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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ADAM RICHARDS, et al., Plaintiffs, v. GAVIN NEWSOM, et al., Defendants.	Case No.: 8:23-cv-02413 JVS (KESx) **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS** Hearing Date: July 15, 2024 Hearing Time: 1:30 p.m. Courtroom: 10C Judge: Hon. James V. Selna

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I. DEFENDANTS CANNOT MEET THE STANDARD FOR DISMISSAL

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is very rare. Indeed, it is "only the *extraordinary* case in which dismissal is proper" for failure to state a claim. *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981) (emphasis added). A court may dismiss a claim only if the complaint: (1) lacks a cognizable legal theory; or (2) fails to contain sufficient facts to support a cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc*., 749 F.2d 530, 534 (9th Cir. 1984). To survive a Rule 12(b)(6) motion to dismiss, then, "a complaint generally must satisfy only the minimal notice pleading requirements of Rule 8(a)(2)." *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003). That is, a plaintiff need provide just a short and plain statement showing that she is entitled to relief. Fed. R. Civ. P. 8(a)(2). What's more, courts must view the complaint "in the light most favorable to the plaintiff, taking all allegations as true, and drawing all reasonable inferences from the complaint in [her] favor." *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005). Doing so here leads to the unmistakable conclusion that dismissal (especially with prejudice) is improper.

In the context of a claim for violation of First Amendment rights based on an ordinance that chills speech, such challenges are given the most leeway, especially at the pleading stage. *See Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir.2003). Standing and injury are sufficiently pleaded by showing that the statute caused or will cause self-censorship. *See id*.; *Libertarian Party of Los Angeles County v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013). As described below, the Complaint and its supporting declarations describe how Plaintiffs, other licensees, and their customers will self-censor due to a regulated omnipresent government recording of their words not necessarily confined to or related to a firearms transaction. Those allegations are sufficient to state a claim.

A plaintiff states a viable Fourth Amendment violation as to the overbreadth of a regulatory search when a plaintiff alleges that an electronic recording of

conversations on private premises was conducted prior to a warrant being sought or issued. *See, e.g.*, *United States v. U.S. Dist. Court for Eastern Dist. of Mich., Southern Div.*, 407 U.S. 297, 315, 320 (1972). So too, a viable Fourth Amendment violation is pleaded when a plaintiff alleges that the government takes a third-party's electronic information without a warrant where there is at least some expectation of privacy, however diminished. See *Carpenter v. U.S.*, 585 U.S. 296, 314-15 (2018). Plaintiffs have alleged that the state has turned their homes and businesses into de facto 24-hour audio recording centers, which conversations of both Plaintiffs and its customers can be taken merely by litigants alleging some nexus between what might have been recorded and some pending civil action. *But see* Cal. Code Civ. P. § 1985.3 (normally third-party recordings and information are protected from disclosure to litigants by a notice and objection process afforded to the affected persons; no such safeguard exists for customers of licensees subject to Penal Code section 26806).

To survive a motion to dismiss, a takings claim of the kind alleged by Plaintiffs must allege that the result of a regulation was the physical invasion of the plaintiff's property. *See Cedar Point Nursery v. Hassid*, 94 U.S. 139, 149 (2021). Here, Plaintiffs' allegations that they are obligated to install and maintain on their properties a video and audio monitoring system for the sole benefit of the government satisfies this standard.

II. PLAINTIFFS STIPULATE TO THE DISMISSAL OF DEFENDANT NEWSOM

Notwithstanding that dismissal of the complaint is not appropriate at this stage given the burden on the movant and the viability of certain of the claims, for purposes of judicial efficiency, Plaintiffs nonetheless do not oppose the dismissal of Defendant Newsom.

Plaintiffs believe that Defendant Newsom, as the head of the State's executive branch, uncontrovertibly has the authority to direct the Attorney General and Department of Justice, including issuing orders and promulgating policies in

response to equitable relief granted in favor of Plaintiffs by this Court that would afford the relief Plaintiffs seek in this lawsuit, e.g., a directive to his Attorney General to cease investigating or prosecuting violations of the law enacted by Senate Bill 1384 or a directive or order to the Bureau of Firearms to cease enforcing or considering SB 1384 in firearms licensing determinations. *See, e.g., Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004) (where state attorney general can do every act that his subordinate county prosecutors can do, such state official is a proper defendant under *Ex Parte Young* even though subordinate county prosecutors would normally perform the acts sought to be enjoined); *and see* Cal. Const. art. V, § 13 (Attorney General is subject to the powers of, and directions and duties given him, by the Governor), and Cal. Gov. Code §§ 12010, 12013, 12014 (same). As Defendant Newsom himself has recently demonstrated, when it comes to enforcement of firearm regulations, the Governor can and does deputize himself to enforce them in the stead of the Attorney General or other subordinates. *See, e.g.*, Notice of Mot. and Mtn. to Intervene of Governor Gavin Newsom filed in *South Bay Rod & Gun Club, Inc. v. Bonta*, No. 22cv1461-BEN(JLB) (S.D. Cal. Sept. 28, 2022), ECF No. 29 (Defendant Newsom intervening in litigation to enforce firearms statute despite such enforcement under the statute being the responsibility of the Attorney General and local government agency attorneys, not the Governor).

However, it is also clear that Defendant Attorney General Robert Bonta has direct supervisory authority over the Department of Justice's Bureau of Firearms. *See* Cal. Gov. Code §§ 12510-12511, 15001, and 15002.5 (West 2024) (authority of Attorney General to create and direct bureaus of the DOJ). So too, Defendant Bonta's subordinate, Bureau of Firearms Director Allison Mendoza, could be named a defendant in Newsom's stead. Mendoza sets policy for the Bureau of Firearms as well as directs Bureau of Firearms agents (who are also DOJ employees) regarding investigation of violations by firearms licensees of state

licensing laws. *See Bureau of Firearms*, State of California Department of Justice, https://oag.ca.gov/careers/descriptions/firearms/ (last visited May 2, 2024). Defendants cannot and would not claim that either of these state actors lack the requisite nexus in enforcing the challenged law such that *Ex Parte Young* does not apply to them. Regardless of the named defendant—Defendant Newsom or one of his subordinates—the equitable relief to which Plaintiffs would be entitled if successful in their lawsuit would both be permissible under the Eleventh Amendment and of the same breadth and scope. Plaintiffs, therefore, do not oppose the dismissal of Defendant Newsom.

III. PLAINTIFFS' FIRST AMENDMENT CLAIM EXCEEDS MERE "PLAUSIBILITY"

A. Section 26806 chills protected speech and association.

Plaintiffs' First Amendment claim, alleging the chilling of speech in both businesses and homes, is more than "plausible;" the fundamental rights of speech and association in one's home are implicated by the overbreadth of Section 26806.

Defendants extol the virtues of Section 26806's in-store and in-home surveillance mandate, claiming it "assists law enforcement in . . . ***deterring***" all manner of potential crimes, including "straw purchases." Mot. at 2:15-17 (emphasis added). Defendants thus contemplate Section 26806 deterring (*i.e.*, *chilling*)[1] at least *some* speech,[2] yet simultaneously insist that Section 26806 chills *no* speech or association whatsoever. *See* Mot. at 4:25-5:21 (claiming Section 26806 does not "even regulat[e] speech"). This theory is incoherent.

First, Defendants posit that Section 26806 cannot possibly chill speech or association because it does not *expressly* "target," "proscribe," or "punish" with

[1] *Compare* "*Deter*," Merriam Webster, https://www.merriam-webster.com/dictionary/deter (last visited May 10, 2024) ("to . . . discourage, or prevent"), *with* "*Chill*," Merriam Webster, https://www.merriam-webster.com/thesaurus/chill#thesaurus-entry-3-3 (last visited May 10, 2024) ("*to discourage*").

[2] Indeed, it is difficult to conduct a straw purchase without *speaking* to a store clerk.

"consequences." Mot. at 4:25, 5:15-16, 6:16. But the Ninth Circuit has made clear that "the government may chill speech" not just by "threatening or causing . . . harm" or by "prohibiting" conduct, but also by "*intercepting*" communications and even "conducting *covert surveillance*" of constitutionally protected conduct. *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 868 (9th Cir. 2016) (emphasis added):

> Both the Supreme Court and [the Ninth Circuit] have recognized a wide variety of conduct that impermissibly interferes with speech. For example, the government may chill speech by threatening or causing pecuniary harm, *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 674, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996); withholding a license, right, or benefit, *Baird v. State Bar of Ariz.*, 401 U.S. 1, 7, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971); prohibiting the solicitation of charitable donations, *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 633, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980); detaining or intercepting mail, *Blount v. Rizzi*, 400 U.S. 410, 417-18, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971); or conducting covert surveillance of church services, *The Presbyterian Church v. United States*, 870 F.2d 518, 522-23 (9th Cir. 1989). Importantly, the test for determining whether the alleged retaliatory conduct chills free speech is objective; it asks whether the retaliatory acts " 'would lead ordinary student[s] ... in the plaintiffs' position' to refrain from protected speech." *O'Brien v. Welty*, 818 F.3d 920, 933 (9th Cir. 2016) (quoting *Pinard v. Clatskanie School Dist.*, 467 F.3d 755, 770 (9th Cir. 2006)]).

Ariz. Students' Ass'n, 824 F.3d at 868; *see also* Pls.' Reply in Supp. of Mot. for Prelim. Inj. at 2:4-4:15, ECF No. 22.

Indeed, the Ninth Circuit has recognized that "congregants are chilled from participating in worship activities[] when they refuse to attend church services because they fear the government is spying on them and taping their every utterance. . . ." *Presbyterian Church (U.S.A.)*, 870 F.2d at 522. If the mere possibility of *covert* surveillance causes congregants reasonably to alter their conduct, then Section 26806's *overt* surveillance of Plaintiffs' utterances (even within their own homes) is even more stifling.

Because Section 26806 places patrons and proprietors on notice of perpetual, government-accessible surveillance, it "prevents Plaintiff Clark from freely communicating with FFLs as to ongoing legal and legislative initiatives for fear of

being recorded by the government," which "chill[s] his ability to speak freely for fear of retribution by the government." Compl. ¶ 25; Decl. of Gerald Clark in Supp. of Compl., ¶ 7, ECF No. 1-4; *see also* Decl. of Jesse Harris in Supp. of Compl., ¶ 13, ECF No. 1-5. A member of Plaintiff GOA, Matthew Gene Peterson-Haywood, can no longer have private talks, have friends stay the night, discuss his political views, perform his job duties, discuss private health matters, or even practice his religion ***within his own home*** without being exposed to pervasive surveillance. Decl. of Matthew Gene Peterson-Haywood in Supp. of Mot. for Prelim. Inj., ¶¶ 14-31, ECF No. 27-1. For purposes of a motion to dismiss, these allegations must be *accepted as true*.

Defendants offer a red herring that Section 26806 "imposes no consequences for making . . . statements," so Plaintiffs' fears of chilled speech cannot be "objectively reasonable." Mot. at 5:15-21 & 6:12-16; see also 6:1-2 (calling Plaintiffs fear of having their most private conversations subject to "pervasive governmental … recordings … objectively *un*reasonable."). But the absence of express punishment is not a characteristic of a "chilling effect" (*see* Pls.' Reply in Supp. of Mot. for Prelim. Inj. at 2:4-19, ECF No. 22), and the absence of enumerated "consequences" did not prevent the Ninth Circuit from finding "a cognizable injury" when government agents simply wore "'body bugs' and surreptitiously recorded church services." *Presbyterian Church*, 870 F.2d at 520, 523. As Plaintiffs observed, Defendants would be singing a different tune if a law-imposed surveillance of conversations and visitors within abortion clinics (not a constitutionally protected industry). *See* Compl. ¶ 343 n.39.

Nor does Defendants' appeal to the purported "tight[] limits [on] the use or release of the recordings" (Mot. at 5:22; *see also id*. at 6:28, "the State cannot use or disclose any information from the recordings") have any basis in fact, as Section 26806(b) plainly allows unfettered access by government "agent[s]" at any time to ensure "compliance," places no restriction on what information may be copied or

seized, and establishes no limit whatsoever on the subsequent use of that information. In fact, Section 26806(b) on its face places restrictions *only on licensees, not the government*.

Defendants close with the non sequitur that Section 26806 "does not 'compel[] disclosure of affiliation with groups engaged in advocacy'" because the state's ability to use recordings is purportedly "limited" and individuals "cho[o]se to appear in person to conduct a commercial transaction" subject to regulation and paperwork. Mot. at 5:22-26, 6:25-7:4. But Section 26806 also records the activities of those who visit a gun store and *do not purchase* a firearm, and sweeps up speech *unrelated* to gun purchases. Nor is it any answer to say that individuals simply could stop patronizing gun stores if they do not wish their affiliations in protected groups like GOC and CRPA to be disclosed. Certainly, the Supreme Court never suggested that members of the NAACP should discontinue their protected activities to avoid disclosure of their identities. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

B. Section 26806 eviscerates the established right to speak anonymously.

Defendants reduce the settled "right to speak anonymously" (*Doe v. 2themart.com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001), which courts uniformly recognize as "an aspect of the freedom of speech protected by the First Amendment," (*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 (1995)) to a "*so-called right*." Mot. at 7:7 (emphasis added). Disputing the *merits* of Plaintiffs' claim (Mot. at 7:9: "no merit to the allegation"), Defendants offer the straw man that Section 26806 "forbids public disclosure," and thus, Plaintiffs somehow remain anonymous vis-a-vis *the government*. *Id.* These arguments only distract from the fact that Section 26806 unmasks Plaintiffs and all manner of gun store patrons to the state, not the public generally. *See* Compl. ¶¶ 121-22. And again, Section 26806(b) limits access only by dealers, not the government or even third-parties

alleging some relevance of the recordings to a civil dispute (e.g., a former employee alleging that evidence of harassment or discrimination is contained on the recorded conversations of coworkers).

Defendants' focus on those participating in *business transactions* in gun stores is similarly unavailing. *See* Mot. at 7:10-22 ("engaging in a face-to-face business interaction," "identity verification is a feature of firearm purchases," "interest in anonymous commercial transactions"). As Plaintiffs explained, Section 26806 reaches far more protected conduct than mere transactions. *See, e.g.*, Compl. ¶ 26 ("speech about gun control, [political] campaign[s], and the current politics of California"), ¶ 28 ("confidential conversations with customers regarding their self-defense needs as well as collecting confidential and personal information"). Defendants make no attempt to grapple with *these* allegations.

IV. PLAINTIFFS DO NOT OPPOSE THE DISMISSAL OF THEIR CLAIM BASED ON A VIOLATION OF EQUAL PROTECTION

Based on the Ninth Circuit's recent upholding of grant of dismissal in *Doe v. Bonta*, Case No. 23-55133 (May 8, 2024), Plaintiffs do not believe they can continue to state a viable facial challenge to SB 1384 on Equal Protection grounds. However, to the extent that, in the future, circumstances may arise that will allow for a viable as-applied challenge, Plaintiffs consent to and request that the dismissal of their claim for Violation of Equal Protection under the Fifth and Fourteenth Amendments be granted without prejudice.

V. PLAINTIFFS DO NOT OPPOSE THE DISMISSAL OF THEIR CLAIM BASED ON A VIOLATION OF THE SECOND AMENDMENT

For the same reasons cited above, Plaintiffs no longer believe they can assert a viable facial challenge SB 1384 based on a violation of the Second Amendment. Plaintiffs consent to and request that the dismissal of their claim be granted without prejudice.

VI. PLAINTIFFS HAVE ADEQUATELY ALLEGED SECTION 26806'S VIOLATION OF THE FOURTH AMENDMENT

The prior briefing and order denying the Plaintiffs' Motion for Preliminary injunction dealt superficially with the Fourth Amendment issues raised by Section 26806 by focusing primarily on whether this law qualifies as an administrative search under the "highly regulated industry" exception and whether it violates the "reasonable expectation of privacy" under *Katz v. United States*, 389 U.S. 347 (1967).[3] But the challenged statute is self-contradictory and still deeply constitutionally flawed.

Electronic surveillance of retail spaces is already an increasingly common practice for retail establishments, even among those businesses that are not highly regulated. *See, e.g.*, James Stark, Improving Retail Security with Video Analytics, by James Stark. Security Mag. (Apr. 14, 2023), https://www.securitymagazine.com/articles/99212-video-analytics-offer-retailers-benefits-that-go-beyond-security (last visited June 6, 2024). At this stage of the proceedings, it is unknown how many firearm dealers voluntarily produce, keep, and maintain electronic surveillance of their business premises. Section 26806 introduces coerced surveillance and ends up creating state actors that could jeopardize future criminal prosecutions, while at the same time violating the reasonableness standard of the Fourth Amendment.

The coercive nature of the transactions associated with fundamental rights that must (and can only) take place at gun stores, coupled with the policy of compelling gun dealers to partner with the government in a perpetual stake-out of their customers, at their own gun stores, transforms the retail gun dealer into a state

[3] The two other concepts analyzed under the "Fourth Amendment" heading by the Order Denying the Preliminary Injunction (ECF No. 28)—the physical occupation and intrusion of private spaces by mandated government surveillance equipment—are more properly analyzed under the Fifth Amendment. *See* Discussion, Part VII, *infra*.

surveillance agent. This violates the Fourth Amendment.

A. Use of the "Highly Regulated Industry" Exception must still be reasonable under the Fourth Amendment.

The Supreme Court recently reiterated that firearm dealers are one of only four highly regulated industries to qualify for "highly regulated industry" exception to the warrant requirements under the Fourth Amendment. *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 424 (2015). That same decision also made clear that the rule from *New York v. Burger*, 482 U.S. 691 (1987) still controls the reasonableness of government conduct under that exception. The three *Burger* factors under which reasonableness must still be satisfied by the government under the pervasively regulated industry exception are: "(1) '[T]here must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made'; (2) 'the warrantless inspections must be 'necessary' to further [the] regulatory scheme'; and (3) 'the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.' " *Patel*, 576 U.S. at 426 (quoting *Burger*, 482 U.S. at 402-03).

As this Court noted in the Order denying the Motion for a Preliminary Injunction, Section 26806 probably (but only) fulfills the first of these standards by addressing a substantial government interest: public safety. That interest, for Fourth Amendment purposes, is the federally mandated collection of data for ensuring lawful transactions and maintaining such data to trace firearms that are the subject of a criminal investigation. That includes some kind of ordinarily recorded and maintained (paper) records or the collection and maintenance of enhanced (electronic/digitized) records. The collection of such limited data (and the government's sharing of only the anonymized data) is not a Fourth Amendment violation. *See generally Doe v. Bonta*, 101 F.4th 633 (9th Cir. 2024).

But this paper or electronic "surveillance" and storage of data, though

authorized by federal law, is also circumscribed by federal law. *See* Congressional Research Service Reports, Statutory Federal Gun Registry Prohibitions and ATF Record Retention Requirement, IF 12057 (Feb, 5, 2024), https://crsreports.congress.gov/product/pdf/IF/IF12057 (last visited June 6, 2024). To expand that surveillance and storage of data to the scheme codified by Section 86806, California must still meet its burden on the other two criteria for what is still a warrantless search of people doing business at a gun store. *See Horton v. California*, 496 U.S. 128, 133 n.4 (1990); *Katz v. United States*, 389 U.S. 347, 357 (1967).

The other two prongs of the *Burger* test—"necessity" and "adequate substitute for a warrant"—are where the challenged law fails to comport with the Constitution.

B. Section 26806 turns licensees into perpetual government surveillants, immediately implicating the Fourth Amendment's warrant requirement regardless of when law enforcement eventually seeks a warrant to retrieve the surveillance.

Section 26806(a) compels the gun store owner to install a digital video surveillance that: (1) also records audio communications; (2) specifically requires clear identification of any person; (3) covers all retail areas; and (4) mandates 15 frames per second, 24 hours per day. Section 26806 further mandates the licensee to ensure (5) the security of the electronic gear necessary to capturing, recording and storing all surveillance; (6) the storage (at the licensees' expense) of all recordings; (7) date/time stamps are present on the recordings; and (8) that a failure notification feature is included on the system.

And subdivision (b) of 26806 forbids the licensee to "use, share, allow access, or otherwise release recordings" except: (1) to an agent of the government conducting an inspection of the licensee's premises to ensure compliance with the law, but only if ***a warrant*** or court order ***would not*** generally be required for that access (emphasis added); (2) only pursuant to ***search warrant*** or other court order

(emphasis added); and (3) only pursuant to insurance claims or as part of a civil discovery process.

Which means California admits that the Fourth Amendment requires a warrant to access the data (face and voice recordings) collected under Section 26806. So why isn't a warrant required for the government-mandated actor to collect and record the data?

1. Section 26806 turns the licensee into a government actor.

Licensed firearm dealers are already considered quasi-government agents in certain law enforcement contexts. *United States v. Tallmadge,* 829 F.2d 767, 774 (9th Cir. 1987) (affirmative defense of entrapment by estoppel available to defendant based on dealer's representations in firearm transaction because dealer is acting as agent of the government in that circumstance). Would that government agent classification extend to a Fourth Amendment analysis when a licensee turns over recordings of video or audio surveillance of his own store, using his own equipment, to help prosecute a robbery, theft, or other crime? Probably not, even without a warrant or court order. *See United States v. Attson,* 900 F.2d 1427, 1433 (9th Cir. 1990) (doctor drawing blood for medical reasons was not intending to aid the government's investigative or administrative capacity.)

But Section 26806 short-circuits that rationale by compelling the licensee to conduct surveillance for the government on pain of penalty, including the loss of his or her license to do business in California. Normally, whether a private party is engaged in state action is a highly specific and fact-centered question. But not Under section 26806. The challenged law codifies the interdependence of the licensee and government officials under all of the tests—joint action, symbiotic relationship, and public function—outlined in *Brunette v. Humane Society of Ventura County,* 294 F.3d 1205, 1210-14 (9th Cir. 2002). This statute turns a California gun dealer into a government agent collecting audio and video surveillance of his customers for the state's uses.

As noted above, subdivisions (b)(1) and (b)(2) of the statute still require warrants for *seizing* or accessing the audio/video recordings that are compelled by 26806, which not only likely appropriate, but is also an admission by the State that the data gathered during retail transactions is intrusive under the Fourth Amendment, and therefore subject to a warrant. But under this statute, the constitutional violation occurs when the government actor—in this case, the statutorily-obliged licensee—*engages in the initial surveillance and recording*, because the use of electronic devices to capture conversations is still *a search* under the Fourth Amendment. *Berger v. New York*, 388 U.S. 41, 51 (1967). Moreover, this electronic surveillance is *not* a search of the licensees' store or the federally mandated business records under the "highly regulated business" exception, it is a search that is conducted by the licensee as a government agent, to record the conduct of every retail customer who enters his store—24 hours a day, 7 days a week, 365 days a year.

Under the third test in *New York v. Burger*, the Fourth Amendment mandates that " 'the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.' " *Patel*, 576 U.S. at 426 (quoting *Burger*, 482 U.S. at 702-03). There is no such "adequate substitute for a warrant" that safeguards the Fourth Amendment rights of a gun dealer's customers in this panopticon scheme mandated by Section 26806.

An obvious test for this? Ask any neutral and detached magistrate if she or he would approve a warrant for 24/7 audio and video surveillance, 365 days a year, of all people seeking to buy liquor, used auto parts, or those engaged in the business of mining, under the rationale or "probable cause" that someone, somewhere might violate a retail regulation at some point in the future, and where the government already requires transaction records executed under penalty of perjury that fulfill the government's "necessity" requirement under *Burger*.

What is the concrete evidence that would support probable cause to believe a crime is (or will be) committed because someone enters a retail establishment looking at regulated products? Liquor stores, auto junk yards, mining enterprises, and firearm dealers are the only four industries that the Supreme Court has identified that qualify for the "highly regulated business" exception to the requirement to get a warrant. *Patel*, 576 U.S. at 424. But those businesses—and, presumably, their customers—are still protected the *Burger* factors. *See generally Craig v. Boren*, 429 U.S. 190 (1976) (gender-based equal protection challenge to state regulation on liquor sales could be brought by vendor on behalf of affected customers, and vendor's "highly regulated business" affected neither standing nor relief).

Section 26860 is a bridge too far. The Fourth Amendment protects people not places. *United States v. Jones*, 565 U.S. 400, 406 (2012). The intercession of a neutral and detached magistrate, based upon a finding of probable cause to believe a crime has been (or will be) committed, backed up with evidence, is the constitutionally minimal requirement to conduct the search and/or surveillance of every retail customer by the licensed dealer acting as a government agent.

2. The signage required by Section 26806(c) does not make the warrantless surveillance or search constitutional.

To be sure, modern technology will continue to present challenges to Fourth Amendment jurisprudence. *See* M.J. Blitz, *The Fourth Amendment Future of Public Surveillance: Remote Recording and Other Searches in Public Space*, 63 Am. U.L. Rev. 21 (Oct. 2013); M. Tokson, *Inescapable Surveillance*, 106 Cornell L. Rev. 409 (Jan. 2021); *and* M. Tokson, *The Carpenter Test as a Transformation of Fourth Amendment Law*, 2023 U. Ill. L. Rev. 507 (2023).

But one thing the Supreme Court made clear in *Carpenter v. United States*, 585 U.S. 296 (2018), is that *unavoidable exposure* to ubiquitous electronic surveillance and the recordation of personal data, conversations, and other

information is still protected against government intrusion under the Fourth Amendment. In that case the Supreme Court "decline[d] to grant the state unrestricted access to a wireless carrier's database of physical location information. In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and ***the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection***." *Id.* at 320 (emphasis added).

The Court went on to find the government's acquisition of the cell phone records—records that are far less intrusive than facial images and recordings of individual conversations—is still a search under the Fourth Amendment.

> As Justice Brandeis explained in his famous dissent, the Court is obligated—as "[s]ubtler and more far-reaching means of invading privacy have become available to the Government"—to ensure that the "progress of science" does not erode Fourth Amendment protections. *Olmstead v. United States*, 277 U.S. 438, 473–474, 48 S.Ct. 564, 72 L.Ed. 944 (1928). Here the progress of science has afforded law enforcement a powerful new tool to carry out its important responsibilities. At the same time, this tool risks Government encroachment of the sort the Framers, "after consulting the lessons of history," drafted the Fourth Amendment to prevent.

Carpenter at 320 (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948).

California must be put to their burden to show that Section 26806 is a valid warrantless surveillance, collection, and storage of the face and voice impressions of gun buyers, exercising their Second Amendment rights, without also requiring them to waive their Fourth Amendment rights. This set of circumstances impacts both *Burger* factors cited above: That "the warrantless inspections must be 'necessary' to further [the] regulatory scheme"; and that "the statute's inspection program, in terms of the certainty and regularity of its application, provid[e] a constitutionally adequate substitute for a warrant." *Burger*, 482 U.S. at 702-03.

The "necessity test" is essentially a tailoring or "means versus ends" analysis, suspectable to the same overbreadth analysis in *Carpenter*. Which analysis reasonably invites inquiries about why all areas of a gun store or home dealer's

place of business need to be surveilled, and why all non-transactional conversations must be recorded, e.g., why not limit such surveillance and recording to the actual signing of federally mandated documents at the cash register when and where the transaction takes place? Why is it necessary to record browsing and window shopping activities and casual conversations between shopkeeper and their potential customer that occur before or after the only legal event that is any of the government's business, i.e., the actual sale and/or transfer of the weapon?

The "warrant substitute" test specifically mandates heightened judicial scrutiny of 26806 to ensure that the government is acting within the bounds of the Constitution to address a legitimate government interest, and not overstepping its bounds by wading into "Big Brother" territory.

California's burden under the *Burger* factors becomes impossible when one considers that almost all firearm sales and transfers must be conducted through licensed dealers. Cal. Penal Code §§ 26500-90 & 27545 (West 2024). And notwithstanding the government's nebulous (but ultimately unenforceable) concession that Section 26806 will not be enforced at gun shows, that means that gun stores and gun shows are the only place people can exercise their fundamental right to acquire firearms to exercise their Second Amendment rights.[4] *See, e.g.*, *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014), *See also Andrews v. State*, 50 Tenn. 165, 178 (1871) ("The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair") (cited favorably in *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008)).

This is why the signage requirement of Section 26806(c) does not cure the

[4] *See also* Cal. Penal Code §§ 27310 (requiring all firearm transfers at gun shows to comply with state and federal law) & 26805 (prohibiting the sale and transfer of a firearm by a licensed dealer at any location other than the dealer's licensed premises but allowing dealer to begin sale and prepare sale documents at a gun show) (West 2024).

defect of making the licensed gun dealer a government surveillance agent. The doctrine being violated by Section 26806, though not labelled as such in *Carpenter*, is traditionally known as an "unconstitutional condition." *See generally* Comment, *Another Look at Unconstitutional Conditions*, 117 U. Pa. L. Rev. 144 (1968). The issue was explicitly addressed in *Simmons v. United States*, 390 U.S. 377, 394 (1968) (defendant cannot be compelled to waive Fifth Amendment rights to invoke Fourth Amendment rights); *and see Kaur v. Maryland*, 141 S. Ct. 5, 6 (2020) (Sotomayor, J., concurring) (quoting *Simmons* "[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another").

California's statutory scheme requiring nearly all civilian gun sales and transfers to be conducted under the surveillance and recordation by conscripted state actors imposes an unconstitutional condition on the exercise of a fundamental right. For Plaintiffs, Plaintiffs' customers, and any typical Californian to exercise their fundamental Second Amendment right to acquire firearms, they must waive their Fourth Amendment right by subjecting themselves to constant and unnecessary warrantless surveillance. Or, in order to escape the panopticon of Section 26806, they must decline to ever exercise their Second Amendment right by lawfully acquiring a firearm. This forfeiture of one right for another is intolerable under the unconstitutional condition doctrine affirmed in *Simmons*.

Like the impermissible warrantless collection of cell-site information in *Carpenter v. United States*, Section 26806 creates an audio and video recording scheme that results in an "inescapable and automatic" collection of private conversations and associations. *Carpenter*, 585 U.S. at 320. "[T]he fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection." *Id*. Plaintiffs have adequately alleged that Section 26806 inflicts a similar constitutional injury in its automatic collection of their private information on both themselves as well as on their members and customers. The allegations supporting these injuries are all that is needed to state a viable

Fourth Amendment violation and survive Defendants' motion to dismiss.

VII. SECTION 26806 APPROPRIATES PRIVATE SPACE AND PRIVATE EQUIPMENT SOLELY FOR GOVERNMENT USE WITHOUT COMPENSATION IN VIOLATION OF THE TAKINGS CLAUSE

Section 26806 imposes on licensee Plaintiffs a legal obligation to undertake continuous digital video surveillance of their own private property, and to permit government agents to freely enter upon their property to perpetually access and view, at-will, that digital video surveillance. This isn't a merely prohibitory restriction, but rather a mandatory action that Plaintiffs must take at their own considerable expense in order to satisfy the government. Moreover, Plaintiffs cannot use or enjoy the benefits of the expensive system; only the government or third-party litigants may access or use it. Cal. Penal Code § 26806(b) (recording system may not be used the licensee at all, and can only be accessed by the licensee for three express purposes, all for the benefits of either the government or third-parties, not the licensee). In essence, Plaintiffs are forced to install in and on their private property, house equipment for in their buildings and dwellings, and pay for a permanent physical recording system *that they are not allowed to use for their own purposes* so that they can be surveilled by the government. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021) ("[w]henever a regulation results in a physical appropriation of property, a per se taking has occurred" and just compensation must be paid.); *see also id*. at 2073 ("a permanent physical occupation constitutes a per se taking regardless whether it results in only a trivial economic loss" and "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.").

And while mandates are nothing new in regulated industries, the law here goes further than mere commercial regulations. It's the government commandeering business owners—including those who conduct business out of a home—to implement a perpetual government surveillance scheme without any form of compensation. This is akin to the situation in *Boise Cascade Corp. v.*

United States, except that there no surveillance of private conversations was involved. 296 F.3d 1339, 1355 (Fed. Cir. 2002) (permanent physical taking when the government "sunk concrete wells on . . . property to monitor groundwater pollution from a nearby superfund site," and thereafter government "workers . . . entered to . . . maintain[] and monitor them. . . . The permanency of the wells and the quasi-permanent right of entry provided to the government workers who monitored and maintained them led us to apply the per se takings theory of *Loretto*."). Actually, it's worse than *Boise Cascade Corp*.; the government here is essentially forcing Plaintiffs to pay for and build the wells on their property and instructing Plaintiffs to never access them except to ensure they are functioning appropriately or to give the government access to them.

The State also argues that operators of highly regulated industries have a diminished expectation of compensation under the Fifth Amendment (Mot. at 19:7-10), but that is not the same as *no* expectation of compensation when the government forces them to adopt a costly surveillance system for its own benefit. The case it cites, *California Housing Securities, Inc. v. U.S.*, is easily distinguishable. There, the owner of a savings and loan association sought compensation for claimed Fifth Amendment takings that allegedly resulted from the appointment and subsequent actions of the Resolution Trust Corporation (RTC) as conservator and receiver of the association. But as the court explained, "[The association] voluntarily subjected itself to an expansive statutory regulatory system when it obtained federal deposit insurance." *California Hous. Sec., Inc. v. U.S.*, 959 F.2d 955, 958 (Fed. Cir. 1992). It was thus receiving the benefit of being FDIC insured, and that came with consequences. And because California required all state-charted savings and loans associations to be federally insured, the association knew of that obligation when it went into business. *Id*.

Here, by contrast, Plaintiffs have operated their businesses for years, and this is a costly new requirement that was never in place when they got into business, nor

does it provide any benefit to them the way FDIC insurance did to the association in *California Housing Securities*. Plaintiffs are obligated to install and operate a costly and intrusive video and audiotape recording system that they will never get any benefit from. At least those required to purchase insurance could expect to have their losses covered when a bank failure occurred; Plaintiffs here cannot do *anything* with their required monitoring system. They cannot use it to monitor employee theft or store losses. It is a tree the government mandates they plant and then water and fertilize in perpetuity waiting for only a DOJ agent, a law enforcement officer, or the issuer of a subpoena permission to pluck the fruit it bears.

And, while doing so, they suffer the further insult of potentially losing sales to would-be customers who may not feel comfortable being recorded as a condition of browsing both licensed and non-licensed wares. And, as noted with home licensees, the lack of any benefit at all to the mandated 24-hour monitoring comes with substantial if not unconstitutionally oppressive burdens: certain areas of the home and curtilage become "no-go zones" if Plaintiffs and licensees want to maintain any semblance of associational or other intimate privacy. *See* Discussion, Parts III & IV, *supra*.

Defendants further argue for dismissal on the basis that Plaintiffs have purportedly failed to allege that Section 26806 will impose a significant or prohibitive enough expense on them. Mot. at 20:27-21:5. But the significance of the cost is a quintessential question of fact not ripe for weighing much less deciding as a basis for dismissal at the pleading stage. Plaintiffs have sufficiently alleged that they are facing not only a financial burden from the requirement, but a significant one, with some alleging they would have to cease their business because of it. *See* Compl. ¶¶ 24, 26, 261, 268; *see also id*. at ¶¶ 374-97 (demonstrating that the total cost of implementation to a gun store would be around $17,000).

These allegations of the costs of SB 1384 causing retailers to exit the market

are neither theoretical nor implausible, but they are demonstrably prohibitive even this early into SB 1384's implementation. Big 5 Sporting Goods, one of California's largest retail firearms licensees prior to 2024, ceased sales of rifles and shotguns at all of its California locations in 2024 in lieu of incurring the cost of compliance with SB 1384. *See* Big 5 Sporting Goods Corp., Annual Report (Form 10-K) (Feb. 28, 2024) at 17, https://www.sec.gov/ix?doc=/Archives/edgar/data/1156388/000095017024021829/bgfv-20231231.htm (last visited June 5, 2024) ("Regulations which took effect January 1, 2024 contributed to the discontinuation of firearm sales in our California markets."). For Defendant Newsom, using intrusive and expensive regulations to make one of California's largest firearms dealers exit the market is another win for his and his allies' admitted efforts to eradicate "gun culture" in California. Driving retailers out of the market is a laudable feature of SB 1384 for those elected officials who, like Defendant Newsom, see the Second Amendment as a bug to be eradicated rather than as part of the bundle of rights these officials swore to uphold.

Regardless of the unassailable fact of dealers already exiting the market due to the costs of compliance with SB 1384, Plaintiffs' plausible allegations of incurring significant cost are all that is required at the pleading stage. But even if the allegations of cost are somehow insufficient, at minimum, this Court should at least grant leave to amend so that the Plaintiffs can discuss how much they have had to spend (or would have had to spend, had they not gone out of business) now that the law has gone into effect.

VIII. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied except as to (1) dismissal of Defendant Gavin Newsom as to all claims, (2) Plaintiffs' Second Claim under 42 U.S.C. § 1983 for a Violation of Plaintiffs' Equal Protection rights, and (3) Plaintiffs' Third Claim under Section 1983 for a Violation of Plaintiffs' Second Amendment rights, which claims Plaintiffs agree should be

dismissed at this time in light of *Doe v. Bonta*. To the extent any of the other claims are dismissed, Plaintiffs should be given an opportunity to amend such claim.

Dated: June 7, 2024

MICHEL & ASSOCIATES, P.C.

s/ Joshua Robert Dale
Joshua Robert Dale
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Dated: June 7, 2024

LAW OFFICES OF DONALD KILMER, APC

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ATTESTATION OF E-FILED SIGNATURES

I, Joshua Robert Dale, am the ECF User whose ID and password are being used to file this PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS. 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: June 7, 2024

s/ Joshua Robert Dale
Joshua Robert Dale

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record 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, certifies that this brief contains 6,987 words, which complies with the word limit of Central District of California L.R. 11-6.1.

Dated: June 7, 2024

s/ Joshua Robert Dale
Joshua Robert Dale

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 JVS (KESx)

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:

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed June 7, 2024.

Laura Palmerin