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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ADAM RICHARDS, an individual; JEFFREY VANDERMEULEN, an individual; GERALD CLARK, an individual; JESSE HARRIS, an individual; ON TARGET INDOOR SHOOTING RANGE, LLC; GAALSWYK ENTERPRISES, INC. (D/B/A/ SMOKIN' BARREL FIREARMS); GUN OWNERS OF CALIFORNIA, INC.; GUN OWNERS OF AMERICA, INC.; GUN OWNERS FOUNDATION; CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED; and SECOND AMENDMENT FOUNDATION, a California Corporation,

Plaintiffs,

v.

GAVIN NEWSOM, in his official capacity as Governor of the State of California; ROBERT BONTA, in his official capacity as Attorney General of the State of California, and DOES 1-10,

Defendants.

Case No.: 8:23-cv-02413

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND ISSUANCE OF PRELIMINARY INJUNCTION

Hearing Date: TBD
Hearing Time: TBD
Courtroom: TBD
Judge: TBD

MEMORANDUM OF POINTS AND AUTHORITIES

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INTRODUCTION

On January 1, 2024, California will implement a mass surveillance regime designed to catalogue the faces, conversations, whereabouts, and shopping habits of millions of Californians engaged in constitutionally protected conduct. This audiovisual recording scheme will operate 24 hours a day, 7 days a week, and 365 days a year, without end. The private citizens commanded to implement this regime on California's behalf will bear all the costs of constructing the state's new Panopticon, which will penetrate thousands of private businesses and *homes* throughout the state. To call this prospect of perpetual government-mandated surveillance "Orwellian" is an understatement.

The law authorizing this egregious invasion of Californians' constitutional rights is Cal. Penal Code § 26806 (SB 1384). Effective January 1, 2024, all dealers of firearms throughout the state will be required to install "permanent[]" and "fixed" cameras inside their premises, which must "continuously record 24 hours per day" all entrances, exits, firearm displays, and points of sale. § 26806(a)(2). These cameras must "clearly record images and … audio" to "allow for the clear identification of any person." § 26806(a)(1), (2). Moreover, gun dealers must purchase, install, and subsequently maintain this surveillance infrastructure and its voluminous data at their own cost, "for a minimum of one year," subject to state inspection, which may occur without limit. § 26806(a)(6). As Plaintiffs Complaint details, compliance is estimated to cost ordinary gun stores tens of thousands of dollars (each). But to make matters worse, California additionally compels its newly commandeered camera operators to display a message of the state's choosing on their properties(both commercial and residential): "THESE PREMISES ARE UNDER VIDEO AND AUDIO SURVEILLANCE. YOUR IMAGE AND CONVERSATIONS MAY BE RECORDED." § 26806(c).

Again, Section 26806 imposes its perpetual surveillance mandate on all gun dealers doing business in California including, whether negligently or intentionally,

those who conduct their businesses out of their homes. The specter of such governmental invasion, occupation, and close scrutiny of a disfavored political minority such as gun sellers and gun owners, chills the exercise of some constitutional rights, infringes the exercise of others, and has altogether no place in a free society.

Plaintiffs bring suit to preserve the status quo and the constitutional order. They include private individuals, business owners, and public-interest advocacy organizations who face irreparable constitutional harms should Section 26806 be allowed to go into effect. Due to Section 26806's flagrant and truly unprecedented attack on the Bill of Rights, Plaintiffs bring numerous causes of action arising under the federal and state constitutions. However, only a subset of these claims underlies the Plaintiffs' instant motion:

First, Section 26806 violates the First and Fourteenth Amendments by chilling the freedom of association, eviscerating the right to speak and criticize the government anonymously, imposing a viewpoint-discriminatory punitive measure on members of a disfavored political minority, and compelling government-approved speech on private property.

Second, Section 26806 violates the Second and Fourteenth Amendments by conditioning the right to acquire and sell firearms on submission to pervasive and perverse government surveillance. Such a practice was entirely unknown to our Founders and, accordingly remains odious to our Constitution today.

Third, Section 26806 violates the Fourth and Fourteenth Amendments by effectuating an unparticularized, general warrant to "rummage" through citizens' daily lives. Moreover, this surveillance regime constitutes an unlicensed and unwarranted physical invasion on Plaintiffs' private property for the purpose of governmental information gathering and is therefore *per se* unreasonable. Finally, Plaintiffs maintain a reasonable expectation of privacy against perpetual government surveillance of their homes, businesses, whereabouts, conversations,

private activities, and shopping habits.

Fourth, Section 26806 violates the Fourteenth Amendment Equal Protection Clause by imposing a viewpoint-discriminatory and animus-based restriction on protected political and ideological speech by a disfavored political minority.

And fifth, Section 26806 violates the California state constitutional right to privacy, which the citizens passed in order to prevent precisely the sort of nefarious technological intrusions into daily life that Section 26806 imposes.

A temporary restraining order is immediately necessary to prevent this myriad of constitutional harm from befalling Plaintiffs and, indeed, all Californians who exercise the enumerated right to keep and bear arms.

ARGUMENT

The standard for a temporary restraining order is "'substantially identical' [to] the standard for a preliminary injunction." *Kingdom Muzic, LLC v. Kingdom Muzic Ministries LLC*, 2022 U.S. Dist. LEXIS 213213, at *4 (C.D. Cal. Oct. 3, 2022). To "obtain a TRO or a preliminary injunction, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that the balance of equities tips in favor of the moving party; and (4) that an injunction is in the public interest." *Id.* (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Section 26806's Panopticon-like surveillance mandate threatens a myriad of constitutional harms and warrants urgent and necessary injunctive relief.

I. PLAINTIFFS ARE OVERWHELMINGLY LIKELY TO SUCCEED ON THE MERITS OF THEIR NUMEROUS CONSTITUTIONAL CLAIMS.

A. Section 26806 Violates First Amendment Rights to Speech, Association, Anonymous Speech, and Freedom from Compelled Speech.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to

assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I.

One of the "most precious freedoms" protected by the First Amendment is "the right of individuals to associate for the advancement of political beliefs." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Section 26806 chills Plaintiffs' (including the members and supporters of the organizational Plaintiffs) rights to free association by imposing a pervasive surveillance regime on locations and activities that the government disfavors, monitoring all who meet at California gun stores to engage in Second Amendment commerce, discuss political issues and advocacy, and criticize the government. *See* Compl. ¶¶ 92-93, 97 (describing California's "outward animus towards gun owners"); *see also NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 462 (1958) ("compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action"); *United States v. United States Dist. Court*, 407 U.S. 297, 314 (1972) ("The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.").

For the organizational Plaintiffs, they are harmed because Section 26806's onerous surveillance chills the likelihood that prospective new members and interested persons will seek out Plaintiffs' literature at gun stores, inquire about their activities, have discussions with association staff and trainers on pertinent issues, and sign up to become members. Compl. ¶¶ 26-33, 94, 102-07. Invariably, such surveillance will discourage and undermine the free association of people for fear of government monitoring, publication,[1] or retribution. Indeed, Plaintiffs Clark and Harris regularly visit gun dealers and gun shows throughout California, where

[1] *See* Compl. ¶ 210 (noting how California "government officials display a shocking carelessness with gun owners' personal information").

they meet with like-minded individuals and engage in political speech about the Second Amendment. Compl. ¶¶ 25-26. Should Section 26806 go into effect, Mr. Clark and Mr. Harris are aware that these "discussi[on]s [of] sensitive issues" will be "constantly monitored," to the point that they will be forced to discontinue visiting California gun stores for those purposes. *Id.* Such fear of pervasive governmental monitoring of core First Amendment speech chills and violates the freedom of association.

Similarly, Section 26806 abridges the freedom of speech by "target[ing] only stores engaged in the exercise of Second Amendment rights to possess and transfer firearms. And it punishes those individuals exercising the right—those with a favorable view of the Second Amendment—with 24/7 surveillance, and not those who disagree with, criticize, or decline to exercise the right themselves." Compl. ¶ 161. Such blatant viewpoint discrimination of pro-Second Amendment speakers "is an 'egregious form of content discrimination' and is 'presumptively unconstitutional,'" subject to strict scrutiny. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019). *See Antonyuk v. Chiumento*, 2023 U.S. App. LEXIS 32492, at *155-56 (2d Cir. Dec. 8, 2023) (a law banning carry of firearms only in churches, but not on other private property, "is not neutral because it allows the owners of many forms of private property … to decide for themselves whether to allow firearms … while denying the same autonomy to places of worship. By adopting a law that applies differently as to places of worship … than to most other privately owned businesses and properties, the CCIA is, on its face, neither neutral nor generally applicable.").

Closely related to the right to speak freely is the right to speak anonymously. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 (1995); *Doe v. 2themart.com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) ("The Federalist Papers (authored by Madison, Hamilton, and Jay) were written anonymously under the name 'Publius.' … Anonymous speech is a great tradition that is woven into the

fabric of this nation's history."). By stripping Plaintiffs of their anonymity when engaging in constitutionally protected commerce, speech, and association at California's gun stores (constitutionally protected establishments), Section 26806 eviscerates Plaintiffs' First Amendment rights to remain anonymous to government officials. *See* Compl. ¶¶ 85, 114-17; *see also Antonyuk*, 2023 U.S. App. LEXIS 32492 at *112-114 (noting that "[i]t is uncontroversial that the First Amendment protects the right to speak anonymously," and finding that there is no historical tradition requiring a person to disclose his identity and speech to the government as a condition of receiving a permit to exercise the Second Amendment right to acquire firearms). There is no practical distinction between New York's statute (a requirement to divulge past speech in order to obtain a firearm) and Section 26806 (a requirement to let the government listen to one's current speech in order to obtain a firearm).

Section 26806 impermissibly compels speech by mandating gun dealers to display state-approved messages warning customers of surveillance and thereby discouraging them from ever entering the premises. *See* Compl. ¶¶ 8, 126-39. What is more, California's compelled message conveniently omits any mention of Section 26806 being the source of gun dealers' compelled speech, leading to prospective customers' inferences that the dealers *themselves* are to blame for such widespread surveillance. *Id.* ¶ 128. Of course, compelled speech is odious to the Constitution, and a statute compelling involuntary statements of fact at Plaintiffs' places of business undoubtedly causes irreparable harm. *See Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62 (2006); *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996). *See Antonyuk v. Hochul*, 639 F. Supp. 3d 232, 344, 345 (N.D.N.Y. 2022) (citation omitted) (New York's requirement that private property owners post signage welcoming firearms constitutes compelled speech "by ***coercing*** them … to conspicuously speak the state's controversial message," and explaining that compelled speech "is not limited to ideological

messages; it extends equally to compelled statements of fact") (emphasis original) (affirmed in part, and reversed in part on other grounds in *Antonyuk*, 2023 U.S. App. LEXIS 32492.

B. Section 26806 Is an Unprecedented Infringement of Second Amendment Rights Unsupported by Early American History.

The Second Amendment protects "the right of the people to keep and bear Arms" with the "unqualified command" — "shall not be infringed." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022). In accordance with this absolutist language, any regulations implicating Second Amendment rights must comport with the original meaning of the constitutional text, as evidenced by Founding-era historical tradition. *Id.* In other words, when the Constitution's "plain text covers an individual's conduct, the Constitution *presumptively protects* that conduct," and only a robust, broad, and enduring historical tradition may rebut that strong presumption. *Id.* at 2129-30 (emphasis added).

At the outset, Section 26806 undoubtedly regulates Second Amendment-protected persons, arms, and activities. Unless and until Defendants prove a Founding-era *tradition* of similar firearm-related government mass surveillance, Section 26806 is presumptively *un*constitutional under the Second Amendment, and immediate injunctive relief is the appropriate interim remedy. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022) (emphasis added) ("The government must … justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. ***Only then*** may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'"). Plaintiffs' conduct falls squarely within the Second Amendment's plain text and therefore is entitled to the stringent protection *Bruen* contemplates.

First, Plaintiffs are members of "the people" that the Second Amendment protects, comprising law-abiding individuals who frequent California gun dealers,

gun dealers themselves, and several public-interest organizations representing their and their members and supporters' interests. Compl. ¶¶ 23-33; *see also District of Columbia v. Heller*, 554 U.S. 570, 580 (2008) ("the term ['the people'] unambiguously refers to all members of the political community, not an unspecified subset"). Plaintiffs seek to acquire, or in the case of Plaintiff dealers, sell firearms. The acquisition and attendant sale of firearms is a natural prerequisite to "keep[ing] … Arms" and is incorporated within the Second Amendment's text. U.S. Const. amend. II; *see also* Compl. ¶ 192 (collecting cases on the right to acquire arms); ¶ 195 (collecting cases on the right to engage in firearm commerce). Next, the firearms involved are protected "Arms" because "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," and in any case, the firearms sold by California gun stores are in "common use." *Heller*, 554 U.S. at 582, 627. Finally, Section 26806 interferes with (and thus infringes) this textual protection by conditioning the exercise of the right to acquire (and sell) firearms on the acceptance of pervasive surveillance and monitoring. Compl. ¶ 194. Aside from effectively prohibiting the acquisition of firearms altogether *unless* buyers and sellers are surveilled, such surveillance undoubtedly "will chill the purchase of firearms in California in much the same way that the compelled disclosure of association members or charity donors would chill First Amendment rights." *Id.* ¶ 212.

Because the Second Amendment presumptively protects Plaintiffs' course of conduct, Defendants bear the heavy burden of justifying Section 26806 by proffering a historical record that evinces an early American tradition of similar surveillance of Founding-era gunsmiths, the analogous "gun dealers" of the time. *See* Compl. ¶¶ 186-191, 214-218 (explaining *Bruen*'s methodology, Defendants' burden, the analytical emphasis on Ratification-era traditions, the insufficiency of

historical "outliers," and the merely confirmatory relevance of post-Founding historical sources); *see also Bruen*, 142 S. Ct. at 2131-34.

Of course, Defendants cannot meet their historical burden. California's only possible ostensible interests in passing Section 26806, some vague notion of the promotion of "public safety" or the untethered concept of the prevention of theft, have been a concern to all governments throughout all of history. Thus, "the lack of a *distinctly similar* historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 142 S. Ct. at 2131 (emphasis added). Of course, the Founders could not have addressed California's modern concerns with mass audiovisual surveillance, because cameras, microphones, and computers did not exist in 1791. But as Plaintiffs observed, "the Founders knew how to record the likenesses of individuals and the contents of conversations when they wanted to—through the use of sketches, drawings, written descriptions, and transcriptions." Compl. ¶ 214. If such surveillance measures comported with the Second Amendment's original meaning, "one would expect to find widespread Founding-era regulations requiring every gunsmith to employ a sketch artist to reproduce or otherwise describe each patron's appearance, and a reporter to write down the conversations that took place during those transactions." *Id.* But no such tradition (or any remotely like it) ever existed, and so Section 26806 is not just presumptively unconstitutional under the Second Amendment—it is conclusively unconstitutional when subjected to *Bruen's* historical framework.

C. Section 26806 Violates the Fourth Amendment's Protection Against General Warrants, Property Invasions, and Violations of Privacy.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

searched, and the persons or things to be seized." Plaintiffs' Complaint alleges three distinct grounds for relief from Section 26806's oppressive surveillance mandate: (1) the Fourth Amendment's flat prohibition of general warrants; (2) the prohibition against trespassory invasions of private property; and (3) the protection of reasonable expectations of privacy. As a testament to Section 26806's sheer Orwellian flagrancy, Plaintiffs succeed under each of these doctrines.

First, Section 26806's surveillance regime operates as a forbidden general warrant. General warrants permit standardless, "unrestrained" "rummag[ing]" of persons, houses, papers, and effects and are *per se* unreasonable and violative of the Fourth Amendment without further analysis. *Riley v. California*, 573 U.S. 373, 403 (2014); *Weeks v. United States*, 232 U.S. 383 (1914) (analyzing the generality of a search); *Rush v. Obledo*, 756 F.2d 713, 721, 723 (9th Cir. 1985) (striking down a California statute authorizing "general searches of any home … at any time of the day or night" as "invalid under the Fourth Amendment as general searches").

Section 26806 bears all the hallmarks of the oppressive writs of assistance the Founding generation suffered at the hands of the British; it grants blanket authority to search all locations associated with a disfavored trade, it operates without expiration, it fails to impose any accountability on government actors via a neutral judicial officer, and it authorizes perpetual intrusions into homes and businesses. Compl. ¶¶ 287-290. With no "subject-matter, locational, [or] temporal boundaries" to be seen, *id.* ¶ 317, Section 26806 sanctions the very sort of widespread, generalized, suspicionless searches of private homes and businesses that shocked the Founders. Section 26806's digital quartering of troops in private homes and businesses across California violates the Fourth Amendment's proscription of general warrants.

Second, Section 26806 violates the Fourth Amendment's protection of private property rights. As the Supreme Court made clear in *United States v. Jones*, 565 U.S. 400 (2012), and *Florida v. Jardines*, 569 U.S. 1 (2013), a government's

unconsented and unwarranted physical intrusion onto an individual's property to gather information constitutes an unreasonable search in violation of the Fourth Amendment. *See also Jones*, 565 U.S. at 404-05 ("The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted.").

Without any claim of a superior property interest to Plaintiffs' persons, effects, homes, and businesses that would justify such an intrusion, Compl. ¶ 319, Section 26806 mandates a physical intrusion on and occupation of Plaintiffs' private property via the installation and perpetual use of audiovisual recording equipment. *Id.* ¶¶ 324-326. Because "such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted," Section 26806 violates the Fourth Amendment's proscription of unreasonable searches. *Jones*, 565 U.S. at 404-05.

Third, Section 26806 violates Plaintiffs' reasonable expectations of privacy under *Katz v. United States*, 389 U.S. 347 (1967). *See* Compl. ¶¶ 330-31, 333-34, 347. (alleging reasonable expectations of privacy individually). Case law forecloses any argument to the contrary, as individuals undoubtedly "have a reasonable expectation of privacy in the whole of their physical movements," *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018), and their private conversations, *Alderman v. United States*, 394 U.S. 165, 178 (1969). Indeed, even a transient[2] video search of a college exam taker's room fails this constitutional test, as does the prolonged surveillance of one's backyard. *See Ogletree v. Cleveland State Univ.*, 647 F. Supp. 3d 602, 609 (N.D. Ohio 2022); *United States v. Cuevas-Sanchez*, 821 F.2d 248, 250 (5th Cir. 1987). Yet Section 26806 reaches even

[2] *See also Katz*, 389 U.S. at 354 (striking down a wiretap *even though*, quite unlike Section 26806, "the surveillance was limited, both in scope and in duration .... The agents confined their surveillance to the brief periods during which he used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself.").

farther, placing surveillance cameras *inside* homes and businesses on a perpetual, 24/7 basis. *See United States Dist. Court*, 407 U.S. at 312-13 ("physical entry into the home is the chief evil against which the wording of the Fourth Amendment is directed … employment by Government of electronic surveillance" is not "a welcome development – even when employed with restraint and under judicial supervision. There is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens.").

Finally, the so-called "highly regulated industry" exception to the Fourth Amendment's warrant requirement cannot save Section 26806. Despite prior judicial consideration of gun dealers as being "highly regulated,"[3] Plaintiffs dispute the continuing validity of "highly regulated industry" cases as they pertain to gun dealers.[4] Moreover, statutes permitting warrantless administrative searches of *actual* highly regulated businesses "remain susceptible to overbreadth challenges if they sweep too far." Compl. ¶ 357. Ninth Circuit precedent dispenses with Section 26806 under this doctrine. *See Rush*, 756 F.2d 713 (invalidating a statute authorizing warrantless administrative searches of a highly regulated industry because the statute permitted general searches, day or night); *cf.* Compl. ¶¶ 357-62 ("Section 26806 subjects home-based dealers to searches 'at any time of the day or night'—in fact, *at all times*—because surveillance must be continuous and uninterrupted.").

[3] *See United States v. Hamad*, 809 F.3d 898, 905 (7th Cir. 2016); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (citation omitted) ("Certain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise.").

[4] *United States v. Biswell*, 406 U.S. 311, 315 (1972) (emphasis added) (admitting that "[f]ederal regulation of the interstate traffic in firearms is *not as deeply rooted in history* as is governmental control of the liquor industry" but citing the governmental interests in such regulation); *Bruen*, 142 S. Ct. at 2136 (focusing constitutional analysis on early, Founding-era historical traditions and rejecting governmental interest balancing entirely).

D. Section 26806 Violates the Fourteenth Amendment's Guarantee of Equal Protection Under the Law.

The imposition of a mass surveillance regime undoubtedly chills protected speech and associational rights. Compl. ¶¶ 23-33, 99-101, 313; *see also NAACP,* 357 U.S.at 462. But because Section 26806 subjects only gun owners, prospective gun owners, and gun dealers to its chilling effects, Section 26806 imposes "a viewpoint-discriminatory and/or animus-based restriction on Plaintiffs' protected political and ideological speech that serves no compelling governmental interest." Compl. ¶ 457. Such selection of a disfavored (but constitutionally protected) group of people for differential, punitive treatment violates Plaintiffs' Fourteenth Amendment rights to equal protection of the laws. Consequently, Section 26806 is presumptively unconstitutional and Defendants bear the burden of justifying their selective surveillance regime under Equal Protection analysis. They cannot.

E. Section 26806 Violates California's State Constitutional Right to Privacy.

Finally, Section 26806 violates Article I, Section 1 of the California Constitution, which provides that "[a]ll people are by nature free and independent and have inalienable rights. Among these [rights] are … pursuing and obtaining … privacy." Adopted via ballot initiative in 1972, the public originally understood this state constitutional provision to "create[] a legal and enforceable right of privacy for every Californian" that proscribes "[t]he proliferation of government snooping and data collecting" which "threaten[s] to destroy our traditional freedoms." *White v. Davis*, 533 P.2d 222, 233 (Cal. 1975) (quoting ballot materials urging adoption). As the amendment's drafters presciently observed, "[g]overnment agencies seem to be competing to compile the most extensive sets of dossiers of American citizens. Computerization of records makes it possible to create 'cradle-to-grave' profiles of every American." *Id.* Section 26806's pervasive digital surveillance is precisely the sort of governmental 'dossier compilation' that Article I, Section 1 was amended to prohibit. Indeed, Article I, Section 1 "prevents government and business interests from collecting and stockpiling unnecessary information about us

and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us." *Id.* at 233-34.

Accordingly, a "plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." *Mathews v. Becerra*, 455 P.3d 277, 286 (Cal. 2019). Plaintiffs clearly establish each of these elements.

First, Section 26806 impinges on a legally protected privacy interest. Section 26806 mandates perpetual audiovisual surveillance of the exercise of several constitutionally protected rights—free association, free exercise, free speech, firearm acquisition, and firearm commerce, to name a few. Compl. ¶¶ 95, 285-302, 446. Moreover, such surveillance necessarily creates government records of citizens' whereabouts, shopping habits, and conversations – not to mention a "dossier" of their exercise of Second Amendment rights, akin to the government creating a list of all the books they read.

Yet at the time Californians amended Article I, Section 1, concerns over "government snooping and data collecting" were paramount. *White*, 533 P.2d at 233. No doubt, Plaintiffs have both "informational" and "autonomy" privacy interests in "precluding the dissemination or misuse of sensitive and confidential information" relating to constitutionally protected firearm purchases and "conducting personal activities [like shopping] without observation, intrusion, or interference." *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 654 (Cal. 1994).

Second, Plaintiffs have a reasonable expectation of privacy in their homes, businesses, conversations, whereabouts, and firearms commerce. Compl. ¶¶ 301, 493, 322-324. While Defendants may demur that customers and gun dealers subject to federal and state recordkeeping requirements cannot reasonably expect to remain private in their affairs, California courts "have never held that the existence

of a long-standing practice or requirement of disclosure can, by itself, defeat a reasonable expectation of privacy in the circumstances." *Mathews*, 455 P.3d at 292; *see also id.* ("we held that patients retain a reasonable expectation of privacy in their [medical] records"). On the contrary, Section 26806 poses an unprecedented expansion of governmental surveillance into a realm of constitutionally protected commerce that never before has suffered any intrusion of such magnitude, and Plaintiffs retain an expectation that their constitutionally protected activities remain free from constant warrantless surveillance by government.

Third, Section 26806's invasion is serious—the intrusiveness of a law requiring the installation of numerous cameras inside private businesses *and private home*s cannot be understated, or reasonably disputed. Moreover, should Section 26806 go into effect, California's mass-surveillance regime will operate perpetually, on all private properties engaged in firearm dealing throughout the state. Compl. ¶ 313 ("California will physically intrude upon these locations and permanently install its 'eyes' and 'ears' to observe all that goes on."); ¶ 303 ("To require 24/7 surveillance of the interior of one's home is Orwellian, to say the least."). Consequently, Plaintiffs have established a clear violation of their state constitutional rights to privacy.

Finally, Defendants' surveillance regime fails to "substantively further[]" any "countervailing interest[]" which constitutionally may justify an invasion of privacy. *Lewis v. Super. Ct. of L.A. Cnty.*, 397 P.3d 1011, 1018 (Cal. 2017). Even if Defendants claimed an amorphous interest in "public safety" and that this interest countervailed Plaintiffs' interests in the private exercise of their constitutional rights and the private enjoyment of their homes (it does not), "there are feasible and effective alternatives … which have a lesser impact on privacy interests" and therefore negate any justification of Section 26806 that Defendants could invent. *Id.* Certainly, a business-hours limitation (or an exemption for homes) would have

a "lesser impact on privacy interests," yet Section 26806 permits no such thing.[5] The authors of SB 1384 offered no findings that recording 24 hours per day all activities going on in a retail establishment, much less someone's home, meet the goals of public safety. In fact, we have multiple situations that have evidenced just the opposite with the increase in retail crime in California and all of the retail crimes caught on camera. Criminals do not care they are being recorded, law abiding citizens do, so who is the state trying to really monitor with Section 26806? More importantly, however, any argument that there *are no* "feasible and effective alternatives" necessarily admits that California's panoply of existing gun laws have proved ineffective at achieving the State's public safety goals.

II. IRREPARABLE CONSTITUTIONAL HARM IS CERTAIN ABSENT PRELIMINARY RELIEF.

As the Ninth Circuit has observed, "a deprivation of constitutional rights, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Latta v. Otter*, 771 F.3d 496, 500 (9th Cir. 2014) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Moreover, in cases where constitutional rights are "being chilled daily, the need for *immediate injunctive relief* without further delay is, in fact, a direct corollary of the matter's great importance." *Cuviello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019) (emphasis added) (discussing this principle in the First Amendment context); *see also Bruen*, 142 S. Ct. at 2156 ("The [Second Amendment] is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'"). Indeed, based on the gravity of the harms threatened, Ninth Circuit "cases do not [even] require a strong showing of irreparable harm for constitutional injuries," *Cuviello*, 944 F.3d at 833, and yet the strength of Plaintiffs' showing remains clear.

No doubt, Section 26806 will chill (and violate outright) Plaintiffs' First and Second Amendment rights. Compl. ¶¶ 4, 23-33, 103-08, 433, 464, 206. Moreover,

[5] To be sure, Section 26806 still would be unconstitutional multiple times over even with such limitations in place.

Section 26806's surveillance regime will harm Plaintiffs' Fourth Amendment rights against unreasonable and unwarranted searches, *id.* ¶¶ 95, 297-303, Fifth Amendment rights against uncompensated takings, *id.* ¶¶ 20, 194, 427, 263, Fourteenth Amendment rights to equal protection of the laws, *id.* ¶¶ 227, 232. 286, and state constitutional rights to privacy. *Id.* ¶ 364-67. The irreparable constitutional harms an Orwellian surveillance regime threatens is beyond reasonable argument (although California no doubt will try).

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVOR PLAINTIFFS.

When a governmental defendant is the opposing party, the balance-of-equities and public-interest factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). These factors militate strongly in Plaintiffs' favor, as "public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). In contrast, California has absolutely no legitimate interest in recording the identities and interactions of people on the grounds that they are exercising their Second Amendment rights, any more than California could mandate installation of pervasive surveillance devices in book stores in order to record which books Californians buy.[6] California has no legitimate interest in surveilling anyone who visits the home of a home-based FFL or the family interactions there, but that is exactly what Section 26806 does. No state can claim an interest in chilling the exercise of constitutional rights, the very negative rights that the state is tasked with *not* violating.

CONCLUSION

For the reasons stated, this Court should enter a temporary restraining order,

[6] *See United States Dist. Court*, 407 U.S. at 314 ("History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies … the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security [*i.e.*, public safety].'").

followed by a preliminary injunction, enjoining enforcement of Section 26806.

Dated: December 20, 2023

MICHEL & ASSOCIATES, P.C.

s/ C.D. Michel
C.D. Michel
Attorneys for Plaintiffs Adam Richards, Jeffrey Vandermeulen, Gerald Clark, Jesse Harris, On Target Indoor Shooting Range, LLC, Gaalswyk Enterprises, Inc. (D/B/A/ Smokin' Barrel Firearms), Gun Owners of California, Inc., Gun Owners of America, Inc., Gun Owners Foundation, and California Rifle & Pistol Association, Incorporated

Dated: December 20, 2023

LAW OFFICES OF DONALD KILMER, APC

s/ Donald Kilmer
Donald Kilmer
Attorney for Plaintiff Second Amendment Foundation

ATTESTATION OF E-FILED SIGNATURES

I, C.D. Michel, am the ECF User whose ID and password are being used to file this MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND ISSUANCE OF PRELIMINARY INJUNCTION. In compliance with Central District of California L.R. 5-4.3.4, I attest that all signatories are registered CM/ECF filers and have concurred in this filing.

Dated: December 20, 2023

s/ C.D. Michel
C.D. Michel

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Plaintiffs Adam Richards, Gerald Clark, Jesse Harris, Jeffrey Vandermeulen, On Target Indoor Shooting Range, LLC, Smokin' Barrel Firearms, Gun Owners of California, Inc., Gun Owners of America, Inc., Gun Owners Foundation, and California Rifle & Pistol Association, Incorporated, certifies that this brief contains 5,365 which complies with the word limit of L.R. 11-6.1.

Dated: December 20, 2023

s/ C.D. Michel
C.D. Michel

CERTIFICATE OF SERVICE
IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case Name: *Richards, et al. v. Newsom, et al.*
Case No.: 8:23-cv-02413

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

I am not a party to the above-entitled action. I have caused service of:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND ISSUANCE OF PRELIMINARY INJUNCTION

on the following parties by the following means:

Robert Bonta, California Attorney General
Office of the Attorney General
300 South Spring Street
Los Angeles, CA 90013-1230

Governor Gavin Newsom
1021 O Street, Suite 9000
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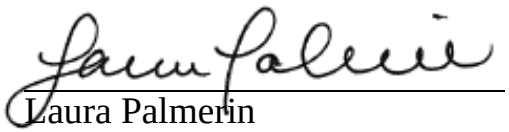
Executed December 20, 2023.



Laura Palmerin