No. 23-15199

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

SAFARI CLUB INTERNATIONAL, ET AL.,
*Plaintiffs-Appellants*,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
*Defendant-Appellee.*

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

# DEFENDANT-APPELLEE'S ANSWERING BRIEF

ROB BONTA
*Attorney General of California*
THOMAS S. PATTERSON
*Senior Assistant Attorney General*
ANTHONY R. HAKL
Supervising Deputy Attorney General
GABRIELLE D. BOUTIN
Deputy Attorney General
1300 I Street, Suite 125
Sacramento, CA 94244-2550
(916) 210-6053
Gabrielle.Boutin@doj.ca.gov
*Attorneys for Defendant-Appellee Rob Bonta, in His Official Capacity as Attorney General of the State of California*

April 7, 2023

# TABLE OF CONTENTS

**Page**

Introduction ..... 1
Jurisdictional Statement ..... 2
Statement of Issues ..... 2
Circuit Rule 28.2.7 Statement ..... 3
Statement of the Case ..... 3
I. Legal Background ..... 3
A. California's Restrictions on the Transfer to and Possession of Firearms by Minors ..... 3
B. California Business and Professions Code Section 22949.80 ..... 4
II. Procedural Background ..... 8
Standard of Review ..... 14
Summary of the Argument ..... 14
Argument ..... 17
I. The District Court Correctly Held That Plaintiffs Are Unlikely to Succeed on Their First Amendment Free Speech Claim ..... 17
A. Section 22949.80 Is a Regulation of Commercial Speech Subject to Review under the Supreme Court's *Central Hudson* Test ..... 17
B. Section 22949.80 Satisfies Each Element of the *Central Hudson* Test ..... 26
1. Section 22949.80 regulates unprotected commercial speech that is misleading and concerns unlawful activity. ..... 26
2. Section 22949.80 serves significant government interests in protecting minors and the general public from firearm-related injuries and deaths. ..... 29
3. Section 22940.80 directly advances the State's significant interests ..... 31
4. Section 22949.80 sweeps no further than necessary to serve the State's significant interests. ..... 36

**TABLE OF CONTENTS**
**(continued)**

**Page**

II. The District Court Correctly Held That Plaintiffs Are Unlikely to Succeed on Their Claim for Unconstitutional Overbreadth .......................... 40

III. The District Court Correctly Held That Plaintiffs Are Unlikely to Succeed on Their First Amendment Association Claim .............................. 42

IV. The District Court Correctly Held That Plaintiffs Are Unlikely to Succeed on Their Claim for Unconstitutional Vagueness............................ 42

A. Section 22949.80 Gives Fair Notice of the Products Covered ........... 44

B. Section 22949.80 Does Not Invite Arbitrary Enforcement ................ 47

V. The District Court Correctly Held That Plaintiffs Are Unlikely to Succeed on Their Equal Protection Claim.................................................. 51

VI. The District Court Correctly Held That Plaintiffs Cannot Establish Irreparable Harm in the Absence of Injunctive Relief ................................ 53

VII. The District Court Correctly Held That the Balance of the Equities and the Public Interest Do Not Favor an Injunction .................................... 53

Conclusion........................................................................................................ 58

# TABLE OF AUTHORITIES

**Page**

**CASES**

*All. for the Wild Rockies v. Cottrell*
632 F.3d 1127 (9th Cir. 2011)........................................................14, 25, 57

*Am. Freedom Def. Initiative v. King Cnty.*
904 F.3d 1126 (9th Cir. 2018)......................................................................22

*Amidon v. Student Ass'n of State Univ. of New York at Albany*
508 F.3d 94 (2d Cir. 2007)..........................................................................49

*Barr v. American Association of Political Consultants, Inc.*
140 S. Ct. 2335 (2020)................................................................................20

*Bates v. State Bar of Arizona*
433 U.S. 350 (1977).............................................................................34, 40

*Bd. of Trustees of State Univ. of New York v. Fox*
492 U.S. 469 (1989)...................................................................24, 36, 38, 40

*Bolger v. Youngs Drug Prods. Corp.*
463 U.S. 60 (1983)..........................................................................17, 24, 34

*Bushco v. Shurtleff*
729 F.3d 1294 (10th Cir. 2013)....................................................................49

*Butler v. Michigan*
352 U.S. 380 (1957)....................................................................................38

*Carey v. Population Services International*
431 U.S. 678 (1977)....................................................................................25

*Carter v. Welles-Bowen Realty, Inc.*
719 F. Supp. 2d 846 (N.D. Ohio 2010) ..........................................................48

*Central Hudson Gas & Electric Corp. v. Public Service Commission*
447 U.S. 557 (1980)...............................................................................*passim*

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

*City of Austin, Texas v. Reagan Nat'l Adver. of Austin, LLC*
142 S. Ct. 1464 (2022) ........................................................................17, 21

*Coates v. City of Cincinnati*
402 U.S. 611 (1971)...............................................................................48

*Contest Promotions, LLC v. City and Cnty. of San Francisco*
874 F.3d 597 (9th Cir. 2017).................................................................19

*Cox v. State of La.*
379 U.S. 536 (1965)...............................................................................48

*Coyote Pub., Inc. v. Miller*
598 F.3d 592 (9th Cir. 2010).................................................................34

*Discount Tobacco City & Lottery, Inc. v. United States*
674 F.3d 509 (6th Cir. 2012)..........................................................33, 34

*Edenfield v. Fane*
507 U.S. 761 (1993)...............................................................................31

*Educational Media Company at Virginia Tech, Incorporated v. Swecker*
602 F.3d 583 (4th Cir. 2010)..................................................33, 34, 37

*Evergreen Ass'n, Inc. v. City of New York*
740 F.3d 233 (2d Cir. 2014)..................................................................49

*Ezell v. City of Chicago*
846 F.3d 888 (7th Cir. 2017).................................................................25

*Fed. Trade Comm'n v. Affordable Media*
179 F.3d 1228 (9th Cir. 1999)...............................................................54

*Fed. Trade Comm'n v. World Wide Factors, Ltd.*
882 F.2d 344 (9th Cir. 1989).................................................................46

*Fla. Bar v. Went For It, Inc.*
515 U.S. 618 (1995).........................................................................31, 34

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

*Fyock v. City of Sunnyvale*
25 F. Supp. 3d 1267 (N.D. Cal. 2014) .......... 55

*Grayned v. City of Rockford*
408 U.S. 104 (1972) .......... 47

*Greater New Orleans Broad. Ass'n, Inc. v. U.S.*
527 U.S. 173 (1999) .......... 36

*Hennessy-Waller v. Snyder*
529 F. Supp. 3d 1031 (D. Ariz. 2021) .......... 56

*Holt v. Hobbs*
574 U.S. 352 (2015) .......... 38

*Human Life of Wash. Inc. v. Brumsickle*
624 F.3d 990 (9th Cir. 2010) .......... 46

*Hunt v. City of Los Angeles*
638 F.3d 703 (9th Cir. 2011) .......... 17, 18, 19

*International Outdoor, Inc. v. City of Troy, Michigan*
974 F.3d 690 (6th Cir. 2020) .......... 20, 21

*Johnson v. Brown*
567 F. Supp. 3d 1230 (D. Or. 2021) .......... 54

*Jones v. Bonta*
34 F.4th 704 (9th Cir. 2022) .......... 25

*Kashem v. Barr*
941 F.3d 358 (9th Cir. 2019) .......... 43

*Lorillard Tobacco Co. v. Reilly*
533 U.S. 525 (2001) .......... 22, 23, 36, 38

*Matal v. Tam*
582 U.S. 218 (2017) .......... 22

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

*Metro Display Advert., Inc. v. City of Victorville*
143 F.3d 1191 (9th Cir. 1998)....................22

*Moss v. U.S. Secret Service*
572 F.3d 962 (9th Cir. 2009)....................22

*Nat'l Rifle Ass'n. v. Bondi*
No. 21-12314, 2023 WL 2484818 (11th Cir. Mar. 9, 2023)....................25

*Nunez by Nunez v. City of San Diego*
114 F.3d 935 (9th Cir. 1997)....................29

*OSU Student All. v. Ray*
699 F.3d 1053 (9th Cir. 2012)....................52

*People v. Agnello*
259 Cal. App. 2d 785 (Ct. App. 1968)....................50

*People v. Andrade*
85 Cal. App. 4th 579 (2000)....................50

*Plyler v. Doe*
457 U.S. 202 (1982)....................51

*Progressive Democrats for Soc. Just. v. Bonta*
No. 21-CV-03875-HSG, 2021 WL 6496784 (N.D. Cal. July 16, 2021)....................56

*Rec. Head Corp. v. Sachen*
682 F.2d 672 (7th Cir. 1982)....................49

*Retail Digital Network, LLC v. Prieto*
861 F.3d 839 (9th Cir. 2017)....................19

*Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*
487 U.S. 781 (1988)....................23, 24

*Rupp v. Becerra*
2018 WL 2138452 (C.D. Cal. May 9, 2018)....................55

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

*Sable Commc'ns of Cal., Inc. v. F.C.C.*
492 U.S. 115 (1989) ........ 29

*Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*
502 U.S. 105 (1991) ........ 21

*Sorrell v. IMS Health, Inc.*
564 U.S. 552 (2011) ........ 35, 36

*Thompson v. Western States Medical Center*
535 U.S. 357 (2002) ........ 35, 36

*Tingley v. Ferguson*
47 F.4th 1055 (9th Cir. 2022) ........ 43, 45

*Tracy Rifle & Pistol LLC v. Harris*
118 F. Supp. 3d 1182 (E.D. Cal. 2015) ........ 55

*Tracy Rifle & Pistol LLC v. Harris*
637 Fed. App'x 401 (9th Cir. 2016) ........ 53

*United States v. Edge Broad. Co.*
509 U.S. 418 (1993) ........ 31

*United States v. Playboy Entm't. Group, Inc.*
529 U.S. 803 (2000) ........ 38

*United States v. Stevens*
559 U.S. 460 (2010) ........ *passim*

*United States v. Williams*
553 U.S. 285, 299-300 (2008) ........ 28

*Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*
425 U.S. 748 (1976) ........ 34

*Valle Del Sol Inc. v. Whiting*
709 F.3d 808 (9th Cir. 2013) ........ 24, 36, 38, 39

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

*Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura*
371 F.3d 1046 (9th Cir. 2004)....................52

*Victory Processing Victory Processing, LLC v. Fox*
937 F.3d 1218 (9th Cir. 2019)....................38

*Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*
455 U.S. 489 (1982)....................40, 43, 44, 45

*Ward v. Rock Against Racism*
491 U.S. 781 (1989)....................43, 46

*Washington Mercantile Ass'n v. Williams*
733 F.2d 687 (9th Cir. 1984)....................40, 41

*Wiese v. Becerra*
263 F. Supp. 3d 986 (E.D. Cal. June 29, 2017)....................55

*Winter v. Natural Resources Defense Council, Inc.*
555 U.S. 7 (2008)....................14

*Yamada v. Snipes*
786 F.3d 1182 (9th Cir. 2015)....................43, 47, 51

*Zaitzeff v. City of Seattle*
No. C17-0184JLR, 2017 WL 2169941 (W.D. Wash. May 16, 2017)....................56

**STATUTES**

United States Code
Title 18 § 48....................41
Title 28 § 1292(a)(1)....................2
Title 28 § 1331....................2

## TABLE OF AUTHORITIES
## (continued)

**Page**

California Business & Professions Code
§ 22940.80 ....................27, 31
§ 22949(a)(1) ....................27
§ 22949(a)(3) ....................27
§ 22949.80 ....................*passim*
§ 22949.80(4)(A) ....................19
§ 22949.80(a)(1) ....................*passim*
§ 22949.80(a)(2) ....................5, 48
§ 22949.80(a)(2)(A) ....................50
§ 22949.80(a)(2)(A)-(F) ....................5, 48
§ 22949.80(a)(3) ....................5, 6, 37, 42
§ 22949.80(c)(3) ....................23, 28, 44, 45
§ 22949.80(c)(4) ....................52
§ 22949.80(c)(5) ....................37, 42, 44, 46
§ 22949.80(c)(6) ....................*passim*
§ 22949.80(e)(1) ....................5
§ 22949.80(e)(3) ....................5
§ 25664 ....................31
§ 27505 ....................4
§ 29615 ....................4
§ 29949.80 ....................35

California Penal Code
§ 16520 ....................4
§ 27505 ....................3, 26, 39
§ 27510 ....................3, 26, 39
§ 29610 ....................4, 26
§ 29610 ....................39
§ 29615 ....................26, 39

Religious Land Use and Institutionalized Persons Act ....................38

### CONSTITUTIONAL PROVISIONS

First Amendment ....................*passim*

Fourteenth Amendment ....................3, 16, 38, 43, 51

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**COURT RULES**

Federal Rules Appellate Procedure
4(a)(1)(B)(i) .......... 2
28.2.7 .......... 3

**OTHER AUTHORITIES**

California Assembly Bill 160 (2021-2022 Reg. Sess.) .......... 6

California Assembly Bill 2571, (2021-2022 Reg. Sess.) .......... 7, 8

Black's Law Dictionary (11th ed. 2019) .......... 18

## INTRODUCTION

California Business and Professions Code section 22949.80 generally prohibits the advertising or marketing of a firearm-related product "in a manner that is designed, intended, or reasonably appears to be attractive to minors." Cal. Bus. & Prof. Code § 22949.80. The California Legislature adopted this provision to address serious concerns about gun-related injuries and fatalities among children. The Legislature considered evidence that gun violence is now the third leading cause of death for children and teens in California and 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. The Legislature also recognized that children are especially susceptible to advertising and are less able to control impulsive and dangerous behavior.

Section 22949.80 addresses these concerns by restricting advertising and marketing communications that offer or promote firearms and closely related products such as firearm components and ammunition when those ads are directed at minors. The law does not apply to political or educational speech. And it specifically exempts speech promoting memberships in advocacy or other organizations, as well as speech promoting firearm safety, sports shooting, or hunting programs and events. The district court properly held that Plaintiffs are not entitled to a preliminary injunction blocking enforcement of the law while

litigation in this case continues. The court correctly held that section 22949.80 applies only to commercial speech, satisfies the applicable *Central Hudson* scrutiny, and is sufficiently precise to provide fair notice and avoid arbitrary enforcement. The district court also correctly concluded that Plaintiffs are not entitled to a preliminary injunction because they failed to show that they would suffer irreparable harm absent relief or that the equities or public interest favor an injunction.

The district court's denial of a preliminary injunction should be affirmed.

## JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. The district court entered an order denying Plaintiffs' motion for a preliminary injunction. 1-ER-2-42. This Court has jurisdiction of the appeal from that order under 28 U.S.C. § 1292(a)(1). The order was entered on January 12, 2023. 1-ER-2. Plaintiffs timely filed their notice of appeal on February 13, 2023. 3-ER-602-603; *see* Fed. R. App. P. 4(a)(1)(B)(i).

## STATEMENT OF ISSUES

1. Whether Plaintiffs are likely to succeed on their claim that section 22949.80 facially violates the First Amendment right to free speech.

2. Whether Plaintiffs are likely to succeed on their claim that section 22949.80 is unconstitutionally overbroad.

3. Whether Plaintiffs are likely to succeed on their claim that section 22949.80 facially violates the First Amendment right to free association.

4. Whether Plaintiffs are likely to succeed on their claim that section 22949.80 facially violates the Fourteenth Amendment right to due process.

5. Whether Plaintiffs are likely to succeed on their claim that section 22949.80 facially violates the Fourteenth Amendment right to equal protection

6. Whether failure to enjoin enforcement of section 22949.80 during the pendency of this litigation would cause Plaintiffs irreparable harm.

7. Whether enjoining enforcement of section 22949.80 during the pendency of this litigation is equitable and in the public interest.

## CIRCUIT RULE 28.2.7 STATEMENT

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

## STATEMENT OF THE CASE

### I. LEGAL BACKGROUND

#### A. California's Restrictions on the Transfer to and Possession of Firearms by Minors

California law generally prohibits the loan or transfer of any firearm to a person under 21 years of age, and it is illegal in California to sell a firearm to a minor under any circumstances. *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 id.* § 29610.[1] There are very limited exceptions to these prohibitions, all of which require the possession to be for a specific recreational, agricultural, or artistic purpose and all of which 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 id.* §§ 27505 & 29615.

### B. California Business and Professions Code Section 22949.80

Section 22949.80 generally prohibits members of the firearm industry, as defined, from advertising, marketing, or arranging 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). For purposes of the statute, "marketing or advertising" means, "in exchange for monetary compensation, to make a communication to one or more individuals, or to arrange for the dissemination to the public of a communication, about a product, the primary

[1] For purposes of Penal 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." Cal. Pen. Code § 16520.

purpose of which is to encourage recipients of the communication to engage in a commercial transaction." *Id.* § 22949.80(c)(6).

In determining whether a marketing or advertising communication is "attractive to minors," courts are directed to look to the "totality of the circumstances," and the statute provides a non-exclusive list of characteristics to guide courts in making that determination. *Id.* § 22949.80(a)(2).[2] Violators of the prohibition are subject to a maximum $25,000 civil penalty, which may be recovered in a civil action brought by specified law enforcement authorities. *Id.* § 22949.80(e)(1). A person harmed by a violation may also commence a civil action to recover damages. *Id.* § 22949.80(e)(3).

The law does not apply to communications offering or promoting firearm safety and hunting safety programs, firearm instructional courses, sport shooting events and competitions, and other similar programs, courses, and events. *Id.* § 22949.80(a)(3). It also does not apply to communications offering or promoting

---

[2] In particular, courts are to consider whether the ad: (1) includes caricatures that "reasonably appear to be minors" or includes cartoon characters; (2) includes accompanying children's merchandise; (3) offers child-sized firearm products; (4) is part of a child-oriented marketing campaign; (5) depicts minors; and (6) appears in a publication whose audience is predominantly composed of minors. *Id.* § 22949.80(a)(2)(A)–(F).

organizational memberships and lawful hunting activities, such as fundraising events, youth hunting programs, and outdoor camps. *Id.*

Section 22949.80 was originally enacted in Assembly Bill (AB) 2571. *See* Assem. Bill No. 2571 (Cal. 2021–2022 Reg. Sess.).[3] The Legislature adopted AB 2571 after considering evidence about gun-related injuries and fatalities among children. For example, the Legislature noted that "[i]n 2021 there were approximately 259 unintentional shootings by children, resulting in 104 deaths and 168 injuries." 2-ER-170. According to the Centers for Disease Control, in 2014, guns accounted for 40% of all suicides, and 59% of all homicides, for children ages 1 to 17. 2-ER-245.

The Legislature also took note of the fact that since 2014, gun violence among children has only worsened. AB 2571's author observed that gun violence is now the third leading cause of death for children and teens in California. 2-ER-187. 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. 2-ER-179; 2-ER-262. Further, according to an analysis of FBI data, nearly half of all active shooting incidents at educational

[3] Section 22949.80 was subsequently amended in California Assembly Bill 160 (2021-2022 Reg. Sess.).

facilities in the United States from 2000 to 2019 were perpetrated by someone under the age of 18. 3-ER-179.

AB 2571 was supported by academic research indicating that "[f]or decades, researchers have recognized children as a vulnerable consumer group because of their budding developmental abilities." 2-ER-266 (Matthew A. Lapierre, Ph.D. et al., *The Effect of Advertising on Children and Adolescents*, 140 PEDIATRICS S152, S153 (2017)). 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. 2-ER-266. 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." 2-ER-267.

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." 2-ER-310; AB 2571, § 1(a). "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." 2-ER-309; AB 2571, § 1(a).

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." 2-ER-309-310; AB 2571, § 1(a). 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." 2-ER-310; AB 2571, § 1(a).

## II. PROCEDURAL BACKGROUND

Plaintiffs are three non-profit organizations that promote, among other things, hunting and recreational shooting. 3-ER-559-563. On August 5, 2022, they filed their initial complaint against the Attorney General. On October 28, 2022, they filed a First Amended Complaint alleging claims for violation of the First Amendment rights to political and ideological speech (3-ER-582), commercial speech (3-ER-586), and assembly and association (3-ER-590), and for overbreadth (3-ER-592). The First Amended Complaint also alleged a due process claim under the void-for-vagueness doctrine (3-ER-595) and an equal protection claim (3-ER-

598). Plaintiffs then filed a motion for preliminary injunction seeking to enjoin section 22949.80 in its entirety. *See* 3-ER-337-370. The motion was briefed by the parties and submitted following hearing. *See* 3-ER-337; 2-ER-97; 2-ER-85; 2-ER-44.

The district court denied Plaintiffs' motion. *See* 1-ER-2-42. It began its analysis with Plaintiffs' First Amendment free speech claims. First, the court examined the text of section 22949.80 and determined that the law applies only to commercial speech. 1-ER-15. The court recognized that "the speech which falls within § 22949.80's purview is communications offering or promoting certain products whose speakers have paid money to disseminate, and the primary purpose of those communications is to encourage recipients 'to engage in a commercial transaction.'" 1-ER-13-14 (quoting Cal. Bus. & Prof. Code § 22949.80(c)(6)). The court also rejected Plaintiffs' contention that section 22949.80 "seeks to prohibit advertisements that are 'inextricably intertwined with core political and economic messages' and therefore should be subject to heightened scrutiny." 1-ER-14-15 (quoting *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 818 (9th Cir. 2013)). The court reasoned that Plaintiffs had failed to show that any political speech was intertwined with commercial speech subject to section 22949.80 or that any such intertwining would be "inextricable." 1-ER-15.

The court then applied the analysis governing challenges to regulations of commercial speech set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). First, the court found that section 22949.80 "does prohibit commercial speech regarding unlawful activities—i.e., to the extent it restricts advertising encouraging minors to purchase a firearm or ammunition or otherwise obtain or possess a firearm or ammunition without parental consent, that would constitute commercial speech promoting unlawful activity under California law." 1-ER-18. The court further concluded that section 22949.80 also regulates speech that is not inherently misleading and that does not concern unlawful activity because "California law permits minors to possess firearms in certain circumstances when accompanied by an adult or allowed by the minor's parent through their presence or written consent." 1-ER-18 (citing Cal. Pen. Code § 29615).

Turning to the additional elements of the *Central Hudson* analysis, the district court found that "there is ample documentation of the serious and ever-increasing problem of gun violence involving minors, and the state has a substantial interest in addressing that problem." 1-ER-21. In determining whether section 22949.80 directly and materially advances that interest, the district court looked to relevant Supreme Court case law and case law in this and other circuits analyzing restrictions on tobacco and alcohol advertising. 1-ER-21-26. The district court

determined that the evidence showed that "advertising increases demand among minors for commercial products—including those that minors cannot legally purchase, such as alcohol and tobacco—and that this demand is curtailed through advertising restrictions on those products." 1-ER-22-23. The court therefore concluded that section 22949.80 "directly and materially advance[s] the state's goals of ensuring that minors do not unlawfully possess dangerous weapons and in protecting its citizens, especially minors, from gun violence." 1-ER-24.

In determining whether AB 2571 is no more extensive than necessary to serve California's interests, the district court observed that the applicable test requires a reasonable fit between the legislative ends and the means chosen, and means that are narrowly tailored to achieve the Legislature's objective. 1-ER-26. It concluded that section 22949.80 achieves a reasonable fit by focusing its totality of the circumstances test on factors that indicate that an advertisement is attractive to children, in particular, and by "explicitly omitting from its scope speech involving the lawful use of firearms by minors." 1-ER-27. These features of California law, the district court explained, demonstrate that the statute is "carefully crafted" and is unlike outright advertising bans that courts have invalidated. 1-ER-27-28.

The court next addressed Plaintiffs' First Amendment claim based on the right to associate and assemble. 1-ER-29. The court concluded that the claim "lacks any cognizable basis." 1-ER-29. It explained that, although Plaintiffs

contended that the statute prohibits them from advertising firearm-related youth programs, the statute explicitly excludes such communications from its scope. 1-ER-29.

Turning to Plaintiffs' overbreadth claim, the court concluded that Plaintiffs failed to show a likelihood of success because section 22949.80 applies only to commercial speech, and "the overbreadth doctrine does not apply to commercial speech." 1-ER-30 (quoting *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 497 (1982)).

Next, the court addressed Plaintiffs' claim for unconstitutional vagueness. 1-ER-31. First, the court rejected Plaintiffs' argument that section 22949.80's definition of "firearm accessories" is unconstitutionally vague, because, according to Plaintiffs, it sweeps in "'a panoply of products that could have nothing to do with firearms, such as backpacks, vests, earplugs and safety goggles.'" 1-ER-32. The court reasoned that the definition of a firearm accessory is limited to an "attachment or device"—"which according to their common dictionary definition would not encompass a backpack, vest, earplugs, or safety goggles[.]" 1-ER-32. For that reason, as well as the statute's context, Plaintiffs' broad interpretation of the scope of the statute was "clearly in error." 1-ER-32 ("definitions are clear and specific enough to provide fair notice"). Second, the court ruled that the statute's multi-factor totality of the circumstances test does not invite arbitrary enforcement

and abuse. 1-ER-40. The court reasoned that the phrase "appeal to" is not vague because, in context of the larger phrase "designed to . . . appeal to," the words mean that the court should "decipher[] the intent behind the product or advertisement at issue." 1-ER-34. It further reasoned that the phrase "reasonably appears" is not vague because, in context, it provides "a qualitative standard for the court to apply on a case-by-case basis to a real-world advertisement," and "laws regularly require courts to gauge whether certain conduct satisfies qualitative standards on a particular occasion." 1-ER-35.

With respect to Plaintiffs' final claim based on equal protection, the court again ruled that Plaintiffs had failed to show a likelihood of success, reasoning that Plaintiffs did not contend that they are in a protected class or that section 22949.80 implicates any fundamental right other than those protected by the First Amendment. 1-ER-40.

Lastly, the district court found that Plaintiffs had not demonstrated that they would suffer irreparable harm absent an injunction, that the balance of equities tipped in their favor, or that the public interest favored granting a preliminary injunction. 1-ER-41-42. The court reasoned that Plaintiffs had failed to show that section 22949.80 violated any constitutional rights and, on the other hand, "the state has a substantial interest in preventing gun violence involving minors and in enforcing its validly enacted statutes." 1-ER-40.

Accordingly, the district court denied Plaintiffs' motion. 1-ER-42.

## STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). A plaintiff seeking a preliminary injunction must show "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." *Id.* at 20. In a "typical" facial challenge, a plaintiff must show that "no set of circumstances exists under which [the challenged statute] would be valid, or that the statute lacks any 'plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 472 (2010) (internal citations omitted). An order denying a preliminary injunction is reviewed for abuse of discretion. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). A district court's conclusions of law are reviewed de novo. *See id.*

## SUMMARY OF THE ARGUMENT

The district court properly declined to enjoin section 22949.80 while this litigation continues. As the district court concluded, section 22949.80 regulates only commercial speech. The statute applies to marketing and advertising communications directed to minors that offer or promote the sale of firearms and

closely related products such as firearm components and ammunition; it does not extend to political, educational, or other noncommercial speech.

Under the established standard for evaluating restrictions on commercial speech, section 22949.80 is constitutional. To begin with, the statute regulates unprotected speech that is misleading and relates to unlawful activity: the sale to and possession of firearms by minors, which are acts prohibited in most circumstances. To the extent the law applies to non-misleading, protected commercial speech, it satisfies intermediate scrutiny. The law directly advances the State's vital interest in protecting children from injuries and fatalities caused by guns; it reflects courts' longstanding recognition, supported by research and the legislative record, that restrictions on advertising reduce demand for those products. And the law is properly tailored to the State's interests: it applies only to communications that encourage transactions involving firearm-related products and that are designed, intended, or reasonably appear to be attractive to minors. Section 22949.80 does not extend to any noncommercial protected speech or activity.

Section 22949.80 is not unconstitutionally overbroad. The law regulates only commercial speech and case law has clearly established that the First Amendment overbreadth doctrine does not apply to commercial speech. The statute also does not violate the First Amendment rights to association and assembly because, by its

plain terms, it applies only to the advertising and marketing of products and not to ads for programs or events.

Section 22949.80's provisions are also sufficiently precise and, as the district court concluded, do not suffer from unconstitutional vagueness. The statute provides fair notice of the types of firearm-related products at issue. And its multi-factor test calls for a case-specific analysis and does not invite arbitrary or discriminatory enforcement.

The statute also does not violate equal protection under the Fourteenth Amendment. Because the statute does not single out any protected class, Plaintiffs' equal protection claim is subsumed by their First Amendment claim.

Moreover—and no less crucially for purposes of their injunction request—Plaintiffs have failed to show that enjoining section 22949.80 during the pendency of this litigation would be equitable or in the public interest. Section 22949.80 directly addresses the serious problem of youth gun violence, and thus the significance of the harm that could result from the improper issuance of an injunction would be substantial. And the relief sought by Plaintiffs here is the same relief that Plaintiffs would obtain after summary judgment or a trial, weighing heavily against issuance of an injunction during the pendency of this litigation.

# ARGUMENT

## I. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THEIR FIRST AMENDMENT FREE SPEECH CLAIM

### A. Section 22949.80 Is a Regulation of Commercial Speech Subject to Review under the Supreme Court's *Central Hudson* Test

The Supreme Court has long distinguished between "commercial speech"—that is, "speech proposing a commercial transaction"—and other types of speech that enjoy greater First Amendment protection. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562 (1980); *see also City of Austin, Texas v. Reagan Nat'l Adver. of Austin, LLC*, 142 S. Ct. 1464, 1480 (2022) (Alito, J., concurring) (recognizing that "under our precedents, regulations of commercial speech are analyzed differently" from other forms of speech (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 571-72 (2011)). 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, and not all of them "must necessarily be present in order for speech to be commercial." *Bolger*, 463 U.S. at 67, n.14.

As the district court correctly held, section 22949.80 is properly understood as a regulation of commercial speech, not core political speech, as Plaintiffs contend.

The statute prohibits a "firearm industry member" from "advertising," "marketing," or "arranging 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)), so long as the "primary purpose" of the communication is to "encourage recipients to engage in a commercial transaction" (*id.* § 22949.80(c)(6)).[4] The statute therefore regulates speech with an obvious economic or commercial motivation. *See Hunt*, 638 F.3d at 715. By its own terms, the statute regulates "advertising or marketing," and it also defines "marketing or advertising" with reference to commercial transactions, i.e., those involving a proposed "exchange for monetary compensation." Cal. Bus. & Prof. Code § 22949.80(c)(6). Thus, section 22949.80 regulates speech constituting an "advertisement" (*see Hunt*, 638 F.3d at 715) or "marketing" (*see* Black's Law Dictionary (11th ed. 2019) (defining "marketing" as including "[t]he act or process of promoting and selling, leasing, or licensing products or services").

Section 22949.80 also regulates advertising and marketing in connection with a

---

[4] As the district court observed, Black's Law Dictionary defines "product" as "[s]omething that is *distributed commercially* for use or consumption and that is usu. (1) tangible personal property, (2) the result of fabrication or processing, and (3) an item that has passed through a chain of commercial distribution before ultimate use or consumption." *See* 1-ER-13 (quoting Black's Law Dictionary (11th ed. 2019) (emphasis added)).

"particular product" (*see Hunt*, 638 F.3d at 715), that is, "firearm-related products" (Cal. Bus. & Prof. Code § 22949.80(c)(6)). The text of the statute thus makes clear that the law applies to speech that proposes a commercial transaction, and is therefore reviewed under the *Central Hudson* test.

Plaintiffs argue that section 22949.80 is subject to strict scrutiny as a purportedly content- and speaker-based regulation.[5] *See* AOB 49-56. But as Plaintiffs appear to recognize (AOB 52, 54-55), this Court sitting en banc has already held that *Central Hudson* intermediate scrutiny, not strict scrutiny, applies to regulations of commercial speech, regardless of whether such regulations are content- or speaker-based. *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 846 (9th Cir. 2017) (en banc); *accord Contest Promotions, LLC v. City and Cnty. of San Francisco*, 874 F.3d 597, 601 (9th Cir. 2017); *see also Cent. Hudson*, 447 U.S. at 563 n.6 (distinguishing between regulation of commercial speech and content-based restrictions of noncommercial speech).

[5] Although section 22949.80 applies to "firearm-industry member[s]," it is not a speaker-based regulation. The statute's definition of a "firearm-industry member" includes "[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." Cal. Bus. & Prof. Code § 22949.80(4)(A). Consequently, no individual, company, or organization is exempt from the prohibition on marketing firearm-related products to minors because, by doing so, they become a "firearm industry member" subject to the law.

Plaintiffs' disagreement with this en banc holding has no merit. *See* AOB 55-56. They point to the Supreme Court's decision in *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), and the Sixth Circuit's ruling in *International Outdoor, Inc. v. City of Troy, Michigan* 974 F.3d 690 (6th Cir. 2020); but neither of those cases supports Plaintiffs' argument that strict scrutiny applies to commercial speech if that speech is content- and speaker-based. Those cases establish only that strict scrutiny applies to content- and speaker-based regulations when those regulations apply to noncommercial speech (or to both noncommercial and commercial speech). The challenge in *Barr* involved noncommercial political speech—telephone outreach by political consultants and pollsters—and the Court therefore applied strict scrutiny without even considering whether *Central Hudson* scrutiny should apply. *Barr*, 140 S. Ct. at 2345, 2347. The law challenged in *International Outdoor* regulated both commercial and noncommercial speech. 974 F.3d at 695-96, 707-08. The Sixth Circuit rejected the district court's application of *Central Hudson* based on this dual application. *Id.* at 707-08. In its analysis, the court also distinguished the case before it from

other decisions that had applied *Central Hudson* scrutiny on the basis that the other cases involved regulations of commercial speech only. *Id.* at 704-06.[6]

Further, the Supreme Court's more recent discussion in *City of Austin v. Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464 (2022), recognized that *Central Hudson* scrutiny continues to apply where, as here, a law regulates only commercial speech. *Id.* at 1471 n.3 (rejecting application of *Central Hudson* scrutiny on the basis that challenged law regulated both commercial *and noncommercial* speech); *see also id.* at 1482 n.1 (Thomas, J., dissenting) ("This Court's precedents have also declined to apply strict scrutiny to several other types of content-based restrictions, including laws targeting "commercial speech" (citing *Cent. Hudson*, 47 U.S. at 561-66)).

Nor is section 22949.80 subject to strict scrutiny as a purportedly viewpoint-based regulation (*see* AOB 46-49) because the statute does not regulate with reference to any viewpoint. The statute applies to communications about products made for the primary purpose of encouraging recipients to engage in a commercial

[6] Plaintiffs also cite *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). *See* AOB 53. That case also involved noncommercial speech—an accused or convicted criminal's works describing his crime. *Simon & Schuster*, 502 U.S. at 108. The challenged law restricted speakers' income derived from such works. *Id.* Thus, the economic component of the challenged law was not the speech itself, but rather, the nature of the government's burden on the speech. *See id.* at 115.

transaction. Cal. Bus. & Prof. Code § 22949.80(a)(1), (c)(6). These products are illegal under California for children to purchase and, absent narrow circumstances, use. Section 22949.80 does not address any political point of view or ideological message. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-65 (2001) (applying *Central Hudson* test to regulation of commercial speech related to tobacco products).

This case is thus not like those cited by Plaintiffs (*see* AOB 46-47), where the government singled out speech that was "disparag[ing]" or targeted particular points of view about elected officials or unions. *See Matal v. Tam*, 582 U.S. 218, 223, 243-244 (2017) (plurality op.) (provision denied trademark registration to "any mark that is offensive to a substantial percentage of the members of any group," such as "marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue"); *Am. Freedom Def. Initiative v. King Cnty.*, 904 F.3d 1126, 1130-33 (9th Cir. 2018) (bar on transit advertising that "demeans or disparages"); *Moss v. U.S. Secret Service*, 572 F.3d 962, 965, 970 (9th Cir. 2009) (demonstration expressing opposition to former President Bush and his policies); *Metro Display Advert., Inc. v. City of Victorville*, 143 F.3d 1191, 1194 (9th Cir. 1998) ("city pressure [on advertising company] was based entirely on the pro-union viewpoint of the ads").

Plaintiffs also appear to suggest that the law discriminates based on viewpoint because it applies to communications that appear attractive to minors, and that this is a "disfavored subset" of firearms advertising. *See* AOB 47. But, as explained above, the speech covered by section 22949.80 is commercial, not political or ideological, and the fact that the subject ads are directed at children does not mean the law is subject to a more rigorous standard than *Central Hudson* scrutiny. *See Lorillard*, 533 U.S. at 554-65.

Plaintiffs are also incorrect in claiming that California's law is aimed at cultural interest in guns. *See* AOB 16, 48-49. The statute expressly states that it does not apply to communications related to youth shooting or instructional programs, events, and activities. Cal. Bus. & Prof. Code § 22949.80(c)(3). The statute also does not apply to communications promoting membership in any organization. *Id.* As explained above, the Legislature's express purpose in enacting the provision was to address the serious problem of gun injuries and fatalities among and caused by minors. *Supra* at 6-7.

Finally, as the district court correctly concluded, section 22949.80 is not subject to strict scrutiny as purportedly "inextricably intertwined with constitutionally-protected activity." 1-ER-14-15; *see* AOB 56. To be sure, speech may not retain its commercial character if it is "inextricably intertwined" with fully protected speech. *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S.

781, 796 (1988). For this determination, a court looks at the "nature of the speech taken as a whole." *Id.* Here, as discussed above, section 22949.80 applies only to commercial speech. Plaintiffs have not identified any political or ideological speech with which commercial firearm advertising is purportedly inextricably intertwined. Moreover, even if any given commercial advertisement for a gun "'link[ed] a product to a current public debate,'" it "is not thereby entitled to the constitutional protection afforded noncommercial speech." *Bolger*, 463 U.S. at 68 (quoting *Cent. Hudson*, 447 U.S. at 563, n.5); *accord Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 475 (1989). Any addition of noncommercial information to an advertisement does not "convert" the ad to noncommercial speech subject to strict scrutiny. *See Fox*, 492 U.S. at 475.

Plaintiffs argue that, under the "inextricably intertwined" principle, strict scrutiny broadly applies not only to situations where commercial speech is inextricably intertwined with noncommercial speech, but also to any restriction on commercial speech that "directly concerns constitutionally-protected activity." AOB 58. But none of Plaintiffs' cited cases support this proposed rule or apply strict scrutiny on the grounds that the commercial speech and protected activity are "inextricably intertwined." *See Bolger*, 463 U.S. 60, 68-75 (applying *Central Hudson* scrutiny to law prohibiting the mailing of unsolicited advertisements for contraceptives); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 818-19 (9th Cir.

2013) (law banning solicitation for work as a day laborer was not inextricably intertwined with political speech where the "primary purpose of the communication" was commercial).

Plaintiffs' reliance on *Carey v. Population Services International*, 431 U.S. 678 (1977), is also misplaced. *See* AOB 57-58, 60. That case preceded *Central Hudson* and invalidated a flat ban on *all* advertisements concerning contraceptives. *Carey*, 431 U.S. at 700-02. Here, in contrast, section 22949.80 addresses only certain product advertisements targeted at children and ample justification for this limited restriction is evident in the legislative history. These authorities therefore do not support Plaintiffs' argument that the principle of "inextricable intertwine[ment]" applies here merely because the commercial speech regulated by section 22949.80 relates to the purchase of firearms.[7]

[7] Importantly, Plaintiffs do not challenge in this action California's laws restricting minors' ability to obtain or use firearms. Nor have they established that minors have a constitutional right to purchase firearms. *See* AOB 59. *Jones v. Bonta*, 34 F.4th 704 (9th Cir. 2022), has been vacated and remanded (*see* 47 F.4th 1124, 1125 (9th Cir. 2022) (Order)) and only considered the rights of "young *adults*" ages 18 to 20 (34 F.4th 704 at 723 (emphasis added)). *Ezell* discussed only minors' ability to use firearms at a firing range and explicitly distinguished cases relating to prohibitions of minors purchasing firearms. *Ezell v. City of Chicago*, 846 F.3d 888, 896-97 (7th Cir. 2017). *See also Nat'l Rifle Ass'n. v. Bondi*, No. 21-12314, 2023 WL 2484818, at *2 (11th Cir. Mar. 9, 2023) (upholding state ban on purchase of firearms by persons under age 21).

### B. Section 22949.80 Satisfies Each Element of the *Central Hudson* Test

Because section 22949.80 regulates only commercial speech, it is subject to the test that the U.S. Supreme Court set forth in *Central Hudson*. Under that test, 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 Cent. Hudson*, 447 U.S. at 566.

#### 1. Section 22949.80 regulates unprotected commercial speech that is misleading and concerns unlawful activity.

As established above, section 22949.80 regulates commercial speech. And for commercial speech to enjoy First Amendment protection, "it at least must concern lawful activity and not be misleading." *See Cent. Hudson*, 447 U.S. at 566.

It is illegal in California to sell a firearm to a minor under any circumstances. *See* Cal. Pen. Code §§ 27505, 27510, & 29615. To market or advertise the sale of a firearm to minors thus concerns illegal activity. Moreover, California law generally prohibits a minor from possessing a handgun, a semiautomatic centerfire rifle, and, as of July 1, 2023, any firearm. *See id.* § 29610. As Plaintiffs point out, there are exceptions to these prohibitions (*see* AOB 61), but they are quite narrow

and carefully circumscribed. As the Legislature recognized, "lawful possession of a firearm by a minor is clearly the exception, rather than the rule under California law" (2-ER-145), and in each and every circumstance in which a minor is permitted to possess a firearm, adult supervision or permission in some form is required for obvious safety reasons. It is thus misleading to advertise the sale of a product to an audience that is legally barred from even possessing the product being advertised, subject to limited exceptions.

Plaintiffs characterize section 22949.80 broadly to attempt to demonstrate that it relates to lawful activity. AOB 62. They argue that section 22949.80 prohibits "a range of speech" that includes "communications promoting their events and programs" and communications encouraging the lawful use of firearms. AOB 62. This interpretation is incorrect. Section 22940.80 applies only to commercial marketing or advertising that encourages the purchase of a particular product. *See* Cal. Bus. & Prof. Code § 22949.80(a)(1), (c)(6) (defining "marketing or advertising"). The statute does not apply to communications simply encouraging the use of firearms and expressly does not apply to communications promoting firearm safety and instructional programs, firearm competitions, and similar events. *Id.* § 22949(a)(1), (3). Moreover, as the district court confirmed, and as explained further below, section 22940.80 applies only to advertisements for

firearms and "attachments and devices" for firearms, not ancillary products. *Id.* § 22949.80(c)(3) (defining "firearm accessory"); *id.* § (a)(1); 1-ER-32-33.

Finally, section 22949.80 applies only to unprotected commercial speech regardless of whether the statute includes an explicit requirement of scienter, i.e., the advertiser's specific intent to illegally sell a firearm to a minor. *See* AOB 63-64. Plaintiffs' cited cases do not support their assertion of a scienter requirement. In the quoted portion of *United States v. Williams*, the Court merely stated that a law banning the distribution of child pornography did not implicate the First Amendment because the law did not target abstract advocacy, but rather was limited to speech "promot[ing]" the transfer of specific material. 553 U.S. 285, 299-300 (2008). Earlier in the decision the Court explained that, read in context, the term "promotes" in the statute meant "the act of recommending purported child pornography to another person for his acquisition." *Id.* at 294-95. Section 22949.80 similarly is not directed to abstract advocacy related to firearms, but is limited to "marketing or advertising communications" (Cal. Bus. & Prof. Code § 22949.80(a)(1)) "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)).

Nor does *United States v. Stevens*, 559 U.S. 460 (2010) provide that a law must include a scienter requirement for it to target unprotected commercial speech.

In that case, the Court concluded that the challenged statute was overbroad because it covered speech related to conduct that may be legal (the killing of an animal), as well as illegal conduct (animal cruelty). *Id.* at 474-75. It did not state that the challenged statute targeted protected speech because it lacked a scienter requirement.

**2. Section 22949.80 serves significant government interests in protecting minors and the general public from firearm-related injuries and deaths.**

Even if section 22949.80 applies to non-misleading, lawful speech, the statute satisfies the remaining elements of the *Central Hudson* test. The district court correctly found that "there is ample documentation of the serious and ever-increasing problem of gun violence involving minors, and the state has a substantial interest in addressing that problem." 1-ER-21. Indeed, the Supreme Court has recognized that a state has "a compelling interest in protecting the physical and psychological well-being of minors." *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). Furthermore, "the government may have a compelling interest in protecting minors from certain things that it does not for adults." *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 945 (9th Cir. 1997). Consistent with these basic principles, section 22949.80 declares that the State has "a compelling interest in ensuring minors do not possess these dangerous weapons [*i.e.*, firearms] and in protecting its citizens, especially minors, from gun violence

and from intimidation by persons brandishing these weapons." 2-ER-309. These are undeniably compelling interests.

In passing section 22949.80, the Legislature found that "the proliferation of firearms to and among minors poses a threat to the health, safety, and security of all residents of, and visitors to, this state." 2-ER-309. This finding is borne out by the facts: "[i]n 2021 there were approximately 259 unintentional shootings by children, resulting in 104 deaths and 168 injuries." 2-ER-170. Furthermore, as of the approximate date on which Defendant's opposition to Plaintiffs' preliminary injunction motion was submitted, there had been at least 238 unintentional shootings by children in 2022, resulting in 106 deaths and 145 injuries nationally. 2-ER-271. In 2020, for the first time, firearms-related injuries surpassed motor vehicle crashes as the leading cause of death nationwide for children and adolescents. 2-ER-262; 2-ER-179. Indeed, as the district court recognized, not only are children victims of gun violence, but they are also at times its perpetrators, as the median age of school shooters is 16. 1-ER-20; 2-ER-168.

Plaintiffs question these interests, asserting that a State has no interest in restricting demand for firearms. AOB 64-65. That overlooks that California law—in provisions that Plaintiffs do not challenge—forbids all sales of firearms to children and generally prohibit minors from possessing them except in carefully circumscribed circumstances.

### 3. Section 22940.80 directly advances the State's significant interests.

Next, under 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). "[E]mpirical 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 v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (quotation marks omitted).

The Supreme Court has long held that the government may restrict advertising in order to dampen demand, and thereby advance a substantial government interest. *See, e.g.*, *United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993).[8] As described above, the Legislature found—and the factual record it relied on demonstrates—that the illegal possession of firearms by minors constitutes a serious health and safety risk to children and other residents of this state. Further, as the Legislature noted, studies have linked the influence of advertising to the use of certain products by youth. 2-ER-146 ("Research on the

---

[8] California has used a similar policy approach in regulating alcohol advertising directed at minors. *See* Cal. Bus. & Prof. Code § 25664 (prohibiting "[t]he use, in any advertisement of alcoholic beverages, of any subject matter, language, or slogan addressed to and intended to encourage minors to drink the alcoholic beverages").

effects of advertising has shown that they may be responsible for up to 30% of underage tobacco and alcohol use.") (citing John P. Pierce, Ph.D. et al., *Tobacco Industry Promotion of Cigarettes and Adolescent Smoking*, 279 J. OF AM. MED. ASS'N 511, 511-15 (1998)). Conversely, studies have shown that restrictions on advertising are associated with the decreased use of certain products by youth. 2-ER-146 ("On the other hand, restrictions on alcohol advertising are associated with both (1) lower prevalence and frequency of adolescent alcohol consumption; and (2) older age of first alcohol use.") (citing Mallie J. Paschall, Ph.D. et al., *Alcohol Control Policies and Alcohol Consumption by Youth: A Multi-National Study*, 104 ADDICTION 1849-55).

As the Legislature recognized at the time of section 22949.80's passage, members of the firearm industry had been directly advertising and marketing firearms to children. 2-ER-250; 2-ER-310 (observing that "firearms manufacturers and retailers continue to market firearms to minors"). By restricting such advertising and marketing, and thereby reducing demand for firearm-related products among minors, a population that is particularly susceptible to marketing appeals, section 22949.80 directly advances the State's goals of reducing gun violence perpetrated by and against minors and others, both intentional and unintentional.

Other circuits have held that similar restrictions on alcohol and tobacco advertising directly advanced several states' interests in decreasing demand for those products among college students and minors, respectively. For example, in *Educational Media Company at Virginia Tech, Incorporated v. Swecker*, 602 F.3d 583 (4th Cir. 2010), the Fourth Circuit examined a restriction on alcohol advertising communications in college or university publications that were "(1) prepared, edited, or published primarily by its students; (2) sanctioned as a curricular or extracurricular activity; and (3) distributed or intended to be distributed primarily to persons under 21 years of age." *Id.* at 587. The Fourth Circuit held that "[t]hough the correlation between advertising and demand alone is insufficient to justify advertising bans in every situation," the regulated publications "primarily target[ed] college students and play an inimitable role on campus," and it was counterintuitive to think that advertisers would choose to promote alcohol products in those publications if they did not believe those advertisements would be effective. *Id.* at 590. And in *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012), the Sixth Circuit upheld bans on distributing free tobacco samples, tobacco branding of non-tobacco merchandise, and tobacco-branded sponsorships of events, observing that a claim "that there is no causal connection between product advertising and the consumer behavior of children . . . stretches the bounds of credulity, even in the absence of

the extensive record submitted by the government, which indicates the contrary." *Id.* at 539–40.

Plaintiffs' arguments that Defendant has failed to satisfy this *Central Hudson* prong are unavailing. First, Plaintiffs suggest that section 22949.80's advancement of the State's' interests is insufficiently direct, citing *Virginia State Board of Pharmacy*, *Bates*, and *Bolger*. AOB 65-66. None of these cases, however, involved the direct causal link between advertisements and increased demand for products. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976) (advertising ban on prescription drug prices did not directly affect pharmacists' professional standards); *Bates v. State Bar of Arizona*, 433 U.S. 350, 378 (1977) (attorney advertising restraints "are an ineffective way of deterring shoddy work"); *Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 73 (1983) (ban on the mailing of contraceptive advertisements failed to satisfy *Central Hudson* scrutiny based on state interest in aiding parents' efforts to discuss birth control with their children). Therefore none of these cases undermines the "common sense" conclusion—supported by evidence here—that a restriction on firearm advertisements attractive to children will reduce the danger of intentional and unintentional gun violence perpetrated by minors. *See Fla. Bar*, 515 U.S. at 628; *see also Swecker*, 602 F.3d at 587; *Discount Tobacco*, 674 F.3d at 539-40; *Coyote Pub., Inc. v. Miller*, 598 F.3d 592, 608 (9th Cir. 2010) ("Common sense

counsels that advertising tends to stimulate demand for products and services. Conversely, prohibitions on advertising tend to limit demand").

Second, Plaintiffs argue that section 22949.80 does not directly affect the (already illegal) sale of firearms to minors or the unlawful transfer of firearms from adults to minors. AOB 67-68. However, as the district court recognized, evidence shows that "advertising increases demand among minors for commercial products—including those that minors cannot legally purchase, such as alcohol and tobacco—and that this demand is curtailed through advertising restrictions on those products." 1-ER-22-23; *see also* 2-ER-266. Moreover, section 22949.80 is also meant to reduce the overall likelihood that minors will choose to illegally *use* firearm-related products, not just purchase them. Indeed, once demand for a product is created by advertising, consumers may seek to obtain the product through means other than direct purchase.

Third, Plaintiffs appear to suggest that any interest directly advanced by section 29949.80 is not legitimate because consumers cannot be denied truthful information, citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011) and *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002). AOB at 68-69. As the district court correctly concluded, however, those cases are inapposite. 1-ER-25-26. Both cases involved complete bans on the transmission of information, and the Court's decisions were based on concerns of paternalism and, in *Sorrell*, the fact

that the audience was "sophisticated and experienced." *Thompson*, 535 U.S. at 375; *Sorrell*, 564 U.S. at 577. Here, section 22949.80 does not restrict speech communicated to an audience of "sophisticated and experienced" consumers but an audience of relatively unsophisticated minors who may not legally purchase or, in most cases, possess the product in question.

#### 4. Section 22949.80 sweeps no further than necessary to serve the State's significant interests.

The fourth prong of the *Central Hudson* test "complements" the third by requiring that a restriction on commercial speech not be "more extensive than necessary to serve the interests that support it." *Greater New Orleans Broad. Ass'n, Inc. v. U.S.*, 527 U.S. 173, 188 (1999). "The test is sometimes phrased as requiring a reasonable fit between government's legitimate interests and the means it uses to serve those interests." *Valle Del Sol Inc.,* 709 F.3d at 825 (internal quotation omitted). That reasonable fit need "not necessarily [be] 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). In other words, "[t]he least restrictive means is not the standard" in step four of the *Central Hudson* analysis. *Lorillard Tobacco*, 533 U.S. at 556. 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.*

Here, as demonstrated above, section 22949.80 regulates only a narrow category of commercial speech—that encouraging commercial transactions involving firearms or closely related products, such as firearm components or ammunition. Cal. Bus. & Prof. Code § 22949.80(a)(1),(c)(5), (c)(6). Section 22949.80 applies only to advertisements for these products and not to communications related to firearm programs and activities. *Id.* § 22949.80(a)(3). As the district court explained, "[t]his carve-out further narrows and clarifies § 22949.80's prohibition by explicitly omitting from its scope speech involving the lawful use of firearms by minors." 1-ER-17. The statute also does not prohibit ads for all audiences, but only those designed, intended, or that reasonably appear to be attractive to minors. Cal. Bus. & Prof. Code § 22949.80(a)(1). Accordingly, section 22949.80 sweeps no further than necessary. *See Swecker*, 602 F.3d at 590 (finding regulation on alcohol advertising in college newspapers to be narrowly tailored where regulation was "not a complete ban," but prohibited advertising only in publications distributed primarily to college students under 21).

Plaintiffs assert that section 22949.80 is "more extensive than necessary" under *Central Hudson* by generally arguing that the State could achieve its interests by enforcing existing laws and enacting new laws restricting the unlawful sales or transfers of firearms to minors. AOB 71. Plaintiffs claim that the State failed to meet its burden to prove that these purported alternatives to section

22949.80 would be ineffective to achieve its goals. AOB 72. But *Central Hudson* scrutiny is less demanding than strict scrutiny and does not require the State to show that the challenged law is the "least restrictive means." *Lorillard*, 533 U.S. at 556; *see also Fox*, 492 U.S. 480. Section 22949.80 need only be a "reasonable fit" (*Valle Del Sol Inc.,* 709 F.3d at 825) and "in proportion" (*Fox*, 492 U.S. at 480) to the State's interest in stemming gun violence involving minors. In addition, the cases Plaintiffs cite in support of their "least restrictive means" argument do not involve the application of *Central Hudson*. *See United States v. Playboy Entm't. Group, Inc.*, 529 U.S. 803, 816 (2000) (applying strict scrutiny to law regulating sexually explicit television programming); *Victory Processing Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1226 (9th Cir. 2019) (applying strict scrutiny to law regulating political robocalls); *Holt v. Hobbs*, 574 U.S. 352, 356 (2015) (analyzing claim for violation of Religious Land Use and Institutionalized Persons Act). *Butler v. Michigan*, 352 U.S. 380, 381 (1957), is also inapposite, as it involved noncommercial speech and struck down the challenged law on Due Process Clause grounds. *Id.* at 381-84.

Plaintiffs also analogize to *Valle Del Sol v. Whiting*, 709 F.3d 808 (9th Cir. 2013), which did apply *Central Hudson* scrutiny. *See* AOB 71. There, this Court struck down a restriction on day laborers soliciting motorists for employment, finding it "a poor fit with Arizona's interest in traffic safety," in part, because there

was no evidence showing that the government's "interest in traffic safety" could not be achieved by enforcing or enacting speech-neutral traffic safety regulations. *Whiting*, 709 F.3d at 827. In reaching that conclusion, the Ninth Circuit considered the specific, "actual traffic safety regulations" and "any potential or actual traffic safety regulations that are obviously available." *Id.* Examples of obvious measures included prohibitions on jay-walking, stopping at red curbs, and obstructing traffic. *Id.*

The district court correctly rejected Plaintiffs' analogy to *Whiting*. 1-ER-28-29. Here, California law already outlaws the sale and transfer of firearms to minors and minors' use of firearms except for in very limited circumstances requiring parental supervision or permission. *See* Cal. Pen. Code §§ 27505, 27510, 29610, 29615. Statistics on the continuing firearm shootings involving minors shows that these laws alone have been insufficient. *Supra* at 6. Moreover, unlike in *Whiting*, there are no "obviously available" laws that California has failed to enact that would achieve its interest. As the district court concluded, section 22949.80 is a "carefully crafted" measure, 1-ER-27, that is properly tailored to achieve its compelling interest in preventing shootings involving minors.

## II. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THEIR CLAIM FOR UNCONSTITUTIONAL OVERBREADTH

As the district court recognized, Plaintiffs' claim for unconstitutional overbreadth fails for the simple reason that the First Amendment overbreadth doctrine does not apply to regulations of commercial speech. *See Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 497 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977); *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 481 (1989); *see also Washington Mercantile Ass'n v. Williams*, 733 F.2d 687, 689 (9th Cir. 1984); 1-ER-30-31.

The First Amendment overbreadth doctrine "represents a departure from the traditional rule that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court." *Bates*, 433 U.S. at 380. Under the doctrine, "a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation omitted).

The Supreme Court has explicitly held, however, that "the overbreadth doctrine does not apply to commercial speech." *Vill. of Hoffman Ests.*, 455 U.S. at 497 (citing *Central Hudson*, 447 U.S. at 565 n.8); *Bates*, 433 U.S. at 381; *Fox*, 492 U.S. at 481 ("a statute whose overbreadth consists of unlawful restriction of

commercial speech will not be facially invalidated"); *Washington Mercantile Ass'n*, 733 F.2d at 689 ("If this statute affects only commercial speech, plaintiffs have standing to assert only constitutional interests relevant to their own activities"). For the reasons explained in detail above, section 22949.80 regulates commercial speech only. As the district court correctly concluded, the statute is therefore not subject to invalidation under the overbreadth doctrine. *See* 1-ER-31.

Plaintiffs analogize this case to *United States v. Stevens*, 559 U.S. 460 (2010). AOB 43-44. That case is inapposite. The decision involved a First Amendment challenge to a statute that created a criminal penalty for anyone who knowingly "'creates, sells, or possesses a depiction of animal cruelty,' if done 'for commercial gain.'" *Stevens*, 559 U.S. at 464-65 (citing 18 U.S.C. § 48). Despite the language in the statute that the prohibited conduct must be for "commercial gain," the Court did not consider the regulated speech in question to constitute "commercial speech," and indeed *Central Hudson* and the commercial speech doctrine are not discussed in that decision. *See id.* at 473-74. In contrast here, section 22949.80 regulates only commercial speech and is therefore not subject to a First Amendment overbreadth claim.

## III. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THEIR FIRST AMENDMENT ASSOCIATION CLAIM

Plaintiffs argue that section 22949.80 infringes on their First Amendment right of association because it purportedly prohibits them from advertising or marketing "firearm-related programs" and "events that [Plaintiffs] sponsor where firearm-related products are exhibit and sold." AOB 74.

As the district court held, this claim "lacks any cognizable basis." 1-ER-29. By its plain terms, section 22949.80 does not prohibit the advertising or marketing of any program or event where people assemble. Cal. Bus. & Prof. Code § 22949.80(a)(1). The statute is limited to advertisements and marketing of a "firearm-related *product*." *Id.* (emphasis added). That term is defined as a firearm, ammunition, or a firearm precursor part, component, or accessory that meets specified conditions. *Id.* § 22949.80(c)(5). And the statute expressly does not apply to an array of "program[s]" and "event[s]." *Id.* § 22949.80(a)(3). As in the district court, here, Plaintiffs "fail to address this provision of the statute." 1-ER-29.

## IV. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THEIR CLAIM FOR UNCONSTITUTIONAL VAGUENESS

In measuring whether a law is unconstitutionally vague, a court asks "whether it 'fails to provide a person of ordinary intelligence fair notice of what is

prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *Yamada v. Snipes*, 786 F.3d 1182, 1187 (9th Cir. 2015) (quoting *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012)). "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989).

"The degree of vagueness the Due Process Clause will tolerate 'depends in part on the nature of the enactment.'" *Kashem v. Barr*, 941 F.3d 358, 370 (9th Cir. 2019) (quoting *Vill. of Hoffman Ests.*, 455 U.S. at 498). "Relevant factors include whether the challenged provision involves only economic regulation, imposes civil rather than criminal penalties, contains a scienter requirement and threatens constitutionally protected rights." *Id.* While laws interfering with constitutional rights are generally subject to a stricter vagueness test, economic regulations and laws imposing civil (and not criminal) penalties are generally subject to a less stringent test. *Id.* at 498-99.

For facial vagueness challenges, courts "tolerate uncertainty at the margins; the law just needs to be clear "in the vast majority of its intended applications.'" *Tingley v. Ferguson*, 47 F.4th 1055, 1089 (9th Cir. 2022) (quoting *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001)). However, if a challenged statute does not implicate constitutionally protected conduct, a facial

vagueness challenge may only succeed "if the enactment is impermissibly vague in all of its applications. *Vill. of Hoffman Ests.*, 455 U.S. at 495.

**A. Section 22949.80 Gives Fair Notice of the Products Covered**

Plaintiffs contend that a single clause of section 22949.80—the definition of "firearm accessories" in subdivision (c)(3)—fails to provide fair notice of the products addressed by the statute. The district court correctly rejected this contention. 1-ER-32-33.

Section 22949.80 applies to certain advertising and marketing communications promoting any "firearm-related product." Cal. Bus. & Prof. Code § 22949.80(a)(1). That term is defined to include a "firearm, ammunition, reloaded ammunition, a firearm precursor part, a firearm component, or a firearm accessory." *Id.* § 22949.80(c)(5). Subdivision (c)(3) then defines a "firearm accessory as:

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

§ 22949.80(c)(3) (emphasis added).

Plaintiff's facial vagueness challenge to section 22949.80 based on subdivision (c)(3) fails. As discussed above, section 22949.80 does not apply to conduct protected by the First Amendment because it applies to speech that

concerns illegal activity and is misleading. *See Cent. Hudson*, 447 U.S. at 566. Plaintiffs are therefore required to show that section 22949.80 is vague in all its applications. *See Vill. of Hoffman Ests.*, 455 U.S. at 495. Plaintiffs have failed to do so, because they have not attempted to argue—nor could they credibly—that the law is impermissibly vague with regard to advertisements promoting firearms, ammunition, firearm components, and the other "firearm-related products" enumerated in subdivision (c)(5). Indeed, Plaintiffs refer to these as "commonly known products." AOB 34. Nor have Plaintiffs shown that the statute is impermissibly vague with respect to all items constituting "firearm accessories." *See* Cal. Bus. & Prof. Code § 22949.80(c)(3). For example, the category includes attachments and devices that are "inserted into" or "affixed onto" firearms to alter their firing capabilities or lethality. *Id.*

To the extent section 22949.80 may implicate commercial speech that is protected by the First Amendment, the statute is nevertheless clear "in the vast majority of its intended applications. *See Tingley*, 47 F.4th at 1089. Again, Plaintiffs do not dispute that section 22949.80 clearly applies to advertising communications related to firearms, ammunition, and firearm parts, as well as many types of firearm accessories.

In any event, section 22949.80's definition of a "firearm accessory" is not vague. The term applies only to firearm "attachments or devices." Cal. Bus. &

Prof. Code § 22949.80. The district court noted, "[t]he Oxford Dictionary defines an "attachment" as "[a]n extra part or extension that is or can be attached to something to perform a particular function" and a "device" as "[a] thing made or adapted for a particular purpose, especially a piece of mechanical or electronic equipment." 1-ER-33 (n.11). These common definitions mean that "attachments and devices" do not include ancillary, non-mechanical and non-electronic products that could be incidentally used while shooting a firearm. A "reasonable person of ordinary intelligence" would understand this. *Fitzgerald*, 882 F.2d at 398. More "perfect clarity and precise guidance" is not required. *Ward*, 491 U.S. at 794.

Even if "attachments or devices" contained any ambiguity, the phrase must be read in context of the statute. *See Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1021 (9th Cir. 2010) ("Otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity" (citation and internal quotation omitted). The context of "attachment or device" in subdivision (c)(3) illustrates that phrase to mean technical items used to shoot a firearm. Further, firearm accessories constitute one out of several enumerated categories of "firearm-related products" covered by the statute. Cal. Bus. & Prof. Code § 22949.80(c)(5). The other categories consist of firearms, firearm components (including precursor parts), and ammunition. *Id.* Under the rule of *ejusdem generis* (of the same kind, class, or nature), firearm accessories therefore

would include only "other items akin to" to firearms, firearm components, and ammunition. Ancillary gear that may be used while hunting, such as backpacks and sunglasses, are not akin to those items. Use of this canon of construction does not render the definition of "firearm accessories" in subdivision (c)(3) surplusage. *See* AOB 36. The canon simply functions as an interpretative tool for that provision—one that *Plaintiffs* contend is vague.

Plaintiffs therefore failed to show that they are likely to succeed on their claim that section 22949.80 is unconstitutionally vague due to its definition of "firearm accessories."

### B. Section 22949.80 Does Not Invite Arbitrary Enforcement

Section 22949.80 prohibits the advertisement of firearm-related products "in a manner that is designed, intended, or reasonably appears to be attractive to minors." Cal. Bus. & Prof. Code § 22949.80(a)(1). Plaintiffs take issue with the phrase "reasonably appears to be attractive to minors" in subdivision (a)(1). *See* AOB 37. The district court correctly held that Plaintiffs were not likely to prevail on this contention. Far from a "standardless" enactment that "authorizes or encourages seriously discriminatory enforcement," *Yamada*, 786 F.3d at 1187, the law "provide[s] explicit standards for those who apply them" in subdivision (a)(2). *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Whether a communication "reasonably appears attractive to minors" is determined by a totality of the circumstances test that includes six nonexclusive factors. Cal. Bus. & Prof. Code § 22949.80(a)(2). Those factors are whether the ad: (1) includes caricatures that "reasonably appear to be minors" or includes cartoon characters; (2) includes accompanying children's merchandise; (3) offers child-sized firearm products; (4) is part of a child-oriented marketing campaign; (5) depicts minors; and (6) features in a publication whose audience is predominantly composed of minors. *Id.* § 22949.80(a)(2)(A)–(F).

These explicit standards stand in contrast to the challenged laws cited by Plaintiffs, which required judges to impose their subjective opinions regarding what is "annoying" (*Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)), a "breach of the peace" (*Cox v. State of La.*, 379 U.S. 536, 551 (1965)), or "reasonable, "sufficient," and "substantial" (*Carter v. Welles-Bowen Realty, Inc.*, 719 F. Supp. 2d 846, 852 (N.D. Ohio 2010), *aff'd*, 736 F.3d 722 (6th Cir. 2013)).

The totality of the circumstances test is not unconstitutionally vague merely because its factors are not exclusive or weighted. *See* AOB 39. A trier does not have free rein in determining what "reasonably appears attractive to minors"—it must consider at least the six enumerated factors. Cal. Bus. & Prof. Code § 22949.80(a)(2) (a court shall consider the totality of the circumstances, including, but not limited to…"). As the district court recognized, "the statute's

language allowing circumstances to be considered beyond the specific conduct that is proscribed in the enumerated factors permits 'flexibility and reasonable breadth' while still making it 'clear what the ordinance as a whole prohibits.'" 1-ER-39 (quoting *Grayned*, 408 U.S. at 110); *see also Bushco v. Shurtleff*, 729 F.3d 1294, 1308 (10th Cir. 2013).

Plaintiffs' cited authorities (*see* AOB 39) do not support the proposition that factors in statutes must be exclusive or that the statute must prescribe how to weigh each one. *See Amidon v. Student Ass'n of State Univ. of New York at Albany*, 508 F.3d 94, 103 (2d Cir. 2007) (deciding claim for First Amendment violation, not unconstitutional vagueness); *Rec. Head Corp. v. Sachen*, 682 F.2d 672, 677-78 (7th Cir. 1982) (striking ordinance with factors that were "fuzzy, contradictory, and dangerously open to erratic and after-the-fact interpretation"); *contra Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 244 (2d Cir. 2014) (upholding statute that prescribed the use of nonexclusive factors to determine whether a facility has the appearance of a licensed medical facility).

The factors themselves are also not unconstitutionally vague because some include the terms "reasonably appear" or "appeal." *See* AOB 39-40. Plaintiffs argue that these terms allow a judge to interpret the factors in an "idiosyncratic" or "subjective manner." AOB at 39-40. This is incorrect.

The phrase "reasonably appear" calls for an objective standard that measures the appearance of the advertisement as viewed by a reasonable person. *Cf. People v. Agnello*, 259 Cal. App. 2d 785, 791 (Ct. App. 1968) (holding that the words "reasonably appear" in criminal statute prohibiting interference with campus activities were not unconstitutionally vague because they are "the very words that infuse into this statute the objective standard of a reasonable man."); *id.* ("'Reasonable appearance' is a well developed doctrine" in California criminal law" (citing *People v. Turner*, 86 Cal .App. 2d 791, 799 (Ct. App. 1948); *People v. Toledo*, 85 Cal. App. 2d 577, 580 (Ct. App. 1948); *People v. Keys*, 62 Cal. App. 2d 903, 903, 916 (1944))). Thus, a trier must consider whether an advertisement "reasonably appears to be attractive to minors" (*see* Cal. Bus. & Prof. Code § 22949.80(a)(1)) based on an objective reasonable person standard and applying the fact-driven considerations in subdivisions (a)(2)(A)-(F). For example, if an ad contains a caricature, the trier must assess the objective attributes of the caricature, such as clothing and physical features, to determine whether that caricature "reasonably appears to be a minor." *Id.* § 22949.80(a)(2)(A).

To the extent that Plaintiffs object to the statute's use of the phrase "designed to . . . appeal to," their arguments are not persuasive. *See* AOB 39-40. The term "design" provides a sufficiently clear standard for objective application by courts. *See People v. Andrade*, 85 Cal. App. 4th 579, 587 (2000) (setting forth plain

meaning of "design" as "a: to conceive and plan out in the mind; b: to have as a purpose: intend; c: to devise for a specific function or end" (quoting Webster's 9th New Collegiate Dict. (1987) p. 343 (brackets omitted)). And, as the district court observed, Plaintiffs conceded at oral argument that the terms "designed" and "intended" as used in subdivision (a)(1) are not unconstitutionally vague. 1-ER-35 (n.12); 2-ER-64.[9]

Plaintiffs have therefore failed to show that section 22949.80 is "so standardless that it authorizes or encourages seriously discriminatory enforcement." *Yamada*, 786 F.3d at 1187.

## V. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THEIR EQUAL PROTECTION CLAIM

"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 omitted) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)). Mere allegations

[9] "And I would concede that perhaps the statute doesn't have these problems if the statute only said 'Designed or intended.' Because that really implies not only an objective standard but also an evidentiary burden of being shown that the statute was, in fact, designed or intended. And the fact finder can make that determination based on the evidence."

that the government is treating plaintiffs differently from other similarly-situated individuals are insufficient to sustain an Equal Protection claim. *See Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura,* 371 F.3d 1046, 1055 (9th Cir. 2004).

Here, Plaintiffs suggest in conclusory fashion that section 22949.80 unconstitutionally discriminates by "singling out politically disfavored 'firearm industry members.'" AOB 76 (quoting Cal. Bus. & Prof. Code § 22949.80(a)(1)). That is not correct because, as explained in the footnote above, under the statute's definition of a "firearm industry member," no individual, company, or organization is exempt from the prohibition on marketing firearm-related products to minors because, by doing so, they become a "firearm industry member" subject to the law. *See* Cal. Bus. & Prof. Code § 22949.80(c)(4). Even if this were not so, Plaintiffs fail to identify any protected class burdened by the statute. Indeed, Plaintiffs' claims are duplicative of, and subsumed by, their flawed First Amendment claim. Where, as here, a plaintiff has failed to allege membership in a protected class, and speech is the only fundamental right underpinning the equal protection claim, the claim "rise[s] and fall[s] with the First Amendment claims." *OSU Student All. v. Ray*, 699 F.3d 1053, 1067 (9th Cir. 2012).

## VI. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS CANNOT ESTABLISH IRREPARABLE HARM IN THE ABSENCE OF INJUNCTIVE RELIEF

Even if Plaintiffs had demonstrated a likelihood of success on the merits, they would still need to demonstrate that they would suffer irreparable harm if a preliminary injunction does not issue. It is true that, as Plaintiffs point out, the loss of First Amendment freedoms constitutes "irreparable harm" for purposes of seeking injunctive relief. *See* AOB 77 (citing *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) (internal quotation omitted)). But as demonstrated above, and as the district court correctly determined, section 22949.80 does not unconstitutionally burden any of their constitutional rights, including their First Amendment rights. Plaintiffs therefore have not shown they will suffer irreparable harm in the absence of preliminary injunctive relief.

## VII. THE DISTRICT COURT CORRECTLY HELD THAT THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST DO NOT FAVOR AN INJUNCTION

Finally, independent grounds exist to uphold the district court's denial of a preliminary injunction—separate and apart from any potential likelihood of success on the merits or showing of irreparable harm. *See, e.g.*, *Tracy Rifle & Pistol LLC v. Harris*, 637 Fed. App'x 401, 402 (9th Cir. 2016) (holding that although district court's finding that a restriction on commercial speech to be likely unconstitutional was not "illogical, implausible, or without support in the record," denial of preliminary injunction was not abuse of discretion where the magnitude

of potential harm to plaintiffs was minimal and balance of equities did not tip in plaintiffs' favor).

Even if Plaintiffs could show that section 22949.80 is likely unconstitutional and they would suffer irreparable harm in the absence of a preliminary injunction, the balance of the equities (which here includes analysis of the public interest) weighs against a preliminary injunction. *See Johnson v. Brown*, 567 F. Supp. 3d 1230, 1266 (D. Or. 2021) (balancing equities even where plaintiffs asserted that their "fundamental constitutional rights" were implicated). "[W]hen a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight." *Fed. Trade Comm'n v. Affordable Media*, 179 F.3d 1228, 1236 (9th Cir. 1999) (quoting *Fed. Trade Comm'n v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989)).

First, the balance of the equities weighs against the issuance of a preliminary injunction because section 22949.80 promotes "a compelling interest in ensuring that minors do not possess these dangerous weapons [i.e., firearms] and in protecting its citizens, especially minors, from gun violence and from intimidation by persons brandishing these weapons." 1-ER-20. 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 Plaintiffs have asked for an injunction of section 22949.80 on its face, as the district court recognized, section

22949.80 clearly bans *at least* some speech that has no First Amendment protection at all. *See* 1-ER-18 ("To be sure, § 22949.80 does prohibit commercial speech regarding unlawful activities").

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, a preliminary injunction would not serve the public interest 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 (E.D. Cal. June 29, 2017) (finding that the public interest is furthered "by preventing and minimizing the harm of gun violence"); *Rupp v. Becerra*, 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, preliminary relief should also be denied here because Plaintiffs effectively seek to litigate the merits of the dispute without a motion for summary judgment or trial. "[C]ourts generally disfavor preliminary injunctive relief that is identical to the ultimate relief sought in the case." *See Progressive Democrats for Soc. Just. v. Bonta*, No. 21-CV-03875-HSG, 2021 WL 6496784, at *11 (N.D. Cal. July 16, 2021) (holding that "it is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial") (quoting *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808–09 (9th Cir. 1963); *see also Hennessy-Waller v. Snyder*, 529 F. Supp. 3d 1031, 1046 (D. Ariz. 2021), *aff'd sub nom. Doe v. Snyder*, 28 F.4th 103 (9th Cir. 2022) (denying motion "because the preliminary injunctive relief sought is identical to the ultimate relief sought in the underlying complaint" and it would be "premature to grant such relief prior to discovery and summary judgment briefing"). The relief sought by Plaintiffs here is the same relief that Plaintiffs would obtain if they prevailed on

their claims after summary judgment or a trial, weighing heavily against issuance of a preliminary injunction.

Concerning the equities and public interest, Plaintiffs primarily reiterate their (incorrect) claims that section 22949.80 is unconstitutional and that they will suffer irreparable harm if an injunction is not granted. *See* AOB 77-79. Otherwise, Plaintiffs suggest only that the State and public safety would not be harmed by an injunction because the State's restrictions on firearm purchases and possession would remain intact. AOB at 76. However, an injunction would still endanger the public because, as the legislative record reflects, the existing restrictions on minors' purchase and use of firearms is insufficient to prevent shootings causing injury or death.

Thus, even assuming Plaintiffs had satisfied the initial requirements for issuance of a preliminary injunction, Plaintiffs have failed to demonstrate that the district court's finding that the balance of equities and the public interest did not favor them was so erroneous as to constitute an abuse of discretion. *See All. for the Wild Rockies v. Cottrell*, 632 F. 3d 1127, 1131 (9th Cir. 2011) (a denial of a preliminary injunction is generally reviewed for abuse of discretion). At the very minimum, the district court's denial of a preliminary injunction should be affirmed for that reason.

## CONCLUSION

The district court's denial of Plaintiffs' motion for a preliminary injunction should be affirmed.

Dated: April 7, 2023

Respectfully submitted,

*s/ Gabrielle D. Boutin*

ROB BONTA
*Attorney General of California*
THOMAS S. PATTERSON
*Senior Assistant Attorney General*
ANTHONY R. HAKL
Supervising Deputy Attorney General
GABRIELLE D. BOUTIN
Deputy Attorney General
1300 I Street, Suite 125
Sacramento, CA 94244-2550
(916) 210-6053
Gabrielle.Boutin@doj.ca.gov
*Attorneys for Defendant-Appellee Rob Bonta, in His Official Capacity as Attorney General of the State of California*

23-15199

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**SAFARI CLUB INTERNATIONAL, et al.,**

Plaintiffs-Appellants,

**v.**

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

Defendant-Appellee

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

No. 2:22-cv-01395-DAD-JDP
Hon. Dale A. Drozd, Judge

## STATEMENT OF RELATED CASES

The following related case is pending in this court: *Junior Sports Magazines, Inc. v. Bonta*, Case No. 22-56090. To the best of our knowledge there are no other related cases pending in this court.

Dated: April 7, 2023

Respectfully submitted,

ROB BONTA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
ANTHONY R. HAKL
Supervising Deputy Attorney General

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

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

**Form 8. Certificate of Compliance for Briefs**

*Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf*

**9th Cir. Case Number(s)** 23-15199

I am the attorney or self-represented party.

**This brief contains** 12,887 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (●) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ( ) is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - [ ] it is a joint brief submitted by separately represented parties.
  - [ ] a party or parties are filing a single brief in response to multiple briefs.
  - [ ] a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated ______.
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

**Signature** /s Gabrielle D. Boutin **Date** April 7, 2023
*(use "s/[typed name]" to sign electronically-filed documents)*

# CERTIFICATE OF SERVICE

Case Name: **So Cal Top Guns, Inc. v. Rob Bonta [Appeal]** No. **23-15199**

I hereby certify that on April 7, 2023, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANT-APPELLEE'S ANSWERING BRIEF**

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 April 7, 2023, at Sacramento, California.

| Ritta Mashriqi | ***/s/Ritta Mashriqi*** |
|---|---|
| Declarant | Signature |

SA2023300898
37065604.docx