.g.*, *A Uniform Act to Regulate the Sale and Possession of Firearms*, *reprinted in* Handbook of the National Conference of Commissioners on Uniform State Laws, 36th Ann. Conf., 576-77 (1926). California maintains essentially the same requirement to this day. Cal. Penal Code §§ 28150, 30352(a). Thus, having non-governmental actors maintain records containing personally identifying information

is a longstanding practice relating to firearms that falls outside the scope of the Second Amendment. *See Jackson*, 746 F.3d at 960.

It does not matter that AB 173 is not identical to California's 1917 recordkeeping requirement. Laws that are reasonably analogous to laws that have long gone unquestioned will satisfy the standard. The Ninth Circuit's decision in *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010), provides guidance. It analogized the federal ban on felons possessing firearms to historical evidence of the founding era showing that the "the right to bear arms does not preclude laws disarming the unvirtuous citizens (i.e. criminals)." *Id.* at 1118 (quotation marks and brackets omitted). Similarly, Chief Judge Thomas concluded that California's 10-day waiting period was longstanding when the State's first waiting period, enacted in 1923, was one day. *See Silvester*, 843 F.3d at 831 (Thomas, C.J., concurring).

Then-Judge Kavanaugh's dissenting opinion in *Heller II* provides additional support for this approach. He reasoned that "when legislatures seek to address new weapons that have not traditionally existed or to impose new gun regulations because of conditions that have not traditionally existed, there obviously will not be a history or tradition of banning such weapons or imposing such regulations." *Heller II*, 670 F.3d at 1276 (Kavanaugh, J., dissenting). He recognized that constitutional principles apply "not only to circumstances as they existed in 1787, 1791, and 1868, for example, but also to modern situations that were unknown to the Constitution's Framers." *Id.* The historical Second Amendment analysis is thus not limited to only laws on the books at some specific date, but also to "analogues" to those laws that deal with "modern weapons and new circumstances." *Id.* at 1271; *see also Kachalsky v. County of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012) (considering a law's "close and longstanding cousins"); *NRA v. ATF*, 700 F.3d 185, 203 (5th Cir. 2012) (finding that the federal prohibition on the sale of handguns to people under the age of 21 was "consistent with a longstanding tradition of

targeting select groups' ability to access and to use arms for the sake of public safety").

3. Plaintiffs' Second Amendment Claim Fails at Step Two of the Analysis

At the second step of the Second Amendment analysis, courts decide what level of scrutiny to apply by "considering (1) how close the challenged law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on that right." *Bauer v. Becerra*, 858 F.3d 1216, 1221-22 (9th Cir. 2017) (quotation marks omitted). This test "amounts to a sliding scale." *Id.* (quotation marks omitted). "A law that imposes such a severe restriction on the fundamental right of self-defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny." *Id.* (quotation marks omitted). "Further down the scale, a law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny." *Id.* "Otherwise, intermediate scrutiny is appropriate." *Id.*

AB 173 imposes no burden at all on Second Amendment rights. So the highest level of scrutiny that could apply is intermediate scrutiny. The Ninth Circuit's decision in *Bauer* is on point. There, the court did not address step one of the analysis, and applied intermediate scrutiny because the challenged $5 firearm-transfer fee did not severely burden the plaintiff's core Second Amendment right. *Bauer*, 858 F.3d at 1221-22. If this Court reaches the second step, it should follow *Bauer* and apply intermediate scrutiny.

"To satisfy intermediate scrutiny, the government's statutory objective must be significant, substantial, or important, and there must be a reasonable fit between the challenged law and that objective." *Duncan*, 19 F.4th at 1108 (quotation marks omitted). The fit between the challenged regulation and the stated objective need not be perfect, nor must the law be the least restrictive means of serving the interest.

Jackson, 746 F.3d at 969. The requirement is that the law must "promote a substantial government interest that would be achieved less effectively absent the regulation." *Mai v. United States*, 952 F.3d 1106, 1116 (9th Cir. 2020). "The test is not a strict one." *Duncan*, 19 F.4th at 1108.

AB 173 addresses the "significant public health and public safety problem" of firearm violence and suicide in California. *See* Cal. Penal Code § 14230(a). Courts have routinely recognized that this purpose is "undoubtedly important." *See, e.g.*, *Duncan*, 19 F.4th at 1109. Plaintiffs do not engage with the obvious purpose of AB 173. Pls.' TRO Appl. at 29:23-24, ECF No. 9. Plaintiffs instead assert that whatever the purpose is, "it can be met without disclosure of Personal Information as authorized by the AB 173 Amendments." *Id.* at 29:27-28. Yet they cite no authority or evidence that support the assertion. Nor do they elaborate on the counterintuitive argument that data about firearms users is somehow useless in helping to understand firearms violence and suicide. They are wrong. The Legislature has called for "more research and more sophisticated research" into firearms violence and suicide, and it has concluded that "California's uniquely rich data," including the information Plaintiffs do not want disclosed, will facilitate that research. *See* Cal. Penal Code § 14230(e). Courts "defer to reasonable legislative judgments" of this sort. *Duncan*, 19 F.4th at 1108. That Plaintiffs could not come up with more than a sentence of argument for their claim that the information AB 173 directs the Department to share with researchers will not help address firearms violence and suicide provides yet another reason that they have no chance of prevailing on the merits of their claim.

C. Plaintiffs Have Not Established a Likelihood of Success on Their Due Process Retroactivity Claim

Plaintiffs contend that AB 173 violates their Fourteenth Amendment due process rights because it operates retroactively. Pls.' TRO Appl. at 26:9-28:4, ECF

No. 9. Their argument largely turns on their failed privacy claim and their purported right not to have information disclosed to the public. *Id.* 27:20-25. They have not established a likelihood of success on the merits of their due process claim for the same reason they have not on their privacy claim.

Plaintiffs also contend that AB 173 "swept away critical privacy guarantees." *Id.* at 24-25. It is not clear what they mean, particularly since the State enacted the California Firearm Violence Research Act in 2016, and that law directed the Department to provide the Center with the data Plaintiffs do not want shared. 2016 Cal. Stat., ch. 24, § 30 (2016 version of Cal. Penal Code § 14231(d)). In that regard, AB 173 did not change anything.

But there is a more fundamental problem with Plaintiffs' retroactivity claim. The proper inquiry in a due process claim based on retroactivity is "whether the legislation imposes *liability or penalty* for conduct occurring prior to the effective date of the statute." *Pinnock v. Int'l House of Pancakes Franchisee*, 844 F. Supp. 574, 584 (S.D. Cal. 1993); *see also Polone v. Comm'r of Internal Revenue*, 505 F.3d 966, 972 (9th Cir. 2007) ("[T]o operate retroactively, a statute must actually attach new legal consequences to completed, past conduct." (quotation mark and brackets omitted)). AB 173 does not impose a liability, penalty, or any other legal consequences on Plaintiffs or any other firearms or ammunition owner. All the law does is clarify the process and parameters of disclosure of information by the Department to the Center and other researchers. Plaintiffs therefore have no likelihood of success on their due process claim.

D. Plaintiffs Have Not Established a Likelihood of Success on Their Preemption Claim

Plaintiffs argue that federal law preempts AB 173 to the extent it authorizes disclosure of social security numbers to researchers because California's concealed carry license application does not comply with the requirements for requesting social security numbers in the Privacy Act of 1974. Pls.' TRO Appl. at 30:6-31-13,

ECF No. 9. Their argument is convoluted. First, they contend that the form California uses for applicants to seek concealed carry licenses does not comply with the act. *Id.* at 30:25-31:9. On this point, they equivocate, saying that the form "*requires* . . . the applicant's social security number," *id.* at 30:27-28 (emphasis added), and that the form "does not specify whether disclosure of the social security number is mandatory or voluntary," *id.* at 31:4-5. In any event, from there, they contend this purported deficiency in the form means that Penal Code section 26175(a) is preempted. *Id.* at 31:10-11. And from there, they assert that Penal Code section 11106 is also preempted. *Id.* at 31:11-13. This line of reasoning makes little sense. Neither Penal Code section 26175 nor section 11106 conflicts with the Privacy Act language that Plaintiffs cite. More importantly, Plaintiffs have not shown that concealed carry licenses or information are entered into the systems that house the information provided to researchers under AB 173. At this early point in the case, it appears that they are not. *See* Simmons Decl. ¶ 17 ("I understand that social security information is not generally recorded in either AFS or DROS.").

As a legal matter, when the Privacy Act was enacted, "Congress did not intend to authorize the issuance of injunctions prohibiting disclosures of protected materials." *Cell Assocs. v. Nat'l Inst. of Health, Dep't of Health, Ed. & Welfare*, 579 F.3d 1155, 1159 (9th Cir. 1978). "Section 7 of the Privacy Act contains no remedy provision of its own, and the private right of civil action created by the Privacy Act and codified in 5 U.S.C. § 552a(g) is specifically limited to actions against agencies of the United States Government." *Dunmore v. County of Placer*, No. CIV S-05-1806 LKK DAD PS, 2007 WL 1217591, at *12 (E.D. Cal. Apr. 24, 2007) (quotation marks omitted) (citing *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1447 (9th Cir. 1981)). What is more, there is no § 1983 private right of action to enforce section 7 of the Privacy Act. *Id.* (citing *Dittman v. California*, 191 F.3d 1020, 1029 (9th Cir. 1999)). Congressional intent is the "ultimate touchstone" of any preemption analysis, express or implied. *Gade v. Nat'l Solid Wastes Mgmt.*

Ass'n, 505 U.S. 88, 96 (1992) (quotation marks omitted). Congress's decision not to authorize injunctions or provide private right of action under § 1983 shows that it did not intend the law to function the way Plaintiffs appear to believe, and their preemption claim therefore has no chance of success on the merits.

E. Sovereign Immunity Bars Plaintiffs' State Law Claims

Plaintiffs assert that they have a likelihood of success on the merits of numerous state law claims alleged in the Complaint. These include ones based on privacy rights under the California Constitution and state statutes, Pls.' TRO Appl. at 25:12-26:5, ECF No. 9, a claim that AB 173 improperly amends Proposition 63 in violation of article II, section 10(c), of the California Constitution, *id.* at 31:17-32:18, another that AB 173 violates the single-subject rule in article IV, section 9, of the California Constitution, *id.* at 32:21-33:14, and yet another that AB 173 violates the appropriations rules in article IV, section 12(e), of the California Constitution. *See also* Compl. ¶¶ 125-152, ¶¶ 174-191, ¶¶ 202-235, ECF No. 1 (setting forth state law claims). Hornbook law, however, establishes that the Eleventh Amendment bars federal courts from granting relief against state officials on the basis of state law. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). As the Supreme Court has observed, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Id.* Plaintiffs therefore have no chance of success on any of their assorted state law claims.

IV. THE PUBLIC INTEREST AND BALANCE OF THE EQUITIES WEIGH AGAINST ISSUING A TEMPORARY RESTRAINING ORDER

When a party seeks a preliminary injunction against the government, the balance of the equities and public interest factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Here the public interest weighs strongly against issuing an injunction. AB 173 facilitates research that promises to help alleviate firearms crimes and murder. *See* Cal. Penal Code § 14230. Delaying

this research will delay the process of developing more effective firearms laws. It will also delay research that might identify ineffective firearms law, meaning those laws might remain on the books longer than necessary.

Enjoining AB 173 also would threaten to impair the interests of the researchers who are relying on data for their work. It may, for example, effect time-sensitive grant applications that depend on receiving data from the Department. The interests of those non-parties, and the potential harm to them, further counsels against issuing a temporary restraining order. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009).

CONCLUSION

Research into the nature and causes of gun violence and suicide as well as the efficacy of firearms regulations should be an unobjectionable issue. Allowing researchers access to large datasets containing information about gun owners, subject to strict protections against public disclosure and approval by an institutional review board, should also be unobjectionable. AB 173 facilitates those goals, and promises to help promote understanding of one of the most bedeviling and devastating problems society faces today. Plaintiffs' application for temporary restraining order offers no good reason to put this socially beneficial law on hold while the case proceeds. This Court should therefore deny the application.

Dated: January 14, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name:	**Doe, Jane, et al. v. Rob Bonta**	**Case No.**	**3:22-cv-00010-AJB-DEB**

I hereby certify that on January 14, 2022, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANT'S OPPOSITION TO PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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 January 14, 2022, at Sacramento, California.

Sondra R. Bushey	***/s/ Sondra R. Bushey***
Declarant	Signature

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