

1 research institutions for the ostensible purposes of preventing gun violence,
2 shooting accidents, and suicide. Plaintiffs ask the Court to enjoin the State from
3 sharing their information and to declare the law, California Assembly Bill 173
4 (“AB 173”), unconstitutional under the Second and Fourteenth Amendments. The
5 gun owners, all of whom are law abiding citizens who passed background checks,
6 raise four claims. First, they argue that AB 173 violates—or at minimum, chills—
7 their Second Amendment right to keep and bear arms. Second, they maintain that
8 disclosing their personal identifying information to non-government researchers
9 violates privacy protections guaranteed to them by the Fourteenth Amendment.
10 Next, they assert that AB 173 violates their right to due process under the
11 Fourteenth Amendment by retroactively expanding access to their restricted
12 personal information. Their final claim, applicable only to applicants for concealed
13 weapon permits (“CCW”) and holders of such permits, is that federal law preempts
14 AB 173 insofar as AB 173 authorizes disclosure of their social security numbers
15 to third parties in derogation of the federal Privacy Act of 1974.

16 This case began with the Plaintiff gun owners seeking the issuance of a
17 temporary restraining order (“TRO”) forbidding enforcement of the law. Tracking
18 the requirements for emergency injunctive relief, Plaintiffs argued they would be
19 irreparably harmed if their personal information was shared with researchers, that
20 they were likely to prevail on the merits of their lawsuit, and that issuance of a
21 TRO was in the public interest. However, the Court declined to issue a TRO,
22 largely on procedural grounds, because Plaintiffs’ request came 108 days after
23 AB 173 took effect and they made no showing of an emergency that would justify
24 immediate judicial intervention. (Dkt. 22 at 3).

25 Plaintiffs then filed a Motion for Preliminary Injunction, mirroring the
26 arguments they raised in their request for a TRO. The Attorney General opposed
27 the motion and filed his own Motion to Dismiss Plaintiffs’ lawsuit. The Court heard
28 argument on both motions on April 5, 2022.

1 In their opposition to the preliminary injunction, Defendants attached the
2 uncontested declaration of Dr. Trent Simmons. Dr. Simmons is the Research Data
3 Supervisor for the California Department of Justice (“DOJ”). He oversees the
4 section of the DOJ responsible for reviewing requests for information relating to
5 gun and ammunition purchases collected by the Department, and his
6 responsibilities include implementing AB 173. (Dkt. 29-4, Simmons Decl. ¶¶ 5–8).

7 In his declaration, Dr. Simmons explains that researchers who apply for
8 access to data that includes the personal identifying information of registered gun
9 owners, gun and ammunition purchasers, and applicants for CCW permits, must
10 explain how the requested information supports a research project, (*id.* ¶ 10), and
11 must comply with strict data security measures set by the Federal Bureau of
12 Investigations (“FBI”), (*id.* ¶ 9). Researchers seeking access to state databases
13 containing personal identifying information must detail their data security
14 protocols, confirm they meet the DOJ’s security requirements, and identify the
15 individual researchers who will use the data. (*Id.* ¶ 12). Each researcher must also
16 complete a fingerprint background check. (*Id.* ¶¶ 8, 12). Only two research
17 institutions are currently authorized to view gun owner and purchaser information,
18 one operating under the auspices of the University of California at Davis (“UC
19 Davis”) and the other under the auspices of Stanford University. (*Id.* ¶¶ 15–17,
20 21–23).

21 Before publishing any material derived from information in the state
22 databases, researchers must provide the DOJ with a pre-publication manuscript
23 at least ten days before publication. (*Id.* ¶ 14). The DOJ then reviews the
24 manuscript to ensure no personal identifying information is published directly or
25 in such a manner that identities could be reverse engineered. (*Id.*).

26 Finally, applicants for access to the databases must agree to report any data
27 breaches. (*Id.* ¶ 23). To date, no researcher has “ever inadvertently disclosed
28 personal identifying information in data obtained from the [DOJ], or any source, to

1 an unauthorized person or the public.” (*Id.*).

2 In response to the Court’s questions during argument on the preliminary
3 injunction motion, the Deputy Attorney General representing the State confirmed
4 that the above-described restrictions on access to and disclosure of data in DOJ
5 gun databases remain in force. (Dkt. 43, Mot. Hr’g Tr. at 24:23–31:15). The Court
6 took the motions under submission and both parties subsequently submitted
7 supplemental briefing.

8 Since the April 5 hearing, two notable events occurred. First, on June 23,
9 2022, the Supreme Court issued its opinion in *New York State Rifle & Pistol Ass’n,*
10 *Inc. v. Bruen*, 142 S. Ct. 2111 (2022)—the first major Second Amendment case
11 in a decade. In *Bruen*, the high court jettisoned what had been a widely accepted
12 “two-step” test for evaluating Second Amendment claims, *see, e.g., Duncan v.*
13 *Bonta*, 19 F.4th 1087, 1100 (9th Cir. 2021), in favor of a one-step historical test.
14 142 S. Ct. at 2126–27. The Court held that the constitutionality of a gun law
15 depends on whether the regulation implicates people, conduct, or arms falling
16 within the “plain text” of the Second Amendment. *Id.* at 2126. If so, the regulation
17 is presumptively unconstitutional and “the government must [then] affirmatively
18 prove that its firearms regulation is part of the historical tradition” of firearms
19 regulation. *Id.* at 2127. Regulations lacking such a historical pedigree are
20 inconsistent with the Second Amendment and are unconstitutional. *Id.* at 2129–30
21 (“When the Second Amendment’s plain text covers an individual’s conduct, the
22 Constitution presumptively protects that conduct.”). Following the *Bruen* decision,
23 this Court ordered supplemental briefing to address the implications of *Bruen* for
24 this case. (Dkt. 47).

25 The second notable event occurred on June 27, 2022, when the DOJ,
26 through its newly launched Firearms Dashboard Portal, publicly exposed the
27 personal identifying information of everyone in the state who had applied for a
28 CCW permit between 2012 and 2021. (Dkt. 49-4, Ex. 2). The information included

1 applicants' names, dates of birth, addresses, gender, race, driver's license
2 numbers, and criminal histories. (*Id.*). In response to this major gaffe, Plaintiffs
3 filed a Motion for Reconsideration of their TRO request. (Dkt. 49). They asked the
4 Court to either grant the TRO or allow them to supplement the record in support
5 of their pending Motion for Preliminary Injunction. (*Id.*). The Court permitted both
6 parties to file supplemental briefing concerning this development.

7 The Court has read, heard, and considered all of the arguments made in
8 support of and in opposition to Plaintiffs' Motion for Preliminary Injunction and
9 Motion for Reconsideration and Defendants' Motion to Dismiss. The Court
10 concludes that Plaintiffs' First Amended Complaint ("FAC") fails to state a claim
11 for which relief can be granted. Fed. R. Civ. P. 12(b)(6). Defendants' Motion to
12 Dismiss is **GRANTED**, and Plaintiffs' claims are **DISMISSED**. With no valid claims
13 remaining to support the Plaintiffs' request for injunctive relief, Plaintiffs' Motion
14 for Preliminary Injunction and Motion for Reconsideration are **DENIED AS MOOT**.

15 **II. BACKGROUND**

16 **A. Procedural History of AB 173 and Plaintiffs' Contentions**

17 In 2016, the California legislature enacted California Penal Code § 14321,
18 which established the Firearm Violence Research Center. 2016 Cal. Stat., ch. 24
19 § 30 (codified as amended at Cal. Penal Code § 14231). The statute directed that,
20 "subject to the conditions and requirements established elsewhere in [the] statute,
21 state agencies . . . shall provide to the center, upon proper request . . . , the data
22 necessary for the center to conduct its research." Cal. Penal Code § 14231(c)(2).
23 UC Davis was initially designated to conduct the research and administer the
24 Center. Later, Stanford University was authorized to also conduct research.

25 AB 173 went into effect five years later on September 23, 2021. (Dkt. 28,
26 FAC ¶¶ 72–74). The statute expressly permits the California DOJ to disclose data
27 from state registries known as the Automated Firearms System ("AFS") and the
28 Dealer Record of Sale System ("DROS") to the California Firearm Violence

1 Research Center and to other “nonprofit bona fide research institution[s]
2 accredited by the United States Department of Education or the Counsel for
3 Higher Education Accreditation for the study of the prevention of violence.” Cal.
4 Penal Code § 11106(d). The registries, which predate the enactment of AB 173,
5 include the personal identifying information of firearm and ammunition purchasers
6 and applicants for CCW permits, including their names, addresses, places and
7 dates of birth, state driver’s license or other identification numbers, telephone
8 numbers, sex, occupations, physical descriptions, and—only in the case of those
9 who apply or have applied for CCW permits—social security numbers.¹ (FAC
10 ¶¶ 54, 59, 64). To prevent public dissemination of this information, AB 173 also
11 revised California Penal Code §§ 14231(c)(3), 11106(d), and 30352(b)(2) to
12 specify:

13 Material identifying individuals shall only be provided for
14 research or statistical activities and shall not be
15 transferred, revealed, or used for purposes other than
16 research or statistical activities, and reports or publications

17 ¹ The parties dispute whether the AFS contains social security numbers and CCW
18 permit applications. Plaintiffs assert that the applications, which contain social
19 security numbers, are included in the AFS, pointing to information available on the
20 DOJ’s website, which in turn states that the AFS is “populated” in part with
21 information from CCW permit applications. (Dkt. 26-7 at 2). Defendants provided
22 conflicting accounts. At oral argument on the motion to dismiss, counsel for
23 Defendants, relying on the declaration of a DOJ employee familiar with the AFS
24 and DROS systems, stated that the systems generally don’t contain social
25 security numbers, (Dkt. 43, Mot. Hr’g Tr. at 23:11–24:22; Dkt. 29-6, Lin Decl.
26 ¶ 11); that the CCW permit applications aren’t part of the AFS, (Mot. Hr’g Tr.
27 82:21–25); and that, to the best of her knowledge, CCW permit applications
28 haven’t yet been transmitted to researchers, (*id.* at 84:25–85:21). However, the
declaration of Professor Garen J. Wintemute, the founding director of the
California Firearm Violence Research Center at UC Davis, states that researchers
have received CCW permits applications, suggesting that social security numbers
have been transmitted to the researchers. (Dkt. 29-1, Wintemute Decl. ¶ 7 (“We
have since obtained individually identifiable [CCW permit application] records
from the Automated Firearm System (AFS) . . . from CA DOJ.”)).

1 derived therefrom shall not identify specific individuals.

2 Plaintiffs' position in this case is that the State's disclosure to
3 non-government researchers of their personal identification information—which
4 they were compelled to furnish as a precondition to purchasing firearms and
5 ammunition or obtaining a CCW permit—violates the Second Amendment. They
6 argue AB 173 has a chilling effect on their exercise of Second Amendment rights
7 because prospective gun and ammunition purchasers will refrain from purchasing
8 guns and ammunition, and that CCW permit applicants will refrain from applying
9 for or renewing CCW permits to protect their personal identifying information from
10 disclosure to third parties. They also assert that the disclosure provisions of
11 AB 173 violate their Fourteenth Amendment right to informational privacy and due
12 process because the statute retroactively broadened access to their personal
13 information. Finally, they maintain that AB 173 is preempted by the Federal
14 Privacy Act of 1974. (FAC ¶ 92).

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B. Firearms Dashboard Portal Data Exposure²

The DOJ launched the Firearms Dashboard Portal on June 27, 2022. (Dkt. 49-4, Ex. 1). The press release announcing the launch highlighted the DOJ's responsibility to balance "its duties to provide gun violence and firearms data to support research efforts while protecting the personal identifying information in the data the [DOJ] collects and maintains." (*Id.*) Unfortunately, the DOJ failed to hold that balance true.

Coinciding with the June 27 launch of the DOJ Dashboard, confidential personal data of nearly 200,000 Californians was unintentionally exposed to the public. (Dkt. 49-4, Ex. 2). See *2022 Firearms Dashboard Data Exposure*, Cal. DOJ: Office of the Attorney General, <https://oag.ca.gov/dataexposure> (last visited Jan. 12, 2023). The exposed material included confidential personal information (previously described) associated with four sets of firearms-related data: (1) CCW permits and applications; (2) Firearms Safety Certificates; (3) DROS transactions;

² The Court **GRANTS** Plaintiffs' requests for judicial notice of the DOJ webpages, entitled "Attorney General Bonta Releases New Firearms Data to Increase Transparency and Information Sharing," (Dkt. 49-4, Ex. 1); "California Department of Justice Alerts Individuals Impacted by Exposure of Personal Information from 2022 Firearms Dashboard," (Dkt. 49-4, Ex. 2); "California Department of Justice Releases Results of Independent Investigation of Firearms Dashboard Data Exposure," (Dkt. 57, Ex. 1); and the independent report of the Firearms Dashboard data exposure, (Dkt. 57, Ex. 2). In ruling on a Rule 12(b)(6) motion, courts generally may not look beyond the four corners of the complaint, with the exceptions of documents incorporated by reference into the complaint and any relevant matters subject to judicial notice. See *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). An exception applies that permits a court to "judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Proper subjects of judicial notice include information posted on websites run by government entities. See *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010). The material posted on the California DOJ website qualifies under this exception.

1 and (4) the Assault Weapons Registry. *Id.* Of note, social security numbers and
2 financial information were not included in the underlying dataset that was
3 exposed. *Id.* The information first became accessible to public view on June 27
4 and remained so until the next day when DOJ removed it and shut down the
5 Firearms Dashboard. *Id.* To be clear, none of the confidential personal information
6 that was exposed came from the California Firearm Violence Research Center at
7 UC Davis or Stanford University—the two authorized firearms research
8 organizations.

9 III. LEGAL STANDARD

10 A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint.
11 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “To survive a motion to
12 dismiss, a complaint must contain sufficient factual matter, accepted as true, to
13 ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662,
14 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). A
15 claim is plausible if the factual allegations supporting it permit “the court to draw
16 the reasonable inference that the defendant is liable for the misconduct alleged.”
17 *Id.* The factual allegations need not be detailed; instead, the plaintiff must plead
18 sufficient facts that, if true, “raise a right to relief above the speculative level.”
19 *Twombly*, 550 U.S. at 545. The plausibility standard is not a “‘probability
20 requirement,’ but it asks for more than a sheer possibility that a defendant has
21 acted unlawfully.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). And
22 courts aren’t required to accept legal conclusions couched as factual allegations.
23 See *Twombly*, 550 U.S. at 555. Ultimately, a court must determine whether the
24 plaintiff’s alleged facts, if proven, permit the court to grant the requested relief.
25 See *Iqbal*, 556 U.S. at 666; Fed. R. Civ. P. 8(a)(2). Dismissal is proper “where
26 there is no cognizable legal theory or an absence of sufficient facts alleged to
27 support a cognizable legal theory.” *Navarro*, 250 F.3d at 732.

28 Plaintiffs have brought only a facial challenge to AB 173—an argument that

1 the law is unconstitutional as it is written. (FAC ¶¶ 44–45). For a facial challenge
2 to survive a motion to dismiss, the complaint must “‘establish[] that no set of
3 circumstances exists under which the [statute] would be valid,’ *i.e.*, that the
4 [statute] is unconstitutional in all of its applications.” *Wash. State Grange v. Wash.*
5 *State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v.*
6 *Salerno*, 481 U.S. 739, 745 (1987)). “[A] facial challenge must fail where the
7 statute has a plainly legitimate sweep.” *Id.* (cleaned up).

8 **IV. DISCUSSION**

9 **A. Violation of the Second Amendment or the Right of Privacy?**

10 Resolving the competing motions in this case presents a threshold question:
11 Do the arguments for and against AB 173 raise a genuine Second Amendment
12 dispute, a privacy dispute, or both? The answer to this question informs the legal
13 standard to be applied.

14 **B. Second Amendment Challenge**

15 If this is principally a Second Amendment case, then the Court must resolve
16 the issues in conformity with *Bruen*. 142 S. Ct. at 1231. The Supreme Court based
17 its analysis in *Bruen* on a textual review of the Second Amendment in light of the
18 historical setting and tradition at the time the Amendment was enacted. Applying
19 that analysis here, the Court must first determine whether the information sharing
20 provision of AB 173 is covered by the plain text of the Second Amendment.
21 Assuming it is, *Bruen* demands that there must be a historical analogue—a
22 tradition of similar firearm regulation—that supports the practice.

23 But preliminarily, it’s important to underscore what *Bruen* didn’t do. *Bruen*
24 didn’t undo all preexisting gun regulations. Licensing requirements, fingerprinting,
25 background checks, and mandatory gun safety training courses exist in many
26 states and operate as prerequisites to exercising the right to possess and carry
27 firearms. The legitimacy of these longstanding and common regulations was
28 recognized in *District of Columbia v. Heller*, 554 U.S. 446, 336 (2008) and in

1 *McDonald v. Chicago*, 561 U.S. 742, 786 (2010)—a point acknowledged by
2 *Bruen*. In his majority opinion in *Bruen*, Justice Thomas confirmed that the
3 constitution permits state licensing regimes to require gun licensing and
4 background checks as long as the requirements don't have the effect of
5 preventing law-abiding citizens from exercising their Second Amendment rights.
6 *Bruen*, 142 S. Ct. at 2138 n.9.³

7 Justices Alito and Kavanaugh echoed this point in their concurring opinions.
8 Justice Alito wrote that *Bruen* decides nothing about “the requirements that must
9 be met to buy a gun,” and doesn't “disturb anything that we said in [*Heller* or
10 *McDonald*] about restrictions that may be imposed on the possession or carrying
11 of guns.” *Id.* at 1257. Similarly, Justice Kavanaugh, joined by the Chief Justice,
12 affirmed that, under *Heller*, “the Second Amendment allows a ‘variety’ of gun
13 regulations,” including such “presumptively lawful regulatory measures” as
14 “requir[ing] a [gun] license applicant to undergo fingerprinting, a background
15 check, a mental health records check, and training in firearms handling and in
16 laws regarding the use of force, among other possible requirements.” *Id.* at 2162.

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18 ³ *Bruen* also didn't repeal existing prohibitions under federal and state laws
19 governing who may possess a firearm. As examples, it is illegal under federal law
20 for persons in the following categories to possess a firearm: a person convicted
21 of a crime punishable by imprisonment for more than one year, 18 U.S.C.
22 § 922(g)(1); a fugitive from justice, § 922(g)(2); an unlawful user of, or one
23 addicted to, a controlled substance, § 922(g)(3); a person adjudicated as a mental
24 defective or committed to a mental institution, § 922(g)(4); a person illegally or
25 unlawfully in the United States, § 922(g)(5); a person dishonorably discharged
26 from the Armed Forces, § 922(g)(6); U.S. citizens who have renounced their
27 citizenship, § 922(g)(7); a person subject to a domestic violence restraining order
28 issued after a hearing on notice, § 922(g)(8); and a person convicted of a
misdemeanor domestic violence crime, § 922(g)(9). State laws have expanded
these categories. All of these laws necessarily contemplate collecting personal
information from gun and ammunition purchasers and CCW permit applicants,
monitoring gun and ammunition sales, running criminal and mental health
eligibility checks, and maintaining official records of the information collected.

1 What one gleans from these qualifications is that there is a difference
2 between prohibiting a right and regulating the right; so long as the regulation of
3 the right to keep and bear arms doesn't amount to a prohibition of the right, the
4 regulation is permissible. Read together, *Heller*, *McDonald*, and *Bruen* establish
5 that "the Second Amendment is neither a regulatory straightjacket nor a regulatory
6 blank check." *Id.* at 2133 (quoting *Heller*, 554 U.S. at 626). Rather, the cases
7 collectively confirm that the Second Amendment permits laws and regulations that
8 precondition the right to keep and bear arms on the obligation to comply with such
9 ministerial tasks as providing personal identifying information and submitting to a
10 background check—provided that the overall regulatory regime is neither overly
11 discretionary nor overly burdensome. See *id.* at 2138 n.9 ("[B]ecause any
12 permitting scheme can be put toward abusive ends, we do not rule out
13 constitutional challenges to shall-issue regimes where, for example, lengthy wait
14 times in processing license applications or exorbitant fees deny ordinary citizens
15 their right to public carry."). Laws requiring gun owners to comply with such
16 ministerial tasks are presumptively valid and don't violate the plain text of the
17 Second Amendment.

18 Therein lies the rub in this case. Under *Bruen*, the first step in assessing
19 whether a regulation violates the Second Amendment is to determine whether the
20 plain text of the Second Amendment covers the conduct regulated by the
21 challenged law. *Id.* at 2126. While Plaintiffs acknowledge the legitimacy of these
22 regulatory prerequisites to gun ownership and possession, and expressly disclaim
23 any purpose "to contest the statutory and regulatory scheme governing the
24 collection of personal information in connection with firearms and ammunition
25 transactions," (Dkt. 24 at 3), they maintain that disclosure of such information to
26 *third party researchers* denies ordinary citizens the right to keep and bear arms.
27 Central to Plaintiffs' Second Amendment claims is the premise that sharing their
28 personal information with outside gun research organizations jeopardizes their

1 personal privacy and physical security. Plaintiffs hypothesize that if their identities
2 are publicly revealed, they will be harassed, subjected to reprisals, and exposed
3 to heightened risks of their homes being burglarized or becoming victims of
4 violence. (FAC ¶¶ 81–82). Notwithstanding that DOJ protocols and the California
5 Penal Code forbid any approved research organization from publicly
6 disseminating the personal information of gun owners, Plaintiffs argue that their
7 information may still be hacked. They also surmise that renegade researchers—
8 hostile to their Second Amendment rights—could surreptitiously release their
9 information to the public. (*Id.* ¶¶ 84–85). Either possibility, according to Plaintiffs,
10 presents a threat of infringement to their Second Amendment rights.

11 The trouble with both arguments is that they are entirely speculative and
12 predictive of harm that is completely attenuated from the plain text and core
13 protections of the Second Amendment. Starting with the possibility of hacking, to
14 date, there has been no claim—not to mention any evidence—that personal
15 information supplied by the DOJ to either the UC Davis or Stanford research
16 organizations has been hacked. And the probability of hacking, though it can
17 never be completely foreclosed, has been greatly reduced by the requirement that
18 all bona fide research organizations follow strict data security protection protocols
19 set by the FBI and DOJ. Even without such protocols in place, the Court is dubious
20 that the threat of hacking alone is sufficient to state a Second Amendment
21 infringement claim. The only personal information to which the research
22 organizations have access is information previously collected by the DOJ. No
23 doubt recognizing the State’s incontrovertible right to collect personal information
24 from gun owners, Plaintiffs haven’t argued—nor could they—that the mere
25 collection of such information violates their Second Amendment rights by
26 improperly subjecting them to the threat of hacking. Nor have they presented
27 evidence that there is any greater threat that data will be hacked from the research
28 organizations than from the DOJ itself. Indeed, the only known unauthorized

1 disclosure of gun owner data was the June 27 mishap for which the DOJ was
2 entirely at fault.

3 Plaintiffs' other fear—that dissident researchers might intentionally breach
4 DOJ protocols by publicly leaking their personal information—is equally
5 unsubstantiated. Again, to state the obvious, the possibility of a recusant,
6 ideologically motivated employee gaining access to Plaintiffs' personal
7 information isn't a risk that is peculiar to the UC Davis and Stanford gun research
8 organizations. No doubt there are state employees, perhaps even some within the
9 DOJ, with ideological axes to grind. But the mere possibility of misbehavior by a
10 rogue activist isn't sufficient to prove that Plaintiffs will be deterred from exercising
11 their Second Amendment rights. This tenuous possibility existed when Plaintiffs
12 first supplied their personal information to the State so they could lawfully acquire
13 firearms, purchase ammunition, or obtain a CCW permit. Unfortunately, rogue
14 actors are a problem every society must grapple with in this technological age.
15 See *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999) ("Enhanced risk, in fact,
16 obtains anytime the government requires an individual to deposit identifying
17 information in the public record.").

18 Additionally, the speculative possibility of hacking or insider malfeasance
19 existed prior to the adoption of AB 173 and didn't prevent Plaintiffs from acquiring
20 firearms and ammunition or obtaining or renewing CCW permits. Before AB 173's
21 adoption, all five Plaintiffs in this case were registered California gun owners and
22 one was granted a CCW permit. The limited disclosure of private information for
23 research purposes permitted by AB 173 doesn't expose Plaintiffs to any novel
24 risks or impose new burdens on them. Nor do these disclosures amount to an
25 "abusive" practice that prevents Plaintiffs from acquiring additional firearms or
26 ammunition or applying for or renewing a CCW permit in the future.

27 Plaintiffs' alternative argument is that even if AB 173 doesn't directly violate
28 the Second Amendment, disclosure of their personal information to the research

1 organizations chills their exercise of the right. A “chilling effect” on the exercise of
2 a constitutional right occurs when a person seeking to engage in constitutionally
3 protected activity is deterred from doing so by government regulations not
4 specifically prohibiting the protected activity. The test is an objective one that asks
5 whether a person of ordinary firmness would be deterred from exercising the
6 protected right. *See O’Brien v. Welty*, 818 F.3d 920, 933 (9th Cir 2016) (applying
7 test to claim of First Amendment retaliation).

8 In support of this argument, Plaintiffs Jane Doe, John Doe No. 2, and John
9 Doe No. 3 submitted declarations asserting that the disclosure of their personal
10 information to third-party researchers has dissuaded them from exercising their
11 Second Amendment rights. (Dkt. 26-9; 26-11; 26-12). But considering the
12 categorical prohibition on publicly disseminating any personal identifying
13 information that the DOJ has imposed on the research organizations, the
14 enhanced risks Plaintiffs fear are no more likely than the risks posed by many
15 other California laws that compel citizens to furnish publicly available personal
16 information. These include property title and land ownership registries, electoral
17 rolls, and court documents. *See, e.g.,* Cal. Gov’t Code § 6253 (providing a right of
18 public access to records of state and local public agencies); § 6252(e) (defining
19 “public records” as “any writing containing information relating to the conduct of
20 the public’s business prepared, owned, used, or retained by any state or local
21 agency regardless of physical form or characteristics”); *see also Publicly Available*
22 *Records: Records Available Online or Through a Different Process*, City of San
23 Diego: Communications, <https://www.sandiego.gov/communications/public-records-requests/records-available> (last visited Jan. 12, 2023) (listing various
24 records available for public inspection). Applications for CCW permits and records
25 of issuance of such permits are likewise considered public documents open to
26 inspection in California unless the public interest clearly weighs against their
27 disclosure. *See* Cal. Gov’t Code § 6255. The pervasiveness of such publicly
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1 available personal information weighs strongly against the objective
2 reasonableness of Plaintiffs' "chilling effect" claim.⁴

3 For these reasons, the Plaintiffs' Second Amendment facial challenge to
4 AB 173 fails. Permitting gun owners' information to be shared under strict privacy
5 protection protocols for legitimate research purposes is merely a limited extension
6 of the "presumptively lawful regulatory measures" that permit states to collect
7 information from gun and ammunition purchasers and CCW permit applicants in
8 the first place. Ancillary regulations like these don't restrict conduct covered by
9 the plain text of the Second Amendment and are permissible.

10 **C. Fourteenth Amendment Challenges**

11 Plaintiffs next contend that the information disclosure provisions of AB 173
12 violate the privacy and due process guarantees of the Fourteenth Amendment.
13 Their argument is two-fold. First, relying on the right to informational privacy
14 recognized in the Fourteenth Amendment, Plaintiffs reprise their position that
15 permitting disclosure of their personal information to third-party researchers
16 violates their right to privacy. Second, they maintain that AB 173 violates the
17 Fourteenth Amendment guarantee of due process by retroactively expanding the
18 purpose for which their personal information was collected and by broadening
19 access to the information.

20 **1. Alleged Violation of Right to Informational Privacy**

21 The Ninth Circuit has recognized a constitutional right to informational
22 privacy. *In re Crawford*, 194 F.3d at 958 & n.4. At the core of this right is the
23 "individual[']s interest in avoiding disclosure of personal matters." *Id.* at 958
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26 ⁴ The Doe declarations also allude to the "potentiality" of dissemination of their
27 personal information "to the broader public." (Dkt. 26-9 at 4; 26-11 at 4). But
28 considering the DOJ prohibitions previously discussed, this conjectural risk must
also be discounted by the improbability of its occurrence. *In re Crawford*, 194 F.2d
at 959.

1 (quoting *Doe v. Attorney General*, 941 F.2d 720, 795 (9th Cir. 1991)). The scope
2 of protection extends to “inherently sensitive or intimate information,” the
3 disclosure of which could “lead directly to injury, embarrassment or stigma.” *Id.* at
4 960. But the right “is not absolute; rather, it is a conditional right which may be
5 infringed upon a showing of proper governmental interest.” *Doe*, 941 F.2d at 796.

6 Plaintiffs’ claim of informational privacy requires the Court to weigh their
7 asserted privacy interests against the government’s professed interests in
8 disclosure. *Id.* Relevant considerations include: (1) the type of record; (2) the
9 information contained in the record; (3) the potential for harm from any subsequent
10 nonconsensual disclosure; (4) the injury from disclosure to the relationship in
11 which the record was generated; (5) the adequacy of safeguards to prevent
12 unauthorized disclosure; (6) the degree of need for access; and (7) the public
13 interest in access. *Id.* (quoting *United States v. Westinghouse Elec. Corp.*, 638
14 F.2d 570, 578 (3d Cir. 1980)). “[T]he government has the burden of showing that
15 ‘its use of the information [advances] a legitimate state interest and that its actions
16 are narrowly tailored to meet [that] legitimate interest.’” *Id.* “In most cases, it will
17 be the overall context, rather than the particular item of information, that will dictate
18 the tipping of the scales.” *In re Crawford*, 194 F.3d at 959.

19 Plaintiffs contend that the biographical information that gun and ammunition
20 purchasers and CCW permit applicants must disclose, such as their names,
21 addresses, dates of birth, and driver’s license numbers—when considered in
22 combination with their status as known gun owners—is confidential information
23 protected by the Fourteenth Amendment. Their specific fear is that
24 non-government researchers may publicly identify them as firearms owners,
25 which in turn might subject them to harassment, threats of physical violence, and
26 the theft of their firearms. Prudent analysis of the relevant considerations listed
27 above doesn’t support their argument.

28 The gun and ammunition purchase records collected by the DOJ are routine

1 ministerial records required by federal and California law. *See, e.g.*, 18 U.S.C.
2 § 923(g)(1)(A)(4) (requiring licensed firearm importers, manufacturers, and
3 dealers to maintain records of firearms sales); Cal. Penal Code § 28100 (requiring
4 firearms dealers to maintain a record of all firearms sales); Cal. Penal Code
5 § 30352(b)(1) (requiring the DOJ to maintain a record of all ammunition sales in a
6 database called the Ammunition Purchase Records File). And the Ninth Circuit
7 has previously held that Plaintiffs’ interest in maintaining confidential the fact of
8 their gun ownership is minimal. *See Silveira v. Lockyer*, 312 F.3d 1052, 1092
9 (9th Cir. 2002) (finding minimal the plaintiffs’ interests in maintaining confidential
10 the fact of their assault weapon ownership). The privacy interest in CCW permits
11 is similarly minimal, as these records have been deemed public records in
12 California since 1957. *See CBS Inc. v. Block*, 42 Cal. 3d 646, 655 (1986). Nothing
13 in the nature of these types of records is stigmatizing, embarrassing, or likely to
14 lead directly to injury. *Cf. Doe*, 941 F.2d 780 (holding records of HIV-status and
15 AIDS diagnosis protected by the right to privacy); *Whalen v. Roe*, 429 U.S. 589
16 (1977) (same for medical information).

17 The nature of the information contained in the records—biographical
18 information that is generally available in many other public registries—is likewise
19 unremarkable. The parties dispute whether social security numbers are included
20 in the data,⁵ but even if so, the inclusion of this information doesn’t necessarily
21 violate Plaintiffs’ right of informational privacy. *In re Crawford*, 194 F.3d at 960
22 (finding social security numbers disclosed to the public in bankruptcy filings not
23 protected). Finally, Plaintiffs’ contention that their biographical information and
24 their status as known gun owners *in combination* poses a threat to them is
25 unsupported. Other federal courts have held the right to privacy doesn’t protect
26 “one’s name, address, and status as a firearm licensee,” *Doe No. 1 v. Putnam*

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28 ⁵ *See supra* note 1.

1 *Cty.*, 344 F. Supp. 3d 518, 541 (S.D.N.Y. 2018); *see also Burke v. Vision Gov't*
2 *Sols., Inc.*, 433 F. Supp. 3d 380, 392 (D. Conn. 2020) (finding no Fourteenth
3 Amendment right to privacy in one's status as a firearm permit holder), so
4 considering this factor in combination with disclosure of Plaintiffs' biographical
5 information adds nothing to the required balancing of interests.

6 The potential for harm from disclosure of Plaintiff's personal information—
7 especially social security numbers—isn't trivial. *In re Crawford*, 194 F.3d at 958
8 (noting danger of rampant identity theft). But this factor must necessarily be
9 considered in tandem with another factor: the adequacy of safeguards to prevent
10 unauthorized disclosure. To reiterate, no data security system is failproof. And
11 while neither party has presented the Court with concise data on the prevalence
12 of hacking, there is no dispute that the UC Davis and Stanford research
13 organizations employ safeguards designed to prevent disclosure of shared
14 information to unscrupulous third parties. It is likewise undisputed that, to date,
15 there have been no incidents or reports of hacking of the organizations'
16 databases. Considering that both research organizations follow DOJ and FBI
17 computer security and protection protocols, the speculative possibility of a data
18 breach occurring at UC Davis or Stanford is no more likely than one occurring at
19 the DOJ, where the data originates. The risk of unauthorized disclosure has been
20 mitigated to the extent reasonably possible.

21 The final two factors, the degree of need for access and the public interest
22 in access, should also be considered together. The legislative findings and
23 declarations supporting AB 173, (Dkt. 36 at 14); Cal. Penal Code § 14230(a),
24 identify California's interest in the public health and safety challenges posed by
25 firearm violence. The findings take note of the multiple forms of firearm violence,
26 highlighting the rising rate of suicides, as well as homicides and accidental deaths.
27 (Dkt. 36 at 14); § 14230(a), (b); *see also Mai v. United States*, 952 F.3d 1106,
28 1120–21 (9th Cir. 2020) (discussing suicide as a form of "gun violence"). The

1 California legislature specifically found that, because of limited research, “[t]oo
2 little is known about firearm violence and its prevention.” (Dkt. 36 at 14); §
3 14230(e). These findings constitute an express statutory mandate and an
4 articulated public policy supporting the restricted disclosure provisions of the
5 statute. See *Doe*, 941 F.2d at 796. While the State’s interests are served in the
6 first instance by collecting data from gun owners, the California legislature
7 reasonably assumes that analysis of the collected data by trained researchers
8 may also prove helpful in advancing the State’s objectives. These findings are
9 sufficient to meet the State’s burden of showing that its use of the information in
10 the manner prescribed advances a legitimate state interest.

11 The State has also demonstrated that disclosure of the information to the
12 research organizations is narrowly tailored to meet the State’s legitimate state
13 interest in preventing gun violence. The essential concern underlying Plaintiffs’
14 lawsuit isn’t the confidential dissemination of their personal information to small
15 groups of vetted researchers. Rather, Plaintiffs’ core concern is that their personal
16 identifying information will somehow make its way into the public square, which
17 will lead to negative consequences. The strict security precautions enacted by
18 DOJ are designed to prevent such an occurrence. Forbidding the research
19 organizations from publicly disseminating shared data absent DOJ approval,
20 requiring background checks of those with access to the data, and mandating
21 strict security protocols governing access to the data repositories all help to
22 protect unauthorized disclosure of Plaintiffs’ information.

23 Balancing the relevant factors, the Court finds that the disclosure provisions
24 of AB 173 don’t violate Plaintiffs’ Fourteenth Amendment right to informational
25 privacy.

26 **2. Alleged Violation of Due Process**

27 Plaintiffs argue that AB 173 violates the Fourteenth Amendment guarantee
28 of due process because it retroactively expands the purposes for which

1 information collected from them could be used and broadens access to their
2 personal information. According to Plaintiffs, when they originally provided
3 personal information to DOJ to lawfully purchase firearms and ammunition, or to
4 apply to obtain a CCW permit, two California statutes, Penal Code §§ 11106 and
5 30352, declared that such information would be used “only for enumerated law
6 enforcement purposes such as assisting with criminal investigations, arrests, and
7 prosecutions.”⁶ (Dkt. 26 at 32). Plaintiffs contend they relied on these statutory
8 assurances and assert that permitting bona fide researchers to access their
9 information isn’t an authorized “law enforcement purpose.”

10 To begin, it isn’t obvious that the California Penal Code sections Plaintiffs
11 cite evince the intent of the California legislature to limit access to the AFS
12 database in the manner they suggest. Plaintiffs maintain that before the
13 amendments effected by AB 173, § 11106 expressly limited disclosure of their
14 personal information “only to a limited class of statutorily defined governmental
15 actors and agencies, and only for law enforcement purposes.” (Dkt. 28 ¶ 140).⁷ In
16

17 ⁶ Record support for this statement isn’t apparent. The materials Plaintiffs point
18 to—Exhibits 11, 12, and 13 to the FAC—don’t contain the limiting language they
19 recite. For example, although DOJ’s Privacy Policy Statement, attached as
20 Exhibit 11, states “[w]e only use or disclose personal information for the specified
21 purposes [the information was collected for],” it goes on to disclaim that the privacy
22 policy is subject to change at any time without notice. (FAC, Ex. 11 at 3–4).
23 Similarly, the privacy notice attached to the Personal Firearms Eligibility Check
24 Application and Firearms Ownership Report, Exhibits 12 and 13 respectively,
25 provides that personal information may be disclosed to “other persons . . . when
26 necessary to perform their legal duties, and their use of your information is
27 compatible and complies with state law, such as for . . . regulatory purposes.” (*Id.*
28 Ex. 12 at 5; Ex. 13 at 5). Moreover, the list of valid disclosures under California
Penal Code § 11105 includes such non-law enforcement purposes as disclosure
to health officers for the prevention of disease, § 11105(b)(14), and disclosure to
public transportation agencies “for the purpose of oversight and enforcement
policies with respect to its contracted providers.” § 11105(b)(25).

⁷ The phrase “law enforcement purposes” doesn’t appear in the either Penal Code

1 fact, the pre-AB 173 version of § 11106 didn't expressly limit the purposes for
 2 which information could be shared to just those enumerated in the statute's text.
 3 Instead, § 11106 delegated authority to the Attorney General and directed him to,
 4 "upon proper application therefor, furnish the information to the officers referred
 5 to in Section 11105." Cal. Penal Code § 11106(b)(3) (eff. Jan. 1, 2021 to Sept. 22,
 6 2021). Section 11105, in turn, authorized the Attorney General to provide access
 7 to a broad swath of criminal and non-criminal information—including the AFS
 8 database—to state and local officials and to other listed entities for a variety of
 9 law enforcement purposes and some other purposes.⁸ See Cal. Penal Code
 10 § 11105 (listing officers and entities). But for the sake of considering Plaintiffs' due
 11 process argument, the Court will assume that AB 173 retroactively broadened the
 12 scope of access to the AFS data base.

13 Nonetheless, the flaw in Plaintiffs' due process argument is that retroactive
 14 changes to a statute, standing alone, don't violate due process. See *Landgraf v.*
 15 *USI Film Prods.*, 511 U.S. 244, 269 & n.21 (1994) ("A statute does not operate
 16 'retrospectively' merely because it is applied in a case arising from conduct
 17 antedating the statute's enactment or upsets expectations based in prior law.")
 18 (citation omitted). To be sure, legislative prospectivity remains the appropriate
 19 default rule. *Id.* at 272. But the *constitutional* impediments to retroactive civil
 20 legislation are now modest, *id.*, and unless a statutory change violates a specific
 21

22 § 11106 or § 11105. Regardless, the Court disagrees with Plaintiffs' narrow
 23 interpretation of the phrase. Legislators, prosecutors, judges—even cops on the
 24 beat—possess no special prowess or general expertise that permits them to
 25 identify workable approaches to preventing gun violence, gun accidents, and gun
 26 suicides. But perhaps researchers do. It is therefore quintessentially a "law
 27 enforcement purpose" for the state to enlist assistance from trained researchers
 28 and research organizations to study these problems and to suggest solutions
 based on their review of pertinent firearm data.

⁸ See *supra* note 6.

1 provision of the Constitution, “the potential unfairness of retroactive civil legislation
2 is not a sufficient reason for a court to fail to give a statute its intended scope,” *id.*
3 at 267.

4 For Plaintiffs’ retroactivity challenge to succeed, they must first demonstrate
5 that AB 173 “attaches new legal consequence to events completed before its
6 enactment.” *Id.* at 270. A new legal consequence is one that imposes a new
7 “liability or penalty.” *Pinnock v. Int’l House of Pancakes Franchisee*, 844 F. Supp.
8 574, 584 (S.D. Cal. 1993). Plaintiffs must also demonstrate that, in enacting
9 AB 173, the California legislature “acted in an arbitrary and irrational way.”
10 *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). The latter
11 issue is reviewed under the rational basis standard. See *Gadda v. State Bar of*
12 *Cal.*, 511 F.3d 933, 938 (9th Cir. 2007). To survive rational basis review, “the
13 statute must be based on ‘a legitimate legislative purpose furthered by rational
14 means.’” *Campanelli v. Allstate Life Ins. Co.*, 322 F.3d 1086, 1100 (9th Cir. 2003)
15 (quoting *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992)); see also
16 *Pension Ben. Guar. Corp.*, 467 U.S. at 729 (“Provided that the retroactive
17 application of a statute is supported by a legitimate legislative purpose furthered
18 by rational means, judgments about the wisdom of such legislation remain within
19 the exclusive province of the legislative and executive branches”).

20 Having rejected Plaintiffs’ argument that the limited nonpublic disclosure of
21 their personal information to bona fide research organizations violates their right
22 to informational privacy, the Court is unable to identify any other new legal
23 consequence, liability, or penalty that AB 173 imposes on Plaintiffs. Considering
24 the required DOJ protocols and data security measures that are in place, Plaintiffs
25 haven’t established that the risk of public dissemination of their information, as
26 well as all of the attendant harms they dread, are any greater simply because
27 AB 173 adds an additional category to the comprehensive list of disclosures
28 authorized by Penal Code § 11105.

1 Even assuming that AB 173 attaches new legal consequences to the record
2 keeping regulations governing gun and ammunition purchases and CCW permit
3 applications, Plaintiffs' due process claim still fails because they haven't shown
4 that the California legislature acted in an arbitrary and irrational way. *Pension Ben.*
5 *Guar. Corp.*, 467 U.S. at 729. By establishing the Firearms Violence Research
6 Center and authorizing the Center to conduct research into the prevention of gun
7 violence, gun accidents, and firearm-related suicide, the California legislature
8 sought to further the State's interest in public health and safety. See Cal. Penal
9 Code § 14230(e). As explained above, granting vetted researchers access to
10 study protected firearms data as a means of implementing § 14230 serves a
11 legitimate legislative purpose in a rational and narrowly tailored manner. While
12 AB 173 may have expanded non-public access to Plaintiffs' personal information,
13 this post factum expansion was neither arbitrary nor irrational.

14 Plaintiffs' argument regarding Penal Code § 30352, which establishes
15 record keeping requirements for *ammunition vendors*, is similarly inapt. Before
16 being amended by AB 173, § 30352 required ammunition vendors to electronically
17 notify the DOJ of all ammunition sales, and further provided that the information
18 was subject to disclosure under § 11105. See Cal. Penal Code § 30352(b) (eff.
19 Jan. 1, 2021 to Sept. 22, 2021). The only material change to § 30352 effected by
20 AB 173 was to permit ammunition sales information to be disclosed to the gun
21 research organizations in the same manner and under the same DOJ protocols
22 that apply to all other database information. *Compare id. with* § 30352(b)(2) (eff.
23 Sept. 22, 2021). For the reasons discussed above, such disclosure doesn't violate
24 Plaintiffs' due process rights.

25 Because AB 173 doesn't unconstitutionally expand the limited purposes for
26 which gun and ammunition purchaser and CCW application data may be collected
27 or shared, the Court rejects Plaintiffs' due process claim.

28 //

1 **D. Preemption under the Federal Privacy Act**

2 Plaintiffs’ last claim concerns only applicants for CCW permits and holders
3 of these permits. They argue that federal law preempts AB 173 insofar as AB 173
4 authorizes disclosure of their social security numbers to third parties in derogation
5 of the Privacy Act of 1974. (FAC ¶¶ 152–61). The argument relies on the notice
6 requirement contained in section 7(b) of the Privacy Act, Pub. L. No. 93-579,
7 § 7(b) 88 Stat. 1896, 1909, *reprinted in* 5 U.S.C. § 552a note, which provides:

8 Any Federal, State, or local government agency which
9 requests an individual to disclose his social security
10 account number shall inform that individual whether that
11 disclosure is mandatory or voluntary, by what statutory or
12 other authority such number is solicited, and what uses will
be made of it.

13 Plaintiffs’ argument misapprehends the text of AB 173 by conflating the statutory
14 language with a section of the CCW application form used by the DOJ.

15 The parties agree that the DOJ form application for obtaining a CCW permit
16 includes a box for applicants to list their social security numbers. The form doesn’t
17 specify whether disclosure of one’s social security number is mandatory or
18 voluntary. However, nothing in the text of AB 173 requires CCW applicants to
19 furnish this information. In fact, the text of the statute doesn’t even mention social
20 security numbers. Contrary to Plaintiffs’ argument, there is no conflict between the
21 text of AB 173 and that of the Federal Privacy Act implicating a *statutory*
22 preemption issue.⁹

23 **V. CONCLUSION**

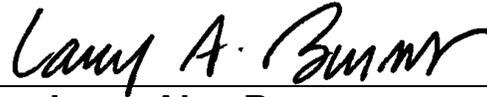
24 For the forgoing reasons, the Court **GRANTS** Defendant’s Motion to
25 Dismiss, and **DISMISSES** Plaintiffs’ FAC in its entirety. To the extent Plaintiffs
26

27 _____
28 ⁹ The Court expresses no view whether the CCW application form currently used
by DOJ conflicts with the Federal Privacy Act.

1 wish to amend their claims, they may do so by filing a motion for leave to amend
2 by **February 10, 2023**, in accordance with the Southern District's Civil Local Rules
3 and this Court's Civil Standing Order.

4 **IT IS SO ORDERED.**

5 Dated: January 12, 2023



6
7 **Hon. Larry Alan Burns**
United States District Judge

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