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8
9 **UNITED STATES DISTRICT COURT**
10 **EASTERN DISTRICT OF CALIFORNIA**

11
12 THE UNITED STATES
SPORTSMEN’S ALLIANCE
13 FOUNDATION, an Ohio nonprofit
corporation; SAFARI CLUB
14 INTERNATIONAL, an Arizona
nonprofit corporation; and
15 CONGRESSIONAL SPORTSMEN’S
FOUNDATION, a Washington, D.C.
16 nonprofit corporation,

17 Plaintiffs,

18 v.

19 ROB BONTA, in his official capacity as
Attorney General of the State of
20 California; and DOES 1-25, inclusive,

21 Defendants.

Case No. 2:22-cv-01395- DAD-JDP

**Plaintiffs’ Reply in Support of
Motion for Preliminary Injunction;
Supporting Memorandum of Points
and Authorities**

Hearing Information

Date: December 13, 2022
Time: 1:30 p.m.
Ctrm: Via Zoom

22
23 **PLEASE TAKE NOTICE** that Plaintiffs¹ hereby reply to the Attorney
24 General’s Opposition² to their Motion for a Preliminary Injunction (the “Reply”).
25 This Reply is based on this Notice, the attached Memorandum of Points and
26

27 ¹ Capitalized terms are ascribed the same meaning as in Plaintiffs’ Motion for
Preliminary Injunction (the “Motion”) [ECF No. 13].

28 ² Def.’s Opp’n to Mot. for Prelim. Inj. (the “Opp’n”) [ECF No. 17].

1 Authorities, the papers and pleadings from this case on file with the Court, all other
2 matters of which this Court may take judicial notice, any further evidence or
3 argument offered to the Court at any hearing on this Motion, and any other matters
4 that the Court may consider.

5
6 Dated: November 14, 2022

Respectfully submitted,
SNELL & WILMER LLP

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9 By: 

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 Section 22949.80 is an unprecedented assault on First Amendment freedoms,
5 expressly intended to stunt the growth of future legal gun ownership, and the State
6 utterly fails to justify its constitutionality. The statute is not only unconstitutionally
7 vague and overbroad on its face, but it also violates the First Amendment by
8 regulating nonmisleading commercial speech concerning lawful activities and
9 infringing Plaintiffs’ right to free assembly and association. Furthermore, Section
10 22949.80 unconstitutionally discriminates against Second Amendment advocates
11 without any constitutionally permissible justification.

12 Plaintiffs will succeed on the merits of their claims, and they will be
13 irreparably harmed without an injunction. Because Section 22949.80 is flagrantly
14 unconstitutional, an injunction is in the public’s interest. The Court should therefore
15 enjoin enforcement of the statute *pendente lite*.

16 **II.**

17 **PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS**

18 **A. Section 22949.80 is Unconstitutionally Vague.**

19 Faced with the statute’s facial vagueness, the State resorts to rewriting Section
20 22949.80 to cure its indeterminacies. But try as it may, the government’s
21 interpretation does not bind the state courts charged with interpreting and applying
22 Section 22949.80’s unconstitutionally subjective standards. *See Virginia v. American*
23 *Booksellers Ass’n*, 484 U.S. 383, 395 (1988) (“as the Attorney General does not bind
24 the state courts or local law enforcement authorities, we are unable to accept her
25 interpretation of the law as authoritative”).

26 At the outset, Section 22949.80 intrudes upon “basic First Amendment
27 freedoms,” and is therefore subject to stringent review. Mot. 15:26–17:9 (quoting
28 *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)). The State does not dispute

1 this argument. Section 22949.80 has all the hallmarks of a statute that is
2 unconstitutionally vague.³

3 Citizens must have fair warning of what conduct will subject them to liability.
4 *Grayned*, 408 U.S. at 108–09; *Connally v. General Construction Co.*, 269 U.S. 385,
5 391 (1926). Thus, a law is unconstitutionally vague if it “impermissibly delegates
6 basic policy matters to . . . judges . . . for resolution on an *ad hoc* and subjective basis,
7 with the attendant dangers of arbitrary and discriminatory application.” *Grayned*, 408
8 U.S. at 108–09. Statutes “must provide explicit standards . . .” *Id.*

9 Section 22949.80 is clothed in subjectivity. It requires judges individually to
10 determine whether a particular advertisement is “attractive to minors” based on the
11 “totality of the circumstances,” including six *non-exclusive* factors. Cal. Bus. & Prof.
12 Code § 22949.80(a)(2). These factors are permeated by subjectivity, and their non-
13 exclusivity invites arbitrary and discriminatory application.

14 The State dismisses these concerns, but its argument underscores just how
15 subjective the statute’s enforcement provision is. “For at least five of the six factors,”
16 the State argues, “a court can make a *fact-based assessment* of the advertisement and
17 the publication.” Opp’n at 15:3–4. However, any such “fact-based” assessment is
18 inherently *ad hoc* and subjective—precisely what the Constitution forbids.⁴ Firearm
19 industry members effectively must wait to be sued (by the government *or a private*
20 *party*) before they know the scope of Section 22949.80’s unlawful zone. As the
21 Supreme Court explained in *Grayned*, laws with such uncertain meanings “inevitably
22 lead citizens,” like Plaintiffs, “to steer far wider of the unlawful zone . . . than if the
23

24
25 ³ Although the statute is unduly vague in multiple respects, *see* Mot. at 17:11–
26 18:22, for the present purposes, Plaintiffs focus primarily on the extreme risk of
arbitrary enforcement that Section 22949.80 creates.

27 ⁴ Though it is a First Amendment case, *Cinevision Corp. v. City of Burbank*, 745
28 F.2d 560, 575 (9th Cir. 1984), illustrates the subjectivity inherent in examining
expressive content like the advertisements Section 22949.80 bans.

1 boundaries of the forbidden areas were clearly marked.” 408 U.S. at 109 (citations
2 and internal quotation marks omitted).

3 **B. Section 22949.80 is Overbroad.**

4 Overbreadth often goes hand in hand with vagueness. Section 22949.80 is no
5 exception. Under the First Amendment overbreadth doctrine, “a statute is facially
6 invalid if it prohibits a substantial amount of protected speech.” *United States v.*
7 *Williams*, 553 U.S. 285, 292 (2008). The reason for this is simple: the *in terrorem*
8 effect of overbroad statutes inevitably discourages protected First Amendment
9 activity. *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977).

10 Section 22949.80 prohibits a substantial amount of lawful, constitutionally
11 protected speech. *See United States v. Stevens*, 559 U.S. 460, 475–77 (2010)
12 (focusing heavily on the requirement that the underlying act of animal cruelty be
13 illegal but nevertheless invalidating a statute banning depictions of animal cruelty
14 under the overbreadth doctrine). The statute’s reach is not, as the State contends,
15 limited to advertisements concerning only firearms; it also includes the broad
16 category of “firearm accessor[ies].” Cal. Bus. & Prof. Code § 22949.80(c)(3). And
17 by including content-based factors *unrelated to firearms* (such as whether the
18 advertiser also “[o]ffers brand name merchandise for minors”), Section 22949.80
19 also burdens swathes of non-commercial speech and will therefore chill
20 constitutionally protected speech and activities. *See id.* § 22949.80(a)(2)(B)–(E).

21 **C. Section 22949.80 Violates the First Amendment.**

22 1. Section 22949.80 is Presumptively Invalid Because it Regulates
23 Commercial Speech Concerning Constitutionally Protected Activity.

24 The State relies on the district court’s decision in *Junior Sports Magazines,*
25 *Inc. v. Bonta*, 2022 WL 14365026 (C.D. Cal. Oct. 24, 2022) (“*Junior Sports*”) to
26 support its argument that Section 22949.80 regulates only commercial speech. *See*
27 *Opp’n* at 7:5–16. *Junior Sports*, however, did not address (or was not presented with)
28 the argument that Plaintiffs make here: when an advertisement is “inextricably

1 intertwined with core political and economic messages,” the statute regulates core
 2 political speech, ***not just commercial speech***, and is subject to heightened scrutiny.
 3 *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 818 (9th Cir. 2013); *cf. Junior Sports*,
 4 2022 WL 14365026, at *12–*14.

5 There can be no question that Section 22949.80 restricts advertisements
 6 intertwined with the lawful possession and use of firearms, which the Second
 7 Amendment protects against unwarranted interference. *N.Y. State Rifle & Pistol*
 8 *Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2127, 2129–30 (2022); *District of Columbia v.*
 9 *Heller*, 554 U.S. 570, 628–29, 635 (2008); Mot. at 20:16–21:6. The restricted
 10 advertisements do not, contrary to the State’s argument, merely “link[] a product to
 11 a current public debate.” Opp’n at 7:19–22 (quotation marks and citations omitted).
 12 Rather, they directly concern activities protected by the Second Amendment—the
 13 right to lawfully purchase, possess, and use firearms. The Supreme Court has
 14 consistently struck down similar laws that suppress information “related to activity
 15 with which, at least in some respects, the State [cannot] interfere.” *Carey v.*
 16 *Population Servs. Int’l*, 431 U.S. 678, 700–01 (1977) (quotation marks and citation
 17 omitted); *Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 69 (1983).

18 The State’s reliance on *Valle Del Sol v. Whiting*, 709 F.3d 808 (9th Cir. 2013)
 19 is similarly misplaced. See Opp’n at 7:22–8:3. That case addressed advertisements
 20 concerning unprotected labor activity, not the core speech and constitutionally
 21 protected conduct that Section 22949.80 restricts. *Valle Del Sol*, 709 F.3d at 819.

22 2. Section 22949.80 is Presumptively Invalid Because it Imposes a
 23 Content- and Speaker-Based Burden on Protected Expression.

24 The State completely ignores Plaintiffs’ argument that Section 22949.80
 25 imposes a content- and speaker-based burden on protected speech and, thus, is
 26 presumptively unlawful. Mot. at 21:17–23:21. The State has therefore waived its
 27 arguments, effectively conceding Plaintiffs have a likelihood of success on the
 28 merits. See *Jenkins v. County of Riverside*, 398 F.3d 1093, 1095 n. 4 (9th Cir. 2005).

1 Even so, the State’s avoidance reveals the weakness of its position under
 2 current law. Thus, it is worth noting the controlling authorities the State all but
 3 ignores: *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 577 (2011) (striking restrictions
 4 on pharmaceutical advertising); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374
 5 (2002) (striking prohibition on advertisement of certain pharmaceuticals); *Lorillard*
 6 *Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (striking store-front, outdoor, and point-
 7 of-sale tobacco advertising); *Greater New Orleans Broad. Ass’n, Inc. v. United*
 8 *States*, 527 U.S. 173 (1999) (striking restriction on gambling advertisements in
 9 Louisiana, where gambling was legal); and *44 Liquormart, Inc. v Rhode Island*, 517
 10 U.S. 484 (1996) (striking prohibition on advertisement of retail prices of alcohol).

11 Instead, the State cites only a few Supreme Court cases applying the *Central*
 12 *Hudson* test, the last of which was decided in 1999. None of these cases involved an
 13 advertising restriction remotely similar to the one at issue here.

14 3. Section 22949.80 Fails the *Central Hudson* Test.

15 a. *Section 22949.80 Restricts Truthful Speech Concerning Lawful*
 16 *Activity.*

17 The State’s first rationale for the constitutionality of Section 22949.80 is that
 18 it “prohibits advertising and marketing for the sale of a product that the target
 19 audience is legally barred from purchasing,” i.e., “the sale of guns to minors.” Opp’n
 20 at 8:21–9:13. Plaintiffs presciently addressed the flaws in this argument in their
 21 Motion. *See* Mot. at 24:8–26:4. But two points merit renewed scrutiny.

22 One, the State distorts Section 22949.80’s plain language, claiming it restricts
 23 only advertisements that “target” minors. *See, e.g.*, Opp’n 2:1–2, 8:4–5, 8:21–23,
 24 11:20–22, 12:25–26, 14:22–24. But the statute imposes a much broader standard
 25 asking whether the advertisement is “reasonably attractive” to minors.⁵ Cal. Bus. &
 26

27 ⁵ In other instances where the State has sought to ban advertisements that actually
 28 target selling unlawful products to minors, it has done so specifically with language
 clearly expressing that intent. *See, e.g.*, Cal. Bus. & Prof. Code § 25664(a).

1 Prof. Code § 22949.80(a)(1). It is practically irrelevant whether the advertisement
2 *actually targets* minors.

3 Two, and further to this point, Section 22949.80 restricts a broad range of
4 truthful speech concerning lawful activity. “An offer to sell firearms or ammunition”
5 is constitutionally protected commercial speech. *Nordyke v. Santa Clara*, 110 F.3d
6 707, 710 (9th Cir. 2009). And the Second Amendment protects the right of minors to
7 bear arms and maintain proficiency, subject to limited and well-established historical
8 regulations. *See Jones v. Bonta*, 34 F.4th 704, 720–23 (9th Cir. 2022) (“young adults
9 have Second Amendment protections”).

10 In its attempt to justify Section 22949.80 based on the principle that “offers to
11 give or receive what it is unlawful to possess . . . enjoy no First Amendment
12 protection,” *United States v. Williams*, 553 U.S. 285, 298 (2008), the State argues
13 Section 22949.80 restricts speech concerning the unlawful sale of firearms to minors.
14 Opp’n 11:1–12:10. It does not, however, submit any evidence to support this
15 conclusion. There is no evidence of, for example, a scourge of unlawful sales of
16 firearms to minors. Nor is there any support for the State’s assumption that the
17 advertisements Section 22949.80 restricts propose illegal sales of firearms to minors,
18 as opposed to lawful sales to adults. In any event, even in cases involving unlawful
19 sales, intent to “initiat[e] the transfer” of the product is required. *Williams*, 553 U.S.
20 at 300. But Section 22949.80 does not require such scienter. *Cf. United States v.*
21 *Stevens*, 559 U.S. 460, 474–77 (2010) (striking law because its “ban on a ‘depiction
22 of animal cruelty’ nowhere requires that the depicted conduct be cruel”).

23 *b. Dampening demand for lawful products is not a legitimate means*
24 *of achieving a state interest.*

25 The State’s second and final rationale for Section 22949.80’s constitutionality
26 is that it supports the State’s interests in (1) “ensuring that minors do not possess
27 these dangerous weapons,” i.e., firearms; and (2) “protecting its citizens, especially
28 minors, from gun violence” At a general level, of course the State has an interest

1 in reducing gun violence. But when the State seeks to restrict speech in the service
 2 of a government policy, the First Amendment requires both that the restriction
 3 “directly and materially advance” the asserted interest, and is “not more extensive
 4 than is necessary” to serve the interest. *Thompson*, 535 U.S. at 367.

5 Contrary to the State’s argument that “courts have long held that the
 6 government may directly advance a government interest by restricting advertising in
 7 order to dampen a product’s demand,” Opp’n 11:9–11, the Supreme Court has
 8 consistently exhibited *hostility* to this sort of paternalistic justification. States “may
 9 not seek to remove a popular but disfavored product from the marketplace by
 10 prohibiting truthful, nonmisleading advertisements.” *Sorrell*, 564 U.S. at 577–78.
 11 Nor may they advance policy goals “through the indirect means of restraining certain
 12 speech by certain speakers.” *Id.* at 577. The premise of the State’s argument “is that
 13 the force of speech can justify the government’s attempts to stifle it”; yet, the State
 14 cannot “quiet speech or burden its messengers” just because it “finds [the] expression
 15 too persuasive.” *Id.* at 577–78.

16 There is no support for demand-dampening advertising restrictions where, as
 17 here, the underlying activity is lawful. In *United States v. Edge Broad. Co.*, 509 U.S.
 18 418, 434 (1993), which the State cites, the underlying gambling activity being
 19 advertised *was illegal* where the ads were broadcast. *Id.* at 429. But in *Greater New*
 20 *Orleans*, the Supreme Court rejected a paternalistic argument for commercial speech
 21 restrictions, holding that that the same law in *Edge* could not be applied to restrict
 22 gambling advertisements in Louisiana, where gambling *was legal*. 527 U.S. at 188–
 23 90 (rejecting government’s desire to limit demand by protecting “compulsive
 24 gamblers” who were “especially susceptible to the persuasiveness and potency of
 25 broadcast advertising”).

26 The rights of adults to lawfully purchase firearms, and of adults and minors to
 27 lawfully possess them, are constitutionally protected, underscoring the conclusion
 28 that Section 22949.80 is unconstitutional. At bottom, the State detests the idea of

1 “attract[ing] future legal gun owners” and preserving the historical tradition of
2 firearms ownership. *See* Pls.’ RJN, Ex. 3. Consequently, the State would like people
3 not to exercise these constitutional rights, much as the Virginia Legislature did in
4 *Bigelow v. Virginia*, 421 U.S. 809 (1975), when it restricted advertising for abortions.
5 Contrary to the State’s demand-dampening theory, the government may not advance
6 its interest “in shielding its citizens from information” about constitutionally
7 protected activities. *Id.* at 827–28. “This asserted interest, even if understandable, [is]
8 entitled to little, if any weight” under these circumstances. *Id.* at 828.

9 *c. Section 22949.80 does not advance the State’s interest in a*
10 *“direct” and “material” way.*

11 Even if its demand-dampening goals were permitted, the State cannot show
12 Section 22949.80 “directly and materially advances the asserted governmental
13 interest[s].” *Greater New Orleans*, 528 U.S. at 188. “This burden is not satisfied by
14 mere speculation or conjecture; rather, a governmental body seeking to restrain a
15 restriction on commercial speech must demonstrate that the harms it recites are real
16 and that its restriction will in fact alleviate them to a material degree.” *Edenfield v.*
17 *Fane*, 507 U.S. 761, 770–71 (1993). “A regulation cannot be sustained if it provides
18 only ineffective or remote support for the government’s purpose, or if there is little
19 chance that the restriction will advance the State’s goal.” *Lorillard*, 533 U.S. at 566.

20 The interests the State asserts are highly generalized: reducing unlawful youth
21 firearm possession and diminishing firearm violence. The third *Central Hudson*
22 factor requires the State to establish a direct link between firearms-related
23 advertisements that may be “reasonably attractive to minors” and reducing unlawful
24 firearm possession and firearm-related violence. *Edenfield*, 507 U.S. at 771.

25 The State’s supposedly direct link is based on studies purporting to show that
26 “restrictions on advertising are associated with the *decreased* use of certain products
27 by youth.” Opp’n at 11:23–24. This and “simple common sense,” the State argues,
28 “demonstrates that a decrease in firearm advertising attractive to minors will alleviate

1 the problem of minors’ unsafe use of firearms.” *Id.* at 11:24–26. The State’s
2 “evidence,” however, is even more general than the interests it asserts. The studies
3 the State cites relate to tobacco and alcohol advertising. *See* Def.’s RJN, Ex. 2 at 12.
4 Putting aside that tobacco and alcohol are not constitutionally protected, minors (and
5 adults for that matter) cannot simply walk into a store and purchase a firearm by, for
6 example, using a fake ID. California already regulates the sale, purchase, and
7 possession of firearms by minors and adults alike (e.g., background checks).

8 In this regard, the State submits no evidence that Section 22949.80’s
9 advertising ban directly affects the unlawful sale of firearms to minors, or the number
10 of shootings involving minors. *Cf. New York v. Ferber*, 458 U.S. 747, 759, 761 (1982)
11 (the market for child pornography was “intrinsically related” to the underlying abuse,
12 and was therefore “an integral part of the production of such materials, an activity
13 illegal throughout the Nation”). Moreover, there is no evidence tying these
14 unintentional shootings to the unlawful sales of firearms, let alone to advertising.

15 Thus, Section 22949.80 does exactly what the Supreme Court has condemned:
16 it precludes consumers’ supposedly “bad” but perfectly lawful “decisions” by
17 denying them “truthful commercial information.” *Sorrell*, 564 U.S. at 577–78. Like
18 the unconstitutional advertising restrictions in *Va. State Bd. of Pharmacy v. Va.*
19 *Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) and *Bates v. State Bar of*
20 *Arizona*, 433 U.S. 350 (1977), Section 22949.80 does not directly and materially
21 advance the State’s asserted interests. *See* Mot. at 27:3–29:7.

22 *d. Section 22949.80 restricts more speech than necessary.*

23 The State also fails to prove that Section 22949.80 is “not more extensive than
24 necessary to serve the interests that support it.” *Lorillard Tobacco*, 533 U.S. at 556
25 (citation and quotation marks omitted). “[I]f the Government could achieve its
26 interests in a manner that does not restrict speech, or that restricts less speech, the
27 Government must do so.” *Thompson*, 535 U.S. at 371–72.

28

1 Section 22949.80 not only strikes at the substance of the information
2 communicated rather than its commercial aspect, but also is overinclusive because
3 California can achieve its asserted interests by enforcing the myriad laws and
4 regulations restricting firearm sales and possession. *See* Mot. at 29:9–30:24. So the
5 statute fails even the “reasonable fit” test.

6 **D. Section 22949.80 Violates the Equal Protection Clause.**

7 The State erroneously contends that Section 22949.80 is subject to rational
8 basis review. As discussed, Section 22949.80 is a content- and speaker-based
9 restriction on protected speech and thus is subject to at least intermediate scrutiny.
10 *See CTIA - The Wireless Ass’n v. City of Berkeley*, 928 F.3d 832, 842 (9th Cir. 2019).
11 The State has no legitimate interest in singling out and restricting firearm industry
12 members while allowing members of other industries to engage in the same speech.

13 **III.**

14 **PLAINTIFFS SATISFY THE REMAINING FACTORS**

15 Plaintiffs have “established a threatened and imminent irreparable harm that
16 cannot be adequately compensated at a later time,” warranting injunctive relief.
17 *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1052 (S.D. Cal. 2006). As the
18 State recognizes in its Opposition, “[t]he loss of First Amendment freedoms, for even
19 minimal periods of time, unquestionably constitutes irreparable injury.” *Klein v. City*
20 *of San Clemente*, 584 F.3d 1196, 1207–08 (9th Cir. 2009).


21 **IV.**

22 **CONCLUSION**

23 For the foregoing reasons and those stated in Plaintiffs’ opening brief,
24 Plaintiffs’ Motion for Preliminary Injunction should be granted.

25 Dated: November 14, 2022

Respectfully submitted,
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