Case No. 24-4050

In the United States Court of Appeals
for the Ninth Circuit

JUNIOR SPORTS MAGAZINES INC., et al.,
Plaintiffs-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 Central District of California
Case No. 2:22-cv-04663-CAS-JC

APPELLANTS' EXCERPTS OF RECORD
VOLUME II OF III

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IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUNIOR SPORTS MAGAZINES INC., RAYMOND BROWN, CALIFORNIA YOUTH SHOOTING SPORTS ASSOCIATION, INC., REDLANDS CALIFORNIA YOUTH CLAY SHOOTING SPORTS, INC., CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, THE CRPA FOUNDATION, AND GUN OWNERS OF CALIFORNIA, INC.; and SECOND AMENDMENT FOUNDATION,

Plaintiffs,

v.

ROB BONTA, in his official capacity as Attorney General of the State of California; and DOES 1-10,

Defendant.

Case No.: 2:22-cv-04663-CAS (JCx)

PLAINTIFFS' NOTICE OF APPEAL AND REPRESENTATION STATEMENT

PRELIMINARY INJUNCTION APPEAL RE: MOTION TO ENFORCE MANDATE IN *JUNIOR SPORTS MAGS., INC., V. BONTA*, 80 F.4th 1109 (9th Cir. 2023) AND ISSUE PRELIMINARY INJUNCTION

This matter is a comeback case pursuant to Ninth Circuit General Orders 1.12, 3.6(d).

NOTICE IS HEREBY GIVEN that Plaintiffs Junior Sports Magazines Inc., Raymond Brown, California Youth Shooting Sports Association, Inc., Redlands California Youth Clay Shooting Sports, Inc., California Rifle & Pistol Association, Incorporated, The CRPA Foundation, Gun Owners of California, Inc., and Second Amendment Foundation, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order granting in part and denying in part Plaintiffs' Motion to Enforce the Ninth Circuit's Mandate and Issue Preliminary Injunction (ECF No. 69) filed on June 18, 2024, but not served on the parties until June 24, 2024.

There have been two previous appeals in this case. The number assigned to the first appeal was No. 22-70185. In that matter, Appellants' requested writ was denied. The second appeal, No. 22-56090, was briefed and argued with an opinion issued on September 13, 2023. (ECF No. 39-1). A petition for en banc review (filed by Defendant Appellee Rob Bonta) was denied on February 20, 2024, after no judge requested a vote to rehear the matter en banc. (ECF No. 52). The mandate in that appeal was issued on February 28, 2024. (ECF No. 51).

Plaintiffs' Representation Statement is attached to this Notice as required by Ninth Circuit Rule 3-2(b).

Dated: June 28, 2024

MICHEL & ASSOCIATES, P.C.

s/ Anna M. Barvir
Anna M. Barvir
Counsel for Plaintiffs Junior Sports Magazines, Inc., Raymond Brown, California Youth Shooting Sports Association, Inc., Redlands California Youth Clay Shooting Sports, Inc., California Rifle & Pistol Association, Incorporated, The CRPA Foundation, and Gun Owners of California, Inc.

Dated: June 28, 2024

LAW OFFICES OF DONALD KILMER, APC

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

ATTESTATION OF E-FILED SIGNATURES

I, Anna M. Barvir, am the ECF User whose ID and password are being used to file this **PLAINTIFFS' NOTICE OF APPEAL AND REPRESENTATION STATEMENT**. In compliance with Central District Local Rule 5-4.3.4 (a)(2)(i), I attest that counsel for Plaintiff Second Amendment Foundation, Donald Kilmer, has concurred in this filing.

Dated: June 28, 2024

s/ Anna M. Barvir
Anna M. Barvir

REPRESENTATION STATEMENT

The undersigned represents Plaintiffs-Appellants, Junior Sports Magazines Inc., Raymond Brown, California Youth Shooting Sports Association, Inc., Redlands California Youth Clay Shooting Sports, Inc., California Rifle & Pistol Association, Incorporated, The CRPA Foundation, Gun Owners of California, Inc., and Second Amendment Foundation, and no other party. Pursuant to Rule 12(b) of the Federal Rules of Appellate Procedure and Circuit Rule 3-2(b), Plaintiffs-Appellants submit this Representation Statement. The following list identifies all parties to the action, and it identifies their respective counsel by name, firm, address, telephone number, and e-mail, where appropriate.

PARTIES	COUNSEL OF RECORD
Plaintiffs-Appellants Junior Sports Magazines Inc., Raymond Brown, California Youth Shooting Sports Association, Inc., Redlands California Youth Clay Shooting Sports, Inc., California Rifle & Pistol Association, Incorporated, The CRPA Foundation, Gun Owners of California, Inc.,	C.D. Michel – SBN 144258 Email: cmichel@michellawyers.com Anna M. Barvir – SBN 268728 Email: abarvir@michellawyers.com MICHEL & ASSOCIATES, P.C. 180 East Ocean Blvd., Suite 200 Long Beach, CA 90802 Telephone: (562) 216-4444 Facsimile: (562) 216-4445 Counsel is registered for Electronic Filing in the 9th Circuit
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Dated: June 28, 2024

MICHEL & ASSOCIATES, P.C.

s/ Anna M. Barvir
Anna M. Barvir
Plaintiffs Junior Sports Magazines, Inc., Raymond Brown, California Youth Shooting Sports Association, Inc., Redlands California Youth Clay Shooting Sports, Inc., California Rifle & Pistol Association, Incorporated, The CRPA Foundation, and Gun Owners of California, Inc.

Dated: June 28, 2024

LAW OFFICES OF DONALD KILMER, APC

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

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

Case Name: *Junior Sports Magazines, Inc., et al. v. Bonta*
Case No.: 2:22-cv-04663-CAS (JCx)

IT IS HEREBY CERTIFIED THAT:

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

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

PLAINTIFFS' NOTICE OF APPEAL AND REPRESENTATION STATEMENT

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

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Attorneys for Defendant

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

Executed June 28, 2024.


Laura Palmerin

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION AT LOS ANGELES

HONORABLE CHRISTINA A. SNYDER, JUDGE PRESIDING

JUNIOR SPORTS MAGAZINES, INC., et al.,	)	
PLAINTIFFS,	)	
vs.	)	CV NO. 22-04663-CAS
ROB BONTA, in his official capacity as Attorney General of the State of California,	)	
DEFENDANT.	)	

ZOOM VIDEO CONFERENCE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, JUNE 10, 2024

10:02 A.M.

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LOS ANGELES, CALIFORNIA; MONDAY, JUNE 10, 2024; 10:02 A.M.

-OOO-

(The following proceedings were had via Zoom video conference.)

THE COURT: Good morning.

THE CLERK: Calling Calendar Item No. 1 on the calendar, CV 22-4663-CAS, Junior Sports Magazine, Inc., et al., versus Rob Bonta.

Counsel, state your appearances.

MR. KILMER: Donald Kilmer, appearing for plaintiffs, Your Honor.

THE COURT: Good morning.

MS. BARVIR: Anna Barvir, on behalf of plaintiffs, Your Honor.

10:02:48 Good morning.

THE COURT: Good morning.

MS. BOUTIN: Good morning, Your Honor.

Gabrielle Boutin, on behalf of Defendant Attorney General, Rob Bonta.

10:02:57 THE COURT: All right. Good morning.

Okay. I think, counsel, you have my tentative thoughts on this matter. I don't know if I need to elaborate. I think my observations should be fairly clear. I'm just not sure that subsection (b) was really

10:03:15 contemplated by the Circuit. It would be great if there

were some procedure, and I'm not -- unaware of it, where Counsel could make inquiry of the Circuit regarding its intention. It might save us a lot of time and trouble.

So if you all think there is such a procedure, I invite you to use it.

MR. KILMER: Your Honor, the only procedure I would be aware of is this -- is that, of course, you could issue a certified question to the panel on your own motion or, perhaps, a motion of one of the parties, or -- the only other remedy I would be aware of would be a writ of mandamus to the Ninth Circuit.

THE COURT: I think that sounds right.

Does the Attorney General have a view on the matter?

MS. BOUTIN: We don't have a view. It's not something that we've looked into at this stage.

MR. KILMER: Your Honor, may I address one point in the tentative without getting argumentive on it?

I have two questions for the Court about the tentative: Number one, I guess I don't know if I'm allowed to make a rebuttal argument to your tentative. But by way of rebuttal, it would be that the Ninth Circuit's mandate was that -- that it hold that the entire statute, 22949.80, is likely unconstitutional under the First Amendment.

And the Court is aware that the Plaintiffs made at

10:04:46 least two, perhaps three claims under the full First Amendment, including commercial speech, pure speech, and freedom of association. And our position is that the right to keep and use and disseminate these mailing lists and 10:05:04 subscription lists and members lists is a freedom of association claim.

The Ninth Circuit in its order specifically said *We don't need to address the freedom of association claims because we think our order or our opinion fairly covers the* 10:05:20 *requested relief,* which was an injunction of the whole statute, just on the commercial speech claims.

I think that is in the second or third footnote of the opinion. And then, of course, the conclusion says that they are invoking the whole First Amendment to find that the 10:05:36 statute is unconstitutional. I also don't think that -- I think this Court has the power to stretch the mandate to include the whole statute, because the Court is bound to not enforce just the plain language of the mandate but also the spirit of the mandate.

10:06:00 Of course, the plain language favors us, because the Court didn't discriminate between different subsections. I think the spirit of the mandate includes the whole statute.

Thank you.

10:06:11 THE COURT: Okay. Well, I see your point. And as

you noted from my comments, it seems to me that to say these are privacy concerns is stretching the matter, because the so-called privacy concerns in subsection (b) appear only to relate to the offering of guns to minors as opposed to for other purposes. So, you know, I think there's some merit to your point, but I just wish there was more clarity in what the Ninth Circuit had to say.

MR. KILMER: All right. Then I just have two questions for the Court, Your Honor, on the practical effect of adopting the tentative. I guess the first question is that subsection (b), as I read it, pretty much encloses -- imposes almost strict liability for the use, dissemination of these subscriptions or mailing lists or membership lists.

And several of our plaintiffs, including the lead plaintiff, Junior Sports Magazines, we -- obviously, they maintain subscription lists and the statute clearly imposes third-party liability for use of these lists as well, so this would include Second Amendment Foundation, California Rifle and Pistol Association, some of the other associational plaintiffs.

So my question to the Court is: If the Court is inclined to adopt the tentative, would it also entertain a stay of further litigation until we can seek this clarity from the Ninth Circuit?

And the reason for that, Your Honor, is I don't

10:07:57 want to get bogged down in a discovery fight in your Court or even collateral litigation in state court of people seeking to ensure that we've complied with this subsection (b) while we get this issue resolved.

10:08:15 So would the Court consider a stay of further litigation on it, if it doesn't adopt the tentative?

THE COURT: I mean -- yes, but let me hear from the Attorney General.

MS. BOUTIN: Yeah. I mean, I think that's a 10:08:31 tricky question, because our position is that the matter of the constitutionality of subdivision (b) has not ever been briefed or considered by either court. So the idea that we would do that for the first time at the Ninth Circuit seems rather odd to me. You know, we're not in here today to 10:08:51 argue the merits of whether subdivision (b) should or should not be enjoined. It's simply that that hasn't been briefed at any level.

So, I mean, I think our position is, is the most more appropriate way to do it would be as suggested in your 10:09:03 tentative which would be, you know, new briefing in this Court on the substance of the matter. To us that would be the more appropriate way to proceed.

THE COURT: Well, I understand that, but I guess the problem -- the stay you're talking about -- the 10:09:23 plaintiff is talking about, I assume, is a stay of

10:09:25 enforcement of subsection (b) pending the litigation, or am I misunderstanding you?

MR. KILMER: Well, yes, Your Honor. I mean, if we don't seek mandamus relief with the Circuit Court, then 10:09:38 obviously that can't go on forever. This case has to move forward here. But if the Court wants to give us a deadline that a stay is imposed for 30 or 60 days while plaintiff seek mandamus relief and the stay expires after 60 days if we haven't sought such relief, then that would be fine.

10:09:59 MS. BOUTIN: Your Honor, I'm sorry. I misunderstood the original request. I thought we were talking about a stay of litigation. I don't think a stay of enforcement of the statute is appropriate, because that's kind of flipping things and flipping the burden. That's 10:10:08 essentially a preliminary injunction that just expires at a certain point.

And I think *(audio interference)* -- is that plaintiffs have the burden to show they're entitled to preliminary injunction, or they could be -- I mean, 10:10:19 if anything, 30 to 60 days, that sounds like a TRO. The burden hasn't been met here for that.

You know, I think -- you know, we would be willing to contemplate, you know, holding off on discovery or, you know, further proceedings in this case if they do plan 10:10:35 to seek mandamus, but I don't think that -- when you're

10:10:37 talking about stay of enforcement, that's a preliminary injunction and that's what we just don't think they've met the burden to obtain at this point.

THE COURT: Well, here's the problem. If, 10:10:48 in fact, the Ninth Circuit did not intend to address subsection (b), you're exactly right. But the problem here is the facts are unclear, to put it nicely. And my concern is that if there's a simple answer from the Circuit that, *Yes, we did intend to cover subsection (b),* then why should 10:11:15 you expend your resources? Why should the plaintiff expend resources re-litigating the thing with a new motion for preliminary injunction and yet another appeal, if there's a short answer to it all?

MS. BOUTIN: I mean, I guess our concern would 10:11:34 just be, you know, we don't think -- I think, if it's a quick request for clarification -- if it essentially serves as a quick request for clarification, I don't think, you know, we have a strong feeling of opposition to that. I just think that if this becomes, you know, in effect a 10:11:50 preliminary injunction and then the briefing at the Ninth Circuit is on the merits of subdivision (b), I don't think that would be an appropriate way to go.

THE COURT: Well, I understand that, but it seems to me that the -- I guess, you know, there can be briefing 10:12:10 at the Ninth Circuit level as to, you know, whether the

10:12:15 Court itself intended to cover subsection (b), but I would think that the Court would know on its own whether it intended to cover subsection (b) or not.

And I certainly think that the Court -- it would 10:12:28 be premature for the Court to treat this as if I granted the injunction as to subsection (b) and to deal with that at this point in time without the benefit of a decision from the trial court. So what I'm looking for is a vehicle to get a quick clarification so we all know what we're doing 10:12:48 here.

MR. KILMER: Well, Your Honor --

THE COURT: Go ahead.

MR. KILMER: Oh, I'm sorry.

THE COURT: No --

10:12:52 MR. KILMER: I didn't mean to --

Your Honor, one other practical solution would be to go ahead and enter the injunction against the full statute and then put the burden on the State to file a motion to modify or terminate the injunction and then we 10:13:06 could appeal from that.

THE COURT: Sure.

MS. BOUTIN: I'm sorry. I guess I don't understand --

THE COURT: Well, I --

10:13:15 *(Overtalking: Unable to report.)*

10:13:15 MS. BOUTIN: -- different than what we're contemplating already.

THE COURT: I don't think you'd agree. What he wants me to do is to enjoin subsection (b) and then -- so 10:13:24 that there can be an appeal from that order, but just -- in other words, I'm not -- you're not going to stipulate to such an injunction, but he's asking me to enter such an injunction just so it can be appealed.

And my answer to that is: That may defeat the 10:13:44 purpose that I have in mind which is a quick plain solution to the question of whether the Court intended to cover (b) or not cover subsection (b).

I understand Mr. Kilmer's approach. And if I were in his shoes, I probably would make the same proposal, but 10:14:07 I -- I don't think it's something you're going to agree to. And I think that before I enter an injunction as to subsection (b), if the Ninth Circuit hasn't already decided the issue, both sides ought to have an opportunity to brief the issue at this level.

10:14:24 MS. BOUTIN: I agree, Your Honor.

MR. KILMER: That could be accomplished by entering the full injunction, Your Honor, and requiring the State -- to put the burden on the State to move to modify the injunction.

10:14:35 MS. BOUTIN: Again, that's reversing the burden of

what the -- what the burden is supposed to be for a preliminary injunction, which is the plaintiff prove their case, the Court consider it and rule on it. So I think, you know --

(Overtalking: Unable to report.)

MS. BOUTIN: Let me finish, please.

They're the ones that have not met their burden in this case. So if we have to go one way or another in terms of waiting what happens pending clarification, I think your tentative should stand as it is.

THE COURT: That doesn't surprise me that that's your position.

Okay. Look, either --

MR. KILMER: Your Honor, I had one other question.

THE COURT: Yes. Sure.

MR. KILMER: And I -- and that relates to the -- the *Safari Club* case out of the Eastern District. My understanding is that the State of California has -- that Court has already entered an injunction against the full statute which is enforceable now.

THE COURT: Yes.

MR. KILMER: And the State has, apparently, filed a motion to modify or limit that relief. Now -- so my question to this Court is: Supposed the Eastern District Judge denies California's motion. That effectively makes

10:15:39 the entire statute unenforceable throughout the state. Instead of us going to the Ninth Circuit for another writ or another appeal, we're protected by the Order on the Eastern District now.

10:15:53 Would this Court entertain a modification of its tentative or a ruling if we -- if the result out of the Eastern District is to enjoin the entire statute?

THE COURT: Well, let me state that differently. Obviously, if Judge Drozd determines that the entire statute

10:16:21 should be enjoined and that's affirmed by the Circuit, then I think I'm bound by it. The problem we have here is the same problem that the state perceives exists in the Eastern District case; namely, that the opinion of the Ninth Circuit is not crystal clear as to whether it's

10:16:46 intended to cover subsection (b) or not.

I think there are two things to do: I can adopt my tentative and we just proceed along and you can decide whether or not to pursue discovery or not pursue discovery and wait for the matter to be decided in the

10:17:05 Eastern District. It's one way of going, because I imagine he's going to make a decision fairly promptly and will either agree or disagree as to modifying the injunction. And then that will go to the Circuit.

Or we can try my simple solution which is that I

10:17:28 certify a question to the Ninth Circuit, but I would want

Counsel to join and be sure that the question I'm asking is one that is acceptable to both sides. But my very simple question is, is the -- does the Court's ruling -- does the Court intend its ruling to cover subsection (b) and intends to, you know -- in other words, does the Court intend to suggest that the entire statute, including subsection (b), be enjoined?

MR. KILMER: I would have to discuss that with my clients, Your Honor. We believe that it already covers subsection (b) and don't know that we would be willing to sign on to a question of that nature at the same time seeking a writ.

THE COURT: You know, you could certainly say that there's a dispute between the parties and you believe that the mandate covers the entirety of the statute and the State says that subsection (b) is not addressed. And with your consent, I'm certifying this question to the Circuit.

MR. KILMER: Is the Court intending to circulate the question and accept proposed revisions to it before it files it?

THE COURT: That would be my intention, because I don't want to submit something -- I don't want to submit a question that the parties think is inappropriate.

MR. KILMER: All right, Your Honor.

MS. BOUTIN: That *(audio interference)* acceptable

10:19:02 to the State. I don't want to skip ahead. I do have one question -- one further point I want to make, but I don't want to skip ahead, because it's a little bit different, so -- but I open it up if anyone else would like to take an 10:19:16 opinion also on this topic.

MR. KILMER: Now, would the certified question include forwarding copies of the -- of the motions that have been filed in this so that there is some briefing from the parties presented to the Ninth Circuit?

10:19:36 THE COURT: I certainly could do that. I'm not opposed to it, although I think it's less likely that I'm going to get an answer, if I do that. I trust -- call it women's intuition. I think the three judges who decided this matter will know pretty clearly what they intended to 10:19:57 do with regard to this statute. And we can get a prompt response. The minute we start submitting briefing, it seems to me the whole process is slowed down, because they have to spend time and energy and treat it like any other matter. If I were there I would just say, *You figure it out. Reach* 10:20:19 *a solution and appeal to us. We aren't going to answer the question.*

MR. KILMER: We'll look forward to receiving your proposed certification letter, Your Honor.

MS. BOUTIN: Yes. Thank you, Your Honor, for 10:20:31 proffering that solution.

10:20:32 I just have one thing I wanted to raise with respect to the tentative, and it has to do with the AG alerting AGs -- I'm sorry, District Attorneys and local attorneys regarding the preliminary injunction. First of 10:20:51 all, you know, we don't think it's necessary to do that. And part of that is because the recipients will all be attorneys.

And we think the fact that -- you know, an attorney, the first thing they would hopefully do would be 10:21:04 to Shepardize the statute they're going to enforce and then *Junior Sports Magazines'* opinion would immediately pop up. And, you know, presumably then they would look and see the injunction itself. So we don't really think it's necessary.

But that said, you know, we think -- if we are 10:21:19 going to have to alert them, we think the language in the tentative now is fine. There are different types of alert-slash, alert-slash-information bulletins that the office issues, so we appreciate that we have a little bit of flexibility of deciding what's appropriate, because it is a 10:21:35 formal process and there are formal guidelines for it.

The only thing I would just add is that if the Court determines an alert is appropriate, that process does take some time. And so we would ask that we have at least 10 days to issue any alert. If plaintiff's counsel is okay 10:21:52 with that, I don't think it needs to be added to the --

added to the language of the ruling; but otherwise we would ask that it be added.

MR. KILMER: Plaintiffs are familiar with bureaucratic delays, Your Honor. 10 days sounds fine to us.

MS. BOUTIN: All right. Thank you. Appreciate that.

THE COURT: Okay. Good.

MR. KILMER: The only thing we would note, Your Honor, though, is -- and it may have been a minor oversight -- is that the District Attorneys of California are under the direct supervision of the Attorney General, so we believe that the order should actually cover them as well with notice to County Counsel and City Attorneys.

MS. BOUTIN: And we would just respond to that by saying, the only provision of law they've cited with respect to California with -- to the respect to District Attorneys is the California Constitution provision. A quick search of that provision shows that California law interprets it not to mean that they have direct control over District Attorneys; that the language is not -- is not meant to be so strictly applied. So we don't think it necessarily is appropriate here. In any event, it would be covered, we think, by the Rule 65(d) language, so...

THE COURT: Okay. Well, I took a look at it, Mr. Kilmer. I think that the State has the better part of

10:23:06 that argument, but I do think that they should be notified so there is no question regarding the fact that the Ninth Circuit has essentially invalidated *(audio interference)* -- some portions of statute.

10:23:22 MR. KILMER: Thank you, Your Honor.

THE COURT: Okay. Let me go to work at my end. I'm going to take a further look at the tentative, but certainly it will become the Court's order on this matter for present purposes. And I would want to get something out

10:23:39 to you within the next week so that we can move forward.

MR. KILMER: Thank you, Your Honor.

MS. BOUTIN: Thank you very much.

MR. KILMER: And we all hope that you're on the mend and doing well.

10:23:51 THE COURT: Thank you very much.

MR. KILMER: Thank you.

MS. BARVIR: Thank you, Your Honor.

(At 10:23 a.m., proceedings were adjourned.)

-oOo-

CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: June 27, 2024

/s/DEBORAH D. PARKER
DEBORAH D. PARKER, OFFICIAL REPORTER

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IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUNIOR SPORTS MAGAZINES INC., RAYMOND BROWN, CALIFORNIA YOUTH SHOOTING SPORTS ASSOCIATION, INC., REDLANDS CALIFORNIA YOUTH CLAY SHOOTING SPORTS, INC., CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, THE CRPA FOUNDATION, AND GUN OWNERS OF CALIFORNIA, INC.; and SECOND AMENDMENT FOUNDATION,

Plaintiffs,

v.

ROB BONTA, in his official capacity as Attorney General of the State of California; and DOES 1-10,

Defendant.

Case No.: 2:22-cv-04663-CAS (JCx)

PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF MOTION TO ENFORCE THE MANDATE AND ISSUE PRELIMINARY INJUNCTION

Hearing Date: June 10, 2024
Hearing Time: 10:00 a.m.
Courtroom: 8D
Judge: Christina A. Snyder

TO THIS COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD, PLEASE TAKE NOTICE OF THIS SUPPLEMENTAL AUTHORITY:

On May 30, 2024, the Supreme Court of the United States issued a unanimous decision in *National Rifle Association of America v. Vullo*, Case No. 22-842. A copy of the slip opinion is attached. This case is controlling on the motion to enforce the mandate pending before this Court for two reasons:

1. At page 19 of the slip opinion, the Supreme Court condemns the use of intermediaries to suppress First Amendment activities (here, commercial speech). This supports Plaintiffs' argument that the preliminary injunction in this matter must be enforceable against this state's District Attorneys, County Counsels, and City Attorneys—and not just the Attorney General of the State of California.

2. Starting at page 15 of the slip opinion, the Supreme Court notes that gun-promotion advocacy—like Plaintiffs' marketing publications here—cannot be suppressed through collateral attacks, such as penalizing the use of mailing lists. California's latent (and late) objection to the mandate issued by the Ninth Circuit (that all of Business & Professions Code section 22949.80 is unconstitutional and not just subsection (a)) is an attempt resuccitate the chilling effect that the challenged law has on these ordinary marketing activities. Again, the most rational interpretation of the Ninth Circuit's mandate in this case is that marketing activities, like maintaining mailing lists, is an essential part of the commercial speech activity that the Ninth Circuit found was protected by the First Amendment. That is why all of section 22949.80 was declared unconstitutional by the three-judge panel.

Respectfully Submitted,

Dated: June 4, 2024

MICHEL & ASSOCIATES, P.C.

s/ Anna M. Barvir
Anna M. Barvir
Counsel for Plaintiffs Junior Sports Magazines Inc., Raymond Brown, California Youth Shooting Sports Association, Inc., Redlands California Youth Clay Shooting Sports, Inc., California Rifle & Pistol Association,

Incorporated, The CRPA Foundation, and Gun Owners of California, Inc.

Dated: June 4, 2024

LAW OFFICES OF DONALD KILMER, APC

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

ATTESTATION OF E-FILED SIGNATURES

I, Anna M. Barvir, am the ECF User whose ID and password are being used to file this PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHROITY IN SUPPORT OF MOTION TO ENFORCE THE MANDATE AND ISSUE PRELIMINARY INJUNCTION. In compliance with Central District of California L.R. 5-4.3.4, I attest that all signatories are registered CM/ECF filers and have concurred in this filing.

Dated: June 4, 2024

s/ Anna M. Barvir
Anna M. Barvir

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NATIONAL RIFLE ASSOCIATION OF AMERICA *v.* VULLO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 22–842. Argued March 18, 2024—Decided May 30, 2024

Petitioner National Rifle Association (NRA) sued respondent Maria Vullo—former superintendent of the New York Department of Financial Services (DFS)—alleging that Vullo violated the First Amendment by coercing DFS-regulated parties to punish or suppress the NRA's gun-promotion advocacy. The Second Circuit held that Vullo's alleged actions constituted permissible government speech and legitimate law enforcement. The Court granted certiorari to address whether the NRA's complaint states a First Amendment claim.

The NRA's "well-pleaded factual allegations," *Ashcroft* v. *Iqbal*, 556 U. S. 662, 678–679, are taken as true at this motion-to-dismiss stage. DFS regulates insurance companies and financial services institutions doing business in New York, and has the power to initiate investigations and civil enforcement actions, as well as to refer matters for criminal prosecution. The NRA contracted with DFS-regulated entities—affiliates of Lockton Companies, LLC (Lockton)—to administer insurance policies the NRA offered as a benefit to its members, which Chubb Limited (Chubb) and Lloyd's of London (Lloyd's) would then underwrite. In 2017, Vullo began investigating one of these affinity insurance policies—Carry Guard—on a tip passed along from a gun-control advocacy group. The investigation revealed that Carry Guard insured gun owners from intentional criminal acts in violation of New York law, and that the NRA promoted Carry Guard without the required insurance producer license. Lockton and Chubb subsequently suspended Carry Guard. Vullo then expanded her investigation into the NRA's other affinity insurance programs.

On February 27, 2018, Vullo met with senior executives at Lloyd's,

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expressed her views in favor of gun control, and told the Lloyd's executives "that DFS was less interested in pursuing" infractions unrelated to any NRA business "so long as Lloyd's ceased providing insurance to gun groups, especially the NRA." App. to Pet. for Cert. at 199–200, ¶21. Vullo and Lloyd's struck a deal: Lloyd's "would instruct its syndicates to cease underwriting firearm-related policies and would scale back its NRA-related business," and "in exchange, DFS would focus its forthcoming affinity-insurance enforcement action solely on those syndicates which served the NRA." *Id.,* at 223, ¶69.

On April 19, 2018, Vullo issued letters entitled, "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations." *Id.*, at 246–251 (Guidance Letters). In the Guidance Letters, Vullo "encourage[d]" DFS-regulated entities to: (1) "continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations"; (2) "review any relationships they have with the NRA or similar gun promotion organizations"; and (3) "take prompt actions to manag[e] these risks and promote public health and safety." *Id.*, at 248, 251. Vullo and Governor Cuomo also issued a joint press release echoing many of the letters' statements, and " 'urg[ing] all insurance companies and banks doing business in New York' " to join those " 'that have already discontinued their arrangements with the NRA.' " *Id.*, at 244. DFS subsequently entered into separate consent decrees with Lockton, Chubb, and Lloyd's, in which the insurers admitted violations of New York's insurance law, agreed not to provide any NRA-endorsed insurance programs (even if lawful), and agreed to pay multimillion dollar fines.

Held: The NRA plausibly alleged that respondent violated the First Amendment by coercing regulated entities to terminate their business relationships with the NRA in order to punish or suppress gun-promotion advocacy. Pp. 8–20.

(a) At the heart of the First Amendment's Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society. When government officials are "engaging in their own expressive conduct," though, "the Free Speech Clause has no application." *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 467. "When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others," and thus does not need to "maintain viewpoint-neutrality when its officers and employees speak about that venture." *Matal* v. *Tam*, 582 U. S. 218, 234. While a government official can share her views freely and criticize particular beliefs in the hopes of persuading others, she may not use the power of her office to punish or suppress disfavored expression.

In *Bantam Books*, *Inc.* v. *Sullivan*, 372 U. S. 58, this Court explored

the distinction between permissible attempts to persuade and impermissible attempts to coerce. The Court explained that the First Amendment prohibits government officials from relying on the "threat of invoking legal sanctions and other means of coercion . . . to achieve the suppression" of disfavored speech. *Id.*, at 67. Although the defendant in *Bantam Books*, a state commission that blacklisted certain publications, lacked the "power to apply formal legal sanctions," the coerced party "reasonably understood" the commission to threaten adverse action, and thus its "compliance with the [c]ommission's directives was not voluntary." *Id.*, at 66–68. To reach this conclusion, the Court considered things like: the commission's authority; the commission's communications; and the coerced party's reaction to the communications. *Id.*, at 68. The Courts of Appeals have since considered similar factors to determine whether a challenged communication is reasonably understood to be a coercive threat. Ultimately, *Bantam Books* stands for the principle that a government official cannot directly or indirectly coerce a private party to punish or suppress disfavored speech on her behalf. Pp. 8–11.

(b) To state a claim that the government violated the First Amendment through coercion of a third party, a plaintiff must plausibly allege conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress speech. See *Bantam Books*, 372 U. S., at 67–68. Here, the NRA plausibly alleged that Vullo violated the First Amendment by coercing DFS-regulated entities into disassociating with the NRA in order to punish or suppress gun-promotion advocacy.

As DFS superintendent, Vullo had direct regulatory and enforcement authority over all insurance companies and financial service institutions doing business in New York. She could initiate investigations, refer cases for prosecution, notice civil charges, and enter into consent decrees. Vullo's communications with the DFS-regulated entities, particularly with Lloyd's, must be considered against the backdrop of Vullo's authority. Vullo made clear she wanted Lloyd's to disassociate from all gun groups, although there was no indication that such groups had unlawful insurance policies similar to the NRA's. Vullo also told the Lloyd's executives she would "focus" her enforcement actions "solely" on the syndicates with ties to the NRA, "and ignore other syndicates writing similar policies." App. to Pet. for Cert. 223, ¶69. The message was loud and clear: Lloyd's "could avoid liability for [unrelated] infractions" if it "aided DFS's campaign against gun groups" by terminating its business relationships with them. *Ibid.* As the reaction from Lloyd's further confirms, Vullo's alleged communications—whether seen as a threat or as an inducement—were reasonably understood as coercive. Other allegations concerning the Guidance

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Letters and accompanying press release, viewed in context of their issuance, reinforce the NRA's First Amendment claim. Pp. 12–15.

(c) The Second Circuit concluded that Vullo's alleged communications were "examples of permissible government speech" and "legitimate enforcement action." 49 F. 4th 700, 717–719. The Second Circuit could only reach this conclusion, however, by taking the complaint's allegations in isolation and failing to draw reasonable inferences in the NRA's favor.

Vullo's arguments to the contrary lack merit. The conceded illegality of the NRA-endorsed insurance programs does not insulate Vullo from First Amendment scrutiny under *Bantam Books*. Nor does her argument that her actions targeted "nonexpressive" business relationships change the fact that the NRA alleges her actions were aimed at punishing or suppressing speech. Finally, Vullo claims that the NRA's position, if accepted, would stifle government speech and hamper legitimate enforcement efforts, but the Court's conclusion simply reaffirms the general principle that where, as here, the complaint plausibly alleges coercive threats aimed at punishing or suppressing disfavored speech, the plaintiff states a First Amendment claim. Pp. 15–18.

(d) The NRA's allegations, if true, highlight the constitutional concerns with the kind of strategy that Vullo purportedly adopted. Although the NRA was not the directly regulated party here, Vullo allegedly used the power of her office to target gun promotion by going after the NRA's business partners. Nothing in this case immunizes the NRA from regulation nor prevents government officials from condemning disfavored views. The takeaway is that the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech, directly or (as alleged here) through private intermediaries. P. 19.

49 F. 4th 700, vacated and remanded.

SOTOMAYOR, J., delivered the opinion for a unanimous Court. GORSUCH, J., and JACKSON, J., each filed a concurring opinion.

SUPREME COURT OF THE UNITED STATES

No. 22–842

NATIONAL RIFLE ASSOCIATION OF AMERICA, PETITIONER *v.* MARIA T. VULLO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[May 30, 2024]

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Six decades ago, this Court held that a government entity's "threat of invoking legal sanctions and other means of coercion" against a third party "to achieve the suppression" of disfavored speech violates the First Amendment. *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 67 (1963). Today, the Court reaffirms what it said then: Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors. Petitioner National Rifle Association (NRA) plausibly alleges that respondent Maria Vullo did just that. As superintendent of the New York Department of Financial Services, Vullo allegedly pressured regulated entities to help her stifle the NRA's pro-gun advocacy by threatening enforcement actions against those entities that refused to disassociate from the NRA and other gun-promotion advocacy groups. Those allegations, if true, state a First Amendment claim.

I

A

Because this case comes to us at the motion-to-dismiss stage, the Court assumes the truth of "well-pleaded factual

allegations" and "reasonable inference[s]" therefrom. *Ashcroft* v. *Iqbal*, 556 U. S. 662, 678–679 (2009). Unless stated otherwise, the allegations aver as follows:

The New York Department of Financial Services (DFS) oversees insurance companies and financial services institutions doing business in the State. See N. Y. Fin. Servs. Law Ann. §201(a) (West 2012). DFS can initiate investigations and civil enforcement actions against regulated entities, and can refer potential criminal violations to the State's attorney general for prosecution. §§301(b), (c)(4). The DFS-regulated entities in this case are insurers that had business relationships with the NRA.

Since 2000, the NRA has offered a variety of insurance programs as a benefit to its members. The NRA contracted with affiliates of Lockton Companies, LLC (Lockton), to administer the various policies of these affinity insurance programs, which Chubb Limited (Chubb) and Lloyd's of London (Lloyd's) would then underwrite. In return, the NRA received a percentage of its members' premium payments. One of the NRA's affinity products, Carry Guard, covered personal-injury and criminal-defense costs related to licensed firearm use, and "insured New York residents for intentional, reckless, and criminally negligent acts with a firearm that injured or killed another person." 49 F. 4th 700, 707 (CA2 2022).

In September 2017, a gun-control advocacy group contacted the New York County District Attorney's office to tip them off to "compliance infirmities in Carry Guard." App. to Pet. for Cert. 206, Second Amended Complaint ¶34. That office then passed on the allegations to DFS. The next month, then-Superintendent of DFS Vullo began investigating Carry Guard, focusing on Chubb and Lockton. The investigation revealed at least two kinds of violations of New York law: that Carry Guard insured intentional criminal acts, and the NRA promoted Carry Guard without an

insurance producer license. By mid-November, upon finding out about the investigation following DFS information requests, Lockton and Chubb suspended Carry Guard. Vullo then expanded her investigation into the NRA's other affinity insurance programs, many of which were underwritten by Lloyd's and administered by Lockton. These NRA-endorsed programs provided similar coverage and suffered from the same legal infirmities.

In the midst of the investigation, tragedy struck Parkland, Florida. On February 14, 2018, a gunman opened fire at Marjory Stoneman Douglas High School, murdering 17 students and staff members. Following the shooting, the NRA and other gun-advocacy groups experienced "intense backlash" across the country. 49 F. 4th, at 708. Major business institutions, including DFS-regulated entities, spoke out against the NRA, and some even cut ties with the organization. App. to Pet. for Cert. 244. MetLife, for example, ended a discount program it offered with the NRA. On February 25, 2018, Lockton's chairman "placed a distraught telephone call to the NRA," in which he privately shared that Lockton would sever all ties with the NRA to avoid "'losing [its] license' to do business in New York." *Id.*, at 298, Complaint ¶42. Lockton publicly announced its decision the next day. Following Lockton's decision, the NRA's corporate insurance carrier also severed ties with the organization and refused to renew coverage at any price. The NRA contends that Lockton and the corporate insurance carrier took these steps not because of the Parkland shooting but because they feared "reprisa[l]" from Vullo. *Id.*, at 210, ¶44; see *id.*, at 209–210, ¶¶41–43.

Around that time, Vullo also began to meet with executives at the insurance companies doing business with the NRA. On February 27, Vullo met with senior executives at Lloyd's. There, speaking on behalf of DFS and then-Governor Andrew Cuomo, Vullo "presented [their] views on gun control and their desire to leverage their powers to combat

the availability of firearms, including specifically by weakening the NRA." *Id.*, at 221, ¶67. She also "discussed an array of technical regulatory infractions plaguing the affinity-insurance marketplace" in New York. *Id.*, at 199, ¶21. Vullo told the Lloyd's executives "that DFS was less interested in pursuing the[se] infractions" unrelated to any NRA business "so long as Lloyd's ceased providing insurance to gun groups, especially the NRA." *Id.*, at 199–200, ¶21; accord, *id.*, at 223, ¶69 (alleging that Vullo made it clear to Lloyd's that it "could avoid liability for infractions relating to other, similarly situated insurance policies, so long as it aided DFS's campaign against gun groups").[1] Vullo and Lloyd's struck a deal: Lloyd's "would instruct its syndicates to cease underwriting firearm-related policies and would scale back its NRA-related business," and "in exchange, DFS would focus its forthcoming affinity-insurance enforcement action solely on those syndicates which served the NRA, and ignore other syndicates writing similar policies." *Ibid.*, ¶69.

On April 19, 2018, Vullo issued two virtually identical guidance letters on DFS letterhead entitled, "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations." *Id.*, at 246–251 (Guidance Letters). Vullo sent one of the letters to insurance companies and the other to financial services institutions. In the letters, Vullo pointed to the "social backlash" against the NRA and other groups "that promote guns that lead to senseless violence" following "several recent horrific shootings, including in Parkland, Florida." *Id.*, at 246, 249. Vullo then cited recent instances of businesses severing their ties with the NRA as examples of companies "fulfilling their corporate social responsibility." *Id.*, at 247, 250.

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[1] According to the complaint, other affinity organizations offered similar insurance policies, including the New York State Bar Association, the New York City Bar, and the New York State Psychological Association, among others. See App. to Pet. for Cert. 207–208, Complaint ¶36.

In the Guidance Letters' final paragraph, Vullo "encourage[d]" DFS-regulated entities to: (1) "continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations"; (2) "review any relationships they have with the NRA or similar gun promotion organizations"; and (3) "take prompt actions to manag[e] these risks and promote public health and safety." *Id.*, at 248, 251.[2]

The same day that DFS issued the Guidance Letters, Vullo and Governor Cuomo issued a joint press release that echoed many of the letters' statements. The press release included a quote from Vullo "'urg[ing] all insurance companies and banks doing business in New York'" to join those "'that have already discontinued their arrangements with the NRA.'" *Id.*, at 244. The press release cited Chubb's decision to stop underwriting Carry Guard as an example to emulate. The next day, Cuomo tweeted: "'The NRA is an extremist organization. I urge companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public.'" *Id.*, at 213, Complaint ¶51.

Less than two weeks after the Guidance Letters and press release went out, DFS entered into consent decrees with Lockton (on May 2), and Chubb (on May 7). The decrees stipulated that Carry Guard violated New York insur-

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[2]The financial-regulatory term "reputational risk" is "'the risk to current or projected financial condition and resilience arising from negative public opinion,' which 'may impair a bank's competitiveness by affecting its ability to establish new relationships or services or continue servicing existing relationships.'" Brief for United States as *Amicus Curiae* 27–28, and n. 10 (quoting Office of the Comptroller of the Currency, Comptroller's Handbook, Examination Process, Bank Supervision Process 28 (Sept. 2019)). DFS monitors the reputational risk of regulated institutions because of its potential effect on market stability. See Brief for Respondent 6.

ance law because it provided insurance coverage for intentional criminal acts, and because the NRA promoted Carry Guard, along with other NRA-endorsed programs, without an insurance producer license. The decrees also listed other infractions of the State's insurance law. Both Lockton and Chubb admitted liability, agreed not to provide any NRA-endorsed insurance programs (even if lawful) but were permitted to sell corporate insurance to the NRA, and agreed to pay fines of $7 million and $1.3 million respectively. On May 9, Lloyd's officially instructed its syndicates to terminate existing agreements with the NRA and not to insure new ones. It publicly announced its decision to cut ties with the NRA that same day. On December 20, 2018, DFS and Lloyd's entered into their own consent decree, which imposed similar terms and a $5 million fine.

B

The NRA sued Cuomo, Vullo, and DFS. The only claims before the Court today are those against Vullo—namely, claims that Vullo violated the First Amendment by coercing DFS-regulated parties to punish or suppress "the NRA's pro-Second Amendment viewpoint" and "core political speech." *Id.*, at 231, ¶91, 234, ¶101. The complaint asserts both censorship and retaliation First Amendment claims, which the parties and lower courts have analyzed together. Vullo moved to dismiss, arguing that the alleged conduct did not constitute impermissible coercion and that, in the alternative, she was entitled to qualified immunity because she did not violate clearly established law.

The District Court denied Vullo's motion to dismiss the NRA's First-Amendment damages claims. The court held that the NRA plausibly alleged that "the combination of [Vullo's and Cuomo's] actions . . . could be interpreted as a veiled threat to regulated industries to disassociate with the NRA or risk DFS enforcement action." *NRA of Am.* v. *Cuomo*, 525 F. Supp. 3d 382, 402–403 (NDNY 2021). That

threat, the court said, crossed a First Amendment line. The District Court concluded that Vullo was not entitled to qualified immunity at the motion-to-dismiss stage.

The Second Circuit reversed. It concluded that Vullo's alleged actions constituted permissible government speech and legitimate law enforcement, and not unconstitutional coercion. The Second Circuit determined that the Guidance Letters and accompanying press release were not unconstitutionally coercive because they "were written in an even-handed, nonthreatening tone and employed words intended to persuade rather than intimidate." 49 F. 4th, at 717. The court found it significant that Vullo "did not refer to any pending investigations or possible regulatory action" and alluded only to business-related risks "amid growing public concern over gun violence." *Ibid.* As for Vullo's meeting with the Lloyd's executives, the court admitted that the allegations presented a "closer call." *Id.*, at 718. Nonetheless, just as with the consent decrees, it found that Vullo "was merely carrying out her regulatory responsibilities." *Id.,* at 718–719. The Second Circuit also held that, even if the complaint stated a First Amendment violation, the law was not clearly established, and so Vullo was entitled to qualified immunity.

The NRA filed a petition for a writ of certiorari, seeking either summary reversal or review of the First Amendment and qualified immunity holdings. This Court granted certiorari on only the first question presented whether the complaint states a First Amendment claim against Vullo. See 601 U. S. ___ (2023).[3]

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[3] Vullo argues that the Court must dismiss the case as improvidently granted because the Court deprived itself of jurisdiction by limiting its review to the First Amendment question and declining to review the Second Circuit's alternative holding that Vullo is entitled to qualified immunity. See Brief for Respondent 21–24. Not so. In this case, "[a]n order limiting the grant of certiorari does not operate as a jurisdictional bar." *Piper Aircraft Co.* v. *Reyno*, 454 U. S. 235, 247, n. 12 (1981). Because the

II

As discussed below, Vullo was free to criticize the NRA and pursue the conceded violations of New York insurance law. She could not wield her power, however, to threaten enforcement actions against DFS-regulated entities in order to punish or suppress the NRA's gun-promotion advocacy. Because the complaint plausibly alleges that Vullo did just that, the Court holds that the NRA stated a First Amendment violation.

A

At the heart of the First Amendment's Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society. The Clause prohibits government entities and actors from "abridging the freedom of speech." When government officials are "engaging in their own expressive conduct," though, "the Free Speech Clause has no application." *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 467 (2009). The government can "'say what it wishes'" and "select the views that it wants to express." *Id.*, at 467–468 (quoting *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 833 (1995)). That makes sense; the government could barely function otherwise. "When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others," and thus does not need to "maintain viewpoint-neutrality when its officers and employees speak about that venture." *Matal* v. *Tam*, 582 U. S. 218, 234 (2017).

A government official can share her views freely and criticize particular beliefs, and she can do so forcefully in the

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Second Circuit is free to revisit the qualified immunity question in light of this Court's opinion, the NRA still could obtain "'effectual relief'" on remand. *Chafin* v. *Chafin*, 568 U. S. 165, 172 (2013). In such circumstances, it cannot be said that the resolution of the First Amendment question is merely advisory.

hopes of persuading others to follow her lead. In doing so, she can rely on the merits and force of her ideas, the strength of her convictions, and her ability to inspire others. What she cannot do, however, is use the power of the State to punish or suppress disfavored expression. See *Rosenberger*, 515 U. S., at 830 (explaining that governmental actions seeking to suppress a speaker's particular views are presumptively unconstitutional). In such cases, it is "the application of state power which we are asked to scrutinize." *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 463 (1958).

In *Bantam Books*, this Court explored the distinction between permissible attempts to persuade and impermissible attempts to coerce. There, a state commission used its power to investigate and recommend criminal prosecution to censor publications that, in its view, were "'objectionable'" because they threatened "youthful morals." 372 U. S., at 59–62, 71. The commission sent official notices to a distributor for blacklisted publications that highlighted the commission's "duty to recommend to the Attorney General" violations of the State's obscenity laws. *Id.*, at 62–63, and n. 5. The notices also informed the distributor that the lists of blacklisted publications "were circulated to local police departments," and that the distributor's cooperation in removing the publications from the shelves would "'eliminate the necessity'" of any referral for prosecution. *Ibid.* A local police officer also conducted followup visits to ensure compliance. In response, the distributor took "steps to stop further circulation of copies of the listed publications" out of fear of facing "'a court action.'" *Id.*, at 63.

The publishers of the blacklisted publications sued the commission, alleging that this scheme of informal censorship violated their First Amendment rights. The commission responded that "it d[id] not regulate or suppress obscenity but simply exhort[ed] booksellers and advise[d] them of their legal rights." *Id.*, at 66. This Court sided with

the publishers, holding that the commission violated their free-speech rights by coercing the distributor to stop selling and displaying the listed publications.

The Court explained that the First Amendment prohibits government officials from relying on the "threat of invoking legal sanctions and other means of coercion . . . to achieve the suppression" of disfavored speech. *Id.*, at 67. Although the commission lacked the "power to apply formal legal sanctions," the distributor "reasonably understood" the commission to threaten adverse action, and thus the distributor's "compliance with the [c]ommission's directives was not voluntary." *Id.*, at 66–68. To reach this conclusion, the Court considered things like: the commission's coordination with law enforcement and its authority to refer matters for prosecution; the notices themselves, which were "phrased virtually as orders" containing "thinly veiled threats to institute criminal proceedings" if the distributor did not come around; and the distributor's reaction to the notices and followup visits. *Id.,* at 68.

Since *Bantam Books*, the Courts of Appeals have considered similar factors to determine whether a challenged communication is reasonably understood to be a coercive threat. Take the decision below, for example. The Second Circuit purported to consider: "(1) word choice and tone; (2) the existence of regulatory authority; (3) whether the speech was perceived as a threat; and, perhaps most importantly, (4) whether the speech refers to adverse consequences." 49 F. 4th, at 715 (citations omitted).[4] Other Circuits have taken similarly fact-intensive approaches,

[4]The NRA posits a three-factor test that looks to: (1) the actor's authority; (2) the content and purpose of the actor's communications; and (3) the reactions of the recipient. Brief for Petitioner 26. The NRA concedes, however, that its test is the same as the Second Circuit's, as it considers the fourth factor in the Second Circuit's test of "'whether the speech refers to adverse consequences'" to be an "aspect of the inquiry into the content and purpose of the communication." *Id.*, at 27, n. 8.

utilizing a multifactor test or a totality-of-the-circumstances analysis. See, *e.g.*, *Missouri* v. *Biden*, 83 F. 4th 350, 380 (CA5 2023) ("[T]o help distinguish permissible persuasion from impermissible coercion, we turn to the Second (and Ninth) Circuit's four-factor test"); *Kennedy* v. *Warren*, 66 F. 4th 1199, 1207 (CA9 2023) (applying the Second Circuit's "useful non-exclusive four-factor framework"); *Backpage.com, LLC* v. *Dart*, 807 F. 3d 229, 230–232 (CA7 2015) (considering the same factors as part of a totality-of-the-circumstances analysis); *R. C. Maxwell Co.* v. *New Hope*, 735 F. 2d 85, 88 (CA3 1984) (same). The Courts of Appeals that employ a multifactor test agree that "[n]o one factor is dispositive." 49 F. 4th, at 715; accord, *Kennedy*, 66 F. 4th, at 1210 (explaining that the absence of direct regulatory authority is not dispositive).

Ultimately, *Bantam Books* stands for the principle that a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf. See, *e.g.*, 372 U. S., at 67–69; see also *Backpage.com*, 807 F. 3d, at 231 (holding that the First Amendment barred a sheriff from "using the power of his office to threaten legal sanctions against . . . credit-card companies for facilitating future speech"); *Okwedy* v. *Molinari*, 333 F. 3d 339, 344 (CA2 2003) (*per curiam*) (holding that a religious group stated a First Amendment claim against a borough president who wrote a letter "contain[ing] an implicit threat of retaliation" against a billboard company displaying the group's disfavored message); cf. *Penthouse Int'l, Ltd.* v. *Meese*, 939 F. 2d, 1011, 1016 (CADC 1991) ("[W]hen the government threatens no sanction—criminal or otherwise—we very much doubt that the government's criticism or effort to embarrass the [intermediary] threatens anyone's First Amendment rights").

B

The parties and the Solicitor General, who filed an *amicus* brief supporting vacatur, agree that *Bantam Books* provides the right analytical framework for claims that the government has coerced a third party to violate the First Amendment rights of another. They also embrace the lower courts' multifactor test as a useful, though nonexhaustive, guide. Rightly so. Considerations like who said what and how, and what reaction followed, are just helpful guideposts in answering the question whether an official seeks to persuade or, instead, to coerce. Where the parties differ is on the application of the *Bantam Books* framework. The NRA and the Solicitor General reject the Second Circuit's application of the framework, while Vullo defends it. The Court now agrees with the NRA and the Solicitor General.

To state a claim that the government violated the First Amendment through coercion of a third party, a plaintiff must plausibly allege conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff's speech. See 372 U. S., at 67–68. Accepting the well-pleaded factual allegations in the complaint as true, the NRA plausibly alleged that Vullo violated the First Amendment by coercing DFS-regulated entities into disassociating with the NRA in order to punish or suppress the NRA's gun-promotion advocacy.

Consider first Vullo's authority, which serves as a backdrop to the NRA's allegations of coercion. The power that a government official wields, while certainly not dispositive, is relevant to the objective inquiry of whether a reasonable person would perceive the official's communication as coercive. See *id.*, at 66–67. Generally speaking, the greater and more direct the government official's authority, the less likely a person will feel free to disregard a directive from the official. For example, imagine a local affinity group in New York that receives a strongly worded letter. One

would reasonably expect that organization to react differently if the letter came from, say, the U. S. Attorney for the Southern District of New York than if it came from an out-of-state school board.

As DFS superintendent, Vullo had direct regulatory and enforcement authority over all insurance companies and financial service institutions doing business in New York. See N. Y. Fin. Servs. Law Ann. §§202, 301. Just like the commission in *Bantam Books*, Vullo could initiate investigations and refer cases for prosecution. Indeed, she could do much more than that. Vullo also had the power to notice civil charges and, as this case shows, enter into consent decrees that impose significant monetary penalties.

Against this backdrop, consider Vullo's communications with the DFS-regulated entities, particularly with Lloyd's. According to the NRA, Vullo brought a variety of insurance-law violations to the Lloyd's executives' attention during a private meeting in February 2018. The violations included technical infractions that allegedly plagued the affinity insurance market in New York and that were unrelated to any NRA business. App. to Pet. for Cert. 199–200, Complaint ¶21; accord, *id.,* at 207–208, ¶¶36–37; *id.*, at 223, ¶69. Vullo allegedly said she would be "less interested in pursuing the[se] infractions . . . so long as Lloyd's ceased providing insurance to gun groups, especially the NRA." *Id.*, at 199–200, ¶21. Vullo therefore wanted Lloyd's to disassociate from all gun groups, although there was no indication that such groups had unlawful insurance policies similar to the NRA's. Vullo also told the Lloyd's executives she would "focus" her enforcement actions "solely" on the syndicates with ties to the NRA, "and ignore other syndicates writing similar policies." *Id.*, at 223, ¶69. The message was therefore loud and clear: Lloyd's "could avoid liability for [unrelated] infractions" if it "aided DFS's campaign against gun groups" by terminating its business relationships with them. *Ibid.*

As alleged, Vullo's communications with Lloyd's can be reasonably understood as a threat or as an inducement. Either of those can be coercive. As Vullo concedes, the "threat need not be explicit," Brief for Respondent 47, and as the Solicitor General explains, "[t]he Constitution does not distinguish between 'comply or I'll prosecute' and 'comply and I'll look the other way,'" Brief for United States as *Amicus Curiae* 18, n. 7. So, whether analyzed as a threat or as an inducement, the conclusion is the same: Vullo allegedly coerced Lloyd's by saying she would ignore unrelated infractions and focus her enforcement efforts on NRA-related business alone, if Lloyd's ceased underwriting NRA policies and disassociated from gun-promotion groups.

The reaction from Lloyd's further confirms the communications' coercive nature. Cf. *Bantam Books*, 372 U. S., at 63, 68 (noting that the distributor's "reaction on receipt of a notice was to take steps to stop further circulation of copies of the listed publications"). At the meeting itself, Lloyd's "agreed that it would instruct its syndicates to cease underwriting firearm-related policies and would scale back its NRA-related business." App. to Pet. for Cert. 223, Complaint ¶69. Minutes from a subsequent board of directors' meeting reveal that Lloyd's thought "the DFS investigation had transformed the gun issue into 'a regulatory, legal[,] and compliance matter.'" 2 App. to Pet. for Cert. 29 (Sealed). That reaction is consistent with Lloyd's public announcement that it had directed its syndicates to "terminate all insurance related to the NRA and not to provide any insurance to the NRA in the future." App. to Pet. for Cert. 224, Complaint ¶72; accord, *id.*, at 306, ¶20 (consent decree memorializing commitment not to underwrite, or participate in, NRA-endorsed programs).

Other allegations, viewed in context, reinforce the NRA's First Amendment claim. Consider the April 2018 Guidance Letters and accompanying press release, which Vullo issued on official letterhead. Cf. *Bantam Books*, 372 U. S., at

61–63, and n. 5 (discussing notice issued in "official Commission stationery"). Just like in her meeting with the Lloyd's executives, here too Vullo singled out the NRA and other gun-promotion organizations as the targets of her call to action. This time, the Guidance Letters reminded DFS-regulated entities of their obligation to consider their "reputational risks," and then tied that obligation to an encouragement for "prompt actio[n] to manag[e] these risks." App. to Pet. for Cert. 248, 251. Evocative of Vullo's private conversation with the Lloyd's executives a few weeks earlier, the press release revealed how to manage the risks by encouraging DFS-regulated entities to "'discontinu[e] their arrangements with the NRA,'" just like Chubb did when it stopped underwriting Carry Guard. App. to Pet. for Cert. 244. A follow-on tweet from Cuomo reaffirmed the message: Businesses in New York should "'consider their reputations'" and "'revisit any ties they have to the NRA,'" which he called "'an extremist organization.'" *Id.*, at 213, ¶51.

In sum, the complaint, assessed as a whole, plausibly alleges that Vullo threatened to wield her power against those refusing to aid her campaign to punish the NRA's gun-promotion advocacy. If true, that violates the First Amendment.

C

In holding otherwise, the Second Circuit found that: (1) the "Guidance Letters and Press Release are clear examples of permissible government speech"; and (2) the Lloyd's meeting was "legitimate enforcement action" in which Vullo was "merely carrying out her regulatory responsibilities" by offering "leniency in the course of negotiating a resolution of the apparent insurance law violations." 49 F. 4th, at 717–719. The Second Circuit could only reach this conclusion by taking the allegations in isolation and failing to draw reasonable inferences in the NRA's favor in violation

of this Court's precedents. Cf. *Iqbal*, 556 U. S., at 678–679; *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544, 570 (2007).

For example, the Second Circuit failed to analyze the Guidance Letters and press release against the backdrop of other allegations in the complaint, including the Lloyd's meeting. Moreover, as discussed above, the complaint alleges that Vullo made a not-so-subtle, sanctions-backed threat to Lloyd's to cut all business ties with the NRA and other gun-promotion groups, although there was no sign that other gun groups also had unlawful insurance policies. See *supra*, at 13. It is also relevant that Vullo made this alleged threat in a meeting where she presented her "desire to leverage [her] powers to combat the availability of firearms, including specifically by weakening the NRA." App. to Pet. for Cert. 221, Complaint ¶67; *id.*, at 223, ¶69 (alleging Vullo hoped to enlist DFS-regulated entities in "aid[ing] DFS's campaign against gun groups"). Given the obligation to draw reasonable inferences in the NRA's favor and consider the allegations as a whole, the Second Circuit erred in reading the complaint as involving only individual instances of "permissible government speech" and the execution of Vullo's "regulatory responsibilities." 49 F. 4th, at 717–719.

For the same reasons, this Court cannot simply credit Vullo's assertion that "pursuing conceded violations of the law," Brief for Respondent 29, is an "'obvious alternative explanation'" for her actions that defeats the plausibility of any coercive threat raising First Amendment concerns, *id.*, at 37, 40, 42 (quoting *Iqbal*, 556 U. S., at 682). Of course, discovery in this case might show that the allegations of coercion are false, or that certain actions should be understood differently in light of newly disclosed evidence. At this stage, though, the Court must assume the well-pleaded

factual allegations in the complaint are true.[5]

Moreover, the conceded illegality of the NRA-endorsed insurance programs does not insulate Vullo from First Amendment scrutiny under the *Bantam Books* framework. Indeed, the commission in that case targeted the distribution and display of material that, in its view, violated the State's obscenity laws. Nothing in that case turned on the distributor's compliance with state law. On the contrary, *Bantam Books* held that the commission violated the First Amendment by invoking legal sanctions to suppress disfavored publications, some of which may or may not contain protected speech (*i.e.*, nonobscene material). See 372 U. S., at 64, 67. Here, too, although Vullo can pursue violations of state insurance law, she cannot do so in order to punish or suppress the NRA's protected expression. So, the contention that the NRA and the insurers violated New York law does not excuse Vullo from allegedly employing coercive threats to stifle gun-promotion advocacy.

Vullo next argues that this case does not involve unconstitutional coercion because her challenged actions in fact targeted business practices and relationships, which qualify as "nonexpressive activity." Brief for Respondent 32. The argument is misplaced. That Vullo "regulate[d]" business activities stemming from the NRA's "relationships with insurers and banks," *ibid.*, does not change the allegations that her actions were aimed at punishing or suppressing speech. In *Bantam Books*, the commission interfered with the business relationship between the distributor and

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[5] Vullo also argues that she is entitled to absolute prosecutorial immunity for her enforcement actions. See Brief for Respondent 25–28. Putting aside whether a financial regulator like Vullo is entitled to such immunity in the administrative context, because Vullo did not raise this defense below with respect to the First Amendment claim (or even with respect to allegations unrelated to the consent decrees), the Court declines to consider that argument here in the first instance.

the publishers in order to suppress the publishers' disfavored speech. 372 U. S., at 66–71. Similarly, in *Backpage.com*, a sheriff interfered with a website's business relationships with payments-service providers in order to eliminate the website's "adult section" (if not the website itself). 807 F. 3d, at 230–232, 235–236. In that case, the sheriff wanted to "suffocat[e]" the website, "depriving the company of ad revenues by scaring off its payments-service providers." *Id.*, at 231. "The analogy," the Seventh Circuit explained, "is to killing a person by cutting off his oxygen supply rather than by shooting him." *Ibid.* So too here. One can reasonably infer from the complaint that Vullo coerced DFS-regulated entities to cut their ties with the NRA in order to stifle the NRA's gun-promotion advocacy and advance her views on gun control. See, *e.g.*, *supra*, at 12–15; App. to Pet. for Cert. 221, 230–235, Complaint ¶¶67, 87–105. Vullo knew, after all, that the NRA relied on insurance and financing "to disseminate its message." *Id.*, at 231, ¶92; see *id.*, at 203–204, ¶¶28–29.[6]

Lastly, Vullo falls back on the argument that a ruling in the NRA's favor would interfere with the government's ability to function properly. She claims that the NRA's position, if accepted, would stifle government speech and hamper legitimate enforcement efforts. This argument falls flat for the simple reason that it requires the Court to accept Vullo's limited reading of the complaint. The Court does not break new ground in deciding this case. It only reaffirms the general principle from *Bantam Books* that where, as here, the complaint plausibly alleges coercive threats aimed at punishing or suppressing disfavored speech, the plaintiff states a First Amendment claim.

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[6]Vullo's boss, Governor Cuomo, also urged businesses to disassociate with the NRA to put the organization "into financial jeopardy" and "shut them down." App. 21 (Aug. 3, 2018, tweet).

III

The NRA's allegations, if true, highlight the constitutional concerns with the kind of intermediary strategy that Vullo purportedly adopted to target the NRA's advocacy. Such a strategy allows government officials to "expand their regulatory jurisdiction to suppress the speech of organizations that they have no direct control over." Brief for First Amendment Scholars as *Amici Curiae* Supporting Petitioner 8. It also allows government officials to be more effective in their speech-suppression efforts "[b]ecause intermediaries will often be less invested in the speaker's message and thus less likely to risk the regulator's ire." *Ibid.* The allegations here bear this out. Although "the NRA was not even the directly regulated party," Brief for Respondent 32, Vullo allegedly used the power of her office to target gun promotion by going after the NRA's business partners. Insurers in turn followed Vullo's lead, fearing regulatory hostility.

Nothing in this case gives advocacy groups like the NRA a "right to absolute immunity from [government] investigation," or a "right to disregard [state or federal] laws." *Patterson*, 357 U. S., at 463. Similarly, nothing here prevents government officials from forcefully condemning views with which they disagree. For those permissible actions, the Constitution "relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks." *Shurtleff* v. *Boston*, 596 U. S. 243, 252 (2022). Yet where, as here, a government official makes coercive threats in a private meeting behind closed doors, the "ballot box" is an especially poor check on that official's authority. Ultimately, the critical takeaway is that the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech, directly or (as alleged here) through private intermediaries.

* * *

For the reasons discussed above, the Court holds that the NRA plausibly alleged that Vullo violated the First Amendment by coercing DFS-regulated entities to terminate their business relationships with the NRA in order to punish or suppress the NRA's advocacy.

The judgment of the U. S. Court of Appeals for the Second Circuit is vacated, and the case remanded for further proceedings consistent with this opinion.[7]

It is so ordered.

[7] On remand, the Second Circuit is free to reconsider whether Vullo is entitled to qualified immunity.

SUPREME COURT OF THE UNITED STATES

No. 22–842

NATIONAL RIFLE ASSOCIATION OF AMERICA, PETITIONER *v.* MARIA T. VULLO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[May 30, 2024]

JUSTICE GORSUCH, concurring.

I write separately to explain my understanding of the Court's opinion, which I join in full. Today we reaffirm a well-settled principle: "A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf." *Ante,* at 11. As the Court mentions, many lower courts have taken to analyzing this kind of coercion claim under a four-pronged "multifactor test." *Ibid*. These tests, the Court explains, might serve "as a useful, though nonexhaustive, guide." *Ante,* at 12. But sometimes they might not. Cf. *Axon Enterprise, Inc.* v. *FTC*, 598 U. S. 175, 205–207 (2023) (GORSUCH, J., concurring in judgment). Indeed, the Second Circuit's decision to break up its analysis into discrete parts and "tak[e] the [complaint's] allegations in isolation" appears only to have contributed to its mistaken conclusion that the National Rifle Association failed to state a claim. *Ante,* at 15. Lower courts would therefore do well to heed this Court's directive: Whatever value these "guideposts" serve, they remain "just" that and nothing more. *Ante,* at 12. "Ultimately, the critical" question is whether the plaintiff has "plausibly allege[d] conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff's speech." *Ante,* at 12, 19.

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[May 30, 2024]

JUSTICE JACKSON, concurring.

Applying our decision in *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963), the Court today explains that a "government official cannot coerce a private party to punish or suppress disfavored speech on her behalf." *Ante,* at 11. I agree. I write separately to stress the important distinction between government coercion, on the one hand, and a violation of the First Amendment, on the other.

I

Coercion of a third party can be the means by which the government violates the First Amendment rights of another. But the fact of coercion, without more, does not state a First Amendment claim. Rather, in addition to finding that the government has crossed a line from persuasion to coercion, courts must assess how that coercion actually violates a speaker's First Amendment rights.

Our decision in *Bantam Books* provides one example of how government coercion of a third party can indirectly bring about a First Amendment violation. As the majority explains, *ante,* at 9–10, *Bantam Books* held that a Rhode Island commission's efforts to coerce intermediary book distributors into pulling certain publications from circulation violated the First Amendment rights of the books' publish-

ers, 372 U. S., at 61–62, 66–67. Even though the state commission had not itself "seized or banned" any books, "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" against the distributors "directly and designedly stopped the circulation of publications in many parts of Rhode Island." *Id.*, at 67–68. Essentially, the State's threats to third parties—the distributors—erected through private hands an "effective state regulation . . . of obscenity." *Id.*, at 69. And the government could not escape responsibility for the distributors' actions merely because the commission did not itself seize any books. See *id.*, at 66–67.

Notably, however, the government's coercion of the distributors into doing its bidding was not—in and of itself—what offended the First Amendment. Rather, by threatening those third-party conduits of speech, the state commission had effectively "subject[ed] the distribution of publications to a system of prior administrative restraints" lacking the requisite constitutional safeguards. *Id.*, at 70. Put another way, by exerting pressure on a third party, the State had constructed a "system of informal censorship." *Id.*, at 71.

The lesson of *Bantam Books* is that "a government official cannot do indirectly what she is barred from doing directly." *Ante,* at 11. That case does *not* hold that government coercion alone violates the First Amendment. And recognizing the distinction between government coercion and a First Amendment violation is important because our democracy can function only if the government can effectively enforce the rules embodied in legislation; by its nature, such enforcement often involves coercion in the form of legal sanctions. The existence of an allegation of government coercion of a third party thus merely invites, rather than answers, the question whether that coercion indirectly worked a violation of the plaintiff's First Amendment rights.

II

Whether and how government coercion of a third party might violate another party's First Amendment rights will depend on the facts of the case. Indeed, under our precedents, determining whether government action violates the First Amendment requires application of different doctrines that vary depending on the circumstances. Different circumstances—who is being coerced to do what, and why—may implicate different First Amendment inquiries.

In *Bantam Books* and many cases applying it, the coercion and First Amendment inquiries practically merge. This is because those cases tend to follow a similar fact pattern: The plaintiff claims that the government coerced a distributor, purveyor, or conduit of expression—like a billboard company, television station, or book retailer—to shut down the speech of another party that relies on that distributor, purveyor, or conduit to spread its message.* Coercing an entity in the business of disseminating speech to stop disseminating someone else's speech obviously implicates the First Amendment, insofar as it may result in censorship similar to the prior restraint identified in *Bantam Books*.

But, in my view, that censorship theory is an awkward fit with the facts of *this* case. According to the complaint, Vullo coerced various regulated entities to cut business ties with the National Rifle Association (NRA). See *ante,* at 3–5. The

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*See, *e.g.*, *Okwedy* v. *Molinari*, 333 F. 3d 339, 340, 342–344 (CA2 2003) (*per curiam*) (billboard company); *R. C. Maxwell Co.* v. *New Hope*, 735 F. 2d 85, 85–88 (CA3 1984) (same); *American Family Assn., Inc.* v. *City and County of San Francisco*, 277 F. 3d 1114, 1119–1120 (CA9 2002) (television stations); *Kennedy* v. *Warren*, 66 F. 4th 1199, 1204–1205 (CA9 2023) (online book retailer); *Penthouse Int'l, Ltd.* v. *Meese*, 939 F. 2d 1011, 1013–1016 (CADC 1991) (convenience stores carrying pornographic magazines); *Hammerhead Enterprises, Inc.* v. *Brezenoff*, 707 F. 2d 33, 34–38 (CA2 1983) (department stores carrying satirical board game); *VDARE Foundation* v. *Colorado Springs*, 11 F. 4th 1151, 1156–1157 (CA10 2021) (resort hosting advocacy group conference).

NRA does not contend that its (concededly unlawful) insurance products offered through those business relationships were themselves "speech," akin to a billboard, a television ad, or a book. Nor does the complaint allege that Vullo pressured the printer of American Rifleman (a longstanding NRA periodical) to stop printing the magazine, or coerced a convention center into canceling the NRA's annual meeting. See *VDARE Foundation* v. *Colorado Springs*, 11 F. 4th 1151, 1157 (CA10 2021). In other words, the effect of Vullo's alleged coercion of regulated entities on the NRA's speech is significantly more attenuated here than in *Bantam Books* or most decisions applying it. It is, for instance, far from obvious that Vullo's conduct toward regulated entities established "a system of prior administrative restraints" against the NRA's expression. *Bantam Books*, 372 U. S., at 70.

Of course, as the majority correctly observes, none of that means that Vullo may target with impunity the NRA's "'nonexpressive'" activity if she is doing so to punish the NRA for its expression. See *ante,* at 17. But it does suggest that our First Amendment retaliation cases might provide a better framework for analyzing these kinds of allegations—*i.e.*, coercion claims that are not directly related to the publication or distribution of speech. And, fortunately for the NRA, the complaint in this case alleges both censorship and retaliation theories for how Vullo violated the First Amendment—theories that, in my opinion, deserve separate analyses.

"'[A]s a general matter,' the First Amendment prohibits government officials from subjecting individuals to 'retaliatory actions' after the fact for having engaged in protected speech." *Houston Community College System* v. *Wilson*, 595 U. S. 468, 474 (2022) (quoting *Nieves* v. *Bartlett*, 587 U. S. 391, 398 (2019)). "[A] plaintiff pursuing a First Amendment retaliation claim must show, among other things, that the government took an 'adverse action' in response to his

speech that 'would not have been taken absent the retaliatory motive.'" *Wilson*, 595 U. S., at 477 (quoting *Nieves*, 587 U. S., at 399). Although our analysis has varied by context, see *Lozman* v. *Riviera Beach*, 585 U. S. 87, 96–99 (2018), we have generally required plaintiffs claiming First Amendment retaliation to "establish a 'causal connection' between the government defendant's 'retaliatory animus' and the plaintiff's 'subsequent injury,'" *Nieves*, 587 U. S., at 398 (quoting *Hartman* v. *Moore*, 547 U. S. 250, 259 (2006)).

Requiring that causal connection to a retaliatory motive is important, because "[s]ome official actions adverse to . . . a speaker might well be unexceptionable if taken on other grounds." *Id.*, at 256. In this case, for example, analyzing causation matters because much of Vullo's alleged conduct, if not done for retaliatory reasons, might otherwise be legitimate enforcement of New York's insurance regulations.

How a retaliation analysis should proceed in this case was not addressed below, so the Court rightly leaves that question unanswered today. But, importantly, any such analysis requires more than asking simply whether the government's actions crossed the threshold from permissible persuasion to impermissible coercion. The NRA concedes that, at the very least, our burden-shifting framework from *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977), likely applies. See Reply Brief 16–17. Should that test govern, the NRA would have to plausibly allege that a retaliatory motive was a "'substantial'" or "'motivating factor'" in Vullo's targeting of the regulated entities doing business with the NRA. *Mt. Healthy*, 429 U. S., at 287. Vullo, in turn, could rebut that allegation by showing that she would have taken the same action "even in the absence of the [NRA's] protected conduct." *Ibid.*; see *Lozman*, 585 U. S., at 96 ("[E]ven if retaliation might have been a substantial motive for the board's action, still there was no liability unless the alleged constitutional violation was a but-for cause of the employment termination").

* * *

The NRA's complaint advances both censorship and retaliation claims, yet the lower courts in this case lumped these claims together and ultimately focused almost exclusively on whether Vullo's conduct was coercive. See *ante,* at 6–7. Consequently, the strength of the NRA's claim under the *Mt. Healthy* framework has received little attention thus far. On remand, the parties and lower courts should consider the censorship and retaliation theories independently, mindful of the distinction between government coercion and the ways in which such coercion might (or might not) have violated the NRA's constitutional rights. That analysis can and should likewise consider which First Amendment framework best captures the NRA's allegations in this case. See, *e.g.*, *VDARE*, 11 F. 4th, at 1159–1175 (separately analyzing censorship and retaliation claims).

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

Case Name: *Junior Sports Magazines, Inc., et al. v. Bonta*
Case No.: 2:22-cv-04663-CAS (JCx)

IT IS HEREBY CERTIFIED THAT:

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

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

PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF PLAINTIFFS' MOTION TO ENFORCE THE MANDATE AND ISSUE PRELIMINARY INJUNCTION

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

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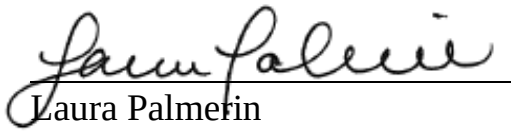
I declare under penalty of perjury that the foregoing is true and correct.

Executed June 4, 2024.



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IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUNIOR SPORTS MAGAZINES INC., RAYMOND BROWN, CALIFORNIA YOUTH SHOOTING SPORTS ASSOCIATION, INC., REDLANDS CALIFORNIA YOUTH CLAY SHOOTING SPORTS, INC., CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, THE CRPA FOUNDATION, AND GUN OWNERS OF CALIFORNIA, INC.; and SECOND AMENDMENT FOUNDATION,

Plaintiffs,

v.

ROB BONTA, in his official capacity as Attorney General of the State of California; and DOES 1-10,

Defendant.

Case No.: 2:22-cv-04663-CAS (JCx)

SUPPLEMENTAL DECLARATION OF ANNA M. BARVIR IN SUPPORT OF PLAINTIFFS' MOTION TO ENFORCE THE MANDATE AND ISSUE PRELIMINARY INJUNCTION

Hearing Date: June 10, 2024
Hearing Time: 10:00 a.m.
Courtroom: 8D
Judge: Christina A. Snyder

SUPPLEMENTAL DECLARATION OF ANNA M. BARVIR

1. I, Anna M. Barvir, am an attorney at the law firm Michel & Associates, P.C., attorneys of record for Plaintiffs in this action. I am licensed to practice law before the United States District Court for the Central District of California. I am also admitted to practice before the Eastern, Northern, and Southern Districts of California, as well as the courts of the state of California, the Supreme Court of the United States, and the D.C., Fourth, Ninth, and Tenth Circuit Courts of Appeals. I have personal knowledge of the facts set forth herein and, if called and sworn as a witness, could and would testify competently thereto.

2. On May 24, 2024, I visited and viewed the official website of the State of California Department of Juste and Attorney General Rob Bonta. From there, I viewed and saved a copy of the California Department of Justice, Division of Law Enforcement, *Information Bulletin Re: New and Amended Firearms/Weapons Laws* (Dec. 16, 2022), *available at* https://oag.ca.gov/system/files/media/2022-dle-17.pdf. A true and correct copy is attached as **Exhibit B**.

3. On May 24, 2024, On May 24, 2024, I visited and viewed the official website of the State of California Department of Juste and Attorney General Rob Bonta. From there, I viewed and saved a copy of the California Department of Justice, Office of the Attorney General, *Legal Alert Re: California's Public-Carry License Scheme and Public-Carry Criminal Laws Remain Constitutional After the U.S. Supreme Court's Decision in New York State Rifle & Pistol Association v. Bruen* (Aug. 17, 2022), *available at* https://oag.ca.gov/system/files/media/legal-alert-oag-2022-03.pdf. A true and correct copy is attached as **Exhibit C**.

I declare under penalty of perjury that the foregoing is true and correct. Executed within the United States on May 24, 2024.

s/ Anna M. Barvir
Anna M. Barvir
Declarant

EXHIBIT B

Rob Bonta, Attorney General

California Department of Justice DIVISION OF LAW ENFORCEMENT John D. Marsh, Chief		**INFORMATION BULLETIN**
Subject: **New and Amended Firearms/Weapons Laws**	*No.* 2022-DLE-17 *Date:* 12/16/2022	*Contact for information:* Bureau of Firearms (916) 210-2300

TO: ALL CALIFORNIA CRIMINAL JUSTICE AND LAW ENFORCEMENT AGENCIES, CENTRALIZED LIST OF FIREARMS DEALERS, MANUFACTURERS, EXEMPT FEDERAL FIREARMS LICENSEES, AND CALIFORNIA AMMUNITION VENDORS

This bulletin provides a brief summary of California firearms/weapons bills signed into law in 2022. Unless otherwise noted, all bills go into effect on January 1, 2023. This bulletin also summarizes bills signed into law prior to 2022 that take effect in 2023.

This bulletin is for informational purposes only. Because it is a summary, it does not cover every aspect of the bills addressed below. You can access the full text of the bills at: http://leginfo.legislature.ca.gov/. The Department of Justice will hereinafter be referred to as "the Department."

BILLS SIGNED INTO LAW IN 2022

AB 228 (Stats. 2022, ch. 138) – Firearms

Effective January 1, 2024

- Requires the Department to conduct inspections of dealers at least every 3 years, with the exception of a dealer whose place of business is located in a jurisdiction that has adopted an inspection program.
- Authorizes the Department to inspect a dealer whose place of business is located in a jurisdiction that has adopted an inspection program.
- Specifies minimum sampling standards for the audit of dealer records during an inspection.

AB 311 (Stats. 2022, ch. 139) – Firearms. Del Mar Fairgrounds

Effective January 1, 2023

- Prohibits the sale of firearms, ammunitions, or firearm precursor parts at the Del Mar Fairgrounds property.

AB 452 (Stats. 2022, ch. 199) – Pupil safety: parental notification: firearm safety laws

Effective January 1, 2023

- Requires a school district, county office of education, and charter school to annually inform parents and guardians of pupils at the beginning of the first semester or quarter of the regular school term of California's child access prevention laws and laws relating to the safe storage of firearms.

- Requires the State Department of Education, on or before July 1, 2023, to develop, and subsequently update as provided, in consultation with the Department of Justice, and provide to school districts, county offices of education, charter schools, and, upon request, to provide to private schools, model language for the notice regarding those child access prevention and safe storage of firearms laws.

- Makes a school district, county office of education, charter school, private school, and the Department immune from civil liability for any damages relating to the notice.

AB 1406 (Stats. 2022, ch. 945) – Law enforcement agency policies: carrying of equipment

Effective January 1, 2023

- Requires a law enforcement agency that authorizes peace officers to carry an electroshock device, such as a Taser or stun gun that is held and operated in a manner similar to a pistol, to require that device to be holstered or otherwise carried on the lateral side of the body opposite to the side that that officer's primary firearm is holstered.

AB 1594 (Stats. 2022, ch. 98) – Firearms: civil suits

Effective January 1, 2023

- Establishes a firearm industry standard of conduct, which would require a firearm industry member to establish, implement, and enforce reasonable controls, take reasonable precautions to ensure that the member does not sell, distribute, or provide a firearm-related product to a downstream distributor or retailer of firearm-related products who fails to establish, implement, and enforce reasonable controls, and adhere to specified laws pertaining to unfair methods of competition, unfair or deceptive acts or practices, or false advertising.

- 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.

- Authorizes a person who has suffered harm, the Attorney General, or specified city or county attorneys to bring a civil action against a firearm industry member for an act or omission in violation of the firearm industry standard of conduct.

- Authorizes a court that determines that a firearm industry has engaged in the prohibited conduct to award various relief, including injunctive relief, damages, and attorney's fees and costs.

AB 1621 (Stats. 2022, ch. 76) – Firearms: unserialized firearms

Effective June 30, 2022

- Redefines a firearm precursor part as any forging, casting, printing, extrusion, machined body, or similar article that has reached a stage in manufacture where it may readily be completed, assembled or converted to be used as the frame or receiver of a functional firearm, or that is marketed or sold to the public to become or be used as the frame or receiver of a functional firearm once completed, assembled, or converted.

- Extends the definition of a firearm to include a firearm precursor part for the purposes of most criminal and regulatory provisions related to the possession, sale, and transfer of a firearm, including provisions which do not apply to a frame or receiver under existing law.

- Repeals provisions relating to the sale of firearm precursor parts through a licensed precursor part vendor, and would prohibit the sale, transfer, or possession of an unserialized firearm precursor part, except as specified.

- Create a process by which a person may apply to the Department for a determination that a particular item or kit is or is not a firearm precursor part.

- Requires any person in possession of an unserialized firearm to apply to the Department for a unique mark of identification and to affix that mark to the firearm before January 1, 2024.

- Beginning on January 1, 2024, explicitly prohibits the possession or transfer of a firearm without a serial number or mark of identification.

- Authorizes a new resident of the state to, within 60 days after arrival in the state, request a unique mark or identification for any unserialized firearm that is otherwise valid to possess in the state.

- Prohibits the possession, sale, transfer, or use of specified firearms manufacturing equipment, with exceptions for specified entities, including the Armed Forces of the United States, the National Guard, and law enforcement.

- Beginning on January 1, 2024, prohibits a person from purchasing more than one completed frame, receiver, or firearm precursor part within a 30-day period.

- Includes a 10-year prohibition for a misdemeanor violation of manufacturing an unserialized firearm, or aiding or abetting the manufacture of a firearm by a prohibited person, that occurs on or after January 1, 2023.

AB 1769 (Stats. 2022, ch. 140) – Firearms: prohibited places

Effective January 1, 2023

- Requires, with specified exemptions, that an officer, employee, operator, lessee, or licensee of the 31st District Agricultural Association, shall not contract for, authorize, or allow the sale of any firearm, firearm precursor part, or ammunition on the property or in the buildings that comprise the Ventura County Fair and Event Center, in the County of Ventura, the City of Ventura, or any successor or additional property owned, leased, or otherwise occupied or operated by the district.

AB 1842 (Stats. 2022, ch. 141) – Firearms: restocking fee

Effective January 1, 2023

- Prohibits a licensee from charging more than 5% of the purchase price of the firearm as a restocking or other return-related fee when the purchase of the firearm, as specified, is canceled by the buyer within 10 days of the application.

AB 2137 (Stats. 2022, ch. 20) – Family justice centers

Effective January 1, 2023

- Requires family justice centers to provide clients with educational materials related to gun violence restraining orders, domestic violence restraining orders, and other legal avenues of protection for victims and their families.

AB 2156 (Stats. 2022, ch. 142) – Firearms: manufacturers

Effective January 1, 2023

- Expands this prohibition to prohibit any person, regardless of federal licensure, from manufacturing firearms in the state without being licensed by the state.

- Decreases the manufacturing threshold requiring state licensure from 50 or more firearms in a calendar year to 3 or more firearms in a calendar year.

- Prohibits any person, unless licensed as a firearm manufacturer, from manufacturing any firearm or precursor part by means of a 3D printer.

AB 2239 (Stats. 2022, ch. 143) – Firearms: prohibited persons

Effective January 1, 2023

- Prohibits a person convicted of misdemeanor child abuse or elder abuse from having a firearm for ten years.

AB 2551 (Stats. 2022, ch. 100) – Firearms

Effective January 1, 2023

- Requires the Department, should it determine that a person prohibited from possessing a firearm has attempted to acquire a firearm, to notify the local law enforcement agency with primary jurisdiction over the area in which the person was last known to reside.

- If the person is prohibited from owning or possessing a firearm for reasons relating to mental health, the bill would require the Department to also notify the county Department of Mental Health in the county in which the person was last known to reside.

- Requires the Department, should it determine that a person prohibited from possessing ammunition has attempted to acquire ammunition, to notify any relevant local law enforcement agency.

AB 2552 (Stats. 2022, ch. 696) – Firearms: gun shows and events

Effective January 1, 2023

- Commencing July 1, 2023, will require the Department to conduct enforcement and inspections at a minimum of one-half of all gun shows or events in the state to ensure compliance with gun show and event laws.

- Requires the Department to post certain violations discovered on their internet website and would require the Department to submit an annual report to the Legislature summarizing their enforcement efforts.

- Doubles the maximum fines for violating this and other requirements and makes the person ineligible for a Certificate of Eligibility for a period of 2 years.

- Requires a vendor to certify that they will not display, possess, or offer for sale any unserialized frame or receiver, including an unfinished frame or receiver or any handgun conversion kits.

- Adds a fine and a suspension from participating as a vendor for a period of one year to the punishment for these violations.

- Requires additional notices relating to the storage, handling, purchase, and theft of firearms to be posted at each public entrance of an event.

AB 2571 (Stats. 2022, ch. 77) – Firearms: advertising to minors

Effective June 30, 2022

- Prohibits a firearm industry member from using, advertising, or marketing any firearm-related product in a manner that is designed, intended, or reasonably appears to be attractive to minors.

- Prohibits 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.

- Imposes 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.

- Makes each copy or republication of marketing or advertising prohibited by these provisions a separate violation.

AB 2870 (Stats. 2022, ch. 974) – Firearms: gun violence restraining orders

Effective January 1, 2023

- Allows a petition for a gun violence restraining order to be made by an individual who has a child in common with the subject, an individual who has a dating relationship with the subject, or a roommate of the subject of the petition.

- Expands the family members who can file a petition for a gun violence restraining order to include any person related by consanguinity or affinity within the 4th degree who has had substantial and regular interactions with the subject for at least one year.

SB 906 (Stats. 2022, ch. 144) – School safety: mass casualty threats: firearm disclosure

Effective January 1, 2023

- Requires on or before July 1, 2023, the State Department of Education, in consultation with relevant local educational agencies, civil rights groups, and the Department of Justice, to develop model content that includes, at a minimum, content that informs parents or guardians of California's child access prevention laws and laws relating to the safe storage of firearms.

- Requires, commencing with the 2023–24 school year, local educational agencies maintaining kindergarten or any of grades 1 to 12, inclusive, to, informed by the model content, include information related to the safe storage of firearms in an annual notification provided to the parents or guardians of pupils.

- Requires a school official whose duties involve regular contact with pupils in any of grades 6 to 12, inclusive, as part of a middle school or high school, and who is alerted to or observes any threat or perceived threat to immediately report the threat or perceived threat to law enforcement.

- Requires, with the support of the local educational agency, the local law enforcement agency, or school-site police, as applicable, to immediately conduct an investigation and threat assessment.

- Requires the investigation and threat assessment to include a review of the firearm registry of the Department and, if justified by a reasonable suspicion that it would produce evidence related to the threat or perceived threat, a school-site search.

SB 915 (Stats. 2022, ch. 145) – Firearms: state property

Effective January 1, 2023

- This bill would, except as exempted, prohibit a state officer or employee, or operator, lessee, or licensee of any state-owned property, from contracting for, authorizing, or allowing the sale of any firearm, firearm precursor part, or ammunition on state property.

SB 1327 (Stats. 2022, ch. 146) – Firearms: private rights of action

Effective January 1, 2023

- Creates a private right of action for any person against any person who, within this state, (1) 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 serial number required by law, assault weapon, or .50 BMG rifle; (2) purchases, sells, offers to sell, or transfers ownership of any firearm precursor part that is not a federally regulated firearm precursor part; or (3) is a licensed firearms dealer and sells, supplies, delivers, or gives possession or control of a firearm to any person under 21 years of age, all subject to certain exceptions.

- Makes the provisions listed above inoperative upon invalidation of a specified law in Texas, and would repeal its provisions on January 1 of the following year.

- Specifies that all statutes regulating or prohibiting firearms shall not be construed to repeal any other statute regulating or prohibiting firearms, in whole or in part, unless the statute specifically states that it is repealing another statute.

SB 1384 (Stats. 2022, ch. 995) – Firearms: dealer requirements

Effective January 1, 2023

- Requires that dealer to carry a policy of general liability insurance (commences July 1, 2023).

- Requires a licensed firearm dealer to have a digital video surveillance system on their business premises (commences January 1, 2024).

BILLS SIGNED INTO LAW BEFORE 2022 THAT BECOME OPERATIVE, IN WHOLE OR IN PART, IN 2023

AB 1281 (Stats. 2021, ch. 209) – Criminal procedure: protective orders

Operative July 1, 2023

- Subject to an appropriation in the Annual Budget Act, on a monthly basis, Requires the Department to review the records in the statewide criminal justice databases, and based on information in the state summary criminal history repository and the Supervised Release File,

identify persons with convictions that meet the criteria set forth in subdivision (B) this statute and are eligible for automatic conviction record relief.

SB 24 (Stats. 2021, ch. 129) – Domestic violence: protective orders: information pertaining to a child

Operative January 1, 2023

- Requires a security guard to complete an assessment to be issued a firearms permit prior to carrying a firearm.

- Requires an applicant who is a registered security guard to have met the requirement of being found capable of exercising appropriate judgment, restraint, and self-control, for purposes of carrying and using a firearm during the course of their duties, within the 6 months preceding the date the application is submitted to the Bureau of Security and Investigative Services (Bureau) within the Department of Consumer Affairs.

- Prohibits an applicant who fails the assessment from completing another assessment any earlier than 180 days after the results of the previous assessment are provided to the Bureau.

- Authorizes the Bureau to revoke a firearm permit upon notification from the Department that the holder of the firearm permit is prohibited from possessing, receiving, or purchasing a firearm under state or federal law, and would instead authorize the Bureau to seek an emergency order against a permit holder if a specified event occurs.

SB 715 (Stats. 2021, ch. 250) – Criminal law

Operative July 1, 2023

- Prohibits the possession of a semiautomatic centerfire rifle and, commencing July 1, 2023, the possession of any firearm, by a minor, with certain exceptions.

- Prohibits a dealer from returning a firearm to the person making the sale, transfer, or loan, if that person is prohibited from obtaining a firearm and would, in those cases, provide a procedure by which that person could transfer the firearm to a law enforcement agency or to a third party, as specified.

EXHIBIT C

California Department of Justice OFFICE OF THE ATTORNEY GENERAL		Legal Alert
Subject: California's Public-Carry License Scheme and Public-Carry Criminal Laws Remain Constitutional After the U.S. Supreme Court's Decision in *New York State Rifle & Pistol Association v. Bruen*	*No.* OAG-2022-03 *Date:* August 17, 2022	*Contact for information:* CCWinfo@doj.ca.gov

TO: All California District Attorneys, County Counsels, City Attorneys, Sheriffs, and Police Chiefs

On June 23, 2022, the United States Supreme Court issued its decision in *New York State Rifle & Pistol Association v. Bruen* (2022) 142 S.Ct. 2111 (*Bruen*).[1] The next day, the Attorney General issued Legal Alert No. OAG-2022-02, which concluded that the "good cause" requirements set forth in California Penal Code sections 26150(a)(2) and 26155(a)(2) were unconstitutional and unenforceable under *Bruen*.[2] That legal alert also made clear that "because the Court's decision in *Bruen* does not affect the other statutory requirements governing public-carry licenses," local officials should "continue to apply and enforce all other aspects of California law with respect to public-carry licenses and the carrying of firearms in public."

As discussed in this Legal Alert, the *Bruen* decision expressly stated that it is constitutional for states to require a license to carry a firearm in public. *Bruen* invalidated only one of the enumerated requirements for obtaining a public-carry license in California—the "good cause" requirement—leaving in place the others. The "good cause" requirement is severable from the rest of the licensing scheme, which remains constitutional. And criminal statutes penalizing the unlicensed carrying of firearms in public remain valid and enforceable after *Bruen*. Finally, *Bruen* does not affect the validity of California's other firearms safety laws.

<u>California's Public-Carry Licensing Regime Remains Constitutional Because *Bruen* Only Impacted the "Good Cause" Requirement</u>

California law authorizes local law enforcement officials—sheriffs and chiefs of police—to issue licenses allowing license holders to "carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person." Cal. Pen. Code §§ 26150, 26155. These licenses exempt the holder from many generally applicable restrictions on the carrying of firearms in public. *Id.* §§ 25655, 26010. The relevant statutes currently authorize local officials to issue such licenses "upon proof of all of the following":

> "(1) The applicant is of good moral character.
> (2) Good cause exists for issuance of the license.
> (3) The applicant is a resident of the county or a city within the county, or the applicant's principal place of employment or business is in the county or a city within the county and the

[1] The decision is available at https://www.supremecourt.gov/opinions/21pdf/20-843_7j80.pdf.
[2] Legal Alert No. OAG-2022-02 is available at https://oag.ca.gov/system/files/media/legal-alert-oag-2022-02.pdf.

applicant spends a substantial period of time in that place of employment or business. (4) The applicant has completed a [firearms safety] course of training. . . ."

Id. § 26150(a); see also *id.* § 26155(a). An applicant must also pass a background check to confirm the applicant is not prohibited under state or federal law from possessing or owning a firearm. *Id.* §§ 26185(a), 26195(a).

Bruen considered the constitutionality of the State of New York's "proper cause" requirement to obtain a public-carry license. *Bruen*, 142 S.Ct. at p. 2156. New York courts had interpreted "proper cause" to mean a "special need for self-protection distinguishable from that of the general community." *Id.* at p. 2123. The United States Supreme Court concluded that the requirement was unconstitutional "in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." *Id.* at p. 2156. The Court also highlighted other states with "analogues" to the "proper cause" requirement, including California, and made clear that California's similar "good cause" requirement is unconstitutional. *Id.* at p. 2124.

Bruen invalidated merely one statutory prerequisite—the "proper cause" or "good cause" requirement—to obtaining a public-carry license. But it did not invalidate all public-carry licensing schemes. The Court did not strike down other aspects of New York's licensing scheme, such as its "good moral character" requirement. Under *Bruen*, states can still constitutionally enforce requirements for residents to obtain a public-carry license. The Court emphasized that licensing schemes that "require applicants to undergo a background check or pass a firearms safety course" were acceptable, because such requirements were "narrow, objective, and definite standards" designed to ensure that only "'law-abiding, responsible citizens'" could obtain a public-carry license. *Bruen*, 142 S.Ct. at p. 2138, fn. 9. Justice Kavanaugh's concurring opinion explicitly acknowledged that states "may continue to require licenses for carrying handguns for self-defense so long as those States employ objective licensing requirements" that did not grant open-ended discretion to licensing officials. *Id.* at pp. 2161-2162 (conc. opn. of Kavanaugh, J.). Justice Kavanaugh specified that such objective requirements can include "fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force, among other possible requirements." *Id.* Justice Alito's concurring opinion highlighted that *Bruen* did not disturb the Court's prior decree in *District of Columbia v. Heller* (2008) 554 U.S. 570 that "restrictions . . . may be imposed on the possession or *carrying of guns*." *Bruen*, 142 S.Ct. at p. 2157 (conc. opn. of Alito, J.) (emphasis added). *Bruen* thus endorsed, rather than invalidated, various public-carry licensing requirements.

The "Good Cause" Requirement Is Severable From the Rest of the Public-Carry Licensing Regime

The "good cause" requirement is severable from the remaining requirements of California's licensing scheme. A constitutionally invalid provision is severable if it is "grammatically, functionally, and volitionally separable" from the remainder of the statute. *Cal. Redevelopment Ass'n v. Matosantos* (2011) 53 Cal.4th 231, 271. The "good cause" requirement in Penal Code sections 26150(a) and 26155(a) meets all three criteria. For grammatical separability, removing the "good cause" requirement would not affect the coherence of the remaining prerequisites. See *id.* The "good cause" requirement is separated by paragraph and sentence from the good moral character, residency, and training course requirements listed in paragraphs (1), (3), and (4) of subdivision (a) of Penal Code sections 26150 and 26155; and, the background check requirement is contained in entirely different statutes (Cal. Penal Code §§ 26185(a), 26195(a)). See *Abbott Laboratories v. Franchise Tax Bd.* (2009) 175 Cal.App.4th 1346, 1358. Functional separability is satisfied because these remaining requirements are "capable of independent application" and can be easily applied by

a sheriff or police chief in accordance with the relevant statutes. *Id.* Volitional separability also exists because there is no question the Legislature would have preferred having some public-carry license prerequisites over none at all if it had known the "good cause" requirement was unconstitutional. See *Matosantos*, 53 Cal.4th at p. 273.

The Remaining Portions of California's Public-Carry Licensing Regime Are Consistent with *Bruen*

In addition to the severability of the "good cause" requirement, the four enduring public-carry license requirements—background check, firearms safety course, residency, and good moral character—survive *Bruen*. The first two of these requirements were specifically endorsed by the Supreme Court. *Bruen*, 142 S.Ct. at p. 2138, fn. 9; *id.* at p. 2161 (conc. opn. of Kavanaugh, J.). The remaining requirements—the residency and good moral character requirements—meet the mandate that a licensing scheme's prerequisites be objective and definite. Under *Bruen*, "good moral character" and "good cause" are not one and the same. See *Hooks v. United States* (D.C. 2018) 191 A.3d 1141, 1145-1146 (the constitutionality of a good-cause requirement is distinct from the constitutionality of a moral-character requirement; the rejection of the former does not entail the rejection of the latter). *Bruen* refers to 43 states as "shall issue" jurisdictions, which includes some jurisdictions that have a suitability or moral character requirement, and the Court explains that those states do not grant licensing officials unfettered discretion to deny licenses. *Bruen*, 142 S.Ct. at p. 2123, fn. 1. As to California's "good moral character" requirement in particular, licensing authorities have developed objective and definite standards to avoid such unfettered discretion. See Legal Alert No. OAG-2022-02 at pp. 2-3 (discussing some examples of these standards). The evaluation of good moral character, which can involve the weighing of defined factors, is inherently different from the open-ended determination of "a special need for self-protection distinguishable from that of the general community" that was constitutionally problematic in New York's "proper cause" requirement. *Bruen*, 142 S.Ct. at p. 2123. The good moral character requirement and the other remaining requirements in California's public-carry license scheme thus remain constitutional post-*Bruen*.[3]

California's Criminal Penalties for Carrying a Firearm in Public Without a License Remain Valid and Enforceable

California's criminal penalties for carrying a firearm in public without a license, such as Penal Code sections 25400, 25850, 26350, 26400, also remain constitutional after *Bruen*. The Supreme Court made clear that restrictions on the carrying and possession of firearms are permissible under the Second Amendment, and implicitly endorsed "reasonable, well-defined" restrictions on the public carrying of firearms. *Bruen*, 142 S.Ct. at p. 2156. Penal Code section 25400, which specifically prohibits various forms of carrying a concealed firearm in public; section 25850, which prohibits various forms of carrying a loaded firearm in public; and sections 26350 and 26400, which prohibit various forms of carrying an unloaded firearm openly in public, fall within such a category of restrictions. Indeed, both section 25400 and 25850 previously survived constitutional challenges in which California Courts of Appeal determined that these laws were categorically different from the ones struck down in *Heller*. *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 311-314 (rejecting a challenge to former Penal Code section 12025, the equivalent of today's section 25400); *People v. Flores* (2008) 169 Cal.App.4th 568, 574-577 (rejecting a challenge to former Penal Code section 12031, the equivalent of today's section 25850). Because *Bruen* built on—and did not detract from—*Heller*, and *Yarbrough* and *Flores* were decided after *Heller*, trial courts are bound by *Yarbrough* and *Flores*. See *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450,

[3] The Legislature of course may choose to amend Sections 26150 and 26155. Any such amendments encompassing "narrow, objective, and definitive standards" will pass constitutional muster. *Bruen*, 142 S.Ct. at p. 2138, fn.9.

455 ("Decisions of every division of the District Courts of Appeal are binding . . . upon all the superior courts of this state").

Moreover, *Bruen* does not provide a basis for dismissing charges filed under Penal Code sections 25400, 25850, 26350, 26400, or other laws or regulations prohibiting the carrying of firearms in certain places. California's licensing scheme has been entirely consistent with *Bruen* since the Attorney General announced that California would no longer enforce its good cause requirement in light of *Bruen* in the June 24, 2022 Legal Alert No. OAG-2022-02.

For individuals who violated these provisions before that date, *Bruen* does not provide a basis for dismissing charges for two reasons. First, in many parts of California, local issuing authorities defined good cause in a way that created no constitutional problem. As discussed above, in *Bruen* the Supreme Court did not cast doubt on state laws requiring individuals to secure a license as a condition of carrying a firearm in public. See *Bruen*, 142 S.Ct. at p. 2161 (conc. opn. of Kavanaugh, J.) ("the Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense"). The problem with New York's "proper cause" requirement was that it mandated that applicants demonstrate a "special need for self-protection distinguishable from that of the general community." *Id.* at p. 2123. But issuing authorities in multiple California counties did not require applicants to show an atypical need for self-defense to secure a license. For example, the practice of the Sacramento County Sheriff's Office was to "accept as good cause an applicant's stated desire to obtain a license for self-defense or for the defense of his or her family." California State Auditor, Concealed Carry Weapon Licenses 1 (Dec. 2017) <https://www.auditor.ca.gov/pdfs/reports/2017-101.pdf> [last visited Aug. 1, 2022]. These counties' application of California's good cause standard was consistent with *Bruen*, and that case therefore does not provide a basis for dismissing charges if the defendant was a resident of one of those counties or had their principal place of business or employment in one of those counties and the defendant spent a substantial amount of time there.

Second, even for defendants who did not reside or work in one of these counties, *Bruen* does not provide a basis for dismissing charges filed for violating California's public-carry laws. A defendant cannot escape criminal liability merely because *Bruen* makes clear that *one* of California's licensing requirements is unconstitutional. As discussed above, the other licensing requirements are plainly constitutional under *Bruen*. Courts across the country have already repeatedly rejected challenges to criminal charges based on *Bruen* for similar reasons. See, e.g., *People v. Rodriguez* (N.Y. Sup. Ct., July 15, 2022) __ N.Y.S. 3d __, 2022 WL 2797784, at pp. *1-*3 (allowing individuals to escape criminal prosecution for conduct that was unlawful before *Bruen* would turn New York "into the Wild West, placing its citizens at the mercy of criminals wielding unlicensed firearms, concealed from public view, in heavily populated areas"); *Fooks v. State* (Md. Ct. Spec. App., June 29, 2022) __ A.3d __, 2022 WL 2339412, at p. *1 (rejecting a challenge to a conviction for illegally possessing a firearm after a criminal contempt conviction); *United States v. Daniels* (S.D. Miss., July 8, 2022) __ F. Supp. 3d __, 2022 WL 2654232, at p. *1 (upholding a federal indictment for possessing a firearm while unlawfully using a controlled substance).

Bruen emphasized the Second Amendment is not a "regulatory straightjacket," and that the newly announced constitutional right to "bear commonly used arms in public [is] subject to certain reasonable, well-defined restrictions." *Bruen*, 142 S.Ct. at pp. 2133, 2156. California's requirements to obtain a public-carry license, other than "good cause," and its criminal restrictions on the unlicensed carrying of firearms in public, constitute such reasonable and well-defined restrictions.

Some district attorney and city attorney offices across California have raised similar arguments in response to efforts by defendants in criminal cases to dismiss charges for carrying a firearm in public without a license. To illustrate how local prosecutorial offices have defended the constitutionality of such criminal charges, here is a link to examples of briefs recently filed by the Sacramento County District Attorney's Office and the Los Angeles City Attorney's Office: https://oag.ca.gov/sites/default/files/combined-garcia-jimenez.pdf.

Bruen Does Not Affect the Validity of Other Firearms Safety Laws

In *Bruen*, the Supreme Court held unconstitutional only New York's requirement that individuals show that they have proper cause as a condition of obtaining a license to carry a firearm in public. The Court did not cast doubt upon, and indeed did not address, other firearm safety laws, including restrictions on large-capacity magazines and assault weapons, restrictions that prevent felons and the dangerously mentally ill from possessing firearms, or other reasonable regulations. On the contrary, the Court reiterated *Heller*'s statement that the Second Amendment is not a right to "keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Bruen*, 142 S. Ct. at p. 2128 (quoting *Heller*, 554 U.S. at p. 626). And in his concurrence, Justice Kavanaugh reiterated *Heller*'s observation that "the Second Amendment allows a 'variety' of gun regulations." *Id.* at p. 2162 (quoting *Heller*, 554 U.S. at p. 636). In particular, he emphasized that the "presumptively lawful measures" that *Heller* identified—including "longstanding prohibitions on the possession of firearms by felons and the mentally ill," laws "forbidding the carrying of firearms in sensitive places," laws "imposing conditions and qualifications on the commercial sale of arms," and laws prohibiting the keeping and carrying of "dangerous and unusual weapons"—remained constitutional, and that this was not an "exhaustive" list. *Id.* at p. 2162 (quoting *Heller*, 554 U.S. at pp. 626-627, 627 fn. 26).

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

Case Name: *Junior Sports Magazines, Inc., et al. v. Bonta*
Case No.: 2:22-cv-04663-CAS (JCx)

IT IS HEREBY CERTIFIED THAT:

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

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

SUPPLEMENTAL DECLARATION OF ANNA M. BARVIR IN SUPPORT OF PLAINTIFFS' MOTION TO ENFORCE THE MANDATE AND ISSUE PRELIMINARY INJUNCTION

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

Kevin J. Kelly, Deputy Attorney General
kevin.kelly@doj.ca.gov
300 South Spring Street, Suite 9012
Los Angeles, CA 90013

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Sacramento, CA 94244-2550
Attorneys for Defendant

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

Executed May 24, 2024.

Laura Palmerin

ROB BONTA
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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

JUNIOR SPORTS MAGAZINES INC. et al., Plaintiffs, **v.** **ROB BONTA, in his official capacity as Attorney General of the State of California et al.,** Defendants.	2:22-CV-04663-CAS-JCx **JOINT STATUS REPORT** Date: May 15, 2024 Time: 11:30 a.m. Dept: 8D (Status Conference by Zoom) Judge: Hon. Christina A. Snyder Trial Date: None set Action Filed: July 8, 2022

Plaintiffs and Defendant respectfully submit this joint status report pursuant to the Court's order at the April 8, 2024 statute conference. *See* ECF No. 55 (Status Conference Minutes). The parties submit below their respective statements regarding next steps in the litigation.

I. Plaintiffs' Statement

A. History of the Case

On September 13, 2023, the Ninth Circuit reversed the denial of Plaintiffs' motion for preliminary injunction in a unanimous decision. *Jr. Sports Mags. Inc., v. Bonta*, 80 F.4th 1109 (9th Cir. 2023). Its mandate to this Court is set forth in the conclusion of that opinion: "In sum, we hold that [California Business & Professions Code] § 22949.80 is likely unconstitutional under the First Amendment, and we thus REVERSE the district court's denial of a preliminary injunction and REMAND for further proceedings consistent with this opinion." *Id.* at 1121.

Thereafter, the State notified the Ninth Circuit that it intended to move for a rehearing, and Junior Sports Magazines requested an injunction against enforcement of section 22949.80 while that petition was pending. The three-judge panel denied the injunction request. 2023 U.S. App. LEXIS 27018 (9th Cir. Oct. 11, 2023). But after no judge in the Ninth Circuit called for a vote to rehear the case en banc, the State's petition for rehearing en banc was denied. 2024 U.S. App. LEXIS 3878 (9th Cir. Feb. 20, 2024). The Ninth Circuit issued the mandate on February 28, 2024. ECF No. 51.

Once the case returned to this Court, the parties agreed to an extension of time for the State to file an answer up to April 22, 2024, on the grounds that it needed more time to consider its options for potential early resolution of this case. ECF No. 52. This Court granted the stipulated extension. ECF No. 53. This Court also entered an order setting a status conference regarding filing and spreading the Ninth Circuit Mandate. ECF No. 54.

During the April 8, 2024, status conference, this Court granted a further extension for the State to respond to the Complaint to and including May 22, 2024. It also set another status conference for May 13, 2024, with a joint status conference statement due on May 6, 2024. The Court orally encouraged the parties

to continue to meet and confer to resolve the case and, if possible, enter any order necessary to address the mandate.

B. Plaintiffs' Position

The parties have met and conferred via teleconference, videoconference, and email to explore avenues for the final disposition of this case and regarding the entry of a preliminary injunction pursuant to the opinion and mandate issued by the Ninth Circuit in this matter. *See Jr. Sports Mags.*, 80 F.4th 1109. The parties have not been able to agree on the terms of any settlement or preliminary injunction, with the present controversy being the scope of the order. In spite of the plain language of the Ninth Circuit opinion, *id.* at 1121, the State contends that the Ninth Circuit's opinion was limited to subsection (a) of Business and Professions Code § 22949.80, also known and cited throughout this litigation as AB 2571.

Plaintiffs disagree. The plain text of the Ninth Circuit's opinion—which is now the law of the case—contradicts the State's claim. *Jr. Sports Mags.*, 80 F.4th at 1120-21 ("In sum, we hold that § 22949.80 is likely unconstitutional under the First Amendment, and we thus REVERSE the district court's denial of a preliminary injunction and REMAND for further proceedings consistent with this opinion.") The Ninth Circuit did not limit its ruling to any particular subsection—for good reason. The complaint challenges the entirety of § 22949.80. *See* ECF No. 1 at 37 ("Prayer for Remedy" repeatedly referring to "AB 2571, codified at California Business & Professions Code section 22949.80"). And Plaintiffs' motion sought to preliminarily enjoin the entirety of § 22949.80. ECF No. 12-14 (proposed order for a preliminary injunction enjoining Defendants and others "from engaging in, committing, or performing, directly or indirectly, by any means whatsoever, any enforcement of AB 2571, codified at Business & Professions Code section 22949.80"). This Court denied Plaintiffs' express request to preliminarily enjoin the entire law. ECF No. 35 at 51. And the Ninth Circuit expressly reversed that decision. *Jr. Sports Mags.*, 80 F.4th at 1120-21. What's more, when petitioning the

Ninth Circuit for rehearing en banc, the State itself acknowledged that Plaintiffs "moved for a preliminary injunction against Section 22949.80 *in its entirety*." Appellees' Petition for Rehearing En Banc 6, *Jr. Sports Mags., Inc. v. Bonta*, 80 F.4th 1109 (9th Cir. 2023), ECF No. 49 (emphasis added). The State's post-remand position that Plaintiffs have not yet established that subsection (b) likely violates the First Amendment is a matter of mere opinion that is not supported by the Ninth Circuit's clear command "that § 22949.80 is likely unconstitutional under the First Amendment." *Jr. Sports Mags.*, 80 F.4th at 1120-21.

Even still, the State claims that "[t]hroughout the litigation, the parties and courts have referred to the law challenged in this action as 'section 22949.80,' as a convenient shorthand for the provision at issue." *See infra*. But that is simply not true. Plaintiffs have never adopted "section 22949.80" as shorthand for anything—let alone section 22949.80(a). On the contrary, they have consistently referred to "AB 2571" as shorthand for their challenge to the *entirety* of § 22949.80, including the amendments made to subsections (a) and (c) by AB 160. *See, e.g.*, ECF No. 1 at 14, fn. 3 ("Throughout this complaint, Plaintiffs refer to the challenged law, California Business & Professions Code section 22949.80, as 'AB 2571.'"); ECF No. 12-1 ("Throughout this motion, Plaintiffs refer to section 22949.80 as AB 2571."); ECF No. 30 at 1, fn. 2 ("For continuity, Plaintiffs refer to the challenged law—Business & Professions Code section 22949.80—as AB 2571."); *see also* Appellants' Opening Brief 2, fn. 1, *Jr. Sports Mags., Inc. v. Bonta*, 80 F.4th 1109 (9th Cir. 2023), ECF No. 7 ("For ease of reference, Appellants refer to AB 2571 (as adopted and as later amended by AB 160) and California Business & Professions Code § 22949.80 as 'AB 2571.'"). This Court adopted a similar naming protocol. ECF No. 35 at 3 ("Governor Gavin Newsom signed many [gun laws] into law, including Business & Professions Code § 22949.80 (referred to hereinafter as "AB 2571"), challenged in this litigation."). The State, for its part, has never indicated in any brief that it was adopting "Section 22949.80" as shorthand for "Section

22949.80(a)."

C. Plaintiffs' Proposals for Moving the Case Forward

Plaintiffs have filed a Motion to Enforce the Mandate and Issue Preliminary Injunction. ECF No. 59. The motion is set to be heard on June 10, 2024, at 10:00 AM. If this Court does not enter a preliminary injunction enjoining the entirety of § 22949.80, Plaintiffs will seek interlocutory relief from the Ninth Circuit. Under Ninth Circuit General Order 3.6, this matter would qualify as a "Comeback Case." If this Court does enter an order enjoining the entirety of § 22949.80—and not just subsection (a)—Plaintiffs are prepared to proceed in one of the following ways:

1. Stipulated judgment for entry of a permanent injunction enjoining enforcement of Business and Professions Code § 22949.80, with specific terms to be determined as part of any negotiated settlement.
2. If settlement is not an option, Plaintiffs intend to file a motion for summary judgment.
3. If the motion for summary judgment does not resolve the matter, Plaintiffs are prepared to take the case to trial.

Additionally, before ruling on the Plaintiffs' Motion to Enforce the Mandate, this Court could order the parties to a mandatory settlement conference on the first available date, so as not to prejudice the Plaintiffs. Plaintiffs believe that this Court has the authority to expand the scope of such a settlement conference to include resolution of the entire case, including the terms of final judgment and award of any attorney fees and costs. If efforts to resolve the matter without further litigation are unsuccessful, Plaintiffs ask this Court to issue a scheduling order that would include deadlines for Rule 26 disclosures, discovery cutoffs, and a briefing schedule on cross-motions for summary judgment.

D. Related Case

Plaintiffs have already filed a notice of the preliminary injunction issued in the coordinated case of *Safari Club Int'l v. Bonta*, No.: 222-cv-01395-DAD-JDP (E.D.

Cal.) enjoining the entirety of Business & Professions Code section 22949.80. ECF No. 56.

II. Defendant's Statement

Since the last status conference, the parties have not agreed on settlement terms. Plaintiff has now filed a motion for preliminary injunction. ECF No. 59. Defendant intends to oppose the motion, but only to the extent that the requested injunction goes beyond the scope of the Ninth Circuit's ruling, including by seeking to enjoin enforcement of California Business and Professions Code section 22940.80 in its entirety, and by seeking to enjoin the conduct of parties not before the Court.

Throughout the litigation, the parties and courts have referred to the law challenged in this action as "section 22949.80," as a convenient shorthand for the provision at issue. To be precise, however, only the requirements of *subdivision (a)* of section 22949.80 have been challenged by Plaintiff, and those are the only requirements that have been considered and ruled on by this Court and Ninth Circuit. Plaintiffs have never shown and neither court has even considered whether the separate requirements of subdivision (b) are unconstitutional, and certainly no court has ruled on the validity of subdivision (b). Indeed, subdivision (b) is severable from the rest of the statute. *See id.*, subd. (f) (severability clause). For these reasons, Defendant intends to oppose Plaintiff's latest motion to ensure that any preliminary injunction issued by this Court is limited to the enforcement of subdivision (a) only.

As mentioned at the outset, Defendant's opposition will also argue that any preliminary injunction should be limited to the conduct of parties actually before the Court, not the conduct of anyone not a party to this action. *See* ECF No. 59-3 at 2 (Plaintiffs' proposed order applying injunction to various nonparty local and state officials).

Resolution of the scope of any preliminary injunction will likely affect next

steps in the litigation. Defendant therefore suggests that the Court rule on the motion and then set a status conference shortly thereafter.

Finally, Defendant asks that the Court grant an extension of time to file his response to the Complaint. The current deadline is May 22, 2024, which is two days after Defendant's deadline to file his opposition to Plaintiff's motion for preliminary injunction. Defendant therefore requests a 28-day extension to June 19, 2024. Plaintiffs have communicated to Defendant that they "take no position on Defendants' latest request for an extension of time to file a responsive pleading."

Dated: May 6, 2024

Respectfully Submitted,

ROB BONTA
Attorney General of California
MARK. R. BECKINGTON
Supervising Deputy Attorney General

s/ Gabrielle D. Boutin
Deputy Attorney General
Attorneys for Defendant Rob Bonta, in his official capacity as Attorney General of the State of California

Dated: May 6, 2024

Respectfully Submitted,

MICHEL & ASSOCIATES, P.C.

s/ Anna M. Barvir
ANNA M. BARVIR
Attorney for Plaintiffs Junior Sports Magazines Incorporated, Raymond Brown, California Youth Shooting Sports Association, Inc. Redlands California Youth Clay Shooting Sports Inc., California Rifle & Pistol Association, Inc., The CRPA Foundation, and Gun Owners of California

Dated: May 6, 2024

Respectfully Submitted,

LAW OFFICES OF DONALD KILMER, APC

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

ATTESTATION OF E-FILED SIGNATURES

I, Gabrielle D. Boutin, am the ECF User whose ID and password are being used to file this JOINT STATUS REPORT. In compliance with Central District of California L.R. 5-4.3.4, I attest that all signatories are registered CM/ECF filers and have concurred in this filing.

Dated: May 6, 2024

s/ Gabrielle D. Boutin
Gabrielle D. Boutin

CERTIFICATE OF SERVICE

Case Name: **Junior Sports Magazines Inc., et al. v. Rob Bonta, et al.** Case Number: **2:22-cv-04663-CAS-JC**

I hereby certify that on May 6, 2024, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

JOINT STATUS REPORT

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on May 6, 2024, at Los Angeles, California.

Dora Mora	*Dora Mora*
Declarant	Signature

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Attorney for Plaintiff Second Amendment Foundation

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUNIOR SPORTS MAGAZINES INC., RAYMOND BROWN, CALIFORNIA YOUTH SHOOTING SPORTS ASSOCIATION, INC., REDLANDS CALIFORNIA YOUTH CLAY SHOOTING SPORTS, INC., CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, THE CRPA FOUNDATION, AND GUN OWNERS OF CALIFORNIA, INC.; and SECOND AMENDMENT FOUNDATION,

Plaintiffs,

v.

ROB BONTA, in his official capacity as Attorney General of the State of California; and DOES 1-10,

Defendant.

Case No.: 2:22-cv-04663-CAS (JCx)

DECLARATION OF ANNA M. BARVIR IN SUPPORT OF PLAINTIFFS' MOTION TO ENFORCE THE MANDATE AND ISSUE PRELIMINARY INJUNCTION

Hearing Date: June 10, 2024
Hearing Time: 10:00 a.m.
Courtroom: 8D
Judge: Christina A. Snyder

DECLARATION OF ANNA M. BARVIR

1. I, Anna M. Barvir, am an attorney at the law firm Michel & Associates, P.C., attorneys of record for Plaintiffs in this action. I am licensed to practice law before the United States District Court for the Central District of California. I am also admitted to practice before the Eastern, Northern, and Southern Districts of California, as well as the courts of the state of California, the Supreme Court of the United States, and the D.C., Fourth, Ninth, and Tenth Circuit Courts of Appeals. I have personal knowledge of the facts set forth herein and, if called and sworn as a witness, could and would testify competently thereto.

2. After the Ninth Circuit mandate was issued and this case returned to this Court, this Court entered an order setting an April 8, 2024, status conference regarding filing and spreading the Ninth Circuit Mandate.

3. In preparation for that conference, the parties met and conferred on April 4, 2024, to discuss potential avenues for the efficient disposition of this case and other procedural matters. On behalf of Plaintiffs, I asked Mr. Kevin Kelly and Ms. Gabrielle Boutin, counsel for the State, to consider entering into a stipulation for entry of an order for a final judgment enjoining enforcement of section 22949.80. Counsel refused to do so at that time. Alternatively, I asked counsel for the State to stipulate to and jointly request an order for a preliminary injunction to protect my clients' interests pending further discussions or litigation. Counsel again refused and, instead, urged Plaintiffs to renew their motion for a preliminary injunction, stating that the State would either not oppose the motion or would file a non-opposition. We agreed to file a renewed motion for preliminary injunction with the understanding that the State would not file an opposition.

4. A day after meeting and conferring, however, Mr. Kelly emailed me to notify me that the State would oppose any preliminary injunction that was not limited to section 22949.80, subsection (a), claiming that such was the only restriction on speech the Ninth Circuit opinion addressed. Mr. Kelly also emailed

me that the State would request a second 30-day extension to respond to the complaint at the upcoming April 8 status conference.

5. During the April 8 status conference, the State requested 30 more days to respond to the Complaint—over Plaintiffs' objection that, without a preliminary injunction in place, the delay risked the further violation of Plaintiffs' First Amendment rights in violation of the Ninth Circuit's order. The Court did not enter a preliminary injunction, but the Court orally encouraged the parties to continue to meet and confer to resolve the case and, if possible, enter any order necessary to address the mandate. This Court also set another status conference for May 13, 2024, with a joint status conference statement due on May 6, 2024. The Court later continued the conference to May 15, 2024.

6. In compliance with this Court's guidance at the April 8 status conference, counsel for the parties exchanged correspondence discussing settlement and the scope of any order that would address the Ninth Circuit's mandate. On April 16, 2024, in light of the recent order granting a preliminary injunction against California Business & Professions Code § 22949.80 in the related *Safari Club International* case (*see* Dkt. No. 56), I asked Mr. Kelly and Ms. Boutin to stipulate to and jointly request this Court enter an identical order preliminarily enjoining § 22949.80 here. I also informed them that, if the parties could not agree to so stipulate, Plaintiffs would move for a preliminary injunction—as the State proposed they do during the April 4 meet-and-confer and as Plaintiffs informed the Court they would do during the April 8 status conference. Mr. Kelly responded that he did not believe that a preliminary injunction order was necessary and that if the Plaintiffs moved to have anything more than section (a) enjoined, the State would oppose such a motion.

7. Through their attorneys of record, the parties met and conferred one last time on May 2, 2024, to prepare for the May 15 case management conference. Once again, we discussed Plaintiffs' intention to move for a preliminary injunction

in hopes that the parties could come to an agreement. As a courtesy, I sent Ms. Boutin a draft of Plaintiffs' intended motion in advance of the call. The parties remained unable to come to an agreement, necessitating this motion.

8. A true and correct copy of the Ninth Circuit's opinion in *Junior Sports Magazines, Inc., v. Bonta*, 80 F.4th 1109 (9th Cir. 2023) is attached as **Exhibit A.**

I declare under penalty of perjury that the foregoing is true and correct. Executed within the United States on May 2, 2024.

s/ Anna M. Barvir
Anna M. Barvir
Declarant

EXHIBIT A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUNIOR SPORTS MAGAZINES INC.; RAYMOND BROWN; CALIFORNIA YOUTH SHOOTING SPORTS ASSOCIATION, INC.; REDLANDS CALIFORNIA YOUTH CLAY SHOOTING SPORTS, INC.; CALIFORNIA RIFLE AND PISTOL ASSOCIATION, INCORPORATED; THE CRPA FOUNDATION; GUN OWNERS OF CALIFORNIA, INC.; SECOND AMENDMENT FOUNDATION, *Plaintiffs-Appellants*, v. ROB BONTA, in his official capacity as Attorney General of the State of California; DOES 1 - 10, *Defendants-Appellees*.	No. 22-56090 D.C. No. 2:22-cv-04663-CAS-JC OPINION

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

Argued and Submitted June 28, 2023
Pasadena, California

Filed September 13, 2023

Before: N. Randy Smith, Kenneth K. Lee, and Lawrence VanDyke, Circuit Judges.

Opinion by Judge Lee;
Concurrence by Judge VanDyke

SUMMARY*

First Amendment/Commercial Speech

The panel reversed the district court's denial of plaintiffs' motion for a preliminary injunction seeking to enjoin, pursuant to the First and Fourteenth Amendments, a California law that prohibits the advertising of any "firearm-related product in a manner that is designed, intended, or reasonably appears to be attractive to minors." California Business and Professions Code § 22949.80.

The panel assumed that California's law regulates only commercial speech and that intermediate scrutiny applies.

Applying intermediate scrutiny, the panel first concluded that because California permits minors under supervision to possess and use firearms for hunting and other lawful

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

activities, Section 22949.80 facially regulates speech that concerns lawful activity and is not misleading. Next, the panel held that section 22949.80 does not directly and materially advance California's substantial interests in reducing gun violence and the unlawful use of firearms by minors. There was no evidence in the record that a minor in California has ever unlawfully bought a gun, let alone because of an ad. Finally, the panel held that section 22949.80 was more extensive than necessary because it swept in truthful ads about lawful use of firearms for adults and minors alike. Because plaintiffs had shown a likelihood of success on the merits and the remaining preliminary injunction factors weighed in plaintiffs' favor, the panel reversed the district court's denial of the preliminary injunction and remanded for further proceedings.

Concurring, Judge VanDyke wrote separately to emphasize that laws like section 2249.80, which attempt to use the coercive power of the state to eliminate a viewpoint from public discourse, deserve strict scrutiny. This circuit's precedent is ambiguous about whether viewpoint-discriminatory laws that regulate commercial speech are subject to strict scrutiny. In the appropriate case, this circuit should make clear they are.

COUNSEL

Anna M. Barvir (argued) and Carl D. Michel, Michel & Associates PC, Long Beach, California; Donald Kilmer, Law Offices of Donald Kilmer, Caldwell, Idaho; for Plaintiffs-Appellants.

Gabrielle D. Boutin (argued), Deputy Attorney General, Office of the California Attorney General, Sacramento, California; Kevin J. Kelley, Deputy Attorney General, Mark R. Beckington, Supervising Deputy Attorney General; Thomas S. Patterson, Senior Assistant Attorney General; Rob Bonta, California Attorney General; Office of the California Attorney General, Los Angeles, California; for Defendants-Appellees.

Marc J. Randazza, Randazza Legal Group PLLC, Las Vegas, Nevada; Jay M. Wolman, Randazza Legal Group PLLC, Hartford, Connecticut; for Amicus Curiae Second Amendment Law Center, Jews for the Preservation of Firearm Ownership, and Citizens' Committee for the Right to Keep and Bear Arms.

OPINION

LEE, Circuit Judge:

This case is not about whether children can buy firearms. (They cannot under California law.) Nor is this case about whether minors can legally use firearms. (California allows minors under adult supervision to possess and use firearms for hunting, target practice, and other activities.) And this

case is not about whether California has tools to combat the scourge of youth gun violence. (It does.)

Rather, this case is about whether California can ban a truthful ad about firearms used legally by adults and minors—just because the ad "reasonably appears to be attractive to minors." So, for example, an ad showcasing a safer hunting rifle with less recoil for minors would likely be unlawful in California. Under our First Amendment jurisprudence, states can ban truthful and lawful advertising only if it "materially" and "directly" advances a substantial government interest and is no more extensive than necessary. California likely cannot meet this high bar.

While California has a substantial interest in reducing gun violence and unlawful use of firearms by minors, its law does not "directly" and "materially" further either goal. California cannot straitjacket the First Amendment by, on the one hand, allowing minors to possess and use firearms and then, on the other hand, banning truthful advertisements about that lawful use of firearms. There is no evidence in the record that a minor in California has ever unlawfully bought a gun, let alone because of an ad. Nor has the state produced any evidence that truthful ads about lawful uses of guns—like an ad about hunting rifles in Junior Sports Magazines' *Junior Shooters*—encourage illegal or violent gun use among minors. Simply put, California cannot lean on gossamers of speculation to weave an evidence-free narrative that its law curbing the First Amendment "significantly" decreases unlawful gun use among minors. The First Amendment demands more than good intentions and wishful thinking to warrant the government's muzzling of speech.

California's law is also more extensive than necessary, as it sweeps in truthful ads about lawful use of firearms for adults and minors alike. For instance, an advertisement directed at adults featuring a camouflage skin on a firearm might be illegal because minors may be attracted to it.

Because Junior Sports Magazines has shown a likelihood of success on the merits and the remaining *Winter* factors favor it, we reverse the district court's denial of preliminary injunction and remand. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

BACKGROUND

I. California enacts § 22949.80 to prohibit advertising firearm-related products "in a manner that is designed, intended, or reasonably appears to be attractive to minors."

California's gun restriction laws are considered among the strictest of any state in the nation. *2023 Everytown Gun Law Rankings*, Everytown Rsch. & Pol'y (Jan. 12, 2023), https://everytownresearch.org/rankings. Yet firearm-related activities, such as hunting and sport shooting, remain popular among Californians, including minors, across a vast swath of this state. *See, e.g.*, *License Statistics: Hunting Licenses*, Cal. Dept. of Fish & Wildlife (last visited July 24, 2023), https://wildlife.ca.gov/Licensing/Statistics/action/review/content/6949#huntinglicenses. California allows minors—with the consent or supervision of a parent or guardian—to possess and use firearms for "lawful, recreational sport, including, but not limited to, competitive shooting, or agricultural, ranching, or hunting activity." Cal. Penal Code §§ 29615, 29610. In fact, California law encourages and incentivizes lawful firearm use among minors. *See, e.g.*,

Hunting Licenses and Tags, Cal. Dep't of Fish & Wildlife, https://wildlife.ca.gov/licensing/hunting (offering discounted license fees for "junior hunters," *i.e.*, those under sixteen years old).

Amid concerns about gun violence, however, the California legislature recently became wary of youth interest in firearms. According to the legislature, "the proliferation of firearms to and among minors poses a threat to the health, safety, and security of all residents of, and visitors to, [the] state," as "[t]hese weapons are especially dangerous in the hands of minors." Assemb. B. 2571, Ch. 77 § 1 (Cal. 2022). The legislature thus sought to quell that interest. But rather than repeal California's firearm-possession laws for minors (which could spark opposition from many Californians who use firearms lawfully), the legislature chose to regulate the "firearm industry" by limiting what it can say in the state. The resulting law, Assembly Bill (AB) 2571, is the subject of this appeal.

AB 2571, as later amended by AB 160, is codified at § 22949.80 of the California Business and Professions Code. The statute mandates that "[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." Cal. Bus. & Prof. Code § 22949.80(a)(1). It thus applies only to marketing or advertising, which it defines as making, "in exchange for monetary compensation, . . . a communication, about a product, the primary purpose of which is to encourage recipients of the communication to engage in a commercial transaction." *Id.* § 22949.80(c)(6). The law does not apply, however, to communications "offering or promoting" firearm safety programs, shooting

competitions, hunting activities, or membership in any organization. *Id.* § 22949.80(a)(3).

For advertisements that fall within the scope of the regulation, § 22949.80 prescribes a totality-of-the-circumstances test to determine whether the marketing is "attractive to minors." *Id.* § 22949.80(a)(2). This assessment considers, for example, whether the advertisement "[o]ffers brand name merchandise for minors"; "[o]ffers firearm-related products in sizes, colors, or designs that are specifically designed to be used by, or appeal to, minors"; or "[u]ses images or depictions of minors in advertising and marketing materials to depict the use of firearm-related products." *Id.* § 22949.80(a)(2)(B)–(C), (E).

Section 22949.80 is enforced with civil penalties not exceeding $25,000 for each violation, and injunctive relief is available "as the court deems necessary to prevent the harm described in this section." *Id.* § 22949.80(e)(1), (4).

II. The district court denies Junior Sports Magazines Inc. preliminary injunctive relief against the enforcement of § 22949.80.

Junior Sports Magazines Inc. publishes *Junior Shooters*, a youth-oriented magazine focused on firearm-related activities and products. According to Junior Sports Magazines, its ability to publish *Junior Shooters* depends on advertising revenue. Fearing liability under § 22949.80, Junior Sports Magazines has ceased distributing the magazine in California and has placed warnings on its website deterring California minors from accessing its content.

Shortly after California enacted AB 2571, Junior Sports Magazines challenged its constitutionality under the First

and Fourteenth Amendments. Junior Sports Magazines also moved to preliminarily enjoin the enforcement of § 22949.80. The district court denied the injunction, however, determining that Junior Sports Magazines was not likely to succeed on the merits of its claims. In particular, the court found that § 22949.80 regulates only commercial speech. It thus did not review the law under strict scrutiny—as would typically apply to laws restricting speech—and instead applied the less-stringent intermediate scrutiny standard established by *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Under this standard, the court found that § 22949.80 is likely constitutional, determining that the law is no more restrictive than necessary to advance the government's substantial interest in reducing unlawful firearm possession and preventing violence. Junior Sports Magazines timely appealed the district court's order.

STANDARD OF REVIEW

"A plaintiff seeking a preliminary injunction must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. The most important among these factors is the likelihood of success on the merits. *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018). This is especially true for constitutional claims, as the remaining *Winter* factors typically favor enjoining laws thought to be unconstitutional. *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *see also Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 837–38 (9th Cir. 2020) (order).

We review the district court's denial of a preliminary injunction for an abuse of discretion. *Harris v. Bd. of Supervisors*, 366 F.3d 754, 760 (9th Cir. 2004). Whether factual findings satisfy a First Amendment legal standard, like the *Central Hudson* test, however, is reviewed de novo. *See Peel v. Atty. Registration & Disciplinary Comm'n*, 496 U.S. 91, 108 (1990); *Prete v. Bradbury*, 438 F.3d 949, 967 (9th Cir. 2006).

DISCUSSION

The parties dispute whether we should review § 22949.80 as a restriction of purely commercial speech under the test announced in *Central Hudson* or as a content- and viewpoint-based restriction of speech under strict scrutiny review. We need not decide this issue because "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011). We thus assume that California's law regulates only commercial speech and that *Central Hudson*'s intermediate scrutiny applies.[1]

[1] Junior Sports Magazines contends that the Supreme Court in *Sorrell* suggested that even commercial speech restrictions "must be tested by heightened judicial scrutiny" if they are content or viewpoint discriminatory. *Sorrell*, 564 U.S. at 563, 566. But California responds that our court has read *Sorrell* narrowly, holding that intermediate scrutiny still applies for at least content-based restrictions on commercial speech. *See Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 847 (9th Cir. 2017) (en banc). *But see Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 703, 705, 707–08 (6th Cir. 2020) ("[T]he intermediate-scrutiny standard applicable to commercial speech . . . applies only to a speech regulation that is content-neutral on its face."). We, however, do not need to answer this question to decide this case.

And even assuming that intermediate scrutiny applies, California's advertising restriction likely imposes an unconstitutional burden on protected speech. The state has made no showing that broadly prohibiting certain truthful firearm-related advertising is sufficiently tailored to significantly advance the state's goals of preventing gun violence and unlawful firearm possession among minors. Because California fails to satisfy its burden to justify the proposed speech restriction, Junior Sports Magazines is likely to prevail on the merits of its First Amendment claim.

I. Junior Sports Magazine is likely to succeed on the merits of its First Amendment claim.

When a statute restricts only commercial speech, *Central Hudson* provides a multipart test to assess whether the law is constitutional. Under this framework, we first ask whether the regulated speech is misleading or concerns unlawful activity. *See Central Hudson*, 447 U.S. at 563–64. Such speech receives no First Amendment protection. *See id.* If the regulated speech "is neither misleading nor related to unlawful activity, the government's power is more circumscribed." *Id.* at 564. It thus becomes the state's burden to show that the statute directly and materially advances a substantial governmental interest and that "it is not more extensive than is necessary to further that interest." *Id.* at 566; *see also Edenfield v. Fane*, 507 U.S. 761, 767 (1993); *Sorrell*, 564 U.S. at 572.

We hold that California has failed to justify its infringement on protected speech under the Supreme Court's *Central Hudson* framework.

A. Section 22949.80 regulates speech that is not misleading and that concerns lawful activity.

The state contends that § 22949.80 regulates misleading speech about unlawful activity because California law prohibits firearm sales to minors and restricts firearm possession by minors.

But California's argument founders on the fact that it permits minors under adult supervision to possess and use firearms for hunting, shooting competitions, and other lawful activities. Cal. Penal Code §§ 29615, 29610. So California's prohibition on advertisements that "reasonably appear[] to be attractive to minors" would include messages about legal use of guns by minors. For example, many Californians hunt with their children, but it would likely be unlawful for a firearm industry member to show that lawful activity in its advertisements—not because it is misleading or involves illegal acts but because it "[u]ses images or depictions of minors . . . to depict the use of firearm-related products." Cal. Bus. & Prof. Code § 22949.80(a)(2)(E).

In addition, § 22949.80 does not apply only to speech soliciting minors to purchase or use firearms unlawfully. Instead, it applies to any advertisements "offering or promoting 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) (emphasis added). Because of this broad wording, § 22949.80 facially encompasses speech directed at adults—who can lawfully purchase firearms—whenever that speech might also reach minors. That alone refutes the state's argument that the law inherently concerns unlawful activity. *See Educ. Media Co. at Va. Tech v. Swecker*, 602 F.3d 583, 589 (4th Cir. 2010) ("[A]dvertisements for age-restricted—but otherwise lawful—products concern lawful activity where the audience comprises both underage and of-age members."); *Centro de la Comunidad Hispana de Locust*

Valley v. Town of Oyster Bay, 868 F.3d 104, 113–14 (2d Cir. 2017) (holding that "commercial speech is not categorically removed from" *Central Hudson*'s test unless "all manifestations of the restricted speech" are misleading or relate to unlawful activity").

We thus hold that § 22949.80 facially regulates speech whose content concerns lawful activities and is not misleading. We now address whether the state has met its burden to show that the law directly and materially advances a substantial governmental interest and is no more extensive than necessary. We conclude that it has not.

B. Section 22949.80 does not directly and materially advance California's substantial interests.

California articulates two interests for its speech restriction: (1) preventing unlawful possession of firearms by minors and (2) protecting its citizens from gun violence and intimidation. We recognize that these interests are substantial. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 435 (2002) (plurality opinion); *Nordyke v. Santa Clara County*, 110 F.3d 707, 713 (9th Cir. 1997).

But simply having a substantial interest does not validate the state's advertising prohibition. Under *Central Hudson*, a state seeking to justify a restriction on commercial speech bears the burden to prove that its law directly advances that interest to a material degree. 447 U.S. at 564; *Edenfield*, 507 U.S. at 770. To satisfy its burden, California must provide evidence establishing "that the harms it recites are real," *Edenfield*, 507 U.S. at 770–71, and that its speech restriction will "*significantly*" alleviate those harms, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505–06 (1996) (plurality opinion). This burden is at its highest where, as here, a state "takes aim at accurate commercial information," *44*

Liquormart, 517 U.S. at 503, 507 (plurality opinion), in an express effort to regulate "a popular but disfavored product," *Sorrell*, 564 U.S. at 577–79.

California's defense of § 22949.80 falls well short of this requirement. The state insists that the law will advance its substantial interests by dampening demand for firearms among minors. Yet every argument that it makes to bolster this theory lacks supporting evidence.

To start with the obvious, a state may not restrict protected speech to prevent something that does not appear to occur. *See Edenfield*, 507 U.S. at 770–71. Yet here—despite enacting a bill whose statement of purpose asserts that "[f]irearms marketing contributes to the unlawful sale of firearms to minors"—the state admitted at oral argument that it is unaware of a *single* instance in which a minor unlawfully bought a firearm in California (presumably because a minor would not pass background check and other requirements). Assemb. B. 2571, Ch. 77 § 1 (Cal. 2022); *cf. Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 557–61 (2001) (citing multiple studies connecting tobacco-industry advertising to underage tobacco use). And if the state cannot cite a single case of a minor in California unlawfully buying a gun, then an advertisement about firearms logically could not have contributed to such a sale.

Changing tack, the state contends that because firearm advertising generally creates demand for firearm-related products, it also increases the overall likelihood that minors will illegally *possess and use* those products—not just purchase them. The state reasons that by restricting firearm-related advertising, § 22949.80 will materially prevent unlawful firearm possession and limit gun violence. Rather than support this argument with any evidence, California

maintains that "common sense"—which, in reality, is just speculation here—provides all the justification it needs. But the First Amendment requires more than fact-free inferences to justify governmental infringement on speech.

There are certainly cases in which "history, consensus, and 'simple common sense"' are enough to justify a law restricting speech. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992)). But a state can invoke "common sense" only if the connection between the law restricting speech and the government goal is so direct and obvious that offering evidence would seem almost gratuitous. But as the government's justifications for a regulation become more attenuated, bare appeals to common sense quickly veer into impermissible speculation. In such cases, the state needs to provide evidence to substantiate that its law will meaningfully further its stated objectives.

The Supreme Court's decision in *44 Liquormart, Inc. v. Rhode Island*, is instructive. Rhode Island had banned advertising alcohol prices, arguing that the law would decrease price competition and ultimately lead to less alcohol consumption. *44 Liquormart*, 517 U.S. at 489, 504–05. Writing for a plurality of the Court, Justice Stevens conceded that common sense could suggest that a ban on pricing advertisements would tend to lead to less price competition, causing higher market prices. *Id.* at 505. He further assumed that demand for alcohol is "somewhat lower" when prices are higher. *Id.* But the Court concluded that the state had to do more than appeal to common sense and a chain of inferences to prove that the law would "*significantly* advance the State's interest in promoting temperance": it had to provide "evidentiary support." *Id.* (emphasis added); *see also id.* at 523 (Thomas, J.,

concurring) (disagreeing with the plurality's approach as too permissive); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188–89 (1999) (noting that even if "advertising concerning casino gambling increases demand for such gambling, which in turn increases the amount of casino gambling that produces those social costs . . . . it does not necessarily follow that the Government's speech ban has directly and materially furthered the asserted interest").

California's argument suffers from a similar flaw. To be sure, we agree that advertising can theoretically stimulate demand. *See Coyote Pub., Inc. v. Miller*, 598 F.3d 592, 608 (9th Cir. 2010).[2] But that is not enough here for the simple reason that firearm use by minors is not per se unlawful. As explained earlier, California allows minors to possess and use guns with adult supervision for hunting, shooting competitions, target practice, and other lawful activities. California even encourages demand for gun use by minors by giving permit discounts for young hunters. *See Greater New Orleans Broad*, 527 U.S. at 189 ("[A]ny measure of the effectiveness of the Government's attempt to minimize the social costs of gambling cannot ignore Congress' simultaneous encouragement of tribal casino gambling.").

[2] California argues that this truism is enough to meet its burden, citing cases involving limitations on tobacco and alcohol advertisements. *See, e.g.*, *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 539–41 (6th Cir. 2012) (underage smoking); *Swecker*, 602 F.3d at 589–90 (underage drinking). But minors cannot legally consume tobacco or alcohol, so ads touting those products to minors would be per se unlawful. In contrast, minors are allowed to use firearms with adult supervision in California for certain activities. Moreover, that advertising contributes to underage substance use is an empirically supported consensus opinion. *See Lorillard Tobacco Co.*, 533 U.S. at 557–61 (citing studies); *Disc. Tobacco*, 674 F.3d at 541.

Given that minors can use guns in California, dampened demand for firearms among minors cannot by itself be a substantial government interest. Rather, decreasing demand for firearms can only be a means to an end for California. Ultimately, the state hopes that § 22949.80's restrictions on truthful advertising will decrease demand for guns, which in turn will "*significantly* reduce" either *unlawful* firearm possession by minors or gun violence. *See 44 Liquormart*, 517 U.S. at 505 (plurality opinion).

But by relying on a chain of inferences, California cannot merely gesture to "common sense" to meet its burden of showing that the law will "significantly" advance its goals. If anything, "common sense" suggests the contrary: minors who unlawfully use guns for violence likely are *not* doing so because of, say, an advertisement about hunting rifles in *Junior Shooters* magazine. The state has provided no evidence—or even an anecdote—that minors are unlawfully using firearms because of advertisements for guns by the firearm industry. With no evidence connecting truthful and lawful firearm advertising to unlawful firearm possession or gun violence, California has not shown that § 22949.80 directly advances its interests to a material degree. *See id.* at 505–07; *Greater New Orleans Broad.*, 527 U.S. at 189. And even if California could provide some evidence, it would have to show that its law restricting speech would "significantly" advance the state's goals. *44 Liquormart*, 517 U.S at 505 (plurality opinion).

In the end, California spins a web of speculation—not facts or evidence—to claim that its restriction on speech will significantly curb unlawful firearm use and gun violence among minors. The First Amendment cannot be so easily trampled through inferences and innuendo. We thus conclude that California has not justified its intrusion on

protected speech. To hold otherwise "would require us to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest." *44 Liquormart*, 517 U.S. at 505–07 (plurality opinion) (quoting *Edenfield*, 507 U.S. at 770).

C. Section 22949.80 is more extensive than necessary.

Even if California's advertising restriction significantly slashes gun violence and unlawful use of firearms among minors, the law imposes an excessive burden on protected speech. *Central Hudson* requires the government to show "a reasonable fit between the means and ends of the regulatory scheme," *Lorillard Tobacco Co.*, 533 U.S. at 561, such that the "suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State's interest," *Central Hudson*, 447 U.S. at 569–70. So "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002); *see also Central Hudson*, 447 U.S. at 566 n.9 ("We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy."); *Sorrell*, 564 U.S. at 575 (citing *44 Liquormart*, 517 U.S. at 503 (plurality opinion)).

We emphasize again that § 22949.80 is not limited to speech encouraging minors to illegally buy firearms. Nor is it circumscribed to reach only speech depicting unlawful possession of firearms. It also is not narrowly focused on speech encouraging minors to engage in unlawful uses of firearms. *See Sorrell*, 564 U.S. at 573. And it does not target

advertisements in contexts geared exclusively to minors. *See, e.g.*, *Swecker*, 602 F.3d at 590–91 (affirming the constitutionality of an alcohol advertising restriction that applied only to "campus publications targeted at students under twenty-one"). Instead, it applies to any firearm-product advertisement—no matter the audience—so long as it "reasonably appears to be attractive to minors."

Under the plain—and sweeping—language of the statute, a company potentially could not market a camouflage-colored gun for adults because it could "reasonably appear[] to be attractive to minors." § 22949.80(a)(1). And bizarrely, California's law would likely ban advertisements promoting safer guns for minors—for example, a hunting rifle designed for young hunters that has less recoil or that comes with a more secure trigger safety—if they are directed at minors and their parents. *Id.*

In view of its apparent lack of any limiting principles, § 22949.80 effectively constitutes a blanket restriction on firearm-product advertising. A speech restriction of that scope is not constitutionally sound under any standard of review. *See Lorillard Tobacco Co.*, 533 U.S. at 561–65 (determining that a regulation "prohibit[ing] any smokeless tobacco or cigar advertising within 1,000 feet of schools or playgrounds" was too broad because "[i]n some geographical areas, [it] would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers"); *Valle Del Sol*, 709 F.3d at 826.

Because the state cannot justify its broad advertising restriction, we conclude that Junior Sports Magazines is likely to prevail on the merits of its First Amendment claim.[3]

II. Because Junior Sports Magazines is likely to succeed on the merits, the remaining *Winter* factors weigh in its favor.

After demonstrating a likelihood of success on the merits of its claim, a party seeking a preliminary injunction must establish that it is "likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "When the government is a party, the last two factors merge." *Azar*, 911 F.3d at 575; *see also Nken v. Holder*, 556 U.S. 418, 435 (2009).

But when a party has established likelihood of success on the merits of a constitutional claim—particularly one involving a fundamental right—the remaining *Winter* factors favor enjoining the likely unconstitutional law. *See Melendres*, 695 F.3d at 1002 ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))); *Index Newspapers*, 977 F.3d at 838 (recognizing "the significant public interest in upholding First Amendment principles" (quoting *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012))). It is no different here.

CONCLUSION

[3] Given this holding, we need not address its constitutional association and equal protection claims.

California has many tools to address unlawful firearm use and violence among the state's youth. But it cannot ban truthful ads about lawful firearm use among adults and minors unless it can show that such an intrusion into the First Amendment will significantly further the state's interest in curtailing unlawful and violent use of firearms by minors. But given that California allows minor to use firearms under adult supervision for hunting, shooting, and other lawful activities, California's law does not significantly advance its purported goals and is more extensive than necessary. In sum, we hold that § 22949.80 is likely unconstitutional under the First Amendment, and we thus **REVERSE** the district court's denial of a preliminary injunction and **REMAND** for further proceedings consistent with this opinion.

VANDYKE, Circuit Judge, concurring,

California wants to legislate views about firearms. The record for recently enacted California Assembly Bill 2751 (AB 2751) indicates a legislative concern that marketing firearms to minors would "seek[] to attract future legal gun owners," and that that's a negative thing. No doubt at least some of California's citizens share that view. They may dream that someday everyone will be repulsed by the thought of using a firearm for lawful purposes such as hunting and recreation. But just as surely some of California's citizens disagree with that view. Many hope their sons and daughters will learn to responsibly use firearms for lawful purposes. Firearms are controversial products, and don't cease to be so when used by minors. But as the majority opinion explains well, there are a variety of

ways a minor can lawfully use firearms in California. And the State of California may not attempt to reduce the demand for lawful conduct by suppressing speech favoring that conduct while permitting speech in opposition. That is textbook viewpoint discrimination.

That is precisely what California did in Assembly Bill 2751. Under this law, those who want to discourage minors from lawfully using firearms (such as for hunting or shooting competitions) are free to communicate their messages. Certain speakers ("firearm industry members") who want to promote the sale of firearms to minors, however, are silenced. I agree with the majority opinion that, even assuming intermediate scrutiny applies, California's nascent speech code cannot withstand it. I write separately to emphasize that laws like AB 2751, which attempt to use the coercive power of the state to eliminate a viewpoint from public discourse, deserve strict scrutiny. Our circuit's precedent is ambiguous about whether viewpoint-discriminatory laws that regulate commercial speech are subject to strict scrutiny. In the appropriate case, we should make clear they are.

I. The California Legislature and Governor Targeted Speech that Encourages Lawful Conduct They Dislike.

In June 2022, California enacted Assembly Bill 2751. AB 2751 restricts speech on the basis of viewpoint. "If a law is facially neutral, we will not look beyond its text to investigate a possible viewpoint-discriminatory motive." *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 899 (9th Cir. 2018). But AB 2751 is not "facially neutral" between viewpoints on the topic of minors using firearms. *Id.* It prohibits advertisements about the use of firearms by

minors that make a "firearm-related product … appear[] to be attractive to minors," while allowing those that don't. Cal. Bus. & Prof. Code § 22949.80(a)(1). More specifically, the law prohibits "firearm industry members" from "advertis[ing], market[ing], or arrang[ing] 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." *Id.* Because the law discriminates on its face, "we may peel back the legislative text and consider legislative history and other extrinsic evidence to probe the legislature's true intent." *Interpipe Contracting, Inc.*, 898 F.3d at 899.

When the text is peeled back, the legislative record indicates an intention that the law will stop the message that minors should lawfully use firearms, and a hope that the law will prevent minors from eventually becoming adults who have a favorable view of gun ownership and use. The very beginning of the legislative analysis of the bill identifies the messages that California attempted to stop in passing AB 2571: messages that "entice children to be interested in possessing and using firearms." One of the legislators who authored AB 2751 lamented in the press release announcing the bill that "[g]un manufacturers view children as their next generation of advocates." Revealing even more animus, the bill's author characterized firearms designed for minors as "disturbing products."

The record also indicates that California viewed stopping youth from possessing firearms as itself a compelling interest, independent of California's concern with gun violence or misuse of firearms. AB 2751 itself includes a finding that California, independent of any concern for gun violence, "has a compelling interest in ensuring that minors do not possess these dangerous weapons." The analysis

prepared for the Assembly Committee on Judiciary explicitly separated California's interest in "protecting its citizens" from its "compelling interest in ensuring that minors do not possess these dangerous weapons."

Elsewhere in the legislative record, it is indicated that the bill "[was] prompted by the incidence of marketing and advertising of firearm-related products to children," advertising that "arguably [sought] to attract future legal gun owners." California is concerned with the prospect of children growing up to become "legal" gun owners. One ostensibly concerning example of marketing was a gun manufacturer marketing a firearm as being "the first in a line of shooting platforms that will *safely* help adults introduce children to the shooting sports." (Emphasis added.). The same analysis quotes a news article stating that some members of the gun industry "see kids as a vital group of future gun buyers who need to be brought into the fold at a young age."

The bill's author warns: "Gun manufacturers view children as their next generation of advocates and customers." Thus, the State must take "away" the "tool" of advertisement "from the gun industry." The author's animus toward positive messages about firearm usage is underlined by the legislative record's reference to a report criticizing the firearm industry's purported attempt to cultivate interest in firearms from minors.

The governor of California, who sponsored the bill, shared the legislature's open animus against the messages targeted by AB 2751. The announcement that Governor Newsom signed the bill stated that the "legislation … directly targets the gun lobby and [firearm] manufacturers." After signing the law, Governor Newsom

took to Twitter and described the messages prohibited by the bill as "sick marketing ploys" and stated that the bill "goes into effect immediately because decent human beings, people with common sense, know that we should not be allowing [these messages]."

The executive branch and the bill's proponents in the legislature did not work in vain to extinguish a viewpoint from the public discussion on firearms. AB 2751 effectively removes one viewpoint from the public conversation over the proper role of firearms in our society, while leaving the opposite viewpoint free to participate. Under AB 2751, those opposed to minors using firearms for competitions, hunting, and other lawful uses may advocate against such usage. Those who "advocat[e] for the purchase, use, or ownership of firearm-related products," however, may not promote firearm-related products to minors, even though the minors can use these products for lawful activities. *See, e.g.*, Cal. Bus. & Prof. Code § 22949.80(a)(1), (c)(4)(B).

Take, for example, a picture depicting a father and son hunting. Without worrying about violating any California law, that picture could be placed in a magazine with the tagline, "Unsafe! Kids Should Shoot Baskets, Not Birds." AB 2751 would, however, prohibit a gun manufacturer from placing an advertisement using that very same picture with the tagline, "Our New Rifle Shoots with Precision and Minimal Recoil—Great for Training Young Shooters to Shoot Safely!" AB 2751 would suppress the latter while permitting the former. "This is blatant viewpoint discrimination." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 124 (2001) (Scalia, J., concurring); *see also Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (noting that the "essence of viewpoint discrimination" is when a law

"reflects the Government's disapproval of a subset of messages it finds offensive" (citation omitted)).

California has thus singled out a particular message it does not like and prohibited its proliferation. Its intent to stamp out this speech is evident from the record. And it crafted a targeted legislative scheme to get the job done. This kind of effort to stamp out disliked viewpoints deserves the strictest of scrutiny. "A legislature cannot privilege one set of speakers as the good guys, while restraining another set of speakers as the baddies." *Ass'n of Nat. Advertisers, Inc. v. Lungren*, 44 F.3d 726, 739 (9th Cir. 1994) (Noonan, J., dissenting).

II. California's Undisguised Viewpoint-Discrimination Should Be Subjected to Strict Scrutiny.

The First Amendment, almost universally, "forbids" laws that restrict speech on the basis of viewpoint. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). The Supreme Court has carved out one exemption allowing the government to discriminate between viewpoints: when the government is itself speaking. *See, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001). The Court has not been so explicit about carving out any restriction from the First Amendment's blanket disapprobation of viewpoint discrimination for when the speech is commercial. Given the strong default rule that viewpoint-discriminatory laws are simply impermissible under the First Amendment, and the lack of an express carveout for commercial speech restrictions, there is no good reason a law like AB 2751 should be subjected to anything less than strict scrutiny. Admittedly, our own circuit's precedent leaves room to argue for a lower level of scrutiny. But as explained below, our precedent doesn't compel a

lower level of scrutiny either. And it would be good for us to clarify in the right case that commercial speech isn't an exception to the almost-universal rule that governmental attempts to police viewpoints are subjected to the highest form of judicial skepticism.

Start with first principles. Government action that regulates speech on the basis of that speech's *content* is inherently suspect and "presumptively unconstitutional" under the First Amendment. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). A content-based restriction regulates the "public discussion of an entire topic." *Id.* at 156 (citation omitted). If California had, for example, prohibited any advertisements related to the use of firearms by minors, then arguably it would have been engaging "only" in content-based discrimination.

But courts have always viewed attempts to regulate *viewpoints* with even greater suspicion than regulating content. Viewpoint discrimination is a type of content discrimination, but a "more blatant" type, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995), which is why the Supreme Court has described the First Amendment as almost universally "forbid[ding] the government [from] regulat[ing] speech in ways that favor some viewpoints or ideas at the expense of others," *Members of City Council*, 466 U.S. at 804. Viewpoint discrimination falls only a little short of being per se invalid under the First Amendment. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (noting that content-based restrictions

"must satisfy strict scrutiny," but "restrictions based on viewpoint are prohibited").[1]

Indeed, the reason for this "pocket of absolutism" in the Court's First Amendment jurisprudence, where it almost never permits viewpoint-discriminatory speech restrictions, is not hard to comprehend.[2] "The First Amendment creates an open marketplace in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 309 (2012) (cleaned up). When the government attempts to stamp out the presentation of one viewpoint, no matter how much the government may dislike it, it short-circuits the public's ability to reason together. "The best test of truth is the power of the thought to get itself accepted in the competition of the market, and the people lose when the government is the one deciding which ideas should prevail." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (cleaned up).

[1] The Supreme Court has repeatedly emphasized the First Amendment's near-absolute prohibition on laws that restrict speech based on the viewpoint of the speaker. *See Fowler v. Rhode Island*, 345 U.S. 67, 69–70 (1953) (citing *Niemotko v. Maryland*, 340 U.S. 268, 273–73 (1951)); *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785–86 (1978); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48–49 (1983); *Members of City Council*, 466 U.S. at 804; *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993); *Rosenberger*, 515 U.S. at 828–29; *Iancu*, 139 S. Ct. at 2299.

[2] Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 4:8.

Putting first principles to the side, the Supreme Court has also stated that "the Constitution … accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980). California argues that this means that AB 2751 need withstand only *Central Hudson*'s intermediate scrutiny. But as multiple circuits have indicated, even though *content*-based speech restrictions on commercial speech must only survive intermediate scrutiny, there is good reason to conclude that a law restricting commercial speech on the basis of *viewpoint* merits strict scrutiny. *See Greater Phila. Chamber of Com. v. City of Philadelphia*, 949 F.3d 116, 139 (3d Cir. 2020) ("We realize, of course, that it may be appropriate to apply strict scrutiny to a restriction on commercial speech that is viewpoint-based."); *Dana's R.R. Supply v. Att'y Gen., Fla.*, 807 F.3d 1235, 1248 (11th Cir. 2015) ("[M]erely wrapping a law in the cloak of 'commercial speech' does not immunize it from the highest form of scrutiny due government attempts to discriminate on the basis of viewpoint."); *cf. Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 708 (6th Cir. 2020) (applying strict scrutiny to a restriction of commercial speech based on content).

The Supreme Court has never invoked *Central Hudson* to apply intermediate scrutiny to a law that discriminates between viewpoints, even in the commercial context. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 434 (1992) (Stevens, J., concurring in the judgment) (noting that "in upholding subject-matter regulations we have carefully noted that viewpoint-based discrimination was not implicated"). The closest the Supreme Court has come to addressing whether commercial speech restrictions enjoy an exemption from the

default rule of strict scrutiny for viewpoint discrimination was in *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011). The Court there described the law's "practical operation" as "go[ing] beyond mere content discrimination[] to actual viewpoint discrimination." *Id.* at 565. The Court thus concluded that "heightened judicial scrutiny [was] warranted." *Id.* Although it did not there define "heightened judicial scrutiny," the Court cited two cases, one of which discussed intermediate scrutiny and one of which discussed strict scrutiny. *See id.* (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 (1993) (discussing intermediate scrutiny), and *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994) (discussing strict scrutiny)).

The Supreme Court noted that it could apply either "a special commercial speech inquiry," *i.e.*, something like *Central Hudson*'s intermediate scrutiny, "or a stricter form of judicial scrutiny." *Id.* at 571. The Court then assumed without deciding that something like *Central Hudson*'s intermediate scrutiny applied because "the outcome [was] the same" regardless of which scrutiny the Court applied. *Id.* But if the Court in *Sorrell* had definitely concluded that commercial speech restrictions receive less than strict scrutiny even when they target certain viewpoints, it would have been odd for it to merely assume that something like intermediate scrutiny applied. *Sorrell* thus suggests that the Supreme Court has never carved out commercial speech from the default rule that viewpoint-discriminatory speech restrictions invoke strict scrutiny. It certainly doesn't compel the opposite conclusion.

The fact that the Supreme Court has never expressly exempted commercial speech from the standard application of strict scrutiny for viewpoint-discriminatory laws is especially probative given that the Court *has* exempted

government speech, and done so expressly. As several members of the Court pointed out, "[i]t is telling that the Court's precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or recruiting others to communicate a message on its behalf." *Matal v. Tam*, 582 U.S. 218, 253 (2017) (Kennedy, J., concurring in part and concurring in the judgment). "[W]hen the government speaks for itself, the First Amendment does not demand airtime for all views." *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1587 (2022). By contrast, the Court has never clearly exempted commercial speech.

Indeed, it is not even clear that our own circuit's precedent requires we subject a law like AB 2751 to anything less than strict scrutiny. California cites *Retail Digital Network, LLC v. Prieto* to support its contention that AB 2751, even if content-based, should receive only intermediate scrutiny. *See* 861 F.3d 839, 846 (9th Cir. 2017) (en banc). That is because our court there held that *Sorrell* did not change the applicability of *Central Hudson*'s intermediate scrutiny test to content-based restrictions on commercial speech. *Id.* at 849. Then-Chief Judge S.R. Thomas wrote a persuasive dissent in that case, explaining how our court misread *Sorrell*. *Id.* at 851. I agree with him that *Sorrell* "requires 'heightened judicial scrutiny,' rather than traditional intermediate scrutiny under *Central Hudson*." *Id.*

But putting aside whether *Retail Digital Network* was correctly decided, it is not obvious that the analysis in *Retail Digital Network* even controls laws that, like here, discriminate on the basis of viewpoint. Our court in *Retail Digital Network* never discussed the relevance of the test applied in *Sorrell* to *viewpoint*-based restrictions on

commercial speech. The court instead reasoned that *Sorrell* did not change the applicability of *Central Hudson* to *content*-based restrictions on speech. *Id.* at 848–49. While *Retail Digital Network* does not mention viewpoint-discrimination, one could argue that, in describing the scrutiny applicable to restrictions of commercial speech on the basis of *content*, our court also implicitly set the level of scrutiny applicable to restrictions of commercial speech on the basis of *viewpoint*—because the latter is a subset of the former. *See Rosenberger*, 515 U.S. at 829. But the Supreme Court has also been clear in regularly distinguishing "mere" content-based discrimination from the even more troubling viewpoint-based discrimination. *See R.A.V.*, 505 U.S. at 391 ("In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination."). I have my doubts that we should read a level of scrutiny applicable to less concerning laws (content-based restrictions), as automatically applying to more concerning laws (viewpoint-based restrictions)—especially given that the First Amendment all but flatly prohibits those more concerning laws.

In short, there are good reasons to believe the First Amendment subjects viewpoint-discriminatory commercial speech restrictions to strict scrutiny. I see a lot in the Supreme Court's precedent supporting that conclusion, and nothing in our precedent preventing it. But there is no need to wrestle these questions to the ground in this case. In the appropriate case where it makes a difference, we should look at that question closely—and I would be surprised and disappointed if the result was that we failed to subject to strict scrutiny a law that targets speech because of its viewpoint.

***

The Court long ago held that commercial speech deserves less protection under the First Amendment than other speech. *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563. Many have criticized the coherence and foundation of that position. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 520 & n.2 (1996) (Thomas, J., concurring in part and concurring in the judgment) (collecting cases). This case illustrates one aspect of the damage done to our republic by the commercial speech doctrine. It has become an attractive nuisance to reactive legislatures that reflexively attempt to target ideas the legislature finds disagreeable. AB 2751 is a particularly egregious example. The summary of AB 2751 emphasizes a belief that, just because a law addresses commercial speech, the government enjoys a carveout from the typical scrutiny applied to a law that directly targets ideas and messages for suppression. In other words, the record suggests that California believed it could rely on the courts' lessened protection for "commercial speech" to get away with activity—suppressing ideas and messages the government merely finds disagreeable—that strikes right at the heart of the First Amendment.

But even *Central Hudson* recognized that we should "review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy." 447 U.S. at 566 n.9. What might justify a truly neutral regulation cannot "save a regulation that is in reality a facade for viewpoint-based discrimination." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 811 (1985). As the majority opinion correctly concludes, California here did such a bad job that its attack on a disfavored viewpoint cannot even withstand intermediate scrutiny. But we should be cognizant of the risks that the commercial speech doctrine

engenders from governments eager to impose their vision of rightthink on the people. And in the appropriate case, we should carefully consider whether our precedent and the Supreme Court's precedent are truly open to the manipulation of free speech by governments that clothe their disapprobation of certain viewpoints in restrictions on commercial speech.

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

Case Name: *Junior Sports Magazines, Inc., et al. v. Bonta*
Case No.: 2:22-cv-04663-CAS (JCx)

IT IS HEREBY CERTIFIED THAT:

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

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

DECLARATION OF ANNA M. BARVIR IN SUPPORT OF PLAINTIFFS' MOTION TO ENFORCE THE MANDATE AND ISSUE PRELIMINARY INJUNCTION

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

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Attorneys for Defendant

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

Executed May 2, 2024.

Laura Palmerin

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Attorney for Plaintiff Second Amendment Foundation

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUNIOR SPORTS MAGAZINES INC., RAYMOND BROWN, CALIFORNIA YOUTH SHOOTING SPORTS ASSOCIATION, INC., REDLANDS CALIFORNIA YOUTH CLAY SHOOTING SPORTS, INC., CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, THE CRPA FOUNDATION, AND GUN OWNERS OF CALIFORNIA, INC.; and SECOND AMENDMENT FOUNDATION,

Plaintiffs,

v.

ROB BONTA, in his official capacity as Attorney General of the State of California; and DOES 1-10,

Defendant.

Case No.: 2:22-cv-04663-CAS (JCx)

PLAINTIFFS' NOTICE OF ISSUANCE OF PRELIMINARY INJUNCTION IN *SAFARI CLUB INTERNATIONAL V. BONTA*

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE of the Order Granting Plaintiffs' Motion for a Preliminary Injunction issued on April 12, 2024, in *Safari Club International v. Bonta*, a case that was coordinated with the above-entitled matter for oral argument in the Ninth Circuit. Order Granting Plaintiffs' Motion for a Preliminary Injunction, *Safari Club Int'l v. Bonta*, No. 2:22-cv-01395-DAD-JDP (E.D. Cal. April 12, 2024), ECF No. 33 (attached as **Exhibit A**). In view of the mandate issued in that case on February 28, 2024, the order declares that the plaintiffs are likely to succeed on their claims that California Business & Professions Code § 22949.80 is unconstitutional and preliminarily enjoins enforcement of the law. *Id.*

The trial court in *Safari Club* issued the order after the parties filed a Joint Status Report that included a proposed order as an exhibit. Joint Status Report, *Safari Club Int'l*, No. 2:22-cv-01395-DAD-JDP (E.D. Cal. Mar. 20, 2024), ECF No. 32 (attached as **Exhibit B**); Exhibit 1 to Joint Status Report, *Safari Club Int'l*, No. 2:22-cv-01395-DAD-JDP (E.D. Cal. Mar. 20, 2024), ECF No. 32-1 (attached as **Exhibit C**).

As directed by this Court at the April 8, 2024, case management conference, the parties in this matter are continuing to meet, confer, and exchange positions regarding Plaintiffs' request for a preliminary injunction, as well as exploring potential settlement of the entire matter.

Dated: April 18, 2024

MICHEL & ASSOCIATES, P.C.

s/ Anna M. Barvir
Anna M. Barvir
Counsel for Plaintiffs Junior Sports Magazines, Inc., Raymond Brown, California Youth Shooting Sports Association, Inc., Redlands California Youth Clay Shooting Sports, Inc., California Rifle & Pistol Association, Incorporated, The CRPA Foundation, and Gun Owners of California, Inc.

Dated: April 18, 2024

LAW OFFICES OF DONALD KILMER, APC

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

ATTESTATION OF E-FILED SIGNATURES

I, Anna M. Barvir, am the ECF User whose ID and password are being used to file this PLAINTIFFS' NOTICE OF ISSUANCE OF PRELIMINARY INJUNCTION IN *SAFARI CLUB INTERNATIONAL V. BONTA*. In compliance with Central District of California L.R. 5-4.3.4, I attest that all signatories are registered CM/ECF filers and have concurred in this filing.

Dated: April 18, 2024

s/ Anna M. Barvir
Anna M. Barvir

EXHIBIT A

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SAFARI CLUB INTERNATIONAL, et al., Plaintiffs, v. ROB BONTA, in his official capacity as Attorney General of the State of California, Defendant.	No. 2:22-cv-01395-DAD-JDP ORDER GRANTING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

In view of the ruling of the Ninth Circuit in *Safari Club International, et al. v. Bonta* (No. 23-15199) entered on September 22, 2023, and the mandate issued on February 28, 2024, the court finds as follows:

1. Plaintiffs are likely to succeed on the merits of their claims that California Business & Professions Code § 22949.80 is unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution;
2. Plaintiffs will suffer irreparable harm if a preliminary injunction is not issued;
3. The balance of the equities tips in plaintiffs' favor;
4. The issuance of a preliminary injunction is in the public interest; and
5. No bond is appropriate under these circumstances.

/////

Accordingly, the court **ORDERS** that pursuant to Rule 65 of the Federal Rules of Civil Procedure, Defendant California Attorney General Rob Bonta and the California Department of Justice, their officers, agents, servants, employees, and anyone else in active concert or participation with any of the aforementioned people or entities, are hereby preliminarily enjoined from enforcing California Business & Professions Code § 22949.80.

It is **FURTHER ORDERED** that plaintiffs shall not be required to post a bond.

IT IS SO ORDERED.

Dated: **April 11, 2024**

Dale A. Drozd

DALE A. DROZD
UNITED STATES DISTRICT JUDGE

EXHIBIT B

Michael B. Reynolds, Bar No. 174534
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES SPORTSMEN'S ALLIANCE FOUNDATION, an Ohio nonprofit corporation; SAFARI CLUB INTERNATIONAL, an Arizona nonprofit corporation; and CONGRESSIONAL SPORTSMEN'S FOUNDATION, a Washington, D.C. nonprofit corporation,

Plaintiffs,

v.

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

Defendants.

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

Joint Status Report

Courtroom: 4
Judge: Hon. Dale A. Drozd
Trial Date: None set
Action Filed: August 5, 2022

Plaintiffs and Defendant, by and through their undersigned counsel, respectfully submit this joint status report pursuant to this Court's May 17, 2023, Order Granting the Parties' Joint Motion for a Stay of Proceedings, ECF No. 29, and the Ninth Circuit's Mandate in *Safari Club International v. Bonta*, issued on February 28, 2024 (*see* Case No. 23-15199, Dkt. 39).

Counsel for the parties have conferred about next steps in this litigation. Defendant is actively considering its next steps in the litigation up to and including a potential resolution of the case.

Plaintiffs request that this Court immediately enter a preliminary injunction consistent with the Ninth Circuit's opinion and judgment, particularly considering that Defendant requires additional time to evaluate its position. Plaintiffs conferred with Defendant and Defendant takes no position regarding this request. Plaintiffs' [Proposed] Order Granting Plaintiffs' Motion for Preliminary Injunction is attached hereto as **Exhibit 1**. In the event the Court does not enter a preliminary injunction by April 2, 2024, Plaintiffs will move the Court for an order granting a preliminary injunction consistent with the opinion and judgment of the Ninth Circuit.

In light of these circumstances, the parties respectfully request that they file a further Joint Status Report with the Court no later than April 19, 2024, updating the Court of their proposed next steps.

DATED this 20th day of March, 2024.

SNELL & WILMER L.L.P.

By: */s/ Cameron J. Schlagel*
Michael B Reynolds
Colin R. Higgins
Cameron J. Schlagel
Attorneys for Plaintiffs

ROB BONTA
Attorney General of California

By: */s/ Gabrielle D. Boutin*
Gabrielle D. Boutin
Deputy Attorney General
Attorneys for Defendants Attorney General Rob Bonta

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EXHIBIT C

EXHIBIT 1

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES SPORTSMEN'S ALLIANCE FOUNDATION, an Ohio nonprofit corporation; SAFARI CLUB INTERNATIONAL, an Arizona nonprofit corporation; and CONGRESSIONAL SPORTSMEN'S FOUNDATION, a Washington, D.C. nonprofit corporation,

Plaintiffs,

v.

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

Defendants.

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

[Plaintiffs' Proposed] Order Granting Plaintiffs' Motion for Preliminary Injunction

ORDER

In view of the ruling of the Ninth Circuit in *Safari Club International, et al. v. Bonta* (No. 23-15199) entered on September 22, 2023, and the Mandate issued on February 28, 2024, the Court finds as follows:

1. Plaintiffs are likely to succeed on the merits of their claims that California Business & Professions Code section 22949.80 is unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution.

2. Plaintiffs will suffer irreparable harm if a preliminary injunction is not issued;

3. The balance of the equities tips in Plaintiffs' favor;

5. A preliminary injunction is in the public interest; and

6. No bond is appropriate under these circumstances.

Accordingly, the Court **ORDERS** that pursuant to Rule 65 of the Federal Rules of Civil Procedure, Defendant California Attorney General Rob Bonta and the California Department of Justice, their officers, agents, servants, employees, and anyone else in active concert or participation with any of the aforementioned people or entities, are hereby preliminarily enjoined from enforcing California Business & Professions Code section 22949.80.

It is **FURTHER ORDERED** that Plaintiffs shall not be required to post a bond.

IT IS SO ORDERED.

Dated: _____ _____

Hon. Dale A. Drozd

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(714) 427-7000

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

Case Name: *Junior Sports Magazines, Inc., et al. v. Bonta*
Case No.: 2:22-cv-04663-CAS (JCx)

IT IS HEREBY CERTIFIED THAT:

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

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

PLAINTIFFS' NOTICE OF ISSUANCE OF PRELIMINARY INJUNCTION IN *SAFARI CLUB INTERNATIONAL V. BONTA*

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

Kevin J. Kelly, Deputy Attorney General
kevin.kelly@doj.ca.gov
300 South Spring Street, Suite 9012
Los Angeles, CA 90013
Attorney for Defendant

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

Executed April 18, 2024.

Laura Palmerin

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL **'O'**

Case No.	2:22-cv-04663-CAS (JCx)	Date	October 24, 2022
Title	JUNIOR SPORTS MAGAZINES INC. v. ROB BONTA		

Present: The Honorable	CHRISTINA A. SNYDER	
Catherine Jeang	Not Present	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (IN CHAMBERS) - PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (Dkt. 12-1, filed on July 20, 2022)

I. INTRODUCTION

On July 7, 2022, plaintiffs Junior Sports Magazines Inc.; Raymond Brown, California Youth Shooting Sports Association, Inc.; Redlands California Youth Claw Shooting Sports, Inc.; California Rifle & Pistol Association, Incorporated; The CRPA Foundation; Gun Owners of California, Inc.; and Second Amendment Foundation (collectively, "plaintiffs") filed suit against Rob Bonta, in his official capacity as the Attorney General of California. Dkt. 1 ("Compl."). Plaintiffs challenge the constitutionality and seek to prevent the enforcement of California Business & Professions Code Section 22949.80, which 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."

Plaintiffs' complaint asserts claims for (1) violation of the right to free speech ("political & ideological speech") under the First Amendment; (2) violation of the right to commercial speech under the First Amendment; (3) violation of the rights to association and assembly under the First Amendment; and (4) violation of the Fourteenth Amendment's Equal Protection Clause. Compl., ¶¶ 107–230.

On July 20, 2022, plaintiffs filed a motion for a preliminary injunction enjoining enforcement of Section 22949.80. Dkt. 12-1 ("Mot."). That same day, plaintiffs filed an *ex parte* application to shorten time for a hearing on their preliminary injunction motion, dkt. 13, which the Court denied on July 22, 2022, dkt. 15.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL **'O'**

Case No.	2:22-cv-04663-CAS (JCx)	Date	October 24, 2022
Title	JUNIOR SPORTS MAGAZINES INC. v. ROB BONTA		

On August 8, 2022, defendant filed his opposition. Dkt. 19 ("Opp."). On August 15, 2022, plaintiffs filed their reply. Dkt. 21 ("Reply").

On August 18, 2022, plaintiffs filed an *ex parte* application to file a supplemental brief in light of defendant's communications with plaintiffs alerting them to potential legislative changes to the challenged statutory provisions. Dkt 23.

On August 19, 2022, the Court granted plaintiffs' *ex parte* application to file the supplemental brief. Dkt. 26. The Court then vacated the hearing scheduled for August 22 in light of the then-pending introduced amendments, and scheduled a status conference for September 12, 2022, to schedule further briefing on the motion for preliminary injunction. Dkt. 24.

On August 24, 2022, plaintiffs filed an emergency petition to the Ninth Circuit for a writ of mandamus to compel a ruling on the preliminary injunction motion. Junior Sports Magazines Inc., et al. v. United States District Court for the Central District of California, No. 22-70185 (9th Cir. Aug. 25, 2022). The Ninth Circuit denied the emergency petition on August 25, 2022. Id.

On August 30 and 31, 2022, the California Senate and Assembly passed AB 160, containing amendments to Section 22949.80.

On September 12, 2022, the Court held a status conference at which it directed the parties to file supplemental briefing addressing the impact of AB 160's amendments to Section 22949.80 on plaintiffs' motion for preliminary injunction.

On September 28, 2022, plaintiffs filed a supplemental brief and supporting declarations. Dkt. 30 ("Pls.' Supp. Brief").

On September 29, 2022, Governor Gavin Newsom signed AB 160 into law.

On October 7, 2022, defendant filed his supplemental brief. Dkt. 32 ("Def.'s Supp. Brief").

On October 17, 2022, the Court held a hearing. Having carefully considered the parties' arguments and submissions, the Court finds and concludes as follows.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL **'O'**

Case No.	2:22-cv-04663-CAS (JCx)	Date	October 24, 2022
Title	JUNIOR SPORTS MAGAZINES INC. v. ROB BONTA		

II. BACKGROUND

The following facts are taken from the complaint, the declarations and exhibits submitted in support and opposition to plaintiffs' motion, and matters subject to judicial notice.

A. Increase in gun violence spurs legislative action in California

Gun violence has increased in the United States over the past several years. See, e.g., Plaintiffs' Request for Judicial Notice ("RJN"), Ex. 7 at 1. This year alone, several mass shootings, such as the killing of 19 children at an elementary school in Uvalde, Texas, have sparked calls to action across the country. RJN, Ex. 6 at 6. In California, state legislators have introduced several new bills. See RJN, Ex. 7 at 3 (listing related gun legislation). Governor Gavin Newsom signed many of them into law, including Business & Professions Code Section 22949.80 (referred to hereinafter as "AB 2571"), challenged in this litigation.

On February 18, 2022, Assemblymember Rebecca Bauer-Kahan introduced AB 2571. The stated purpose of AB 2571 was to "restrict the marketing and advertising of firearms to minors in all media. Specifically, [AB 2571] would prohibit [a firearm industry member] . . . from marketing or advertising firearms, ammunition, or reloaded ammunition to minors." RJN, Ex. 4 at 1.

On June 30, 2022, after both houses of the state legislature had passed AB 2571, Governor Gavin Newsom signed the bill into law. Compl., ¶ 43. AB 2571 was designated 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," enabling it to take immediate effect. RJN, Ex. 1 at 4.

AB 2571 was passed with an accompanying policy statement. Specifically, the Legislature found that California "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." Id. at 2. Accordingly, the Legislature found that "[t]he 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." Id. at 1.

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The Legislature further determined that "[t]hese 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." Id. at 1–2. The Legislature noted that "firearms manufacturers and retailers continue to market firearms to minors," even with the fact that "children are especially susceptible to marketing appeals, as well as more prone to impulsive, risky, thrill-seeking, and violent behavior than other age groups." See id. at 2. As the Legislature described, "[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." Id.

The Legislature concluded that "intent . . . in enacting this act" is "to further restrict the marketing and advertising of firearms to minors." Id.

B. What AB 2571 seeks to regulate

As initially enacted, AB 2571 adds Chapter 39 "Marketing Firearms to Minors" to the California Business and Professions Code. Section 22949.80(a)(1) establishes that "[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."

The chapter further defines what "firearm industry member," "firearm-related product," "attractive to minors," and "marketing or advertising" respectively mean.

"Firearm industry member" is defined by Subsection 22949.80(c)(4) in two non-exclusive ways. The first definition is 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." Id., § 22949.80(c)(4)(A). The second definition is:

> 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:

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(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.

Id., § 22949.80(c)(4)(B).

A "firearm-related product" is defined by Subsection 22949.80(c)(5) as a "firearm, ammunition, reloaded ammunition, a firearm precursor part, a firearm component, or a firearm accessory" meeting any of these four conditions: "[t]he item is sold, made, or distributed in California," "[t]he item is intended to be sold or distributed in California," "[i]t is reasonably foreseeable that the item would be sold or possessed in California," or "[m]arketing or advertising for the item is directed to residents of California." Id., § 22949.80(c)(5).

AB 2571 defines "marketing or advertising" in Subsection 22949.80(c)(6) to mean, "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." Id., § 22949.80(c)(6).

To determine whether "marketing or advertising of a firearm-related product is attractive to minors,"[1] Subsection 22949.80(a)(2) establishes a "totality of the circumstances" test for courts to use. Id., § 22949.80(a)(2). Factors to be considered include, but are 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.

[1] In this chapter, "minor" is defined as a "natural person under 18 years of age who resides in [California]." Id., § 22949.80(c)(7).

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(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.

Id.

Anyone who violates AB 2571 "shall be 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." Id. § 22949.80(e)(1).[2] Subsection 22949.80(e)(3) also authorizes any "person harmed by a violation of this section" to "commence a civil action to recover their actual damages," as well as "reasonable attorney's fees and costs." Id. § 22949.80(e)(3)–(5).[3]

Finally, AB 2571 contains a severability clause, stating in full that:

[2] Subsection 22949.80(e)(6) provides that "each copy or republication of marketing or advertising prohibited by this section shall be deemed a separate violation."

[3] Additionally, AB 2571 contains two privacy-related provisions, Subsections 22949.80(b) and 22949.80(d). Neither of those have been challenged by plaintiffs in their complaint or briefing on this motion, although they are evidently encompassed by plaintiffs' request to "enjoin the enforcement of section 22949.80." Mot. at 25.

> 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.

Id. § 22949.80(f).

C. AB 160 Amends AB 2571

The amendments to AB 2571 changed the statute in three ways. First, the amendment replaced the phrase "*concerning* any firearm-related product" with "*offering or promoting* any firearm-related product" in Subsection 22949.80(a)(1). That section now reads in full that "[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." Id. § 22949.80(a)(1).

Second, the amendment modified the definition of "marketing or advertising" in Subsection 22949.80(c)(6) to remove references to the words "use" and "service." The subsection now defines "marketing or advertising" to mean, "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." Id. § 22949.80(c)(6).

Third, the amendment created Subsection 22949.80(a)(3), which states that Subsection 22949.80(a)'s prohibition "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." Id. § 22949.80(a)(3).

D. Plaintiffs' claims for relief

As set forth above, plaintiffs bring four claims for relief. In their initial moving papers filed on July 20, 2022, before the enactment of the amendments, plaintiffs contended that the definition of "firearm industry member" may be read to encompass "organizations formed to promote and preserve the rights to keep and bear arms, organizations that offer competitive and recreational shooting programs, businesses that offer shooting skills courses or firearm-safety training, and gun show promoters[.]" Mot. at 3.

Similarly, plaintiffs asserted that AB 2571 restricts not only marketing or advertising for the purchase of firearms by minors but also "honest commercial speech promoting lawful activities and services," as well as "a broad category of pure speech," including communications by youth hunting and shooting magazines seeking to promote shooting sports; education campaigns by gun rights organizations encouraging youth to engage in recreational or competitive shooting activities; promotional merchandise and giveaways by firearm industry members, including nonprofit Second Amendment organizations; recommendations provided in youth firearm- and hunter-safety courses; and communications depicting minors enjoying or encouraging minors to enjoy their right to possess and use firearms at recreational or competitive shooting events, as well as communications promoting such events; among other communications. Id. at 4.

Throughout their briefing, plaintiffs also argue that California lawmakers have shown clear "contempt" and "animus" for the firearm industry in public discussions of the statute. See, e.g., id. at 1, 8, 9.

Accordingly, plaintiffs argue that as content-based and viewpoint-based regulation of protected, non-commercial speech, AB 2571 does not withstand strict scrutiny under the First Amendment. Plaintiffs also argue that to the extent AB 2571 restricts commercial speech, it cannot withstand scrutiny under the less stringent test set forth in Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, 447 U.S. 557, 566 (1980). Finally, plaintiffs argue that to the extent that AB 2571 restricts their political and ideological free speech rights, the legislation thereby violates plaintiffs' right to associate under the First Amendment and right to equal protection under the Fourteenth Amendment.

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In their supplemental briefing filed on September 28, 2022, after AB 2571 was amended, plaintiffs contend that the statutory provisions, as amended, still violate their constitutional rights, with the changed language constituting a "trivial word swap," and the added category for exceptions simply highlighting the law's allegedly unconstitutional censorship. See generally Pls.' Supp. Brief.

Defendant disputes plaintiffs' contentions as set forth in greater detail below.

III. REQUEST FOR JUDICIAL NOTICE

Federal Rule of Evidence 201 empowers a court to take judicial notice of facts that are either "(1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); see also Mullis v. U. S. Bankr. Court for Dist. of Nevada, 828 F.2d 1385, 1388 n.9 (9th Cir. 1987).

Here, plaintiffs request that the Court take judicial notice of the following documents:

(1) Assembly Bill 2571, 2021-2022 Reg. Sess. (Cal. 2022) (RJN Ex.1);

(2) Assembly Privacy & Consumer Prot. Comm., Bill Analysis Re: AB 2571 (Bauer-Kahan) – As Amended April 7, 2022, 2021-2022 Reg. Sess. (Cal. 2022) (RJN Ex. 2);

(3) Assembly Judiciary Comm., Bill Analysis Re: AB 2571 (Bauer-Kahan) – As Amended April 7, 2022, 2021-2022 Reg. Sess. (Cal. 2022) (RJN Ex. 3);

(4) Assembly Appropriations Comm., Bill Analysis Re: AB 2571 (Bauer-Kahan) – As Amended April 27, 2022, 2021-2022 Reg. Sess. (Cal. 2022) (RJN Ex. 4);

(5) Assembly, Assembly Floor Analysis Re: AB 2571 (Bauer-Kahan and Gipson) – As Amended April 27, 2022, 2021-2022 Reg. Sess. (Cal. 2022) (RJN Ex. 5);

(6) Senate Judiciary Comm., Bill Analysis Re: AB 2571 (Bauer-Kahan), 2021-2022 Reg. Sess. (Cal. 2022) (RJN Ex. 6);

(7) Senate Appropriations Comm. Bill Analysis Re: AB 2571 (Bauer-Kahan), 2021-2022 Reg. Sess. (Cal. 2022) (RJN Ex. 7);

(8) Senate Rules Comm., Senate Floor Analysis Re: AB 2571 (Bauer-Kahan and Gipson), 2021-2022 Reg. Sess. (Cal. 2022) (RJN Ex. 8); and

(9) Assembly, Concurrence in Senate Amendments Re: AB 2571 (Bauer-Kahan and Gipson) – As Amended June 15, 2022 (RJN Ex. 9); and

(10) Assembly Bill 160, 2021–2022 Reg. Sess. (Cal. 2022) (Plaintiffs' Supplemental RJN "Supp. RJN").

The Court finds and concludes that plaintiffs' request for judicial notice, which defendant does not oppose, is appropriate. "Legislative history is properly a subject of judicial notice." Anderson v. Holder, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012). Accordingly, the Court **GRANTS** plaintiffs' request for judicial notice as to these documents.

IV. LEGAL STANDARD

A. Preliminary injunction

A preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." Lopez v. Brewer, 680 F.3d 1068, 1072 (9th Cir. 2012) (emphasis in original) (quoting Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam)); accord Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008). The Ninth Circuit summarized the Supreme Court's clarification of the standard for granting preliminary injunctions in Winter as follows: a plaintiff "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." City & County of San Francisco v. USCIS, 944 F.3d 773, 788–89 (9th Cir. 2019) (quoting Winter, 555 U.S. at 20) (alterations in original). "Likelihood of success on the merits is the most important factor." California v. Azar, 911 F.3d 558, 575 (9th Cir. 2018) (quotations omitted).

Alternatively, " 'serious questions going to the merits' and a hardship balance that tips sharply towards the plaintiff can support issuance of an injunction, so long as the

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plaintiff also shows a likelihood of irreparable injury and that the injunction is in the public interest." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). Serious questions are those "which cannot be resolved one way or the other at the hearing on the injunction." Bernhardt v. Los Angeles Cty., 339 F.3d 920, 926 (9th Cir. 2003) (quoting Republic of the Philippines v. Marcos, 862 F.2d 1355, 1362 (9th Cir. 1988)).

Finally, in the Ninth Circuit, a preliminary injunction is disfavored when it is "identical to the ultimate relief sought in the case." Progressive Democrats for Soc. Just. v. Bonta, No. 21-CV-03875-HSG, 2021 WL 6496784, at *11 (N.D. Cal. July 16, 2021) (citing Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 808–09 (9th Cir. 1963). "It is so well settled as not to require citation of authority that the usual function of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits. The hearing is not to be transformed into a trial of the merits of the action upon affidavits, and it is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial." Tanner, 316 F.2d at 808–09.

B. Constitutional avoidance of facial challenges

"To succeed in a typical facial attack, [a plaintiff] would have to establish that no set of circumstances exists under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep." United States v. Stevens, 559 U.S. 460, 472 (2010) (internal citations and quotation marks omitted). Claims of facial invalidity are disfavored because they "carr[y] much too promise of premature interpretation of statutes on the basis of factually barebones records." Sabri v. United States, 541 U.S. 600, 609 (2004) (internal formatting and quotation marks omitted).

When constitutional issues are raised, facial challenges are also to be analyzed in light of the rules of construction that counsel in favor of avoiding constitutional questions where reasonably possible. See Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936). Thus, when "an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of [the legislature]." Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

In light of these principles, the Supreme Court has repeatedly cautioned that "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the

people." Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006) (quoting Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion)). Accordingly, "the touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.' " Id. at 330 (quoting Califano v. Westcott, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part)). When an application or portion of a statute is deemed unconstitutional, courts "must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" Id.

C. Principles of statutory interpretation

"If the statutory language is plain, [a court] must enforce it according to its terms." King v. Burwell, 576 U.S. 473, 486 (2015). "But oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' " Id. (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S., 120, 132 (2000)). Therefore, "when deciding whether the language is plain, [a court] must read the words 'in their context and with a view to their place in the overall statutory scheme.' " Id. The Ninth Circuit has further described the steps in this task: courts "look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of [the legislature]. Then, if the language of the statute is unclear, [courts] look to its legislative history." Nw. Forest Res. Council v. Glickman, 82 F.3d 825, 830–31 (9th Cir. 1996), as amended on denial of reh'g (May 30, 1996) (internal quotation omitted).

V. DISCUSSION

A. Likelihood of Success on the Merits

To prevail on their motion for a preliminary injunction, plaintiffs must at a minimum establish that there are "serious questions" on the merits of at least one of its claims for relief. Cottrell, 632 F.3d at 1135. As discussed below, the Court finds and concludes that plaintiffs fail to raise serious questions going to the merits of their claims.

1. First Amendment Free Speech Claim (Political and Ideological)

Plaintiffs' first claim asserts that AB 2571 violates their right to free speech under the First Amendment to the U.S. Constitution. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." "Content-based laws" are "those that target speech based on its communicative content." Reed v. Town of

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Gilbert, 576 U.S. 155, 163 (2015). A content-based restriction on speech is generally subject to strict scrutiny. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."). Applying that standard, a law found to be content based is "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Reed, 576 U.S. at 163. However, "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." Cent. Hudson v. Pub. Serv. Comm'n, 447 U.S. at 562–63 (internal citation omitted).

Determining whether AB 2571 restricts non-commercial speech subject to strict scrutiny requires interpretation of the scope and application of the challenged law. To provide clarity on the statutory interpretation issues presented by AB 2571, the Court first describes the parties' pre-amendment arguments before addressing the parties post-amendment arguments.

a. Parties' Arguments About the Scope of AB 2571 As Originally Enacted

In their initial memorandum in support of their motion for a preliminary injunction, plaintiffs argued that AB 2571 regulates political and educational, as well as commercial, speech and constitutes a content-based and viewpoint-based restriction. Mot. at 11. Plaintiffs identified several provisions of AB 2571 that they argued result in restricting non-commercial speech. First, plaintiffs pointed to § 22949.80(c)(4), which defines "firearm industry members," whose speech the statute restricts, to include the following:

> 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.

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

According to plaintiffs, Section 22949.80(c)(4), as originally enacted, may be read to encompass "organizations formed to promote and preserve the rights to keep and bear arms, organizations that offer competitive and recreational shooting programs, businesses that offer shooting skills courses or firearm-safety training, and gun show promoters[.]" Id. at 3.

Plaintiffs additionally point to Subsection 22949.80(c)(6), which defines "marketing or advertising" to mean, "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." Lastly, plaintiffs point to § 22949.80(a)(1), which restricts marketing or advertising communications "*concerning* any firearm-related product." Id. (emphasis added).

Plaintiffs contend that, taken together, these provisions encompass communications concerning firearms by firearm industry members, including "organizations formed to promote and preserve the rights to keep and bear arms," with the primary purpose of "promot[ing] not just the purchase but even 'the *use* [of] the product or service.' " Mot. at 3 (quoting Cal. Bus. & Prof. Code § 22949.80(c)(6)). Thus, plaintiffs assert that AB 2571 restricts not only marketing or advertising aimed at selling firearms to minors, but also "honest commercial speech promoting lawful activities and services," as well as "a broad category of pure speech," including communications by youth hunting and shooting magazines seeking to promote shooting sports; education campaigns by gun rights organizations encouraging youth to engage in recreational or competitive shooting activities; promotional merchandise and giveaways by firearm industry members, including nonprofit Second Amendment organizations; recommendations provided in youth firearm- and hunter-safety courses; and communications depicting minors enjoying or encouraging minors to enjoy their right to possess and use firearms at recreational or competitive shooting events, as well as communications promoting such events; among other communications. Id. at 4.

Plaintiffs go on to argue that these prohibitions on speech constitute content-based restrictions because they "single[] out speech based on both its 'particular subject matter' . . . and its 'function or purpose.' " Id. at 11 (quoting Reed v. Town of Gilbert, 576 U.S. at

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163 (explaining that content-based restrictions "defin[e] regulated speech by particular subject matter" or "by its function or purpose."")). Plaintiffs further contend that AB 2571 discriminates based on viewpoint because it "target[s] only the speech of organizations formed to promote the possession and use of 'firearm-related products,' " including nonprofit organizations soliciting youth membership and promoting pro-gun messages, while permitting anti-gun organizations to solicit youth membership and promote anti-gun messages. Id. at 12. See Reed, 576 U.S. at 168 ("Government discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.' ") (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)). In support of the position that AB 2571 constitutes viewpoint discrimination, plaintiffs argue that California lawmakers have shown clear "contempt" for the firearm industry in public discussions of the statute. Mot. at 1, 8, 9.

According to plaintiffs, AB 2571 is subject to strict scrutiny, which applies to content-based restrictions on speech and requires that such restrictions be upheld only if the government proves that they are "narrowly tailored to serve [a] compelling state interest." Reed, 576 U.S. at 163; Mot. at 13. In the alternative, plaintiffs urge the Court to apply intermediate scrutiny, requiring the government to prove that AB 2571 is "narrowly tailored to serve a significant government interest." Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 764 (1994); Mot. at 13.

In opposition to plaintiffs' argument that AB 2571's prohibitions encompass political speech, defendant contends that plaintiffs read the statute too broadly and that, when read holistically and in its entirety, it is clear that the statute "does not purport to restrict communications of *any* kind about firearms or firearm-related activities" but rather regulates the advertising of firearms-related products to minors in exchange for monetary compensation. Opp. at 9–10. Defendant points to several aspects of the statute in support of this reading. First, defendant cites the definition of "firearm-related product," "which encompasses only certain tangible products, described as 'items' – firearms, their components, and accessories." Id. at 9 (quoting § 22949.80(c)(5)). Next, defendant argues that the terms "marketing and advertising" imply "an offer to engage in a *commercial* transaction for the *sale and purchase*" of a product. Id. Further, defendant contends that the title of the bill, "Marketing Firearms to Minors," additionally supports this reading, as does the bill's legislative purpose and history, which explicitly reflect an intent to regulate

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"commercial speech" and "advertising of firearms to minors." Id. at 9–10 (quoting RJN, Ex. 1 at 1, 2).

Contrary to plaintiffs' contention that the word "use" in the statute's definition of "marketing or advertising" sweeps within its scope a host of communications promoting use of firearms, defendant argued that the word "use" is limited by the definition of product, and, therefore, the statute's restrictions on marketing and advertising with the primary purpose of encouraging "use of a product or service" do not include communications concerning educational or sporting events or political speech. Id. at 9, n.3. Rather, they apply to communications encouraging use of a product offered for sale, that is, in "exchange for monetary compensation." Id. § 22949.80(c)(6).

When given its appropriate and intended meaning, defendant argues, AB 2571 is properly understood as a restriction of only commercial speech. Opp. at 8. According to defendant, "[f]actors to be considered in deciding whether speech constitutes 'commercial speech' include whether (1) the speech is an advertisement; (2) the speech refers to a particular product; and (3) the speaker has an economic motivation." Id. (citing Hunt v. City of Los Angeles, 638 F.3d 703, 715 (9th Cir. 2011) (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–68 (1983)). As AB 2571 restricts advertising, marketing or arranging for placement of an advertising or marketing communication, it "regulates speech with an obvious economic or commercial motivation." Id. Further, defendant points to the reference to "exchange for monetary compensation" in the definition of "marketing or advertising" and to the reference to "firearm-related products" as evidence that the legislation only intended to restrict advertisements promoting commercial transactions involving particular products. Id.

Defendant goes on to argue that AB 2571 is not a content-based or viewpoint-based restriction because it "regulates commercial speech, and was not adopted to regulate speech 'because of disagreement with the message it conveys.' " Opp. at 10 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). Defendant maintains that AB 2571 would not restrict the speech of Second Amendment rights organizations unless those organizations were "advertising firearms-related products to minors in exchange for monetary compensation," id. at 10 (internal quotation marks omitted), speech that would likewise be prohibited if the party engaged in the same advertising or marketing were an anti-gun organization, id. at 11. Plaintiffs' allegations regarding the alleged contempt for the firearms industry shown by California lawmakers, defendant argues, does not render AB 2571 a viewpoint-based restriction. Id. See Nordyke v. King, 644 F.3d 776, 792 (9th

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Cir. 2011) (declining to look to individual county supervisor's comments to ascertain the motivation of county ordinance prohibiting possession of firearms on county property).

In reply, plaintiffs argue that they do not make "an unfairly broad interpretation of AB 2571" but rather that "[i]t is a plain reading of the law as it was drafted and adopted by the Legislature." Reply at 3. Plaintiffs depict defendant's opposition as presenting "a tortured interpretation of AB 2571 that misrepresents key provisions of the law, ignores the plain language of the statute, and replaces that language with 'implicit' meanings that the Legislature did not adopt." Id. at 5. For example, plaintiffs argue that while a bill's title "may reflect the law's basic thrust or help clarify ambiguous statutory language . . . it is 'not meant to take the place of the detailed provisions of the text' and 'cannot limit the plain meaning of the text.' " Id. (quoting Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519, 528, 529 (1947) (emphasis omitted).

More specifically, plaintiffs dispute defendant's interpretation of "in exchange for monetary compensation" as written in subsection 22949.80(c)(6)'s definition of "marketing or advertising." Id. at 8. Because that phrase comes at the start of the definition rather than at the end, plaintiffs contend that the subsection unambiguously refers to "making a communication in exchange for monetary compensation—whether or not it also proposes an exchange of monetary compensation with regard to the subject product. . . ." Id. Based on an interpretation of the statute that prohibits more than advertising a product for sale, plaintiffs accordingly argue that the Bolger factors defendant cites are inapplicable here. See, e.g., id. at 9–10 ("[T]he third Bolger factor does not support the State's position because, again, the law does not restrict only speech proposing an exchange of products or services for monetary compensation.")

b. Parties' Arguments In Light of AB 160's Amendments to AB 2571

In their supplemental briefing on the amendments to AB 2571, plaintiffs argue that "aside from adding subsection (c)(3), which carved out a limited exemption for some categories of pure speech," the amendments "made just two non-substantive changes to the original text of AB 2571." Pls.' Supp. Brief at 3. Plaintiffs contend that the amendments merely swap out the word "concerning" for "offering or promoting" in subsection (a)(1), and remove references to "service" and "use" in subsection (c)(6). Id. According to plaintiffs, "AB 2571 (as amended by AB 160) will prohibit 'firearm industry members' from making or distributing any 'communication' 'in exchange for monetary compensation' if the speech (1) 'offers' or 'promotes' a 'firearm-related product,' (2) is

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designed, intended, or could reasonably be considered 'attractive to minors,' and (3) seeks to encourage the audience to 'engage in a commercial transaction.' " Id. Plaintiffs argue that even with the amendments, AB 2571 is still a content- and viewpoint-based regulation "that targets the messages of particular speakers based on the communications' 'subject matter' and its 'function or purpose.' " Id. at 4. Consequently, while the amended statute "no longer prohibits" plaintiffs from promoting junior membership in their organizations and "allows" plaintiffs to resume advertising to youth for their hunting, sporting, and firearm safety programs, plaintiffs argue that a wide breadth of non-commercial speech will still remain restricted. Id. at 2. This includes, according to plaintiffs, their ability to endorse, promote, or communicate about firearm-related products in person or at specified locations. Id. at 5 (citing Dkt. 31 ("Supp. Brown Decl."); Dkt. 30-3 ("Supp. Minch Decl.")).

In supplemental briefing, defendant argues that the amendments to AB 2571 "serve to obviate" plaintiffs' assertions. Def.'s Supp. Brief at 1. Defendant argues that plaintiffs' initial arguments relied on unreasonably expansive interpretations of AB 2571's terms "concerning", "use" and "service." Id. at 5–6 (citing Mot. at 3–4, 11, 15, 17; Reply at 4, 7). Instead, defendant notes that the word "concerning" has been replaced with "offering or promoting" that "make[s] clear that the law addresses commercial speech," and that the words "use" and "service" have been entirely removed from the relevant subsection. Id. at 6. Defendant argues that to characterize these amendments as "trivial" and to adopt plaintiffs' earlier "incorrect reading of the statute" would be "untenable" now. Id. Accordingly, defendant argues that plaintiffs' scenarios of non-commercial speech that might be covered by the statute no longer apply, and that this statute makes clear that it only covers speech that has the "primary purpose" to "encourage recipients of the communication to engage in a commercial transaction." Id. (citing Cal. Bus. & Prof. Code § 22949.80(c)(6)).

Having carefully reviewed the statute and the parties' arguments, the Court concludes that AB 2571, as amended, is properly read as only applying to commercial speech. Here, where California's stated purpose of enacting AB 2571, "Marketing Firearms to Minors," is to "further restrict the marketing and advertising of firearms to minors," RJN, Ex. 1 at 1–2, the Court "see[s] no reason not to take the government at its word in this circumstance, and in doing so, find[s] that the primary intent of the marketing bans is the regulation of commercial expression," Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 539 (6th Cir. 2012).

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To that end, the Court agrees with defendant that, when read in its entirety, AB 2571, as amended, is properly understood as a restriction on the marketing and advertising of firearms, ammunition, and firearm components and accessories to minors to encourage the purchase by them of these products, and not as a blanket restriction on communications relating to firearms more broadly. As amended, AB 2571 restricts advertising or marketing "offering or promoting any firearm-related product," Cal. Bus. & Prof. Code § 22949.80(a)(1), where "firearm-related product" is defined as follows:

"(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."

Id., § 22949.80(c)(5).

The Court reads this definition of firearm-related product, taken together with the other provisions of the statute, to mean a firearm, ammunition, or a firearm component or accessory to be sold or distributed to minors in California. This reading is supported by the commonsense meaning of "product," which implies an item for sale, as well as the conditions in §§ 22949.80(c)(5)(A)–(D), which reasonably suggest that the item is being sold or is intended to be sold. See also PRODUCT, Black's Law Dictionary (11th ed. 2019) ("Something that is distributed commercially for use or consumption and that is usu. (1) tangible personal property, (2) the result of fabrication or processing, and (3) an item that has passed through a chain of commercial distribution before ultimate use or consumption.").

The statute's definition of "marketing or advertising" further supports this interpretation. "Marketing or advertising" is defined as "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

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which is to encourage recipients of the communication to engage in a commercial transaction." Cal. Bus. & Prof. Code § 22949.80(c)(6).

The Court finds plaintiffs' characterizations of the amendments to this subsection (and the statute as a whole) as "trivial" and "non-substantive" to be unpersuasive. While plaintiffs claimed that the statute broadly swept in non-commercial speech through its inclusion of the word "use" in the definition of "marketing or advertising," plaintiffs do not now meaningfully argue that the new amended definition—standing on its own or in light of the prior version—must carry the same sweep as their interpretation of the prior definition. Compare Mot. at 11–12; Reply at 10–13; with Pls.' Supp. Brief at 3–4 ("For the reasons already laid out in Plaintiffs' moving papers . . . the amended law is still a content- and viewpoint-based regulation . . . . Indeed, the State's trivial word swaps do not change what is really being prohibited—distributing to the public, including both adults and children, information about firearm-related products that they might wish to use for lawful hunting and shooting activities.").

Additionally, as described above, the parties dispute the meaning and application of the phrase "in exchange for monetary compensation" within this definition of "marketing or advertising." Specifically, plaintiffs argue that the placement of the phrase "in exchange for monetary compensation" at the beginning of the definition applies to speech "whether or not it also proposes an exchange of monetary compensation with regard to the subject product. . . ." Reply at 8.

In construing a statute, "[p]articular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme." United States v. Lewis, 67 F.3d 225, 228–29 (9th Cir. 1995) (citing Dole v. United Steelworkers of America, 494 U.S. 26, 35 (1990)). As stated above, the " 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' " King v. Burwell, 576 U.S. at 486 (quoting Brown & Williamson Tobacco Corp., 529 U.S. at 132). In addition to looking at the plain language, considering phrases in context also requires "construing the provisions of the entire law, including its object and policy, to ascertain the intent of [the legislature]." Nw. Forest Res. Council v. Glickman, 82 F.3d at 830–31.

Looking at these factors, the limiting condition of "in exchange for monetary compensation" indicates that the statute restricts the marketing or advertising of a firearm-related product for sale to minors. The bill's title, ("Marketing Firearms to Minors"), as well as the legislative purpose, additionally indicate that AB 2571 restricts the marketing

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and advertising of firearms, ammunition, and firearm components and accessories, for sale, to minors. See RJN, Ex. 1, at 1 ("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."); id. at 2 ("It is the intent of the Legislature in enacting this act to further restrict the marketing and advertising of firearms to minors.").

Finally, the amendments to AB 2571 added a new subsection, Subsection 22949.80(a)(3), which states that AB 2571 "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." Cal. Bus. & Prof. Code § 22949.80(a)(3). While plaintiffs characterize this subsection as a "carve-out for censorship," Pls.' Supp. Brief at 1, the Court instead views this subsection in light of the other amendments, the overall statutory text and framework, and the legislative purpose, to establish that the statute's scope does not encompass non-commercial speech.

Reading AB 2571, as amended, to restrict only marketing and advertising directed at minors for the sale of firearms, ammunition, and firearm components and accessories, the Court agrees with defendant that the statute constitutes a restriction only on commercial speech.[4] All three of the Bolger factors used to determine whether speech is "commercial

[4] At oral argument, counsel for plaintiffs raised the questions as to how application of this statute would not require certain plaintiffs to cease publication of their periodicals within California and other jurisdictions, and if so, whether that would impermissibly impose California's will on other states. Additionally, counsel for plaintiffs argued that AB 2571 on its face cannot be limited to just commercial speech, because by its breadth it sweeps in protected non-commercial speech and collapses the distinction between commercial and non-commercial speech for the purposes of Central Hudson scrutiny analysis.

As stated elsewhere within the order, the Court finds that the absence of a full factual record makes these questions too speculative to resolve, and that they are better considered on an as-applied basis. Additionally, the Court recognizes that interpreting AB 2571 as restricting non-commercial, political speech and discriminating based on content and

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speech" are present here. See Bolger, 463 U.S. at 66–68 (considering whether (1) the speech is an advertisement; (2) the speech refers to a particular product; and (3) the speaker has an economic motivation."). The speech at issue is "an advertisement," see Cal. Bus. & Prof. Code § 22949.80(a) ("[a] firearm industry member shall not advertise, market, or arrange for placement of an advertising or marketing communication"), and refers to a "particular product," see id. (restricting communications "offering or promoting any firearm-related product"). And the speaker "has an economic motivation" because the speaker is advertising a product "in exchange for monetary compensation." Id., § 22949.80(c)(6).

Accordingly, the Court concludes that AB 2571, as amended, may be read to only restrict commercial speech. Therefore, for purposes of evaluating a facial attack to the statute on this motion, the Court concludes that plaintiffs are not likely to succeed on their political and ideological right-to-free-speech claims.

2. First Amendment Commercial Speech Claim

Alternatively, plaintiffs' second claim asserts that AB 2571 unconstitutionally infringes on their commercial speech. As the Supreme Court has explained "for commercial speech to come within [the First Amendment], it at least must concern lawful

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viewpoint would subject the statute to strict scrutiny and potentially raise serious constitutional questions. Mot. at 13. But "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court [should] construe the statute to avoid such problems unless such construction is plainly contrary to the intent of [the legislature]." Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). This is not a case where construing a statute to avoid serious constitutional problems would be "plainly contrary" to the intent of the legislature. Id. Rather, as described above, reading AB 2571 to restrict advertising and marketing directed at minors for the sale of firearms, ammunition, and firearm components and accessories is supported by the text of the statute as well as the legislative purpose reflected in the legislative record and the bill's title. Moreover, where plaintiffs bring only a facial challenge and there is no evidentiary record indicating that the State has enforced the statute in a manner contrary to its interpretation, the Court "see[s] no reason not to take the government at its word," Disc. Tobacco City & Lottery, Inc., 674 F.3d at 539, and to interpret the statute in this way.

activity and not be misleading." Cent. Hudson, 447 U.S. at 566. When commercial speech instead concerns unlawful activity, or "when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive." In re R. M. J., 455 U.S. 191, 203 (1982).

Moreover, commercial speech that is protected by the First Amendment may still be regulated, but is subject to analysis in light of the factors set forth in the Supreme Court's seminal case, Central Hudson v. Public Service Commission of New York. When reviewing protected commercial speech, courts must "ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [the 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." 447 U.S. at 566.

c. Regulation of commercial speech concerning unlawful activity

Plaintiffs state that AB 2571 constitutes a restriction on protected commercial speech because it regulates speech that is not misleading and that concerns lawful activity. Mot. at 16. While plaintiffs appear to acknowledge that AB 2571 restricts speech promoting certain unlawful activity—specifically, the sale of firearms to minors in California—they argue that, because minors can, under certain circumstances, lawfully possess firearms in California, the restrictions in AB 2571 pertain to lawful activity and therefore constitute restrictions on protected commercial speech. Id. Plaintiffs characterize the statutory exceptions to California Penal Code Section 29610, which prohibits minors from possessing firearms, as being "so broad that [they] nearly swallow[] the rule." Id. Specifically, plaintiffs point out that "minors may legally possess firearms and ammunition when they are engaged in or traveling to or from recreational sports if a parent or guardian is present or if the minor is accompanied by another responsible adult and their parent has given written consent." Mot. at 16 (citing Cal. Penal Code §§ 29615(a)–(b), 29655). Further, plaintiffs argue, such possession is legal with parental consent, even without an adult present, if the minor is at least sixteen years of age or engaging in recreational sports on lands lawfully possessed by their parent or guardian. Id. at 17 (citing Cal. Penal Code §§ 29615(c), (d)). Plaintiffs additionally contend that the definition of

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"militia" under federal law to include "all able-bodied male [citizens] of at least 17 years of age," 10 U.S.C. § 246, anticipates minors' possession of firearms. Mot. at 17. In light of these statutory provisions permitting minors' possession of firearms as well as the fact that adults may lawfully use firearm-related products, plaintiffs argue that AB 2571 bans speech concerning legal conduct. Id.

In its opposition, defendant responds by characterizing plaintiffs' exceptions as "quite narrow and carefully circumscribed." Opp. at 12. Defendant points out that "[i]t is illegal in California to sell a firearm to a minor under any circumstances, and illegal to loan or transfer any firearm to a person under 21 years of age, subject to narrow exceptions." See Cal. Penal Code §§ 27505, 27510, 29615; Opp. at 12. Additionally, Cal. Penal Code § 29610 "generally prohibits a minor from possessing a handgun, a semiautomatic centerfire rifle, and, as of July 1, 2023, any firearm." Id. A minor's possession of a firearm pursuant to any of the statutory exceptions requires some form of adult supervision or permission. Id. According to defendant, this statutory scheme refutes plaintiffs' assertion that the exceptions undermine the statute's aim of preventing illegal sales of firearms to minors. Id. Defendant contends, "AB 2571 regulates commercial speech respecting unlawful activity – the sale of guns to minors," as well as commercial speech that is misleading because "[i]t is inherently misleading to advertise the sale of a product to an audience that is legally barred from purchasing the product being advertised." Id. at 12–13.

In reply, plaintiffs contend that any acknowledgment that "AB 2571 does, in fact, ban such [unlawful] speech is no big revelation. Of course, it does. What matters is that the law also restricts a substantial amount of truthful, lawful, and fully protected commercial (and non-commercial) speech." Reply at 14. For instance, plaintiffs describe how, because the language of the provisions target advertising or marketing "attractive to minors," "AB 2571 restricts speech promoting the purchase of firearms not only by minors, but also the lawful purchase of lawful firearms by adults." Id. Accordingly, plaintiffs argue that the law "restricts protected commercial speech and . . . must survive heightened scrutiny." Id.

In their supplemental briefing, plaintiffs argue that "by now, it is beyond dispute that AB 2571, both as adopted and as recently amended, bans truthful commercial speech about lawful conduct," because the amendment law "acknowledges on its face that, even if they must do so under adult supervision or with parental consent, minors may legally handle and shoot firearms in California." Pls.' Supp. Brief at 7–8. Defendant argues that the law

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regulates commercial speech that is "misleading and relates to illegal conduct – the sale of firearms to minors, which remains illegal, and the possession of firearms by minors, which remains illegal unless specific qualifying circumstances present." Def.'s Supp. Brief at 1. Even if the law would restrict some commercial speech, defendant contends that it survives intermediate scrutiny. Id.

To the extent that AB 2571 restricts advertising encouraging minors to purchase firearms, it regulates speech that is misleading and that invites unlawful activity because it is illegal to sell a firearm to a minor in California under Penal Code Section 27505. See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388–89 (1973) (explaining that regulations may constitutionally restrict advertisements proposing or soliciting illegal activity, even when the "illegality . . . may be less overt"); see also Utah Licensed Beverage Ass'n v. Leavitt, 256 F.3d 1061, 1068 (10th Cir. 2001) (distinguishing between statutes restricting truthful, non-misleading commercial speech and statutes banning advertising of alcohol giveaways where such giveaways are already unlawful under state law).

However, it appears that AB 2571 regulates speech that is not inherently misleading and that does not concern unlawful activity. For example, an advertisement marketing a firearm for sale that displays a minor using the firearm in a recreational setting does not necessarily promote illegal activity since minors may use firearms with adult supervision and permission under the statutory exceptions. See Cal. Bus. & Prof. Code § 29615 (listing exceptions to general prohibition on youth possession of firearms). Further, courts have treated restrictions on advertising as regulations on commercial speech related to lawful activity where the activity at issue was age-restricted but otherwise lawful, and where the advertising was not solely distributed to minors. See Educ. Media Co. at Virginia Tech v. Swecker, 602 F.3d 583, 589 (4th Cir. 2010) (finding that restriction on alcohol advertisements in college student publication regulated speech concerning lawful activity because the speech was not "solely distributed to underage students" but rather "also reach[ed] of-age readers"). Because the advertising that is "designed, intended, or reasonably appears to be attractive to minors," Cal. Bus. & Prof. Code § 22949.80(a)(1), may also reach adults who can legally purchase firearms, the law regulates more than just commercial speech relating to unlawful activity.

Thus, because the scope of AB 2571, as amended, encompasses commercial speech that may not be misleading or concern unlawful conduct, it is subject to the remainder of the Central Hudson test below. See 447 U.S. at 566 (the test asks "whether the asserted

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governmental interest is substantial . . . whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest").

d. Central Hudson factors for regulation of protected commercial speech

The parties dispute whether AB 2571—to the extent it regulates protected commercial speech—satisfies each prong of the Central Hudson test, which the Court addresses in turn.

(1) Does the government have a substantial interest?

Here, plaintiffs "assume, without conceding that it is the State's actual interest, that the State generally has a substantial interest in preventing violence against its citizens." Mot. at 18. However, plaintiffs contend that the two stated interests of AB 2571, " 'ensuring that minors do not possess [firearms]' and protecting Californians from gun violence" are in fact not "genuine" and "undercut by the State's laws expressly allowing minors to possess firearms for lawful purposes." Id. at 17 (citing RJN, Ex. 1 at 3).

Defendant disputes plaintiffs' characterization of the government's interests advanced by AB 2571. In addition to AB 2571's stated purpose, as cited by plaintiffs, defendant also quotes the bill's legislative findings 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." Opp. at 14 (citing RJN, Ex. 1 at 1). Defendant contends that the pre-existing statutory framework in California "reflects a policy concern that firearm possession by minors—for any purpose, including the narrowly specified, permissible uses set out in statute—presents inherent safety concerns." Id. at 15. As such, defendant argues that rather than being "undercut" by the state's limited exceptions for minors, AB 2571 instead supports California's interest in the "safety concerns regarding the *illegal* possession and use of firearms by minors." Id. To that end, defendant cites Supreme Court and Ninth Circuit precedent holding that the government has "a compelling interest in protecting the physical and psychological well-being of minors," Sable Commc'ns of California, Inc. v. F.C.C., 492 U.S. 115, 126 (1989), and that "the government may have a compelling interest in protecting minors from certain things that it does not for adults," Nunez by Nunez v. City of San Diego, 114 F.3d 935, 945 (9th Cir. 1997).

California has a substantial interest in promoting public safety broadly, along with the more specific goals to reduce gun violence and crime, especially those affecting and

committed by minors.[5] And because it already outright forbids firearm sales to minors, it has likewise an interest in taking measures designed to effectuate that restriction. These interests are "substantial" and also "compelling," as borne out in Supreme Court and Ninth Circuit precedent. See e.g., Sable Commc'ns, 492 U.S. at 126 ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."); Pena v. Lindley, 898 F.3d 969, 980 (9th Cir. 2018) ("There is no doubt that the governmental safety interests identified for the CLI and MDM [chamber load indicator and magazine detachment mechanism] requirements are substantial. California represents that the legislature's goal in requiring CLIs and MDMs 'was targeting the connection between cheaply made, unsafe handguns and injuries to firearms operators and crime.' These interests are undoubtedly adequate."); Silvester v. Harris, 843 F.3d 816, 827 (9th Cir. 2016) ("The waiting period in California has had the objective of promoting safety and reducing gun violence. The parties agree that these objectives are important. The first step is undisputedly satisfied.").

Protecting minors and the public broadly from gun violence is a substantial government interest. Whether or not AB 2571 is appropriately tailored to advance that interest in a constitutional manner is better addressed by the other Central Hudson factors.

(2) Does the regulation directly and materially advance the government interest?

In their moving papers, plaintiffs identify two disagreements with the Assembly Judiciary Committee's claim that AB 2571 "directly advances its stated governmental interests to limit the exposure of, and consumption by, minors to such advertising and marketing material, given the lethality (and general illegality for minors) of the products being advertised." Mot. at 18 (quoting RJN, Ex. 3 at 11). First, plaintiffs argue that this claim ignores the statutory exceptions to the general rule that minors cannot possess firearms in the state of California, as well as the host of lawful activities that plaintiffs interpret the statute to cover, such as recreational and training activities. Id. Plaintiffs

[5] While in their moving papers plaintiffs argue that AB 2571's two stated interests do not "appear[] genuine" and that plaintiffs "assume, without conceding" that the State generally has a substantial interest, Mot. at 17–18, plaintiffs in their reply claim that they "do not now argue that the State's interest . . . is not compelling," Reply at 15 (citation omitted).

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suggest that, because AB 2571 limits such lawful activity, it is not appropriately tailored to directly advance the state's interest in preventing unlawful activity.

Second, plaintiffs state that the Assembly Judiciary Committee's findings "morphs the State's likely substantial interest in protecting minors from physical harm to an illegitimate interest in limiting the exposure of minors to certain speech the Legislature finds too harmful for them to hear." Id. Plaintiffs argue that silencing speech promoting the use of firearms in ways that may appear attractive to minors only indirectly serves the state's public safety interest and that the State is only speculating that such speech restrictions may reduce minors' demand for firearms and thereby reduce gun violence. Id. Plaintiffs additionally characterize AB 2571 as "the sort of 'paternalistic approach' the Supreme Court has long condemned," id. (citing Va. Bd. of Pharm. v. Va. Citzs. Consumer Council, 425 U.S. 748, 770 (1976)), because it "den[ies] Californians access to truthful information concerning lawful firearm-related products . . . to deter minors' supposedly harmful, but legal, possession and use of firearms, as well as their parents' exercise of their right to consent to such use by their minor children," id. Plaintiffs argue that the better approach "is to open the channels of communication rather than to close them." Id. (quoting Va. Bd. of Pharm., 425 U.S. at 770).

In his opposition, defendant argues that "the Supreme Court has long held that the government may restrict advertising in order to dampen demand, and thereby advance a substantial government interest." Opp. at 15–16 (citing U.S. v. Edge Broadcasting Co., 509 U.S. 418, 434 (1993). Defendant points to the Legislature's findings that the illegal possession of firearms by minors constitutes a serious health and safety risk and to studies linking advertising to the use of harmful products by minors, as well as studies linking restrictions on advertising to decreased demand for harmful products among minors. Id. at 16. Defendant additionally cites the Violence Policy Center finding relied upon by the Legislature that firearm industry members have been directly advertising and marketing firearms to minors. Id. at 16–17. Taken together, defendant asserts, these findings support the conclusion that restricting advertising and marketing of firearm-related products to minors will reduce demand for such products among minors and will likely reduce the unsafe use of firearms by minors, thereby directly advancing the State's goals of reducing gun violence perpetrated by and against minors. Id. at 17.

In response to plaintiffs' argument that the Assembly Judiciary Committee's finding ignores the statutory exceptions to the general prohibition making it illegal for minors to possess firearms in California, as well as the host of lawful activities that plaintiffs interpret

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the statute to address, defendant states that "this argument oversimplifies both AB 2571 and the background prohibition on possession of firearms by minors, which permits only narrow exceptions[.]" Id.

In reply, plaintiffs argue that the fact that the "very purpose of advertising is to encourage the use of the advertised products . . . does not give the State carte blanche to ban truthful speech about otherwise lawful (and constitutionally protected) products and commercial transactions." Reply at 16. More specifically, plaintiffs claim that—by "reduc[ing] demand for firearm-related products among minors by restricting such advertising and marketing," AB 2571 is "at best, an impermissible restriction on speech that only indirectly serves the State's compelling public safety interest." Id. (citing Opp. at 17). In support, plaintiffs cite the Supreme Court's opinion in Sorrell v. IMS Health Inc. holding that a state may not "achieve its policy objectives through the indirect means of restraining certain speech by certain speakers." 564 U.S. 552, 577 (2011). Finally, plaintiffs reiterate their contention that "restrictions on advertising of alcohol, tobacco, and cannabis to children are irrelevant because—unlike possession and use of firearms—it is not legal for minors to possess or use those substances in California. And none of those products are constitutionally protected." Reply at 17 n. 5 (citing Mot. at 11–12).

In supplemental briefing, plaintiffs emphasize their argument that AB 2571 fails to advance the state's underlying interest: "Rather than *directly* attack the perceived problem of *illegal* possession and use of firearms by minors, AB 2571 approaches the issue exactly backwards. It seeks to *indirectly* dampen the demand for even *legal* possession of firearm-related products through advertising restrictions aimed at both minors and adults. But it does so while simultaneously authorizing speech encouraging minors to participate in activities where they will, in fact, be using firearms and related products." Pls.' Supp. Brief at 9. Additionally, plaintiffs cite to the Supreme Court's opinion in Carey v. Population Services International striking down state laws prohibiting advertisements of contraceptives in support of their contention that California may not seek to banish "constitutionally protected products" from the marketplace. Id. at 10 (citing 431 U.S. 678 (1977)).

In response, defendant reiterates that "since the sale of firearms directly to minors is never permitted, and the possession of a firearm by a minor is allowed only under limited and well-defined circumstances, to permit marketing or advertising those items in a way that is appealing to minors – even if there are limited exceptions to those baseline rules – would not be rational or consistent with that overarching and longstanding policy." Def.'s

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Supp. Brief at 9–10. Accordingly, defendant claims that the law is "far from exactly backwards or working indirectly," because "the prohibited communications signal to minors and others who may be unaware of the contours of the law that such conduct is permitted. That AB 2571 now explicitly exempts certain communications related to the exceptions to these rules does not conflict with that policy in a way that it might if the statutory scheme granted minors an unfettered right to possess firearms in California under any circumstances." Id. at 10.

Here, the Court finds the case law regarding the regulation of tobacco and alcohol advertising provides a relevant framework for assessing the parties' Central Hudson arguments.[6] In Lorillard Tobacco Co. v. Reilly—cited in plaintiffs' briefing—the Supreme Court assessed the constitutionality of a series of cigarette, smokeless tobacco, and cigar regulations promulgated by the Massachusetts Attorney General, the purpose of which was to "eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold and distributed in Massachusetts in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age . . . [and] in order to prevent access to such products by underage consumers." 533 U.S. at 533 (citation omitted). The Supreme Court applied the Central Hudson test to two types of regulations: (1) outdoor advertising restrictions, and (2) point-of-sale advertising regulations.[7]

First, the outdoor advertising regulations prohibited *any* smokeless tobacco or cigar advertising within 1,000 feet of schools or playgrounds, according to which the definition of "outdoor" included "not only advertising located outside an establishment, but also

[6] Although California (like many states) prohibits the purchase by minors of alcohol, the State does have certain limited exemptions, *e.g.*, minors employed by law enforcement may purchase alcohol for the purposes of exposing illegal alcohol sales to minors, Cal. Bus. & Prof. Code § 25658, and minors are permitted to possess alcohol while making a delivery in "pursuance of the order of a parent, responsible adult relative . . . or of employment," Cal. Bus. & Prof. Code § 25662.

[7] A third type of restriction on sales practices was upheld under First Amendment analysis unrelated to Central Hudson's commercial speech test because those provisions "regulate conduct that may have a communicative component, but Massachusetts seeks to regulate the placement of tobacco products for reasons unrelated to the communication of ideas." Id. at 569.

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advertising inside a store if that advertising is visible from outside the store. The regulations restrict advertisements of any size and the term advertisement also includes oral statements." Id. at 562. The Massachusetts Attorney General had promulgated the regulations on the basis that "advertising affects demand for tobacco products." Id. at 558. The state relied on several studies, such as one conducted by the Food and Drug Administration finding that "the period prior to adulthood is when an overwhelming majority of Americans first decide to use tobacco products, and that advertising plays a crucial role in that decision." Id. at 557–58. These studies pointed to "sufficient evidence" in support of this basis, such as the fact that youth choice of cigarette brands "directly track[ed] the most heavily advertised brands," or that "television advertising of small cigars increased dramatically in 1972 and 1973, filled the void left by cigarette advertisers, and sales soared." Id. at 558–60 (internal quotations omitted).

The Supreme Court concluded that these regulations satisfied the "directly and materially advances" prong of Central Hudson. The Court found that the "Attorney General has provided ample documentation of the problem," disagreeing with "petitioners' claims that there is no evidence that preventing targeted campaigns and limiting youth exposure to advertising will decrease underage use of smokeless tobacco and cigars." Id. The Court held, "[o]n this record and in the posture of summary judgment, we are unable to conclude that the Attorney General's decision to regulate advertising of smokeless tobacco and cigars in an effort to combat the use of tobacco products by minors was based on mere 'speculation [and] conjecture.' " Id. at 561 (quoting Edenfield v. Fane, 507 U.S., at 770).

Second, the point-of-sale-advertising regulation in Lorillard prohibited advertising "placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any school or playground." Id. at 566 (citation omitted). The Supreme Court held that this provision failed the "directly and materially advances" prong, in which a regulation cannot be sustained "if it only provides ineffective or remote support" or "if there is little chance that the restriction will advance the State's goal." Id. (citations omitted). The state's goal there was to "prevent minors from using tobacco and to curb demand for that activity by limiting youth exposure to advertising." Id. However, the Court concluded that "the 5–foot rule does not seem to advance that goal. Not all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings." Id.

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In Educational Media Company at Virginia Tech, Inc. v. Swecker, the Fourth Circuit applied the Central Hudson "directly and materially advances" prong to a Virginia regulation that "prohibits various types of advertisements for alcohol in any 'college student publication,' which it defines as any college or university publication that is: (1) prepared, edited, or published primarily by its students; (2) sanctioned as a curricular or extracurricular activity; and (3) 'distributed or intended to be distributed primarily to persons under 21 years of age.' " 602 F.3d 583, 587 (4th Cir. 2010) (citation omitted). The regulation restricted qualifying publications from printing advertisements for beer, wine, or mixed beverages unless the ads are 'in reference to a dining establishment.' " Id.

The Fourth Circuit held that the regulation directly and materially advances the government's interest in decreasing demand for alcohol by college students. While the "correlation between advertising and demand alone is insufficient to justify advertising bans in every situation," the court explained that the correlation in its case was "strengthened because 'college student publications' primarily target college students and play an inimitable role on campus." Id. at 590. The court further reasoned that "[this link is also supported by the fact that alcohol vendors *want* to advertise in college student publications. It is counterintuitive for alcohol vendors to spend their money on advertisements in newspapers with relatively limited circulation, directed primarily at college students, if they believed that these ads would not increase demand by college students." Id. Additionally, the court rejected the plaintiffs' arguments that the regulation's exemptions for restaurant ads undermined its effectiveness because the "argument fails to take into account the actual scope of [the exemption]." Id. at n. 5 (holding the regulation's "exception for restaurants does not render it futile").

In Discount Tobacco City & Lottery, Inc. v. U.S., the Sixth Circuit applied the Central Hudson "directly and materially advances" prong to four regulations established by the Federal Family Smoking Prevention and Tobacco Control Act: (1) a ban on distribution of free tobacco product samples, (2) a ban on non-tobacco brand merchandise, (3) a ban on brand name event sponsorship, and (4) a ban on "continuity programs." 674 F.3d 509 at 537, 543 (6th Cir. 2012).

As a threshold matter, the Sixth Circuit noted that a claim "that there is no causal connection between product advertising and the consumer behavior of children . . . stretches the bounds of credulity, even in the absence of the extensive recorded submitted by the government." Id. at 539–40. The court then examined a variety of studies, similar to those discussed above in Lorillard, showing that "the massive amount of money invested

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by the tobacco industry in advertising and marketing is largely devoted to (1) attracting new young adult and juvenile smokers, and (2) brand competition in the young adult and juvenile market." Id. at 540. Without "credible evidence" to rebut these propositions, the court found as a general precept that "there is a substantial state interest in curbing juvenile tobacco use that can be directly advanced by imposing limitations on the marketing of tobacco products." Id.

The Sixth Circuit then analyzed whether each of the four bans directly and materially advanced this interest. First, it found that the ban on distributing free tobacco product samples directly and materially advanced the state's interest because, given the "extensive documentation," "providing an opportunity for an underage nonsmoker to actually try a tobacco product, at no cost, may serve as the best advertisement of all for a product that is physiologically addictive, and socially attractive to youth." Id.

Second, the court examined the ban on tobacco branding of non-tobacco merchandise. The court highlighted two sources, including a "Gallup poll [that found] that nearly half of adolescent smokers—and more than a quarter of non-smokers—owned at least one tobacco-related promotional item" and studies showing that "obtaining tobacco branded non-tobacco products precedes, and reliably predicts, smoking initiation. . . ." Id. at 541–42 (citation and internal quotation omitted). Considering this support, the court found that the ban directly and materially advanced the state's interest.

Third, the court held that the ban on tobacco-branded sponsorship of events directly and materially advanced the government's interest. The government had offered "substantial evidence . . . that the exposure (which includes television broadcasts) that young people have to sponsored events is substantial." Id. at 542 (citation and internal quotation omitted). The court explained that "just as in traditional advertising mediums, tobacco advertising through event sponsorship has an effect on juvenile tobacco consumption." Id.

On the other hand, the court concluded that the ban on continuity programs ("loyalty programs") in connection with tobacco product sales did not directly and materially advance the government's interest. The court noted the "relative dearth of evidentiary support showing that juveniles are significantly influenced by continuity programs." Id. at 544. To that end, because continuity programs are "by nature directly linked to consumption," the court reasoned that the "overwhelming beneficiaries, both numerically and comparatively, of these continuity programs are adult consumers." Id. As such,

regulating an adult program would not directly and materially advance the government's interests in protecting minors.

The Court concludes that AB 2571 directly and materially advances California's compelling interest in protecting minors. Plaintiffs' two primary arguments to the contrary are unavailing. Their first argument—that the governmental interests in AB 2571 in discouraging the illegal sale of firearms to minors are undercut by the exemptions to the prohibitions on the possession and use of firearms by minors —is unpersuasive because the exceptions do not undermine AB 2571's overriding purpose. At its core, by restricting advertising of firearm-related products designed to appeal to minors, AB 2571 directly and materially advances California' explicit prohibition on firearm sales to minors. While California permits the possession and use of firearms by minors in certain limited and specified contexts,[8] AB 2571's focus on the "safety concerns regarding the *illegal*

[8] The exemptions from California's blanket restriction on the possession of firearms by minors are as follows:

> (a) The minor is accompanied by a parent or legal guardian, and the minor is actively engaged in, or is in direct transit to or from, a lawful, recreational sport, including, but not limited to, competitive shooting, or agricultural, ranching, or hunting activity or hunting education, or a motion picture, television, or video production, or entertainment or theatrical event, the nature of which involves this use of a firearm.
>
> (b) The minor is accompanied by a responsible adult, the minor has the prior written consent of a parent or legal guardian, and the minor is actively engaged in, or is in direct transit to or from, a lawful, recreational sport, including, but not limited to, competitive shooting, or agricultural, ranching, or hunting activity or hunting education, or a motion picture, television, or video production, or entertainment or theatrical event, the nature of which involves the use of a firearm.
>
> (c) The minor is at least 16 years of age, the minor has the prior written consent of a parent or legal guardian, and the minor is actively engaged in, or is in direct transit to or from, a lawful recreational sport, including, but not limited to, competitive shooting, or agricultural, ranching, or hunting activity or hunting education, or a motion picture, television, or video production, or

possession and use of firearms by minors" conforms with California's existing statutory framework "reflect[ing] a policy concern that firearm possession by minors—for any purpose, including the narrowly specified, permissible uses set out in statute—presents inherent safety concerns." Opp. at 15

Plaintiffs' second argument—that the State engages in "speculation" and thereby "paternalistical[ly] silences speech"—similarly does not undermine the defendant's showing that AB 2571 directly and materially advances the State's interests. While plaintiffs cite to the Supreme Court's opinion in Virginia State Pharmacy Board v. Virginia Citizens Consumer Council rejecting a "paternalistic approach" to advertising, this case is inapposite to the statute at issue here. 425 U.S. at 770, quoted in Mot. at 19. Virginia State

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> entertainment or theatrical event, the nature of which involves the use of a firearm.
>
> (d) The minor has the prior written consent of a parent or legal guardian, the minor is on lands owned or lawfully possessed by the parent or legal guardian, and the minor is actively engaged in, or is in direct transit to or from, a lawful, recreational sport, including, but not limited to, competitive shooting, or agricultural, ranching, or hunting activity, or a motion picture, television, or video production, or entertainment or theatrical event, the nature of which involves the use of a firearm.
>
> (e) The minor possesses, with the express permission of their parent or legal guardian, a firearm, other than a handgun or semiautomatic centerfire rifle, and both of the following are true:
>
> (1) The minor is actively engaged in, or in direct transit to or from, a lawful, recreational sport, including, but not limited to, competitive shooting, or an agricultural, ranching, or hunting activity or hunting education, the nature of which involves the use of a firearm.
>
> (2) The minor is 16 years of age or older or is accompanied by a responsible adult at all times while the minor is possessing the firearm.

Cal. Penal Code § 29615. Each listed exemption contains a variation of the phrase "actively engaged in, or is in direct transit to or from . . . ."

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Pharmacy concerned a blanket ban on publishing prescription drug prices which was not tailored to serve a substantial state interest. The Supreme Court nonetheless held that "some forms of commercial speech regulation are surely permissible" (including regulating commercial speech that is "provably false," "wholly false," "deceptive," or "misleading"). Id. at 771. Plaintiffs' reliance on the Supreme Court's opinions in Sorrell v. IMS Health Inc. and Carey v. Population Services International is unhelpful for the same reason. The Supreme Court in Sorrell found that the invalidated statute, which prohibited pharmacies from selling prescriber-identifying information and for use in marketing by pharmaceutical manufacturers, only indirectly served the state's interest in protecting physician confidentially and promoting public health, and noted that the state did not claim the provision "will prevent false or misleading speech." 564 U.S. at 573–75; see also id. at 577 (explaining that skepticism against paternalism "appl[ies] with full force when the audience, in this case prescribing physicians, consists of 'sophisticated and experienced' consumers"). And while Carey did concern regulations of what plaintiffs described as "constitutionally protected products," those regulations restricted the advertising of contraceptives under any condition whatsoever. See 431 U.S. at 681 n. 1 (quoting New York Ed. Law § 6811(8) (McKinney 1972)). The regulations in Carey are distinguishable from AB 2571 which, rather than on its face prohibiting the advertising of firearms under all circumstances, restricts the advertising of firearms to minors who cannot legally purchase and own those products.

Ultimately, plaintiffs have not sufficiently shown that AB 2571 fails to directly and materially advances the state's interests by restricting firearms sales advertising that is "attractive" to minors.[9] The Supreme Court has repeatedly "acknowledged the theory that

[9] At oral argument, counsel for plaintiffs cited to a case from the Eastern District of California striking down California's ban on handgun advertising placed within stores and visible from outside the premises. In Tracy Rifle & Pistol LLC v. Harris, the court granted summary judgment in favor of plaintiffs' commercial speech claim, finding that the government failed to show that the handgun advertising regulation directly and materially advanced California's interest in reducing impulsive handgun purchases (contributing to violence and suicide), and that the regulation was no more extensive than necessary. 339 F. Supp. 3d 1007, 1018 (E.D. Cal. 2018).

The Court finds the underlying regulation and litigation posture of Tracy Rifle distinguishable from the instant motion. First, the decision in Tracy Rifle cited by plaintiffs

product advertising stimulates demand for products, while suppressed advertising may have the opposite effect." Lorillard, 533 U.S. at 557 (citing Rubin, 514 U.S., at 487; United States v. Edge Broadcasting Co., 509 U.S. 418, 434, (1993); Central Hudson, 447 U.S., at 568–569). Here, the State has shown that the "harms [of gun violence] it recites are real and that its restriction [on advertising unlawful firearm transactions to minors] will in fact alleviate them to a material degree." See Edenfield, 507 U.S. at 762; see also Opp. at 3 ("AB 2571 also reflects the fact that '[f]or decades, researchers have recognized children as a vulnerable consumer group because of their budding developmental abilities.') (quoting Kelly Dec., Ex. C); Discount Tobacco, 674 F.3d at 539–40 ("[The claim] that there is no causal connection between product advertising and the consumer behavior of children . . . stretches the bounds of credulity, even in the absence of the extensive record submitted by the government.").

Both defendant's briefing and AB 2571's legislative history provide "ample documentation of the problem." Lorillard, 533 U.S. at 528. As discussed above, defendant lays out the harms of gun violence involving children:

> The 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." See id., Exh. 1, at 1. This finding is borne out by the facts:

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arose on a motion for summary judgment. However, in a prior order the Tracy Rifle court denied plaintiffs' motion for preliminary injunction, emphasizing that the lack of a completed evidentiary record weighed against preliminary determinations of the constitutionality of the regulation at issue. 118 F. Supp. 3d 1182, 1194 (E.D. Cal. 2015), aff'd, 637 F. App'x 401 (9th Cir. 2016) ("Given the seriousness of these issues [handgun crime and violence], it is not in the public interest to impose the extraordinary remedy of a preliminary injunction without further fact finding and more formal guidance."). Moreover, the factual record and legal analysis in the Tracy Rifle summary judgment order is not analogous to AB 2571's restrictions. While the court in Tracy Rifle concluded that the "Government may not restrict speech that persuades adults, who are neither criminals nor suffer from mental illness, from purchasing a legal and constitutionally-protected product, merely because it distrusts their personality trait and the decisions that personality trait may lead them to make later down the road," 339 F. Supp. 3d at 1014, here, as stated, California prohibits through AB 2571 the targeted advertising of firearms to minors, who may not lawfully purchase and own them.

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> "[i]n 2021 there were approximately 259 unintentional shootings by children, resulting in 104 deaths and 168 injuries." See id., Exh. 6, at 9. Furthermore, to date, there have been at least 169 unintentional shootings by children in 2022, resulting in 74 deaths and 104 injuries nationally. See [. . .] Kelly Dec. Exh. D. And in 2020, for the first time, firearms-related injuries surpassed motor vehicle crashes as the leading cause of death nationwide for children and adolescents. See [RJN, Ex. 7] at 1; Kelly Dec., Exh. C, at 1955.

Opp. at 14–15; see also RJN, Ex. 6 at 6–7 ("Not only are children increasingly the victims, but also the perpetrators of school shootings . . . . The median age of school shooters is 16.") (citing John Woodrow Cox, et al., More than 310,000 students have experienced gun violence at school since Columbine, Washington Post (May 27, 2022)).

Additionally, the California Senate Judiciary Committee summarized studies showing that "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." RJN, Ex. 6 at 8 (quoting Anna North, Marketing Guns to Children, New York Times (February 19, 2022)); see also id. ("One particularly acute example is a product marketed by WEE1 Tactical . . . [of] a semi-automatic rifle for kids modeled on the AR-15, which has been used in a number of deadly mass shootings . . .") (citing Agence France Presse, US Gunmaker Unveils Semi-automatic Rifle Marketed To Kids, Barron's (February 18, 2022)). The Senate Judiciary Committee also cited to studies noting the parallels between youth advertising in the tobacco context: "Much like the tobacco industry's search for replacement smokers, the gun industry is seeking replacement shooters to purchase its deadly products." Id. at 7 (quoting Josh Sugarmann, "Start Them Young" How the Firearms Industry and Gun Lobby Are Targeting Your Children, Violence Policy Center (February 2016)).

Given the foregoing, it follows that the State has shown that it is reasonable to conclude that restricting advertising of firearm-related products "designed, intended, or reasonably appear[ing] to be attractive to minors" would reduce the unlawful purchase and possession of firearms by minors. See, e.g., Educ. Media Co. at Virginia Tech, 602 F.3d at 590 ("It is counterintuitive for alcohol vendors to spend their money on advertisements in newspapers with relatively limited circulation, directed primarily at college students, if they believed that these ads would not increase demand by college students.")

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Accordingly, the Court concludes that plaintiffs are unlikely to successfully prove that AB 2571 fails to materially and directly advance the State's substantial interests.

(3) Is the regulation no more extensive than necessary to serve that interest?

Plaintiffs make two arguments that AB 2571 is broader than necessary to serve the State's interests. First, plaintiffs contend that AB 2571 sweeps too broadly because the phrase "attractive to children" applies "whether the media is directed to children or a general audience." Mot. at 20 (quoting RJN, Ex. 2 at 6). As a result, plaintiffs claim that the regulation prohibits "communications that are equally attractive to adults who have a right to obtain information about such products to make informed decisions for themselves and their children." Id. (citing Lorillard, 533 U.S. at 562). Similarly, the prohibition is "seriously overinclusive because it abridges the First Amendment rights of young people whose parents . . . think [the shooting sports] are a harmless [even beneficial] pastime." Id. (quoting and paraphrasing Entm't Merchs. Ass'n, 564 U.S. at 804).

Second, plaintiffs claim that even if AB 2571 were not overinclusive in the ways alleged in the preceding paragraph, it would still "remain far too broad for the simple reason that the State 'has various other laws at its disposal that would allow it to achieve its stated interests while burdening little or no speech.' " Id. (quoting Valle Del Sol v. Whiting, 709 F.3d 808, 826 (9th Cir. 2013)). Plaintiffs suggest that California could "counteract firearm advertising with which it disagrees with 'more speech, not enforced silence,' " id. (citing Lorillard, 533 U.S. at 586 (Thomas, J., concurring)), such as "launch[ing] an educational campaign promoting safe firearm handling, storage, and use" or "reminding retailors of their responsibilities with regard to sales to minors," id.

Defendant contests plaintiffs' portrayal of AB 2571's regulatory scope. Although plaintiffs point to the state legislature's statement that the statute's prohibition "applies whether the media is directed to children or a general audience," Mot. at 20 (quoting RJN, Ex. 2 at 6), defendant argues that "plaintiffs ignore that AB 2571 narrowly regulates advertising and marketing communications that are 'designed, intended, or reasonably appear[] to be attractive to minors' as demonstrated by a variety of non-exclusive factors," Opp. at 18 (citing § 22949.80(a)(2)).

Additionally, defendant disagrees with plaintiffs' characterization of the constitutional latitude afforded in regulating commercial speech. Defendant contends that courts "must look for a fit between the government's ends and the means chosen to

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accomplish those ends that is reasonable," a fit that represents " 'not necessarily the single best disposition but one whose scope is in proportion to the interest served . . . .' " Id. at 17 (quoting Bd. Of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)). When such a fit is achieved, defendant argues, courts " 'leave it to governmental decisionmakers to judge what manner of regulation may be best employed.' " Id.

In reply, plaintiffs reiterate their arguments that AB 2571 sweeps more broadly than permissible under this Central Hudson prong. Reply at 17–20. Plaintiffs contend that "firearms in nontraditional colors are just as fun and attractive to many adults" and that "parents have a protected interest in receiving non-misleading information about these lawful products so they may responsibly decide whether a particular firearm is a good fit for their child's lawful recreational or competitive shooting needs." Id. at 19.

In supplemental briefing, plaintiffs reiterate their arguments, explaining that "[e]ven if minors could constitutionally be denied all manner of firearm use and possession, the government goes a bridge too far when it broadly suppresses truthful speech by and for adults about lawful and, in fact, constitutionally protected products."[10] Pls.' Supp. Brief at 13. Plaintiffs argue that the statute's amendments "fail to clear up this fatal overbreadth." Id.

In response, defendant reiterates his contention that AB 2571 "narrowly regulates advertising that is 'designed, intended, or reasonably appears to be attractive to minors,' which is analyzed by a 'totality of circumstances' test, a test that courts routinely apply in other contexts. Def.'s Supp. Brief at 10–11 ("the idea that, at the margins, one or more of these characteristics might also appeal to an adult should not serve to invalidate the entire scheme"). In particular, defendant claims that plaintiffs' reliance on Lorillard is inapposite to the extent that "AB 2571 operates much more narrowly to address its concerns" than the provisions struck down by the Supreme Court. Id.

While blanket bans on forms of advertising may not satisfy the "no more extensive than necessary" prong of Central Hudson, see Zauderer, 471 U.S. at 649 ("Broad prophylactic rules may not be so lightly justified if the protections afforded commercial

[10] For the first time, plaintiffs cite in their supplemental brief to the Supreme Court's recent Second Amendment decision in New York State Rifle & Pistol Ass'n v. Bruen, --- U.S. ---, 142 S. Ct. 2111 (2022). See Pls.' Supp. Brief at 14. However, plaintiffs do not bring a Second Amendment claim in this suit.

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speech are to retain their force."), not every commercial speech restriction can be classified as a blanket ban. Additionally, the Supreme Court has explained that the tailoring required with respect to commercial speech is not as exacting as that required under strict scrutiny review: "The least restrictive means is not the standard." Lorillard, 533 U.S. at 556. Here again, the Court finds tobacco and alcohol advertising case law to be a relevant framework for assessing the parties' tailoring arguments.

In Lorillard, as discussed above, the Supreme Court assessed the constitutionality of outdoor advertising restrictions and point-of-sale advertising regulations. Having held that the outdoor advertising regulations satisfied the "directly and materially advance" prong, see supra, Part V.A.2.b.2, the Supreme Court held that these regulations failed the "no more extensive than necessary" prong because in several parts of the state, "these regulations would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers. The breadth and scope of the regulations, and the process by which the Attorney General adopted the regulations, do not demonstrate a careful calculation of the speech interests involved." Id. at 562. As to the point-of-sale advertising restriction, the Supreme Court found that "while Massachusetts may wish to target tobacco advertisements and displays that entice children, much like floor-level candy displays in a convenience store," the blanket height restriction was poorly tailored because it "does not constitute a reasonable fit with that goal." Id. at 567; see also id. at 566 ("Not all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings.").

In applying the Central Hudson test to regulations designed to protect minors from tobacco advertising, the Supreme Court in Lorillard explained that "[a] careful calculation of the costs of a speech regulation does not mean that a State must demonstrate that there is no incursion on legitimate speech interests, but a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." Id. at 565. Importantly, the Court also recognized, "[t]o the extent that studies have identified particular advertising and promotion practices that appeal to youth, tailoring would involve targeting those practices while permitting others." Id. at 565.

Accordingly, courts throughout the country have applied the Central Hudson tailoring prong to various youth-centered advertising regulations, upholding those that satisfy the test and striking down those that do not.

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In Educational Media Company at Virginia Tech, Inc., as discussed above, the Fourth Circuit applied the Central Hudson "no more extensive than necessary" prong to Virginia's regulation that "prohibits various types of advertisements for alcohol in any 'college student publication.' " 602 F.3d at 587 (citation omitted). The regulation restricted qualifying publications from printing advertisements for beer, wine, or mixed beverages unless the ads are 'in reference to a dining establishment.' " Id. These exempted ads "may not refer to brand or price, but they may use five approved words and phrases, including 'A.B.C. [alcohol beverage control] on-premises,' 'beer,' 'wine,' 'mixed beverages,' 'cocktails,' or 'any combination of these words.' " Id.

The Fourth Circuit found that the regulation was sufficiently tailored because it is "not a complete ban on alcohol advertising in college newspapers." Id. at 590. First, the court explained that "the regulation only prohibits certain types of alcohol advertisements" because it "allows restaurants to inform readers about the presence and type of alcohol they serve." Id. at 590–91. Second, the restriction "only applies to 'college student publications'—campus publications targeted at students under twenty-one." Id. at 591. Because it does not "affect all possible student publications on campus," the court found the restriction to be "sufficiently narrow." Id. Additionally, the court considered how the government created this regulation to "complement" non-speech alternatives such as its state alcohol education and law enforcement programs. Id.

In Discount Tobacco, the Sixth Circuit applied the Central Hudson "no more extensive than necessary" prong to the five federal regulations previously discussed above. The Sixth Circuit upheld the ban on distribution of free tobacco product samples despite the plaintiffs' arguments that it is not narrowly tailored because "it cast[s] an unduly broad net that sweeps in vital speech to Plaintiffs' adult tobacco customers." 674 F.3d at 541. The court found that the ban was reasonable given the government's "extensive documentation that free samples of tobacco products are [an] 'easily accessible source of these products to young people' . . . and freely obtainable, even with the tobacco industry's 'voluntary codes that supposedly restrict distribution of free samples to underage persons.' " Id. (citation omitted).

The court also concluded that the ban on tobacco branding of non-tobacco products was no more extensive than necessary. The plaintiffs had contended that the ban, like the others at issue, was over-inclusive for "encompass[ing] marketing that is geared toward and largely received by adults, and is 'critical . . . in inter-brand competition for adult consumers.' " Id. at 538. They argued that it was more extensive than required because

"more tailored solutions were available to address the court's youth-spill-over concerns, such as . . . limiting the brand-name merchandise ban to the types of items that can become 'walking advertisements' (e.g., caps and t-shirts, but not matchbooks or key chains)." Id. at 542. The court held that because the Act included an exception for matchbooks, one of the only two items that Plaintiffs highlight as being unreasonably swept up by the regulation, strongly supports our finding that the provision is sufficiently tailored to survive scrutiny under Central Hudson." Id.

Additionally, the Sixth Circuit upheld the ban on tobacco-branded sponsoring of "any athletic, musical, artistic, or other social or cultural event, or any entry or team in any event." Id. at 538. The plaintiffs argued that the ban is overly broad because it encompasses events that "are youth-restricted" and "for which there is no evidence whatsoever of any media coverage." Id. at 543. These arguments were unavailing. The court found that, as with its reasoning for branded non-tobacco merchandising restrictions, the ban on tobacco-branded event sponsorships was sufficiently tailored because it "reaches a wide audience of juveniles and contributes to their decisions to use tobacco products." Id.; see also id. at 542 ("At the time of the 1996 FDA rulemaking, it was estimated that more than 64 million children each year were exposed to tobacco advertising on television through auto-racing sponsorship alone."). Additionally, for all three of these upheld bans, the court rejected the plaintiffs' identification of alternative means to combat underage tobacco marketing and consumption.[11]

On the other hand, the court held that the bans on continuity programs ("loyalty programs") and use of color and imagery in tobacco product packaging and labelling could not withstand Central Hudson scrutiny. The plaintiffs argued that continuity programs are designed to maintain the loyalty of existing customers and not to attract new ones. The

[11] The plaintiffs in that case had raised several alternatives, including "restricting media coverage of brand-name-sponsored events or limiting the brand-name merchandise ban to the types of items that can become 'walking advertisements,' strengthening laws prohibiting the sale of tobacco products to minors, improving the state's use of funds negotiated through the 1998 Master Settlement Agreement, raising the legal age of purchase to 19 years-old, which would remove legal-age tobacco users from high schools; penalizing youth use by suspending offenders' drivers' licenses; public advertising campaigns; and social-influence-focused interventions." Id. at 538.

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court found that such a ban was overly broad: "because there is no real dispute that '[a]dults consume more than 98% of all tobacco products sold in this country,' and continuity programs are by nature directly linked to consumption, logic dictates that the overwhelming beneficiaries, both numerically and comparatively, of these continuity programs are adult consumers." Id. at 544.

Similarly, the court found overly broad the restrictions on color and imagery in cigarette and smokeless tobacco product labeling and advertising. Though the restrictions contained certain exemptions for "adult publications," the court explained that the overall "consequence of this restriction is that tobacco advertisers may 'use only black text on a white background' to advertise cigarettes or smokeless tobacco products in most formats in which they currently advertise." Id. at 545 (citation omitted). Noting that almost every product can be marketed through colorful advertising and the creation of positive associations, the Sixth Circuit held that such a broad prophylactic rule was not justified. Id. at 547; see also id. (citing Zauderer, 471 U.S. at 629) ("Given the possibility of policing the use of illustrations in advertisements on a case-by-case basis, the prophylactic approach taken by [the State] cannot stand."). The court described how "all use of color and imagery in tobacco advertising, of course, is not deceptive or manipulative" and listed several uses containing expressive value, such as ads that are largely informational, marketing that "simply shows the package" of the product, colorful imagery that is "simply attention grabbing in a crowded marketplace," and color ads that have no appeal to the youth market. Id.

The Sixth Circuit explained that "[a]s the district court correctly stated, instead of instituting such a sweeping and complete ban, 'Congress could have exempted large categories of innocuous images and colors—*e.g.*, images that teach adult consumers how to use novel tobacco products, images that merely identify products and producers, and colors that communicate information about the nature of a product, at least where such colors and images have no special appeal to youth.' " Id. at 548 (citation omitted). "There is no doubt that identifying and targeting certain advertising practices will be more arduous than banning all color and graphics in tobacco advertising," the court concluded. "But this is the exact work required by the First Amendment." Id. at 548.

Here, by enacting AB 2571, the Legislature intended to restrict the illegal marketing and advertising of firearm products to minors. To ensure constitutionally appropriate tailoring, the law expressly delineates a totality of the circumstances approach aimed at prohibiting only advertising designed to appeal to minors, with several enumerated factors

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provided. Indeed, some of these factors are similar to the types of restrictions upheld in the cases described above. Compare Cal. Bus. & Prof. Code § 22949.80(a)(2)(F) ("Is placed in a publication created for the purpose of reaching an audience that is predominantly composed of minors and not intended for a more general audience composed of adults") with Educ. Media Co. at Virginia Tech, Inc. v. Sweck, 602 F.3d at 587 (upholding Virginia regulation that "prohibits various types of advertisements for alcohol in any 'college student publication' . . . define[d] as any college or university publication that is: (1) prepared, edited, or published primarily by its students; (2) sanctioned as a curricular or extracurricular activity; and (3) 'distributed or intended to be distributed primarily to persons under 21 years of age.' "); compare also Cal. Bus. & Prof. Code § 22949.80(a)(2)(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") with 21 C.F.R. § 1140.34 ("No manufacturer and no distributor of imported cigarettes or smokeless tobacco may market, license, distribute, sell, or cause to be marketed, licensed, distributed, or sold any item (other than cigarettes or smokeless tobacco or roll-your-own paper) or service, which bears the brand name (alone or in conjunction with any other word), logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigarettes or smokeless tobacco."), cited in Discount Tobacco, 674 F.3d at 542 (upholding regulation).

Moreover, some of the other factors listed are explicitly more narrowly tailored than the blanket bans struck down in the above cases. In Discount Tobacco City, the court invalidated restrictions banning "all color and graphics in tobacco advertising," 674 F.3d at 548. Here, by contrast, AB 2571 lists as one factor determining whether the prohibited "[ads] offer firearm-related products in sizes, colors, or designs that are specifically designed to be used by, or appeal to minors," Cal. Bus. & Prof. Code § 222949.80(a)(2)(C). In doing so, AB 2571 is "identifying and targeting certain advertising practices," which is "is the exact work required by the First Amendment." 674 F.3d at 548; see also Lorillard, 533 at 563 ("To the extent that studies have identified particular advertising and promotion practices that appeal to youth, tailoring would involve targeting those practices while permitting others."). And these factors are not by themselves outcome determinative—they are to be considered under a "totality of the circumstances" test to determine whether "marketing or advertising of a firearm-related product is attractive to minors." Cal. Bus. & Prof. Code § 222949(a)(2). Finally, the Court notes that the text and scope of the statute

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are similar to youth advertising prohibitions on tobacco and alcohol.[12] Consequently, plaintiffs appear unlikely to prove that AB 2571 is unconstitutionally overbroad in its scope and application in light of the tailoring test in Central Hudson.

Given all the foregoing reasons, and—as previously stated—the speculative and disfavored nature of facial attacks on an entire statute, the Court cannot conclude at the time of this motion that plaintiffs are likely to succeed on the merits of their commercial speech claim.

3. First Amendment Right to Association Claim

In their third claim for relief, plaintiffs assert that AB 2571 violates their First Amendment right to freedom of association. The Supreme Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others." Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2382 (2021) (quoting Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984)).

Plaintiffs cite the Supreme Court's opinion in NAACP v. Patterson that when "governmental action which may have the effect of curtailing [the right to associate] is subject to the closest scrutiny." Mot. at 21–22 (quoting NAACP v. Patterson, 357 U.S. 449, 462 (1958)). Here, plaintiffs argue that AB 2571 violates their right to associate

[12] See, e.g., Cal. Bus. & Prof. Code § 25600(b)(2)(D) ("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."); N.H. Rev. Stat. Ann. § 179:31(VII) ("Advertising of liquor or beverages shall not contain . . . [a]ny subject matter or illustrations that the commission determines is reasonably likely to induce minors to drink."); 3 Va. Admin. Code 5-20-10(D) ("No advertising shall contain any statement, symbol, depiction or reference that . . . [w]ould tend to induce minors to drink. . ."); and Ala. Code § 28-11-16 (forbidding manufacturers of tobacco and electronic nicotine products from sponsoring scholarships and most public events using the product brand name, from advertising tobacco and electronic nicotine products in mixed-audience publications, and from using in product labeling or design depiction of "characters or symbols that are known to appeal primarily to minors"). None of these laws were struck down.

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because it "casts such a wide net that it prohibits Plaintiffs from advertising, marketing, or arranging for the placement of advertising or marketing concerning their various firearm-related programs and services, where Plaintiffs peacefully and lawfully assemble and associate with each other and members of the public, including youth, to engage in expressive activities related to 'gun culture,' the lawful use of firearms, and preservation of the Second Amendment." Mot. at 22. Accordingly, plaintiffs contend based on their above free speech arguments that the State's interest is not compelling, not narrowly tailored, and not the least restrictive means.

In opposition, defendant claims that—similar to its free speech arguments—AB 2571 does not in fact restrict plaintiffs' right to associate. Opp. at 10. Defendant contends that "nothing in the extensive legislative history evinces an intent to restrict promotion of educational, recreational, or competitive events, much less solicitation of membership in any organization or political speech of any kind." Id. Instead, the "only activity of [plaintiffs] prohibited by AB 2571 is the advertising of firearms-related products to minors 'in exchange for monetary compensation'—that is, if they proposed a commercial transaction for the product." Id.

The Court concludes that plaintiffs are unlikely to succeed on the merits of their freedom of association claim for the same reasons addressed with respect to plaintiffs' political and ideological free speech claims. See, e.g., DeFabio v. E. Hampton Union Free Sch. Dist., 658 F. Supp. 2d 461, 484 & n.9 (E.D.N.Y. 2009), aff'd, 623 F.3d 71 (2d Cir. 2010) (rejecting free association claim where plaintiff "only briefly mention[s] the right of association in conjunction with the free speech claim," and the free association claim is "duplicative" of an unsuccessful free speech claim). As stated above, AB 2571's restrictions on the advertising and marketing of firearm-related products do not "restrict promotion of educational, recreational, or competitive events, much less solicitation of membership in any organization or political speech of any kind." Opp. at 10. Accordingly, plaintiffs' right to freely associate is not implicated here.

4. Fourteenth Amendment Equal Protection Claim

Finally, plaintiffs bring a claim for relief under the Equal Protection Clause of the Fourteenth Amendment. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985)

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(internal quotation marks and citation omitted). To establish a violation of equal protection, a plaintiff generally must show both that they were similarly situated to others who received preferential treatment, id. at 439, and that there was a discriminatory motive or intent behind that different treatment. McLean v. Crabtree, 173 F.3d 1176, 1185 (9th Cir. 1999); Thomas v. Borg, 159 F.3d 1147, 1150 (9th Cir. 1998). A mere demonstration of inequality is not enough: "[t]here must be an allegation of invidiousness or illegitimacy in the statutory scheme before a cognizable [equal protection] claim arises." McQueary v. Blodgett, 924 F.2d 829, 835 (9th Cir. 1991). Moreover, unless the alleged discrimination involves a suspect class of persons or a fundamental right, a challenged statute satisfies equal protection if it bears a rational relation to a legitimate governmental interest. See United States v. Klein, 860 F.2d 1489 (9th Cir. 1988), overruled on other grounds by United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000)); City of New Orleans v. Dukes, 427 U.S. 297 (1976) (explaining that federal courts employ a presumption that governmental classifications do not violate the Equal Protection Clause unless they burden a suspect class or a fundamental interest).

Plaintiffs argue that AB 2571 is "undeniably infused with the State's desire to harm [the] politically unpopular" groups associated with promotion of the Second Amendment and so-called "gun culture." Mot. at 22–23. As such, plaintiffs contend that AB 2571, its underlying legislative history, and viewpoints of sponsored and authoring politicians, evince "animus" towards Second Amendment supporters and the "firearm industry members" defined in the statute. Id. Accordingly, plaintiffs suggest that Court should apply "heightened scrutiny" towards AB 2571's "unequal treatment." Id. at 22 (citing Police Dep't of Chic. v. Mosley, 408 U.S. 92, 96 (1972); Loving v. Virginia, 388 U.S. 1, 11 (1967)).

In opposition, defendant argues that "conclusory allegations that the government is treating plaintiffs differently from other similarly-situated individuals are insufficient to allege a valid Equal Protection claim," and that plaintiffs' claims here that the government officials created the law "solely out of animus" is also conclusory. Opp. at 19. Moreover, defendant contends that plaintiffs "fail[] to identify any protected class" and that their Equal Protection claim is "duplicative of and subsumed by their flawed First Amendment claim." Id. In such circumstances, the claim "rise[s] and fall[s] with the First Amendment claims." OSU Student All. v. Ray, 699 F.3d 1053, 1067 (9th Cir. 2012).

In reply, plaintiffs cite the Supreme Court's holding in Mosley that "[t]he Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly

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tailored to their legitimate objectives." Mosley, 408 U.S. at 101. As such, plaintiffs argue that "if the Court finds that Plaintiffs are likely to succeed on their claim that AB 2571 is an impermissible content-based and viewpoint-discriminatory restriction on their core speech, it naturally follows that the law also violates their right to equal protection under the law." Reply at 20.

Because the Court has concluded above that AB 2571 does not restrict political and ideological speech, plaintiffs' equal protection claim is unlikely to succeed on the merits for the same reasons relating to their right to associate claim. Therefore, to the extent plaintiffs' equal protection claim is "essentially the same" as their First Amendment claim, Reply at 20, that claim "fall[s] with the First Amendment Claim." OSU Student All., 699 F.3d at 1067.[13]

B. Remaining Preliminary Injunction Factors

The remaining preliminary injunction factors are whether plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief, whether the balance of equities tips in their favor, and whether an injunction is in the public interest.

1. Irreparable injury

"It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.' " Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)).

Plaintiffs contend that "[i]f this Court concludes that Plaintiffs are likely to succeed on any one of their alleged constitutional violations, the remaining preliminary injunction factors follow readily." Mot. at 23. Plaintiffs cite the Supreme Court's holding that "the loss of First Amendment freedoms," such as those alleged in this case, "for even minimal

[13] And here, plaintiffs' Equal Protection claim must be "essentially the same" as their First Amendment claim because they do not assert a sufficient and independent alternative basis for an Equal Protection claim. That is, plaintiffs do not identify any protected class (*e.g.*, race, gender) and have not satisfactorily shown animus directed at that class which would evince a "bare . . . desire to harm a politically unpopular group" such as through "[d]iscriminations of an unusual character." United States v. Windsor, 570 U.S. 744, 770 (2013) (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973)).

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periods of time, unquestionably constitutes irreparable injury." Id. (quoting Elrod, 427 U.S. at 373).

In opposition, defendant agrees with the relevant legal standard—that the deprivation of constitutional rights constitutes irreparable injury—but argues that "[p]laintiffs are not likely to succeed on the merits because AB 2571 does not unconstitutionally burden any of their constitutional rights." Opp. at 20. "For the same reason," defendant argues, "they cannot show they will suffer irreparable harm if their motion is denied." Id.

As set forth above, the Court concludes that plaintiffs are unlikely to succeed on the merits of their claims. On that basis, plaintiffs accordingly have not demonstrated irreparable harm if the requested injunction is not issued.

2. Balance of equities and the public interest in an injunction

The last two factors weigh the "balance of hardships between the parties" and measure a public interest in issuing the injunction. Cottrell, 632 F.3d at 1137. As a threshold matter, "[w]hen the government is a party, these last two factors merge." Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing Nken v. Holder, 556 U.S. 418, 435 (2009)). On the one hand, "it is always in the public interest to prevent the violation of party's constitutional rights." Index Newspapers LLC v. United States Marshals Serv., 977 F.3d 817, 838 (9th Cir. 2020) (citation omitted). At the same time, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." Maryland v. King, 567 U.S. 1301, 1303 (2012).

Plaintiffs cite to Ninth Circuit precedent holding that there is a " 'significant public interest' in upholding free speech principles, as the 'ongoing enforcement of the potentially unconstitutional [law] . . . would infringe not only the free expression interests of plaintiffs, but also the interests of other people' subjected to the same restrictions." Klein v. City of San Clemente, 584 F.3d 1196, 1208 (9th Cir. 2009), cited in Mot. at 24; see also Reply at 23 ("The Ninth Circuit has 'consistently recognized the significant public interest in upholding First Amendment principles.' ") (quoting Doe v. Harris, 772 F.3d 563, 583 (9th Cir. 2014). Additionally, plaintiffs argue that the State will suffer no injury because the State "cannot suffer harm from an injunction that merely ends an unlawful practice. . . ." Reply at 21 (quoting Rodriguez v. Robbins, 715 F.3d 1127, 1145 (9th Cir. 2013)).

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In opposition, defendant argues that the "significant of the harm that could result from the improper issuance of an injunction would be substantial." Opp. at 21; see also id. (" 'The costs of being mistaken, on the issue of whether the injunction would have a detrimental effect on handgun crime, violence, and suicide, would be grave,' and those costs which would impact both 'members of the public' and 'the Government which is tasked with managing handgun violence.' ") (quoting Tracy Rifle & Pistol LLC v. Harris, 118 F. Supp. 3d 1182, 1193 (E.D. Cal. 2015), aff'd, 637 F. App'x 401 (9th Cir. 2016)).

Plaintiffs' arguments are ultimately inapplicable to the instant motion. Plaintiffs' contention that the balance of the equities tips in their favor, and that there exists a public interest in granting the injunction, more or less mirrors the logic of their irreparable harm argument. In contrast to the instant motion, the courts in the cases cited by plaintiffs, such as Klein and Doe v. Harris, found the respective plaintiffs likely to succeed on the merits of their First Amendment claims.

Here, because the Court does not find plaintiffs likely to succeed on the merits of their claims, the Court accordingly concludes that the balance of equities does not tip in plaintiffs' favor and that the public interest does not weigh in favor of issuing the injunction.

Moreover, the State, both in the Legislature's findings made in enacting AB 2571, see generally supra, Part V.A.2.b.1–2, and the case law recognizing the public interest in curbing gun violence, Opp. at 20–21, identifies strong countervailing factors weighing against issuance of an injunction enjoining AB 2571. See also Wiese v. Becerra, 263 F. Supp. 3d 986, 994 (E.D. Cal. 2017) ("The State has a substantial interest in preventing and limiting gun violence, as well as in enforcing validly enacted statutes.") (citing Maryland v. King, 567 U.S. at 1303).

VI. CONCLUSION

In accordance with the foregoing, the Court **DENIES** plaintiffs' motion for a preliminary injunction.

IT IS SO ORDERED.

Initials of Preparer	00 : 00
	CMJ

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE CHRISTINA A. SNYDER, U.S. DISTRICT JUDGE

JUNIOR SPORTS MAGAZINE, INC., RAYMOND BROWN, CALIFORNIA YOUTH SHOOTING SPORTS ASSOCIATION, INC., REDLANDS CALIFORNIA YOUTH CLAY SHOOTING SPORTS, INC., CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, THE CRPA FOUNDATION, AND GUN OWNERS OF CALIFORNIA, INC.; AND SECOND AMENDMENT FOUNDATION,	)	CASE NO. 22-CV-04663-CAS
Plaintiffs,	)	
vs.	)	
ROB BONTA, in his official capacity as Attorney General of the State of California; and DOES 1-10,	)	
Defendants.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS VIA ZOOM

MONDAY, OCTOBER 17, 2022

11:14 A.M.

LOS ANGELES, CALIFORNIA

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LOS ANGELES, CALIFORNIA; MONDAY, OCTOBER 17, 2022

11:14 A.M.

-oOo-

THE COURTROOM DEPUTY: Calling Calendar Item 4, Case No. CV 22-4663, Junior Sports Magazine Incorporated, et al. versus Rob Bonta.

Counsel, please state your appearances.

MS. BARVIR: Good morning. Anna Barvir for Plaintiff Junior Sports Magazine, Brown, California Youth Shooting Sports Association, Redlands California Youth Clay Shootings Sports Inc., CRPA, CRPA Foundation, and Gun Owners of California.

THE COURT: Good morning.

Mr. Kilmer, we can't hear you.

MR. KILMER: (Muted.)

THE COURT: Your mute is still on.

MR. KILMER: There we go. I apologize for that.

THE COURT: No problem.

MR. KILMER: Donald Kilmer for the Second Amendment Foundation, Your Honor. Ms. Barvir will be speaking this morning.

THE COURT: All right. Very well.

MR. KELLY: Good morning, Your Honor. Kevin Kelly, Deputy Attorney General, for Defendant Rob Bonta.

THE COURT: Okay. Good morning, everyone. My apologies that we are starting so late. We tried to finish up everything on the 11:00 calendar. So the remaining time will be yours.

I know you have the tentative. I realize it's lengthy, to put it mildly. But I imagine that the plaintiffs will want to be heard.

So, Ms. Barvir, if you wish to proceed.

MS. BARVIR: Thank you, Your Honor, for your time this morning.

THE COURTROOM DEPUTY: Before you start, Counsel, if you can make sure all other electronic devices are moved away just to make sure that there's no feedback or whatnot. And once there is some feedback, if anybody is not speaking, please mute yourselves, and we'll help you through it.

THE COURT: I'm here. I'm trying to open the window.

THE COURTROOM DEPUTY: Thank you. I'm sorry, Ms. Barvir.

THE COURT: I'm back.

MS. BARVIR: Thank you. Is that better? No.

Is that better? Okay. Thank you.

California has chosen to ban all firearm industry members from engaging in any speech promoting a firearm-related product if that speech constitutes advertising or marketing

that might reasonably appear to be attractive to minors.

In doing so, California has adopted a broad ban on speech about items that are not only entirely lawful to use and possess by both adults and minors even in California but are constitutionally protected under the Second Amendment.

In service of California's supported interest in preventing the unlawful use of firearms by minors and in protecting its citizens, especially children, from gun violence, the speech ban is at once both overinclusive and underinclusive.

This, plaintiff posits, is fatal to the state's case no matter what level of scrutiny applies if the Court is looking at this as a pure speech restriction subject to strict scrutiny or whether the Court adopts the traditional Commercial Speech Doctrine analysis as the tentative did.

As the judi- -- district Court held in *Tracy Rifle v. Pistol versus* -- excuse me. As the district Court held in --

THE REPORTER: Counsel --

MS. BARVIR: -- *Tracy Rifle and Pistol v. Harris* --

THE REPORTER: Counsel --

MS. BARVIR: -- California has an array of policies at its disposal to combat the perceived problem of unlawful possession and unlawful use of firearms by minors in California.

None of this policy choices involve restricting speech in any way, and because such options are available to the state, it must resort to them. What it cannot do is to ban speech to both minors and adults about products that are not only lawful for minors to use, though under adult supervision or with parental consent, but more importantly, again, are constitutionally protected.

In light of the concerns in the Court's detailed tentative, plaintiffs wish to request one point of clarification --

THE REPORTER: Counsel --

MS. BARVIR: -- and address --

THE REPORTER: Counsel --

MS. BARVIR: -- two potential misunderstandings that plaintiffs --

THE COURT: Okay.

MS. BARVIR: Thank you. To clarify, I would like to ask whether the -- whether my clients print or display disclaimers in all of their publications and advertisements say something like no information about firearms-related product in this publication are intended to promote a commercial transaction. If they did, would they be facing prosecution or civil penalty under AB 2571, the challenged law?

As the law is written, plaintiff cannot be sure which, I think, goes a bit -- excuse me -- to the vagueness and

overbreadth we've mentioned throughout our briefing.

THE COURT: Well, I think it's always been --

MS. BARVIR: Thank you.

As to my next point, holding that AB 2571 only restricts commercial speech, the tentative focuses only on the direct ban on traditional advertisement and marketing of firearms-related products.

But in our supplemental briefing and supplemental declarations, however, plaintiffs have laid out in quite explicit detail about how the law indirectly but just as intentionally as is evident throughout the legislative history of AB 2571, especially in documents that show contempt for named Plaintiff Junior Sports Magazine's Magazine Junior Shooters bans all pure speech engaged in when Youth Shooting magazines cannot be distributed or events cannot be held in California because those magazines and events necessarily rely on the banned commercial speech for their very existence.

California's ban on firearm-related speech does not only directly bars Junior Sporting magazines -- Junior Sports magazines and other plaintiffs from -- from publishing their traditional ads about firearms-related products and articles endorsing those products. It also indirectly bars all the speech found at -- within the pages of Junior Shooters magazine and other similar magazines for youth.

That is, the law forces Plaintiff Junior Sports

magazine to choose between either barring all ads for firearm-related products, a substantial source of funding for the magazine to say the least, risking the magazine's closure, again, then banning all speech or B, keeping those ads and ceasing all distributed -- distribution of its speech to use in California as it should do.

In the declaration -- the supplemental declaration of Andrew Fink, he has declared that Junior Sports magazine had to choose the latter, ceasing publishing and distributing of Junior Shooters magazine in California because 2571 passed in June, and it has not because it could not resume that conduct since the ad- -- adoption of AB 160.

The California speech ban clearly does not only restrict commercial -- commercial speech, but it also bars a not insignificant amount of pure firearm specific speech that is inextricably linked to that commercial speech.

The inability to effectively parse out speech that merely proposes a commercial transaction and the pure speech that encourages the exercise of Second Amendment productive conduct illustrates why -- well why reasons recent Supreme Court cases have begun to nullify or diminish the distinction between so-called commercial speech and other types of speech: Ideological, educational, et cetera.

Now, granting all protected speech the full protection of the First Amendment in lieu of judging commercial

speech under a separate rubric that looks at whether the advertising is false or misleading and apply something like intermediate scrutiny.

Plaintiff argued that the Court should grant plaintiff's speech that same respect. That said, even if a rational distinction could exist -- could be said to exist between commercial speech and pure speech, the Commercial Speech Doctrine is not a license for governments to create banned subject matters from its publication -- from publication.

So moving to the Court's commercial speech analysis, plaintiff recognized that the Court's tentative repeats a line from California's brief that -- and I'm quoting, "California Penal Code 29610" -- and that's the section from -- excuse me. That's a new law that has been introduced in a recent bill. Generally -- I mean, that's a -- that has recently been amended, I'm sorry, by a recent bill.

Back to the quote -- "generally prohibits a minor from possessing a handgun and semiautomatic centerfire rifle and as of July 1st, 2023, any firearm."

Respectfully, that is not, in fact, the state of the law today nor will it be the state of the law after July 1st, 2023. Minors may, in fact, still possess firearms for lawful purposes, subject not to just narrow exceptions but a common sense exception that requires minors to have adult supervision

or consent to engage in firearm conduct.

For clarity and for the record on appeal, plaintiffs want to be sure the Court understands that the minors' possession of firearms under adult supervision and consent are the same today as they will be come July 2023.

Plaintiffs also want to clarify in case the Court isn't aware that no commercial transaction firearm take place to anyone, let alone minors -- well, legal ones, that is, legal commercial transactions that is -- in California unless a commercial transaction takes place through an FFL. An FFL is for purposes of firearm sales considered an agent of the Federal Government. They also must go through a California firearms licensed firearm dealer which is an agent of the California government for the purposes of firearm sales.

That means we offer for sale the acceptance, consideration, and delivery of firearms products -- not firearms. Not other related products that this law also affects -- must take place through a government agent. And they may only take place after a significant background check and ten-day waiting period.

Guns that sold at 7-Eleven or Toys "R" Us, they are not readily available for unlawful purchase by minors as, say, tobacco or alcohol. But the Court's tentative relies very heavily on case law analyzing restrictions on commercial speech pertaining to such substances. And I can see -- and plaintiff

can see the temptation to do that.

But when it's clear that California law does not (inaudible) minors from lawfully possessing and using firearms, it also becomes clear that these cases make for a very poor analogy.

Both the state and the Court's tentative rely on cases whereby the courts have permitted advertising restrictions to dampen the demand for products and services to establish that the state may ban -- ban speech to dampen the demand of youth to engage in a shooting sporch -- sport.

Respectfully, plaintiffs argue that that reliance is misplaced. These cases generally deal with restrictions on advertising of products or services like alcohol and tobacco. Other similar restrictions -- other similar cases deal with restrictions on advertising of brothels and gambling and such conduct.

They do not speak to restrictions on truthful speech about products that are not only illegal to only use but Constitutionally protected as is the speech that California bars under 2571.

Respectfully, plaintiff's posit that the more apt analysis would be -- excuse me -- found under *Carey v. Population Services*. Like the unconstitutional ban on advertising contraceptives to children and adults, in theory, AB 2571 seeks to suppress information about the availability of

and price of constitutionally protected products.

It cannot be said, as the Court's tentative acknowledges, to prohibit only misleading ads or only ads proposing illegal transactions. Nor can it be characterized as directed to inciting or producing imminent lawless action.

To the contrary, the speech that plaintiffs engage in and which is, in fact, banned by AB 2571 does not propose that minors engage in lawful sales -- unlawful sales or the unlawful use of firearms. It pertains to lawful and constitutionally-protected conduct, and it targets speech to both adults and minors as long as that could be considered reasonably attractive to minors who might seek market information about lawful firearms for lawful use. And so, as in *Carey*, the state cannot ban plaintiff's speech.

Unless the Court has in anything else or thinks additional briefing could assist the Court in understanding the issues with regard to the state of the law regarding transfer of firearms, plaintiffs would rest.

THE COURT: All right. I appreciate that. You had a lot to say. A lot of that is in your moving papers.

I guess I'd like to hear from Mr. Kelly first. I must say that I think you assume things about the statute that I just think doesn't cover it. It doesn't purport to ban sales and limit advertising. And I think it limits commercial speech. I know you disagree.

But let's hear from Mr. Kelly and see what he has to say.

MR. KELLY: Thank you, Your Honor. You know, obviously we agree with the vast majority of the Court's tentative ruling. It was our position that the statute was always Constitutional, and I think the amendment to the law, the recent amendment, makes it clear that it regulates commercial speech and nothing beyond that.

I think the plaintiff often bring up examples existing at the margins, and I think they often point to communications regarding the use of firearms-related products by minors, but that is not what the statute is regulating.

It's regulating, as you said, marketing and advertising communication of firearm-related products only.

So it's difficult to respond to a lot of those arguments about rehashing the Court's reasoning and tentative ruling --

THE COURT: Let me just ask you this. I think -- and I don't mean to interrupt, but that's exactly what I'm doing. For example, I think you and I agree that several injunction factors are implicated because of the nature of the regulation.

I believe that what Miss Barvir is saying is that I have the wrong analogy, that I shouldn't be looking at alcohol cases or cigarette cases and things of that nature. And I

think it's because she believes that the Second Amendment protects gun ownership, and so therefore, a different standard has to apply.

And, I guess, what do you say about that?

MR. KELLY: So, Your Honor, I think the analogy is appropriate in this case because I think, as Your Honor pointed out in the tentative decision, the concern here is the prevention of illegal and unsafe firearm use by minors. That's what the law is addressing here. That's the purpose of the law, and that's what the law does address here.

So I think the constitutionality of minor possession of firearms is not really at issue in this case, and I think it's something the Court really doesn't need to go into here.

But I think the Court was absolutely correct in addressing and discussing how the interest deemed further here is the illegal use of firearms by minors. We put forth data and numbers showing that there is a very real problem with what that the legislation recognized, and it's material submitted along with the bill. And so in that way, I think the analogy is actually appropriate in the situation.

THE COURT: Okay. I interrupted you. Do you want to proceed?

MR. KELLY: Oh, one moment, Your Honor. I'm sorry.

Yes, Your Honor. So I'll just respond with a couple more of the plaintiff's points. So they've continually argued

that this statute is both overinclusive and underinclusive and that there are other means possible to prevent gun violence involving minors.

But I think they are really applying a strict scrutiny standard here. Intermediate scrutiny is all that's required. And just because this is not the only solution to the problem does not mean it's a permissible way to address the problem of youth gun violence.

I think to the extent that they argue that the definition of being reasonably attractive to minors is too overbroad, it's belied by the statute itself. It lists very specific factors for a Court to consider. And, again, it does not -- it is limited to commercial solicitation rather than communications regarding the youth of firearms --

THE COURT: Well, what do you say in response to the argument that the statute effectively requires publishers either to not distribute in California or basically close down?

MR. KELLY: I think that's a conclusory statement. I don't think there's been any evidence other than just a mere statement saying, well, since we can't -- well, first of all, that the advertisements that they purport to want to carry actually run afoul of the law.

And secondly, that -- that not being able to carry those advertisements would actually doom their publication. And they are perfectly able to seek sponsorships and financial

compensation in other ways. But again, I don't think they've established significant facts that that would actually be a problem.

THE COURT: Okay. Anything else you want to cover before I go back to Ms. Barvir?

MR. KELLY: No, nothing else, Your Honor.

THE COURT: Okay. Ms. Barvir.

MS. BARVIR: Thank you, Your Honor. I don't have anything to add. Though I would like to just quickly respond to a few points that I heard my friend speaking to.

First, the state -- the --

(Audio feedback.)

THE COURTROOM DEPUTY: Try to back up just a little bit. You might be too close to the microphone.

MS. BARVIR: Thank you. Is that better?

THE COURT: Yes.

MS. BARVIR: First, the state and the Court's tentative argue that the issue and what is being barred here is illegal use and possession, and that isn't it. The law does address that, but it's much, much broader than that. If the law focused only on, perhaps, barring speech for -- excuse me.

You know, they literally, I think, targeting and telling minors, hey, buy guns here, perhaps that might be -- that might be something that is referencing just illegal contracts or just -- this though is all types of speech

including speech regarding and promoting lawful use and possession as long as that speech is attractive to minors.

And again, that is speech that might equally be attractive to adults. So we are not just talking about speech targeting children. We are talking about speech between adults. Okay?

Second, I believe -- excuse me. The state is -- misunderstands or -- misunderstands plaintiff's argument with regarding -- with regard to the overinclusive and underinclusivity of AB 2571 and points made about having to resort to laws and policies that restrict conduct and not speech.

We are not talking about a strict scrutiny standard here. This argument, taking the lead from *Tracy Rifle v. Harris* which was specifically and only about commercial transaction speech -- and that court did, in fact, find that bans on this type of -- I believe it was being able to view images of handguns from outside the store -- excuse me -- found that that commercial speech was violative of the First Amendment even under the Commercial Speech Doctrine because there were all of these other things that the state could have done that did not in any way restrict the speech -- the rights of the speech -- the plaintiffs to speak in that case. That was under a commercial speech analysis, not a strict scrutiny analysis.

And finally, the point about whether or not plaintiff had made enough -- shown enough evidence that they'd be put out of business if they couldn't advertise their -- advertise as they currently do, I think there's a few things to say about that.

A, when the law was passed in June -- excuse me -- and took effect immediately, it did not have any of those restrictions. So they had to -- they weren't clear about what -- exactly what -- that it was not as clear as it perhaps is now. Though I still think it's not entirely clear even after AB 160.

So I think the relevant time period to look at is the end of September when AB 160 took effect. It is not enough time for them to have even shown that there was an impact on their business. So the signed affidavit of the owner of that business I think should be sufficient to show that he thinks what they have to do in order to stay afloat is to not distribute to California, and that's a ban on speech to California.

Additionally, requiring that they first then go ahead and take all that speech out, this is a nationwide -- actually, worldwide distributed publication. So what California is trying to do in suggesting it's inappropriate is ban speech in other states that do not restrict such speech, and California can't do that either.

With that, plaintiffs would rest.

THE COURT: Mr. Kilmer?

MR. KILMER: Your Honor, I didn't hear an answer to Ms. Barvir's question proposed to Mr. Kelly that she made initially. And that is, is the disclaimer going to fix all of this? If these publications or websites merely print a disclaimer that no information about firearm-related products in this publication are intended to promote a commercial transaction, are we -- are we safe? Are we immune from 2571?

THE COURT: Well, I'll leave that to Mr. Kelly because I suspect that the answer is -- that the disclaimer in a general sense may be okay, but then it may not.

Mr. Kelly?

MR. KELLY: Yeah, I think that's correct. I think, again, the statute lays out the totality of circumstances analysis here. I'm hesitant to say whether -- there are a lot of factors that go into this; right?

I think -- and, you know, I'm hesitant to speak on behalf of my office and take a position here on behalf of everyone at my office.

But again, I think I would point to the statute. Does it fall under the -- do the communications that the publication is offering fall under the definition of marketing or advertising under the law, and do they constitute being attractive to minors as defined by the law.

So I don't think that there's one clear-cut answer there. And I think, again, you would have to look at the statute for the answer to that and apply it all with different factors that the statute provides for.

THE COURT: I think -- here's the problem, folks. Obviously this is a significant issue for both sides. We are speaking now in terms of what the statute says and what I and you think is a reasonable conclusion under the statute.

There may be instances that are brought forth where as applied, the statute may fail or as applied, it may succeed. But the problem is we don't have a lot before it.

But I certainly don't see anything in this legislation that would require the magazine to cease publishing in California. I think the statute is clear regarding what types of advertising is prohibited; and namely, that is the advertising which is -- that encourages minors to possess and own firearms illegally.

I believe it's commercial speech. It is a much broader prohibition. But at the end of the day, I do believe the statute, particularly after the amendment, makes clear what the state's intention is, and that is to regulate commercial speech, not other speech, and it is directed toward speech that is intended to encourage or entice people who are ineligible to own guns to want to possess or buy guns.

I think on that basis, I think it withstands

scrutiny. But obviously I know the plaintiff vehemently disagrees.

So I am going to take another look at the ruling in light of the comments. But I would not expect me to change anything dramatically after today's hearing. So I suppose you should all plan accordingly.

Okay. I appreciate your indulgence and your briefing and all that you have done. I will try to have something for you in the next few days.

MS. BARVIR: Thank you, Your Honor.

MR. KELLY: Thank you, Your Honor.

MR. KILMER: Thank you, Your Honor.

THE COURTROOM DEPUTY: Thank you, Counsel. This Court is adjourned.

(At 11:40 a.m. the proceedings adjourned.)

CERTIFICATE OF OFFICIAL REPORTER

I, MAREA WOOLRICH, FEDERAL OFFICIAL REALTIME COURT REPORTER, IN AND FOR THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT TO SECTION 753, TITLE 28, UNITED STATES CODE THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT THE TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE REGULATION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

DATED THIS 28TH DAY OF NOVEMBER, 2022.

/S/ MAREA WOOLRICH

MAREA WOOLRICH, CSR NO. 12698, CCRR
FEDERAL OFFICIAL COURT REPORTER

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2024, an electronic PDF of APPELLANTS' EXCERPTS OF RECORD, VOLUME II OF III was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Dated: July 30, 2024

Respectfully submitted,

MICHEL & ASSOCIATES, P.C.

s/ Anna M. Barvir
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