24-4050

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUNIOR SPORTS MAGAZINE, INC., et al.,
Plaintiffs and Appellants,

v.

ROB BONTA,
Defendant and Appellee.

On Appeal from the United States District Court
for the Central District of California

No. 2:22-cv-04663-CAS-JCx
Hon. Christina A. Snyder, Judge

DEFENDANT-APPELLEE'S SUPPLEMENTAL EXCERPTS OF RECORD
VOLUME I OF I

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IN THE UNITED STATES DISTRICT COURT

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,

Defendant.

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

PLAINTIFFS' REPLY TO DEFENDANTS' LIMITED OPPOSITION TO 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

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INTRODUCTION

The State objects to the scope of relief requested on the grounds that Plaintiffs seek to restrain nonparties from enforcing Business & Professions Code section 22949.80. Although the issue of "to whom" an injunction should apply was not expressly addressed on appeal, Federal Rule of Civil Procedure 65 provides sufficient guidance to this Court as it implements the Ninth Circuit's mandate after reversing this Court's denial of Plaintiffs' request for a preliminary injunction. Indeed, Rule 65 expressly authorizes this Court to enjoin not only the named defendant, but also his "officers, agents, servants, employees, and attorneys," *and* any person "in active concert or participation with" those persons. This includes anyone in "privity" with the Attorney General, including all public officials authorized to enforce AB 2571.

The State also objects to the scope of the relief requested on an issue that the Ninth Circuit expressly addressed—that is, whether all of section 22949.80 is likely unconstitutional and therefore subject to preliminary injunctive relief. This objection lacks merit. Essentially, the State's argument is that the Ninth Circuit panel's opinion is ambiguous or somehow just plain wrong. More seriously, California is advocating judicial anarchy—asking this Court to violate a number of sacrosanct judicial principles, including the law of the case, judicial precedent, stare decisis, collateral estoppel, and issue preclusion. The State also thumbs its nose at the rules of civil and appellate procedure. This Court should decline the State's invitation to defy the Ninth Circuit and, instead, it should issue a preliminary injunction that faithfully applies the reasoning and letter of the panel's mandate.

ARGUMENT

I. THE PRELIMINARY INJUNCTION SHOULD BIND THE ATTORNEY GENERAL, HIS OFFICERS, EMPLOYEES, AGENTS, AND ATTORNEYS, AND EVERY PERSON IN ACTIVE CONCERT OR PARTICIPATION WITH HIM

Plaintiffs have requested, among other orders, a prohibitory preliminary injunction against the enforcement of section 22949.80 directed to the Attorney

General, "his employees, agents, successors in office, and all District Attorneys, County Counsel, and City Attorneys holding office in the state of California, as well as their successors in office." The Attorney General counters that this Court may not restrain the enforcement of AB 2571 by anyone other than the named party, his successors in office, and their agents. Opp'n 10-11. The argument lacks merit.

Federal Rule of Civil Procedure 65(d)(2) allows district courts to enjoin any of "the following who receive actual notice of it by personal service or otherwise: (A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)." Fed. R. Civ. P. 65(d)(2). "The Supreme Court has interpreted this language to allow injunctions to bind not only defendants but also people 'identified with them in interest, in "privity" with them, represented by them or subject to their control.'" *Cal. Chamber of Com. v. Council for Educ. & Research on Toxics*, 29 F.4th 468, 483 (9th Cir. 2022) (quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 179 (1973); *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945)). Otherwise, defendants could "nullify a decree by carrying out prohibited acts through aiders and abettors" simply because they were not named parties. *Regal Knitwear*, 324 U.S. at 14. To avoid that outcome here, the Court should fashion preliminary injunctive relief that binds all public officials expressly authorized to enforce AB 2571—both parties and non-parties. At a minimum, this Court should enjoin enforcement by the Attorney General, his officers, agents, servants, and employees, and anyone else in active concert or participation with those persons.[1]

[1] This is similar to the injunction the Eastern District issued in the companion case of *Safari Club International v. Bonta*: "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." Order Granting Plaintiffs' Motion for a Preliminary Injunction 2, *Safari Club Int'l v. Bonta*, No. 22-cv-01395 (E.D. Cal. April 11, 2024), ECF No. 56.

It is undisputed that Attorney General Bonta, his successors in office, and their agents are the proper subject of Plaintiffs' requested injunction. Opp'n 11. The Attorney General is a named party. Compl. ¶ 21. He is sued in his official capacity. *Id.* And he is expressly tasked with enforcing AB 2571 through civil suits to recover civil penalties. Cal. Bus. & Prof. Code § 22949.80(e)(1). The Attorney General is thus appropriately bound by any injunction this Court issues. Fed. R. Civ. P. 65(d)(2); *Ex parte Young*, 209 U.S. 123, 157 (1908) (holding that the public official to be restrained "must have some connection with the enforcement of the act").

Under Rule 65(d)(2), this Court may direct a preliminary injunction to not only the Attorney General but also to those subordinate officers over whom he has direct supervisory authority. Fed. R. Civ. P. 65(d)(2)(B). This includes all 58 District Attorneys who, along with the Attorney General, are expected to bring civil actions to enforce AB 2571 in the name of the People of the State of California. Cal. Bus. & Prof. Code § 22949.80(e)(1). Indeed, under Article V, section 13 of the California Constitution, the Attorney General's powers include "direct supervision over every district attorney and sheriff and over such other law enforcement officer as may be designated by law, in all matters pertaining to the duties of their respective offices."

Finally, this Court may enjoin enforcement of AB 2571 by nonparty County Counsels and City Attorneys even though they are employed by and represent local political subdivisions and not the State itself. Both Rule 65 and the common-law principles it stands for contemplate two categories of nonparties that an injunction may bind: (1) "nonparties acting in concert with a bound party"; and (2) "nonpart[ies] in 'privity' with an enjoined party." *Nat'l Spiritual Assem. of Ba'hais of U.S. Under Hereditary Guardianship, Inc. v. Nat'l Spiritual Assem. of Ba'hais of U.S., Inc.*, 628 F.3d 837, 848 (7th Cir. 2010) (citing *Golden State Bottling*, 414 U.S.

Plaintiffs have not submitted a revised proposed order adopting this language, but they would not oppose an injunction that mirrors the one issued in *Safari Club*. And, if this Court prefers, Plaintiffs will provide a new proposed order that reflects this.

1 at 179-80, 94; *Regal Knitwear*, 324 U.S. at 14; *Rockwell Graphic Sys., Inc. v. DEV*
2 *Indus., Inc.*, 91 F.3d 914, 919 (7th Cir. 1996)). This case concerns the latter type.
3 "[P]rivity exists when a third party's interests are so intertwined with a named
4 party's interests that it is fair under the circumstances to hold the third party bound
5 by the judgment against the named party." *Saga Int'l, Inc. v. John D. Brush & Co.*,
6 984 F. Supp. 1283, 1287 (C.D. Cal. 1997) (citing *United States v. ITT Rayonier,*
7 *Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980)). Privity can arise if the nonparty's
8 "interests are adequately represented by the named party … or if some other implied
9 or in-fact representation or alignment of interests existed between the parties." *Id.*
10 (citing *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980)).
11 Here, the interests of nonparty County Counsels and City Attorneys are *identical* to
12 the interests of the Attorney General. They are all authorized by the State to bring
13 civil actions in the name of the People under AB 2571, Cal. Bus. & Prof. Code
14 § 22949.80(e)(1), and they all share the same interest in seeing the law enforced.
15 That interest is *more than adequately* represented by the Attorney General, who (as
16 the chief law officer of the state) has a duty to "see that the laws of the State are
17 uniformly and adequately enforced." Cal. Const. art. 5, § 13.
18 For these reasons, this Court has the authority to issue an injunction that binds
19 not only the Attorney General, but his officers, employees, agents, employees, and
20 attorneys, and every person in active concert or participation with him—including
21 those state and local public officials authorized to enforce AB 2571.
22 This Court also has the authority to issue mandatory injunctive relief. *Marlyn*
23 *Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878 (9th Cir.
24 2009). If this Court disagrees that it has the authority to bind County Counsels and
25 City Attorneys, Plaintiffs ask that the Court also grant a mandatory injunction,
26 directing the Attorney General to issue an alert notifying District Attorneys, County
27 Counsels, and City Attorneys in California of this lawsuit and that enforcement of
28 AB 2571 has been preliminarily enjoined. An alert is necessary to give notice to

these officials that the law is likely unconstitutional and therefore unenforceable—especially given that the Attorney General notified "all California criminal justice and law enforcement agencies" of the law's adoption through an official information bulletin in 2022. *See* Suppl. Barvir Decl., Ex. B.

The mandatory relief that Plaintiffs propose is not unusual. In fact, the Attorney General regularly "issues information bulletins on a wide range of topics" in order to "provide technical guidance to partners across the state." Often, "these bulletins follow changes in state laws, *court precedent*, regulations, or technology. [And they] are generally sent to local authorities, including law enforcement and agencies that use information systems maintained by the Department." *Information Bulletins*, Rob Bonta, Attorney General, State of California Department of Justice, https://oag.ca.gov/info-bulletins (last visited May 24, 2024) (emphasis added). For instance, in response to *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), the Attorney General issued a bulletin informing local law enforcement and government lawyers of the decision and its impact on California's carry license regime. *See* Suppl. Barvir Decl., Ex. C. Providing similar notice in this case will give meaningful effect to the prohibitory injunction Plaintiffs are entitled to.

II. THE NINTH CIRCUIT HELD THAT THE ENTIRETY OF SECTION 22949.80 IS LIKELY UNCONSTITUTIONAL; THIS COURT HAS NO AUTHORITY TO NARROW THE SCOPE OF THE MANDATE TO ONLY SUBSECTION (a)

A. The Ninth Circuit's Opinion Is Not Ambiguous, and the State's Plea That This Court Should Narrow or Modify the Ninth Circuit Mandate Invites Reversible Error

The State contends that the Ninth Circuit's opinion was limited to subsection (a) of section 22949.80 and so too should the preliminary injunction—a claim it never once made before this case returned to this Court on remand. Opp'n 6. The argument, however, rests on a profound distortion of Plaintiffs' motion for preliminary injunction and the Ninth Circuit's decision. Indeed, the plain language of the Ninth Circuit's opinion—which is now the law of the case—contradicts the State's claim. "In sum, we hold that § 22949.80 is likely unconstitutional under the

First Amendment ….” *Jr. Sports Mags., Inc. v. Bonta*, 80 F.4th 1109, 1120-21 (9th Cir. 2023). This language is not susceptible to two meanings. It is not overly complex or lacking in clarity; it does not require "Talmudic scholars nor skill[s] in the use of Urim and Thummin to construe it." *Herrgott v. U.S. Dist. Ct. for the N. Dist. of Cal. (In re Cavanaugh)*, 306 F.3d 726, 729 (9th Cir. 2002). Even still, the State claims there is some latent ambiguity in the Court of Appeals' words because, despite the very plain language of the decision, the court *really* meant to hold that only subsection (a) is likely unconstitutional. Opp'n 8. The State is wrong.

The Ninth Circuit did not limit its ruling to any subsection, and for good reason. The complaint challenges the entirety of section 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"). Plaintiffs' motion sought to preliminarily enjoin *all* of section 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.[2] And the Ninth Circuit reversed that decision. *Jr. Sports Mags.*, 80 F.4th at 1120-21.

Even more astonishingly, the State effectively argues that Plaintiffs themselves had no idea what law they were challenging in either their complaint or their motion for preliminary injunction. Indeed, the State claims that "consistent with the scope of this action, the parties and the courts have simply used those phrases ["section 22949.80" or "AB 2571"] as shorthand for the advertising regulations in subdivision (a)." Opp'n 8. That is simply not true. Plaintiffs have

[2] In a footnote, this Court observed that it was not clear whether Plaintiffs had challenged anything but subsection (a), but it ultimately acknowledged that Plaintiffs' motion for preliminary injunction did seek to enjoin all subsections of the law. ECF No. 35 at 6, n.3.

1 never adopted "section 22949.80" as shorthand for anything—let alone section
2 22949.80(a). Rather, they have consistently referred to "AB 2571" as shorthand for
3 their challenge to the entirety of § 22949.80, including the amendments made to
4 subsections (a) and (c) by AB 160.[3] And the State itself never once stated that it was
5 adopting "Section 22949.80" as shorthand for "Section 22949.80(a)." In fact, when
6 petitioning the Ninth Circuit for rehearing en banc, the State itself acknowledged
7 that Plaintiffs "moved for a preliminary injunction against Section 22949.80 *in its*
8 *entirety*." Appellees' Petition for Rehearing En Banc 6, *Jr. Sports Mags.*, 80 F.4th
9 1109 (9th Cir. 2023), ECF No. 49 (emphasis added).

10 It is more than frivolous for the State to suddenly reverse course and suggest
11 that there is some hidden meaning in the parties' briefs or, even worse, the Ninth
12 Circuit's opinion—an opinion that, in its penultimate declarative sentence, sets forth
13 the simple and straightforward holding of the Court of Appeals. Is the State really
14 suggesting that legal texts are susceptible to mind-reading exercises to gain insight
15 into the panel's meaning and shorthand notations? If so, what other secret messages
16 are contained in the opinion that are apparently discoverable only by the Attorney
17 General's decoder ring?

18 The only rational approach to interpreting legal texts requires this Court to
19 enjoin the entire statute because that is what the plain text of the mandate said in
20 plain English. The State, however, asks this Court to narrow or modify the plain
21 language of the mandate. This Court has no power to do as the State demands. The
22 mere suggestion invites this Court to commit a clear error that will subject these
23 proceedings to yet another interlocutory appeal. It is well settled that:

24

25 [3] *See, e.g.*, ECF No. 1 at 14, n.3 ("Throughout this complaint, Plaintiffs refer to the challenged law, California Business & Professions Code section 22949.80, as
26 'AB 2571.'"); ECF No. 12-1 ("Throughout this motion, Plaintiffs refer to section 22949.80 as AB 2571."); ECF No. 30 at 1, n.2 ("For continuity, Plaintiffs refer to
27 the challenged law—Business & Professions Code section 22949.80—as AB 2571."); *see also* Appellants' Opening Brief 2, n.1, *Jr. Sports Mags.*, 80 F.4th 1109
28 (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.'").

> The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded.

Sibbald v. United States, 37 U.S. 488, 491 (1838). *See also NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240, 245 (1959). The "law of the case" was expressed in the Ninth Circuit's opinion and mandate. The plain language of that opinion and mandate is the exposition of the law itself. It is not some suggestion—or mere evidence—of the rule laid down by that court.[4]

"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." *Junior Sports Mags., Inc. v. Bonta,* 80 F.4th 1109, 1121 (9th Cir. 2023). Defiance of this mandate is reversible error.

B. This Court Has No Power to Review the Court of Appeals Opinion or Mandate for Any Perceived Error

Perhaps the State's most remarkable argument—made for the first time in its post-appeal opposition brief— is its use of the simple truism that "[a]n injunction must be narrowly tailored to remedy the specific harm" to narrow the Ninth

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[4] Professor Laurence H. Tribe has written about the interpretation of legal texts:

> "Like Justice Scalia, I never cease to be amazed by the arguments of judges, lawyers, or others who proceed as though legal texts were little more than interesting documentary evidence of what some lawgiver had in mind."
>
> ….
>
> "[I]t is the text's meaning, and not the content of anyone's expectations or intentions, that binds us as law."

Laurence H. Tribe, *Comment*, in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 65, 66 (1997) (discussed in Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 295 (Thomson/West, Kindle ed. 2012)).

Circuit's clear holding. Opp'n 7 (citing *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019)). Setting aside that *East Bay* stands only for the proposition that a nationwide injunction is disfavored when the harm is occurring within one district or circuit, the State's reliance on *East Bay* is remarkable because of its not-so-subtle implication that the Ninth Circuit panel erred by holding all of section 22949.80—not just subsection (a)—is likely unconstitutional under the First Amendment. Even if the panel did err, the State cites no precedent authorizing trial courts to narrow the holding of an appellate court after the issuance of an unambiguous mandate from an interlocutory appeal.

As noted above, the Ninth Circuit's mandate is not ambiguous. The State even acknowledged in its failed petition for en banc review that Plaintiffs here (and in the companion *Safari Club International* case) "moved for a preliminary injunction against Section 22949.80 in its entirety." Appellees' Petition for Rehearing En Banc 6, *Jr. Sports Mags.*, 80 F.4th 1109. Yet there is no language in that petition (or anywhere else) seeking to limit the scope of the appeal to only subsection (a) or asking an en banc panel to limit the scope of the three-judge panel's reversal and remand with instructions to only enjoin subsection (a). The State's waiver of this issue in its failed en banc petition means the alleged error (assuming there is one and assuming it has been properly preserved on this record) can now be corrected only by the Supreme Court.

If the State is suggesting that the Ninth Circuit panel's holding is overbroad and thus in error, it is applying to the wrong court to remedy that alleged error. If this overbreadth conjecture is the foundation of the State's objection to enjoining the entirety of section 22949.80, then its remedy—from as far back in federal judicial practice as *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816)—lies in a petition to the Supreme Court. It does not lie in advocating that this trial court defy an edict issued by a court of higher authority. "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent … *must be followed by the lower federal courts*

no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (emphasis added). Moreover, the lower courts must adhere not just to the result obtained by the higher court, but also to any reasoning necessary to that result. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) (and collected cases).

In *Brockett v. Spokane Arcades*, 472 U.S. 491 (1985), the Supreme Court reviewed a Ninth Circuit opinion holding that an entire statute was null and void on First Amendment grounds. The Court reversed for a redetermination of exactly which provisions or subsections of the statute were unconstitutional. *Id.* at 507. Presumably, the Ninth Circuit panel knows the rule generated by *Brockett*—that a federal court may not extend its invalidation of a statute further than necessary to dispose of the case before it. If the panel members harbored any concern about impermissible judicial overreach, they understood well how to limit their ruling as shown by their use of the doctrine of constitutional avoidance to reserve judgment on Plaintiffs' equal protection and Freedom of Association claims. *See Jr. Sports Mags.*, 80 F.4th at 1120, n.3.

So, which is more plausible? That the three-judge panel made a conscious decision to enjoin the entirety of section 22949.80, or that three judges of the Ninth Circuit (including their clerks) ignored Supreme Court precedent and engaged in the judicial anarchy that California is urging this Court to engage in?

C. Any Request Made to this Court for Modification of the Mandate Is Not Ripe

Finally, any power this Court has to modify or narrow the mandate of the Ninth Circuit—that section 22949.80 in its entirety is likely unconstitutional—requires a motion by the party seeking modification upon a showing of changed circumstances, a change in the law, or new facts that would warrant a modification of the original preliminary injunction that is required by the panel decision. *See A&M Records v. Napster, Inc.*, 284 F.3d 1091, 1098 (9th Cir. 2002). The State has

1 failed to even allege such changes, let alone document them with evidence and
2 support them with valid arguments. At best, any modification of the Ninth Circuit's
3 mandate is not ripe for review, especially when the government has not even filed an
4 answer nor pleaded any affirmative defenses.

5 **CONCLUSION**

6 The State never made the "only subsection (a)" argument in their merits briefs
7 before the Ninth Circuit panel that decided this matter. It made no such argument in
8 its failed petition for rehearing en banc. It did not request a narrower holding in a
9 petition for panel rehearing. Nor has it moved to recall the mandate for clarification
10 or petitioned for certiorari with the Supreme Court.

11 The Ninth Circuit's mandate is unambiguous, unreviewable, and unalterable
12 by this Court. This Court must grant the relief requested by Plaintiffs and mandated
13 by the Ninth Circuit's published opinion.

14

15 Dated: May 24, 2024 **MICHEL & ASSOCIATES, P.C.**

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

21

22 Dated: May 24, 2024 **LAW OFFICES OF DONALD KILMER, APC**

23 *s/ Donald Kilmer*
Donald Kilmer
24 Counsel for Plaintiff Second Amendment
Foundation

25

26 **ATTESTATION OF E-FILED SIGNATURES**

27 I, Anna M. Barvir, am the ECF User whose ID and password are being used
28 to file this PLAINTIFFS' REPLY TO DEFENDANTS' LIMITED OPPOSITION

TO 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: May 24, 2024

s/ Anna M. Barvir
Anna M. Barvir

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record 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., certifies that this brief contains 3,784 which complies with the word limit of L.R. 11-6.1.

Dated: May 24, 2024

s/ Anna M. Barvir
Anna M. Barvir

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' REPLY TO DEFENDANTS' LIMITED OPPOSITION TO 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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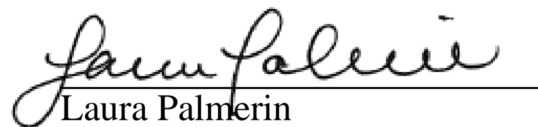
I declare under penalty of perjury that the foregoing is true and correct.

Executed May 24, 2024.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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-JC **DEFENDANT'S LIMITED OPPOSITION TO MOTION TO ENFORCE MANDATE AND ISSUE PRELIMINARY INJUNCTION** Date: June 10, 2024 Time: 10:00 a.m. Courtroom: 8D Judge: Hon. Christina M. Snyder Trial Date: None set Action Filed: July 8, 2022

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1
INTRODUCTION

2 Defendant Attorney General Rob Bonta respectfully submits this limited
3 opposition to Plaintiffs' Motion to Enforce Mandate and Issue Preliminary
4 Injunction.

5 "An injunction must be narrowly tailored to remedy the specific harm
6 shown." *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019)
7 (internal quotation omitted). Defendant opposes Plaintiffs' motion because the
8 proposed preliminary injunction is insufficiently tailored in two respects.

9 First, consistent with the Ninth Circuit's opinion in this matter, *Junior Sports*
10 *Mags., Inc. v. Bonta*, 80 F.4th 1109 (9th Cir. 2023), any preliminary injunction
11 should enjoin only subdivision (a) of California Business and Professions Code
12 section 22949.80. Subdivision (a) concerns advertising firearm-related products
13 to minors and is the only statutory provision that Plaintiffs have challenged in this
14 action. However, section 22949.80 includes another distinct, substantive
15 regulation in subdivision (b). Subdivision (b) is a privacy provision—as opposed
16 to an advertising one—that imposes requirements relating to the use and
17 dissemination of minors' personal information. As described in detail below,
18 Plaintiffs have never challenged subdivision (b), and neither this Court nor the
19 Ninth Circuit has considered the validity of subdivision (b). Moreover, the
20 provisions of section 22949.80 are presumptively severable, and at no time have
21 Plaintiffs rebutted that presumption. Plaintiffs therefore failed to meet their
22 burden of "establishing the elements necessary to obtain injunctive relief" as to
23 subdivision (b). *Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir.
24 2009).

25 It is true that, since the filing of Plaintiffs' complaint, the parties and courts
26 have often used references to "section 22949.80" or "AB 2571" as a shorthand for
27 the advertising regulations in subdivision (a). But that does not change the
28 substance of what has—and has not—been litigated in this case. Moreover,

subdivisions (c) through (f) of the statute inform how to interpret and enforce both subdivisions (a) and (b). Thus, limiting the injunction to subdivision (a) is therefore the only way to issue an injunction consistent with the Ninth Circuit's opinion in the appeal.

Second, in accordance with Federal Rule of Civil Procedure 65, any preliminary injunction should enjoin only Defendant, his officers, agents, servants, employees, and attorneys, and persons who are in active concert or participation with anyone of them. *See* Fed. R. Civ. Proc. 65(d). It should not specifically enjoin "all District Attorneys, County Counsel, and City Attorneys" in the State, per Plaintiffs' proposed order. *See* ECF No. 59-3 at 2.

Defendant respectfully asks this Court to limit any preliminary injunction in these two respects.

BACKGROUND

I. CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 22949.80

Section 22949.80 contains two separate subdivisions that regulate speech or conduct. Subdivision (a) is the subdivision Plaintiffs challenge in this action. *See* Background, section II, *infra*. It states: "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).

Subdivision (b) of section 22949.80, meanwhile, does not purport to regulate any advertising or similar types of communications. *Id.* § 22949.80(b). Rather, it limits the use and dissemination of the personal information of minors. *Id.*

Subdivision (b) states:

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

Id.

Section 22949.80 also includes an express severability provision. *Id.* § 22949.80(f).

II. The Complaint

Plaintiffs filed the operative Complaint on July 8, 2022. ECF No. 1. The Complaint purports to "challenge the constitutionality of California Business & Professions Code section 22949.80, which makes it unlawful for any "firearm industry member" to "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." *Id.* at 2-3 (citing Cal. Bus. & Prof. Code § 22949.80(a)(1)). The Complaint regularly cites subdivision (a) of section 22949.80 (*id.* at 3, 14, 15, 16) and alleges injuries and causes of action arising out of the advertising regulations in that provision (*see, e.g.*, *id.* at 30-36). The Complaint does not mention or cite to subdivision (b) of the statute at any point. It also does not mention subdivision (b)'s privacy regulations, or even allude to them. This Court later acknowledged in its order denying the original motion for preliminary injunction that the Complaint does not challenge the constitutionality of the regulations in subdivision (b). ECF No. 35 at 6 n.3.

III. Plaintiffs' Original Motion for Preliminary Injunction and This Court's Order

Plaintiffs filed a preliminary injunction on July 20, 2022. ECF No. 12. In the motion, Plaintiffs sought to "enjoin enforcement of section 22949.80." ECF

No. 12-1 at 30 (Memorandum of Points and Authorities). The motion also used the term "AB 2571," the statute's enacting legislation. *See* ECF No. 12-1. However, consistent with the Complaint, all of Plaintiffs' arguments in the motion related to the statute's advertising regulations in subdivision (a). *See id.*; ECF No. 21 (Reply brief). Plaintiffs' motion did not once mention subdivision (b) or its privacy regulations. *See* ECF Nos. 12-1, 21.

This Court issued a minute order denying the motion for preliminary injunction. ECF No. 35. The order considered whether the requirements of subdivision (a) are constitutional and otherwise subject to a preliminary injunction. *See id.* The order specifically concluded that subdivision (b) of section 22949.80 had *not* been "challenged by plaintiffs in their complaint or briefing on this motion, although [it is] evidently encompassed by plaintiffs' request to "enjoin the enforcement of section 22949.80." *Id.* at 6, n.3. The order therefore did not otherwise mention or discuss subdivision (b) or its privacy regulations. *See* ECF No. 35.

IV. PLAINTIFF'S APPEAL AND THE NINTH CIRCUIT'S RULING

Plaintiffs appealed the district court's order to the Ninth Circuit Court of Appeals. ECF No. 37. Again, Plaintiffs' arguments concerned only the advertising restrictions in subdivision (a). *See* Appellants' Opening Br., ECF No. 7, *Junior Sports Mags., Inc. v. Bonta*, 80 F.4th 1109 (9th Cir. 2023) (No. 22-56090), 2022 WL 17980278; Appellants' Reply Br., ECF No. 25, *Junior Sports*, 80 F.4th 1109, 2023 WL 2226847. Plaintiffs made no mention of subdivision (b) or its privacy regulations. Moreover, Plaintiffs did not dispute the district court's earlier conclusion that they had not challenged the constitutionality of subdivision (b) in either their complaint or motion for preliminary injunction.

The Ninth Circuit reversed the district court's denial of the Plaintiffs' motion for preliminary injunction and remanded "for further proceedings consistent with [the] opinion." *Junior Sports*, 80 F.4th at 1121. In the decision, the court

considered only whether the requirements of subdivision (a) are constitutional and otherwise subject to a preliminary injunction. *See Junior Sports*, 80 F.4th 1109. The court did not mention, allude to, or consider the constitutionality of subdivision (b)'s privacy regulations or whether that subdivision is subject to a preliminary injunction. *See id*. The court also took no issue with this Court's determination that Plaintiffs had not challenged subdivision (b) in their Complaint or motion. *See id.*

V. RECENT PROCEEDINGS IN *SAFARI CLUB V. BONTA*

Following the Ninth Circuit's ruling in Plaintiffs' appeal, the same panel issued a short Memorandum in the related preliminary injunction appeal of *Safari Club International v. Bonta*. No. 23-15199, 2023 WL 6178500 (9th Cir. Sept. 22, 2023), in which Attorney General Bonta is also the Defendant. The Memorandum stated, "For the reasons outlined in *Junior Sports Magazines v. Bonta*, No. 22-56090 (9th Cir. Sept. 13, 2023), we reverse the denial of preliminary injunction and remand for further proceedings consistent with that opinion." *Id.* at *1.

Thereafter, the parties in *Safari Club* submitted to the district court a Joint Status Report, in which the plaintiffs asked the Court to issue a preliminary injunction "consistent with the Ninth Circuit's opinion and judgment." Joint Status Report at 2, ECF No. 32, *Safari Club Int'l v. Bonta*, No. 2:22-cv-01395-DAD-JDP (E.D. Cal. Mar. 20, 2024). Defendant took no position on that request. *Id.* When, after a brief period, no preliminary injunction had issued, Defendant informed the *Safari Club* plaintiffs that he would not oppose a new motion for preliminary injunction, but only if the motion requested "an injunction consistent with the substance and scope of the Ninth Circuit's ruling." *See* Decl. of Gabrielle Boutin in Supp. of Mtn, for an Order Clarifying Prelim. Inj. ¶ 4, ECF No. 35-1, *Safari Club Int'l v. Bonta*, No. 2:22-cv-01395-DAD-JDP (E.D. Cal. May 15, 2024). Defendant specifically explained, "[f]or example, we assume you will request an injunction only of subsection (a) of Business & Professions Code

section 22949.80, since that is the only restriction on speech that the 9th Circuit addressed in its opinion [in *Junior Sports*]." *Id.*

Before the *Safari Club* plaintiffs filed a new motion for preliminary injunction, however, the district court issued an Order Granting Pls' Mtn. for a Prelim. Inj.. Order Granting Plaintiffs' Motion for a Preliminary Injunction, ECF No. 33, *Safari Club Int'l v. Bonta*, No. 2:22-cv-01395-DAD-JDP (E.D. Cal. April 12, 2024). The Order enjoins enforcement of "California Business & Professions Code § 22949.80" by "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." *Id.*

On May 15, 2024, Defendant filed a Motion for an Order Clarifying the Preliminary Injunction. *See* Mem. of P. & and A. Supp. of Mtn. for an Order Clarifying Prelim. Inj., ECF No. 35, *Safari Club Int'l v. Bonta*, No. 2:22-cv-01395-DAD-JDP (E.D. Cal. May 15, 2024). There, Defendant has asked the court to clarify that the existing injunction enjoins the enforcement only of subdivision (a).[1] *See id.* at 1. That motion is set for hearing on July 2, 2024. *Id.*

ARGUMENT

I. Any Preliminary Injunction Should Enjoin Only Subdivision (a) of Section 22949.80.

A plaintiff has the burden to show they are entitled to a preliminary injunction of the scope that they seek. *See Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009) (the plaintiff bears the burden of "establishing the elements necessary to obtain injunctive relief"); *E. Bay Sanctuary Covenant v.*

[1] Prior to Plaintiffs' filing of the instant motion in this case, Defendant advised them that he was planning to ask the court in *Safari Club* to clarify that its preliminary injunction was limited to subdivision (a) of section 22949.80. *See* Pls' Mem. of P. & and A. Supp. of Mtn. to Enforce Mandate & Issue a Prelim. Inj. ("Mtn."), ECF No. 59-1, at 9. Defendant also explained to Plaintiffs the reasoning for this limited opposition to their motion. *Id.* at 7.

1 *Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) ("[a]n injunction must be narrowly
2 tailored to remedy the specific harm shown" (internal quotation omitted)); *see*
3 *also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (injunctive
4 relief is an "extraordinary remedy that may only be awarded upon a clear showing
5 that the plaintiff is entitled to such relief").
6 Here, Plaintiffs have not shown that they are entitled to any injunction of
7 subdivision (b) of section 22949.80. As this Court previously observed, Plaintiffs
8 did not challenge the constitutionality of the privacy regulations in subdivision (b)
9 in either their Complaint or their original preliminary injunction motion. ECF No.
10 35 at 6 n.3. Plaintiffs did not challenge subdivision (b)'s constitutionality in the
11 Ninth Circuit appeal. And, at no stage have Plaintiffs established any of the
12 elements necessary for injunctive relief as to subdivision (b).
13 Instead, Plaintiffs' arguments and showing has been limited to the
14 advertising regulations in subdivision (a), which is presumptively severable from
15 the rest of the statute. Cal. Bus. & Prof. Code § 22949.80(f) (severability
16 provision). *See Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1325 (9th
17 Cir. 2015) ("Severability is . . . a matter of state law" (ellipsis in original)); *Vivid*
18 *Ent., LLC v. Fielding*, 774 F.3d 566, 574 (9th Cir. 2014) ("California law directs
19 courts to consider first the inclusion of a severability clause in the legislation . . .
20 'The presence of such a clause establishes a presumption in favor of severance"
21 (quoting *Cal. Redev. Ass'n v. Matosantos*, 53 Cal.4th 231, 270 (2011)). Although
22 this is a rebuttable presumption, Plaintiffs have never attempted to meet their
23 burden to rebut the presumption. *See Santa Barbara Sch. Dist. v. Superior Court*,
24 13 Cal.3d 315, 331 (1975) ("Although not conclusive, a severability clause
25 normally calls for sustaining the valid part of the enactment").
26 The Ninth Circuit's opinion and mandate does not require this Court to
27 preliminarily enjoin subdivision (b). Rather, it requires this Court to conduct
28 further proceedings "consistent with" its opinion. *Junior Sports Mags.*, 80 F.4th

at 1121. Like this Court's appealed order, the Ninth Circuit opinion discusses and analyzes *only* the advertising regulations in subdivision (a). It does not consider whether, much less rule that, the privacy regulations in subdivision (b) are likely unconstitutional or otherwise subject to a preliminary injunction. It is true that the Ninth Circuit opinion, like the filings of this Court and the parties before it, generally refers at times to "section 22949.80" or "AB 2571." But consistent with the scope of this action, the parties and the courts have simply used those phrases as shorthand for the advertising regulations in subdivision (a). *See, e.g., Junior Sports Mags.*, 80 F.4th at 1113. Indeed, the Ninth Circuit described the challenged regulation as follows:

> 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).

Id. at 1114; *see also id.* at 1113 ("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"). No phrase or label used for rhetorical convenience can change the substance of the Court's legal discussion and analysis.[2]

---

[2] Defendant's own references in prior briefs to "section 22949.80" or subdivisions (c) and (e) of the statute are irrelevant to the issue of whether Plaintiffs have met their burden to show that subdivision (b) should be preliminarily enjoined. *See* Mtn. at 8-9. Even if those references were relevant, they do not indicate that Defendant thought that Plaintiffs challenged subdivision (b), despite Plaintiffs' failure to mention, much less discuss, that provision in their Complaint or briefs. Each of Defendant's references was made to support his argument that *subdivision (a)*'s advertising regulations are constitutional and not subject to a preliminary injunction. *See, e.g.,* Defendant-Appellee's Answering Br. at 4-5, 15-16, 20, 34, ECF No. 20, *Junior Sports*, 80 F.4th 1109 (9th Cir. 2023) (No. 22-56090), 2023 WL 1768545; Pet'n for Rehearing En Banc at 3-4, ECF No. 49, *Junior Sports*, 80 F.4th 1109.

Plaintiffs argue that they are entitled to a preliminary injunction of subdivision (b) because their proposed order in support of their original motion for preliminary injunction sought to enjoin enforcement of "AB 2571, codified at Business & Professions Code section 22949.80" and the Ninth Circuit did not suggest that narrower relief is appropriate. *See* Mtn. at 8. However, this Court denied that motion, rejected the proposed order, and recognized that Plaintiffs had not challenged subdivision (b)'s constitutionality. Later, the Ninth Circuit simply determined that the advertising regulations in subdivision (a) were properly subject to a preliminary injunction and that this Court should conduct proceedings consistent with that determination.[3] The Ninth Circuit did *not* conclude that this Court should have adopted Plaintiffs' previously-submitted proposed order. *See* *Junior Sports*, 80 F.4th 1109.

Plaintiffs also argue that subdivision (b) should be enjoined because it is "wholly reliant on the marketing of firearm industry members that the Ninth Circuit has found to be protected speech." Mtn. at 10. But during the preliminary injunction proceedings, Plaintiffs never explained, much less proved, why this is so. Plaintiffs do not claim to have submitted any evidence or cited any legal authorities on this point. (Had they done so, then Defendant would have fairly had the opportunity to rebut those submissions and citations.) Logic alone does not dictate that subdivision (b)'s privacy regulations necessarily prevent Plaintiffs from speaking as described in subdivision (a). For example, why do Plaintiffs need to "knowingly . . . disclose" to third parties the personal information of a minor in order to publish firearm advertisements directed to minors? *See* Cal. Bus. & Prof. Code § 22949.80(b). And, why must publications knowingly use the

[3] Indeed, after the Ninth Circuit issued the opinion, but before mandate issued, the Ninth Circuit panel rejected Plaintiffs' request that it immediately issue a preliminary injunction. *See* Motion for Injunction Pending Appeal, ECF No. 44, *Junior Sports*, 80 F.4th 1109 (9th Cir. 2023) (No. 22-56090); Order, ECF No. 48, *Junior Sports*, 80 F.4th 1109 (9th Cir. 2023) (No. 22-56090).

personal information of minors, instead of their parents with whom they live? *See id.* Plaintiffs do not attempt to address these or similar questions, and the answers are not obvious. In any event, neither this Court nor the Ninth Circuit has determined that subdivisions (a) and (b) must stand or fall together. Indeed, the Legislature did not think so, having included a severability clause in AB 2571.

Finally, there is no need to preliminarily enjoin subdivisions (c) through (f) of section 22949.80. *See* Mtn. at 10. Again, a preliminary injunction must be narrowly-tailored. *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019). Unlike subdivisions (a) and (b), subdivisions (c) through (f) do not proscribe any speech or conduct. Rather, they simply inform how subdivisions (a) and (b) are to be interpreted and enforced. *See* Cal. Bus. & Prof Code § 22949.80(c) (providing definitions of terms); *id.* § 22949.80(d) (describing conduct *not* affected by the statute); *id.* § 22949.80(e) (describing how the statute is enforced); *id.* 22949.80(f) (severability provision).

II. THE PERSONS SUBJECT TO ANY PRELIMINARY INJUNCTION SHOULD BE LIMITED TO THOSE ENUMERATED IN FEDERAL RULE OF CIVIL PROCEDURE 65(D)

If this Court issues a preliminary injunction, it should also limit the scope of the persons bound by the injunction. Under Federal Rule of Civil Procedure 65(d), a preliminary injunction binds only the following persons who receive actual notice of the injunction: "(A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)." Fed. R. Civ. P. 65(d); *see also Regal Knitwear Co. v. NLRB*, 324 US 9, 13, 65 (1945) (courts may not grant injunction "so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law").

Here, in their proposed order, Plaintiffs seek to enjoin the conduct of "Defendant, his employees, agents, successors in office, and all District Attorneys,

County Counsel, and City Attorneys holding office in the state of California, as well as their successors in office." ECF No. 59-3 at 2. This Court should decline to enjoin the conduct of this list of persons, as many are not parties to this action. The Court should instead issue the injunction against only those persons identified in Rule 65(d)—Defendant, his officers, agents, servants, employees, and attorneys, and other persons in active concert with them. Plaintiffs have not provided any legal authority or argument for enjoining any persons other than those listed in Rule 65(d).

CONCLUSION

For the reasons described above, Defendant respectfully submits that any preliminary injunction issued by this Court should enjoin only enforcement of section 22949.80, subdivision (a), and enjoin only those persons enumerated in Federal Rule of Procedure 65(d).

Dated: May 20, 2024

Respectfully submitted,

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

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

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendant Rob Bonta, in his official capacity as Attorney General for the State of California, certifies that this brief contains 3364 words, which complies with the word limit of L.R. 11-6.1.

Dated: May 20, 2024

Respectfully submitted,

ROB BONTA
Attorney General of California

s/ Gabrielle D. Boutin
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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 20, 2024, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANT'S LIMITED OPPOSITION TO MOTION TO ENFORCE MANDATE AND ISSUE PRELIMINARY INJUNCTION

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 20, 2024, at Los Angeles, California.

Dora Mora	*Dora Mora*
Declarant	Signature

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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' MEMORANDUM OF POINTS AND AUTHORITIES 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

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INTRODUCTION

This motion should not even be necessary—and not because some action by this Court is not required—but because the State should have cooperated in securing the post-mandate preliminary injunction, that was ordered by the Court of Appeals, without forcing the parties and this Court to engage in unnecessary litigation.

From the summary of the published opinion in *Junior Sports Magazines, Inc., v. Bonta*, 80 F.4th 1109 (9th Cir. 2023):[1]

> 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 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.

Given this outcome and the time and resources already expended in this matter, the State should have entered into a stipulation for compliance with the Ninth Circuit's mandate and agreed to the entry of a preliminary injunction. Because it will not agree to do so, Plaintiffs find themselves forced to file this motion.

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[1] The full opinion is attached as Exhibit A to the Declaration of Anna M. Barvir and filed simultaneously herewith.

FACTUAL BACKGROUND

I. STATEMENT OF FACTS

Because this Court is already familiar with this case, the facts recounted in this post-mandate motion are taken from the Ninth Circuit decision verbatim.

A. 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

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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).

B. 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, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (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.

II. PROCEDURAL HISTORY AFTER NINTH CIRCUIT OPINION

On September 13, 2023, the Ninth Circuit reversed the denial of Plaintiffs' motion for preliminary injunction motion in a unanimous decision. *Jr. Sports Mags.*, 80 F.4th 1109. 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.

Later, 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 based on its September 13, 2023, opinion on February 28, 2024. Dkt. 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. Dkt. No. 52. This Court granted the stipulated extension. Dkt. No. 53. This Court also entered an order setting a status conference regarding filing and spreading the Ninth Circuit Mandate. Dkt. No. 54.

In preparation for that conference, the parties met and conferred about potential avenues for the efficient disposition of this case. Barvir Decl. ¶ 3. The State refused to enter into a stipulation for entry of an order for a final judgment

enjoining enforcement of section 22949.80. *Id.* ¶ 3. It also refused to enter into a stipulation for the entry of an order for a preliminary injunction pending further discussions or litigation. *Id.* Instead, the State urged Plaintiffs to renew their motion for a preliminary injunction, stating that it would either not oppose the motion or would file a non-opposition. A day after meeting and conferring, counsel for the State gave notice that Defendants would, in fact, oppose any preliminary injunction that was not limited solely to subsection (a) of section 22949.80, *id.* ¶ 4—despite the Ninth Circuit's express holding that, without qualification, ***"§22949.80 is likely unconstitutional under the First Amendment."*** *Jr. Sports Mags.*, 80 F.4th at 1121 (double emphasis added).

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. Barvir Decl. ¶ 5. It also set another status conference for May 13, 2024, with a joint status conference statement due on May 6, 2024. *Id.* The Court orally encouraged the parties to continue to meet and confer to resolve the whole case and, if possible, enter any order necessary to address the mandate. *Id.* In compliance with the Court's directives, the parties exchanged correspondence discussing settlement and the scope of any order that would address the Ninth Circuit's mandate. But because the parties continue to disagree over whether the Ninth Circuit opinion addresses more than subsection (a), no agreement could be reached. *Id.* ¶ 6.

On April 18, 2024, the Plaintiffs 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. Dkt. No. 56. Even still, Defendants have refused to agree to enter an identical preliminary injunction here in this case. Barvir Decl. ¶ 6. Plaintiffs are thus forced to file this motion to enforce the Ninth Circuit's mandate and obtain the preliminary injunctive relief against enforcement of section 22949.80 while this case proceeds.

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ARGUMENT

"The purpose of a preliminary injunction is to preserve the status quo pending a determination of the action on the merits." *Chalk v. U.S. Dist. Ct. (Orange Cnty. Superin. of Schs.)*, 840 F.2d 701, 704 (9th Cir. 1998). To obtain relief, Plaintiffs must show (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm absent preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

The Ninth Circuit has already made all the necessary findings for granting a preliminary injunction in its disposition published at *Junior Sports Magazines, Inc. v. Bonta*, 80 F.4th 1109, 1120-21 (9th Cir. 2023). Those findings are binding on this Court and represent the law of the case. The mandate is effective when issued. Fed. R. App. P. 41(c). And the opinion on which the mandate is based "REVERSE[D] the district court's denial of a preliminary injunction." *Id.* at 1121. Plaintiffs are thus entitled to a preliminary injunction enjoining enforcement of section 22949.80—in its entirety—while this case proceeds to settlement or final judgment.

I. THE NINTH CIRCUIT HAS ALREADY HELD THAT PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. Section 22949.80 Impermissibly Infringes on Plaintiffs' Right to Free Speech

As noted, the law of the case as to the First Amendment issues is set forth in the Ninth Circuit's decision in *Junior Sports Magazines, Inc. v. Bonta*, 80 F.4th 1109 (9th Cir. 2023). The mandate, set forth in the conclusion of that opinion, is not open to reexamination or further review that the State is apparently now insisting on. Indeed, it is well-established that:

> [W]hatever was before the Court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided

on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded.

Sibbald v. United States, 37 U.S. 488 (1838). *See also NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240, 245 (1959).

For purposes of Plaintiffs' post-mandate motion for a preliminary injunction, it is Business & Professions Code section 22949.80—in its entirety—that is (likely) unconstitutional. *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.")

Because that is now the law of the case, Plaintiffs need not retread their successful First Amendment Commercial Speech arguments or their claims brought under the right to associate and the Equal Protection Clause.[2]

B. The State's Claim That Only Subsection (a) Is Subject to Injunction Is Frivolous

The State has not provided Plaintiffs with any authority during their meet-and-confer efforts for the recently concocted claim that the Ninth Circuit declared only subsection (a) unconstitutional. The plain text of the opinion—which is now the law of the case—contradicts that assertion. Any pleading the State files making that argument comes dangerously close to violating rule 11(b)(1) and (b)(2) of the Federal Rules of Civil Procedure.[3] Because Plaintiffs have not had the opportunity to analyze a formal brief (or even informal argument) from the State on this point, they offer the observations below in anticipation of the State making that frivolous argument.

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[2] They do not, however, waive any of those other constitutional claims or the arguments they made in their initial motion or on appeal that are not based on the commercial speech doctrine. The Court of Appeals, applying the doctrine of avoidance, found it unnecessary to address those claims because full relief was available under the commercial speech doctrine. *Jr. Sports Mags.*, 80 F.4th at 1115, fn. 1, 1121, fn. 3.

[3] Certainly, Plaintiffs would not take any action regarding Rule 11 unless they are served with a pleading by the State that violates the rule.

1. The relief sought by Plaintiffs in their original motion for a preliminary injunction was clearly laid out in the proposed order filed with that motion. It expressly requested that "during the pendency of this action, the named Defendant, his employees, agents, successors in office, and all District Attorneys, County Counsel, and City Attorneys holding office in the state of California, as well as their successors in office, are enjoined and restrained 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." Dkt. No. 12-14. Nothing in the Ninth Circuit's opinion or the mandate suggests that this relief should now be narrower than what was requested by the Plaintiffs in their original motion and now mandated by the Court of Appeals.

2. Though subsection (a) of section 22949.80 is repeatedly cited in the State's Appellee's Answering Brief on appeal, the context of those citations makes clear that the brief was explaining the function of various subsections of that code. Appellees' Answering Brief 4-5, 15-16, 20, 34, *Jr. Sports Mags., Inc. v. Bonta*, 80 F.4th 1109 (9th Cir. 2023), ECF No. 20. It should be noted that not once did California argue that *only* subsection (a)'s constitutionality was the *sole* issue on appeal. In fact, the table of authorities of the State's brief cites the full code section, Cal. Bus. & Prof. Code § 22949.80, as *passim. Id.* at vii, implying that they too understood that the constitutionality of the entire statute was at issue.

3. The State's Petition for Rehearing En Banc is even more damning in this respect. The table of contents and brief headings still treat "Section 22949.80" as a unitary law, as does the table of authorities. Appellees' Petition for Rehearing En Banc ii-iii, *Jr. Sports Mags., Inc. v. Bonta*, 80 F.4th 1109 (9th Cir. 2023), ECF No. 49. The petition itself acknowledges that "[t]he law at issue here is Section 22949.80 of the California Business and Professions Code." *Id.* at 3. Furthermore, the petition's analysis was not limited to any particular subsection, *id.* Indeed, the

petition speaks broadly about the policy interests advanced by the legislature and its motive for enacting section 22949.80, not just subsection (a).

The brief even acknowledges that Plaintiffs here (and the companion case of *Safari Club International v. Bonta*) "moved for a preliminary injunction against Section 22949.80 *in its entirety*." *Id.* at 6 (emphasis added). There is no language at all in the petition seeking to limit the scope of the appeal to only subsection (a) or asking an en banc panel to limit the scope of the three-judge panel's reversal and remand to only subsection (a). Even if that request could be inferred by some (undisclosed) judicial insight or inspiration, not one judge on the Ninth Circuit thought the case worthy of en banc review for any reason. The petition failed to garner even a call for a vote. Order, *Jr. Sports Mags., Inc. v. Bonta*, 80 F.4th 1109 (9th Cir. Feb. 20, 2024), ECF No. 52.

4. As noted above, the Eastern District, in the coordinated case of *Safari Club International*, has already issued a preliminary injunction against the enforcement of the entire statute by Defendants. The injunction in favor of the plaintiffs in that case is enforceable statewide. So, unless the State is seeking modification or reconsideration of the order issued by the Eastern District, asking this Court to limit its preliminary injunction to only subsection (a) is both frivolous and reeks of bad faith.

5. At the risk of encouraging the State, this is a *preliminary injunction.* The place and time for California to seek a modification or limitation of any preliminary injunction—already mandated by the Court of Appeals—is to litigate the matter to a full and final judgment or to seek a modification of the preliminary injunction in the final injunction with different terms or negotiate a settlement that seeks a more limited remedy. They are foreclosed (as is this Court) from reconsidering the Ninth Circuit's opinion on remand.

6. The Ninth Circuit has published an opinion (that the entire Ninth Circuit declined to rehear or otherwise modify) which found that directly marketing

firearms to minors (as long as such marketing otherwise complies with state and federal law) is protected commercial speech under the First Amendment. It strains credulity to think that the rest of section 22949.80 is still somehow valid.

First, subsection (b) is wholly reliant on the marketing activities of firearm industry members that the Ninth Circuit has found to be protected speech. And subsection (b) merely prohibits the "use, disclos[ur]e, and compil[ation], of personal information … of [a] minor … for the purpose of marketing or advertising to ... minor[s] any firearm-related product." If marketing firearm products to minors is protected speech, how is the use and maintenance of mailing lists to conduct such marketing activities not also protected conduct?

As for the remaining subsections, if subsections (a) and (b) are unenforceable, none of them can survive in any functional way. Subsection (c) simply sets forth definitions, several of which merely repeat definitions from other statutes. The other definitions are now potentially vague and ambiguous because the law using those code-specific definitions has been found unconstitutional. Subsection (d) contradicts subsection (b) and suffers from the same constitutional infirmities as (b). Subsection (e) is rendered nonsensical because it is the enforcement mechanism for a statutory scheme that is now unconstitutional under Ninth Circuit case law. And subsection (f) is the vestigial severability clause that California is trying to hang its hat on.

7. Lastly, it is borderline frivolous for California to suggest that the circuit court judges did not know where the parentheses and small "a" keys were on their keyboards when they drafted an opinion that concludes with "*§22949.80 is likely unconstitutional under the First Amendment*." *Jr. Sports Mags.*, 80 F.4th at 1121 (emphasis added).

II. THE NINTH CIRCUIT HAS ALREADY HELD THAT PLAINTIFFS SATISFY THE REMAINING FACTORS AND ARE ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF

The Ninth Circuit held that Plaintiffs have "demonstrate[ed] a likelihood of success on the merits of its claim." *Jr. Sports Mags.*, 80 F.4th at 120-21. As the

Ninth Circuit held, "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." *Id.* (citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). That is because "the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Id.* (quoting *Melendres*, 695 F.3d at 1002). "It is no different here." *Id.*

CONCLUSION

For these reasons, the Court should grant Plaintiffs' Motion to Enforce the Mandate and Issue a Preliminary Injunction enjoining the enforcement of section 22949.80—in its entirety—while this case proceeds.

Dated: May 2, 2024

MICHEL & ASSOCIATES, P.C.

s/ Anna M. Barvir
Anna M. Barvir
Counsel 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 2, 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' MEMORANDUM OF POINTS AND AUTHORITIES 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: May 2, 2024

s/ Anna M. Barvir
Anna M. Barvir

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record 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., certifies that this brief contains 3,719 which complies with the word limit of L.R. 11-6.1.

Dated: May 2, 2024

s/ Anna M. Barvir
Anna M. Barvir

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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' MEMORANDUM OF POINTS AND AUTHORITIES 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 May 2, 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; REDLANDS CALIFORNIA YOUTH CLAY SHOOTING SPORTS INC.; CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED; THE CRPA FOUNDATION; GUN OWNERS OF CALIFORNIA; and SECOND AMENDMENT FOUNDATION, Plaintiffs, v. ROB BONTA, in his official capacity as Attorney General of the State of California; and DOES 1-10, Defendants.	CASE NO: 2:22-cv-04663-CAS (JCx) **REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Hearing Date: August 22, 2022 Hearing Time: 10:00 a.m. Courtroom: 8D Judge: Christina A. Snyder

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INTRODUCTION

In their moving papers, Plaintiffs explain in detail how, on its face, Assembly Bill 2571 restricts their protected speech, applying not only to misleading commercial speech encouraging children to engage in unlawful behavior, but to a great deal of fully protected political and educational speech, truthful commercial speech aimed at adults, and speech promoting activities that are lawful to engage in by both adults and minors in California. In response, the State points to extrinsic evidence, providing dubious support for its fundamental claim that AB 2571 regulates only commercial speech proposing the sale of "firearm-related products" to minors and so, at most, intermediate scrutiny applies. The State also doubles down on misleading (if not entirely false) claims that legal firearm possession and use by minors is so extremely rare and narrowly prescribed in California that any commercial speech promoting such conduct is "inherently misleading" to young people, giving the State broad authority to restrict such speech.

But the State's reliance on extrinsic evidence of legislative intent is improper here, where the plain language of the statute itself makes clear that the State's exceedingly narrow interpretation was not intended by the Legislature. And no matter how many times the State repeats it, the fact remains that minors can and do lawfully possess and use firearms for lawful purposes even in California. AB 2571 thus restricts not only potentially misleading speech about unlawful behavior but protected truthful speech about lawful (and constitutionally protected) activities.

Under either strict scrutiny applied to restrictions on pure speech or intermediate scrutiny applied to restrictions on commercial speech, AB 2571 violates Plaintiffs' First Amendment rights to free speech, assembly, and association. And, because the law targets speech concerning the exercise of a fundamental right and is rooted in animus, it similarly violates their right to equal protection under the law.

Because Plaintiffs have shown they are likely to succeed on the merits,

because they suffer irreparable harm from the ongoing unconstitutional enforcement of AB 2571, and because the balance of equities and the public interest favor preliminarily enjoining the law while this case proceeds, the Court should grant Plaintiffs' motion.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

A. AB 2571 Is an Unconstitutional Content- and Viewpoint-based Restriction on Plaintiffs' Pure Speech

1. AB 2571 Does Not Restrict Only Commercial Speech; Rather, It Restricts a Broad Swath of Pure Speech Promoting the Mere Use of "Firearm-related Products"

As explained in Plaintiffs' moving papers, AB 2571 restricts Plaintiffs' core speech, including political and educational speech promoting the lawful purchase and use of "firearm-related products," including firearms, ammunition, firearm precursor parts, and accessories. Mot. 9-11. Contrary to the State's characterizations, the law is not limited to so-called "commercial speech" because it does not restrict only speech that proposes a commercial transaction. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983); *see Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989) (stating that the proposal of a commercial transaction test is "the test for identifying commercial speech"). While it is true that AB 2571 has been publicly described by its political supporters as a ban on advertising firearms to children, the law, as drafted and adopted, is simply not so narrow. It sweeps within its broad grasp a wide range of speech (both commercial and non-commercial) promoting the lawful purchase or use of firearms and related products.

a. The plain language of AB 2571 reveals the legislative intent to restrict both commercial and non-commercial speech.

Recall, AB 2571 bars any "firearm industry member" from "advertis[ing], market[ing], or arrang[ing] for the 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." Cal. Bus. & Prof. Code §

22949.80(a)(1). In clarifying what speech is prohibited, AB 2571 provides a statutory definition of "marketing or advertising." Rather than rely on commonly understood or dictionary definitions of these terms, under the newly enacted law:

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

Id. at 22949.80(c)(6) (emphasis added). While it is difficult to determine the full scope of restricted speech because it is hard to say what speech might be "attractive to minors," the plain language of the statute is clear about one thing: the law does not merely restrict speech proposing a commercial transaction. To the contrary, it bars "firearm industry members" from making or distributing any "communication" "in exchange for monetary compensation" if the speech (1) "concerns" a "firearm-related product," (2) is designed, intended, or could reasonably be considered "attractive to minors," and (3) seeks to encourage the audience (whether adult or child) to either purchase *or use* the product. *Id.* at 22949.80(a)(1), (c)(6). This is not an unfairly broad interpretation of AB 2571. It is a plain reading of the law as it was drafted and adopted by the Legislature.

All the examples of non-commercial speech Plaintiffs identify in their complaint and motion fall within AB 2571's restrictions. *See* Compl. ¶¶ 70-87; Mot. 5-8. For example, *Junior Shooters* magazine cannot run articles endorsing a "firearm-related product" and its particular benefits to young and beginner shooters. Fink Decl. ¶¶ 14-20. Plaintiff CRPA cannot sell branded t-shirts with its logo and "Be safe. Shoot straight. Fight back!" motto because AB 2571 tells us that such merchandise is "attractive to minors" and the slogan necessarily promotes the use of firearms and ammunition. Minnich Decl. ¶¶ 14-15; *see also* Home, www.crpa.org (last accessed Aug. 15, 2022) (for an image of CRPA's logo and motto). Nor can CRPA host a youth recreational shooting event or "hunt" because the primary

1 purpose of promoting and holding such events is to encourage children to use
2 firearms both at the event and in the future. Minnich Decl. ¶ 12.[1] Plaintiffs CRPA
3 and SAF cannot offer or promote paid youth memberships because such offers are
4 inextricably related to the organizations' foundational purpose of promoting the
5 lawful purchase, possession, and use of firearms and related products. *Id.* ¶ 3;
6 Gottlieb Decl. ¶ 4. Plaintiff Brown cannot engage in his business of training youth
7 shooters because such training necessarily includes speech that encourages the
8 minor to use "firearm-related products." Brown Decl. ¶¶ 10. And Plaintiffs CYSSA
9 and RCYCSS cannot encourage minors to enter their youth shooting competitions
10 (if entry or membership fees are charged) because such communications encourage
11 youth to use "firearm-related products," both in preparation for such events and
12 competing in them. Coleman Decl. ¶¶ 8-10; Rangel Decl. ¶¶ 9-11.
13 The State fights the conclusion that AB 2571 restricts these expressive and
14 associational activities, but Plaintiffs—while genuinely hopeful that they would not
15 be targeted if they engage in this fully protected speech—are not convinced that
16 every Attorney General, District Attorney, County or City Counsel, *private person*,
17 or reviewing court would read the law as narrowly as the State does now. To the
18 contrary, Plaintiffs reasonably fear that most would not.[2] The State's opposition
19
20 [1] Assuming, without conceding, that the State is correct that—despite the law's express reference to "services"—AB 2571 does not bar speech about
21 "services" requiring or promoting the use of "firearm-related products," like competitive and recreational youth shooting events, the State ignores a crucial
22 concern about the law's impact on such events. AB 2571 effectively shutters such events because they are tied to speech promoting the sale or use of "firearm-related
23 products." Such events often rely on the support of firearm retailers and manufacturers in exchange for the opportunity to showcase their products through
24 logo placement on event promotional materials, traditional advertisements in event programs, and vendor booths, banners, or other signage at the event. What's more,
25 by promoting a youth event where youth are handling and using "firearms-related products," one is necessarily promoting the use of "firearm-related products" in a
26 manner designed and intended to appeal to minors.
[2] That reasonable fear, of course, creates the sort of "chilling effect" on
27 Plaintiffs'' speech that the First Amendment simply does not tolerate. *Edge v. City of Everett*, 929 F.3d 657, 664-65 (9th Cir. 2019) (requiring "specificity of laws"
28 when "First Amendment freedoms are" implicated because unclear laws might "chill[] protected speech or expression by discouraging participation").

presents 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. What's more, it relies on extrinsic evidence that purportedly shows a legislative intent to restrict only traditional marketing of "firearm-related products" to children. Opp'n 9-10. But the State's interpretation of that evidence contradicts the unambiguous language of AB 2571, improperly narrowing the scope of the law in violation of established canons of statutory construction. *See, e.g.*, *King v. Burwell*, 576 U.S. 473, 486 (2015) (describing the "plain meaning rule" that, where the language of a statute is plain, the only role of the courts is to enforce it according to its terms and reference to otherwise-relevant information about statutory meaning is impermissible).

For instance, the State argues that the bill's title, "Marketing Firearms to Minors," "indicates what it regulates and how it should be interpreted and applied." Opp'n 9. While a title can help explain the Legislature's motivations, the limitations of such evidence can hardly be understated. A title, being only "a short-hand reference to the *general subject matter* involved," *Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528 (1947) (emphasis added), may reflect the law's basic thrust or help clarify *ambiguous* statutory language. But titles are "not meant to take the place of the detailed provisions of the text." *Id.* They "cannot limit the plain meaning of the text," *id.* at 529, and they have "no power to give what the text of the statute takes away," *Demore v. Kim*, 538 U.S. 510, 535 (2003) (O'Connor, J., concurring) (citing *INS v. St. Cyr*, 533 U.S. 289, 308- 09 (2001)).

So, while AB 2571 no doubt restricts traditional marketing of firearms to minors consistent with the bill's title, the more "detailed provisions of the text" are no less clear that the law's restrictions do not stop there. Indeed, nothing about the statutory definition of "marketing or advertising" limits AB 2571 to speech proposing a commercial transaction. To the contrary, it expressly includes within its scope speech that promotes even the lawful use (not just the sale) of "firearm-related

1 products." Cal. Bus. & Prof. Code § 22949.80(c)(6). The bill's title, which merely
2 summarizes the basic thrust of the law, cannot replace the Legislature's clear
3 expression of intent in the plain language of the statute. After all, the intent of the
4 legislature "is found in the words it has chosen to use." *Harbison v. Bell*, 556 U.S.
5 180, 198 (2009) (Thomas, J., concurring).

6 What's more, if the bill's title and other isolated statements narrow the scope
7 of the law as the State contends, the State must also concede that AB 2571 would be
8 limited to marketing of *firearms* to *minors*. *See, e.g.*, Pls.' Req. Jud. Ntc., Ex. 1 at 93
9 (finding and declaring that the "proliferation of firearms to and among minors
10 poses" a public safety threat); *id.* at 94 (declaring the legislative intent "to further
11 restrict the marketing and advertising of firearms to minors"). It would not extend to
12 other "firearm-related products," like ammunition, precursor parts, or firearm
13 accessories. Nor would it extend to marketing of firearms to adults that "appears
14 attractive to minors." Surely, the State would not take such a position. For the plain
15 language of the statute conflicts with such an interpretation. Just as it conflicts with
16 claims that AB 2571 restricts only communications that propose the commercial sale
17 of "firearm-related products," when the law expressly refers to speech promoting
18 even the *use* of such products.

19 In response, the State claims (without support) that "*implicit* in the terms
20 'marketing or advertising' in relation to any specific product is an offer to engage in
21 a commercial transaction for the sale and purchase of that product." Opp'n 9. But
22 even if that is so, the State does not get to rely on "implicit" definitions of terms that
23 it explicitly defined in the statute. *See Colautti v. Franklin*, 439 U.S. 379, 392 (1979)
24 (observing that, if a word or phrase is defined in the statute, then that definition
25 governs). The statutorily created definition of "marketing or advertising" is not
26 limited to offers to engage in the commercial sale of a specific product. In fact, no
27 such language appears anywhere in the statute at all. If the Legislature meant to
28 incorporate the State's purportedly implicit definition of "marketing or advertising,"

one would think it would have done so. Instead, the Legislature chose to create its own definition that includes any communication, made in exchange for monetary compensation, about a product or service, the primary purpose of which is to encourage the audience to purchase *or use* that product or service. Cal. Bus. & Prof. Code § 22949.80(c)(6). That is the definition that must control.

The State goes on, remarkably claiming that Plaintiffs argue that "the statute's prohibition against marketing 'concerning' certain tangible products encompasses anything and everything related to firearms in any way." Opp'n 9. Of course, the State provides no citation to anything in Plaintiffs' memorandum making such a wild claim. And for good reason. Plaintiffs never argued such a thing. Rather, Plaintiffs highlight the Legislature's use of the phrase "*concerning* any firearm-related product" in subsection (a)(1) because it illustrates the Legislature's intent *not* to limit AB 2571 to commercial speech about the sale of "firearm-related products," and aligns with subsection (c)(6)'s explicit reference to not just the sale of such products, but also their use. That is, the Legislature chose to restrict "advertising or marketing communication[s] *concerning* any firearm-related product," instead of "advertising or marketing communication[s] promoting the sale or purchase of any firearm-related product" or similar language. *See* Cal. Bus. & Prof. Code § 22949.80(a)(1). And, likewise, it chose to define "marketing or advertising" to include communications intended to encourage recipients to *use* "firearm-related products," not just purchase them *Id.* § 22949.80(c)(1). Assuming the Legislature means to use the words that it uses (and not to use the words it doesn't), it is hard to see how AB 2571 could be limited in the way the State's opposition contends it is.

In a footnote, the State attempts to explain away the law's reference to communications promoting the mere "use" of a product. In doing so, the State again assigns its own meaning to the statutory language, claiming that the Legislature's unqualified use of the word "use" really refers to a "commercial appeal[] to 'use' a particular product offered for sale." Opp'n 9. For support, the State argues that AB

1 2571 defines "'marketing or advertising' as communications encouraging [the]
2 'purchase or use of a product or service,' only 'in exchange for monetary
3 compensation." Opp'n 9, n.3. But the State's argument relies on a critical sleight of
4 hand that it employs repeatedly throughout its opposition. *See also id.* at 8 ("The
5 statute also defines 'marketing or advertising' with reference to commercial
6 transactions, i.e., those involving a proposed "exchange for monetary
7 compensation."). Recall, subsection (c)(6) reads:

8 > "Marketing or advertising" means, *in exchange for*
9 > *monetary compensation*, to make a communication to one
10 > or more individuals, or to arrange for the dissemination to
11 > 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.

12 (Emphases added). The placement of the clause "in exchange for monetary
13 compensation" is crucial here. It directly precedes the reference to "mak[ing] a
14 communication to one or more individuals." It does not follow the reference to
15 encouraging recipients of the communication to purchase or use the product. So,
16 contrary to the State's claim that the definition refers to communications "involving
17 a proposed 'exchange for monetary compensation,'" Opp'n 8, or "encouraging [the]
18 'purchase or use of a product or service,' only 'in exchange for monetary
19 compensation," Opp'n 9, n.3, AB 2571 refers to *making a communication* in
20 exchange for monetary compensation—whether or not it also proposes an exchange
21 of monetary compensation with regard to the subject product or service.

22 In short, the plain language AB 2571 is clear that the law restricts not just
23 speech that proposes a commercial sale of "firearm-related products," but also
24 speech that promotes the use of such products. The State's repeated appeals to
25 extrinsic evidence to narrow the unambiguous language of the statute are unavailing.

26 27 **b. The *Bolger* factors do not support the State's position that AB 2571 restricts only commercial speech.**

28 Trying to immunize AB 2571 from the full protections of the First

Amendment afforded to non-commercial speech, the State abandons the straightforward "commercial transaction test" described above in favor of analyzing the law under three non-dispositive factors laid out in *Bolger*. Opp'n 8. The *Bolger* factors consider whether the speech is an advertisement, whether the speech refers to a particular product, and whether the speaker has an economic motivation. 463 U.S. at 66-68. In the first place, it is doubtful that the *Bolger* factors can aid this Court in determining whether AB 2571 restricts only commercial speech on its face, as opposed to analyzing whether a particular communication constitutes commercial speech. In any event, none of the *Bolger* factors provide any real support for the State's position that "AB 2571 is properly understood as a regulation of commercial speech, not core political speech." Opp'n 8.

The first *Bolger* factor—whether the restricted speech is an advertisement—does not fairly point in either party's direction. To be sure, AB 2571 does restrict traditional advertising of "firearm-related products." But the law does not stop there. As established above, AB 2571 defines "marketing or advertising" to include pure speech that does not constitute "advertising," as we commonly know it. *See* Part I.A.1.a., *supra.*

Second, AB 2571 does not restrict only speech about a particular product. To be sure, the law is limited to speech concerning "firearm-related products," but it does not restrict only speech about a "*particular* product." Rather, it refers to "any firearm-related product," which is broadly defined as "a firearm, ammunition, reloaded ammunition, a firearm precursor part, a firearm component, or a firearm accessory" that has some connection with the state of California. Cal. Bus. & Prof. Code § 22949.80(c)(5).

Finally, the 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. Under AB 2571, it is enough that the speaker makes the communication in exchange for monetary compensation. *Id.* §

22949.80(c)(6). That is not the sort of economic motivation that is the hallmark of commercial speech. This matters, of course, because "[t]the mere fact of 'monetary compensation' for producing speech does not make the speech purely commercial." Pls.' Req. Jud. Ntc., Ex. 3 at 7 (citing *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1117 (9th Cir. 2021)). This must be so. For "a great deal of vital expression" emerges from an economic motivation. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (citing *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)). So that factor, standing alone, does not make all economically motivated speech "commercial."

2. AB 2571 Is Both Content- and Speaker-based and Viewpoint-discriminatory

Once the State's mischaracterizations of AB 2571 are stripped away, and it becomes clear that the law does not strictly regulate commercial speech, support for the State's claim that AB 2571 is not "a content- or viewpoint-based restriction on core speech or on Plaintiffs' right to associate"[3] largely falls away too. Indeed, in support of its argument, the State simply claims that "the statute regulates [only] commercial speech." Opp'n 10. And it assures the reader that the law "was not adopted to regulate speech 'because of the disagreement with the message it conveys,'" *id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)), but to "serve important government interests implicated by the marketing and advertising of firearms-related to products to children," *id.*

The State's argument conflates the interests purportedly served by AB 2571 with the determination of whether the law is content based. "A court, however, must consider 'whether a law is content neutral on its face *before* turning to the law's justification or purpose.'" *B&L Prods., Inc. v. 22nd Dist. Agric. Ass'n*, 394 F. Supp. 3d 1226, 1245 (S.D. Cal. 2019) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 165

[3] The State's entire opposition to Plaintiffs' freedom of association claim is limited to this single passing reference.

(2015)). "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 576 U.S. at 165. Indeed, the Supreme Court has confirmed that "'[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment,'" and a party opposing the government "need adduce 'no evidence of an improper censorial motive.'" *Id.* (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991)). Though evidence of such makes the determination simpler. *See, e.g.*, *Sorrell*, 564 U.S. at 563-565 (statute was content based "on its face," and there was also evidence of an impermissible legislative motive).

On its face, AB 2571 is content- and speaker-based because it targets speech by specified individuals and businesses, i.e., "firearm industry members," based on the communication's "subject matter" and its "function or purpose." That is, it restricts certain speech "concerning firearm-related products," if the "primary purpose" of the communication "is to encourage recipients of the communication to purchase or use the product or service." Cal. Bus. & Prof. Code § 22949.80(c)(6). Because the statute "require[s] 'enforcement authorities 'to examine the content of the message that is conveyed to determine whether' a violation has occurred," it is content based, not content neutral. *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)); *see also Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (explaining that "'content-neutral' speech regulations" are "those that are *justified* without reference to the content of the regulated speech" (internal quotation marks omitted)).[4]

What's more, because speech promoting the lawful purchase and use of firearms "is likely to be predominantly, if not exclusively, favorable to guns and gun

[4] Even if AB 2571 regulated strictly "commercial speech," such a restriction is not content neutral if it lacks a "neutral justification." *Sorrell*, 564 U.S. at 566 (citing *Cincinnati v. Discovery Network*, 507 U.S. 410, 429-30 (1993)).

rights, '[i]n its practical operation,' [AB 2571] 'goes even beyond mere content discrimination, to actual viewpoint discrimination.'" *B&L Prods.*, 394 F. Supp. 3d at 1245 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)). "In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory." *Sorrell*, 564 U.S. at 571 (citing *R.A.V.*, 505 U.S. at 382 (holding that "[c]ontent-based regulations are presumptively invalid")).

The State argues that AB 2571 is not viewpoint discriminatory because gun control organizations are not exempt if they engage in traditional marketing of "firearm-related products." Opp'n 10-11. Setting aside the absurdity of arguing that groups like Moms Demand Action and ***Gun Free*** Kids would suddenly start engaging in the advertising of firearms, the State's argument relies on its improper narrowing of the law to only speech proposing the commercial sale of "firearm-related products." Because it is not so limited, and touches upon non-commercial speech promoting the use of firearms in ways that are attractive to minors, the law restricts groups like CRPA, GOC, and SAF from engaging in such speech. While it leaves untouched the opposing views of groups like Moms Demand Action.

But even if the State's narrow interpretation of AB 2571 were correct, gun-control groups and anti-gun politicians like Governor Newsom are free to use traditional marketing communications promoting the commercial sale of firearms as examples to further their message that such speech is "bad," and that minors should not have access to information about firearms designed for their smaller hands. Mot. 12 (discussing Newsom's use of advertising from WEE1 Tactical of their JR-15 to express his disdain for such speech). Firearm manufacturers, retailers, and gun-rights groups, on the other hand, are expressly barred from distributing those very same advertisements—simply because they seek to promote the lawful use of firearms, not end it. *Id.* The State never explains how this could be viewed as anything but content based and viewpoint discriminatory.

Instead, the State attacks Plaintiffs' use of the statements of Governor

Newsom and Assemblymember Bauer-Kahan—the sponsors of AB 2571—as evidence that the law was driven by animus. Opp'n 11-12. Concededly, the Supreme Court has cautioned against "void[ing] a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of [legislators] said about it. What motivates one legislator to make a speech about a statute is not[, after all,] necessarily what motivates scores of others to enact it." *United States v. O'Brien*, 391 U.S. 367, 384 (1968). But Plaintiffs do not ask this Court to void a law that is constitutional on its face based on the isolated comments of a few legislators. To the contrary, AB 2571 is both content-based and viewpoint-discriminatory on its face. *See* Part I.A.2, *supra*. And the statements of Newsom and Bauer-Kahan merely confirm that the bill's *sponsors* were motivated by animus to draft, introduce, and hurry AB 2571 through the legislative process. *See* Mot. 1, 8-9, 12. While their statements may not be dispositive, they are at least revealing.

Even so, the State is so confident that its law is not content- or viewpoint-based restriction, it does not even attempt to defend AB 2571 under strict scrutiny. As a result, the State has waived any argument that it could survive such review. So if the Court agrees that AB 2571 likely imposes a content-based restriction on protected speech, it should hold that Plaintiffs have shown a likelihood of success on the merits of their First Amendment free speech claim and preliminarily enjoin AB 2571 while this case proceeds.

B. Even if AB 2571 Restricted Only "Commercial Speech," the Outcome Is the Same

The State advocates for a more forgiving standard than strict scrutiny because, in its view, AB 2571 burdens strictly commercial speech. Opp'n 13 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-66 (1980); *Coyote Publ'g Inc. v. Miller*, 598 F.3d 592, 598-610 (9th Cir. 2010)). "[T]he outcome is the same[, however,] whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied. *Sorrell*, 564 U.S. at 571 (citing *Greater*

1 *New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 184 (1999)).

2-3 **1. AB 2571 Does Not Restrict Only Misleading Commercial Speech Concerning Unlawful Activity**

4 Simply put, AB 2571 does not restrict only potentially misleading speech
5 promoting the unlawful sale of firearms to minors. Sure, it does restrict that speech,
6 but it also prohibits speech encouraging the lawful use of firearms by minors and the
7 lawful sale of firearms and related products to adults, either for their personal use or
8 for their children's supervised use. Cal. Bus. & Prof. Code § 22949.80(a)(1), (c)(6).
9 Because AB 2571 plainly regulates truthful speech about lawful activities, it cannot
10 be fairly characterized as a law that "permissibly regulates commercial speech
11 concerning unlawful activity." Opp'n 12.

12 To be very clear, minors may lawfully possess and use firearms for various
13 lawful purposes—even in California. Mot. 16 (citing Cal. Pen. Code §§ 29615,
14 29655). Trying to minimize the importance of this fact, the State observes that
15 minors in the state generally must have the consent or supervision of their parents to
16 engage in such conduct. Opp'n 12. But that fact does not make it any less true that
17 minors may lawfully engage in various activities with firearms, including education
18 and safety courses, firearm training, hunting, competitive shooting, and other
19 recreational shooting sports, as well as traveling to and from such activities. *Id.* And
20 there are countless activities children may not engage in without their parent's
21 consent—that does not make promotion of those activities unlawful or misleading.
22 What's more, there is no law in California that bars adults from purchasing firearms
23 for their children to use with their consent or supervision. Even still, AB 2571
24 restricts speech promoting the purchase of firearms not only by minors, but also the
25 lawful purchase of lawful firearms by adults.

26 Yet the State misleadingly claims that "AB 2571 regulates commercial speech
27 respecting unlawful activity—the sale of guns to minors." Opp'n 12-13. Again,
28 while the law does restrict that speech, it also sweeps up a great deal more speech

that promotes the lawful purchase or use of "firearm-related products" if it "reasonably appears to be attractive to minors." If AB 2571 were limited to "marketing or advertising the sale of firearms to minors," perhaps the State's argument would hold some weight. But that is not the law the Legislature passed.

By selectively quoting just part of a sentence from Plaintiffs' brief, the State makes a bad-faith argument that Plaintiffs concede that "AB 2571 regulates advertising and marketing that is inherently misleading to the young viewers and readers it seeks to protect." Opp'n 13. Plaintiffs do not concede that the speech restricted by AB 2571 is "inherently misleading," and they do not merely recognize that "AB 2571 might technically ban misleading speech promoting the unlawful sale of firearms to minors[.]" *Id.* (selectively quoting Mot. 11). They explain that the law "*is in no way limited to such speech*. In fact, it ensnares a substantial amount of protected political, educational, and commercial speech—*likely far more of such speech than the arguably unprotected speech the bill purports to target*." Mot. 11.

But conceding that AB 2571 does, in fact, ban such 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. Because it does so, AB 2571 does not simply regulate misleading commercial speech about an unlawful activity. It restricts protected commercial speech and, to survive Plaintiffs' challenge, must survive heightened scrutiny.

2. AB 2571 Does Not Directly or Materially Advance the State's Purported Interest in Protecting the Physical and Psychological Well-being of Children in California

Plaintiffs conceded in their moving papers that the State generally "has a substantial interest in preventing violence against its citizens," Mot. 17-18, and they do not now argue that the State's "interest in protecting the physical and psychological well-being of minors" is not compelling. Opp'n 14 (quoting *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) Rather, as they did in their moving papers, Plaintiffs focus on the bill's absolute failure to advance the

1 State's purported interests in any direct or material way.
2 The State relies on legislative findings that "the *illegal* possession of firearms
3 by minors constitutes a serious health and safety risk to children and other residents
4 of this state." Opp'n 16 (quoting Req. Jud. Ntc., Ex. 3 at 12) (emphasis added). But
5 it does not link the existence of communications promoting the lawful purchase and
6 use of firearms—communications that are undisputedly restricted by AB 2571—to
7 the illegal possession of firearms by minors. Opp'n 15-17. Rather, the State simply
8 argues that advertising is linked to the use of certain products by youth, and that
9 "restrictions on advertising are associated with decreased use of certain products by
10 youth." *Id.* at 16 (citing Req. Jud. Ntc., Ex. 3 at 12). So what? The very purpose of
11 advertising is to encourage the use of the advertised products, so naturally the
12 proliferation of such communications correlates with increased use and the
13 restriction of such communications correlates with decreased use. That does not give
14 the State carte blanche to ban truthful speech about otherwise lawful (and
15 constitutionally protected) products and commercial transactions.
16 Arguing that AB 2571 seeks to "reduc[e] demand for firearm-related products
17 among minors" by "restricting such advertising and marketing," the State tacitly
18 admits that its illegitimate aim is to reduce the demand for even the lawful use of
19 lawful firearms by minors in hopes that reducing such demand might serve its more
20 permissible goal of "reducing gun violence perpetrated by and against minors and
21 others, both intentional and unintentional." Opp'n 17. This is, at best, an
22 impermissible restriction on speech that only *indirectly* serves the State's compelling
23 public safety interest. *Sorrell*, 564 U.S. at 554-55 (holding that the state may not
24 "achieve its policy objectives through the indirect means of restraining certain
25 speech by certain speakers"). It is also the sort of "paternalistic approach" the
26 Supreme Court has long condemned. *See Va. Bd. of Pharm. v. Va. Citzs. Consumer*
27 *Council*, 425 U.S. 748, 770 (1976). Plaintiffs made both these points in their moving
28 papers, and the State simply ignored them.

The State relies on *United States v. Edge Broadcasting*, 509 U.S. 418 (1993), to argue "that the government may restrict advertising in order to dampen demand, and thereby advance a substantial government interest." *See, e.g.*, *Edge Broad. Co.*, 509 U.S. at 434 ("If there is an immediate connection between advertising [for gambling] and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced."). But *Edge Broadcasting* dealt with restrictions on advertising for gambling—conduct that is neither expressive nor protected by any provision of the federal Constitution. In short, the government can legitimately seek to decrease the demand for gambling in service of other substantial interests.[5]

Simply put, the State has no legitimate interest in merely reducing the demand to lawfully engage in constitutionally protected conduct. Mot. 19. And the State does not argue that minors are wholly without Second Amendment rights, so it may not "achieve its policy objectives through the indirect means of restraining certain speech by certain speakers." *Sorrell*, 564 U.S. at 554-55. Rather, it must directly work to combat the problem of unlawful possession and use of firearms by minors in ways that do not impermissibly ban large swaths of protected truthful speech.

3. AB 2371 Is Also More Extensive than Necessary to Serve the State's Purported Interest in Protecting the Physical and Psychological Well-being of Children in California

Finally, the last prong of *Central Hudson* requires the State to show that the speech restriction "is no more extensive than necessary to further" its purported interests. 447 U.S. at 569-70. Even commercial speech restrictions purportedly

[5] The State also cites its "similar policy approach in regulating alcohol advertising aimed at minors." Opp'n 16, n.4 (citing Cal. Bus. & Prof. Code § 25664). But, as explained in Plaintiffs' moving papers, "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." Mot. 11-12 (internal citation omitted). So, much like restrictions on advertising for gambling, the State may permissibly seek to reduce the demand for alcohol, tobacco, and cannabis among children in service of broader policy aims of protecting minors from the harms of those substances.

aimed at protecting minors must be narrowly drawn to achieving an asserted state interest. *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565-66 (2001) (striking restrictions on tobacco marketing likely to be observed by children). Indeed, "only in relatively narrow and well-defined circumstances may the government bar public dissemination of protected materials to" children because even "minors are entitled to a significant measure of First Amendment protection." *Erznoznik v. Jacksonville*, 422 U.S. 205, 212-13 (1975). Ignoring the Supreme Court's guidance in *Lorillard* and *Erznoznik*, two binding authorities on the regulation of commercial speech aimed at minors, the State implies it has "leeway" to regulate here because "the Supreme Court has written … of the virtue of providing 'the Legislative and Executive Branches needed leeway in a field (commercial speech) traditionally subject to government regulation . . ..'" Opp'n 17-18 (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

The State then argues that AB 2571 is no more extensive than necessary to serve the state's purported compelling interests because it "regulates only a narrow category of commercial speech (that offering firearms, their components, and accessories for sale)" "promulgated by a narrowly defined group of commercial speakers—the firearm industry—rather than on publishers, or even advertisers, in general."[6] Even if AB 2571 regulates as narrowly as the State claims, no matter how narrowly a law regulates speech, it is far too broad if the State "has various other laws at its disposal that would allow it to achieve its stated interests while burdening little or no speech." *Valle Del Sol v. Whiting*, 709 F.3d 808, 826 (9th Cir. 2013). "If the [State] considers its existing safeguards inadequate to combat [firearm misuse by minors], it may pass additional direct regulations within constitutionally permissible boundaries." *Tracy Rifle & Pistol LLC v. Harris*, 339 F. Supp. 3d 1007, 1018-19

[6] This argument contradicts the State's earlier claim that "no individual, company or organization is exempt from the prohibition on marketing firearm-related products to children because, by doing so, they become a 'firearm industry member' subject to the law." Opp'n 11.

(E.D. Cal. 2018). Or it may counter firearm advertising with which it disagrees with "more speech," not less. *Lorillard*, 533 U.S. at 586 (Thomas, J., concurring). But it may *not* ban truthful advertising promoting the lawful sale or use of lawful products simply because some of its viewers might be inspired to act on it unlawfully.

Contrary to the State's assertion, in arguing that the prohibition "applies whether the media is directed to children or a general audience," Mot. 20 (quoting Req. Jud. Ntc., Ex. 2 at 6), Plaintiffs do *not* ignore that AB 2571 "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'n 18. To the contrary, they are acutely aware that AB 2571 regulates in this way. Communications that are "designed, intended, or reasonably appear[] to be attractive to minors" are often the same sorts of communications that are attractive to adults who have an "interest in receiving truthful information about [firearm-related] products" to make informed decisions for both themselves and their children. *Lorillard*, 533 U.S. at 564. AB 2571 does not necessarily exempt speech that is attractive to minors just because it is also attractive to adults.

For instance, AB 2571 identifies among the list of relevant factors that help to establish whether a communication "reasonably appears to be attractive to minors" speech that "[o]ffers firearm-related products in sizes, colors, or designs that are specifically designed to be used by, or appeal to, minors." Cal. Bus. & Prof. Code § 22949.80(a)(2)(C). But firearms in nontraditional colors are just as fun and attractive to many adults. And many lawful firearms come in sizes designed to be lawfully and safely used by minors; 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. The State cannot restrict this commercial speech to adults in order "to shield a segment of the population when there are less restrictive alternatives." *Tracy Rifle*, 339 F. Supp. 3d at 1014, n.8; *see also Lorillard*, 533 U.S. at 581 ("[T]

governmental interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults.”).

In short, AB 2571 is more extensive than necessary to achieve the State’s purported interests because it impermissibly burdens speech concerning not only the illegal purchase or use of firearms by minors, but also the lawful use of “firearm-related products” by minors and the lawful purchase and use of such products by adults. It is also more extensive than necessary because the State has a variety of tools available to combat the problem of illegal firearm use by minors that would not restrict speech at all. The State’s choice to reject those options and, instead, indirectly attack the problem through the regulation of protected speech dooms AB 2571. Indeed, “if the [g]overnment could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the [g]overnment must do so.” *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002).

C. AB 2571 Also Violates Plaintiffs’ Right to Equal Protection

Because AB 2571 treats some speech (and, necessarily, some speakers) differently from others, it also violates the Equal Protection Clause of the Fourteenth Amendment. *Dariano v. Morgan Hill Unif. Sch. Dist.*, 767 F.3d 764, 779-780 (9th Cir. 2014) (“Government action that suppresses protected speech in a discriminatory manner may violate both the First Amendment and the Equal Protection Clause.”) The analysis of Plaintiffs’ equal protection claim is “essentially the same” as the analysis of their First Amendment claim. *Id.* at 780. Indeed, “[t]he Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives.” *Police Dep’t of Chic. v. Mosley*, 408 U.S. 92, 101 (1972). So 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.

/ / /

II. THE OTHER PRELIMINARY INJUNCTION FACTORS WARRANT ENJOINING AB 2571 WHILE THIS CASE PROCEEDS ON THE MERITS

A. Plaintiffs Will Suffer Irreparable Harm if the Court Denies Relief

"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)); 11A Charles Alan Wright et al., Federal Practice and Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). The State's opposition concedes, as it must, that if Plaintiffs are likely to prevail on any of their free speech claims, then irreparable harm is presumed. Opp'n 20. "By demonstrating a likelihood of success on the merits of their First Amendment claims, Plaintiffs have demonstrated that irreparable harm will result from the continued restriction of their protected speech." *B&L Prods.*, 394 F. Supp. 3d at 1250. So if this Court finds that Plaintiffs have shown a likelihood of success on the merits on any of their constitutional claims, it must follow that they have established irreparable harm for purposes of granting preliminary injunctive relief.

B. The Balance of Equities Tip Sharply in Plaintiffs' Favor

This factor considers the "balance of hardships between the parties." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137 (9th Cir. 2011). Unlike Plaintiffs' injuries detailed in the complaint and Plaintiff' moving papers, the State will suffer no injury. For there is no plausible, identifiable interest that infringing Plaintiffs' constitutional rights serves. Indeed, the State "cannot suffer harm from an injunction that merely ends an unlawful practice…." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013).

Yet, the State argues that the balance of equities weighs in its favor because AB 2571 promotes a compelling interest. Opp'n 20-21. But even if it does, the State never argued that AB 2571 is narrowly tailored or that it employs the least restrictive means under strict scrutiny. *See* Part I.A.2, *supra*. And it failed to establish under

Central Hudson that the law directly and materially advances the State's purported interest or that it is no more extensive than necessary. *See* Part I.B.2-3, *supra*. Instead, the State implores the Court to withhold the relief Plaintiffs are entitled to because AB 2571 bars "at least some conduct harmful to the public's safety." *Id*. To be clear, it is the State's job to craft legislation that meets the exacting tests of heightened scrutiny applied to restrictions on free speech. Its failure to do so renders the law unconstitutional, stripping the State of any interest in the continued enforcement of the law. The mere fact that the law might still prevent *some* harm to public safety is not enough to shift the balance of equities in the State's favor.

Finally, the State argues that Plaintiffs' motion should be denied because it "effectively seek[s] to litigate the merits of the dispute without a motion for summary judgment or trial." Opp'n 21-22. The argument is a strange one indeed. Every motion for preliminary injunction involves the litigation of the merits of a dispute to some extent—that's how Plaintiffs establish whether they are likely to succeed on the merits, after all. Instead, the State's citations, which do not support its position, illustrate the real test. For example, the State cites *Progressive Democrats for Social Justice v. Bonta*, but that case just reiterates the principle that 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." *Prog. Dems. for Soc. Just. v. Bonta*, No. 21-cv-03875, 2021 U.S. Dist. LEXIS 250746, at *34 (N.D. Cal. July 16, 2021); *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808-09 (9th Cir. 1963).

Preservation of the status quo—a return to "the last uncontested status which preceded the pending controversy" or the state of affairs as they existed on June 29, 2022—is all Plaintiffs seek here. This is clearly permissible on a motion for preliminary injunction, as the State's own authorities confirm. *Tanner Motor Livery*, 316 F.2d at 808-09 (citing *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir. 1958)).

C. Granting Preliminary Injunctive Relief Is in the Public Interest

When challenging government action that affects the exercise of constitutional rights, "[t]he public interest ... tip[s] sharply in favor of enjoining the" law. *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009). As the Ninth Circuit has made clear, "all citizens have a stake in upholding the Constitution" and have "concerns [that] are implicated when a constitutional right has been violated." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) (emphasis added). The Ninth Circuit has "consistently recognized the significant public interest in upholding First Amendment principles." *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014).

CONCLUSION

For the reasons laid out in this reply, as well as Plaintiffs' moving papers, the Court should grant Plaintiffs' Motion for Preliminary Injunction and enjoin the enforcement of section 22949.80 while this case proceeds to a final decision on the merits.

Dated: August 15, 2022

MICHEL & ASSOCIATES, P.C.

s/ *Anna M. Barvir*

Anna M. Barvir
Counsel 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: August 15, 2022

LAW OFFICES OF DONALD KILMER, APC

s/ *Donald Kilmer*

Donald Kilmer
Counsel for Plaintiff Second Amendment Foundation

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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:

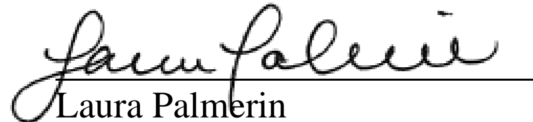
REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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
Attorney for Defendant

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

Executed August 15, 2022.



Laura Palmerin

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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

JUNIOR SPORTS MAGAZINES INC. ET AL.,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA ET AL.,

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date: August 22, 2022
Time: 10:00 a.m.
Courtroom: 8D
Judge: Christina A. Snyder
Action Filed: July 8, 2022

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INTRODUCTION

Plaintiffs are not entitled to the extraordinary remedy of a preliminary injunction barring enforcement of California Business & Professions Code § 22949.80 ("AB 2571" or "§ 22949.80") in its entirety. Their motion is based on a misreading of the statute: it does not restrict core political speech about guns or conduct protected by the Second Amendment, but rather commercial speech concerning illegal activity – the sale of guns and other firearm-related products to minors. In an attempt to show that the statute sweeps well beyond that, Plaintiffs argue that California law broadly permits minors to use and possess firearms. To the contrary, California law generally prohibits minors from using or possessing guns and ammunition, with specified, narrow exceptions, and the law in all cases requires some form of adult supervision or permission. These restrictions are based on the obvious dangers posed by minors using guns, both to themselves and others.

Because AB 2571 is directed at regulating the advertising and marketing of guns to children, who are legally barred from purchasing them, it is constitutional. To the extent it regulates commercial speech about lawful activity, it satisfies the applicable *Central Hudson* test. AB 2571 directly advances a substantial government interest in protecting the safety and well-being of minors and society at large, and is no more restrictive than necessary to serve that interest.

For related reasons, Plaintiffs fail to demonstrate irreparable harm sufficient to obtain an injunction. The sweeping restrictions on speech they have read into AB 2571 cannot be squared with the operative text or the Legislature's expressly stated purposes. At the same time, enjoining AB 2571, a measure aimed at promoting public safety, would directly harm the public interest. That, coupled with the irreparable harm to the state that flows from any federal court order enjoining a duly enacted state law, precludes the relief Plaintiffs are seeking. Indeed, Plaintiffs seek an order barring *any* enforcement of the statute pending trial, yet they do not contend that it lacks *any* legitimate sweep, nor could they. By asking the court to

enjoin the statute in its entirety, Plaintiffs bear a particularly heavy burden here, and they fail to meet it. For these reasons and those discussed more fully below, this Court should deny Plaintiffs' motion for a preliminary injunction.

BACKGROUND

A. The Challenged Statute

AB 2571, which went into effect as an urgency statute on June 30, 2022, is a reasonable legislative approach to an urgent nationwide crisis. Among other things, it restricts the marketing and advertising of firearm products to minors, attaches financial penalties for violations, and authorizes private enforcement.

AB 2571 is a product not only of years of professional research and scholarship on youth gun violence and the influence of advertising and marketing on children and adolescents, but also common sense. The legislative history of AB 2571, including academic literature and other materials considered by the Legislature, bear this out.[1] The author of AB 2571 quoted from and cited to a 2016 report entitled *Start Them Young* by the Violence Policy Center ("VPC"), a "national nonprofit educational organization that conducts research and public education on violence in America and provides information and analysis to policymakers, journalists, advocates, and the general public." *See* Request for Judicial Notice in Support of Plaintiffs' Motion for Preliminary Injunction ("Req. Jud. Nte."), Exhibit ("Exh.") 6, at 7. The VPC report included data from the Centers for Disease Control on firearm-related injuries and deaths among minors. *See* Violence Policy Center, *Start Them Young* (2016), annexed to the Declaration of Kevin J. Kelly ("Kelly Dec.") as Exh. A, at 40. According to the CDC, in 2014, the leading cause of death among minors ages 1 to 17 were unintentional injuries, with

[1] To the extent plaintiffs request that the Court take judicial notice of various related legislative materials, including various legislative analyses of AB 2571 and the bill itself (*see* Plaintiffs' Request for Judicial Notice in Support of Plaintiffs' Motion for Preliminary Injunction), Defendant does not oppose that request.

firearms accounting for 2% of all fatal unintentional injuries. *See id.* Guns also accounted for 40% of all suicides, and 59% of all homicides, in this age group. *See id.* The report further noted that toxic lead found in ammunition also poses a major health risk to both minors and adults. *See* id. at 42-43.

The Legislature also took note of the fact that since 2014, gun violence among children has only worsened. Indeed, AB 2571's author observed that gun violence is now the third leading cause of death for children and teens in California. *See* Req. Jud. Nte., Exh. 6, at 4. And the CDC recently reported that in 2020, for the first time, firearm-related injuries surpassed motor vehicle crashes as *the leading cause of death nationwide* among children and adolescents. *See* Req. Jud. Nte., Exh. 7, at 1; Jason E. Goldstick, Ph.D. et al, *Current Causes of Death in Children and Adolescents in the United States*, 386 New Eng. J. Med. 1955, 1955 (2022), annexed to the Kelly Dec. as Exh. B. Further, according to an analysis of FBI data, nearly half of all active shooting incidents at educational facilities in the United States from 2000 to 2019 were perpetrated by someone under the age of 18. *See* Req. Jud. Nte., Exh. 7, at 1.

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." Matthew A. Lapierre, Ph.D. et al., *The Effect of Advertising on Children and Adolescents*, 140 PEDIATRICS S152, S153 (2017), annexed to the Kelly Dec. as Exh. C. For example, research has linked the marketing of certain products, including unhealthy food, alcohol, and tobacco, to an increased likelihood that adolescents will use these products. *See id*. Moreover, while "there have been calls to invest in the development of educational interventions to empower children by increasing their advertising knowledge," "research indicates that possessing advertising knowledge does not necessarily enable children to cope with advertising in a conscious and critical manner." *Id.* at S154.

It was with these concerns in mind that the Legislature enacted AB 2571. 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." Req. Jud. Nte., Exh. 1, at 2. "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." *Id.* at 1.

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. Despite these risks, and 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," "firearms manufacturers and retailers continue to market firearms to minors." *See id.* at 2.

Against this backdrop, AB 2571 prohibits members of the firearm industry, as defined, from advertising, marketing, or arranging for placement of an advertising or marketing communication concerning firearm-related products in a way that is designed, intended, or reasonably appears to be attractive to minors. *See* § 22949.80(a)(1). Courts are directed to look to the "totality of the circumstances" to determine whether the marketing or advertising is attractive to minors, and the statute provides a non-exclusive list of characteristics to assist courts in making that determination. *See id.* § 22949.80(2). Violators of the prohibition are subject to a maximum $25,000 penalty (*see id.* § 22949.80(e)(1)), and a person harmed by a violation may commence a civil action to recover damages (*see id.* § 22949.80(e)(3)). A court may also issue injunctive relief to prevent the harm

described in the statute and must award reasonable attorney's fees and costs to a prevailing plaintiff. *See id.* § 22949.80(e)(5).

B. California's Restrictions on the Ownership, Possession, and Use of Firearms by Minors.

AB 2571 restricts advertising and marketing in a narrow field that is already closely regulated. California law generally prohibits the sale, loan, or transfer of any firearm to a person under 21 years of age, with certain enumerated exceptions. *See* Cal. Pen. Code §§ 27505 & 27510. Furthermore, minors – those under the age of 18 – are generally prohibited from possessing a handgun, a semiautomatic centerfire rifle, and, as of July 1, 2023, any firearm. *See* Cal. Pen. Code § 29610.[2] There are very limited exceptions to these prohibitions. For example, the law allows a minor to possess or be loaned a firearm for certain limited purposes and under very specific circumstances. *See, e.g., id.* § 27505(b)(2) (permitting the loan of a firearm to a minor by the minor's parent or legal guardian for lawful recreational, agricultural, hunting, or artistic performance purposes, and for no longer than is reasonably necessary); *id.* § 29615 (permitting a minor to possess a firearm for lawful recreational, agricultural, hunting, or artistic performance purposes if accompanied by a parent or adult guardian and/or with the prior written consent of a parent or adult guardian and/or accompanied by a responsible adult). All of these permitted uses require the supervision and/or permission of a parent, legal guardian, and/or a responsible adult, depending on the purpose for which the item is used and, in some cases, the age of the minor. *See* Cal. Pen. Code §§ 27505 & 29615.

[2] For purposes of Cal. Pen. Code § 29610, a "firearm" is generally "a device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of an explosion or other form of combustion," and includes "the frame or receiver of the weapon, including both a completed frame or receiver, or a firearm precursor part." *See* Cal. Pen. Code § 16520.

1 **C. Plaintiffs' Allegations**

2 On July 8, 2022, Plaintiffs filed their Complaint. *See* ECF No. 1. The
3 Complaint names eight individuals and entities as Plaintiffs and purports to allege a
4 variety of constitutional claims, including violations of Plaintiffs' First Amendment
5 rights to "political & ideological speech," "commercial speech," and "association &
6 assembly," and their Fourteenth Amendment equal protection rights. *See* Complaint
7 ¶¶ 107-141.

8 Plaintiffs allege that AB 2571 "imposes a content- and speaker-based
9 restriction on protected speech that is viewpoint discriminatory, that serves no
10 legitimate government interest (directly or indirectly), and that is both facially
11 overbroad and far more extensive than necessary to achieve any purported interest."
12 *Id.* ¶ 7. They further allege that it violates their "rights to assemble and associate"
13 because "it directly prohibits advertising, marketing, or arranging for the placement
14 of advertising or marketing promoting various firearm-related events and programs,
15 where Plaintiffs peaceably and lawfully assemble and associate with each other and
16 members of the public," and it "impermissibly restricts pro-gun (but not anti-gun)
17 organizations from promoting membership in or financial support of their
18 organizations in ways that might be deemed 'attractive to minors.'" *Id.* ¶ 9. They
19 additionally allege that AB 2571 violates their equal protection rights "for many of
20 the reasons [AB 2571] violates Plaintiffs' rights to engage in free speech[.]" *Id.* ¶
21 10.

22 On July 20, 2022, Plaintiffs filed the instant motion. *See* ECF No. 12.
23 Plaintiffs concurrently filed an ex parte motion to shorten the time for a hearing on
24 the preliminary injunction motion, which Defendant opposed and the Court denied.
25 *See* ECF Nos. 13, 14, & 15.

26 In their motion, Plaintiffs contend that, as a result of the passage of AB 2571,
27 they and other "firearm industry members" have "immediately postponed or
28 canceled youth shooting events and hunter's safety courses, scrubbed advertising

for such events from their websites, and terminated magazine subscriptions for minors living in California." Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction ("Plaintiffs' Memo") at 5. As a remedy, they seek an order barring enforcement of the statute in its entirety. *See id.* at 25.

LEGAL STANDARD

Injunctive relief is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Alvarez v. Larose*, 445 F. Supp. 3d 861, 865 (S.D. Cal. 2020) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). "In cases where the movant seeks to alter the status quo," injunctive relief is "disfavored and a higher level of scrutiny must apply." *Disbar Corp. v. Newsom*, 508 F. Supp. 3d 747, 751 (E.D. Cal. 2020).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "When the government is a party, these last two factors," balance of the equities and public interest, "merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014); *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (same). Analysis of the first factor (*i.e.*, likelihood of success on the merits) is a "threshold inquiry," and thus if a movant fails to establish that factor, the court "need not consider the other factors." *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018).

ARGUMENT

I. PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS.

A. Contrary to Plaintiffs' contentions, AB 2571 is a regulation of commercial speech, not core political speech or association.

The Supreme Court has long distinguished between "commercial speech" – that is, "speech proposing a commercial transaction" – and other types of speech,

which may enjoy greater First Amendment protection. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562 (1980). Factors 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. *See 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)). These factors are "not dispositive" (*Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1116 (9th Cir. 2021)), and not all of these factors "must necessarily be present in order for speech to be commercial" (*Bolger*, 463 U.S. at 67 n.14).

Here, AB 2571 is properly understood as a regulation of commercial speech, not core political speech, as Plaintiffs contend. It prohibits a "firearm industry member" from *advertising, marketing, or arranging for placement of an advertising or marketing communication* concerning any firearm-related product in a manner that is designed, intended, or reasonably appears to be attractive to minors. § 22949.80(a)(1). Thus, it regulates speech with an obvious economic or commercial motivation. *See Hunt*, 638 F.3d at 715. The statute also defines "marketing or advertising" with reference to commercial transactions, i.e., those involving a proposed "exchange for monetary compensation." *See* § 22949.80(c)(6). Thus, AB 2571 regulates speech constituting an "advertisement." *See Hunt*, 638 F.3d at 715. AB 2571 also explicitly regulates advertising and marketing in connection with a "particular product" (*see id.*), that is, "firearm-related products" (*see* § 22949.80(c)(6)). Therefore, all of the hallmarks for applying commercial speech doctrine are present here.

Plaintiffs argue incorrectly that AB 2571 regulates speech that "ranges from purely political to commercial," because it applies to (1) magazines that include images and articles depicting minors enjoying shooting sports and selling advertising space for "firearm-related products;" (2) organizations that sell and give

away branded merchandise that promote their organization and messages; and (3) entities that advertise and market lawful recreational and competitive shooting events, educational programs, safety courses, and gun shows where youth are likely to attend and use firearm-related products. *See* Plaintiffs' Memo at 9-10. In support, they point to the law's language prohibiting advertising and marketing "concerning" a firearm-related product, as well as to the definition of "marketing or advertising," which includes commercial appeals to "use" a particular product. *See id.* at 3-4.

Plaintiffs read AB 2571 too broadly. The statute should be read holistically and in its entirety, and with a view to the dangers that the Legislature designed it to address. Plaintiffs largely ignore the statute's narrow definition of "firearm-related product," which encompasses only certain tangible products, described as "items" – firearms, their components, and accessories. § 22949.80(c)(5). Instead, Plaintiffs argue that, despite the fact that the law includes no express reference to the broad swath of educational, sporting and political activity they invoke, the statute's prohibition against marketing "concerning" certain tangible products encompasses anything and everything related to firearms in any way. This reading stretches AB 2571 too far and renders the narrow definition of "firearm-related products" superfluous.[3] Implicit in the terms "marketing or advertising" in relation to *any* specific product is an offer to engage in a *commercial* transaction for the *sale and purchase* of that product; AB 2571 does not purport to restrict communications of *any* kind about firearms or firearm-related activities. The title of the bill – "Marketing Firearms to Minors" – indicates what it regulates and how it should be interpreted and applied.

[3] Similarly, *commercial appeals* to "use" a particular product offered for sale necessarily includes the limiting definition of product, and thus do not include communications concerning educational or sporting events, much less political speech. *See* Cal. Bus. & Prof. Code § 22949.80(c)(6) (defining "marketing or advertising" as communications encouraging "purchase or use of a product or service," only "in exchange for monetary compensation").

1 The Legislature's express statements of purpose, which focus exclusively on
2 marketing of tangible products – firearms and accessories – to minors, further
3 support this common-sense reading. *See* Req. Jud. Nte., Exh. 1, at 1 (introductory
4 paragraph stating intent to regulate "commercial speech" and "advertising"); *id.*
5 ("This bill would prohibit a firearm industry member, as defined, from advertising
6 or marketing any firearm-related product as defined, in a manner that is designed,
7 intended, or reasonably appears to be attractive to minors."); *id.* at 2 ("It is the
8 intent of the Legislature in enacting this act to further restrict the marketing and
9 advertising of firearms to minors."). Nothing in the extensive legislative history
10 evinces an intent to restrict promotion of educational, recreational, or competitive
11 events, much less solicitation of membership in any organization or political speech
12 of any kind.

13 Thus, fairly read, AB 2571 cannot be viewed as a content- or viewpoint-based
14 restriction on core speech or on Plaintiffs' right to associate. The statute regulates
15 commercial speech, and was not adopted to regulate speech "because of
16 disagreement with the message it conveys." *See Ward v. Rock Against Racism*, 491
17 U.S. 781, 791 (1989). Rather, it was adopted to serve important government
18 interests implicated by the marketing and advertising of firearms-related to products
19 to children (that are discussed more fully below, *see infra* at I.(c)(1)).

20 Indeed, Plaintiffs are incorrect that the law prohibits them from, for example,
21 "engaging in noncommercial speech soliciting memberships for youth and using
22 branding merchandise." Plaintiffs' Memo at 12. As explained above, the only
23 activity of Second Amendment rights organizations prohibited by AB 2571 is the
24 advertising of firearms-related products to minors "in exchange for monetary
25 compensation" – that is, if they proposed a commercial transaction for the product.
26 *See* § 22949.80(c)(6).

27 Plaintiffs are similarly incorrect that the law targets those expressing a
28 particular viewpoint and that they are targeted as a disfavored class. *See id.* at 12,

22. Indeed, if organizations such as Moms Demand Action for Gun Sense in America and Gun Free Kids (*see id.* at 12) engaged in the same prohibited "advertising or marketing" conduct for the purchase of firearms, they too would run afoul of the statute as a "firearm industry member" (*see* Cal. Bus. & Prof. Code § 22949.80(c)(4)(A) (defining "firearm industry member" as "[a] person, firm, corporation, company, partnership, society, joint stock company, or any other entity or association engaged in the . . . retail sale of firearm-related products")). Contrary to Plaintiffs' assertion, no individual, company or organization is exempt from the prohibition on marketing firearm-related products to children because, by doing so, they become a "firearm industry member" subject to the law. Accordingly, the law does not target any particular group or viewpoint, but rather specific prohibited conduct.

Plaintiffs' allegations about the personal feelings or motivations of individual government officials (*see, e.g.*, Plaintiffs' Memo at 1, 8-9, 12) do not change this result. In *Nordyke*, 644 F.3d at 792, the Ninth Circuit rejected the contention that a county ordinance prohibiting possession of firearms on county property was adopted "in order to prevent members of the 'gun culture' from expressing their views about firearms and the Second Amendment," finding that "the Ordinance's language suggests that gun violence, not gun culture, motivated its passage." *Id.* (citing statement in ordinance that "[p]rohibiting the possession of firearms on County property will promote the public health and safety by contributing to the reduction of gunshot fatalities and injuries in the County"). The Court declined to rely on comments made by an individual county supervisor, because "the feelings of one county official do not necessarily bear any relation to the aims and interests of the county legislature as a whole," and because "the Supreme Court has admonished litigants against attributing the motivations of legislators to legislatures." *Id.* (citing *United States v. O'Brien,* 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what

1 motivates scores of others to enact it, and the stakes are sufficiently high for us to
2 eschew guesswork.")); *Johnson*, 491 U.S. 397; *City of Renton v. Playtime Theatres,*
3 *Inc.*, 475 U.S. 41, 48 (1986). The same reasoning applies here; the Court should
4 disregard Plaintiffs' assertions regarding the purported motivations of individual
5 government officials in adopting AB 2571.

6 **B. AB 2571 permissibly regulates commercial speech concerning**
7 **unlawful activity.**

8 As established above, AB 2571 – in light of both the operative language and
9 the Legislature's express statements of purpose – regulates commercial speech. And
10 for commercial speech to enjoy First Amendment protection, "it at least must
11 concern lawful activity and not be misleading" (*Cent. Hudson Gas & Elec. Corp. v.*
12 *Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980)), which Plaintiffs
13 acknowledge (*see* Plaintiffs' Memo at 16). "[W]hen the particular content or
14 method of the advertising suggests that it is inherently misleading or when
15 experience has proved that in fact such advertising is subject to abuse, the States
16 may impose appropriate restrictions." *In re R. M. J.*, 455 U.S. 191, 203 (1982).

17 It is illegal in California to sell a firearm to a minor under any circumstances,
18 and illegal to loan or transfer any firearm to a person under 21 years of age, subject
19 to narrow exceptions. *See* Cal. Pen. Code §§ 27505, 27510, & 29615. California
20 law also generally prohibits a minor from possessing a handgun, a semiautomatic
21 centerfire rifle, and, as of July 1, 2023, any firearm. *See* Cal. Pen. Code § 29610. As
22 Plaintiffs point out, there are exceptions to these prohibitions, but they are quite
23 narrow and carefully circumscribed. Moreover, in each and every circumstance in
24 which a minor is permitted to possess a gun, adult supervision or permission in
25 some form is required for obvious safety reasons. Plaintiffs' assertion that these
26 exceptions are "so broad that [they] nearly swallow the rule" (*see* Plaintiffs' Memo
27 at 16) is plainly refuted by the statutory scheme itself. Therefore, AB 2571
28 regulates commercial speech respecting unlawful activity – the sale of guns to

minors. And, for the same reason, AB 2571 regulates advertising and marketing that is inherently misleading to the young viewers and readers it seeks to protect, a point that Plaintiffs appear to concede (although they seek to minimize its importance). *See* Plaintiffs' Memo at 11 (observing that "AB 2571 might technically ban misleading speech promoting the unlawful sale of firearms to minors[.]"). It is inherently misleading to advertise the sale of a product to an audience that is legally barred from purchasing the product being advertised.

C. Even assuming AB 2571 regulates commercial speech that is protected by the First Amendment, it directly advances a substantial government interest and is no more restrictive than necessary to serve that interest.

Regulations of protected commercial speech are reviewed under a form of intermediate, not strict, scrutiny. *See Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-66 (1980); *Coyote Publ'g Inc. v. Miller*, 598 F.3d 592, 598-610 (9th Cir. 2010). If the commercial speech at issue concerns a lawful activity and is not misleading, then government regulation of the speech will be upheld so long as the government asserts a substantial interest, the regulation directly advances the government's asserted interest, and the regulation is no more restrictive than necessary to serve that interest. *See Central Hudson*, 447 U.S. at 566. When applying the intermediate scrutiny standard, courts give "substantial deference to the predictive judgments of [the legislature]." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (internal quotation marks and citation omitted); *see also United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993) ("Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments.").

Lawmakers "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *City of Renton*, 475 U.S. at 52 (internal quotation marks and citation omitted). In making such judgments, the legislature may rely on evidence "reasonably believed to be relevant to the problem" (*id.* at 51)

1 and such evidence need not be empirical (*see, e.g.*, *City of Los Angeles v. Alameda*
2 *Books, Inc.*, 535 U.S. 425, 439 (2002) (plurality opinion) (explaining that city did
3 not need empirical data to support its conclusion that adult-bookstore ordinance
4 would lower crime)). Indeed, "history, consensus, and simple common sense" can
5 suffice. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (internal quotation
6 marks and citation omitted). To the extent that AB 2471 regulates truthful, lawful
7 commercial speech, it directly advances the State's asserted substantial interest and
8 is no more extensive than necessary to serve that interest, and it passes muster
9 under *Central Hudson*.

10 **1. AB 2571 serves significant government interests in**
11 **protecting minors and the general public from gun-related injuries and deaths.**

12 As the Supreme Court has recognized, a state has "a compelling interest in
13 protecting the physical and psychological well-being of minors." *Sable Commc'ns*
14 *of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). Furthermore, "the
15 government may have a compelling interest in protecting minors from certain
16 things that it does not for adults." *Nunez by Nunez v. City of San Diego*, 114 F.3d
17 935, 945 (9th Cir. 1997). Consistent with these basic principles, AB 2571 declares
18 that the State has "a compelling interest in ensuring minors do not possess these
19 dangerous weapons [*i.e.*, firearms] and in protecting its citizens, especially minors,
20 from gun violence and from intimidation by persons brandishing these weapons."
21 *See* Req. Jud. Nte., Exh. 1, at 2. These are undeniably compelling interests.

22 The Legislature found that "the proliferation of firearms to and among minors
23 poses a threat to the health, safety, and security of all residents of, and visitors to,
24 this state." *See id.*, Exh. 1, at 1. This finding is borne out by the facts: "[i]n 2021
25 there were approximately 259 unintentional shootings by children, resulting in 104
26 deaths and 168 injuries." *See id.*, Exh. 6, at 9. Furthermore, to date, there have been
27 at least 169 unintentional shootings by children in 2022, resulting in 74 deaths and
28 104 injuries nationally. *See* Everytown Research & Policy, *#NotAnAccident Index*,

https://everytownresearch.org/maps/notanaccident (last visited August 8, 2022), annexed to the Kelly Dec. as 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* Req. Jud. Nte., Exh. 7, at 1; Kelly Dec., Exh. C, at 1955.

Plaintiffs try to cast doubt on the above interests as "genuine" and claim that they are somehow "undercut by the State's laws expressly allowing minors to possess firearms for lawful purposes." *See* Plaintiffs' Memo at 17-18. But, as explained above, the prohibition on firearm possession by minors is the rule, not the exception. The existing statutory framework 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. In any event, as evidenced by the bill itself, the State's interest arises from safety concerns regarding the *illegal* possession and use of firearms by minors. *See* Req. Jud. Nte., Exh. 1, at 2 ("In recognition of these facts, the Legislature has already prohibited minors from possessing firearms, except in limited circumstances.").

The government interests explicitly stated by the Legislature in AB 2571 easily satisfy the "substantial state interest" prong of the analysis.

2. AB 2571 directly advances the State's significant government interests.

In applying the third prong of the *Central Hudson* test, "a government body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 762 (1993). Nevertheless, "empirical data [need not] come . . . accompanied by a surfeit of background information," and such restrictions may be "based solely on history, consensus, and 'simple common sense.'" *Fla. Bar*, 515 U.S. at 628 (quotation marks omitted). Of particular relevance here, the Supreme Court has long held that the government

1 may restrict advertising in order to dampen demand, and thereby advance a
2 substantial government interest. *See, e.g.*, *Edge Broad.*, 509 U.S. at 434 ("If there is
3 an immediate connection between advertising [for gambling] and demand, and the
4 federal regulation decreases advertising, it stands to reason that the policy of
5 decreasing demand for gambling is correspondingly advanced.").[4]
6 As described above, the Legislature found – and the factual record it relied on
7 demonstrates – that the illegal possession of firearms by minors constitutes a
8 serious health and safety risk to children and other residents of this state. Further, as
9 the Legislature noted, studies have linked the influence of advertising to the use of
10 certain products by youth. *See* Req. Jud. Nte., Exh. 3, at 12 ("Research on the
11 effects of advertising has shown that they may be responsible for up to 30% of
12 underage tobacco and alcohol use.") (citing John P. Pierce, Ph.D. et al., *Tobacco*
13 *Industry Promotion of Cigarettes and Adolescent Smoking*, 279 J. OF AM. MED.
14 ASS'N 511, 511-515 (1998)). Conversely, studies have shown that *restrictions* on
15 advertising are associated with the *decreased* use of certain products by youth. *See*
16 *id.* ("On the other hand, restrictions on alcohol advertising are associated with both
17 (1) lower prevalence and frequency of adolescent alcohol consumption; and (2)
18 older age of first alcohol use.") (citing Mallie J. Paschall, Ph.D. et al., *Alcohol*
19 *Control Policies and Alcohol Consumption by Youth: A Multi-National Study*, 104
20 ADDICTION 1849-1855).
21 As the VPC found and as the Legislature recognized at the time of the bill's
22 passage, firearm industry members have been directly advertising and marketing
23 firearms to children. *See* Kelly Dec. Exh. A at 45; Req. Jud. Nte., Exh. 1, at 2
24 (observing that "firearms manufacturers and retailers continue to market firearms to
25
26 [4] The State has used a similar policy approach in regulating alcohol advertising aimed at minors. *See* Cal. Bus. & Prof. Code § 25664 (prohibiting
27 "[t]he use, in any advertisement of alcoholic beverages, of any subject matter,
28 language, or slogan addressed to and intended to encourage minors to drink the alcoholic beverages").

minors”). By restricting such advertising and marketing, and thereby reducing demand for firearm-related products among minors, AB 2571 is likely to reduce the unsafe use of firearms by minors. It will thus directly advance the State’s goals of reducing gun violence perpetrated by and against minors and others, both intentional and unintentional.

Nevertheless, Plaintiffs argue that AB 2571 “builds on the deceptive claim that minors may not lawfully possess firearms in California, while ignoring the fact that the law bars even communications about expressly lawful recreational and training purposes.” *See* Plaintiffs’ Memo at 18. Again, this argument oversimplifies both AB 2571 and the background prohibition on possession of firearms by minors, which permits only narrow exceptions for specified uses, and even in those limited circumstances requires mandatory adult supervision and/or parent or legal guardian permission, depending on the circumstances and/or the age of the minor.

3. AB 2571 sweeps no further than necessary to serve the State’s significant interests.

The fourth prong of the *Central Hudson* test “complements” the third prong by providing that a restriction on commercial speech must not be “more extensive than necessary to serve the interests that support it.” *Greater New Orleans Broadcasting Ass’n, Inc. v. United States*, 527 U.S. 173, 188 (1999). In analyzing this prong, the court must look for a fit between the government’s ends and the means chosen to accomplish those ends that is reasonable, representing “not necessarily the single best disposition but one whose scope is in proportion to the interest served . . . .” *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (quotation marks omitted). So long as a statute falls within those bounds, courts “leave it to governmental decisionmakers to judge what manner of regulation may best be employed.” *Id.* In fact, the Supreme Court has written “of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires,” and of the virtue of providing “the Legislative and

1 Executive Branches needed leeway in a field (commercial speech) traditionally
2 subject to government regulation . . . .” *Id.* at 481 (quotation marks omitted).
3 Here, as demonstrated above, AB 2571 regulates only a narrow category of
4 commercial speech (that offering firearms, their components, and accessories for
5 sale), and only by those “engaged in the manufacture, distribution, importation,
6 marketing, wholesale, or retail sale of firearm-related products” and entities or
7 associations “formed for the express purpose of promoting, encouraging, or
8 advocating for the purchase, use, or ownership” of a firearm-related product and
9 that advertises, endorses, or sponsors the products or the events where they are sold.
10 *See* Req. Jud. Nte., Exh. 1, at 3. As the legislative materials reiterate, AB 2571
11 focuses on commercial speech “promulgated by a narrowly defined group of
12 commercial speakers – the firearm industry – rather than on publishers, or even
13 advertisers, in general.” *Id.*, Exh. 5, at 3. Accordingly, it sweeps no further than
14 necessary.
15 Plaintiffs argue that AB 2571 is overbroad because it “includes
16 communications that are equally attractive to adults who have a right to obtain
17 information about such products to make informed decisions for both themselves
18 and their children.” Plaintiffs’ Memo at 20. In so arguing, they point to the
19 Legislature’s statement that the prohibition “applies whether the media is directed
20 to children or a general audience. In other words, it applies to all marketing,
21 regardless of the target audience.” *See id.* (quoting Req. Jud. Nte., Exh. 2 at 6).
22 Plaintiffs ignore that AB 2571 narrowly regulates advertising and marketing
23 communications that are “designed, intended, or reasonably appear[] to be
24 attractive to minors” as demonstrated by a variety of non-exclusive factors. *See* §
25 22949.80(a)(2). Indeed, these factors may include that they are “part of a marketing
26 or advertising campaign designed with the intent to appeal to minors” (*id.* §
27 22949.80(a)(2)(D)) and/or “placed in a publication created for the purpose of
28 reaching an audience that is predominately composed of minors and not intended

for a more general audience composed of adults" (*id.* § 22949.80(a)(2)(F)). And even so, an advertising or marketing communication is subject to the prohibition *only* if a court determines that they meet a "totality of the circumstances" test, a legal exercise that courts routinely perform in various other contexts.

4. Plaintiffs are not likely to succeed on their Equal Protection claim because it is duplicative of their First Amendment claims, and because they have not alleged sufficient facts showing that they are part of a protected class of individuals.

"The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). "But so too, the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Id.* (internal quotation marks and brackets omitted) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)). Conclusory allegations that the government is treating plaintiffs differently from other similarly-situated individuals are insufficient to allege a valid Equal Protection claim. *See Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura,* 371 F.3d 1046, 1055 (9th Cir. 2004) (conclusory allegations of Equal Protection violation, unaccompanied by allegations identifying others similarly situated or alleging how they are treated differently from plaintiff, are insufficient to withstand motion to dismiss).

Here, Plaintiffs allege in conclusory fashion that AB 2571 "targets only 'firearm industry members,'" a purportedly unpopular group, and that government officials adopted the law solely out of animus toward the Plaintiffs. *See* Plaintiffs' Memo at 22-23. This fails to identify any protected class. Indeed, Plaintiffs' claims are duplicative of and subsumed by their flawed First Amendment claim. Where, as here, the plaintiffs have failed to allege membership in a protected class, and speech is the only fundamental right underpinning the equal protection claim, the claim

1 "rise[s] and fall[s] with the First Amendment claims." *OSU Student All. v. Ray*, 699
2 F.3d 1053, 1067 (9th Cir. 2012).

3 **II. PLAINTIFFS CANNOT ESTABLISH IRREPARABLE HARM IN THE ABSENCE**
4 **OF INJUNCTIVE RELIEF.**

5 Even if Plaintiffs had demonstrated a likelihood of success on the merits, they
6 would still need to demonstrate that they would suffer irreparable harm if an
7 injunction were not issued. It is true that, as Plaintiffs point out, a demonstration of
8 even minimal loss of First Amendment freedoms constitutes "irreparable harm" for
9 purposes of seeking injunctive relief. *See* Plaintiffs' Memo at 23 (citing *Elrod v.*
10 *Burns*, 427 U.S. 347, 373 (1976)). But as demonstrated above, Plaintiffs are not
11 likely to succeed on the merits because AB 2571 does not unconstitutionally burden
12 any of their constitutional rights. For the same reason, they cannot show they will
13 suffer irreparable harm if their motion is denied.

14 **III. THE BALANCE OF EQUITIES, WHICH INCLUDES ANALYSIS OF THE**
PUBLIC INTEREST, TIPS AGAINST AN INJUNCTION.

15 Even if Plaintiffs could show that they would suffer irreparable harm in the
16 absence of a preliminary injunction, the balance of the equities (which, where the
17 defendant is a government official, includes analysis of the public interest) weighs
18 against a preliminary injunction for numerous reasons. *See Johnson v. Brown*, 567
19 F. Supp. 3d 1230, 1266 (D. Or. 2021) (balancing equities even where Plaintiffs
20 asserted that their "fundamental constitutional rights" were implicated). "[W]hen a
21 district court balances the hardships of the public interest against a private interest,
22 the public interest should receive greater weight." *FTC. v. Affordable Media*, 179
23 F.3d 1228, 1236 (9th Cir. 1999) (quoting *FTC v. World Wide Factors, Ltd.*, 882
24 F.2d 344, 347 (9th Cir.1989)). First, the balance of the equities does not weigh in
25 favor of the issuance of a preliminary injunction because AB 2571 promotes "a
26 compelling interest in ensuring that minors do not possess these dangerous weapons
27 [i.e., firearms] and in protecting its citizens, especially minors, from gun violence
28 and from intimidation by persons brandishing these weapons." *See* Req. Jud. Nte.,

Exh. 1, at 2. Indeed, Plaintiffs seek an order barring *any* enforcement of the statute pending trial, yet they do not and cannot contend that it lacks *any* legitimate sweep. Although they are asking the court to enjoin AB 2571 on its face, Plaintiffs do not dispute that it bars at least some conduct harmful to the public's safety.

Moreover, the significance of the harm that could result from the improper issuance of an injunction would be substantial. "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 would impact both "members of the public" and "the Government which is tasked with managing handgun violence." *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). The same cautions apply here.

Furthermore, the public interest would not be served by a preliminary injunction because "gun violence threatens the public at large." *See Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1283 (N.D. Cal. 2014), *aff'd sub nom. Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) (denying preliminary injunction where the public interest factor weighed against issuance of an injunction); *see also Wiese v. Becerra*, 263 F.Supp.3d 986, 994 (finding that the public interest is furthered "by preventing and minimizing the harm of gun violence"); *Rupp v. Becerra*, No. 817CV00746JLSJDE, 2018 WL 2138452, at *13 (C.D. Cal. May 9, 2018) ("[B]ecause the objective of the [challenged firearms law] is public safety, Plaintiffs fail to show that an injunction would be in the public interest."); *Zaitzeff v. City of Seattle*, No. C17-0184JLR, 2017 WL 2169941, at *3 (W.D. Wash. May 16, 2017) (denying motion for preliminary injunction based in part on a finding that a local ordinance banning certain uses of weapons, including nunchucks and fixed-blade knives, "serves a public safety interest").

Finally, the preliminary relief Plaintiffs seek here should also denied because they effectively seek to litigate the merits of the dispute without a motion for

1 summary judgment or trial. "[C]ourts generally disfavor preliminary injunctive
2 relief that is identical to the ultimate relief sought in the case." *See Progressive*
3 *Democrats for Soc. Just. v. Bonta*, No. 21-CV-03875-HSG, 2021 WL 6496784, at
4 *11 (N.D. Cal. July 16, 2021) (holding that "it is not usually proper to grant the
5 moving party the full relief to which he might be entitled if successful at the
6 conclusion of a trial") (quoting *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d
7 804, 808–09 (9th Cir. 1963); *see also Hennessy-Waller v. Snyder*, 529 F. Supp. 3d
8 1031, 1046 (D. Ariz. 2021), *aff'd sub nom. Doe v. Snyder*, 28 F.4th 103 (9th Cir.
9 2022) (denying motion "because the preliminary injunctive relief sought is identical
10 to the ultimate relief sought in the underlying complaint" and it would be
11 "premature to grant such relief prior to discovery and summary judgment
12 briefing"). The relief sought by Plaintiffs here is the same relief that Plaintiffs
13 would obtain after summary judgment or a trial, weighing heavily against issuance
14 of a preliminary injunction.

15 **CONCLUSION**

16 For the foregoing reasons, this Court should deny Plaintiffs' request for a
17 preliminary injunction.

18

19 Dated: August 8, 2022

Respectfully submitted,

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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' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: August 22, 2022
Hearing Time: 10:00 a.m.
Courtroom: 8D
Judge: Christina A. Snyder

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INTRODUCTION

"Have you no common decency?" This is the question Governor Gavin Newsom posed to members of our Supreme Court and those who do not share his world view when he announced that he had just signed Assembly Bill 2571, a state law flatly banning a broad swath of speech by "firearms industry members" who seek to impart their viewpoints "concerning firearm-related products" to youth. Not content to merely restrict unlawful access to and use of firearms, Governor Newsom and the state of California now seek to prevent the Second Amendment community from passing down their traditions and ideals to the next generation.

In service of that end, AB 2571 bans communications by "firearm industry members" seeking to promote the use of firearms and related products if those communications reasonably appear to be attractive to minors. The broad-sweeping law applies not only to "commercial speech" targeting children or encouraging them to engage in unlawful behavior, but to a great deal of political and educational speech, truthful commercial speech aimed at adults, and speech promoting activities that are perfectly lawful to engage in—even by minors in California. Because the law is not tailored to serving a compelling governmental interest, it violates the First Amendment rights to free speech, assembly, and association. Because it strikes at speech about a fundamental right and is rooted in animus for the speaker and the message, it also violates the right to equal protection under the law.

Plaintiffs thus seek to preliminarily enjoin AB 2571 while this case proceeds. Such relief is necessary because Plaintiffs are likely to succeed on the merits, because they suffer irreparable harm every second the law is in force, and because the balance of equities and public interest tip sharply in favor of enjoining the law.

FACTUAL BACKGROUND

I. CALIFORNIA'S ASSEMBLY BILL 2571 (BAUER-KAHAN)

AB 2571, which added section 22949.80 to the California Business &

Professions Code,[1] makes it unlawful for "firearm industry members" to "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." Cal. Bus. & Prof. Code § 22949.80(a)(1). Because the law creates a number of statutory definitions for otherwise common words and phrases, it is important to discuss each definition in order to better understand the full breadth of California's ban on speech.

First, AB 2571 targets speech not only "designed or intended" for minors, but that which might "reasonably appear[] to be attractive to minors." *Id.* Though the phrase is open to broad subjective interpretation, AB 2571 provides some guidance for courts tasked with determining whether a communication is "attractive to minors." *Id.* § 22949.80(a)(2). "[A] court shall consider the totality of the circumstances," including *but not limited to*, whether the communication:

> (A) Uses caricatures that reasonably appear to be minors or cartoon characters to promote firearm-related products.
>
> (B) Offers brand name merchandise for minors, including, but not limited to, hats, t-shirts, or other clothing, or toys, games, or stuffed animals, that promotes a firearm industry member or firearm-related product.
>
> (C) Offers firearm-related products in sizes, colors, or designs that are specifically designed to be used by, or appeal to, minors.
>
> (D) Is part of a marketing or advertising campaign designed with the intent to appeal to minors.
>
> (E) Uses images or depictions of minors in advertising and marketing materials to depict the use of firearm-related products.
>
> (F) Is placed in a publication created for the purpose of reaching an audience that is predominately composed of minors and not intended for a more general audience composed of adults.

Id. § 22949.80(a)(2).

Second, AB 2571 does not bar all speakers from "advertising and marketing"

---

[1] Throughout this motion, Plaintiffs refer to section 22949.80 as AB 2571.

"firearm-related products." Rather, section 22949.80(c)(4) targets only "firearm industry members," which the law defines in two ways:

> (A) A person, firm, corporation, company, partnership, society, joint stock company, or any other entity or association engaged in the manufacture, distribution, importation, marketing, wholesale, or retail sale of firearm-related products.
>
> (B) A person, firm, corporation, company, partnership, society, joint stock company, or any other entity or association formed for the express purpose of promoting, encouraging, or advocating for the purchase, use, or ownership of firearm-related products that does one of the following:
>
> (i) Advertises firearm-related products.
>
> (ii) Advertises events where firearm-related products are sold or used.
>
> (iii) Endorses specific firearm-related products.
>
> (iv) Sponsors or otherwise promotes events at which firearm-related products are sold or used.

AB 2571 thus does not apply to members of the book, movie, television, and video game industries, even though the author of AB 2571 expressly identified the "slick advertising" of "firearm-related products" in children's books, cartoons, and video games as sources of "shameless" advertising of "weapons" to children. Req. Jud. Ntc., Ex. 6 at 9. The law does, however, apply to 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—not just firearms manufacturers and retailers. Cal. Bus. & Prof. Code § 22949.80(c)(4).

Finally, AB 2571 broadly defines "advertising or marketing" as any "communication" made or placed by a "firearm industry member" in exchange for compensation, if the "primary purpose" is to promote not just the purchase but even the "*use* [of] the product or service." *Id.* § 2949.80(c)(6) (emphasis added). And because the restriction extends to any such communication that even *concerns* a "firearm-related product," *id.* § 22949.80(a)(1), it sweeps within its sizable grasp not

1 just traditional "advertising or marketing" as laypeople might conceive of it, but all
2 manner of speech that promotes the use of "firearm-related products."
3 AB 2571 thus restricts honest commercial speech promoting lawful activities
4 and services, including, but not limited to, traditional advertisements for youth
5 shooting competitions and recreational events, firearm-safety classes, shooting skills
6 courses, and youth shooting programs and organizations. Compl. ¶ 57. But it also
7 bans a broad category of pure speech, including, *but not limited to:*

8 a. All (or nearly all) aspects of youth hunting and shooting
9 magazines by organizations and businesses whose
10 purpose is to promote the shooting sports and the
websites, social media, and other communications
promoting those magazines;

11 b. Videos, cartoons, coloring books, posters, social media
12 posts, and education campaigns by gun rights
13 organizations and/or firearms trainers encouraging youth
to take up lawful recreational or competitive shooting
activities or teaching about firearm safety;

14 c. Branded merchandise, giveaways, or "swag" by a
15 "firearm industry member" that promotes a "firearm
industry member," *including nonprofit Second
Amendment organizations*, or contains pro-gun slogans;

16 d. Youth firearm- and hunter-safety courses and youth
17 shooting skills courses, as well as recommendations by
18 trainers about the most appropriate firearms, ammunition,
and accessories for young and beginner shooters; and

19 e. Signage, flyers, posters, discussions, merchandise, and
20 other communications generally depicting minors
21 enjoying or encouraging minors to enjoy their right to
possess and use firearms at recreational or competitive
shooting events—conduct that is legal under California
law—as well as communications promoting such events.

22 Any person who violates AB 2571 "shall be liable for a civil penalty not to
23 exceed twenty-five thousand dollars ($25,000) for each violation, which shall be
24 assessed and recovered in a civil action brought in the name of the people of the
25 State of California by Defendant Attorney General Rob Bonta ("the State") or by
26 any district attorney, county counsel, or city attorney in any court of competent
27 jurisdiction." *Id.* § 22949.80(e)(1). AB 2571 also authorizes any "person harmed by
28 a violation of this section" to "commence a civil action to recover their actual

damages," as well as attorney's fees and costs. *Id.* § 22949.80(e)(3)-(5).

II. THE IMPACT OF AB 2571 ON PLAINTIFFS' PROTECTED CONDUCT

AB 2571 was adopted by the Legislature and signed by the governor on June 30, 2022, and immediately went into effect, Compl. ¶ 42, sending industry members scrambling to comply with the law's nearly indecipherable restrictions on their speech. Indeed, Plaintiffs and other "firearm industry members" throughout the country immediately postponed or canceled youth shooting events and hunter's safety courses, scrubbed advertising for such events from their websites, and terminated magazine subscriptions for minors living in California. *See, e.g.*, Fink Decl. ¶¶ 16-17, Exs. 19-20; Minnich Decl. ¶¶ 8, 15.

Plaintiffs are a group of "firearm industry members," as defined by AB 2571, that regularly "advertise, market, or arrange for placement of an advertising or marketing communication concerning … firearm-related product[s] in a manner that is designed, intended, or [might] reasonably appear[] to be attractive to minors." Compl. ¶¶ 65-96; Coleman Decl. ¶¶ 2-8; Fink Decl. ¶¶ 2-3, 9-15, Ex. 13; Gomez Decl. ¶¶ 2-9; Gottlieb Decl. ¶¶ 6-15; Minnich Decl. ¶¶ 2-15; Paredes Decl. ¶¶ 2-6; Rangel Decl. ¶¶ 2-8.

Plaintiff Junior Sports Magazines publishes and distributes the online and print magazine *Junior Shooters*, a shooting sports magazine that promotes, encourages, and advocates for the lawful use of firearms—especially by young people. Fink Decl. ¶ 3. The magazine is specifically for young people, and it is dedicated to promoting the participation and achievements of youth in the shooting sports. *Id. Junior Shooters* regularly includes articles, images, and other depictions of minors using "firearm-related products," as well as endorsements of specific products appropriate for young and beginner shooters. *Id.* ¶¶ 10-13, Exs. 14-15. *Junior Shooters* also includes articles and advertisements promoting youth shooting competitions and recreational events, youth shooting organizations, firearm-safety courses, and shooting skills courses, as well as traditional advertisements for

"firearm-related products." *Id.* ¶¶ 11, 14-15. Because AB 2571 bans all of this otherwise protected speech, the website for *Junior Shooters* now warns visitors that youth in California may not access the site and future editions will not be available for distribution in California. *Id.* ¶¶ 16-17, Exs. 19-20.

Plaintiff Raymond Brown is a firearms trainer who regularly engages in the planning, advertising, and facilitation of firearm education courses specifically for youth or where youth are extremely likely to be in attendance and where youth lawfully use, handle, observe, or otherwise possess firearms, ammunition, and firearm parts. Compl. ¶¶ 14, 74-76.[2] His firearm training and coaching sessions focus on various aspects of competitive and recreational shooting, including discussion and recommendations concerning "firearm-related products" that are most suitable for young and/or beginner shooters. *Id.*

Plaintiffs California Youth Shooting Sports Association and Redlands California Youth Clay Shooting Sports are non-profit shooting sports organizations that offer participation in their youth shooting programs. Coleman Decl. ¶¶ 2-3, Exs. 10-11; Rangel Decl. ¶¶ 2-4. Through these programs, Plaintiffs CYSSA and RCYCSS regularly engage with minors through advertising, marketing, and other communications promoting youth competitive shooting events where "firearm-related products" are used and providing recommendations on which "firearm-related products" are most suitable its young shooters' competitive and recreational shooting needs. Coleman Decl. ¶¶ 4-7, Ex. 10; Rangel Decl. ¶¶ 5-8.

Plaintiff California Rifle & Pistol Association, a non-profit member organization, not only promotes, sponsors, and hosts youth programs like those described above, Minnich Decl. ¶¶ 2, 5, 8, 12-13, Ex. 23, it is also rolling out paid

[2] Due to the unusually rapid turnaround necessary to prepare Plaintiffs' motion for preliminary injunction in light of AB 2571 being declared "urgency" legislation, and Mr. Brown's summer travel and training schedule, Mr. Brown was unavailable to provide a fully executed declaration supporting this motion. Plaintiffs will submit Mr. Brown's declaration as soon as he is available.

memberships for youth and uses CRPA-branded merchandise and giveaways to promote the organization and solicit memberships and financial support, as well as to spread pro-gun messages. *Id.* ¶¶ 14-15, Exs. 23-26. CRPA also publishes a bi-monthly magazine that has included and, but for the enforcement of AB 2571, would continue to include cartoons (including political cartoons), as well as articles and depictions of the use of "firearm-related products" by minors. ¶¶ 9-11, Ex. 22. These publications also include advertisements promoting youth shooting competitions, youth recreational shooting and outdoors events, and firearm safety courses , as well as traditional advertisements for "firearm-related products." *Id.*

Plaintiff CRPA Foundation is a 501(c)(3) non-profit organization that not only supports, promotes, sponsors, and participates in programs for youth like those described above, it also solicits funds for and provides scholarships to individual youth shooters and youth shooting teams, publishes a variety of informational bulletins, brochures, and articles promoting the possession and use of firearms, and (in response to countless requests from CRPA and CRPAF supporters) is launching an activity book about the shooting sports for children. Gomez Decl. ¶¶ 1-9, Ex. 21.

Plaintiff Gun Owners of California is a non-profit organization that regularly supports youth shooting teams and individual talented young shooters through sponsorships and other support. Through this work, GOC engages with minors through advertisements, sponsorships, and other communications promoting events where "firearm-related products" are used. Paredes Decl. ¶ 4.

Plaintiff Second Amendment Foundation, a non-profit member organization, sponsors and supports an initiative called 2AGaming, an outreach program with the goal of growing the Second Amendment community. Gottlieb Decl. ¶¶ 2, 10-14. 2AGaming functions by reaching out to people who play video games, especially people who play games that focus on guns. *Id.* ¶ 11. This outreach necessarily includes minors and young adults who play such games. *Id.* SAF also produces and distributes branded merchandise to promote itself, increase paid memberships,

1 encourage participation in shooting sports, and spread its Second Amendment
2 message. *Id.* ¶ 15.
3 As a result of the adoption and immediate enforcement of AB 2571, Plaintiffs
4 (and businesses across the country) have begun to curtail these activities, as well as
5 all manner of speech that could arguably fall under AB 2571's broad ban—fearing
6 the draconian penalties that attach. Compl. ¶ 97; Coleman Decl. ¶¶ 8-10; Fink Decl.
7 ¶¶16-19, Exs. 19-20; Gomez Decl. ¶ 10; Minnich Decl. ¶¶ 7-8, 11, 15; Paredes Decl.
8 ¶ 6; Rangel Decl. ¶¶ 9-11; *see also* Canon Decl. ¶¶ 8-12; Fitzgerald Decl. ¶¶ 4-10.

9 **ARGUMENT**

10 "The purpose of a preliminary injunction is to preserve the status quo pending
11 a determination of the action on the merits." *Chalk v. U.S. Dist. Ct. (Orange Cty.*
12 *Superin. of Schs.)*, 840 F.2d 701, 704 (9th Cir. 1998). To obtain relief, Plaintiffs
13 must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable
14 harm absent preliminary relief; (3) that the balance of equities tips in his favor; and
15 (4) that an injunction is in the public interest. *Am. Trucking Ass'ns, Inc. v. City of*
16 *Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). Because the burdens at this stage
17 track those at trial, Plaintiffs bear only "the initial burden of making a colorable
18 claim that [their] First Amendment rights have been infringed, or are threatened with
19 infringement," then "the burden shifts to the government to justify the restriction."
20 *Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014) (citation omitted).

21 **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS**

22 **A. AB 2571 Impermissibly Infringes on Plaintiffs' Right to Free**
23 **Speech**

24 Plaintiffs seek to engage in all manner of protected expression—including
25 political, ideological, and educational speech, as well as commercial speech—
26 concerning the lawful sale, possession, and use of "firearm-related products." But
27 the State has flatly banned Plaintiffs' intended speech on the basis of the content and
28 viewpoint of Plaintiffs' message—a message that California lawmakers hardly try to

1 conceal their contempt for. This Court should thus apply strict scrutiny and hold that
2 Plaintiffs are likely to succeed on their claim that AB 2571 violates their free speech
3 rights. But no matter what level of scrutiny applies, the result is the same—the State
4 cannot "prov[e] the constitutionality of its actions." *United States v. Playboy Entm't*
5 *Grp., Inc.*, 529 U.S. 803, 816 (2000).

6 **1. The First Amendment Protects Plaintiffs' Speech**

7 The First Amendment no doubt protects Plaintiffs' intended expression. It is
8 not obscene, defamatory, or fraudulent. It does not advocate for imminent lawless
9 action or solicit others to commit crimes. No, Plaintiffs' intended expression is not
10 among those unprotected classes of speech. *See United States v. Alvarez*, 567 U.S.
11 709, 717 (2012). To the contrary, it involves speech that ranges from purely political
12 to commercial—and it all pertains to the exercise of the right to keep and bear arms.
13 *See, e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding
14 that speech about "politics, nationalism, religion, or other matters of opinion" has
15 long been considered the core of the First Amendment); *Cent. Hudson Gas & Elec.*
16 *Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64 (1980) (holding that
17 commercial speech receives First Amendment protection if it is not misleading and
18 concerns a lawful activity); *Nordyke v. Santa Clara*, 110 F.3d 707, 710 (9th Cir.
19 2009) (holding that an offer to sell legal firearms is protected speech).

20 For example, Plaintiff Junior Sports publishes *Junior Shooters*, a magazine
21 *specifically* for youth shooters. Fink Decl. ¶ 3, Exs. 13-15. The magazine and
22 website includes images and written depictions of minors lawfully enjoying the
23 shooting sports. *Id.* ¶¶ 9-13, Exs. 13-16. It also features articles by and for youth
24 endorsing "firearm-related products," *id.* ¶ 10, Ex. 16, as well as marketing for youth
25 shooting organizations, competitions, and recreational events, *id.* ¶¶ 11, 13, Ex. 17.
26 Finally, Junior Sports sells space for traditional advertising concerning "firearm-
27 related products" that minors may lawfully possess in California. *Id.* ¶ 14, Ex. 18.
28 To be clear, however, the advertising is not intended to encourage minors to

unlawfully buy firearms. *Id.* ¶ 15. Rather, it is intended for an audience of firearms-savvy youths who might ask their parents to purchase "firearm-related products" for their lawful use under California's exceptions for possession of firearms by minors. *Id.* In short, the speech found within *Junior Shooters* runs the gamut of protected speech. And there is hardly a page that could survive the State's draconian ban.

Plaintiffs CRPA and SAF sell and give away branded merchandise, like t-shirts, hats, stickers, patches, and buttons, to promote the organization and solicit memberships (including youth memberships) and other financial support, as well as to spread pro-gun messages and slogans. Gottlieb Decl. ¶ 15; Minnich Decl. ¶ 14, Exs. 24-27. Because CRPA and SAF are "firearm industry members," AB 2571 prohibits this otherwise protected speech. *See Hunt v. City of Los Angeles*, 601 F. Supp. 2d 1158 (C.D. Cal. 2009), *aff'd* 638 F.3d 703 (9th Cir. 2011) ("The sale of merchandise inextricably intertwined with a religious, political, ideological, or philosophical message is fully protected by the First Amendment.").

Finally, all Plaintiffs engage, to some degree, in the advertising, marketing, promoting, sponsoring, hosting, or facilitating of and participation in lawful recreational and competitive shooting events, educational programs and firearm-safety courses, or gun shows, specifically for youth or where youth are extremely likely to be in attendance and where youth lawfully use or handle "firearm-related products." Compl. ¶ 66; Coleman Decl. ¶¶ 4-7, Ex. 10; Fink Decl. ¶¶ 11, 13. Ex. 17; Gomez Decl. ¶¶ 7-8; Gottlieb Decl. ¶¶ 6-9; Minnich Decl. ¶¶ 5-10, 12-13; Paredes Decl. ¶ 4; Rangel Decl. ¶¶ 4-7, 10. These programs regularly involve a variety of communications depicting minors enjoying or otherwise encouraging minors to possess and use lawful firearms for lawful purposes. Compl. ¶¶ 67-68; Coleman Decl. ¶ 6; Minnich Decl. ¶ 12, Ex. 23; Rangel Decl. ¶ 6. These programs often include exhibitors that (1) promote membership in their organizations; (2) distribute branded merchandise or merchandise with pro-gun slogans; or (3) engage in speech promoting the use of firearms, the importance of firearm safety, and participation in

youth shooting programs.

So, while AB 2571 might technically ban misleading speech promoting the unlawful sale of firearms to minors, it is in no way limited to such speech. In fact, it ensnares a substantial amount of protected political, educational, and commercial speech—likely far more of such speech than the arguably unprotected speech the bill purports to target.

2. AB 2571 Is an Impermissible Content- and Viewpoint-based Restriction on Speech

"[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). Government restrictions that selectively ban speech based on its "particular subject matter" or "its function or purpose" are "content-based regulations." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Relatedly, "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'" known as viewpoint discrimination. *Id.* at 2230. Content- and viewpoint-based speech restrictions are *presumed invalid*. *Id.* Indeed, holding that a government restriction on speech is content- or viewpoint-based is often determinative. *See, e.g.*, *Ark. Writers' Project v. Ragland*, 481 U.S. 221, 231-32 (1987).

There can be little doubt that AB 2571 is the uniquely offensive law that *both* content-based and viewpoint-discriminatory. Indeed, the law singles out speech based on both its "particular subject matter"—certain speech "concerning firearm-related products"—and its "function or purpose"—speech "the primary *purpose* of which is to encourage recipients … to purchase or use the product or service." Cal. Bus. & Prof. Code § 22949.80(c)(6) (emphasis added). Plaintiffs know of no other state law that flatly bans speech "concerning" a product that both minors and adults have a statutory and constitutional right to use for lawful purposes. Even restrictions

on advertising of alcohol, tobacco, or cannabis to children are irrelevant because—unlike possession and use of firearms, Cal. Penal Code §§ 29615, 29655—it is not legal for minors to possess or use those substances in California. And none of those products are constitutionally protected.

Worse yet, by targeting only the speech of organizations formed to promote the possession and use of "firearm-related products," Cal. Bus. & Prof. Code § 22949.80(c)(4), which necessarily includes nonprofits like Plaintiffs CYSSA, RCYCSS, CRPA, CRPA Foundation, GOC, and SAF, the challenged law blatantly discriminates against the viewpoint of the speaker. For instance, the law prohibits Plaintiffs CRPA and SAF from engaging in noncommercial speech soliciting memberships for youth and using branded merchandise, like hats, t-shirts, stickers, and buttons, to promote their organizations, solicit memberships, and spread their pro-gun messages. *Id.* § 22949.80(a), (c)(4). It does not, however, prohibit *anti-gun* organizations, like Moms Demand Action for Gun Sense in America and Gun Free Kids, from soliciting youth memberships or using branded merchandise bearing anti-gun messages and slogans—*or even images of unlawful firearms*—to promote their organizations, solicit financial support, and spread their political messages.

This discriminatory impact is not hypothetical. It is already happening. In a recorded statement posted to his official Twitter account upon the signing of AB 2571, Governor Newsom displayed advertising from WEE1 Tactical of their JR-15, a semiautomatic firearm that was designed for smaller, younger shooters. But because he is not a "firearm industry member" seeking to urge his audience to "purchase or use the product"—but rather an anti-gun politician seeking to disparage those whose viewpoints do not align with his—Governor Newsom is free to display the very same images WEE1 is now barred from distributing.[3]

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[3] Rosalio Ahumada, *Gavin Newsom Signs New Gun Safety Laws Targeting Illegal Weapons, Marketing to Kids*, Sac. Bee (July 1, 2022), *available at* https://www.sacbee.com/news/local/crime/article263108183.html (the full video of Newsom's remarks is available on the Sacramento Bee website).

3. AB 2571 Cannot Survive Heightened Scrutiny

Because AB 2571 is a content-based speech restriction on noncommercial speech, it is presumed invalid and may be upheld only if the government proves it is "narrowly tailored to serve [a] compelling state interest" under strict scrutiny. *Reed*, 576 U.S. at 163. But even under the somewhat less-demanding intermediate scrutiny, the government must still prove AB 2571 is "narrowly tailored to serve a significant government interest." *Madsen v. Women's Health Ctr. Inc.*, 512 U.S. 753, 764 (1994). The means employed must be "closely drawn" to avoid "unnecessary abridgment" of protected conduct. *McCutcheon v. FEC*, 572 U.S. 185, 199 (2014). AB 2571 is not "closely drawn" to any legitimate government interest, and it cannot pass constitutional muster under any test the Court might apply.

First, the State has no actual compelling or substantial interest in banning Plaintiffs' political and educational speech concerning "firearm-related products." Indeed, the State's purported interests in "ensuring that minors do not possess [firearms]" and "protecting its citizens … from gun violence," Req. Jud. Ntc. Ex. 1 at 3, Ex. 3 at 11, are inconsistent with the fact that, under California law, minors can and do literally possess firearms and related products for a myriad of legal reasons. Cal. Penal Code § 29615 (firearms); *id.* § 29655 (ammunition).

What's more, the State has no legitimate interest in simply curbing the mere "proliferation of firearms to and among minors." *Id.* Ex. 1 at 1. Even minors have at least some right to possess firearms for lawful purposes. *See Ezell v. City of Chicago*, 846 F.3d 888, 896 (7th Cir. 2017) (holding that "there's zero historical evidence that firearm training for [minors] is categorically unprotected"). The State, however, apparently believes that the exercise of that right by youths—even with their parents' consent and supervision—is unwise. So it seeks to shield them from (some) speech that might encourage them to engage in the shooting sports and, ultimately, become the "next generation of [Second Amendment] advocates and customers" of firearms. Req. Jud. Ntc., Ex. 6 at 9. But the State may not ban

constitutionally protected speech to indirectly advance an illegitimate interest in reducing the demand for engaging in constitutionally protected conduct. And while the State has a "legitimate power to protect children from harm," that authority "does not include a free-floating power to restrict the ideas to which children may be exposed." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 798 (2011).

Really, the State's interest was an animus-driven desire to eradicate a vital outlet for the exchange of ideas related to the lawful use of firearms and for the preservation of the "gun culture" by engaging youth in the shooting sports. Both on its face and as evidenced by its legislative history, this appears to be the very intent of AB 2571. Indeed, the Senate Judiciary Committee's Bill Analysis quotes heavily from a 2016 report that disparagingly "outlines the [so-called] problem" of the "gun industry's" attempts "to attract future legal gun owners" and "recruit[] children into the gun culture." Req. Jud. Ntc., Ex. 6 at 7-8 (quoting Josh Sugarman, *"Start Them Young" How the Firearms Industry and Gun Lobby Are Targeting Your Children* (Feb. 2016)). As the bill's author put it, the firearm industry:

> [E]ncourages children to hold a gun as soon as they can walk. Gun manufacturers view children as *their next generation of **advocates** and customers* and target them with slick advertising—even children's books. The advertising for these weapons is shameless. Children in California are not allowed to buy or own a gun, yet they are advertised to across all forms of media with cartoons, video games, and social media.
>
> ….
>
> Guns are not a toy. Guns are a tool of death. Taking away this *tool of violent indoctrination* from the gun industry is a vital step forward to protect California's children.

Id. at Ex. 6 at 9, Ex. 8 at 5 (emphases added). Setting aside the author's readily apparent animus, it is clear that the intent of AB 2571 was not simply to prevent unlawful purchase or use of firearms by minors or to curb gun violence, but to prevent "firearm industry members" from "indoctrinating" youth to become "advocates" for the Second Amendment and "gun culture" in America.

But even if the State could point to some sufficient interest in public safety, it

cannot prove that AB 2571 is appropriately tailored to that end. The requirement of narrow tailoring requires the government to target the exact wrong it seeks to remedy—and no more. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the evil it seeks to remedy."). AB 2571 comes nowhere near meeting this exacting requirement. To the contrary, it sweeps up all communications "*concerning* firearm-related products" made by "firearm industry members" "in exchange for monetary compensation" that are "designed, intended, or reasonably appear[] to be attractive minors." Cal. Bus. & Prof. Code § 22949.80(a)(1), (c)(6) (emphasis added). This includes communications promoting lawful activities, including recreational events, competitions, shooting skills courses, and safety programs specifically for youth or where youth are likely to be in attendance and where youth lawfully use and handle "firearm-related products." It also prohibits pro-gun organizations from soliciting members through marketing to and providing memberships for minors.

Even assuming AB 2571 were not written with the intention of barring these programs (and the advertising necessarily attendant to them), that is its effect. Indeed, AB 2571 is so vague that Plaintiffs (and others similarly situated) have begun to curtail all manner of speech that could arguably fall under its overly broad ban. Compl. ¶115.[4] Thus, AB 2571 is likely to chill (and has already chilled) a wide range of protected activities. This "chilling" also offends the First Amendment. *Edge v. City of Everett*, 929 F.3d 657, 664-65 (9th Cir. 2019) (requiring "specificity of laws" when "First Amendment freedoms are" implicated because unclear laws might "chill[] protected speech or expression by discouraging participation").

4. Even If AB 2571 Restricted Only Commercial Speech, It Fails the Test Set Forth in *Central Hudson*

The fact that AB 2571 also restricts purely commercial speech—speech that does no more than propose a commercial transaction—does not change the result.

[4] *See, e.g.*, Coleman Dec. ¶¶ 8-10; Fink Decl. ¶¶ 16-19, Exs. 19-20; Minnich Decl. ¶¶ 7-8, 11, 15; *see also* Canon Decl. ¶¶ 8-12; Fitzgerald Decl. ¶¶ 4-10.

Such speech receives First Amendment protection if it is not misleading and concerns a lawful activity. *Cent. Hudson Comm'n*, 447 U.S. at 563-64. Government restrictions on such speech are constitutional *only* if they directly advance a substantial government interest and are not broader than necessary to serve that interest. *Id.* at 564.[5] AB 2571 fails the *Central Hudson* test at every step.

a. AB 2571 restricts non-misleading speech that concerns lawful activity.

Again, AB 2571 does not merely restrict misleading speech promoting the unlawful sale of firearms to minors. Argument, Part I.A.1, *supra*. Even still, the State has suggested that Plaintiffs' intended speech is unprotected (and may thus be banned) because, in its view, the "truthfulness" of "marketing materials in which firearm-related products are attractive to minors" is "debatable." Req. Jud. Ntc., Ex. 3 at 10-11. For support, the State made the exaggerated claim that, "in most cases," minors "cannot lawfully possess" firearms in California. *Id.* While it may be *technically* true that "lawful possession of a firearm by a minor is … the [statutory] exception rather than the rule," *id.* at 11, the exception is so broad that it nearly swallows the rule. To be clear, 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. Cal. Penal Code §§ 29615(a)-(b), 29655; Barvir Decl., Ex. 32 (Department of Fish & Wildlife form seeking parental consent for minor to "handle, manipulate, and/or use firearms" during the state hunter's safety course). If the minor's parent consents, and the minor is at least 16 or is

[5] Though this is currently the test for so-called "commercial speech" that this Court is likely bound to apply, modern case law is trending toward extending *full* First Amendment protection to all speech. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011). Plaintiffs thus reserve their right to advocate for the application of strict scrutiny to AB 2571's restrictions on "commercial speech" on appeal. In fact, this case illustrates well why commercial speech should be afforded full protection. For the language of AB 2571 makes it nearly impossible to tease out a clear distinction between commercial and noncommercial speech. The two types of speech are so inextricably intertwined that nothing less than full protection is appropriate.

1 engaging in recreational sports on "lands lawfully possessed by their parent or
2 guardian," no adult even need be present. Cal. Penal Code § 29615(c)-(d). And not
3 for nothing, but federal law includes "all able-bodied male [citizens] at least 17
4 years of age" as part of the "militia." 10 U.S.C. § 246. So not firearm possession by
5 minors is not only legal under state law, but federal law also anticipates that some
6 will be equipped with firearms and trained in their use if called upon to serve.
7 This fact was not lost on the Legislature. To the contrary, the Assembly
8 Judiciary Committee's analysis recognizes that "advertising and marketing materials
9 that encourage minors to possess and use firearms *may or may not* concern a lawful
10 activity." Req. Jud. Ntc., Ex. 3 at 11 (emphasis added). But instead of targeting only
11 speech promoting unlawful activity, the State chose to ban even speech concerning
12 legal (and constitutionally protected) conduct. "Even if [California] could prohibit
13 advertisements reading, 'Hey kids, buy [guns] here,' [AB 2571] sweep[s] much
14 more broadly than that." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 579 (2001)
15 (Thomas, J., concurring). Indeed, it targets any communication "designed, intended,
16 or [that] reasonably appears to be attractive to minors" and "concern[s] any firearm-
17 related product," if the purpose of the speech is to encourage the "purchase or use
18 [of] the product or service." Cal. Bus. & Prof. Code § 22949.80(a)(1), (c)(6). That
19 includes speech that encourages the *lawful* use of firearm-related products by not
20 only minors, but adults as well. Req. Jud. Ntc., Ex. 2 at 6.
21
22 **b. The State has no substantial interest in banning Plaintiffs' protected commercial speech.**
23 The second prong of *Central Hudson* requires the State to demonstrate that it
24 has a substantial governmental interest in the restriction of commercial speech. 447
25 U.S. at 566. The findings of AB 2571 advance two interests it declares are
26 "compelling"—"ensuring that minors do not possess [firearms]" and protecting
27 Californians from gun violence. Req. Jud. Ntc., Ex. 1 at 3. As discussed above,
28 neither interest appears genuine, and both are undercut by the State's laws expressly

1 allowing minors to possess firearms for lawful purposes. Plaintiffs nevertheless
2 assume, without conceding that it is the State's actual interest, that the State
3 generally has a substantial interest in preventing violence against its citizens.
4
5 **c. AB 2571 does not directly and materially advance the State's purported interests.**

6 The third prong of *Central Hudson* requires the government to show "that the
7 speech restriction directly and materially advances the asserted governmental
8 interest[s]." *Greater New Orleans Broad. Ass'n v. United States*, 528 U.S. 173, 188
9 (1999). "This burden requires more than 'mere speculation or conjecture; rather, a
10 governmental body seeking to restrain a restriction on commercial speech must
11 demonstrate that the harms it recites are real and that its restriction will in fact
12 alleviate them to a material degree.'" *Tracy Rifle & Pistol LLC v. Harris*, 339 F.
13 Supp. 3d 1007, 1013 (E.D. Cal. 2018) (quoting *Edenfield v. Fane*, 507 U.S. 761,
14 770-71 (1993)). This prong is "critical; otherwise, 'a State could with ease restrict
15 commercial speech in the service of other objectives that could not themselves
16 justify a burden on commercial expression.'" *Rubin v. Coors Brewing Co.*, 514 U.S.
17 476, 487 (1995) (quoting *Edenfield*, 507 U.S. at 771)).

18 The Assembly Judiciary Committee's analysis claims that AB 2571 "directly
19 advances its stated governmental interests to limit the exposure of, and consumption
20 by, minors to such advertising and marketing material, given the lethality (and
21 general illegality for minors) of the products being advertised." Req. Jud. Ntc., Ex. 3
22 at 11. The argument rests on at least two faulty premises. First, it builds on the
23 deceptive claim that minors may not lawfully possess firearms in California, while
24 ignoring the fact that the law bars even communications about expressly lawful
25 recreational and training purposes—the very purposes that Plaintiffs'
26 communications serve. But more importantly, it subtly morphs the State's likely
27 substantial interest in protecting minors from physical harm to an illegitimate
28 interest in limiting the exposure of minors to certain speech the Legislature finds too

harmful for them to hear. *See Erznoznik v. Jacksonville*, 422 U.S. 205, 213-14 (1975) (holding that protected speech "cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them").

Essentially, the State speculates that by silencing speech that promotes the use of firearms in ways that might appear attractive to minors, the State might reduce the demand for possession of firearms by minors and thereby serve its interest in curbing gun violence. At best, this is an impermissible restriction on speech that only indirectly serves the State's public safety interest—if it serves it at all. *Sorrell*, 564 U.S. at 554-55 (holding that the state may not "achieve its policy objectives through the indirect means of restraining certain speech by certain speakers").

At worst, it is the sort of "paternalistic approach" the Supreme Court has long condemned. *See Va. Bd. of Pharm. v. Va. Citzs. Consumer Council*, 425 U.S. 748, 770 (1976). By denying Californians access to truthful information concerning lawful firearm-related products, the State seeks 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. "There is, of course, an alternative to this highly paternalistic approach," the Supreme Court once held. "That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.*, *see also Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) (holding that the state cannot justify content-based restrictions based on the "fear that people would make bad decisions if given truthful information").

d. AB 2571 is far more extensive than necessary to achieve the State's purported interests.

The last prong of *Central Hudson* requires the State to show that the speech restriction "is no more extensive than necessary to further" its purported interests. 447 U.S. at 569-70. Even commercial speech restrictions purportedly aimed at

1 protecting minors must be narrowly drawn to achieving an asserted state interest.
2 *See, e.g.*, *Lorillard*, 533 U.S. at 565-66 (striking restrictions on tobacco marketing
3 likely to be observed by children). Indeed, "minors are entitled to a significant
4 measure of First Amendment protection, and only in relatively narrow and well-
5 defined circumstances may the government bar public dissemination of protected
6 materials to them." *Erznoznik*, 422 U.S. at 212-13. So even if the Court assumes AB
7 2571 directly advances some substantial interest, the law must still be struck down
8 because it is far more extensive than necessary to achieve that interest.

9 AB 2571 includes communications that are equally attractive to adults who
10 have a right to obtain information about such products to make informed decisions
11 for both themselves and their children. As the bill's legislative history confirms, "the
12 prohibition on marketing of firearms that are 'attractive to children' applies whether
13 the media is directed to children or a general audience. In other words, it applies to
14 all marketing, regardless of the target audience." Req. Jud. Ntc., Ex. 2 at 6. AB 2571
15 thus impinges on the protected interest of "firearm industry members" "in conveying
16 truthful information about their products to adults," and adults' "corresponding
17 interest in receiving truthful information about [firearm-related] products" to make
18 informed decisions for both themselves and their children. *Lorillard*, 533 U.S. at
19 564. It is also "seriously overinclusive because it abridges the First Amendment
20 rights of young people whose parents … think [the shooting sports] are a harmless
21 [even beneficial] pastime." *See Entm't Merchs. Ass'n*, 564 U.S. at 805.

22 But even if AB 2571 targeted a narrower class of speech, it would remain far
23 too broad for the simple reason that the State "has various other laws at its disposal
24 that would allow it to achieve its stated interests while burdening little or no
25 speech." *Valle Del Sol v. Whiting*, 709 F.3d 808, 826 (9th Cir. 2013). "[I]f the
26 [g]overnment could achieve its interests in a manner that does not restrict speech, or
27 that restricts less speech, the [g]overnment must do so." *Thompson*, 535 U.S. at 371.
28 Among the many options available to the State, the most obvious is to directly

1 regulate the very conduct with which the State purports to be concerned—or to
2 enforce its existing regulations on that conduct. *See, e.g.*, *Valle Del Sol*, 709 F.3d at
3 826-27 (holding that Arizona could further its interest in traffic safety by enforcing
4 existing traffic regulations); *Lorillard*, 533 U.S. at 586 (Thomas, J., concurring)
5 (observing that "Massachusetts already prohibits the sale of tobacco to minors, but it
6 could take steps to enforce that prohibition more vigorously").
7 "If the [State] considers its existing safeguards inadequate to combat [firearm
8 misuse by minors], it may pass additional direct regulations within constitutionally
9 permissible boundaries." *Tracy Rifle*, 339 F. Supp. 3d at 1018-19.[6] Or it may
10 counteract firearm advertising with which it disagrees with "more speech, not
11 enforced silence." *Lorillard*, 533 U.S. at 586 (Thomas, J., concurring). For example,
12 if the State is concerned about the dangers of firearms in kids' hands, it could launch
13 an educational campaign promoting safe firearm handling, storage, and use or
14 reminding retailers of their responsibilities with regard to sales to minors. What it
15 *cannot* do is flatly ban a broad class of truthful advertising concerning lawful
16 products simply because some of its viewers might be inspired to act on it
17 unlawfully. If it could, "then there is no limit to the State's censorial power."
18 *Lorillard*, 533 U.S. at 580 (Thomas, J., concurring).

19 **B. AB 2571 Impermissibly Infringes on Plaintiffs' Right to Associate**

20 The First Amendment protects not only the right of free speech, but also the
21 right to freely associate. U.S. Const., amend. I. The freedom to associate often
22 merges with the right to free expression because "[e]ffective advocacy of both
23 public and private points of view, particularly controversial ones, is undeniably
24 enhanced by group association." *NAACP v. Patterson*, 357 U.S. 449, 462 (1958).
25 "Governmental action which may have the effect of curtailing" this right "is subject
26
27 [6] The legislative history confirms that the State "could advance its interest to
28 keep these attractive [to children] yet deadly products out of the stream of commerce without suppressing otherwise lawful speech" by directly restricting the sale of firearms designed or intended for children. Req. Jud. Ntc., Ex. 3 at 15.

1 to the *closest* scrutiny." *Id.* at 461-62. So for the same reasons AB 2571 offends the
2 First Amendment right to speech, it also offends the right of Plaintiffs to associate.
3 Indeed, AB 2571 casts such a wide net that it prohibits Plaintiffs from
4 advertising, marketing, or arranging for the placement of advertising or marketing
5 concerning their various firearm-related programs and services, where Plaintiffs
6 peacefully and lawfully assemble and associate with each other and members of the
7 public, including youth, to engage in expressive activities related to "gun culture,"
8 the lawful use of firearms, and preservation of the Second Amendment. *See* Factual
9 Background, Part II, *supra*. It also directly prohibits Plaintiffs CRPA and SAF from
10 advertising, marketing, or arranging for the placement of advertising or marketing
11 paid memberships to youth and from distributing branded merchandise to promote
12 membership in their organizations. *Id.* The State's interest in restricting Plaintiffs'
13 right to free association is neither compelling nor significant. *See* Argument, Part
14 I.B. It is not narrowly tailored, and it is not the least restrictive means. *Id.* Thus, AB
15 2517 cannot survive heightened judicial scrutiny.

16 **C. AB 2571 Denies Plaintiffs Equal Protection Under the Law**

17 Singling out Plaintiffs because of the content of their speech, as AB 2571
18 does, also violates Plaintiffs' fundamental rights under the Equal Protection Clause.
19 U.S. Const. amend. XIV. The Supreme Court, long ago, recognized that *both* the
20 Equal Protection Clause *and* the First Amendment forbid the government from
21 granting "the use of a forum to people whose views it finds acceptable, but
22 deny[ing] use to those wishing to express less favored or more controversial views."
23 *Mosley*, 408 U.S. at 96. If unequal treatment occurs in the context of exercising a
24 fundamental right, or the government is motivated by animus toward a disfavored
25 group, courts apply heighted scrutiny. *See Loving v. Virginia*, 388 U.S. 1, 11 (1967).
26 AB 2571, which targets only "firearm industry members," *including*
27 *organizations whose purpose is to preserve and promote the Second Amendment*
28 *right to keep and bear arms*, is undeniably infused with the State's desire to harm

this politically unpopular group. *See* Argument, Part I.A.3, *supra*. It was introduced at the direction of the popular governor of California, who does not believe that those who engage in or support the now-banned speech are "decent human beings" or have "common sense." Ahumada, *supra* n. 3; Compl. ¶¶ 42, 105; Barvir Decl., Ex. 31; Req. Jud. Ntc., Ex. 2 at 3, Ex. 6 at 2, Ex. 8 at 1; *see also* Barvir Decl., Exs. 29-31. And the bill's legislative history is littered with references to the State's concerns with the "problem" of exposing children to the "gun culture." Compl. ¶¶ 99-104; Req. Jud. Ntc., Ex. 2 at 4-5, Ex. 3 at 1, 9-10, Ex. 6 at 7-8, Ex. 8 at 4-5. They're tomorrow's voters, after all, and the State simply cannot stand for them having a positive experience with firearms. *See* Compl. ¶ 102; Barvir Decl., Ex. 28.

Once again, the State cannot justify AB 2571 under either heightened scrutiny for purposes of the First Amendment, and it cannot justify it for purposes of equal protection either. Because the law is not narrowly tailored to serve some compelling government interest, it unconstitutionally denies Plaintiffs equal protection under the law. It is invalid and should be enjoined.

II. PLAINTIFFS ARE SUFFERING IRREPARABLE HARM AND WILL CONTINUE TO SUFFER SUCH HARM IF THE COURT DENIES PRELIMINARY RELIEF

If this Court concludes that Plaintiffs are likely to succeed on any one of their alleged constitutional violations, the remaining preliminary injunction factors follow readily. "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)); 11A Charles Alan Wright et al., Federal Practice and Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). In the First Amendment context, such harm is particularly acute. Indeed, the Supreme Court has long held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373.

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III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST WARRANT RELIEF

When the government is a party, the final two factors of the preliminary injunction test—whether the balance of equities and the public interest—merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The Court's inquiry thus weighs the interests of the Plaintiffs, the government, and the public, balancing the relative harms to each should preliminary relief be granted or denied. Application of this test to the case at bar plainly favors injunctive relief.

The Ninth Circuit has consistently held that when challenging government action that affects the exercise of constitutional rights—especially First Amendment freedoms—"[t]he balance of equities and the public interest … tip *sharply* in favor of enjoining the" law. *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (emphasis added). Truly, "[i]t is always in the public interest to prevent the violation of a party's constitutional rights. *Index Newsps. LLC v. U.S. Marshalls Serv.*, 977 F.3d 817 (9th Cir. 2020). Certainly, 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." *Id.* (citation omitted). "[E]nforcement of an unconstitutional law," on the other hand, "is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013); *see also Am. Civ. Liberties Union v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012) ("[T]he public interest is not harmed by preliminarily enjoining the enforcement of a law that is probably unconstitutional.")

Enjoining the enforcement of AB 2571 will end the irreparable harm Plaintiffs are currently suffering, including the violation of their rights to free speech, free association and assembly, and equal protection under the law, as well as the state's improper interference with their missions. But not only Plaintiffs' rights are at stake, so too are the rights of all people seeking to engage in protected expression barred by the state's extraordinarily broad ban, as well as those who seek to hear the

1 messages the state has banished. These interests far outweigh whatever burden the
2 State might trot out. For the state "cannot suffer harm from an injunction that merely
3 ends an unlawful practice or reads a statute as required to avoid constitutional
4 concerns." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). To be sure,
5 the State may have a general public safety interest in preventing "gun violence" or
6 even a specific interest in stopping minors from illegally obtaining firearms. But
7 enforcement of AB 2571 does not serve those interests in any meaningful (or
8 appropriately tailored) way—particularly because the State can readily further such
9 goals by enforcing existing laws directly prohibiting the unlawful possession and
10 sale of firearms to and by minors.

11 **CONCLUSION**

12 For the foregoing reasons, the Court should grant Plaintiffs' Motion for
13 Preliminary Injunction and enjoin the enforcement of section 22949.80.

14 Dated: July 19, 2022 **MICHEL & ASSOCIATES, P.C.**

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

20 Dated: July 19, 2022 **LAW OFFICES OF DONALD KILMER, APC**

21 *s/ Donald Kilmer*
22 Donald Kilmer
Counsel for Plaintiff Second Amendment
23 Foundation

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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:

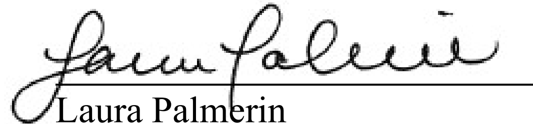
PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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
Attorney for Defendant

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

Executed July 20, 2022.



Laura Palmerin

CERTIFICATE OF SERVICE

Case Name: **Junior Sports Magazine, Inc., et al. v. Rob Bonta** Case No. **24-4050**

I hereby certify that on August 27, 2024, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANT APPELLEE'SSUPPLEMENTAL EXCERPTS OF RECORD VOLUME I OF I

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 August 27, 2024, at Los Angeles, California.

Dora Mora	Dora Mora
Declarant	Signature

SA2024900321