

Appeal No. 23-15199

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SAFARI CLUB INTERNATIONAL,
an Arizona nonprofit corporation, et al.,

Plaintiff-Appellants,

v.

ROB BONTA, in his official capacity as
Attorney General of the State of California,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California
Hon. Dale A. Drozd
Case No. 2:22-cv-01395-DAD-JDP

APPELLANTS' OPENING BRIEF

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Safari Club International, the United States Sportsmen’s Foundation, and the Congressional Sportsmen’s Foundation have no parent companies. Nor does any publicly-held company have a 10% or greater ownership interest in Safari Club International, the United States Sportsmen’s Foundation, or the Congressional Sportsmen’s Foundation.

Dated: March 10, 2023

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellants respectfully request oral argument. This cases raises important questions about the Fifth Amendment's void-for-vagueness doctrine, the First Amendment rights to free speech, association, and assembly, and the Fourteenth Amendment right to equal protection. Counsel's responses to this Court's questions may aid the Court in its decisional process. *See* Fed. R. App. P. 34(a)(1).

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INTRODUCTION

In June 2022, the California Legislature enacted Assembly Bill 2571, opening a new chapter in its decades-long assault on the First Amendment rights of firearm industry members and proponents of hunting and the shooting sports. Through AB 2571, California seeks to preclude truthful speech concerning the lawful use of firearms by adults and minors. The California Legislature made its purpose clear: to stamp out a way of life it disdains by restricting speech that might stimulate minors' interest in firearms, conservation, and the shooting sports. This, California hopes, will stunt the growth of hunting and shooting culture among future generations, thereby stifling demand for lawful firearm products.

AB 2571 is an unprecedented assault on First Amendment freedoms and the State utterly fails to justify its constitutionality. At base, the State does not have any legitimate interest in curbing demand for products and activities that are not only lawful, but also constitutionally-protected under the Second Amendment. Even putting that aside, AB 2571 violates the First, Fifth, and Fourteenth Amendments because it is vague and overbroad on its face. The statute also violates the First Amendment by: (i) imposing viewpoint-, content-, and speaker-based restrictions on protected speech; (ii) regulating nonmisleading commercial speech concerning lawful activities; and (iii) infringing Appellants' right to free

assembly and association. Finally, AB 2571 discriminates against Second Amendment advocates without any constitutionally permissible justification.

Appellants sued Attorney General Rob Bonta seeking preliminary injunctive relief and a declaration that AB 2571 is unconstitutional. The district court held that Appellants were unlikely to succeed on the merits and denied Appellants' motion for preliminary injunction (the "Motion"). This Court should vacate that decision.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. The district court entered an order on January 12, 2023, denying Appellants' Motion.¹ Appellants timely filed their notice of appeal on February 10, 2023.² *See* Fed. R. App. P. 4(a)(1)(B)(i). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

1. Whether the district court erred in concluding that Appellants are unlikely to succeed on their claim that AB 2571 violates their rights under the Fifth and Fourteenth Amendments because it is impermissibly vague.

¹ 1-ER-02-42.

² 3-ER-602-03.

2. Whether the district court erred in concluding that Appellants are unlikely to succeed on their claim that AB 2571 violates their First Amendment rights to free speech and association.

3. Whether the district court erred in concluding that Appellants are unlikely to succeed on their claim that AB 2571 violates their Fourteenth Amendment rights to equal protection.

4. Whether the district court erred in concluding that the balance of equities and the public interest did not warrant a preliminary injunction.

CIRCUIT RULE 28.2.7 STATEMENT

All applicable constitutional provisions and statutes are contained in the addendum to this Opening Brief.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND.

On June 30, 2022, “to further restrict the marketing and advertising of firearms to minors,” the California Legislature passed, and Governor Newsom signed into law, AB 2571, adding Section 22949.80 to California’s Business and Professions Code. 2022 Cal. Stats., Ch. 77, §§ 1(b) & 3. Then, in August 2022, AB 160 was signed into law, amending the newly-added Section 22949.80.

A. Section 22949.80 Singles Out “Firearm Industry Members” and Prohibits Them from Engaging in a Broad Range of Advertising and Marketing of Lawful Products.

As amended, Section 22949.80 broadly prohibits “firearm industry members” from making, distributing, or arranging for the placement of “an advertising or marketing communication” that offers or promotes “any firearm-related product” in a manner that “is designed, intended, or reasonably appears to be attractive to minors.” Cal. Bus. & Prof. Code § 22949.80(a)(1). In August 2022, the California Legislature, through AB 160, amended Section 22949.80 to exempt certain advertising communications. As amended, Section 22949.80 exempts communications:

[O]ffering or promoting any firearm safety program, hunting safety or promotional program, firearm instructional course, sport shooting event or competition, or any similar program, course, or event, nor does it apply to a communication offering or promoting membership in any organization, or promotion of lawful hunting activity, including, but not limited to, any fundraising event, youth hunting program, or outdoor camp.

Id. § 22949.80(a)(3), amended 2022 Cal. Stats. Ch. 771, § 1.

Three terms are particularly important to understanding Section 22949.80’s prohibitions: “firearm industry member,” “firearm-related product,” and “marketing or advertising.”

First, “firearm industry member” means any person or entity whose purpose is “promoting, encouraging, or advocating for the purchase, use, or ownership of

firearm-related products” that: “(i) advertises firearm-related products[;] (ii) advertises events where firearm-related products are sold or used[;] (iii) endorses specific firearm-related products[;] [or] (iv) sponsors or otherwise promotes events at which firearm-related products are sold or used.” *Id.* § 22949.80(c)(4).

This broad definition sweeps within its scope not only firearm manufacturers and sellers, but also a multitude of other non-commercial organizations that publish content concerning hunting, conservation, and other lawful firearm-related activities, as well as sponsor sporting, shooting, and other events where firearm-related products are used or sold. Moreover, this definition must be read together with the statute’s operative language, which prohibits marketing, advertising, *and* “arranging for placement of” an advertisement. *Id.* § 22949.80(a)(1).

Second, a “firearm-related product” is “a firearm, ammunition, reloaded ammunition, a firearm precursor part, a firearm component, or a *firearm accessory*” sold in California or directed towards California residents. *Id.* § 22949.80(c)(5) (emphasis added). “Firearm accessory” is, in turn, “an attachment or device designed or adapted to be inserted into, affixed onto, *or used in conjunction with*, a firearm which is designed, intended, or functions to alter *or enhance* the firing capabilities of a firearm, the lethality of the firearm, *or* a shooter’s ability to *hold, carry, or use* a firearm.” *Id.* § 22949.80(c)(3) (emphasis added). The latter term is practically limitless and its inclusion *within* the

definition of “firearm-related product”—the subject of the statute’s advertising prohibition—means that Section 22949.80 regulates not only advertisements of firearms, but also a vaguely defined universe of otherwise benign products. These products might include, for example, the scopes that attach to a hunting rifle, or accessories that might be considered to “enhance . . . a shooter’s ability to hold, carry, or use a firearm,” like slings, hunting vests, and eyewear.

Third, the phrase “marketing or advertising” means “in exchange for monetary compensation,” to make or disseminate to individuals or the public “a communication” about a firearm-related product, “the primary purpose of which is to encourage recipients of the communication to engage in a commercial transaction.” Cal. Bus. & Prof. Code § 22949.80(c)(6).

In sum, Section 22949.80 prohibits “firearm industry members” from engaging in, or facilitating, speech that (1) offers or promotes a firearm or firearm-related accessory, (2) is designed, intended, or “reasonably appears to be attractive to minors,” and (3) appears to encourage “a commercial transaction.” Cal. Bus. & Prof. Code §§ 22949.80(a)(1) & (c)(6).

B. Section 22949.80 Requires Courts to Evaluate the Content of Advertisements and Grants Them Nearly Unlimited Discretion in Determining Whether an Advertisement Violates the Statute.

Section 22949.80 vests courts with broad, nearly unlimited, discretion to determine whether an advertisement violates the statute. Cal. Bus. & Prof. Code

§ 22949.80(a)(2). To determine whether an advertisement of a “firearm-related product” “reasonably appears to be attractive to minors,” courts are directed to consider the “totality of the circumstances, including, but not limited to,” whether the communication:

(A) Uses caricatures that reasonably appear to be minors or cartoon characters to promote firearm-related products.

(B) Offers brand name merchandise for minors, including, but not limited to, hats, t-shirts, or other clothing, or toys, games, or stuffed animals, that promotes a firearm industry member or firearm-related product.

(C) Offers firearm-related products in sizes, colors, or designs that are specifically designed to be used by, or appeal to, minors.

(D) Is part of a marketing or advertising campaign designed with the intent to appeal to minors.

(E) Uses images or depictions of minors in advertising and marketing materials to depict the use of firearm-related products.

(F) Is placed in a publication created for the purpose of reaching an audience that is predominately composed of minors and not intended for a more general audience composed of adults.

Cal. Bus. & Prof. Code § 22949.80(a)(2). This provision is content-based in two respects:

- *First*, the prefatory clause plainly directs courts to evaluate the content of the advertisement and any broader communication.

- *Second*, the nonexclusive factors require courts to evaluate not only the advertisement’s content, but also surrounding, contextual content.

Finally, the statute authorizes the California Attorney General and any district, county, or city attorney to sue for a civil penalty of up to \$25,000 for each copy of an offending advertisement. *Id.* § 22949.80(e)(1). Private parties “harmed by a violation” also have standing to sue for actual damages. *Id.* § 22949.80(e)(3). Courts are directed to order injunctive relief and to award attorney’s fees and costs, but only to a prevailing plaintiff. *Id.* § 22949.80(e)(4)–(5).

II. FACTUAL AND PROCEDURAL BACKGROUND.

Appellants engage in, or facilitate, a broad range of advertising communications concerning lawful Second Amendment conduct—communications that are now prohibited. Appellants publish, for example, magazines and other communications featuring articles about youth engagement in hunting, conservation, and shooting-sports activities, as well as images depicting minors lawfully using firearms and firearm-related products.³ Appellants also sell space for traditional advertising concerning firearm-related products that California

³ See 3-ER-373–74, 378–83, 387, 400–04, 415–19, 428, 456, 461, 467, 471–72, 478–80, 500–01, 524–26, 531–33, 536–42, 544–551.

law allows minors to use and possess.⁴ These advertisements are featured next to, or in close proximity with, the editorial content of Appellants' publications.⁵

Appellants also offer and sell branded merchandise, some of which feature caricatures and cartoons to promote their organizations, solicit membership and other support, and promote pro-Second Amendment messages.⁶ Many of these items, and the symbols and caricatures they bear, are designed to be attractive to both minors and adults.

Finally, Appellants advertise, promote, sponsor, and facilitate lawful recreational youth shooting events, educational programs and safety courses, or gun shows where youths are likely to attend.⁷ These events often involve the handling or use of firearms and firearm-related products, and exhibitions or advertising by third parties concerning firearm-related products, promoting membership in their organizations, distributing of branded merchandise, or promoting the safe and lawful use of firearms.⁸

Appellants commenced the underlying action for declaratory and injunctive relief on August 5, 2022,⁹ and filed the operative First Amended Complaint on

⁴ *See ibid.*

⁵ *See, e.g.*, 3-ER-531–33, 538–42, 544–551.

⁶ *See* 3-ER-373–74, 386, 428.

⁷ *See* 3-ER-373–74, 386, 428.

⁸ *See* 3-ER-374–77, 386–88.

⁹ 3-ER-605 (ECF No. 1).

October 18, 2022.¹⁰ Appellants moved for a preliminary injunction on October 21, 2022.¹¹ Defendant-Appellee Attorney General Rob Bonta answered the Amended Complaint on November 1, 2022.¹² Appellee opposed the Motion on November 4, 2022,¹³ and Appellants filed their Reply on November 14, 2022.¹⁴

The district court, on December 20, 2022, held a hearing on Appellants' Motion,¹⁵ and then denied the Motion in an Order entered on January 12, 2023.¹⁶ Appellants timely filed their Notice of Appeal on February 10, 2023.¹⁷

III. THE DISTRICT COURT'S ORDER.

The district court evaluated each of Appellants' constitutional claims and determined they were unlikely to succeed on the merits. First, the district court determined Appellants were not likely to succeed on their political and ideological speech claim because "the speech which § 22949.80 seeks to regulate is commercial speech."¹⁸ Although Appellants argued that strict scrutiny applied

¹⁰ 3-ER-555-601.

¹¹ 3-ER-337-554.

¹² 2-ER-275-301.

¹³ 2-ER-96-273.

¹⁴ 2-ER-85-95.

¹⁵ 2-ER-44-84.

¹⁶ 1-ER-2-42.

¹⁷ 3-ER-602-03.

¹⁸ 1-ER-13-14.

because Section 22949.80 implicates core political and economic messages related to the Second Amendment, the district court disagreed.¹⁹

Second, the district court rejected Appellants’ assertion that Section 22949.80 violates the First Amendment’s protection of commercial speech.²⁰

Although recognizing that “[Section] 22949.80 regulates some commercial speech that is not misleading and which concerns certain lawful activities involving minors and firearms,”²¹ the district court deferred to the State’s proffered interest in reducing gun violence involving minors.²² “Simple common sense,” according to the district court, supported the State’s argument that Section 22949.80 directly and materially advances its claimed interest,²³ and is “a reasonable fit.”²⁴

Third, because it rejected Appellants’ political and ideological free speech claim, the district court held that Appellants were not likely to succeed on their First Amendment right to associate claim.²⁵ According to the district court, Section 22949.80 does not apply to “a communication offering or promoting membership

¹⁹ 1-ER-14–16.

²⁰ 1-ER-15–29.

²¹ 1-ER-18.

²² 1-ER-20–21.

²³ 1-ER-25.

²⁴ 1-ER-26–29.

²⁵ 1-ER-29–30.

in any organization” and the right to associate does not extend to commercial speech.²⁶ The court rejected Appellants’ overbreadth claim for a similar reason.²⁷

Fourth, the district court determined Appellants were unlikely to succeed on their void-for-vagueness claim. This was based on the district court misreading the statute so narrowly as to avoid the definitional ambiguity of “firearm-related product” and “firearm accessories.”²⁸ It also rejected Appellants’ contention that Section 22949.80’s nonexclusive and subjective “totality of the circumstances” test for determining what “reasonably appears to be attractive to minors” invites arbitrary enforcement.²⁹

Fifth, the district court rejected Appellants’ equal protection claim based on its finding that Section 22949.80 does not violate Appellants’ First Amendment rights.³⁰

Based on these erroneous findings, the district court further found no irreparable harm, and that the balance of the equities tipped in the State’s favor.³¹

²⁶ 1-ER-29–30.

²⁷ 1-ER-30–31.

²⁸ 1-ER-32.

²⁹ 1-ER-33–40.

³⁰ 1-ER-40.

³¹ 1-ER-41–42.

SUMMARY OF ARGUMENT

Section 22949.80 is unconstitutional for at least the following reasons:

- It is unduly vague on its face. The statute fails to provide fair notice of what conduct it prohibits, not least because of its imprecise definition of “firearm-related product” and “firearm accessory.” Furthermore, Section 22949.80 invites arbitrary enforcement because it requires judges to determine subjectively whether a particular advertisement “reasonably appears to be attractive to minors” based on the “totality of the circumstances,” including six *non-exclusive factors*. And even if the six factors were exclusive, they are so permeated with subjectivity that they do not cure the vagueness that inheres in the statute’s enforcement provision.

- Section 22949.80 violates the First Amendment overbreadth doctrine. The statute encompasses *all communications* “offering or promoting any firearm-related product” made by “firearm industry members” “in exchange for monetary compensation” that “reasonably appear[] to be attractive to minors”—even communications concerning lawful and constitutionally protected products, and those that are equally attractive to adults who have a right to obtain information about those products.

- Strict scrutiny applies because Section 22949.80 (i) imposes content- and speaker-based restrictions on protected speech, and (ii) regulates speech that is inextricably intertwined with Second Amendment-protected conduct. To the extent

this Court’s precedents hold that restrictions on commercial speech—even ones that are content- and speaker-based—are subject to only intermediate scrutiny, this Court should abandon those precedents in view of contemporary Supreme Court decisions holding that content-based regulations are subject to strict scrutiny.

- Section 22949.80 fails even intermediate scrutiny under *Central Hudson*. The statute regulates nonmisleading commercial speech concerning lawful activity but does not materially advance any legitimate State interest. Moreover, there are plausible less-restrictive means for the State to achieve its objectives. In view of Section 22949.80’s breadth, coupled with the availability of plausible alternatives, the statute is not reasonably fit to achieve the State’s claimed interests.

- Section 22949.80 infringes on Appellants’ right to freely associate and assemble because it prohibits them from advertising or marketing their firearm-related programs, where Appellants and members of the public, including youths, lawfully assemble and associate with one another. And the statute is not narrowly tailored to the ends the State seeks to achieve.

- Section 22949.80 unconstitutionally discriminates against a disfavored group of speakers—“firearm industry members”—in violation of the Fourteenth Amendment’s Equal Protection Clause.

- Appellants are likely to succeed on the merits and, in view of the restrictions on protected speech that Section 22949.80 imposes, they will be irreparably harmed without an injunction. The balance of the equities tips in Appellants' favor, and an injunction is in the public interest.

STANDARD OF REVIEW

“The purpose of a preliminary injunction is to preserve the status quo pending a determination of the action on the merits.” *Chalk v. U.S. Dist. Ct. (Orange Cnty. Superin. of Schs.)*, 840 F.2d 701, 704 (9th Cir. 1998). To obtain a preliminary injunction, Appellants need only show “that [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). This Court reviews “order[s] regarding preliminary injunctive relief for abuse of discretion, but review[s] any underlying issues of law de novo.” *Karnoski v. Trump*, 926 F.3d 1180, 1198 (9th Cir. 2019). Further, where applying the correct rule compels the resolution of the ultimate issues, the court of appeals may reach the merits. *Rucker v. Davis*, 237 F.3d 1113, 1118–19 (9th Cir. 2001) (en banc), *rev'd on other grounds*, *Dep't of Hous. & Urb. Devel. v. Rucker*, 535 U.S. 125 (2002).

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT APPELLANTS ARE UNLIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT SECTION 22949.80 IS UNCONSTITUTIONALLY VAGUE.

The void for vagueness doctrine is rooted in the due process principle that a law is unconstitutional “if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 44 (1991) (O’Connor, J., dissenting) (“Due process requires that a State provide meaningful standards to guide the application of its laws.”). This doctrine “addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.” *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

Thus, there are two ways in which a statute can be unconstitutionally vague. First, if the statute fails to provide “fair warning” of what conduct will subject a person to liability. *See, e.g., Grayned*, 408 U.S. at 108–09; *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Second, a law is vague if it “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Grayned*, 408 U.S. at 108–09. To

prevent those dangers, statutes “must provide explicit standards for those who apply them.” *Id.*

A. Section 22949.80 Is Subject to Strict Review for Vagueness Because it Regulates Protected Speech.

The most important factor affecting the degree of clarity that the Constitution requires is whether constitutional rights are at stake. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982). Laws that intrude upon “basic First Amendment Freedoms”—like Section 22949.80—require a higher degree of clarity because “[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.” *Grayned*, 408 U.S. at 109 (citations and internal quotation marks omitted); *see also N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963); *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 972 (9th Cir. 1996) (“Where the guarantees of the First Amendment are at stake the [Supreme] Court applies its vagueness analysis strictly.”).

Section 22949.80 on its face regulates First-Amendment-protected speech by restricting advertising of “firearm-related products” by “firearm industry members.”³² It is therefore subject to the strictest vagueness standard.

³² *See* Sections II.A. & II.B.1., *infra*.

B. Section 22949.80 is Unconstitutionally Vague.

Section 22949.80 is unduly vague in two respects. First, it fails to provide “fair warning” of what conduct will subject a person to liability. *See Grayned*, 408 U.S. at 108–09. Second, and perhaps most important, the statute invites arbitrary enforcement and abuse because it requires judges to determine subjectively whether a particular advertisement “reasonably appears to be attractive to minors” based on the “totality of the circumstances,” including consideration of six non-exclusive factors. *See id.*; *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (the “more important aspect of the vagueness doctrine” is “the requirement that a legislature establish minimal guidelines to govern” its enforcement).

1. Section 22949.80 Fails to Provide Fair Notice.

It is fundamental to our legal system that “laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *F.C.C.*, 567 U.S. at 253; *see also Connally*, 269 U.S. at 391 (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law”); *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972) (“Living under a rule of law entails various suppositions, one of which is that ‘[all persons] are entitled to be informed as to what the State commands or forbids’” (alteration in original)).

The most glaring example of Section 22949.80’s vagueness is its definition of the most important term in the statute’s operative clause: “firearm-related product.” *See* Cal. Bus. & Prof. Code § 22949.80(a)(1). Though the term does include commonly known products like “firearm[s], ammunition, reloaded ammunition, a firearm precursor part, [and] a firearm component,” the inclusion of “firearm accessory” gives “firearm-related product” nearly unlimited application. This is because “firearm accessory” is defined so vaguely³³ as to encompass an entire panoply of products that are useful for both firearm-related activities and non-firearm-related activities (such as optics, braces, slings, clothing, and eye-and-ear protection)—none of which are unlawful for minors to possess.³⁴ That, coupled with the statute’s use of the word “promoting,” makes it impossible to know what communications Section 22949.80 prohibits. *Cf. Coates v. City of Cincinnati*,

³³ “Firearm accessory” is defined as “an attachment or device designed or adapted to be inserted into, affixed onto, or used in conjunction with, a firearm which is designed, intended, or functions to alter or enhance the firing capabilities of a firearm, the lethality of the firearm, or a shooter’s ability to hold, carry, or use a firearm.” Cal. Bus. & Prof. Code § 22949.80(c)(3).

³⁴ The Fourth Circuit held that a school district’s dress code prohibiting students from wearing “messages on clothing . . . that . . . relate to weapons” likely was unconstitutionally overbroad. *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 259–60 (4th Cir. 2003). Citing the dress code, the school had prohibited the plaintiff from wearing a t-shirt depicting three black silhouettes of men holding firearms superimposed on the letters “NRA” positioned above the phrase “SHOOTING SPORTS CAMP.” The Fourth Circuit held that the dress code improperly “exclude[d] a broad range and scope of symbols, images, and political messages that are entirely legitimate and even laudatory.” *Id.* at 260.

402 U.S. 611, 614–15 (1971).

In addressing this issue, the district court both misinterpreted the statute and misapplied a fundamental canon of statutory interpretation.³⁵ First, the district court erroneously found that a “firearm accessory” “is limited to ‘an attachment or device’” and, worse, narrowly interpreted “device” to mean only “mechanical or electronic equipment.”³⁶ It therefore concluded the statute excludes items such as backpacks, shooting vests, and safety glasses, “because those items cannot be affixed to a firearm to perform a particular function, nor could those items constitute ‘mechanical or electronic equipment.’”³⁷ But the statute plainly does not impose either of these limitations. *See* Cal. Bus. & Prof. Code § 22949.80(c)(3). Putting aside that “attachment” and “device” are both undefined, “firearm accessory” broadly includes any device that “functions to alter or enhance” not only the performance of a firearm, but also “a shooter’s ability to hold, carry, or use a firearm.” *Id.* The district court effectively re-wrote the statute so the California Legislature did not have to.

³⁵ *See* 1-ER-32–33.

³⁶ *See* 1-ER-32–33. Confusingly, the district court limited the definition of “device” to include only “mechanical or electronic equipment,” even though the definition it cited states more broadly: “[a] thing made or adapted for a particular purpose, especially a piece of mechanical or electronic equipment.” 1-ER-33 n.11.

³⁷ 1-ER-32–33.

Second, the district court fundamentally misapplied the *ejusdem generis* canon. According to the district court, the term “firearm accessory” is “limited by the more specific words listed before it *in the definition of* ‘firearm-related product.’”³⁸ But this neglects that “firearm accessory” is defined independently of “firearm-related product.” Compare Cal. Bus. & Prof. Code § 22949.80(c)(3), with *id.* § 22949.80(c)(5). The latter therefore cannot limit the former. Otherwise, the separate definition of “firearm accessory” would be superfluous. See *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996) (“Courts have long followed the principle that statutes should not be construed to make surplusage of any provision.”); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174–79 (2012) (no provision should be given an interpretation which causes it to have no consequence).

2. Section 22949.80 Invites Arbitrary Enforcement.

Citizens must have fair warning of what conduct will subject them to liability. *Grayned*, 408 U.S. at 108–09; *Connally*, 269 U.S. at 391. Thus, a law is unconstitutionally vague if it “impermissibly delegates basic policy matters to . . . judges . . . for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Grayned*, 408 U.S. at 108–09. The vice of such enforcement is two-fold. First, it undermines the sense a citizen

³⁸ 1-ER-33 (emphasis added).

body must have, if it is to respect a system of law, that the law is the same for any offender. Second, it encourages legislators to evade difficult decisions that would otherwise subject them to political pressures and accountability. *Cf. id.* at 108–09 & n.5. Statutes must, therefore, “provide explicit standards.” *Id.* at 108–09.

Here, Section 22949.80 invites arbitrary enforcement and abuse because it grants judges unbridled discretion to determine subjectively whether a particular communication “reasonably appears to be attractive to minors” based on the “totality of the circumstances,” including consideration of six *nonexclusive* factors. Cal. Bus. & Prof. Code § 22949.80(a)(2). Statutes like Section 22949.80 impermissibly allow “the legislature [to] set a large enough net to catch all possible offenders, and leave it to the courts to step in” and decide who has or has not committed a violation. *United States v. Reese*, 92 U.S. 214 (1875), *quoted in Papachristou*, 405 U.S. at 165. This concern is particularly acute in a case such as this where the statute is a content-based regulation of speech. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 870–71 (1997) (the vagueness of a content-based regulation “raises special First Amendment concerns because of its obvious chilling effect”).

The Supreme Court has consistently struck down similarly subjective statutes as unconstitutional. *See, e.g., Coates*, 402 U.S. at 614; *Cox v. Louisiana*, 379 U.S. 536, 551–52 (1965); *see also Carter v. Welles-Bowen Realty, Inc.*, 719 F.

Supp. 2d 846, 852 (N.D. Ohio 2010), *aff'd*, 736 F.3d 722 (6th Cir. 2013) (HUD’s ten factor test for distinguishing “sham” and “bona fide” providers, for purposes of an exception to the statute, was void for vagueness because the factors themselves were vague, and that vagueness was compounded by the inherently subjective balancing test). And it has likewise condemned broadly worded licensing ordinances granting such standardless discretion to public officials that they are free to censor ideas and enforce their own personal preferences. *See, e.g.*, *Shuttlesworth v. Birmingham*, 394 U.S. 147, 153–55, 158–59 (1969); *Staub v. City of Baxley*, 355 U.S. 313, 322, 325 (1958).

The existence of “standards”—like Section 22949.80’s six nonexclusive, unweighted factors—does not save the statute from its vagueness. This is for two reasons. First, the factors are nonexclusive. Second, the factors are themselves clothed with subjectivity. Thus, the existence of discretion turns on the looseness of the standards such that they are meaningless as to some or all persons subject to the regulation. *Cf. Shuttlesworth*, 394 U.S. at 153 (1969) (“[W]e have consistently condemned licensing systems which vest . . . official discretion . . . upon broad criteria unrelated to proper regulation of public places.” (internal quotation marks omitted)); *Chesapeake B & M, Inc. v. Harford County*, 58 F.3d 1005, 1009 (4th Cir. 1995) (“Unbridled discretion naturally exists when a licensing scheme does not impose *adequate standards* to guide the licensor’s discretion.” (emphasis

added)). Indeed, it is the risk of *an abuse of discretion* that has motivated the Supreme Court’s decisions in this area, and a risk of abuse exists wherever a decisionmaker can effectively discriminate against certain viewpoints, the existence of standards notwithstanding. *See Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130–31 (1992).

a. The Factors are Nonexclusive and Unweighted.

Because Section 22949.80’s six factors are nonexclusive, there is a disconcerting risk that a court’s application of the law would be guided by post-hoc reliance on unspecified criteria to justify the State’s action. Just as written criteria alone do not ensure that official discretion is adequately “bridled,” Section 22949.80’s nonexclusive factors do not save it from its vagueness. *See, e.g., Amidon v. Student Ass’n of State Univ. of New York at Albany*, 508 F.3d 94, 103–04 (2d Cir. 2007) (nonexclusive factors were insufficient to clarify the statute’s vagueness); *Rec. Head Corp. v. Sachin*, 682 F.2d 672, 677–78 (7th Cir. 1982) (to similar effect).

b. The Six Factors are Vague and Ambiguous.

Section 22949.80 fails to provide any standard capable of objective application. The six nonexclusive factors are themselves permeated by subjectivity, turning upon words and phrases like “reasonably appear” and “appeal,” the meaning of which depends on the particular judge’s idiosyncratic interpretation of

the communication at issue. *Id.* § 22949.80(a)(2). These factors, therefore, do not ameliorate the vagueness that otherwise inheres in the “reasonably appears to be attractive to minors” language—they exacerbate it. The proceeding below is a case in point.

The district court concluded that the words and phrases “appeal,” “design,” and “reasonably appear” do not invite subjective application because the factors in which they are used “involve deciphering the intent behind the product or advertisement at issue.”³⁹ In so holding, the district court relied on *Flipside*. But, contrary to the district court’s conclusion, the statute evaluated in *Flipside* is distinguishable from Section 22949.80 in key respects that illustrate the vagueness of the latter.

The statute in *Flipside* required a retailer to obtain a license if it sold “any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs.” 455 U.S. at 500. The Supreme Court construed the phrase “designed or marketed for use” in a way that minimized vagueness. *Id.* at 500–01. “Designed for use” referred to the objective characteristics of an item as manufactured, not to the intent—or possible adaptive ingenuity—of the retailer or his customers. *Id.* at 501. “Marketed for use,” on the other hand, referred to a “retailer’s intentional display and marketing of merchandise . . . in a manner that

³⁹ 1-ER-34.

appeals to or encourages illegal drug use,” thus stating a scienter requirement. *Id.* at 502. Under the Court’s construction then, the statute reached only two forms of conduct: the sale of objects manufactured as drug paraphernalia, and the sale of other, more ambiguous implements if they are deliberately displayed to encourage drug use.

Section 22949.80, by comparison, is much broader. Its prohibitions attach to advertising of “firearm-related product[s],” including “firearm accessor[ies],” which together broadly encompass firearm products that are lawful for minors to possess and use under specific circumstances, and accessory products that are unconditionally lawful for minors to possess and use. Thus, in contrast to *Flipside*, Section 22949.80 prohibits not only advertisements of products with definite, objective design characteristics, but also products with a range of independent uses and adaptive possibilities. *Cf. Flipside*, 455 U.S. at 500–01. Furthermore, the six enumerated factors encompass a range of conduct and products so broad that they fail to make the prohibited conduct any clearer. The gloss on these factors is far less precise than “marketed for use,” which the Supreme Court has read to refer to the deliberate marketing strategy of retailers to encourage *illegal use of drugs*. *See Flipside*, 455 U.S. at 502.

In sum, Section 22949.80 is impermissibly vague and must be stricken. The six factors that are supposed to help define an advertisement that “reasonably

appears to be attractive to minors,” are fuzzy, contradictory, and dangerously open to erratic and after-the-fact interpretation. And this risk of arbitrary enforcement has already caused Appellants to refrain from speech that might arguably fall within the statute’s indeterminable unlawful zone.⁴⁰ *Grayned*, 408 U.S. at 109.

II. THE DISTRICT COURT ERRED IN HOLDING THAT APPELLANTS ARE UNLIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS THAT SECTION 22949.80 VIOLATES THE FIRST AMENDMENT.

A. Section 22949.80 Violates the First Amendment Overbreadth Doctrine.

A statute is “facially invalid” under the First Amendment overbreadth doctrine “if it prohibits a substantial amount of protected speech.” *United States v. Williams*, 553 U.S. 285, 292 (2008). This doctrine recognizes that overbroad restrictions of speech tend to chill the speech of third parties. “First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect” of an overbroad statute. *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977). A statute is overbroad where “there is a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court,’ or the statute is ‘susceptible of regular application to protected expression.” *United States v. Hansen*, 25 F.4th 1103, 1106 (9th Cir. 2022) (internal quotation marks omitted).

⁴⁰ See 3-ER-376–77, 387–88, 429.

“The government may restrict speech ‘in a few limited areas,’ including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.” *Id.* at 1109 (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)). But none of the speech that Section 22949.80 regulates falls within these traditional “limited areas.” Instead, it prohibits a substantial amount of lawful, constitutionally protected speech. *See Stevens*, 559 U.S. at 475–77 (focusing heavily on the requirement that the underlying act of animal cruelty be illegal but nevertheless invalidating a statute banning depictions of animal cruelty as overbroad).

The Supreme Court’s decision in *Stevens* is instructive. There the Court invalidated a statute that imposed criminal penalties on “anyone who knowingly ‘creates, sells, or possesses a depiction of animal cruelty,’ if done ‘for commercial gain’ in interstate or foreign commerce.” 559 U.S. at 464–65. The problem with the statute, the Court explained, was that it did not actually require the depiction of animal cruelty; it required only that an animal be “intentionally maimed, mutilated, tortured, wounded, or killed.” *Id.* at 474. The statute plainly outlawed, for example, all hunting imagery. *Id.* at 474–76. Accordingly, the Court concluded that because “the protection of the First Amendment presumptively extends to many forms of speech that . . . fall within the broad reach of” the statute, it was overbroad. *Id.* at 480.

The same is true here. Section 22949.80 encompasses *all* communications “offering or promoting any firearm-related product” made by “firearm industry members” “in exchange for monetary compensation” that are “designed, intended, or reasonably appear[] to be attractive to minors”—even communications concerning lawful and constitutionally protected products as well as communications that are equally attractive to adults who have a right to obtain information about those products. And the statute’s prohibitions are not limited to advertisements concerning only firearms. It also prohibits advertising of “firearm accessor[ies],” none of which are illegal for minors to purchase or possess. Thus, Section 22949.80 has the effect of barring a wide range of truthful speech concerning *lawful* products and activities.

Additionally, by restricting advertising that promotes the sale of “firearm-related products” to minors, Section 22949.80 burdens a vast amount of pure speech. For example, Section 22949.80 bans advertising and marketing of “firearm-related products” in any manner that may relate to youth shooting events, competitions, and education programs designed to instill students with an appreciation of the history, text, and tradition of the Second Amendment and firearms ownership in the United States. And by including content-based factors *unrelated to firearms*—such as whether the advertiser also “[o]ffers brand name

merchandise for minors”—Section 22949.80 also burdens swathes of non-commercial speech. *See id.* § 22949.80(a)(2)(B)–(E).

The intent underlying Section 22949.80 is irrelevant in an overbreadth challenge because “[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.” *Stevens*, 559 U.S. at 470. Here, the statute will have the effect of chilling constitutionally protected speech and activities. In fact, Appellants have already started to curtail speech that *might* fall under Section 22949.80’s overly broad ban.⁴¹ This chilling of speech itself offends the First Amendment. *See, e.g., Coates*, 402 U.S. at 614–15; *Cox*, 379 U.S. at 551–52; *Button*, 371 U.S. at 433.

B. Section 22949.80 Violates the First Amendment.

1. The District Court Erred in Applying the *Central Hudson* Test, Instead of Strict Scrutiny, Because Section 22949.80 is Impermissibly Content-Based on its Face and Regulates Truthful Speech.

Appellants argued below that AB 2571 imposes content- and speaker-based restrictions on commercial speech and is therefore subject to strict scrutiny. 3-ER-357–59. They also argued that AB 2571 is subject to heightened scrutiny because it regulates commercial speech that is inextricably intertwined with constitutionally-protected activities. 3-ER-356–57. Without any meaningful analysis, the district

⁴¹ *See* 3-ER-376–77, 387–88, 429.

court rejected these arguments and, based on its erroneous conclusion that heightened scrutiny is never appropriate when a statute regulates only commercial speech, proceeded to apply intermediate scrutiny under *Central Hudson*. See 1-ER-016–17. This was error.

a. Section 22949.80 Is Viewpoint-Based and Facially Invalid Under the First Amendment.

Viewpoint-based speech discrimination, which “is a ‘more blatant’ and ‘egregious form of content discrimination,’” *Reed v. Town of Gilbert*, 576 U.S. 155, 168–69 (2015) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)), is forbidden under the First Amendment, *Matal v. Tam*, 582 U.S. 218, 234 (2017) (plurality); *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 970 (9th Cir. 2009). “[T]he test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed.” *Matal*, 582 U.S. at 248 (Kennedy, J., Concurring). As this Court said: “Viewpoint discrimination occurs when the government prohibits speech by particular speakers, thereby suppressing a particular view about a subject.” *Moss*, 572 F.3d at 970 (cleaned up). In other words, the government is acting “*because of* not merely in spite of” the message. *Id.* (italics in original).

In *Matal*, “all eight Justices (Justice Gorsuch was recused) held that offensive speech is, itself, a viewpoint and that the government engages in

viewpoint discrimination when it suppresses speech on the ground that the speech offends.” *Am. Freedom Def. Initiative v. King Cnty.*, 904 F.3d 1126, 1131 (9th Cir. 2018) (citation omitted). The *Matal* Court invalidated the Lanham Act’s prohibition on trademarking disparaging content and held that a band called “The Slants,” based on the shape of its Asian members’ eyes, could trademark its name. *Matal*, 582 U.S. at 223, 247; compare *Metro Display Advertising, Inc. v. City of Victorville*, 143 F.3d 1191 (9th Cir. 1998) (finding unconstitutional viewpoint discrimination in city’s refusal to renew contract with lessor of bus shelter advertising space after lessor’s refusal to remove pro-union advertisements from the shelter, because act was clearly aimed at the message the speech conveyed), with *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998) (city’s ban on all noncommercial advertising on municipal buses was viewpoint neutral).

California, likewise, has engaged in viewpoint discrimination by banning advertisements that might “reasonably appear attractive to minors.” Cal. Bus. & Prof. Code § 22949.80(c)(6). Appearing attractive to minors is not constitutionally different than disparaging or offensive content. It is also “a subset of” firearms advertising that is “disfavor[ed] based on the views expressed,” *Matal*, 582 U.S. at 248 (Kennedy, J., Concurring), and similar to pro-union advertising under *Metro Display Advertising, Inc.* See also *Ctr. for Bio-Ethical Reform, Inc. v. City & Cnty. of Honolulu*, 455 F.3d 910, 921 (9th Cir. 2006) (ordinance prohibiting tow-banners

being dragged from airplanes was viewpoint neutral but noting that if the ordinance distinguished among views on abortion, then it would be viewpoint based). There is no question that the State is acting “*because of*” the message. *Moss*, 572 F.3d at 970.

Moreover, if “the law includes indicia of discriminatory motive, [the Court] may peel back the legislative text and consider legislative history and other extrinsic evidence to probe the legislature’s true intent,” and “statements by government officials . . . help to determine legislative intent.” *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 899 (9th Cir. 2018) (citations omitted).⁴² The California Legislature made clear when it enacted the AB 2571 that it was intended to stifle interest in firearms, firearm accessories, and firearm-related activities among youth.⁴³ Indeed, the materials that the Legislature relied on—in particular, the publication *Starting Them Young*⁴⁴—clearly show that its target was to prevent the growth of youth gun culture by restricting dissemination of truthful information about firearm-related products and activities from being

⁴² Over and underinclusive statutes also indicate discriminatory intent. *Id.* As briefed above, Section 22949.80 is overbroad. But it is also underinclusive given the fact that the state allows several other types of violent imagery to be shown, most of which is created in Hollywood.

⁴³ See, e.g., 2-ER-166–74.

⁴⁴ See 2-ER-200–60; see also, e.g., 2-ER-166–74 (legislative history relying on *Starting Them Young*).

disseminated to minors. For instance, *Starting Them Young* highlights an advertisement in the National Rifle Association’s junior member magazine that depicts a father and son hunting,⁴⁵ and attacks the viewpoint that it is appropriate to “encourage youth shooters” to become “lifelong firearms enthusiasts and Second Amendment advocates.”⁴⁶ It also targets similar viewpoints and messages disseminated by other organizations.⁴⁷ This viewpoint discrimination is unconstitutional on its face.

b. Strict Scrutiny Applies Because Section 22949.80 Is Content- and Speaker-Based and Regulates Truthful Commercial Speech Concerning Lawful Products.

Under the First Amendment, the State “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Reed*, 576 U.S. at 163 (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). Laws that “target speech based on its communicative content . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Id.* Regulation of speech is content-based and therefore subject to strict scrutiny “if a law applies to particular speech because of the topic discussed or the idea or message expressed”; some obvious facial distinctions based on a message include “defining regulated speech

⁴⁵ 2-ER-235.

⁴⁶ 2-ER-237.

⁴⁷ *See, e.g.*, 2-ER-227–34, 237–40.

by particular subject matter” or “by its function or purpose.” *Id.* at 163–64. A law is also considered content based if, to enforce it, an official “must necessarily examine the content of the message that is conveyed.” *Forsyth*, 505 U.S. at 134.

The “crucial first step in the content-neutrality analysis” involves “determining whether the law is content neutral on its face.” *Reed*, 576 U.S. at 165. A facially content-based law is “subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.” *Id.* (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). As the Supreme Court in *Reed* explained, “[b]ecause strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.” *Id.* at 166.

Section 22949.80 is plainly content based. It specially targets speech “concerning firearm-related products” that might appear “attractive to minors.” Cal. Bus. & Prof. Code § 22949.80(c)(6) (emphasis added); *cf. Reed*, 576 U.S. at 163. Worse, the statute requires judges to “evaluate the substantive content of a message” to decide whether it “reasonably appears to be attractive to minors.” *Reed*, 576 U.S. at 164 (content-based laws include those that cannot be “justified without reference to the content of the regulated speech, or that were adopted by

the government because of disagreement with the message [the speech] conveys” (citation and internal quotation marks omitted); *Forsyth*, 505 U.S. at 134 (law was content-based because, in order to enforce it, “the administrator must necessarily examine the content of the message that is conveyed”); *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 796 n.12 (9th Cir. 2006) (same).

For instance, one consideration that Section 22949.80 prescribes is whether the advertising communication “[o]ffers brand name merchandise for minors” such as “hats, t-shirts, or other clothing, or toys, games, or stuffed animals, that promotes a firearm industry member or firearm-related product.” Cal. Bus. & Prof. Code § 22949.80(a)(2)(B). Another is whether the advertisement “[u]ses caricatures that reasonably appear to be minors or cartoon characters to promote firearm-related products.” Cal. Bus. & Prof. Code § 22949.80(a)(2)(A). Both are classic indicia of a content-based law. Moreover, these factors also infringe symbolic speech. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632–33 (1943). Indeed, “the Ninth Circuit has reaffirmed its holding that the sale of merchandise inextricably intertwined with a religious, political, ideological, or philosophical message is fully protected by the First Amendment.” *Hunt v. City of Los Angeles*, 601 F. Supp. 2d 1158, 1176 (C.D. Cal. 2009), *aff’d* 638 F.3d 703 (9th Cir. 2011) (collecting and summarizing authorities).

Furthermore, Section 22949.80 engages in speaker-based discrimination by singling out “firearm industry member[s].” Cal. Bus. & Prof. Code § 22949.80(a) & (c)(4). For example, Section 22949.80 prohibits Appellants from advertising and advocating, even indirectly, the possession and use of a “firearm-related product,” such as by soliciting or promoting pro-Second Amendment activity using branded merchandise. The statute does not, however, prohibit non-firearm industry members from engaging in the same speech—using similar imagery irrespective of the content of the message—to promote their organizations, solicit support, and spread political ideas.

In summarily rejecting Appellants’ argument that AB 2571 is subject to heightened scrutiny because it imposes content- and speaker-based restrictions, the district court relied on *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839 (9th Cir. 2017), which held that regulations of commercial speech—regardless of whether they are content-based—are subject to intermediate scrutiny under *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557 (1980). But in *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335 (2020), the Supreme Court reaffirmed that under its precedents, including *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), a “‘law that is content based’ is ‘subject to strict scrutiny.’” *Barr*, 140 S. Ct. at 2347 (quoting *Reed*, 576 U.S. at 165).

The Supreme Court has consistently emphasized the danger of content-based restrictions: the government may use them to “effectively drive certain ideas or viewpoints from the marketplace.” *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991). The Court in *Simon & Schuster* invalidated New York’s “Son of Sam” law, which regulated an accused or convicted criminal’s receipt of income generated by works that described his crime. *Id.* at 108. Such laws, the Court explained, are particularly prone to abuse because they establish a “financial disincentive to create or publish works with a particular content.” *Id.* at 118. Notwithstanding the commercial purpose of the speech, the Court applied strict scrutiny and held the law was “significantly overinclusive” as a “means of ensuring that victims [were] compensated from the proceeds of crime.” *Id.* at 121.

Commercial speech is no exception. *Sorrell*, 564 U.S. at 566. The Supreme Court held in *Sorrell* that “heightened judicial scrutiny is warranted” when a statute is “designed to impose a specific, content-based burden on protected expression.” 564 U.S. at 565. There, the Court invalidated a Vermont law that restricted pharmaceutical companies from using industry information to market drugs to doctors. *Id.* at 557–58. It explained that States are not permitted to advance policy goals “through the indirect means of restraining certain speech by certain speakers,” *id.* at 577, nor may they “burden the speech of others in order to

tilt public debate in a preferred direction,” *id.* at 578–79. “The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys,” even in the commercial speech context. *Id.* at 566 (internal quotations omitted). Accordingly, laws that impose content- and speaker-based burdens on protected speech are “presumptively invalid” and “the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.” *Sorrell*, 564 U.S. at 571 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992)).⁴⁸

Following this reasoning, the appellant in *Retail Digital* argued that “for content- or speaker-based regulations of commercial speech, *Sorrell* requires courts to apply a greater level of scrutiny than *Central Hudson* previously required.” 861 F.3d at 846. This Court rejected that argument, concluding instead that *Sorrell* did not “mark a fundamental departure from *Central Hudson*’s four-factor test, and *Central Hudson* continues to apply.” *Id.* In so holding, this Court emphasized that *Sorrell*’s discussion of “heightened scrutiny” and whether the “law at issue imposed a content- or speaker-based burden” appeared only in the Supreme Court’s consideration of whether the Vermont statute “was a speech

⁴⁸ Both the majority and dissent in *Sorrell* agreed on one thing: the test the majority prescribed was stricter than *Central Hudson*’s test for commercial speech. See *Sorrell*, 564 U.S. at 588 (Breyer, J., dissenting) (agreeing the majority applied a stricter test than *Central Hudson*).

regulation in the first instance.” *Id.* at 847. Therefore, in the panel’s view, the *Sorrell* Court’s reference to “heightened scrutiny” was simply a reference to “the scrutiny that courts apply to speech regulations—as opposed to the rational basis review that courts apply to non-speech regulations of commerce and non-expressive conduct.” *Id.* at 847.

The Supreme Court’s decision in *Barr* undermines this distinction. By reaffirming that content-based restrictions of *any* speech are subject to strict scrutiny, the Supreme Court emphasized that although the “First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech,” content- and speaker-based laws inherently impose more than an incidental burden on protected expression. *Barr*, 140 S.Ct. at 2347 (citing *Sorrell*, 564 U.S. at 567). Thus, the dispositive issue is not whether the regulated speech is commercial, but rather, whether the law “is directed at certain content and is aimed at particular speakers.” *Id.* (quoting *Sorrell*, 564 U.S. at 567).

Since *Barr*, at least one circuit court has held that “the intermediate-scrutiny standard applicable to commercial speech under *Central Hudson* . . . applies only to a speech regulation that is content-neutral on its face.” *Int’l Outdoor, Inc. v. City of Troy, Michigan*, 974 F.3d 690, 703 (6th Cir. 2020). Put differently, “a regulation of commercial speech that is not content-neutral is still subject to strict scrutiny under *Reed*.” *Id.* There, the district court determined “that the speech at issue—

erecting advertising billboards—was commercial speech and therefore not subject to strict scrutiny,” and held that the law at issue survived intermediate scrutiny under *Central Hudson*. *Id.* at 707. The Sixth Circuit vacated this decision, holding that because the ordinance was a content-based restriction on speech, the district court should have applied “strict and not intermediate scrutiny.” *Id.* at 708.

In view of the foregoing, this Court should abandon *Retail Digital* and hold that **all** content- and speaker-based restrictions are subject to strict scrutiny under *Reed*. Applying this standard, the State bears the burden to “prov[e] the constitutionality of its actions.” *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 816 (2000). Accordingly, if this Court agrees that AB 2571 imposes a content- and speaker-based restriction on protected speech, it should hold that Appellants have established a likelihood of success on the merits of their First Amendment speech claim.

c. Section 22949.80 Impermissibly Regulates Speech that is Inextricably Intertwined with Constitutionally-Protected Activity.

When an advertisement is “inextricably intertwined with core political and economic messages,” the statute regulates core political speech, not just commercial speech, and is subject to strict scrutiny. *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 818 (9th Cir. 2013) (citing *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988)). For instance, the Supreme Court has struck down

bans on advertising of contraceptives, partly because “the information suppressed by this statute ‘related to activity with which . . . the State could not interfere.’” *Carey v. Population Servs. Int’l*, 431 U.S. 678, 700–01 (1977) (citation omitted); *see also Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 69 (1983) (striking down ban on mailing contraceptive advertisements, partly because “advertising for contraceptives . . . relates to activity which is protected from unwarranted state interference”). This Court has also noted that political speech on a firearm is protected speech. *Nordyke v. King*, 319 F.3d 1185, 1190 (9th Cir. 2003).

The Supreme Court’s decision in *Carey* illustrates this concept. There, the Court affirmed the district court’s holding that “the prohibition of any ‘advertisement or display’ of contraceptives is unconstitutional.” *Carey*, 431 U.S. at 700. The Court distinguished the ban on contraceptive advertising from a regulation that is “a mere time, place, and manner restriction,” that “prohibits only misleading or deceptive advertisements,” or restricts advertisements that propose illegal transactions. *Id.* (citation omitted). And it emphasized that “in addition to the ‘substantial individual and societal interests’ in the free flow of commercial information . . . the information suppressed by this statute” related to constitutionally-protected activity. *Id.* at 700–01. Finally, the Court rejected the appellants’ contention that the advertisements might legitimate illicit sexual behavior, finding that none of the advertisements could be even remotely

“characterized as ‘directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.’” *Id.* at 701 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

The same heightened constitutional protection extends to the lawful possession and use of firearms, which the Second Amendment protects. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2127, 2129–30 (2022); *District of Columbia v. Heller*, 554 U.S. 570, 628–29, 635 (2008). The Second Amendment implicitly includes the right to acquire firearms. *See Ezell v. City of Chicago (Ezell I)*, 651 F.3d 684, 704 (7th Cir. 2011) (“[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn’t mean much without the training and practice that make it effective.”); *Ill. Ass’n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 930 (N.D. Ill. 2014) (“the right to keep and bear arms for self-defense under the Second Amendment . . . must also include the right to **acquire** a firearm”) (emphasis added).

Thus, the advertisements restricted by Section 22949.80 do much more than merely “link[] a product to a current public debate.” *Bd. of Tr. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 475 (1989). They directly concern constitutionally-protected conduct. *Cf. id.* at 473–74 (the commercial speech of selling Tupperware at “Tupperware parties” was not “inextricably intertwined” with the fully protected

speech discussed at those parties because “nothing . . . prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.”⁴⁹

There can be no question that Section 22949.80 restricts advertisements intertwined with the lawful possession and use of firearms. Although minors cannot lawfully purchase firearms in California, the State conceded below that the law allows them to possess and use firearms under certain circumstances with adult supervision.⁵⁰ *See, e.g.*, Cal. Penal Code § 27505(b)(2) (permitting the loan of a firearm to a minor for lawful recreational, agricultural, hunting, or artistic performance purposes); *id.* § 29615 (permitting a minor to possess a firearm for lawful recreational, agricultural, hunting, or artistic performance purposes if accompanied by a parent or adult guardian)). Indeed, minors have a constitutional right to do so. *See Jones v. Bonta*, 34 F.4th 704, 720–23 (9th Cir. 2022) (“young adults have Second Amendment protections”); *Ezell v. City of Chicago (Ezell II)*, 846 F.3d 888, 896 (7th Cir. 2017) (“There’s zero historical evidence that firearm training for [minors under 18] is categorically unprotected” by the Second

⁴⁹ *See, e.g.*, 3-ER-531–33, 538–42, 544–551.

⁵⁰ 2-ER-108–09.

Amendment). The State, therefore, cannot claim that Section 22949.80 facially restricts only unlawful activity.

Nor may the State “‘completely suppress the dissemination of concededly truthful information about entirely lawful activity,’ even when that information could be categorized as ‘commercial speech.’” *Carey*, 431 U.S. at 700 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976)). As in *Carey*, here, there is no legitimate rationale for the State to completely suppress the dissemination of truthful information about lawful activity.

2. Section 22949.80 Violates the First Amendment’s Protection of Commercial Speech under *Central Hudson*.

The First Amendment protects commercial speech—speech that “does no more than propose a commercial transaction” or relates solely to the economic interests of the speaker and audience—provided it is not misleading and concerns lawful activity. *Cent. Hudson*, 447 U.S. at 563. Under *Central Hudson*, a court first inquires “whether the expression [being restricted] is protected by the First Amendment,” which means that “it at least must concern lawful activity and not be misleading.” *Id.* at 566. Second, the State must show that the “asserted governmental interest is substantial.” *Id.* Then, “[i]f both inquiries yield positive answers,” a court “must determine whether the regulation directly advances the

governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.” *Id.*

a. Section 22949.80 Restricts Truthful Speech Concerning Lawful Activity.

As the district court recognized, “Section 22949.80 regulates some commercial speech that is not misleading and which concerns certain lawful activities involving minors and firearms.”⁵¹ Indeed, on its face, Section 22949.80 restricts a broad range of truthful speech concerning lawful activity. “An offer to sell firearms or ammunition” is constitutionally protected commercial speech. *Nordyke v. Santa Clara*, 110 F.3d 707, 710 (9th Cir. 2009). And the Second Amendment protects the right of minors to bear arms and maintain proficiency in their use, subject to limited and well-established historical regulations such as those requiring adult approval and supervision. *See Jones*, 34 F.4th at 720–23 (“young adults have Second Amendment protections”); *Ezell*, 846 F.3d at 896; *see also Bruen*, 142 S. Ct. at 2127, 2129–30. This is reflected in California’s laws, which allow minors to possess and use firearms, with adult supervision, for hunting and other recreational shooting activities.⁵² *Cf. Washington Mercantile Ass’n v. Williams*, 733 F.2d 687, 691 (9th Cir. 1984) (advertising drug

⁵¹ 1-ER-18.

⁵² *See* 2-ER-108–09 (citing statutes).

paraphernalia in states where it is legal is protected speech, but advertising in Washington, where it was illegal, is not).

As discussed, Appellants engage in a range of speech that Section 22949.80 now prohibits. Appellants widely distribute printed and electronic communications promoting their events and programs, including images or depictions of adults and minors handling or “using firearm-related products.”⁵³ Furthermore, their lawful activities regularly involve signage, flyers, discussions, branded merchandise and giveaways, and/or other communications depicting minors exercising (often accompanied by supervising adults), or otherwise encouraging the exercise of the Second Amendment right to possess and use lawful firearms for lawful purposes.⁵⁴

Section 22949.80 is not limited to commercial sales of firearms and ammunition. It encompasses much more. *See* Cal. Bus. & Prof. Code § 22949.80(c)(3), (5), & (6); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (a statute must be interpreted “so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant”). Read together with its constituent parts, Section 22949.80 prohibits advertising of not only firearms, but also a wide range of “firearm-related products,” including vaguely-defined “firearm accessor[ies].” Cal. Bus. & Prof. Code §§ 22949.80(a), (c)(3), (5), & (6).

⁵³ *See* 3-ER-373–74, 387, 428–29.

⁵⁴ *See* 3-ER-374–77, 386–88.

This interpretation is consistent with the “evidence” that lawmakers cited in support of the statute, which shows the statute’s purpose is to prevent firearm industry members from “attract[ing] future legal gun owners” and “recruiting children into gun culture.”⁵⁵

The State here cannot rely on the principle that “offers to give or receive what it is unlawful to possess . . . enjoy no First Amendment protection.”

Williams, 553 U.S. at 298. As discussed, minors may lawfully possess and use firearms under certain circumstances.⁵⁶ Nor can the State, relying on generalized statistics about the effects of advertising on minors, show that Section 22949.80 restricts only speech concerning the unlawful sale of firearms to minors. There is no evidence of, for example, a scourge of unlawful sales of firearms to minors. Even if there were, there is no evidence linking Appellants’ protected speech to such sales. Nor is there any support for the State’s assumption that the advertisements restricted by Section 22949.80 propose illegal firearm sales to minors, instead of lawful sales to adults.

Even in cases involving unlawful sales, an intent to “initiat[e] the transfer” of the unlawful product is required. *Id.* at 300. However, Section 22949.80 does not require scienter—it requires only that the advertisement “reasonably appear to

⁵⁵ See 2-ER-168–74.

⁵⁶ See 2-ER-108–09 (citing statutes).

be attractive to minors.” Cal. Bus. & Prof. Code § 22949.80(a)(1). Even if Section 22949.80’s loose discussion of intent could be considered as requiring scienter, this language falls well short of the constitutional requirements because it does not require showing an intent to initiate an unlawful transfer. *Cf. Stevens*, 559 U.S. at 474 (statute was overbroad because its “ban on a ‘depiction of animal cruelty’ nowhere requires that the depicted conduct be cruel.”); *id.* at 475 (although the statute required that the depicted conduct be “illegal,” it did not distinguish “based on the reason the . . . killing of an animal is made illegal”). Rather, the language asks only whether an advertisement might be attractive to minors. This bears on the lawfulness of some of the prohibited images—not scienter, which is a separate concept.

b. The State Has No Interest in Banning Appellants’ Protected Speech.

AB 2571 claims to advance two “compelling” state interests: (1) “ensuring that minors do not possess these dangerous weapons,” (i.e., firearms); and (2) “protecting its citizens, especially minors, from gun violence and from intimidation by persons brandishing these weapons.” Appellants dispute the genuineness of these interests and contend Section 22949.80 does nothing to advance them. *See* Section II.B.2.c., *infra*. The Supreme Court has repeatedly said that “bans that target truthful, nonmisleading commercial messages rarely protect consumers from [commercial] harms. Instead, such bans often serve only to obscure an ‘underlying

governmental policy’ that could be implemented without regulating speech.” *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502–03 (1996).

Though the State claims to be concerned with unlawful gun violence, as discussed, Section 22949.80 was enacted to curb interest in firearms and Second Amendment-protected activities among minors. The district court recognized this at the hearing on Appellants’ Motion.⁵⁷ But there is no legitimate State interest in restricting demand for lawful, constitutionally-protected products and activities. *See Aschcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (“The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.”); *44 Liquormart*, 517 U.S. at 502–03 (bans of nonmisleading information “serve only to obscure an ‘underlying governmental policy’ that could be implemented without regulating speech”).

c. The State Cannot Establish That Section 22949.80 Directly and Materially Advances a Legitimate Government Interest.

The third *Central Hudson* prong requires the government to show “that the speech restriction directly and materially advances the asserted governmental interest[s].” *Greater New Orleans Broad. Ass’n v. United States*, 528 U.S. 173, 188 (1999). This requires more than “mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must

⁵⁷ *See* 2-ER-81–82.

demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Edenfield*, 507 U.S. at 770–71. The direct advancement prong requires the government to advance its goals “in a permissible way,” not by operating based on “the ‘fear that people would make bad decisions if given truthful information.’” *Sorrell*, 564 U.S. at 570 (citation omitted); *see also Free Speech Coal.*, 535 U.S. at 245.

Thus, regulations that “only indirectly advance the state interest involved” have consistently been declared unconstitutional. *Cent. Hudson*, 447 U.S. at 564. For example, in *Va. State Bd. of Pharmacy*, the Supreme Court invalidated a law declaring it unprofessional for a pharmacist to advertise prescription drug prices because “[t]he advertising ban [did] not directly affect professional standards one way or the other.” 425 U.S. at 769. Likewise, in *Bates v. State Bar of Arizona*, the Court invalidated an advertising prohibition designed to protect the “quality” of a lawyer’s work, finding that “[r]estraints on advertising . . . are an ineffective way of deterring shoddy work.” 433 U.S. at 378. In *Bolger*, the Supreme Court held that although the government had a substantial interest in “aiding parents’ efforts to discuss birth control with their children,” the federal ban on “mailing of unsolicited advertisements for contraceptives” was only marginally related to that goal and therefore unconstitutional. 463 U.S. at 73.

Section 22949.80 is even more attenuated from the State’s declared interests. The California Legislature found that “the proliferation of firearms to and among minors poses a threat to the health, safety, and security of all residents of, and visitors to, this state.” 2022 Cal. Stats., Ch. 77, § 1(a). This finding was based in part on the fact that “[i]n 2021 there were approximately 259 *unintentional shootings* by children, resulting in 104 deaths and 168 injuries.”⁵⁸ The Legislature then declared that “[f]irearms marketing contributes to the unlawful sale of firearms to minors, as well as the unlawful transfer of firearms to minors by adults who may possess those weapons lawfully.” 2022 Cal. Stats., Ch. 77, § 1(a). The Legislature, in effect, speculates that prohibiting a broad category of speech promoting firearms and “firearm-related products” in a manner that *might* be attractive to minors will reduce demand for firearms. The Legislature then concludes by drawing another attenuated (or more likely nonexistent) connection between this speculative reduction in demand and the interest in protecting minors from gun violence.

As discussed, Section 22949.80 prohibits advertising of a wide range of “firearm-related products,” not just firearms. Cal. Bus. & Prof. Code §§ 22949.80(a), (c)(3), (5), & (6). That notwithstanding, the advertising ban does not directly affect the unlawful sale of firearms to minors, nor can it directly affect the

⁵⁸ See 2-ER-170.

number of shootings involving minors. *Cf. New York v. Ferber*, 458 U.S. 747, 759, 761 (1982) (the market for child pornography was “intrinsically related” to the underlying abuse, and was therefore “an integral part of the production of such materials, an activity illegal throughout the Nation”); *Stevens*, 559 U.S. at 470–72. Moreover, there is no finding or evidence tying these unintentional shootings to the unlawful sale of a firearm, let alone to advertising related to any such unlawful sale. The State cannot point to a single instance showing that a “firearm industry member” would advertise an illegal sale of a firearm to a minor. Instead, to the extent any commercial transaction is proposed, it is a lawful transaction to be consummated by an adult through a licensed firearms dealer.

Nor does the advertising ban conceivably affect “the unlawful transfer of firearms to minors by adults who may possess those weapons lawfully.” 2022 Cal. Stats., Ch. 77, § 1(a). Notwithstanding the Legislature’s failure to relate these purported unlawful transfers to minors with the cited incidences of unintentional shootings involving minors, any such transfer is too attenuated from the commercial transaction for the advertising ban to reduce the instances of these alleged unlawful transfers from adults to minors.

Moreover, the State lacks an interest “in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information.” *Thompson*, 535 U.S. at 374; *Sorrell*,

564 U.S. at 577. Thus, to the extent Section 22949.80 aims to reduce demand for firearms—not just among minors, but also adults (i.e., the finding that adults may transfer *lawfully-owned* firearms)—it does what the Supreme Court has condemned: prevent consumers’ supposedly “bad” but perfectly lawful “decisions” by denying them “truthful commercial information.” The State “may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements.” *Sorrell*, 564 U.S. at 577–78.

d. Section 22949.80 Is More Extensive than Necessary.

Section 22949.80 also fails the final step of the *Central Hudson* analysis, in which the government must prove “the speech restriction is not more extensive than necessary to serve the interests that support it.” *Lorillard Tobacco*, 533 U.S. at 556 (citation and quotation marks omitted). This step reflects the view that, “[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort.” *Thompson*, 535 U.S. at 373. “[I]f the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.” *Id.* at 371–72.

The Supreme Court has consistently struck down broadly based bans on truthful, nonmisleading commercial speech designed to serve ends unrelated to consumer protection. *44 Liquormart*, 517 U.S. at 497–98. It is true that the Court has recognized that States may require commercial messages to “appear in such a

form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.” *Va. Bd. of Pharmacy*, 425 U.S. at 772 n.24. But the State has far less regulatory authority “when its commercial speech restrictions strike at ‘the substance of the information communicated’ rather than the ‘commercial aspect of [it]—with offerors communicating offers to offerees.’” *44 Liquormart*, 517 U.S. at 498 (citation omitted).

Here, Section 22949.80’s ostensible purpose is to prevent minors from seeing content that will make them more likely to use firearms in an unlawfully. But the Supreme Court, more than 65 years ago, invalidated a Michigan ban on material “tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth.” *Butler v. Michigan*, 352 U.S. 380, 381 (1957) (quoting former Mich. Penal Code § 343)).

The Court’s decision in *Playboy Ent.* is also instructive. There, the Court invalidated a statute that “require[d] cable television operators who provide channels ‘primarily dedicated to sexually-oriented programming’ either to ‘fully scramble or otherwise fully block’ those channels or to limit their transmission to hours when children are unlikely to be viewing, set by administrative regulation as the time between 10 p.m. and 6 a.m.” 529 U.S. at 806. There was, however, a less-restrictive measure: blocking the channels at individual homes upon the homeowner’s requests. *Id.* at 816.

This Court has likewise invalidated commercial speech regulations as overinclusive where enforcement of preexisting laws would serve its interest without burdening speech. *Valle Del Sol*, 709 F.3d at 826–27; *Project 80’s, Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th Cir. 1991) (“restrictions which disregard far less restrictive and more precise means are not narrowly tailored”).

In *Valle Del Sol*, the plaintiffs challenged an Arizona law barring in-street solicitation of day laborers, which the state claimed was justified by its interest in traffic safety. The solicitation ban failed the fourth step of the *Central Hudson* test because Arizona could have served its interest without burdening speech by enforcing its existing traffic safety regulations and by enacting additional speech-neutral regulations. 709 F.3d at 826–27; *see Stevens*, 559 U.S. at 474–77.

Section 22949.80 fails the fourth prong of the *Central Hudson* test for the same reasons as in *Playboy Ent.* and *Valle Del Sol*. California comprehensively regulates the sale, purchase, and possession of firearms, particularly by minors. It could achieve its interest in preventing unlawful sales or transfers to minors by enforcing existing laws and regulations. If such enforcement is insufficient, the Legislature can pass additional direct regulations (within constitutionally permissible boundaries). *See Valle Del Sol*, 709 F.3d at 826–27; *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1125 (9th Cir. 2020). The State could also take steps to achieve its asserted interest that do not involve restricting protected speech.

California could, for example, ban only advertisements depicting minors engaging in unlawful conduct with firearms. It could also conduct educational campaigns promoting responsible firearm use by minors. Indeed, State agencies already promote such campaigns.⁵⁹

Once “a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government’s obligation to prove that the alternative will be ineffective to achieve its goals.” *Playboy Ent.*, 529 U.S. at 816. “To meet this burden, the state must provide ‘more than anecdote and supposition;’ it must point to evidence in the legislative record or present other evidence that demonstrates why the challenged restriction, rather than a less restrictive alternative, is necessary to further its significant interests. *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1228 (9th Cir. 2019) (quoting *Playboy Ent.*, 529 U.S. at 820–22). Courts “must not ‘assume a plausible, less restrictive alternative would be ineffective.’” *Holt v. Hobbs*, 574 U.S. 352, 369 (2015) (citation omitted).

On this point, the district court committed reversible error by shifting the burden to Appellants to present evidence “supporting the efficacy of the alternative

⁵⁹ See, e.g., *California’s In-Person Hunter Education Instruction Returns; Online Courses Remain a Permanent Option*, CAL. DEP’T OF FISH & WILDLIFE (Apr. 15, 2022), available at <https://wildlife.ca.gov/News/californias-in-person-hunter-education-instruction-returns-online-courses-remain-a-permanent-option>. (Cited at 3-ER-366).

means they propose.”⁶⁰ The State, for its part, dismissed Appellants’ alternatives out of hand, arguing not that they are implausible, but rather that the State’s chosen means are proportional to the interests they purport to serve.⁶¹ However, where, as here, “there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the ‘fit’ between ends and means is reasonable.” *City of Cincinnati*, 507 U.S. at 417 n.13. The district court erred both by improperly placing the burden on Appellants to justify the facially plausible alternatives, and by failing to meaningfully analyze whether, in view of numerous plausible alternatives, Section 22949.80’s restriction on commercial speech is a “reasonable fit” to achieve the State’s objective.

C. Section 22949.80 Violates Appellants’ Right to Associate.

The First Amendment protects not only the right of free speech, but also “the right of the people peaceably to assemble.” U.S. CONST., amend. I. The right to assemble is closely associated, and often merges, with the right to free expression. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). Because the “threat of sanctions may deter” the exercise of First Amendment freedoms “as potently as the actual application of sanctions,”

⁶⁰ 1-ER-28–29.

⁶¹ *See* 2-ER-116.

government may regulate expressive and associational conduct “only with narrow specificity.” *Button*, 371 U.S. at 433; see *NAACP v. Patterson*, 357 U.S. 449, 461–62 (1958). The State must prove that the regulation is “necessary” to achieve a “compelling” and “legitimate” state interest. *Button*, 371 U.S. at 433, 438–39.

Section 22949.80 burdens associational conduct and, for the reasons discussed in preceding sections, the State cannot prove that the regulation is necessary to achieve either a compelling or a legitimate interest. Section 22949.80 infringes on Appellants’ right to freely associate and assemble because it prohibits them from advertising or marketing their various firearm-related programs, where Appellants and members of the public, including youths, peacefully and lawfully assemble and associate with one another. Likewise, it prohibits Appellants from advertising or marketing events that they sponsor where firearm-related products are exhibited and sold—core Second Amendment-related activity—and where members of the public and youths often assemble together.

There is no compelling (or legitimate) government interest in prohibiting “firearm industry members” from advertising or marketing their firearm-related youth programming and services and the “firearm-related products” used, sold, endorsed, recommended, or advertised at such events. Section 22949.80 effectively puts an end to such events and, by extension, the rights of Appellants to associate and assemble at them. See *Button*, 371 U.S. at 433–34. Even if the State’s interests

were compelling, they could be achieved through less drastic means. *See Wooley v. Maynard*, 430 U.S. 705, 716–17 (1977) (“The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same purpose.”).

D. Section 22949.80 Unconstitutionally Discriminates against Appellants.

The Fourteenth Amendment provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. Singling out speakers because of the content of their speech violates their fundamental rights under the Equal Protection Clause. U.S. CONST., amend. XIV. If unequal treatment occurs in the context of exercising a fundamental right, or the government is motivated by animus toward a disfavored group, courts apply heightened scrutiny. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985). Indeed, “[b]ecause the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest.” *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 666 (1990), *rev’d on other grounds*, *Citizens United v. Fed. Elec. Comm’n*, 558 U.S. 310 (2010).

As discussed, Section 22949.80 is a content- and speaker-based restriction on Plaintiffs’ protected speech that serves no compelling governmental interest. The legislative history of Section 22949.80 evinces an intent to thwart the

promotion and preservation of the nation’s historical tradition of firearms ownership in California through the passing down of pro-gun attitudes and traditions to future generations. Section 22949.80 does not apply to similar or opposing speech made by businesses, organizations, or people who are not considered “firearm industry members.” There is no legitimate interest in singling out politically disfavored “firearm industry members,” while leaving members of other industries, like the popular entertainment and video game industries, as well as anti-gun organizations, free to engage in similar or identical speech.

III. APPELLANTS SATISFY THE REMAINING PRELIMINARY INJUNCTION FACTORS.

A. Irreparable Harm is Presumed Because Section 22949.80 Infringes on Appellants’ Rights under the First and Fourteenth Amendments.

To obtain a preliminary injunction, a party must show that it “is likely to suffer irreparable harm in the absence of preliminary relief.” *Winter*, 555 U.S. at 20. As discussed, the district court erred as a matter of law in determining that Appellants are not likely to succeed on their claims.

Appellants’ likelihood of success on the merits presumptively establishes irreparable harm because Section 22949.80 causes the constitutional injury. *Rendish v. City of Tacoma*, 123 F.3d 1216, 1226 (9th Cir. 1997); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). This is because “constitutional violations cannot be adequately remedied through damages and therefore generally

constitute irreparable harm.” *Stormans, Inc. v. Stelecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (quotation marks omitted). As the State conceded below, “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Klein v. City of San Clemente*, 584 F.3d 1196, 1207–08 (9th Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Accordingly, Appellants “established a threatened and imminent irreparable harm that cannot be adequately compensated at a later time,” so as to warrant injunctive relief. *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1052 (S.D. Cal. 2006). The district court’s conclusion to the contrary is legally incorrect; it should have found that the irreparable harm factor tipped in Appellants’ favor.

B. The Balance of the Equities and Public Interest Warrant Preliminary Relief.

When a government entity is a party to a lawsuit, it is appropriate to “consider the balance of equities and the public interest together.” *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018). As Plaintiffs explained below, the balance of equities tips sharply in their favor “because they have a significant First Amendment and economic interest in engaging in [the prohibited] speech,” and California “need not impede that speech in order to pursue its” interests. *Valle Del Sol Inc.*, 709 F.3d at 828–29. If Section 22949.80 is not enjoined, Defendant-Appellee will enforce this unconstitutional law against Appellants, who will be

forced to choose between sacrificing their First Amendment rights or incurring devastating financial penalties.

Conversely, an injunction would impose no administrative burden on the State, nor threaten public safety, since California's direct restrictions on the unlawful purchase, sale or possession of firearms would remain intact. And California "cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013).

Additionally, the Ninth Circuit has "consistently recognized the 'significant public interest' in upholding free speech principles, as the 'ongoing enforcement of the potentially unconstitutional regulations . . . would infringe not only the free expression interests of plaintiffs, but also the interests of other people subjected to the same restrictions." *Klein*, 584 F.3d at 1208 (citation omitted). A preliminary injunction would also promote the public interest by allowing for the free flow of commercial information. *See e.g., Bates*, 433 U.S. at 364; *Va. Bd. of Pharmacy*, 425 U.S. at 765. On the other hand, enforcement of an unconstitutional law is against the public interest. *See e.g., Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005); *ACLU v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012) ("[T]he public interest is not harmed by preliminarily enjoining the enforcement of a law that is

probably unconstitutional.”). Given these considerations, the balance of the equities plainly tips in Appellants’ favor.

CONCLUSION

For the foregoing reasons, the district court committed reversible error in denying Appellants’ motion for preliminary injunction. Appellants, therefore, respectfully ask this Court to reverse that order and remand for further proceedings.

Dated: March 10, 2023

SNELL & WILMER L.L.P.

By: /s/ Cameron J. Schlagel

Michael B. Reynolds

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Attorneys for Plaintiff-Appellants

NOTICE OF RELATED CASE

This appeal involves several issues that are the same as or closely related to those raised in another currently pending appeal: *Junior Sports Magazines, Inc.*, et al., v. *Rob Bonta*, Case No. 22-56090.

Dated: March 10, 2023

SNELL & WILMER L.L.P.

By: /s/ Cameron J. Schlagel

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Attorneys for Plaintiff-Appellants

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CA Bus & Prof Code § 22949.80 (2022)

- (a) (1) A firearm industry member shall not advertise, market, or arrange for placement of an advertising or marketing communication offering or promoting any firearm-related product in a manner that is designed, intended, or reasonably appears to be attractive to minors.
- (2) In determining whether marketing or advertising of a firearm-related product is attractive to minors, as described in paragraph (1), a court shall consider the totality of the circumstances, including, but not limited to, whether the marketing or advertising:
 - (A) Uses caricatures that reasonably appear to be minors or cartoon characters to promote firearm-related products.

(B) Offers brand name merchandise for minors, including, but not limited to, hats, t-shirts, or other clothing, or toys, games, or stuffed animals, that promotes a firearm industry member or firearm-related product.

(C) Offers firearm-related products in sizes, colors, or designs that are specifically designed to be used by, or appeal to, minors.

(D) Is part of a marketing or advertising campaign designed with the intent to appeal to minors.

(E) Uses images or depictions of minors in advertising and marketing materials to depict the use of firearm-related products.

(F) Is placed in a publication created for the purpose of reaching an audience that is predominately composed of minors and not intended for a more general audience composed of adults.

(3) This subdivision does not apply to a communication offering or promoting any firearm safety program, hunting safety or promotional program, firearm instructional course, sport shooting event or competition, or any similar program, course, or event, nor does it apply to a communication offering or promoting membership in any organization, or promotion of lawful hunting activity, including, but not limited to, any fundraising event, youth hunting program, or outdoor camp.

(b) A firearm industry member publishing material directed to minors in this state or who has actual knowledge that a minor in this state is using or receiving its material, shall not knowingly use, disclose, compile, or allow a third party to use, disclose, or compile, the personal information of that minor with actual knowledge that the use, disclosure, or compilation is for the purpose of marketing or advertising to that minor any firearm-related product.

(c) As used in this chapter:

(1) “Ammunition” has the same meaning as provided in subdivision (b) of Section 16150 of the Penal Code.

(2) “Firearm” has the same meaning as provided in subdivisions (a) and (b) of Section 16520 of the Penal Code.

(3) “Firearm accessory” means an attachment or device designed or adapted to be inserted into, affixed onto, or used in conjunction with, a firearm which is designed, intended, or functions to alter or enhance the firing capabilities of a firearm, the lethality of the firearm, or a shooter’s ability to hold, carry, or use a firearm.

(4) “Firearm industry member” means any of the following:

(A) A person, firm, corporation, company, partnership, society, joint stock company, or any other entity or association engaged in the manufacture, distribution, importation, marketing, wholesale, or retail sale of firearm-related products.

(B) A person, firm, corporation, company, partnership, society, joint stock company, or any other entity or association formed for the express purpose of promoting, encouraging, or advocating for the purchase, use, or ownership of firearm-related products that does one of the following:

(i) Advertises firearm-related products.

(ii) Advertises events where firearm-related products are sold or used.

(iii) Endorses specific firearm-related products.

(iv) Sponsors or otherwise promotes events at which firearm-related products are sold or used.

(5) “Firearm-related product” means a firearm, ammunition, reloaded ammunition, a firearm precursor part, a firearm component, or a firearm accessory that meets any of the following conditions:

(A) The item is sold, made, or distributed in California.

(B) The item is intended to be sold or distributed in California.

(C) It is reasonably foreseeable that the item would be sold or possessed in California.

(D) Marketing or advertising for the item is directed to residents of California.

(6) “Marketing or advertising” means, in exchange for monetary compensation, to make a communication to one or more individuals, or to arrange for the dissemination to the public of a communication, about a product, the primary purpose of which is to encourage recipients of the communication to engage in a commercial transaction.

(7) “Minor” means a natural person under 18 years of age who resides in this state.

(d) This section shall not be construed to require or authorize a firearm industry member to collect or retain age information about users or subscribers of products or services offered.

(e) (1) Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed twenty-five thousand dollars (\$25,000) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

(2) The court shall impose a civil penalty under paragraph (1) for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant’s misconduct, and the defendant’s assets, liabilities, and net worth.

(3) A person harmed by a violation of this section may commence a civil action to recover their actual damages.

(4) The court shall also order injunctive relief, including a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the court deems necessary to prevent the harm described in this section.

(5) Upon a motion, a court shall award reasonable attorney’s fees and costs, including expert witness fees and other litigation expenses, to a plaintiff who is a prevailing party in an action brought pursuant to this section.

(6) Each copy or republication of marketing or advertising prohibited by this section shall be deemed a separate violation.

(f) The provisions of this section are severable. If any portion, subdivision, paragraph, clause, sentence, phrase, word, or application of this section is for any reason held to be invalid by any court of competent jurisdiction, that decision shall not affect the validity of the remaining portions of this chapter. The Legislature hereby declares that it would have adopted this section and each and every portion, subdivision, paragraph, clause, sentence, phrase, word, and application not declared invalid or unconstitutional without regard to whether any other portion of this section or application thereof would be subsequently declared invalid.


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AB-160 Public safety trailer bill. (2021-2022)

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Assembly Bill No. 160

CHAPTER 771

An act to amend Section 22949.80 of the Business and Professions Code, to amend Section 68085.1 of, and to amend, repeal, and add Sections 13956, 13957, 13957.5, 13959, and 13962 of the Government Code, to amend Sections 290.008, 457.1, 1203.4b, and 1463.001 of, to amend, repeal, and add Sections 4900 and 4904 of, and to add Section 679.027 to, the Penal Code, and to amend Section 1732.10 of the Welfare and Institutions Code, relating to public safety, and making an appropriation therefor, to take effect immediately, bill related to the budget.

[Approved by Governor September 29, 2022. Filed with Secretary of State September 29, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

AB 160, Committee on Budget. Public safety trailer bill.

(1) Existing law prohibits a firearm industry member, as defined, from engaging in advertising or marketing related to firearms that is intended for minors or reasonably appears to be attractive to minors, as specified.

This bill would exempt from this prohibition any advertising that is offering or promoting classes or events related to firearm safety, hunting, or sport shooting, as specified, or promoting membership in any organization.

(2) Existing law generally provides for the compensation of victims and derivative victims of specified types of crimes by the California Victim Compensation Board from the Restitution Fund, which is continuously appropriated to the board. Existing law prohibits the board from granting compensation to a person who is convicted of a violent felony, as prescribed, until that person has been discharged from probation or has been released from a correctional institution and has been discharged from parole, or has been discharged from postrelease community supervision or mandatory supervision, if any, for that violent crime.

This bill would instead prohibit compensation from being granted to a person in the above circumstances until after that person has been released from a correctional institution.

(3) Existing law authorizes the board to compensate for pecuniary loss, including compensation equal to the loss of income or loss of support, or both, that a victim or derivative victim incurs as a direct result of the victim's or derivative victim's injury or the victim's death, as specified. Existing law also provides limits on the compensation a victim and derivative victim may receive.

This bill would authorize the board, in authorizing compensation for loss of income and support, to base the loss of income on the actual loss the victim sustains or the wages that an employee would earn, as specified, during the period that the victim is unable to work or seek work as a result of the injury for adult victims, and upon the

10/19/22, 8:25 AM

Bill Text - AB-160 Public safety trailer bill.

loss the victim actually sustains for victims who are under 18 years of age at the time of the crime, as specified. The bill would also specify that an adult derivative victim and a derivative victim who was legally dependent on the victim at the time of the crime are also similarly eligible for compensation for loss of income, as specified. The bill would specify that if a victim is a minor at the time of the crime, the victim is eligible for future loss of income, calculated as specified.

This bill would specify that if an adult victim or derivative victim was not employed or receiving earned income benefits at the time of the crime, the victim or derivative victim, as applicable, shall be eligible for loss of income if they were fully or partially employed or receiving income benefits for a total of at least 2 weeks in the 12 months preceding the qualifying crime, or had an offer of employment at the time of the crime and was unable to begin employment as a result of the crime, as specified. The bill would specify that if a derivative victim who is otherwise eligible for loss of support is eligible for loss of support if the deceased victim was not employed or receiving earned income benefits at the time of the crime, but the deceased victim was fully or partially employed or receiving earned income benefits for a total of at least 2 weeks in the 12 months preceding the qualifying crime, if the victim had an offer of employment at the time of the crime and was unable to begin employment as a result of the crime.

This bill would require the board, by July 1, 2025, to adopt new guidelines to rely on a range of evidence in considering and approving claims for loss of income, as specified.

The bill would also remove or raise various limits on the compensation a victim and derivative victim may receive, as specified. By expanding the eligibility for, and by increasing or removing limits on, compensation from a continuously appropriated fund, this bill would make an appropriation.

(4) Existing law requires the board to publicize the existence of the victim compensation program, and requires a local law enforcement agency to inform crime victims of these provisions, as specified.

This bill would require the board to provide every general acute care hospital in the state that operates an emergency department with specified information, and require the hospital to display the information, as specified. The bill would also require every local law enforcement agency to inform crime victims of the existence of specified trauma recovery centers. By requiring local law enforcement agencies to provide additional information to crime victims, this bill would impose a state-mandated local program.

(5) Existing law, as added by Proposition 9, the Victims' Bill of Rights Act of 2008: Marsy's Law, at the November 4, 2008, statewide general election, requires a law enforcement agency investigating a criminal act and an agency prosecuting a criminal act to, at the time of initial contact with a crime victim, during followup investigation, or as soon thereafter as deemed appropriate, provide or make available to the victim a "Marsy Rights" card that contains the constitutional rights of crime victims without charge or cost to the victim.

This bill would require every law enforcement agency investigating a criminal act and every agency prosecuting a criminal act to, at the time of initial contact with a crime victim, during followup investigation, or as soon thereafter as deemed appropriate by investigating officers or prosecuting attorneys, provide or make available to each victim of the criminal act without charge or cost a "Victim Protections and Resources" card and to provide other information, as specified. The bill would also require the Attorney General to design and make available in PDF or other imaging format to these agencies a "Victim Protections and Resources" card containing specified information. The bill would authorize the "Victim Protections and Resources" card to be designed as part of and included with the "Marsy Rights" card described above. By requiring these agencies to provide additional information to crime victims, this bill would impose a state-mandated local program.

(6) Existing law allows a person who was erroneously convicted of a felony and imprisoned in the state prison or a county jail to present a claim to the board for the injury sustained by the person through the erroneous conviction and imprisonment or incarceration. Existing law requires the board to provide a recommendation to the Legislature that an appropriation be made for the purpose of indemnifying the claimant for the erroneous conviction injury. Existing law requires that the amount of the appropriation recommended by the board be equivalent to \$140 per day of incarceration served, as specified.

This bill would require that the compensation recommendation for a claimant be equivalent to \$70 per day served on parole or supervised release, as specified. The bill would require that these amounts be updated annually to account for changes in the United States Bureau of Labor Statistics Consumer Price Index, West Region.

(7) Existing law creates the Division of Juvenile Justice within the Department of Corrections and Rehabilitation to operate facilities to house specified juvenile offenders. Existing law requires the Division of Juvenile Justice to

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close on June 30, 2023, and provides for the transition of youth who are currently housed within a Division of Juvenile Justice facility to the care and custody of counties.

Existing law requires a person convicted of specified sex offenses, including a person who is discharged or paroled from the Department of Corrections and Rehabilitation after having been adjudicated a ward of the juvenile court because of the commission of a sex offense, to register with local law enforcement agencies while residing in the state or while attending school or working in the state. Existing law requires a person convicted of arson, or a person who is discharged or paroled from the Department of Corrections and Rehabilitation, Division of Juvenile Justice after being adjudicated a ward for having committed arson, to register with certain local officials in the area in which they reside.

This bill would define a discharged person for purposes of these sex offender and arson registration requirements to include specified persons who transition out of the division due to its statutorily required closure. The bill would require the court of jurisdiction to establish the point at which the ward is required to register and notify the Department of Justice of its decision.

(8) Existing law allows a defendant who successfully participated in the California Conservation Camp program as an incarcerated individual hand crew member, or successfully participated as a member of a county incarcerated individual hand crew, except as specified, to petition the court to have the pleading dismissed, as described, thus releasing the person of any penalties and disabilities of conviction, except as otherwise provided.

This bill would also grant this relief to a defendant who has successfully participated at an institutional firehouse, as specified.

(9) Existing law prescribes the distribution of funds collected from specified fines, forfeitures, and civil assessments imposed for crimes.

This bill would correct erroneous cross-references in existing law.

(10) Existing law, within the Department of Corrections and Rehabilitation, creates the Division of Juvenile Justice, headed by a director, to operate facilities to house specified juvenile offenders. Existing law requires the division to close on June 30, 2023, and provides for the transition of youth who are currently housed within a Division of Juvenile Justice facility to the care and custody of counties. Existing law requires the State Department of State Hospitals, upon closure of the division, to continue to provide evaluation, care, and treatment of state hospital patients referred to the division.

This bill would correct an erroneous cross-reference in existing law.

(11) This bill provides that certain of its provisions shall become operative on July 1, 2024, only if General Fund moneys over the multiyear forecasts beginning in the 2024–25 fiscal year are available to support ongoing augmentations and actions, and if an appropriation is made to backfill the Restitution Fund to support the actions.

(12) This bill would incorporate additional changes to Sections 13956 and 13957 of the Government Code proposed by SB 299 and SB 877, respectively, and Sections 4900 and 4904 of the Penal Code proposed by SB 1468, to be operative only if this bill and the other specified bills are enacted and this bill is enacted last.

(13) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement. This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

(14) This bill would declare that it is to take effect immediately as a bill providing for appropriations related to the Budget Bill.

Vote: majority Appropriation: yes Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 22949.80 of the Business and Professions Code is amended to read:

22949.80. (a) (1) A firearm industry member shall not advertise, market, or arrange for placement of an advertising or marketing communication offering or promoting any firearm-related product in a manner that is

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designed, intended, or reasonably appears to be attractive to minors. Case 2:22-cv-01395-DAD-JDP Document 14-2 Filed 10/21/22 Page 5 of 6

(2) In determining whether marketing or advertising of a firearm-related product is attractive to minors, as described in paragraph (1), a court shall consider the totality of the circumstances, including, but not limited to, whether the marketing or advertising:

(A) Uses caricatures that reasonably appear to be minors or cartoon characters to promote firearm-related products.

(B) Offers brand name merchandise for minors, including, but not limited to, hats, t-shirts, or other clothing, or toys, games, or stuffed animals, that promotes a firearm industry member or firearm-related product.

(C) Offers firearm-related products in sizes, colors, or designs that are specifically designed to be used by, or appeal to, minors.

(D) Is part of a marketing or advertising campaign designed with the intent to appeal to minors.

(E) Uses images or depictions of minors in advertising and marketing materials to depict the use of firearm-related products.

(F) Is placed in a publication created for the purpose of reaching an audience that is predominately composed of minors and not intended for a more general audience composed of adults.

(3) This subdivision does not apply to a communication offering or promoting any firearm safety program, hunting safety or promotional program, firearm instructional course, sport shooting event or competition, or any similar program, course, or event, nor does it apply to a communication offering or promoting membership in any organization, or promotion of lawful hunting activity, including, but not limited to, any fundraising event, youth hunting program, or outdoor camp.

(b) A firearm industry member publishing material directed to minors in this state or who has actual knowledge that a minor in this state is using or receiving its material, shall not knowingly use, disclose, compile, or allow a third party to use, disclose, or compile, the personal information of that minor with actual knowledge that the use, disclosure, or compilation is for the purpose of marketing or advertising to that minor any firearm-related product.

(c) As used in this chapter:

(1) "Ammunition" has the same meaning as provided in subdivision (b) of Section 16150 of the Penal Code.

(2) "Firearm" has the same meaning as provided in subdivisions (a) and (b) of Section 16520 of the Penal Code.

(3) "Firearm accessory" means an attachment or device designed or adapted to be inserted into, affixed onto, or used in conjunction with, a firearm which is designed, intended, or functions to alter or enhance the firing capabilities of a firearm, the lethality of the firearm, or a shooter's ability to hold, carry, or use a firearm.

(4) "Firearm industry member" means any of the following:

(A) A person, firm, corporation, company, partnership, society, joint stock company, or any other entity or association engaged in the manufacture, distribution, importation, marketing, wholesale, or retail sale of firearm-related products.

(B) A person, firm, corporation, company, partnership, society, joint stock company, or any other entity or association formed for the express purpose of promoting, encouraging, or advocating for the purchase, use, or ownership of firearm-related products that does one of the following:

(i) Advertises firearm-related products.

(ii) Advertises events where firearm-related products are sold or used.

(iii) Endorses specific firearm-related products.

(iv) Sponsors or otherwise promotes events at which firearm-related products are sold or used.

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(5) "Firearm-related product" means a firearm, ammunition, reloaded ammunition, a firearm precursor part, a firearm component, or a firearm accessory that meets any of the following conditions:

- (A) The item is sold, made, or distributed in California.
- (B) The item is intended to be sold or distributed in California.
- (C) It is reasonably foreseeable that the item would be sold or possessed in California.
- (D) Marketing or advertising for the item is directed to residents of California.

(6) "Marketing or advertising" means, in exchange for monetary compensation, to make a communication to one or more individuals, or to arrange for the dissemination to the public of a communication, about a product, the primary purpose of which is to encourage recipients of the communication to engage in a commercial transaction.

(7) "Minor" means a natural person under 18 years of age who resides in this state.

(d) This section shall not be construed to require or authorize a firearm industry member to collect or retain age information about users or subscribers of products or services offered.

(e) (1) Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed twenty-five thousand dollars (\$25,000) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

(2) The court shall impose a civil penalty under paragraph (1) for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(3) A person harmed by a violation of this section may commence a civil action to recover their actual damages.

(4) The court shall also order injunctive relief, including a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the court deems necessary to prevent the harm described in this section.

(5) Upon a motion, a court shall award reasonable attorney's fees and costs, including expert witness fees and other litigation expenses, to a plaintiff who is a prevailing party in an action brought pursuant to this section.

(6) Each copy or republication of marketing or advertising prohibited by this section shall be deemed a separate violation.

(f) The provisions of this section are severable. If any portion, subdivision, paragraph, clause, sentence, phrase, word, or application of this section is for any reason held to be invalid by any court of competent jurisdiction, that decision shall not affect the validity of the remaining portions of this chapter. The Legislature hereby declares that it would have adopted this section and each and every portion, subdivision, paragraph, clause, sentence, phrase, word, and application not declared invalid or unconstitutional without regard to whether any other portion of this section or application thereof would be subsequently declared invalid.

SEC. 2. Section 13956 of the Government Code is amended to read:

13956. Notwithstanding Section 13955, a person shall not be eligible for compensation under the following conditions:

(a) An application may be denied, in whole or in part, if the board finds that denial is appropriate because of the nature of the victim's or other applicant's involvement in the events leading to the crime, or the involvement of the person whose injury or death gives rise to the application.

(1) Factors that may be considered in determining whether the victim or derivative victim was involved in the events leading to the qualifying crime include, but are not limited to:



Assembly Bill No. 2571

CHAPTER 77

An act to add Chapter 39 (commencing with Section 22949.80) to Division 8 of the Business and Professions Code, relating to firearms, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor June 30, 2022. Filed with Secretary of State June 30, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2571, Bauer-Kahan. Firearms: advertising to minors.

Existing law generally regulates manufacturers and dealers of firearms. Under existing law, commercial speech or advertising is generally protected under the First Amendment to the Constitution of the United States. Existing laws and regulations, however, restrict the content and placement of advertising and promotional marketing of alcohol, cannabis, and tobacco to protect minors.

This bill would prohibit a firearm industry member, as defined, from advertising or marketing any firearm-related product, as defined, in a manner that is designed, intended, or reasonably appears to be attractive to minors. The bill would also prohibit a firearm industry member from using, disclosing, or compiling a minor's personal information if it is intended to market or advertise a firearm to that minor, as specified. The bill would impose a civil penalty of up to \$25,000 for each violation of these provisions, and would authorize a person harmed by a violation to bring suit to recover any damages suffered, as specified. The bill would make each copy or republication of marketing or advertising prohibited by these provisions a separate violation. The bill would declare that its provisions are severable, as specified.

This bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. (a) The Legislature hereby finds and declares that the proliferation of firearms to and among minors poses a threat to the health, safety, and security of all residents of, and visitors to, this state. These weapons are especially dangerous in the hands of minors because current research and scientific evidence shows that minors are more impulsive, more likely to engage in risky and reckless behavior, unduly influenced by peer pressure, motivated more by rewards than costs or negative consequences, less likely to consider the future consequences of their actions

and decisions, and less able to control themselves in emotionally arousing situations. In recognition of these facts, the Legislature has already prohibited minors from possessing firearms, except in certain limited circumstances. Nonetheless, firearms manufacturers and retailers continue to market firearms to minors, often identifying particular weapons as starter guns, especially good for children. As reflected in numerous laws regulating marketing of dangerous products to minors, children are especially susceptible to marketing appeals, as well as more prone to impulsive, risky, thrill-seeking, and violent behavior than other age groups. Firearms marketing contributes to the unlawful sale of firearms to minors, as well as the unlawful transfer of firearms to minors by adults who may possess those weapons lawfully. This state has a compelling interest in ensuring that minors do not possess these dangerous weapons and in protecting its citizens, especially minors, from gun violence and from intimidation by persons brandishing these weapons.

(b) It is the intent of the Legislature in enacting this act to further restrict the marketing and advertising of firearms to minors. Nothing in this chapter shall be construed to limit in any way the enforceability of existing law concerning firearms and marketing thereof.

SEC. 2. Chapter 39 (commencing with Section 22949.80) is added to Division 8 of the Business and Professions Code, to read:

CHAPTER 39. MARKETING FIREARMS TO MINORS

22949.80. (a) (1) A firearm industry member shall not advertise, market, or arrange for placement of an advertising or marketing communication concerning any firearm-related product in a manner that is designed, intended, or reasonably appears to be attractive to minors.

(2) In determining whether marketing or advertising of a firearm-related product is attractive to minors, as described in paragraph (1), a court shall consider the totality of the circumstances, including, but not limited to, whether the marketing or advertising:

(A) Uses caricatures that reasonably appear to be minors or cartoon characters to promote firearm-related products.

(B) Offers brand name merchandise for minors, including, but not limited to, hats, t-shirts, or other clothing, or toys, games, or stuffed animals, that promotes a firearm industry member or firearm-related product.

(C) Offers firearm-related products in sizes, colors, or designs that are specifically designed to be used by, or appeal to, minors.

(D) Is part of a marketing or advertising campaign designed with the intent to appeal to minors.

(E) Uses images or depictions of minors in advertising and marketing materials to depict the use of firearm-related products.

(F) Is placed in a publication created for the purpose of reaching an audience that is predominately composed of minors and not intended for a more general audience composed of adults.

(b) A firearm industry member publishing material directed to minors in this state or who has actual knowledge that a minor in this state is using or receiving its material, shall not knowingly use, disclose, compile, or allow a third party to use, disclose, or compile, the personal information of that minor with actual knowledge that the use, disclosure, or compilation is for the purpose of marketing or advertising to that minor any firearm-related product.

(c) As used in this chapter:

(1) “Ammunition” has the same meaning as provided in subdivision (b) of Section 16150 of the Penal Code.

(2) “Firearm” has the same meaning as provided in subdivisions (a) and (b) of Section 16520 of the Penal Code.

(3) “Firearm accessory” means an attachment or device designed or adapted to be inserted into, affixed onto, or used in conjunction with, a firearm which is designed, intended, or functions to alter or enhance the firing capabilities of a firearm, the lethality of the firearm, or a shooter’s ability to hold, carry, or use a firearm.

(4) “Firearm industry member” means any of the following:

(A) A person, firm, corporation, company, partnership, society, joint stock company, or any other entity or association engaged in the manufacture, distribution, importation, marketing, wholesale, or retail sale of firearm-related products.

(B) A person, firm, corporation, company, partnership, society, joint stock company, or any other entity or association formed for the express purpose of promoting, encouraging, or advocating for the purchase, use, or ownership of firearm-related products that does one of the following:

(i) Advertises firearm-related products.

(ii) Advertises events where firearm-related products are sold or used.

(iii) Endorses specific firearm-related products.

(iv) Sponsors or otherwise promotes events at which firearm-related products are sold or used.

(5) “Firearm-related product” means a firearm, ammunition, reloaded ammunition, a firearm precursor part, a firearm component, or a firearm accessory that meets any of the following conditions:

(A) The item is sold, made, or distributed in California.

(B) The item is intended to be sold or distributed in California.

(C) It is reasonably foreseeable that the item would be sold or possessed in California.

(D) Marketing or advertising for the item is directed to residents of California.

(6) “Marketing or advertising” means, in exchange for monetary compensation, to make a communication to one or more individuals, or to arrange for the dissemination to the public of a communication, about a product or service the primary purpose of which is to encourage recipients of the communication to purchase or use the product or service.

(7) “Minor” means a natural person under 18 years of age who resides in this state.

(d) This section shall not be construed to require or authorize a firearm industry member to collect or retain age information about users or subscribers of products or services offered.

(e) (1) Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed twenty-five thousand dollars (\$25,000) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

(2) The court shall impose a civil penalty under paragraph (1) for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(3) A person harmed by a violation of this section may commence a civil action to recover their actual damages.

(4) The court shall also order injunctive relief, including a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the court deems necessary to prevent the harm described in this section.

(5) Upon a motion, a court shall award reasonable attorney's fees and costs, including expert witness fees and other litigation expenses, to a plaintiff who is a prevailing party in an action brought pursuant to this section.

(6) Each copy or republication of marketing or advertising prohibited by this section shall be deemed a separate violation.

(f) The provisions of this section are severable. If any portion, subdivision, paragraph, clause, sentence, phrase, word, or application of this section is for any reason held to be invalid by any court of competent jurisdiction, that decision shall not affect the validity of the remaining portions of this chapter. The Legislature hereby declares that it would have adopted this section and each and every portion, subdivision, paragraph, clause, sentence, phrase, word, and application not declared invalid or unconstitutional without regard to whether any other portion of this section or application thereof would be subsequently declared invalid.

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the California Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to protect public safety by prohibiting firearm advertising to minors as soon as possible, it is necessary that this act take effect immediately.

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 2571 (Bauer-Kahan)
Version: April 27, 2022
Hearing Date: June 14, 2022
Fiscal: Yes
Urgency: No
CK

SUBJECT

Firearms: advertising to minors

DIGEST

This bill prohibits firearm industry members from advertising or marketing, as defined, firearm-related products to minors. The bill restricts the use of minors' personal information in connection with marketing or advertising firearm-related products to those minors.

EXECUTIVE SUMMARY

In the United States, children are more likely to die from gun violence than in any other high-income country. In 2020, gun violence overtook car accidents to become the number one cause of death for U.S. children and adolescents.¹ In California, children are generally restricted from purchasing and possessing firearms and ammunition, except under specified circumstances. However, concerns have arisen that children are still being marketed to by the gun industry.

This bill prohibits firearm industry members from advertising or marketing, as defined, firearm-related products in a manner that is designed, intended, or reasonably appears to be attractive to minors. The determination of whether it is "attractive to minors" is based on a consideration of the totality of the circumstances, including whether the marketing or advertising used cartoon characters or offered brand name stuffed animals promoting the entity or firearm-related product. The bill also prohibits knowingly leveraging the personal information of a minor for the purpose of marketing or advertising to that minor any firearm-related product, as specified.

¹ Laurel Wamsley, *The U.S. is uniquely terrible at protecting children from gun violence* (May 28, 2022) NPR, <https://www.npr.org/2022/05/28/1101307932/texas-shooting-uvalde-gun-violence-children-teenagers>. All internet citations are current as of June 2, 2022.

This bill is sponsored by Governor Gavin Newsom. It is supported by a variety of groups, including Everytown for Gun Safety and the County of San Diego. The bill is opposed by the National Rifle Association.

PROPOSED CHANGES TO THE LAW

Existing federal law:

- 1) Provides, pursuant to the Second Amendment to the United States Constitution, that a well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed. (U.S. Const. Amend. 2.)
- 2) Prohibits a qualified civil liability action from being brought in any Federal or State court. (15 U.S.C. § 7902.) A “qualified civil liability action” means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines or penalties, or other relief resulting from the criminal or unlawful misuse of a qualified product by the person or a third party. (15 U.S.C. § 7903.)
- 3) Establishes the federal Children’s Online Privacy Protection Act (COPPA) to provide protections and regulations regarding the collection of personal information from children under the age of 13. (15 U.S.C. § 6501 et seq.)

Existing state law:

- 1) Requires a person be at least 18 years of age to be sold most firearms and at least 21 years of age to be sold a handgun, except as specified. (Pen. Code §§ 27505, 27510.)
- 2) Establishes the Privacy Rights for California Minors in the Digital World (PRCMDW), which prohibits an operator of an internet website, online service, online application, or mobile application (“operator”) from the following:
 - a) marketing or advertising specified products or services, such as firearms, cigarettes, and alcoholic beverages, on its internet website, online service, online application, or mobile application that is directed to minors;
 - b) marketing or advertising such products or services to minors who the operator has actual knowledge are using its site, service, or application online and is a minor, if the marketing or advertising is specifically directed to that minor based upon the personal information of the minor;and

- c) knowingly using, disclosing, compiling, or allowing a third party to use, disclose, or compile, the personal information of a minor with actual knowledge that the use, disclosure, or compilation is for the purpose of marketing or advertising such products or services to that minor, where the website, service, or application is directed to minors or there is actual knowledge that a minor is using the website, service, or application. (Bus. & Prof. Code § 22580.)
- 3) Requires, pursuant to the PRCMDW, certain operators to permit a minor user to remove the minor's content or information and to further inform the minor of this right and the process for exercising it. (Bus. & Prof. Code § 22581.)
- 4) Requires, pursuant to the Parent's Accountability and Child Protection Act, a person or business that conducts business in California, and that seeks to sell any product or service in or into California that is illegal under state law to sell to a minor to, notwithstanding any general term or condition, take reasonable steps, as specified, to ensure that the purchaser is of legal age at the time of purchase or delivery, including, but not limited to, verifying the age of the purchaser. (Civ. Code § 1798.99.1(a)(1).)
- 5) Prohibits a business from selling or sharing the personal information of a consumer if the business has actual knowledge that the consumer is less than 16 years of age unless the consumer, in the case of consumers between 13 and 16 years of age, or the consumer's parent or guardian, in the case of consumers who are less than 13 years of age, has affirmatively authorized such sale or sharing. A business that willfully disregards the consumer's age shall be deemed to have had actual knowledge of the consumer's age. (Civ. Code § 1798.120.)
- 6) Defines "firearm" as a device designed to be used as a weapon from which is expelled through a barrel, a projectile by the force of an explosion or other form of combustion. (Pen. Code § 16520.) It defines "firearm precursor part" to mean a component of a firearm that is necessary to build or assemble a firearm and is either an unfinished receiver or an unfinished handgun frame. (Pen. Code § 16531.)
- 7) Defines "ammunition" to include any bullet, cartridge, magazine, clip, speed loader, autoloader, ammunition feeding device, or projectile capable of being fired from a firearm with a deadly consequence. (Pen. Code § 16150(b).)
- 8) Requires firearms dealers to obtain certain identifying information from firearms purchasers and forward that information, via electronic transfer, to the DOJ to perform a background check on the purchaser to determine whether they are prohibited from possessing a firearm. (Pen. Code §§ 28160-28220.)

This bill:

- 1) Prohibits a firearm industry member from advertising, marketing, or arranging for placement of an advertising or marketing communication concerning any firearm-related product in a manner that is designed, intended, or reasonably appears to be attractive to minors.
- 2) Defines “firearm industry member” to include any of the following:
 - a) any person or entity engaged in the manufacture, distribution, importation, marketing, wholesale, or retail sale of firearm-related products; or
 - b) any person or entity formed for the express purpose of promoting, encouraging, or advocating for the purchase, use, or ownership of firearm-related products that endorses or advertises such products, or advertises, sponsors, or promotes events where they are sold or used.
- 3) Requires a court when determining whether marketing or advertising of a firearm-related product is attractive to minors to consider the totality of the circumstances, including, but not limited to, whether the marketing or advertising:
 - a) uses caricatures that reasonably appear to be minors or cartoon characters to promote firearm-related products;
 - b) offers brand name merchandise for minors, including, but not limited to, hats, t-shirts, or other clothing, or toys, games, or stuffed animals that promotes a firearm industry member or firearm-related product;
 - c) offers firearm-related products in sizes, colors, or designs that are specifically designed to be used by, or appeal to, minors;
 - d) is part of a marketing or advertising campaign designed with the intent to appeal to minors;
 - e) uses images or depictions of minors in advertising and marketing materials to depict the use of firearm-related products; or
 - f) is placed in a publication created for the purpose of reaching an audience that is predominately composed of minors and not intended for a more general audience composed of adults.
- 4) Prohibits a firearm industry member publishing material directed to minors in this state or who has actual knowledge that a minor in this state is using or receiving its material, from knowingly using, disclosing, compiling, or allowing a third party to use, disclose, or compile the personal information of that minor with actual knowledge that the use, disclosure, or compilation is for the purpose of marketing or advertising to that minor any firearm-related product.
- 5) Provides that any person in violation is liable for a civil penalty not to exceed \$25,000 for each violation, which shall be assessed and recovered in a civil action

brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

- 6) Authorizes a person harmed by a violation to commence a civil action to recover their actual damages.
- 7) Authorizes the court to order injunctive relief, including a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct.
- 8) Entitles a prevailing plaintiff to reasonable attorney's fees and costs, including expert witness fees and other litigation expenses.
- 9) Deems each copy or republication of prohibited marketing or advertising a separate violation.
- 10) Defines "firearm-related product" as a firearm, ammunition, reloaded ammunition, a firearm precursor part, a firearm component, or a firearm accessory that has a specified connection to California.

COMMENTS

1. Children and the epidemic of gun violence in the United States

Gun violence in the United States has surged in recent years. While most shooting deaths involve handguns, there has been a dramatic rise in the use of assault weapons in gun massacres with six or more deaths, owing to their ability to inflict greater damage at a quicker rate.² Research shows that laws restricting assault weapons reduce deaths; estimates find mass-shooting fatalities were 70 percent less likely during the period when the federal ban was in effect.³ Another rising scourge is the prevalence of "ghost guns." In 2020, California accounted for 65 percent of all ghost guns seized by

² Emily Shapiro, *The type of gun used in most US homicides is not an AR-15* (October 26, 2021) ABC News, <https://abcnews.go.com/US/type-gun-us-homicides-ar-15/story?id=78689504>. All internet citations are current as of March 22, 2022.

³ Charles DiMaggio, et al., *Changes in US mass shooting deaths associated with the 1994-2004 federal assault weapons ban: Analysis of open-source data* (January 2019) *The Journal of Trauma and Acute Care Surgery*, <https://doi.org/10.1097/TA.0000000000002060>.

the Bureau of Alcohol, Tobacco, Firearms and Explosives.⁴ The weapons have been linked to 24 killings and dozens of other crimes in 2020 in Los Angeles alone. The problem of gun violence in our society is not going away. In 2020, over 45,000 Americans died from gun-related injuries in the United States. This is the most on record by far, a 43 percent increase from a decade prior.

As stated, gun violence has now become a leading cause of death of children in this country. This is a problem that is increasingly involving children from an early age:

On May 24th an 18-year-old gunman, Salvador Ramos, walked into an elementary school in Uvalde, a town in south-west Texas, and shot dead at least 21 people, including 19 children. Mr Ramos was himself killed, reportedly by police. His motive remains unclear. It is the latest in a spate of mass shootings in America, and the toll is the biggest at a school since a gunman killed 26 people at Sandy Hook Elementary in Newtown, Connecticut, in 2012.

In the decade since Sandy Hook there have been over 900 shootings on school grounds in America. After more than 60 years in which motor-vehicle crashes were the leading cause of death for young people, since 2017 guns have killed more Americans between the ages of one and 24. In 2020 more than 10,000 young Americans were killed by firearms, up from just under 7,000 two decades earlier. Pupils at almost all schools take part in active-shooter drills, learning to hide beneath their desks. Some drills use pellet guns and fake blood to simulate an attack.⁵

Not only are children increasingly the victims, but also the perpetrators of school shootings:

In cases where the source of the gun could be determined, more than 85 percent of shooters brought them from their own homes or obtained them from friends or relatives, according to The Post's analysis.

The ranks of school shooters include a 6-year-old boy, who killed a classmate after saying he didn't like her, and a 15-year-old girl, who did the same to a friend for rejecting her romantic overtures.

⁴ Justin Ray, 'An instrument of death': The problem of ghost guns in California (November 15, 2021) Los Angeles Times, <https://www.latimes.com/california/newsletter/2021-11-15/ghost-guns-california-essential-california>.

⁵ Guns are the things most likely to kill young people in America (May 25, 2022) The Economist, <https://www.economist.com/graphic-detail/2022/05/25/guns-are-the-things-most-likely-to-kill-young-people-in-america>.

Seven in 10 of them, however, were under the age of 18, which means that – often because of an adult’s negligence – dozens of children had access to deadly weapons.

The median age of school shooters is 16.⁶

This is borne out in other studies as well. According to an analysis of FBI data, in 29 of 62 active shooting incidents at educational facilities in the United States between 2000 and 2019, the offender was younger than 18, with an additional 10 shooters between 18 and 21 years old.⁷ Another federally-run center database shows “at least 59 percent of the 2,275 school shootings researchers recorded since 1970 were committed by someone under 21 years old. The offender’s age is unknown in another 18 percent of incidents.”⁸

2. Targeting children with firearm-related products

This bill is prompted by the incidence of marketing and advertising of firearm-related products to children, arguably seeking to attract future legal gun owners. A report from the Violence Policy Center (VPC) outlines the problem:

The gun industry has long understood that it faces a slow-motion demographic collapse. With the industry’s customer base growing older, household gun ownership in America has steadily declined. As its primary market of white males ages and dies off, the firearms industry has set its sights on America’s children. Much like the tobacco industry’s search for replacement smokers, the gun industry is seeking replacement shooters to purchase its deadly products. Firearms companies have teamed up with “corporate partners” like the National Rifle Association of America, the gun industry’s trade association the National Shooting Sports Foundation (NSSF), and online publications such as Junior Shooters in an industry-wide effort to market firearms to kids. They do this by promoting websites and magazines targeted at children, designing “kid-friendly” guns to appeal to the youth market, and even working to create the equivalent of “‘reality’ video” games to encourage gun use from an early age.

⁶ John Woodrow Cox, et al., *More than 311,000 students have experienced gun violence at school since Columbine* (May 27, 2022) Washington Post,

<https://www.washingtonpost.com/graphics/2018/local/school-shootings-database/>.

⁷ Mary Katherine Wildeman, *Data show most school shootings carried out by young adults, teens* (May 26, 2022) CT Insider, <https://www.ctinsider.com/news/article/Data-show-most-school-shootings-carried-out-by-17199231.php>.

⁸ *Ibid.*

The industry's focus on recruiting children into the gun culture has been acknowledged since at least the 1990s.⁹

One particularly acute example is a product marketed by WEE1 Tactical:

A US gun manufacturer has unveiled a semi-automatic rifle for kids modeled on the AR-15, which has been used in a number of deadly mass shootings, sparking condemnation from gun safety groups.

The gun dubbed the JR-15 is being marketed by maker WEE1 Tactical as "the first in a line of shooting platforms that will safely help adults introduce children to the shooting sports."

The company's website says the rifle "also looks, feels, and operates just like Mom and Dad's gun."

The JR-15 is only 31 inches (80 centimeters) long, weighs less than 2.5 pounds (one kilogram) and comes with magazines of five or 10 rounds of 22 caliber bullets. It was released in mid-January with a price tag of \$389.

The adult model, the AR-15, is the civilian version of a military-style weapon and has been used in multiple mass killings in the United States, including in schools.¹⁰

The marketing generally includes more compact models that are lighter to handle or firearms in various colors. A New York Times blog synthesizes the VPC report:

The gun industry markets a variety of products explicitly to children, a new report shows, from armed stuffed animals to lighter versions of rifles. And some see kids as a vital group of future gun buyers who need to be brought into the fold at a young age.

The report, called "Start Them Young" and issued on Thursday by the Violence Policy Center, lists a variety of firearms meant at least partly for children. It mentions the Crickett rifle, a gun made for children by the company Keystone Sporting Arms. Keystone's website and some of its merchandise bear the image of "Davey Crickett," a gun-wielding cartoon insect. The company sells Davey Crickett hats, dog tags and pins, as well as a Davey Crickett Beanie Baby, listed as "not for children under three years of age."

⁹ Josh Sugarmann, "Start Them Young" *How the Firearms Industry and Gun Lobby Are Targeting Your Children* (February 2016) VPC, <https://www.vpc.org/studies/starttheyoung.pdf>.

¹⁰ Agence France Presse, *US Gunmaker Unveils Semi-automatic Rifle Marketed To Kids* (February 18, 2022) Barron's, <https://www.barrons.com/articles/top-gun-movie-business-51654023576>.

Keystone’s website also sells books featuring “Little Jake,” a boy who uses his gun to bring down a bear and save an African village from a marauding elephant. The publisher of the books says Little Jake is actually older than he looks: “Little Jake is a fictional character in his late teens. While small in stature so that young children may relate to him, Little Jake is old enough to hunt and fish safely on his own without adult supervision.”

“Start Them Young” also cites the rise of .22-caliber versions of higher-caliber rifles, often produced with lightweight materials. According to an article in the trade magazine *Shooting Sports Retailer*, “these guns bring the coolness and fun of the tactical rifle to kids and less serious shooters.”¹¹

According to the author:

In 2021 there were approximately 259 unintentional shootings by children, resulting in 104 deaths and 168 injuries. Weapons used by children have put other children at risk. 91% of the victims in these shootings by children were also under 18, often siblings of the children shooting. In California, gun violence is the third-leading cause of death for children and teens. This epidemic of deadly violence is fueled by an industry that encourages children to hold a gun as soon as they can walk.

Gun manufacturers view children as their next generation of advocates and customers, and target them with slick advertising – even children’s books. The advertising for these weapons is shameless. Children in California are not allowed to buy or own a gun, yet they are advertised to across all forms of media with cartoons, video games, and social media.

AB 2571 will prohibit a person or entity from publishing materials that advertise or market firearms or weapons to anyone under the age of 18. This bill would allow the Attorney General, a District or County Attorney, or a County Counsel to bring a civil action against each violation up to \$25,000.

Guns are not a toy. Guns are a tool of death. Taking away this tool of violent indoctrination from the gun industry is a vital step forward to protect California’s children.

¹¹ Anna North, *Marketing Guns to Children* (February 19, 2022) *The New York Times*, <https://takingnote.blogs.nytimes.com/2016/02/19/marketing-guns-to-children>.

3. Prohibiting the marketing or advertising of such products to children

This bill prohibits a firearm industry member from advertising or marketing any firearm-related product in a manner that is designed, intended, or reasonably appears to be attractive to minors. Furthermore, the bill places limitations on how these entities can utilize the personal information of minors in this context. If they are publishing material directed to minors in California or have actual knowledge that a minor is using or receiving its material, they are prohibited from knowingly using, disclosing, compiling, or allowing a third party to use, disclose, or compile, the personal information of that minor with actual knowledge that the use, disclosure, or compilation is for the purpose of marketing or advertising to that minor any firearm-related product.

Violations of these provisions are subject to civil penalties of up to \$25,000 for each violation in civil actions brought by the Attorney General or by any district attorney, county counsel, or city attorney. Each copy or republication of prohibited marketing or advertising is deemed a separate violation. Courts are provided specific factors to consider in setting the amount of the penalty including the nature, seriousness, and willfulness of the defendant's misconduct and the defendant's assets, liabilities, and net worth.

An individual harmed by a violation is also authorized to bring suit to recover their actual damages. This would require the individual to establish the causal connection between the violation and their damages.

In addition to the remedies above, the court can order injunctive relief, including a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct. A prevailing plaintiff is entitled to reasonable attorney's fees and costs, including expert witness fees and other litigation expenses.

The bill also provides some direction to courts in determining whether marketing or advertising of a firearm-related product is attractive to minors. They are to consider the totality of the circumstances, including whether the marketing or advertising:

- uses caricatures that reasonably appear to be minors or cartoon characters to promote firearm-related products;
- offers brand name merchandise for minors, including, but not limited to, hats, t-shirts, or other clothing, or toys, games, or stuffed animals that promotes a firearm industry member or firearm-related product;
- offers firearm-related products in sizes, colors, or designs that are specifically designed to be used by, or appeal to, minors;
- is part of a marketing or advertising campaign designed with the intent to appeal to minors;

- uses images or depictions of minors in advertising and marketing materials to depict the use of firearm-related products; or
- is placed in a publication created for the purpose of reaching an audience that is predominately composed of minors and not intended for a more general audience composed of adults.

4. Concerns raised with the bill

Some concerns have been raised about the bill's constitutionality, namely whether it violates the First Amendment. The prohibitions in this bill restrict the commercial speech of the firearm industry members, but the mere fact that it restricts speech does not mean that such a restriction would violate the First Amendment of the United States Constitution or Article I of the California Constitution.

Generally speaking, the First Amendment and Article I of the California Constitution, act to protect the freedom of expression of the citizens of California. Commercial speech, which is done on behalf of a company or individual for purpose of making a profit, is protected under the state and federal guarantees of free speech, but to a lesser degree than noncommercial speech.¹² A blanket prohibition against truthful, nonmisleading speech about a lawful product, which serves an end unrelated to consumer protection, must be reviewed with skepticism. A "state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes[.]" (44 *Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 510.) Ultimately, the First Amendment protects commercial speech against "unwarranted" governmental regulation.

In order to be upheld as a valid restriction on commercial speech, the proposed law must meet the following four-part test: (1) the speech must be about a lawful activity and cannot be false or misleading; (2) the government must have a substantial interest; (3) the law must directly advance the governmental interest asserted; and (4) the law must be no more extensive than necessary. (*Central Hudson Gas v. Public Service Commission* (1980) 447 U.S. 559.)

In this case, the proposed restriction is arguably about restricting the marketing of products to children that are not generally legally able to buy them. California law generally prohibits minors from possessing a handgun and most semi-automatic rifles, as well as ammunition. The possibility and even likelihood that marketing or advertising of firearm-related products that makes those products attractive to children who, in most cases, cannot lawfully possess them, greatly strengthens the argument that the bill's restrictions on the marketing and advertising of firearm-related products could withstand constitutional scrutiny. Even if the speech is lawful, the State of California arguably has a strong interest in taking steps to prevent firearms from being

¹² See *Gerawan Farming, Inc. v. Lyons* (2004) 33 Cal.4th 1, 22.

sold to minors, and the proposed law advances that interest in a manner that does not cover products or advertisements directed to lawful purchasers. Based on the findings incorporated into the bill that firearms marketing and advertising contributes to the unlawful sale of firearms to minors, as well as the unlawful transfer of firearms to minors by adults who may possess those weapons lawfully, the bill is arguably substantially related to the achievement of its objective. Although a determination regarding the First Amendment is ultimately for the courts, arguably the proposed restriction on marketing and advertising could survive such a challenge.

Similar laws already exist that restrict the advertising of other products to children. For instance, coin banks, toys, balloons, magic tricks, miniature bottles or cans, confections, dolls, or other items that appeal to minors or underage drinkers may not be used in connection with the merchandising of beer. (Bus. & Prof. Code § 25600.) Similarly, edible cannabis products cannot be designed to be appealing to children or easily confused with commercially sold candy or foods that do not contain cannabis. (Bus. & Prof. Code § 26130.)

Another particularly relevant example is the Privacy Rights for California Minors in the Digital World, which prohibits an operator of an internet website, online service, online application, or mobile application (“operator”) from the following:

- marketing or advertising specified products or services such as firearms, cigarettes, and alcoholic beverages on its internet website, online service, online application, or mobile application that is directed to minors;
- marketing or advertising such products or services to minors who the operator has actual knowledge are using its site, service, or application online and is a minor, if the marketing or advertising is specifically directed to that minor based upon the personal information of the minor; and
- knowingly using, disclosing, compiling, or allowing a third party to use, disclose, or compile, the personal information of a minor with actual knowledge that the use, disclosure, or compilation is for the purpose of marketing or advertising such products or services to that minor, where the website, service, or application is directed to minors or there is actual knowledge that a minor is using the website, service, or application. (Bus. & Prof. Code § 22580.)

As can be seen, the language of this bill borrows from these existing statutes.

Writing in opposition, the National Rifle Association argues the bill will not withstand constitutional challenge:

Even if one is to assume that AB 2571 meets the first three criteria of the test set forth in *Central Hudson*, the regulation fails the fourth part of the test. A minor may find a piece of advertising attractive for the same reasons as an adult. Adults and minors often use firearms for the same lawful purposes, prize the same characteristics in firearms, and therefore

would be attracted to the same advertising materials. As AB 2571 would target advertising valued by both minors and adults it would necessarily “impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products.”

Moreover, the restriction in AB 2571 fails to appreciate that minors can and do possess and use firearms for a variety of lawful purposes. The state interest asserted in AB 2571 is to combat the “proliferation of firearms to and among minors.” The bill also notes, “[t]his state has a compelling interest in ensuring that minors do not possess these dangerous weapons.” The asserted interest is not necessarily to discourage illegal use of firearms by minors, but rather all use.

First, as minors are permitted by state law to use firearms for a variety of lawful purposes, it is dubious that the state’s asserted interest in AB 2571 of preventing firearm use by minors is “substantial,” as required by the second part of the *Central Hudson* test.

Second, if it is the drafters of AB 2571’s goal to curb the illegal use of firearms by minors, a less suspect state interest, surely banning all advertising that may be attractive to minors, even that contemplating the use of firearms for lawful purposes, would be overbroad under part four of the *Central Hudson* test.

The legislation’s drafters justify their proposed regulation by citing restrictions on “advertising and promotional marketing of alcohol, cannabis, and tobacco to protect minors.” As noted in the discussion of *Lorillard Tobacco Co. v. Reilly*, such measures must be the narrowest means of achieving an asserted state interest – which was not the case in *Lorillard* and is not the case with AB 2571.

However, lawmakers should also understand that the restrictions cited as analogous to that in AB 2571 are of a fundamentally different character. Unlike restrictions on advertising for alcohol, cannabis, and tobacco, the underlying products and conduct that AB 2571 seeks to curb the advertisement of are protected under the U.S. Constitution. As such, lawmakers should be prepared for the courts to level more scrutiny upon restrictions on advertisements concerning Second Amendment protected products and conduct than those leveled at products that don’t enjoy such protection.

One additional, potential legal barrier to the bill, is the federal Protection of Lawful Commerce in Arms Act (PLCAA). The PLCAA prohibits a qualified civil liability action from being brought in any federal or state court. (15 U.S.C. § 7902.) A “qualified civil

liability action” means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party. (15 U.S.C. § 7903.) These statutes stand to preempt state laws that impose liability on manufacturers, sellers, and trade associations for the misuse of firearms by third parties.

However, there are exceptions to the PLCAA’s preemptive effect. Specifically, the federal law explicitly does not preempt “an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought.” (15 U.S.C. § 7903.) Given that liability attaches in this bill for the direct conduct of firearm industry members themselves, namely their advertising, marketing, or use of minors’ personal information, and is not triggered solely by the misconduct of another party, the bill should arguably not be found to be preempted.

5. Stakeholder support

Brady California and the Brady Campaign to Prevent Gun Violence write in support of this measure:

Current laws restrict the content and placement of advertising and promotional marketing of alcohol, cannabis, and tobacco to protect minors. This is done to prevent potentially harmful substances from getting in the hands of young people as well as preventing the glorification around them. While we certainly see the point of restricting ads around the previous products listed, unlike firearms none of these are a leading cause of death for children and teens.

Writing in support, the City of Mountain View argues the bill provides “another tool in the tool belt of municipalities to counter dangerous practices that jeopardize the health and wellness of our communities.”

The County of San Diego writes in support of this bill, and gun legislation in general:

The County of San Diego recognizes action must be taken to prevent unintentional shootings and reduce the risk of homicides and decrease access to guns used in crimes.

State legislation that addresses gun violence will help hold the gun industry accountable through private lawsuits and by prohibiting the advertisement of certain categories of weapons. The County of San Diego

supports these and other efforts that would allow for new oversight and accountability measures for the gun industry.

SUPPORT

Governor Gavin Newsom (sponsor)
Brady California
Brady Campaign to Prevent Gun Violence
City of Mountain View
County of San Diego
Everytown for Gun Safety
March for Our Lives
Moms Demand Action for Gun Sense in America
Students Demand Action for Gun Sense in America

OPPOSITION

National Rifle Association

RELATED LEGISLATION

Pending Legislation:

SB 1327 (Hertzberg, 2022) establishes privately-enforced civil causes of action against any person who manufactures or causes to be manufactured, distributes, transports, or imports into the state, or causes to be distributed or transported or imported into the state, keeps for sale or offers or exposes for sale, or gives or lends any firearm lacking a required serial number, assault weapon, .50 BMG rifle, or firearm precursor part, as specified. This bill is currently in the Assembly Judiciary Committee.

AB 452 (Friedman, 2022) requires local educational agencies to inform parents, through a notice, of California's child access prevention laws and other firearm laws. This bill is currently in the Senate Appropriations Committee.

AB 1594 (Ting, 2022) establishes a firearm industry standard of conduct, which would require a firearm industry member, as defined, to, among other things, establish, implement, and enforce reasonable controls, as defined, and adhere to specified laws pertaining to unfair methods of competition, unfair or deceptive acts or practices, or false advertising. The bill also prohibits a firearm industry member from manufacturing, marketing, importing, offering for wholesale sale, or offering for retail sale a firearm-related product that is abnormally dangerous and likely to create an unreasonable risk of harm to public health and safety in California, as specified. This bill is currently in this Committee and will be heard on the same day as this bill.

AB 1621 (Gipson, 2022), among other things, prohibits the sale, transfer, or possession of an unserialized firearm precursor part, except as specified, and explicitly prohibits the possession or transfer of a firearm without a serial number or mark of identification. This bill is currently in the Senate Public Safety Committee.

Prior Legislation: SB 568 (Steinberg, Ch. 336, Stats. 2013) established the Privacy Rights for California Minors in the Digital World.

PRIOR VOTES:

Assembly Floor (Ayes 48, Noes 16)

Assembly Appropriations Committee (Ayes 12, Noes 4)

Assembly Judiciary Committee (Ayes 7, Noes 2)

Assembly Privacy and Consumer Protection Committee (Ayes 7, Noes 1)
