

1 C.D. Michel – SBN 144258
2 Sean A. Brady – SBN 262007
3 Anna M. Barvir – SBN 268728
4 Matthew D. Cubeiro – SBN 291519
5 MICHEL & ASSOCIATES, P.C.
6 180 E. Ocean Boulevard, Suite 200
7 Long Beach, CA 90802
8 Telephone: (562) 216-4444
9 Facsimile: (562) 216-4445
10 Email: cmichel@michellawyers.com

11 Attorneys for Plaintiffs

12 **UNITED STATES DISTRICT COURT**
13 **SOUTHERN DISTRICT OF CALIFORNIA**

14 KIM RHODE, et al.,
15 Plaintiffs,

16 v.

17 XAVIER BECERRA, in his official
18 capacity as Attorney General of the State
19 of California,

20 Defendant.

Case No.: 3:18-cv-00802-BEN-JLB

**PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO
DISMISS THE FIRST AMENDED
COMPLAINT**

Judge: Hon. Roger T. Benitez
Date: September 20, 2018
Time: 10:00 a.m.
Courtroom: 5A

Action Filed: April 26, 2018

TABLE OF CONTENTS

Table of Authorities	iii
Introduction	1
Statement of Facts	2
A. California’s Novel and Expansive Ammunition Scheme	2
B. California’s Novel and Expansive Ammunition Scheme	4
Standard of Review	7
Argument.....	7
I. Plaintiffs State a Plausible Commerce Clause Claim	7
A. Plaintiffs Have Alleged a Valid Commerce Clause Claim that California’s Ammunition Laws Regulate Extraterritorially.....	8
B. Plaintiffs Have Alleged a Valid Commerce Clause Claim that California’s Ammunition Scheme Discriminates Against Interstate Commerce to the Advantage of California’s Economic Interests	12
II. Plaintiffs Allege a Valid Equal Protection Claim	14
III. Plaintiffs Allege a Valid 18 U.S.C. § 926A Preemption Claim	16
A. Section 926A Applies to Ammunition	18
B. Section 926A Preempts Enforcement of State Laws that Unduly Conflict with Its Protections of People Transporting Firearms and Ammunition	18
1. Because Plaintiffs May Lawfully Possess Ammunition in California, Section 926A Entitles Them to Transport It Free from In-State Legal Barriers Like Prop 63	19
2. Section 926A’s Protections Apply to the Transportation of Ammunition from One State Into, Not Only Through, Another	20
3. Prop 63 Precludes Plaintiffs from Transporting Ammunition Acquired Out-of-State into California	21
Conclusion	22

TABLE OF AUTHORITIES**Page(s)****Cases**

<i>Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris,</i> 729 F.3d 937 (9th Cir. 2013)	11
<i>Associated Indus. of Mo. v. Lohman,</i> 511 U.S. 641 (1994).....	12
<i>Bell Atlantic Corp. v. Twombly,</i> 550 U.S. 544 (2007).....	7
<i>Brown-Forman Distillers Corp. v. New York State Liquor Authority,</i> 476 U.S. 573 (1986).....	10
<i>C&A Carbone, Inc. v. Town of Clarkstown,</i> 511 U.S. 383 (1994).....	8
<i>California v. ARC Am. Corp.,</i> 490 U.S. 93 (1989).....	17
<i>Chinatown Neighborhood Ass'n v. Harris,</i> 794 F.3d 1136 (9th Cir. 2015)	11
<i>City of Cleburne, Tex., v. Cleburne Living Ctr.,</i> 473 U.S. 432 (1985).....	15
<i>Coalition of N.J. Sportsmen v. Florio,</i> 744 F. Supp. 602 (D.N.J. 1990).....	20
<i>Crosby v. Nat'l Foreign Trade Council,</i> 530 U.S. 363 (2000).....	16, 22
<i>Doe v. United States,</i> 419 F.3d 1058 (9th Cir. 2005)	7
<i>English v. General Electric Co.,</i> 496 U.S. 72 (1990).....	16
<i>Exxon Corp. v. Governor of Maryland,</i> 437 U.S. 117 (1978).....	12

1	<i>Fresno Rifle & Pistol Club, Inc v. Van de Kamp,</i>	
2	746 F. Supp. 1415 (E.D. Cal. 1990)	20
3	<i>General Motors Corp. v. Tracy,</i>	
4	519 U.S. 278 (1997).....	14
5	<i>Granholm v. Heald,</i>	
6	544 U.S. 460 (2005).....	8, 13, 14
7	<i>Healy v. Beer Instit.,</i>	
8	491 U.S. 324 (1989).....	8, 9, 10
9	<i>Hines v. Davidowitz,</i>	
10	312 U.S. 52 (1941).....	17
11	<i>Hussey v. City of Portland,</i>	
12	64 F.3d 1260 (9th Cir. 1995)	15
13	<i>Jackson v. City & Cty. of San Francisco,</i>	
14	746 F.3d 953 (9th Cir. 2014)	18
15	<i>Lazy Y Ranch Ltd. v. Behrens,</i>	
16	546 F.3d 580 (9th Cir. 2008)	7
17	<i>N.Y. State Rifle & Pistol Ass’n v. Cuomo,</i>	
18	990 F. Supp. 2d 349 (W.D.N.Y. 2013).....	13
19	<i>Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of State of Or.,</i>	
20	511 U.S. 93 (1994).....	12
21	<i>Porter v. Jones,</i>	
22	319 F.3d 483 (9th Cir. 2003)	7
23	<i>Sam Francis Found. v. Christies Inc.,</i>	
24	784 F.3d 1320 (9th Cir. 2015)	7, 8, 11
25	<i>Teixeira v. Cnty. of Alameda,</i>	
26	822 F.3d 1047 (9th Cir. 2016)	15
27	<i>United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.,</i>	
28	550 U.S. 330 (2007).....	7
	<i>Valley Bank of Nev. v. Plus Sys., Inc.,</i>	
	914 F.2d 1186	8

1	<i>W. Lynn Creamery v. Healy</i> ,	
2	512 U.S. 186 (1994).....	8, 9, 11

Statutes

4	18 U.S.C § 926A	2, 5, 16, 17, 18, 19, 20, 21, 22
5	18 U.S.C. § 927	22
6	Cal. Code Regs. tit. 11 § 4261	4
7	Cal. Code Regs. tit. 11 § 4263	3
8	Cal. Pen. Code § 30210.....	19
9	Cal. Pen. Code § 30305.....	19
10	Cal. Pen. Code § 30312.....	2, 3, 4, 9
11	Cal. Pen. Code § 30314.....	3, 4, 16, 17, 21
12	Cal. Pen. Code § 30342.....	2
13	Cal. Pen. Code § 30385.....	2, 3, 4
14	Cal. Pen. Code § 30390.....	4
15	Cal. Pen. Code § 30395.....	4
16	Cal. Pen. Code § 30605.....	20
17	N.Y. Pen. Law § 400.03.....	13

Other Authorities

21	2013 Sess. Law News of N.Y. Ch. 1 (S. 2230) (McKINNEY’S)	13
22	California Senate Bill No. 1235.....	2
23	SAFETY FOR ALL ACT, 2016 Cal. Legis. Serv. Prop. 63 (West)	2
24	U.S. Const. Amend. II.....	1, 2, 5, 15
25	U.S. Const. Art. VI, cl. 2.....	16

INTRODUCTION

Plaintiffs’ allegations are sufficient to state multiple claims for relief based on California’s unprecedented and sweeping restrictions on the acquisition of ammunition. These restrictions confer on in-state ammunition businesses full discretion to deny out-of-state ammunition businesses access to the California market, in violation of the Dormant Commerce Clause. They also prohibit California residents—and *only* California residents—from bringing ammunition into California if it is acquired out of state, in violation of the Equal Protection Clause. And they bar California residents from bringing ammunition they acquire out-of-state into California on their person, in irreconcilable conflict with the protections provided by the Firearm Owners Protection Act.

Plaintiffs are a collection of law-abiding individuals—including Olympic and competitive shooters, hunters, and practitioners of self-defense—who are seeking to acquire ammunition for lawful purposes from out-of-state; out-of-state businesses who seek to service California residents like Plaintiffs; and a civil rights membership organization dedicated to protecting its members’ constitutional rights to access ammunition. Each of them is unlawfully precluded by California’s new scheme from engaging in interstate activity involving ammunition acquisition.

Defendant California Attorney General Xavier Becerra (“Defendant”) argues that this Court should dismiss each of these three challenges for failing to state a claim.¹ But Plaintiffs have stated a claim for each of these causes of action, and Defendants contrary arguments lack merit. First, Plaintiffs have sufficiently alleged a violation of the Dormant Commerce Clause, as California’s law regulates wholly out-of-state transactions and discriminates against out-of-state economic interests. Defendant’s contention that California regulates only in-state ammunition activity in a non-discriminatory way ignores the practical reality that in-state businesses effectively have veto power over out-

¹ Plaintiffs also assert a Second Amendment challenge to these restrictions, but Defendant does not move to dismiss that particular claim here.

1 of-state businesses servicing Californians. Second, Plaintiffs have asserted an Equal
 2 Protection claim because the law applies only to California residents and no one else.
 3 This distinction cannot even survive rational basis, as there is no difference between a
 4 California resident and a non-resident for purposes of ammunition importation. Plaintiffs’
 5 Equal Protection claim is wholly independent of their Second Amendment claim,
 6 contrary to Defendant’s suggestion, as the Equal Protection claim focuses on the
 7 disparate treatment of California residents vis-à-vis nonresidents, which is a unique
 8 concern of the Equal Protection Clause. Finally, Plaintiffs have stated a valid preemption
 9 claim based on 18 U.S.C § 926A because California’s law prohibits the free transport of
 10 ammunition across state lines. Defendant’s contention that it does not protect the
 11 transportation of ammunition into a state cannot be reconciled with the statute’s text and
 12 purpose.

13 For these reasons, described in more detail herein, Defendant’s motion to dismiss
 14 Plaintiffs’ claims should be denied in its entirety.

15 **STATEMENT OF FACTS**

16 **A. California’s Novel and Expansive Ammunition Scheme**

17 In 2016, California enacted and amended a lengthy list of statutes that, subject to
 18 very limited exceptions, place sweeping restrictions on the purchase, sale, transfer, and
 19 importation of ammunition. See SAFETY FOR ALL ACT, 2016 Cal. Legis. Serv. Prop.
 20 63 (West); 2016 California Senate Bill No. 1235, California 2016-2017 Regular Session.

21 In California, as of January 1, 2018, “the sale of ammunition by any party must be
 22 conducted by or processed through a licensed ammunition vendor.” Cal. Penal Code §
 23 30312(a) (West 2017). To become a “licensed ammunition vendor” one must either apply
 24 with the California Department of Justice, unless already a California licensed firearm
 25 dealer. Cal. Penal Code §§ 30342; 30385(d) (West 2017).

26 Any individual who wishes to sell more than 500 rounds of ammunition in a 30-
 27 day period does not have the option to process the transfer through a “licensed
 28 ammunition vendor,” but rather must become one. Cal. Penal Code § 30342(a).

1 When neither party to an ammunition sale is a licensed vendor in California, the
2 seller must deliver the ammunition to a licensed vendor to process the transaction. Cal.
3 Penal Code § 30312(b). The licensed California vendor may charge the purchaser an
4 additional fee for processing the private party transaction. Cal. Penal Code § 30312(c).
5 “If the purchaser will be present for immediate delivery of the ammunition, the fee shall
6 not exceed five dollars (\$5).” Cal. Code Regs. tit. 11 § 4263(a) (2018). “If the purchaser
7 will not be present for immediate delivery of the ammunition, the vendor may charge an
8 additional storage fee as agreed upon with the purchaser prior to the vendor receiving the
9 ammunition.” Cal. Code Regs. tit. 11 § 4263(b) (2018). In other words, there is no cap on
10 what the licensed vendor can charge a private party purchaser who is not present for
11 immediate delivery, which, as a practical matter, includes all transactions originating
12 from out-of-state. What’s more, the in-state vendor is not required by any law to process
13 transactions for out-of-state vendors who wish to sell to California consumers.

14 Thus, ammunition vendors that do not have a physical presence in California
15 operate at the whim of licensed vendors that do, as they may either completely price them
16 out of the market by charging the purchaser an unlimited fee or outright refuse to process
17 the transaction.

18 As of January 1, 2018, subject to some narrow exemptions, a resident of California
19 may not bring or transport into California any ammunition that he or she acquired outside
20 of the state, unless it is first shipped to a licensed vendor in California to process the
21 transaction. Cal. Penal Code § 30314, subds. (a),(b) (West 2017). This transaction would
22 also be completely subject to the in-state vendor’s discretion to charge the purchaser a fee
23 in any amount or to simply refuse to process it. Cal. Penal Code § 30312(a).

24 DOJ was required to begin accepting applications for ammunition vendor licenses
25 on July 1, 2017. Cal. Pen. Code § 30385(a). DOJ failed to meet that deadline and began
26 issuing licenses after January 1, 2018.

27 According to DOJ’s regulations, the “term of an ammunition vendor license is
28 from January 1 through December 31, regardless of the date the initial license is issued.

1 Cal. Code Regs. tit. 11 § 4261(b) (2018). Penal Code section 30385(b), however, states
 2 that any ammunition vendor license “shall be valid for a period of one year,” with no
 3 limitation on the date the license is acquired.

4 Ammunition vendors are required to pay a fee to be set by the Department to cover
 5 the costs of California’s expansive ammunition licensing and registration scheme. Cal.
 6 Penal Code § 30390 (West 2017).

7 The Department is authorized to issue vendor licenses to qualified California
 8 ammunition vendors, Cal. Penal Code § 30395(a) (West 2017), and must maintain a
 9 registry of all licensed ammunition vendors for law enforcement review, Id., § 30395(b).

10 The Challenged Provisions carry misdemeanor criminal penalties for violations,
 11 including fines and incarceration. Section 30314 is punishable as an infraction for the
 12 first offense. All subsequent violations are punishable as a misdemeanor.

13 The requirement that ammunition sales be conducted by or processed through a
 14 licensed ammunition vendor in a face-to-face transaction, beginning January 1, 2018,
 15 does not apply to law enforcement, licensed importers or manufacturers of firearms,
 16 California licensed firearm retailers, out of state licensed firearm dealers and collectors,
 17 licensed collectors who possess a valid certificate of eligibility issued by DOJ, licensed
 18 ammunition vendors, consultant evaluators, persons who receive ammunition at a target
 19 facility holding a business or other regulatory licenses provided that the ammunition is at
 20 all times kept within the facility’s premises, persons who receive ammunition from
 21 certain family members, and persons involved in law enforcement training. Cal. Penal
 22 Code § 30312(a),(c).

23 **B. Plaintiffs’ Allegations**

24 On June 11, 2018, Plaintiffs filed their First Amended Complaint (FAC)
 25 challenging various provisions of California’s ammunition scheme (hereafter referred to
 26
 27
 28

1 as “Prop 63”).² Plaintiffs are a collection of law-abiding individuals— including Olympic
 2 and competitive shooters, hunters, and practitioners of self-defense—who are seeking to
 3 acquire ammunition for lawful purposes from out-of-state; out-of-state businesses who
 4 seek to service California residents like Plaintiffs; and a civil rights membership
 5 organization dedicated to protecting its members’ constitutional rights to access
 6 ammunition.

7 Many of the Plaintiffs regularly acquire ammunition from outside of California that
 8 they use for various lawful purposes, whether in person—*see*, e.g., FAC 4:22-28
 9 (“Plaintiff Rhode ... has ammunition that she uses for marksmanship practice for
 10 shooting competitions and self-defense training shipped by her ammunition sponsors ...
 11 to various shooting ranges ... outside California. She regularly transports ammunition
 12 that she takes receipt of at these ranges back to her home [in California]”; FAC 4:18-28
 13 (“Plaintiffs Brennan ... visits other states annually for hunting and regularly purchases
 14 ammunition while hunting outside of California”—or via shipments in the mail. FAC
 15 5:16-28.

16 These Plaintiffs allege that because Prop 63 places barriers on them bringing
 17 ammunition from out-of-state into California on their persons, Prop 63 runs afoul of 18
 18 U.S.C. § 926A, because they are legally able to possess ammunition in California and are
 19 thus entitled under § 926A to transport it across state lines. FAC 31:9-17. And, because
 20 Prop 63 only restricts California residents from bringing ammunition from out-of-state
 21 into California on their persons, Plaintiffs also contend that Prop 63 violates the Equal
 22 Protection Clause, because access to ammunition is protected by the Second Amendment
 23 and Plaintiffs are being treated differently than other Americans by Prop 63 in their
 24 access to ammunition, without any rational basis. FAC 17:6-11; 18:20-23.

26
 27 ² “Prop 63” is in reference to California’s Proposition 63, which created the
 28 ammunition scheme at issue in this lawsuit. Because that is how Defendant chose to refer
 to the laws being challenged in his motion, Plaintiffs continue with that term to avoid
 confusing the Court.

1 For example, Plaintiffs allege:

2 “Where neither party to a transaction is a licensed vendor in California, the
3 seller must deliver the ammunition to a license vendor to process the
4 transaction. Cal. Penal Code 30312(b)...the vendor may charge an
5 additional storage fee as agreed upon with the purchaser prior to the vendor
6 receiving the ammunition.” Cal. Code Regs. Tit. 11 4263(b). In other words,
7 there is no cap on what the licensed vendor can charge a private party
8 purchaser who is not present for immediate delivery, which, as a practical
9 matter, includes all transactions originating from out-of-state. What’s more,
10 the in-state vendor is not required by any law to process the transactions for
11 out-of-state vendors who wish to sell to California Customers.”

12 FAC 12:22-13:6

13 Because Prop 63 also authorizes in-state businesses to prevent out-of-state
14 businesses from the California ammunition marketplace, by either charging an exorbitant
15 fee or simply refusing to process a transaction for a California customer, Plaintiffs allege
16 that this violates the Dormant Commerce Clause by discriminating against ammunition
17 vendors that to not have an in-state location. FAC 13:3-6.

18 These out-of-state vendor Plaintiffs are equally disadvantaged when servicing
19 California customers who drive or otherwise travel into a neighboring state to purchase
20 ammunition and return to California with that ammunition.

21 “...[A] resident of California may not bring or transport into California any
22 ammunition that he or she acquired outside of the state, unless it is first
23 shipped to a licensed vendor in California to process the transaction. Cal.
24 Penal Code section 30314, subds. (a), (b), This transaction would also be
25 completely subject to the in-state vendor’s discretion to charge the purchaser
26 a fee in any amount or to simply refuse to process it. Cal. Penal Code
27 30312(a).

28 FAC 13:7-13

Plaintiffs allege that the result of this regulatory scheme is to grant in-state vendors
an effective monopoly over the California ammunition market and deprive California
residents, and out-of-state businesses, of their right to have access to other State’s
ammunition markets on equal terms. FAC 24:17-25.

///

STANDARD OF REVIEW

“To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), 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). Rule 8(a)(2) merely requires that a plaintiff provide a short and plain statement showing that he is entitled to relief to give a defendant fair notice of the claims and the grounds for the claims. Fed. R. Civ. P. 8(a)(2). At this stage in the proceedings, district courts are required to construe the complaint liberally, viewing it “in the light most favorable to the plaintiff, taking all allegations as true, and drawing all reasonable inferences from the complaint in [plaintiffs’] favor.” *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005); *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). The plaintiff “receives the benefit of imagination, so long as the hypotheses are consistent with the complaint.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007) (quoting *Sanjuan v. American Bd. of Psychiatry & Neurology*, 40 F.3d 247, 251 (7th Cir. 1994)).

ARGUMENT

I. PLAINTIFFS STATE A PLAUSIBLE COMMERCE CLAUSE CLAIM

Plaintiffs’ allegations that Prop 63 regulates wholly out of state transactions and discriminates against out-of-state ammunition suppliers clearly state a claim for relief under the Commerce Clause. The Dormant Commerce Clause, which derives from the power granted to Congress under the Commerce Clause, limits states’ ability to regulate interstate commerce even where federal law is silent on the issue. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). The purpose of the restriction is to “ensure[] that state autonomy over ‘local needs’ does not inhibit the ‘overriding requirement of freedom for the national commerce.’” *Sam Francis Found. v. Christies Inc.*, 784 F.3d at 1320, 1323 (9th Cir. 2015), quoting *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976).

To that end, the Dormant Commerce Clause prohibits a state from, among other things, regulating a commercial transaction that takes place wholly outside of the state’s

border, “whether or not the commerce has effects within the State.” *Healy v. Beer Instit.*, 491 U.S. 324, 336 (1989); *see also W. Lynn Creamery v. Healy*, 512 U.S. 186, 194-95 (1994). Such laws are per se invalid “regardless of whether the statute’s extraterritorial reach was intended by the legislature.” *Sam Francis*, 784 F.3d at 1323, quoting *Healy v. Beer*, 491 U.S. at 336. The Dormant Commerce Clause also prohibits a state, in all but the narrowest of circumstances, from mandating differential treatment of in-state and out-of-state economic interests. *Granholm v. Heald*, 544 U.S. 460, 472 (2005); *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994).

Plaintiffs have sufficiently alleged that Prop 63 runs afoul of both of these constraints on state power. Although Plaintiffs are not required to thoroughly articulate each and every potential theory of liability under the Commerce Clause at this early state of the litigation, they have provided substantial factual allegations that, if taken as true, raise a valid claim that Prop 63 violates the Commerce Clause, both by regulating extraterritorially and by otherwise discriminating against interstate commerce.³

A. Plaintiffs Have Alleged a Valid Commerce Clause Claim that California’s Ammunition Laws Regulate Extraterritorially

“[W]hen a state law directly affects transactions that ‘take place across state lines’ or entirely outside of the state’s borders,” the law is “invalid per se” under the Commerce Clause. *Valley Bank of Nevada v. Plus System, Inc.*, 914 F. 2d 1186, 1189-90 (9th Cir. 1990) (citations omitted). “The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.” *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (citing *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986)); *accord Valley Bank of Nev.*, 914 F. at 1190.

³ A state law that regulates even-handedly can also violate the Commerce Clause if it impermissibly burdens interstate commerce in relation to local interests. *See Healy*, 512 U.S. at 194-95. But, contrary to the State’s assertion, Plaintiffs do not raise such an argument. For this reason, Plaintiffs do not address the arguments raised in section I.C. of Defendant’s motion.

1 Defendant argues that Prop 63 does not run afoul of that prohibition because it
 2 “regulate[s] only conduct within California,” *i.e.*, the act of California residents bringing
 3 ammunition acquired from out-of-state into California. State Mem. P. & A. Supp. Mot.
 4 Dismiss (“State Mot.”) 7-8. But that ignores the “practical effect” of the regulation,
 5 which is clearly to control conduct outside California’s borders. Indeed, the practical
 6 effect of Prop 63 is to afford California ammunition vendors complete control over
 7 whether and at what cost an out-of-state business can service California customers. Few
 8 laws could more plainly “affect” out-of-state transactions.

9 As Plaintiffs detail in the complaint, Prop 63 requires an out-of-state ammunition
 10 vendor seeking to sell and ship ammunition to a California resident to first ship it to an
 11 in-state ammunition vendor for processing. California Penal Code §§ 30312(a),(b);
 12 30314(a). It also provides, as Defendant does not dispute, that “the in-state vendor is not
 13 required by any law to process the transactions for out-of-state vendors who wish to sell
 14 to California Customers.” FAC 13:1-2. Prop 63 thus gives California vendors complete
 15 control over orders for ammunition that a California resident places with an out-of-state
 16 vendor—like Plaintiffs Able’s Sporting, Ammunition Depot, and Sam’s Shooters
 17 Emporium—as it effectively allows a California vendor to cancel out-of-state orders by
 18 preventing the out-of-state vendor from complying with the law. Defendant also does not
 19 dispute that Prop 63 confers on an in-state vendor the discretion to charge the California
 20 resident any fee amount the vendor wishes, in order to process the transaction. FAC
 21 12:16-27. This effectively allows the in-state vendor to fix the price for a Californian to
 22 purchase ammunition out-of-state.

23 Prop 63 thus runs headlong into the Supreme Court’s decision in *Healy*, which
 24 struck down a Connecticut statute requiring brewers and “out-of-state shippers” to post
 25 the prices of beer “to be sold in Connecticut” in advance. *Healy*, 512 U.S. at 326-27.
 26 Although the statute purported to regulate only conduct occurring inside Connecticut, the
 27 Court held that it violated the Dormant Commerce Clause nonetheless, concluding that it
 28

1 “has the extraterritorial effect, condemned in *Brown-Forman*⁴, of preventing brewers
 2 from undertaking competitive pricing in Massachusetts based on prevailing market
 3 conditions.” *Id.* at 338. As the Court explained, “States may not deprive businesses and
 4 consumers in other States of ‘whatever competitive advantages they may possess’ based
 5 on the conditions of the local market.” *Id.* at 339.

6 Under *Healy*, a statute that affects the price an out-of-state vendor can charge for
 7 its products being sold in-state violates the Commerce Clause. *A fortiori*, a statute that
 8 not only allows in-state vendors to set the price an in-state consumer must pay to engage
 9 in commerce with an out-of-state vendor, but allows the in-state vendor complete
 10 discretion to bar such a transaction altogether, violates the Commerce Clause too. For,
 11 such a regime not only impermissibly deprives out-of-state businesses of any
 12 “competitive advantages they may possess,” *id.* at 339, but may deprive them of the
 13 ability to engage in business at all. That is exactly what Plaintiffs allege California’s
 14 ammunition scheme does here.

15 Indeed, a California resident seeking to acquire ammunition from out-of-state
 16 cannot even escape the reach of the in-state vendor’s control by physically going out of
 17 state. To legally bring the ammunition home, he or she would have to, *while out-of-state*,
 18 ship the ammunition to a licensed California vendor and retrieve it once back in-state.
 19 Just as with businesses shipping into California, however, the in-state vendor may refuse
 20 to accept the shipment. FAC 13:1-2. This means that a California resident has no
 21 mechanism to acquire ammunition from out-of-state without approval of an in-state
 22 vendor. FAC 17:12-18:19. Prop 63 thus plainly impermissibly “attempt[s] to regulate
 23

24
 25 ⁴ In *Brown Forman* the Supreme Court held that a New York law violated the
 26 Commerce Clause in part because it required in-state and out-of-state distillers to sell
 27 their products in accordance with a monthly price schedule, effectively forcing distillers
 28 who sold liquor to wholesalers within New York to sell at a price that was no higher than
 the lowest price that the liquor distiller charged to wholesalers anywhere in the United
 States.

1 transactions conducted wholly out of state.” *Chinatown Neighborhood Ass’n v. Harris*,
 2 794 F.3d 1136, 1146 (9th Cir. 2015).

3 That readily distinguishes this case from *Chinatown Neighborhood Ass’n*, on
 4 which Defendant relies, because nothing in the statute at issue in that case suggested that
 5 California businesses could control out-of-state businesses’ participation in the shark fin
 6 market. Instead, that statute closed the market for *everyone*. The “practical effect” on
 7 interstate commerce of a state closing a particular market altogether within its borders is
 8 wholly different from a state attempting to insulate in-state commerce from all out-of-
 9 state competition, as is the case with Prop 63. *See Ass’n des Eleveurs de Canards et*
 10 *d’Oies du Quebec v. Harris*, 729 F.3d 937, 948 (9th Cir. 2013). Defendant’s reliance on
 11 *Sam Francis*, 784 F.3d 1320, 1323 (9th Cir. 2015) (en banc), is likewise misplaced. As an
 12 initial matter, Defendant points to nothing in that case that would foreclose Plaintiffs’
 13 extraterritorial arguments here. If anything, it bolsters Plaintiffs’ argument. The Ninth
 14 Circuit in *Sam Francis* held that a state law’s “regulation of out-of-state sales runs afoul
 15 of the” Dormant Commerce Clause. That is precisely what Prop 63 does.

16 That conclusion is underscored by the Supreme Court’s admonition that “the
 17 practical effect of the statute must be evaluated not only by considering the consequences
 18 of the statute itself, but also by considering how the challenged statute may interact with
 19 the legitimate regulatory regimes of other States and what effect would arise if not one,
 20 but many or every, State adopted similar legislation.” *Healy*, 512 U.S. at 336. If every
 21 state in the Union adopted a regime identical to Prop 63, the practical effect would be that
 22 ammunition vendors in each state would be able to force their fellow residents to acquire
 23 ammunition for use in their home state from them. Surely, that is the type of “practical
 24 effect” on interstate commerce that is forbidden under the Commerce Clause.

25 At bottom, Plaintiffs’ allegations that the Challenged Provisions unlawfully
 26 regulate out-of-state transactions are sufficient to raise a valid claim for relief under the
 27 Dormant Commerce Clause.
 28

B. Plaintiffs Have Alleged a Valid Commerce Clause Claim that California's Ammunition Scheme Discriminates Against Interstate Commerce to the Advantage of California's Economic Interests

Prop 63 also impermissibly favors California ammunition vendors' economic interests over the interests of out-of-state vendors. *See Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality of State of Or.*, 511 U.S. 93, 99 (1994). Defendant tries to ignore this reality by recasting the law as favoring "brick and mortar stores" over "online (or mail order) sales," State Mot. at 14, but that argument cannot withstand scrutiny.⁵

As explained above, Prop 63 grants out-of-state vendors access to the California marketplace solely at the discretion of in-state vendors. This is true regardless of whether the California purchaser is attempting to order ammunition directly from the out-of-state vendor (via Internet or mail), or whether the purchaser travels to the physical location of the out-of-state vendor for a face-to-face transaction at its brick-and-mortar store with the intention of returning to California with the ammunition. Either way, under Prop 63, an in-state vendor can completely bar an out-of-state vendor from servicing California residents either by charging the purchaser an exorbitant fee or outright refusing to process the transaction. Accordingly, while Prop 63 may draw a distinction between "brick and mortar stores" and "online (or mail order) sales" for purposes of *in-state* vendors, its discrimination against *out-of-state* vendors is absolute.

That stands in stark contrast to *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 119-20 (1978), on which Defendant relies, in which the Supreme Court rejected Exxon's arguments that a Maryland law violated the dormant Commerce Clause because it restricted a method of distribution that was only utilized by out-of-state companies.

⁵ Defendant points to the supposed purpose of Prop 63, State Mot. 9, but even assuming the purpose is as Defendant describes (which Plaintiffs do not concede), the purpose of the law is beside the point. "[A] court need not inquire into the purpose or motivation behind a law to determine that in actuality it impermissibly discriminates against interstate commerce." *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 653 (1994).

1 Plaintiffs allege not that Prop 63 restricts a method of distribution that burdens only out-
 2 of-state businesses, but that it discriminates against *every* form of out-of-state
 3 ammunition commerce, rendering out-of-state vendors' ability to do business in
 4 California entirely dependent on the discretion of their in-state competitors, and
 5 subjecting them to substantial additional costs. Said differently, the constitutional
 6 infirmity with Prop 63 is not that Plaintiffs cannot access California customers in a
 7 *particular manner*, but that in-state vendors may preclude them from accessing the
 8 California market *at all*.⁶ Prop 63 thus "deprive[s] citizens of their right to have access to
 9 the markets of other states on equal terms," *Granholm* at 473, in violation of the Dormant
 10 Commerce Clause.

11 Defendant protests that Plaintiffs are comparing apples and oranges, insisting that
 12 out-of-state shippers and in-state brick-and-mortar stores are not "similarly situated."
 13 State Mot. 11-12. Again, Defendant mischaracterizes Prop 63, which does not divide the
 14 line between brick-and-mortar stores and vendors who sell by phone, internet, or mail.
 15 Plaintiff Sam's Shooters Emporium has a brick-and-mortar store; it is just *out of state*.
 16 The actual distinction Prop 63 draws is between in-state and out-of-state vendors, which
 17 is plainly discriminatory under the Dormant Commerce Clause. That is clear from the
 18 law's disparate effect on in-state versus out-of-state online or mail vendors. Whereas an
 19 in-state online vendor can avoid the impact of Prop 63 by converting to a brick-and-
 20 mortar store, there is *no* way an out-of-state vendor can escape its reach. That

23 ⁶ Defendant's also rely on *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 990 F. Supp. 2d
 24 349 (W.D.N.Y. 2013), *aff'd* in part and *rev'd* in part and *rev'd* in part on other grounds,
 25 804 F.3d 242 (2d Cir. 2015). This case does not (and cannot) warrant the dismissal of
 26 Plaintiffs' dormant Commerce Clause claim. Aside from being an out-of-circuit, district
 27 court opinion concerning a law that was never implemented or considered by an appellate
 28 court, the New York law is notably different from California's. Unlike Prop 63, the New
 York law did not deny access to the New York marketplace in any manner, subject solely
 to the discretion of in-state economic interests. See N.Y. Penal Law § 400.03; See also
 2013 Sess. Law News of N.Y. Ch. 1 (S. 2230) (McKINNEY'S).

underscores the impermissible discriminatory effect that Prop 63 inevitably has on out-of-state-vendors.

At any rate, Defendant’s contention that out-of-state ammunition shippers and in-state brick-and-mortar vendors are not “similarly situated” is plainly wrong, as they are both engaged in the same business—selling ammunition—and seek to sell it to the same market, California residents. And in all events, even assuming there were room for debate on whether there is an “absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market,” *General Motors Corp. v. Tracy*, 519 U.S. 278, 300, that factual debate would not be appropriate for resolution at the motion to dismiss stage.

Defendant’s additional argument that Prop 63 is not discriminatory because it does not preclude out-of-state owned businesses from establishing a physical presence in California is likewise unavailing. Defendant cites no authority supporting its argument; and for good reason. Forcing an out-of-state company to have an in-state presence as a condition to having access to that state’s market by definition favors in-state economic interests over out-of-state interests and cannot be squared with Dormant Commerce Clause principles. *See Granholm v. Heald*, 544 U.S. 460, 466 (2005) (striking down Michigan and New York laws allowing in-state wineries to sell wine directly to consumers but effectively prohibiting or at best hampering out-of-state wineries from doing so). Defendant’s contrary argument would effectively mean that no law, except one that not only forbids out-of-state commerce but also expressly forbids out-of-state entities from establishing a presence in a state, would discriminate in violation of the Dormant Commerce Clause. That is not the law.

In sum, Plaintiffs have plainly pleaded not only a sufficient dormant Commerce Clause claim, but a strong one. The Court should reject Defendant’s request to dismiss it.

II. PLAINTIFFS ALLEGE A VALID EQUAL PROTECTION CLAIM

Plaintiffs have sufficiently alleged that California’s unequal treatment of California residents entering the state with ammunition violates the Equal Protection Clause. FAC

17:6-21. Prop 63’s prohibition on California residents bringing ammunition acquired in another state into California on their person, while allowing residents of other states to do so, cannot be justified under any level of scrutiny. Defendant argues that Plaintiffs’ Equal Protection claim should be dismissed because it is simply a repeat of their Second Amendment claim and cannot survive rational basis review, State Mot. 18-21, but Defendant is mistaken on both grounds.

First, Defendant misunderstands the nature of Plaintiffs’ Equal Protection claim when it argues that Plaintiffs raise “a Second Amendment claim dressed in Equal Protection clothing.” *Teixeira v. Cnty. of Alameda*, 822 F.3d 1047, 1052 (9th Cir. 2016) (citing *Orin v. Barclay*, 272 F.3d 1207, 1213 n. 3 (9th Cir. 2001)). In *Teixeira*, individuals sought to operate a firearm retail business at a location that was restricted by a local zoning ordinance prohibiting *anyone* from opening a firearm retail business within certain parameters. 822 F.3d at 1049-52. These individuals and several organizations challenged the ordinance on both Second Amendment and Equal Protection grounds. After concluding that “this is not a situation where one group is being denied a right while another” is not, the Ninth Circuit acknowledged that plaintiffs’ Equal Protection claim would be “more appropriately analyzed under the Second Amendment.” *Id.* at 1052.

Unlike *Teixeira*, Plaintiffs’ Equal Protection challenge is not based on the fact that the activity being restricted is protected by the Second Amendment. Instead, their claim is based on the fact that Prop 63 imposes special burdens on California residents that it does not impose on residents of other states—even when they are in California. To be sure, the fact that this burden is imposed on Second Amendment activity should demand even more rigorous scrutiny. *City of Cleburne, Tex., v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citation omitted). “[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which invade or restrain them must be closely scrutinized;” *Hussey v. City of Portland*, 64 F.3d 1260, 1265 (9th Cir. 1995) (quoting *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966), and citing *Kramer v.*

1 *Union Free School Dist.*, 395 U.S. 621, 633 (1969). But regardless of whether heightened
 2 scrutiny is applicable here, there is simply no rational basis for restricting the ability of
 3 residents to bring ammunition into California while leaving nonresidents free to do so.

4 A hypothetical scenario highlights the irrationality of California's scheme. Plaintiff
 5 Rhode has alleged that, as an Olympic shotgun shooter, USA Shooting (the National
 6 Governing Body for the sport of shooting chartered by the United States Olympic
 7 Committee) previously would ship ammunition to a training facility in Arizona, from
 8 where she retrieved it and brought it into California for training and competition
 9 purposes. FAC 4:11-22. Under § 30314(a), she can no longer bring it to California
 10 herself. She must have it shipped to an in-state vendor from whom she can pick it up after
 11 it is registered to her and she is cleared. However, if her non-California-resident
 12 teammate were to be given the same ammunition at the same facility on the same day,
 13 she would lawfully be able to drive that ammunition across the border into California
 14 herself.

15 There is simply no rational basis for treating the two differently. Defendant
 16 attempts to posit a few rationales, State Mot. 21: 5-18, but none hits the mark for one
 17 reason: California is set up to run background checks on non-residents. And, there is zero
 18 difference between a California resident and a non-resident putting the ammunition in the
 19 mail and having it shipped to an in-state vendor. In sum, Prop 63's disparate treatment of
 20 California residents cannot be justified. As such, Plaintiffs have asserted a valid Equal
 21 Protection claim.

22 **III. PLAINTIFFS ALLEGE A VALID 18 U.S.C. § 926A PREEMPTION CLAIM**

23 Plaintiffs have stated a valid claim for preemption under § 926A. "A fundamental
 24 principle of the Constitution is that Congress has the power to preempt state law."
 25 *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *see also* U.S. Const.
 26 Art. VI, cl. 2. The Supreme Court has held that a "state law is pre-empted to the extent
 27 that it actually conflicts with federal law." *English v. General Electric Co.*, 496 U.S. 72,
 28 79 (1990). A state law is also preempted whenever Congress has "occup[ied] the field"

in a particular area, *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989), or where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Congress expressly designed the Firearm Owner Protection Act to preempt certain local laws that, as the Act’s name suggests, affect firearm owners. It provides, in relevant part:

Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be *entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm* if, during such transportation the firearm is *unloaded*, and neither the firearm nor any *ammunition* being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm *or ammunition* shall be contained in a locked container other than the glove compartment or console.

18 U.S.C. § 926A (emphasis added).

Prop 63 provides, in relevant part, that:

[A] resident of this state shall not bring or transport into this state any ammunition that he or she purchased or otherwise obtained from outside of this state unless he or she first has that ammunition delivered to a licensed ammunition vendor for delivery to that resident

Cal. Pen. Code § 30314(a).

Because no law prohibits Plaintiffs from possessing ammunition in California, as long as they are bringing it from a place where they also lawfully possessed it, § 926A plainly “entitle[s]” them “to transport” it into and through California. FAC 22:1-14. Because Prop 63 prevents them from doing either, it is preempted by § 926A.

Neither of Defendant’s two arguments to the contrary—that § 926A applies only to *firearms*, not *ammunition* and that Congress did not intend § 926A to enjoin enforcement of a law in a person’s home state (State Mot. 23:25-28; 24:17-18)—withstands scrutiny.

///

///

1 **A. Section 926A Applies to Ammunition**

2 Defendant’s view that § 926A does not apply to ammunition ignores the clear text
 3 of the statute. It expressly refers to “ammunition,” clarifying that the statute’s protections
 4 from local laws only apply as long as ammunition is not directly accessible in the
 5 vehicle’s passenger compartment or is locked up. And the statute expressly says that “the
 6 firearm *or* ammunition shall be contained in a locked container other than the glove
 7 compartment or console.” 18 U.S.C. § 926A. Congress would have had no need to use
 8 the disjunctive “or” if only a firearm could be transported (or, relatedly, if ammunition
 9 could be transported only in conjunction with a firearm). Given that the statute
 10 specifically instructs how to store ammunition when transporting it, the statute *a fortiori*
 11 protects the transport of ammunition. Defendant’s view of § 926A cannot be squared with
 12 the plain text of the statute.

13 That § 926A clearly protects the transfer of ammunition also follows from the
 14 statute’s purpose, which, as reflected in its title, is to protect firearm owners while in
 15 transit. As the Ninth Circuit has recognized, ammunition is inextricable from firearm
 16 ownership. *See Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir.
 17 2014) (recognizing that “without bullets, the right to bear arms would be meaningless”).
 18 As a result, firearm owners are commonly transporting ammunition, as they cannot use
 19 one without the other. It would make little sense for Congress to be concerned only about
 20 protecting firearm owners from liabilities arising from transporting the firearm but have
 21 no concern over liabilities arising from transporting the ammunition that is necessary to
 22 use those very firearms.

23 **B. Section 926A Preempts Enforcement of State Laws that Unduly Conflict**
 24 **with Its Protections of People Transporting Firearms and Ammunition**

25 Prop 63 is in conflict with the protections afforded by § 926A. Defendant’s three
 26 arguments for why § 926A does not preempt Prop 63 are all premised on a basic
 27 misunderstanding of either § 926A or Prop 63. First, Defendant argues that it is illegal to
 28 possess ammunition that was brought into California in violation of Prop 63 and,

1 therefore, § 926A’s protections do not apply. State Mot. 24:4-16. But Prop 63 does not
 2 bar *possession* of ammunition. Because it is legal to possess ammunition in California,
 3 the protections of § 926A apply and preempt any state laws that stand in conflict with it.
 4 Defendant’s contrary argument would mean that states could evade § 926A entirely by
 5 simply declaring it illegal to possess a firearm that has been transported from another
 6 state. That is plainly contrary to what Congress intended. Second, Defendant argues that
 7 § 926A only protects against the laws of a state that a person is passing through, not the
 8 person’s state of residence. State Mot. 24:17-25:8. But Defendant again misunderstands
 9 the law, nothing in the text or purpose of §926A limits its scope only to passers through.
 10 And third, Defendant suggests that Prop 63 does not offend § 926A because it does not
 11 prevent Plaintiffs from transporting ammunition into California, but only requires them to
 12 pass a background check to be able to do so. State Mot. 22:16-23:3; 25:9-12. But Prop 63
 13 does not require only a background check (which itself would be problematic); it also
 14 requires the person transporting the ammunition to *first* deliver it to a licensed in-state
 15 ammunition vendor. In sum Defendant’s arguments fail to rebut Plaintiffs’ claim that
 16 Prop 63 and § 926A stand in irreconcilable conflict.

17 **1. Because Plaintiffs May Lawfully Possess Ammunition in California,**
 18 **Section 926A Entitles Them to Transport It Free from In-State Legal**
 19 **Barriers Like Prop 63**

20 Defendant is correct that § 926A’s protections only apply where possession of the
 21 firearm or ammunition being transported is legal, but possession of ammunition is legal
 22 in California. Prop 63 does not regulate the possession of ammunition, nor does any other
 23 California law generally regulate the possession of ammunition (with the exception of
 24 regulating certain people’s possession, e.g., Penal Code section 30305 (prohibiting
 25 possession of ammunition by persons prohibited from owning or possessing firearms); or
 26 possession of specific types of ammunition, e.g., Penal Code section 30210 (ammunition
 27 containing “flechette darts” or any bullet containing an “explosive agent”)). Rather, Prop
 28

63 exclusively restricts the very activity that § 926A expressly protects: *transportation* of ammunition between places where its possession is lawful.

That is why the State’s reliance on *Fresno Rifle & Pistol Club, Inc v. Van de Kamp*, 746 F. Supp. 1415 (E.D. Cal. 1990), is misplaced. *Fresno Rifle* involved “assault weapons,” which categorically could not be legally possessed in California. Cal. Pen. Code § 30605(a). The court’s conclusion that § 926A’s requirement that a person “be legally entitled to possess it [a firearm] in the place to which it is being transported” was lacking thus has no bearing on this case. *Id.* at 1427. Plaintiffs are not invoking § 926A to, for example, strike down California’s prohibition on *possessing* “armor-piercing” ammunition within the state. Rather, Plaintiffs contend that it is lawful for them to possess the ammunition that they would *transport* into California but for Prop 63, which renders Prop 63 in conflict with § 926A’s protections.

2. Section 926A’s Protections Apply to the Transportation of Ammunition from One State Into, Not Only Through, Another

There is simply nothing in § 926A’s text or purpose that supports Defendant’s interpretation that it only protects against the laws of a state that a person is passing through, not the person’s destination state. To the contrary, § 926A provides that a person is “entitled to transport a firearm for any lawful purpose from any *place* where he may lawfully possess and carry such firearm *to any other place* where he may lawfully possess and carry such firearm . . .” (emphasis added.) It does not say “through” or “while in transit” or include any other language suggesting that it applies only to a person passing through one state to another. To the contrary, it provides that a person is entitled to transport firearms and ammunition “to any other place” where possession is lawful. To say that § 926A does not extend its protections to any laws of the destination state would not only run counter to the express language in the statute, but to its very purpose.

The case of *Coalition of N.J. Sportsmen v. Florio*, 744 F. Supp. 602, 609 (D.N.J. 1990), that Defendant cites does not support his contrary view. State Mot. 24:17-22. That court was not being asked to decide 926A’s preemptive effect on a state law restricting

1 *transportation* into the state, but rather one restricting *possession* of firearms in the state.
 2 *Id.* at 609-10. To the extent it can be read as supporting Defendant’s view, it is an out-of-
 3 circuit, district court opinion that is not binding on, and should be ignored by this Court;
 4 as it is simply wrong and unfaithful to § 926A’s text.

5 Nor does Defendant’s view make any sense. Under that view, § 926A would
 6 preempt Prop 63 when a Californian enters California with ammunition purchased in
 7 Nevada, for the purpose of passing through to Oregon. But, § 926A would *not* preempt
 8 Prop 63 when the same person enters California intending to stop at home. Nothing in the
 9 text or purpose of § 926A draws that arbitrary line. To the contrary, § 926A protects the
 10 free transportation of firearms and ammunition “to any other place”—including
 11 California—and the provisions of Prop 63 conflict that with that protection.

12 **3. Prop 63 Precludes Plaintiffs from Transporting Ammunition** 13 **Acquired Out-of-State into California**

14 Finally, Defendant mischaracterizes both the law and the facts at issue in this case
 15 in arguing that § 926A does not preempt Prop 63 because Prop 63 requires Plaintiffs only
 16 to undergo a background check in order to transport ammunition into California and does
 17 not “prevent” them from doing so. Defendant is simply wrong that Prop 63 requires only
 18 a background check before someone may transport ammunition into California.

19 Setting aside that the background-check requirement itself inhibits the free
 20 transport of ammunition across state lines in conflicts with §926A, that is not all the
 21 California law requires. By its very terms, Prop 63 requires a California resident who
 22 acquires ammunition from out-of-state to have it delivered it to a licensed ammunition
 23 vendor in California *before* he or she can “bring or transport” the ammunition into the
 24 state. Cal. Pen. Code § 30314(a). In other words, the California resident would have to
 25 have the ammunition shipped to a vendor in California from out-of-state. That
 26 requirement *prohibits* the person from transporting ammunition across state lines, which
 27 is precisely the activity protected by § 926A.
 28

1 Accordingly, Prop 63 has created a “direct and positive conflict” with § 926A,
 2 such that “the two cannot be reconciled or consistently stand together,” and is, therefore,
 3 preempted. 18 U.S.C. § 927. At a very minimum, Prop 63 “stands as an obstacle to the
 4 accomplishment and execution of the full purposes and objectives of Congress”
 5 expressed in § 926A. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 377 (2000)
 6 (internal quotation marks omitted).

7 CONCLUSION

8 For the foregoing reasons, Plaintiffs’ allegations state a claim for relief under the
 9 Dormant Commerce Clause, the Equal Protection Clause, and 18 U.S.C. §926A. The
 10 Court should deny Defendant’s motion to dismiss in its entirety. To the extent the Court
 11 believes that Plaintiffs’ complaint is deficient in stating any of the claims it purports to
 12 raise, or any of the arguments raised in this brief, Plaintiffs respectfully request leave to
 13 amend their Complaint or a declaration from this Court that it believes an amendment
 14 would be futile.

15
 16 Dated: September 6, 2018

MICHEL & ASSOCIATES, P.C.

17
 18 s/Sean A. Brady
 19 Sean A. Brady
 20 Email: sbrady@michellawyers.com
 21 Attorneys for Plaintiffs
 22
 23
 24
 25
 26
 27
 28

CERTIFICATE OF SERVICE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Case Name: *Rhode, et al. v. Becerra*

Case No.: 3:18-cv-00802-JM-JMA

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, declare under penalty of perjury that I am a citizen of the United States over 18 years of age. My business address is 180 East Ocean Boulevard, Suite 200 Long Beach, CA 90802. I am not a party to the above-entitled action.

I have caused service of the following documents, described as:

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO
DISMISS THE FIRST AMENDED COMPLAINT**

on the following parties by electronically filing the foregoing on September 6, 2018, with the Clerk of the District Court using its ECF System, which electronically notifies them.

Nelson R. Richards
Deputy Attorney General
nelson.richards@doj.ca.gov
2550 Mariposa Mall, Room 5090
Fresno, CA 93721

*Attorneys for Defendant Attorney General
Xavier Becerra*

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 6, 2018, at Long Beach, CA.

/s/Laura Palmerin
Laura Palmerin