No. 20-55437

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIM RHODE; ET AL.,
Plaintiffs-Appellees,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Defendant-Appellant

On Appeal from the United States District Court
for the Southern District of California
No. 18-cv-00802-BEN-JLB
The Honorable Roger T. Benitez, Judge

BRIEF OF GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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STATEMENT REGARDING CONSENT TO FILE, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

All parties have consented to the filing of this brief. Giffords Law Center certifies that no party or party's counsel authored this brief in whole or in part, or contributed money intended to fund its preparation or submission. No person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief. Fed. R. App. P. 29(c)(5).

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INTEREST OF AMICUS CURIAE

Giffords Law Center to Prevent Gun Violence is a non-profit policy organization dedicated to researching, writing, enacting, and defending laws and programs proven to reduce gun violence and save lives. It provides free assistance and expertise to lawmakers, advocates, legal professionals, law-enforcement officials, and citizens seeking to make their communities safer from gun violence. Its attorneys track and analyze firearm legislation, evaluate policy proposals regarding gun-violence prevention, and participate in litigation nationwide. The organization has provided courts with amicus assistance in many important cases implicating guns and gun violence. Giffords Law Center submits this brief to assist the Court in analyzing the Dormant Commerce Clause claim, an issue that has the potential to impact the constitutionality of other firearm legislation as well as a variety of other product safety and consumer protection laws.

SUMMARY OF ARGUMENT

Gun violence is a public health emergency in the United States, which has a gun homicide rate 25 times, and a gun suicide rate eight times, that of comparable developed countries. Erin Grinshteyn & David Hemenway, *Violent Death Rates: The U.S. Compared with Other High-income OECD Countries, 2010*, 129 Am. J. Med. 26 (2016). According to a research model developed in 2012 by economists at the Pacific Institute for Research and Evaluation (PIRE), gun violence costs the

nation around $229 billion per year, fully 1.4 percent of GDP, *see* A State-by-State Examination of the Economic Costs of Gun Violence, U.S. Congress Joint Economic Committee Democratic Staff, September 18, 2019, and imposes annual costs of $6.5 billion on California, with taxpayers bearing $1.4 billion of that, *see* The Cost of Gun Violence in California, https://lawcenter.giffords.org/wp-content/uploads/2018/03/Economic-Cost-of-Gun-Violence-in-California.pdf. These are conservative estimates, leaving out mental health costs, lost business opportunities, and long-term medical care.

Error! Hyperlink reference not valid. Ammunition contributes to gun violence as much as firearms. But before 2016, California (like many states) failed to regulate ammunition sales. Dangerous individuals could have unlimited ammunition mailed to their door with no background check and no questions asked. Prior to 2016, criminals buying ammunition was an enormous problem: California law enforcement recovered millions of rounds of illegally owned ammunition while investigating illegal gun possession.[1] Mass shooters have

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[1] *See* SB 140 Supplemental Report of the 2015-16 Budget Package, Armed Prohibited Persons System, at 22 (Jan. 1, 2016), http://oag.ca.gov/sites/all/files/agweb/pdfs/publications/sb-140-supp-budget-report.pdf (in the 2.5 years before enactment of Proposition 63, APPS enforcement teams recovered nearly 1,000,000 rounds of illegally owned ammunition); APPS 2017 Annual Report to the Legislature, at 2 (Mar. 9, 2018), https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/armed-prohib-person-

exploited lax laws in this area: In 2012, for example, the Aurora, Colorado shooter bought more than 6,000 rounds on the internet before his movie theater shooting spree. Jack Healy, *Suspect Bought Large Stockpile of Rounds Online*, N.Y. Times, July 22, 2012.

As part of the State's ongoing effort to reduce gun violence, guard against devastating mass shootings, and ensure guns and ammunition are safely regulated, California voters approved Proposition 63. Among other provisions, the initiative required face-to-face transactions for the sale or transfer of ammunition to ensure purchasers undergo a background check and do not evade laws prohibiting possession by dangerous people. Proposition 63 did not require sellers to be residents of California, did not require sellers to incorporate in California, and did not prohibit ammunition sales commencing out of state. Rather, the law regulated a step in a market transaction (delivery) to ensure legitimate public safety goals.

Notwithstanding that out-of-state sellers *could* continue to sell ammunition to California residents by complying with the face-to-face delivery requirements (by contractual arrangements or otherwise), the district court, applying strict scrutiny, concluded California's ammunition safety laws violated the Dormant

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system-2017.pdf (in 2017 alone, officials recovered 819,343 rounds of illegally owned ammunition).

Commerce Clause. The district court's conclusion is wrong, and, if endorsed by this Court, would have untenable effects on states' ability to protect consumers and public safety. Indeed, the district court's interpretation of the Dormant Commerce Clause would jeopardize a host of similar face-to-face transaction requirements for alcohol, tobacco, and firework purchases, as well prohibitions concerning online services that have led to consumer fraud.[2]

The Constitution's Commerce Clause contains a "negative" or "dormant" corollary with the primary purpose of barring states from enacting economically protectionist legislation. *See, e.g., Maine v. Taylor*, 477 U.S. 131, 138 (1986) (internal quotation marks and citation omitted). When, as with Proposition 63, a state law "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden . . . is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) ("the *Pike* test").

Distinguishing even-handed from discriminatory enactments requires comparing "substantially similar entities." *Gen. Motors Corp. v. Tracy*, 519 U.S.

[2] This brief addresses the Commerce Clause issue only. That silence does not indicate agreement with or endorsement of the district court's Second Amendment analysis; Giffords Law Center agrees with Appellants that the court's misapplication of the law governing Second Amendment facial challenges warrants reversal as well.

278, 298–99 (1997). That determination considers not only the products or services sold, but also sellers' business structures or methods of operation. "Because states may legitimately distinguish between business structures in a retail market, a business entity's structure is a material characteristic for determining if entities are similarly situated." *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown* ("*Optometrists I*"), 567 F.3d 521, 527 (9th Cir. 2009).

Here, California mandated that *all* businesses require face-to-face delivery of ammunition through licensed vendors, recognizing the public-safety interest in confirming that people actually taking possession of ammunition are of sound mind and pass a background check establishing permission to own and use it. Authority from numerous federal appellate courts to have considered similar laws addressed to other goods and services confirms such laws *do not* discriminate against out-of-state commerce and *do not* raise Dormant Commerce Clause concerns. The district court was simply mistaken. It should have never applied strict scrutiny, and Proposition 63 easily survives the *Pike* test.

ARGUMENT

I. CALIFORNIA'S AMMUNITION LAW DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE

The district court's Dormant Commerce Clause analysis departed from established precedent both procedurally and substantively. As an organization

committed to gun safety and violence prevention, Giffords Law Center supports new approaches to state firearm regulation addressing proven threats to public safety. *Accord, e.g., McDonald* v. *City of Chi.*, 561 U.S. 742, 784–85 (2010) (plurality opinion) ("state and local experimentation with reasonable firearms regulations" will continue after incorporation of Second Amendment). Improperly classifying gun legislation as economically protectionist, and then compelling state and local governments to defend it under strict scrutiny, chills that development. To assist this Court in correcting the lower court's errors, this brief thus (1) demonstrates the district court's procedural errors, (2) shows the district court's analysis is out of step with federal appellate authority, and (3) establishes that California's law passes the *Pike* test.

A. The District Court Failed To Hold Plaintiffs To Their Burden

This Court's Dormant Commerce Clause jurisprudence teaches that a "statutory scheme can discriminate against out-of-state interests in three different ways: (a) facially, (b) purposefully, or (c) in practical effect." *Optometrists I*, 567 F.3d at 525 (citation and internal quotation marks omitted). The type of discrimination invoked determines the plaintiff's evidentiary burden. "Two levels of scrutiny exist for analyzing state statutes challenged under the dormant Commerce Clause." *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1230 (9th Cir. 2010). "The higher level of scrutiny applies to a state statute that

discriminate[s] against interstate commerce 'either on its face or in practical effect,'" whereas a less exacting tier applies to nondiscriminatory laws that allegedly burden interstate commerce. *Id.* (citations omitted). Within the higher tier of scrutiny, "where neither facial economic discrimination nor improper purpose is an issue" it is plaintiffs' "burden[] to offer *substantial evidence* of an actual discriminatory effect." *Id.* at 1232 (citations omitted) (emphasis added). Here, there is no allegation of purposeful protectionism, and it was plaintiffs' burden to offer such substantial evidence.

Instead, the district court confused the two tiers of scrutiny, blurred the analyses for facial and in-effect discrimination, and did not impose upon plaintiffs the "substantial" burden of showing the latter. The court suggested its burden analysis was not based on a substantial evidentiary showing, but rather what it deemed "reasonable inferences." ER 104 (". . . at this early stage there are reasonable inferences to be drawn . . ."). "Reasonable inferences" is not the standard. "Substantial evidence" is, even at the preliminary injunction stage. *See, e.g., Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 405 (9th Cir. 2015) ("Two recent decisions from our court establish that a plaintiff must satisfy a higher evidentiary burden when, as here, a statute is neither facially discriminatory nor motivated by an impermissible purpose.").

At a minimum, then, this Court should vacate the injunction and remand for application of the correct legal standard and consideration of the evidence. *See, e.g.*, *Wine And Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 14 (1st Cir. 2007) (reviewing district court's discriminatory effect holding "[a]fter a full trial"). But remand should not be necessary because, as addressed below, Proposition 63's approach to ammunition safety does not violate the Dormant Commerce Clause under any theory.

B. The Challenged Law Is Facially Nondiscriminatory Because It Is Impartial Regarding Similarly Situated Entities

The rules imposed through Proposition 63 are facially neutral. California voters mandated that "the sale of ammunition by any party shall be conducted by or processed through a licensed ammunition vendor" and that "sale, delivery, or transfer of ownership of ammunition by any party may only occur in a face-to-face transaction with the seller, deliverer, or transferor, provided, however, that ammunition may be purchased or acquired over the Internet or through other means of remote ordering if a licensed ammunition vendor initially receives the ammunition and processes the transaction." Cal. Penal Code § 30312(a)-(b). This rule is impartial regarding in- and out-of-state vendors who wish to take orders online (or by mail-order or phone) and ship ammunition directly to California consumers. Both are barred from doing so, and both must now either arrange to

have ammunition delivered to the purchaser by a licensee or become a licensed brick-and-mortar operation. The district court missed the legal import of this symmetry, instead suggesting that "how a state disfavors its resident online sellers compared to its resident brick-and-mortar sellers is of no moment for Commerce Clause analysis. What is important is that California's resident businesses are the only businesses that may sell directly." ER 102-103.

This is mistaken. Because the Dormant Commerce Clause is fundamentally a guard against "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors," *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008) (citation omitted)—it is necessary to consider whether California online sellers—the similarly situated competitors to out-of-state online sellers—benefit versus out-of-state online sellers. They do not. Here, comparable in-state businesses experience *precisely the same* treatment as out-of-state businesses. And where comparable in- and out-of-state entities face the same regulatory burden, there is neither facial discrimination nor in-effect discrimination and strict scrutiny does not apply. That is true whatever the cost to particular out-of-state businesses. *Rocky Mountain Farmers Union v. Corey* (*RMFU I*), 730 F.3d 1070, 1089 (9th Cir. 2013); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978).

1. The Cases Relied Upon By the District Court Are Inapposite

Two cases seemed to drive the District Court's contrary analysis of facial discrimination: *Granholm v. Heald*, 544 U.S. 460 (2005), and *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 721 (9th Cir. 2017). *See* ER 100-104, 108-109. Neither should control here.

a. *Post-*Granholm *Authority Confirms States May Impose Face-to-Face Transaction Requirements*

In *Granholm*, the Supreme Court struck down alcohol-regulation regimes in Michigan and New York that exempted in-state wineries from prohibitions on direct shipments of wine. *See* 544 U.S. at 468-469. While Michigan flatly banned direct shipments by out-of-state wineries, New York allowed out-of-state wineries "to establish a distribution operation in New York . . . to gain the privilege of direct shipment." *Id.* at 477.[3] The Supreme Court found both regimes discriminatory because they were structured to "subject[] out-of-state wineries, but not local ones, to the [regulatory] system." *Id.* at 474. While out-of-state wineries could not ship wine directly to customers in Michigan and New York, in-state wineries could.

California, by contrast, subjects *all* vendors to a uniform system requiring a face-to-face transaction, verifiable by a visual ID check and magnetic card swipe.

[3] New York also made out-of-state wineries completely ineligible for the most advantageous "farm license," 544 U.S. at 475, as well as premising licensure on producing wines only from New York grapes, *id.* at 474.

See Cal. Penal Code § 30312(a)-(b); ER 914-916. Just as out-of-state sellers cannot ship ammunition directly to California customers' doors, California sellers cannot ship directly to customers' doors; both *lack* "the privilege of direct shipment," *Granholm*, 544 U.S. at 477, and must conduct an in-person background check and ID verification. As with face-to-face requirements for wine sales, California's law helps ensure that minors and other prohibited individuals do not obtain ammunition. California's law is therefore unlike the statutes at issue in *Granholm*, and instead mirrors laws that (1) limit sales to licensed retailers and/or face-to-face transactions while (2) prohibiting direct shipments from ***both*** in-state and out-of-state businesses.

Federal appellate courts have regularly upheld rules like this, rejecting Dormant Commerce Clause challenges even after *Granholm*. In a post-*Granholm* world, in fact, this Court had little difficulty in concluding that "Arizona's in-person [wine] purchase requirement does not discriminate against out-of-state wineries." *Black Star Farms*, 600 F.3d at 1234. Analogous to the situation here, the Court reasoned that "[t]he direct shipment of wine under a direct shipment license—whether by an in-state or out-of-state winery—is subject to the in-person purchase requirement, regardless of the state in which the winery is found, including Arizona." *Id.* Just as here, out-of-state and in-state businesses faced the same requirements.

Similarly, in *Jelovsek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008), the Sixth Circuit explained that "evenhanded restrictiveness," like "evenhanded permissiveness," implicates no Dormant Commerce Clause issues. In *Jelovsek*, "Tennessee's ban on direct shipment of alcoholic beverages, including wine . . . applied equally to in-state and out-of-state wineries." *Id.* at 436. And in *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28 (1st Cir. 2007), the First Circuit upheld Maine's face-to-face wine sales requirement, noting its even application: "In the absence of any explicit (i.e., facial) discrimination, the plaintiffs must persuade us that Maine's evenhanded requirement that all wine purchases be made face to face camouflages some more sinister reality: that its practical effect is invidiously discriminatory," which Plaintiffs failed to do. *Id.* at 36 ("This is a burden that litigants in analogous cases ordinarily have failed to carry.").

Black Star Farms, *Jelovsek,* and *Cherry Hill Vineyard* all followed *Granholm* to *uphold* regulations imposing an evenhanded face-to-face purchase requirement. *Black Star Farms*, 600 F.3d at 1235; *Jelovsek*, 545 F.3d at 436; *Cherry Hill Vineyard*, 505 F.3d at 39. Other courts have had little difficulty enforcing this type of regulatory approach. *See Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2d Cir. 2009) (approving requirement that out-of-state alcohol be sold to New York consumers through licensed in-state retailers); *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 815 (5th Cir. 2010) (approving Texas

licensure and in-state presence requirements); *Baude v. Heath*, 538 F.3d 608, 611 (7th Cir. 2008).

Granholm's progeny are squarely at odds with the District Court's application of the case. Licensure and face-to-face transaction requirements for goods that minors and others cannot lawfully possess—like alcohol or ammunition—do not facially discriminate against out-of-state businesses. To the contrary, such restrictions are lawful when, as here, they subject in-state and out-of-state companies to the same burdens. *See Cherry Hill Vineyard*, 505 F.3d. at 35 (unlike the laws "rigged to favor in-state" producers in *Granholm*, laws "outlaw[ing] any and all direct shipping of" the product are neutral and nondiscriminatory).

b. Nationwide Biweekly *Did Not Deal With Face-to-Face Transactions*

The district court also drew a mistaken analogy to *Nationwide Biweekly* to conclude that Proposition 63 facially discriminated against out-of-state businesses. PI at 100-103. In *Nationwide Biweekly*, this Court held that a mortgage refinancing or "prorating" service was likely to succeed in its attempt to enjoin a California regulation requiring proraters to either incorporate in California or to create a subsidiary incorporated in California. 873 F.3d at 724.

But the economic regulation of mortgage services in *Nationwide Biweekly* and Proposition 63's safety regulation of ammunition sales differ in legally significant ways. First, *Nationwide Biweekly* did not involve a face-to-face transaction requirement, since incorporation can be done remotely. The facts of that case therefore render it inapposite here. Instead, the cases upholding even-handed state requirements that purchasers appear in-person to obtain a dangerous or age-restricted item should have controlled the district court's analysis. Second, an in-state incorporation requirement carries burdensome legal and tax implications absent from the mere requirement that an out-of-state firm either establish brick-and-mortar residence to comply with state regulations or sell through an intermediary. *See* Cal. Corp. Code §§ 102 et. seq.

Third, and finally, because of the nature of the services being sold in *Nationwide Biweekly*, there was no avenue left to the plaintiff for commerce within California *except* incorporation or creation of a subsidiary. *See* 873 F.3d at 736–37. The law at issue here is different: out-of-state sellers unwilling to establish residence may continue to do business as before provided they (just like in-state online or mail-order sellers) deliver their goods through an in-state licensee who can conduct an in-person background check. Cal. Penal Code § 30312(b) ("ammunition may be purchased or acquired over the Internet or through other means of remote ordering if a licensed ammunition vendor initially receives the

ammunition"); Cal. Code Regs. tit. 11, § 4263 (procedures for licensed vendors to process third party sales). Out-of-state vendors are availing themselves of this option and have even compiled lists of California vendors that will accept ammunition orders. *See California Ammo Shipping*, Target Sports USA, https://www.targetsportsusa.com/t-california-ammo-shipping-2018.aspx (a San Diego zip code yielded 20 options for California dealers who would accept orders).[4]

The district court therefore erred in concluding that, as in *Nationwide Biweekly*, "Proposition 63 [] requires any ammunition seller that wants to engage in business with California customers to become a resident." ER 102. It does not. Rather, it allows an out-of-state seller *to transact through a licensed California dealer* or in the alternative become a licensed brick-and-mortar vendor ammunition in California, precisely the same options it affords to in-state sellers. Cal. Penal Code § 30312(b) (applying rules to "ammunition . . . purchased or acquired over the Internet or [] other means of remote ordering" without differentiating based on state of origin); Cal. Code Regs. tit. 11, § 4263 (noting that licensed vendors

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[4] See also *Purchasing Ammo*, SurplusAmmo.com, https://www.surplusammo.com/pages/before-you-order/purchasing-ammo.html; *California Buyers Guide*, Palmetto State Armory, https://palmettostatearmory.com/help-center/california-ammo-buying-guide.html.

"process[] the sale of ammunition between two private parties" and saying nothing about such parties' domiciles).

A "distinction drawn based on a firm's business model . . . does not constitute facial discrimination." *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 400 (9th Cir. 2015). Proposition 63's ammunition regulations hinge on a distinction between two business models—in-store sales and direct-to-consumer delivery—with divergent public safety implications. *See* Proposition 63,[5] Section 2.7 (noting problem of "violent felon[s] or dangerously mentally ill person[s]" having unfettered access to ammunition absent an effective background-check regime), Section 3.3 (stating purpose of "ensur[ing] that those who buy ammunition in California—just like those who buy firearms—are subject to background checks"); ER 879 (Notice of Proposed Rulemaking explained goal of "minimiz[ing] the likelihood of a dangerous prohibited individual taking possession of ammunition").

Nationwide Biweekly did not deal with a legitimate and border-blind classification based on divergent business models with a differing impact on public safety. It, thus, should not control the outcome here. Indeed, the law at issue

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[5] Original text available at http://downloads.capta.org/leg/BallotMeasures/Prop63_FullText.pdf.

Nationwide Biweekly blocked all commerce from out-of-state entities and thus facially discriminated. 873 F.3d at 724, 736-737. Proposition 63 imposes no such absolute blockages, leaving methods for out-of-state businesses to engage in commerce that are indistinguishable from those applicable to California businesses. Cal. Penal Code § 30312(b); Cal. Code Regs. tit. 11, § 4263. Akin to the laws upheld in *Black Star Farms*, *Jelovsek*, and *Cherry Hill Vineyard*, and unlike in *Nationwide Biweekly*, Proposition 63's directives are facially non-discriminatory laws that apply to in-state and out-of-state businesses in kind.[6]

2. *Courts Have Repeatedly Upheld Product Safety-Related Sales Regulations That, like California's Ammunition Laws, Are Facially Nondiscriminatory*

The district court also seemed to suggest that Proposition 63 was facially discriminatory because the Act's face-to-face and card-check requirements would *in practice* limit licensed commerce to California brick-and-mortar operations. *See, e.g.*, ER 99-100. In fact out-of-state companies are selling ammunition to California customers through in-state intermediaries. *See supra* p. 15 & n.4. But

[6] It is well-established that licensure regimes do not in and of themselves raise Dormant Commerce Clause problems. *See Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 396 (9th Cir. 1995) (collecting cases "upholding the constitutionality of regulations requiring interstate businesses to obtain state permits").

in any event, no evidence was developed on this point below, and properly so—because "in practice" is not the test for *facial* discrimination.

As the Second Circuit explained in upholding an in-person transaction requirement for the sale of cigarettes: a "district court err[s] in finding 'facial' discrimination based upon its interpretation of the Statute's effects." *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 210 (2d Cir. 2003). Facial discrimination and "effects" are two different tests. *Id.* (" . . . the district court conducted a 'facial' analysis by examining the Statute's effects, thereby conflating two of the three inquiries . . ."). One looks to the statutory language, and the other looks to whether the plaintiff came forward with substantial evidence of a discriminatory effect. *Int'l Franchise Ass'n*, 803 F.3d at 405. A finding of facial discrimination must rest on the face of the statute itself, and not its effects. If a prohibition on direct shipments is evenhanded, as the Second Circuit explained, the law does not discriminate—even if it makes it "unworkable and uneconomic for [plaintiffs] to establish brick-and-mortar outlets in New York." *Brown & Williamson*, 320 F.3d at 213 (quoting *Exxon*, 437 U.S. at 127). Here, since Proposition 63 prohibits direct ammunition shipments for everyone, and provides an evenhanded opportunity for out-of-state sellers to establish brick-and-mortar outlets or process sales through California licensees, there is no facial discrimination.

To hold otherwise would call into question a broad range of in-person transaction requirements designed to further public health and consumer safety, or to protect buyers or sellers from fraud and scams. In addition to affirming such requirements for alcohol and tobacco purchases, courts have previously upheld a variety of other in-person transaction and physical-presence requirements, finding no facial discrimination and applying a deferential standard. *See, e.g.*, *Consigned Sales Co. v. Sanders*, 543 F. Supp. 230, 232-233 (W.D. Okla. 1982) (fireworks); *Churchill Downs Inc. v. Trout*, 589 F. App'x 233, 237 (5th Cir. 2014) (racetrack gambling); *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 448-449, 451-453 (9th Cir. 2019) (vacation rentals), *cert. denied* (U.S. May 18, 2020); *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1041-1044 (10th Cir. 2009) (legal services). And, indeed, a New York federal district court similarly upheld, without applying strict scrutiny, a face-to-face requirement for ammunition sales. *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 990 F. Supp. 2d 349, 380 (W.D.N.Y. 2013), *rev'd in part on other grounds*, 804 F.3d 242 (2d Cir. 2015). Following *Brown*, the Court explained the law "does not create a 'monopoly' for New York dealers, as Plaintiffs argue; instead (and again like *Brown*) it eliminates the direct sale of ammunition to New Yorkers no matter the seller's place of business." *Id.*

The Western District of New York got it right. For purposes of the Dormant Commerce Clause, a state can freely choose to eliminate a pathway of sale for a

good or service—whether it is alcohol, fireworks, vacation rentals, the provision of legal services, or ammunition—so long as it does so as it does to all purveyors of the good or service alike. It would be perplexing if the Dormant Commerce Clause allowed states to regulate the points of sale for such a wide variety of goods but precluded states from imposing like regulations as to ammunition.[7] And indeed, affirming the district court's Dormant Commerce Clause ruling in this case would cast doubt on *all* face-to-face transaction requirements in every other context as well. Such a sweeping expansion of the doctrine could leave states unable to pass laws that effectively keep weapons, tobacco, and alcohol out of the hands of minors and other prohibited possessors, guard customers from rental scams and attorney fraud, or combat any number of dangerous or deceptive online sales practices that may arise in the future.

C. The Laws Do Not Discriminate in Effect

Where facial discrimination and protectionist purpose are absent, as they are here, only "substantial evidence" of discriminatory effect allows a court to apply strict scrutiny. *Int'l Franchise Ass'n*, 803 F.3d at 405-406; *Black Star Farms*, 600

[7] The Second Amendment does not disturb this conclusion. As this Court has held, nothing in recent Supreme Court Second Amendment jurisprudence has disturbed its conclusion that "laws imposing conditions and qualifications on the commercial sale of firearms are presumptively lawful." *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) (en banc).

F.3d at 1231-32. Plaintiffs offered nowhere near "substantial" evidence showing that Proposition 63 is discriminatory in effect. Instead, Plaintiffs offered two declarations from out-of-state sellers claiming they experienced declines in shipments to California, and suggesting, anecdotally, that the new laws led in-state vendors to refuse transactions. *See* ER 1551; ER 1554.[8]

These anecdotes do not add up to substantial evidence of discrimination against out-of-state vendors. Nor do they address the pertinent legal question: whether *general* interstate commerce is burdened because *comparable* in- and out-of-state interests are classified differently. The Dormant Commerce Clause does not protect "particular interstate firms, from prohibitive or burdensome regulations." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978). This means that, "[e]ven if [a plaintiff] had made a competent showing of [their] own economic loss attributable to the law, [they] would still need to show a

[8] Despite offering multiple declarations from both California ammunition purchasers and California licensed sellers pleading the legislation's burdens, plaintiffs placed nothing in the record concerning a Californian's attempt to arrange interstate shipments under the new regime. There is therefore no evidence that brick-and-mortar vendors are using their intermediary position to deter Californians from ordering shipments from out-of-state vendors, let alone the additionally necessary evidence that deterred out-of-state transactions have led to in-state gains. Nothing in the record suggests that California online sellers whose business model used to involve direct shipments to buyers have somehow avoided the business losses plaintiffs claim. Such evidence would seem necessary to show there has been a discriminatory effect upon out-of-state vendors that exceeds the impact on California licensees.

discriminatory effect upon interstate commerce in [the] services as a whole." *Kleinsmith*, 571 F.3d at 1042. In other words, here, plaintiffs would need to show that their alleged losses are evidence of *discrimination* between "substantially similar entities" in California and outside of California—those selling ammunition in online or other non-face-to-face transactions. *See Gen. Motors Corp.*, 519 U.S. at 298–99; *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 163 (5th Cir. 2007).

Plaintiffs' declarations fall far short of doing that. Even if the declarations could be construed to show a decline in shipments from out-of-state ammunition sellers to California buyers, the declarants' losses of ammunition shipments could be matched or exceeded by a decline in online-originating ammunition sales made by *California* vendors to *California* customers. It is likely that, as a result of Proposition 63, online sales of ammunition in California *as a whole* are down, but that does not a Dormant Commerce Clause claim make. Plaintiffs should have been required to show that "local economic actors are favored by the legislation" such that California "alter[ed] the competitive balance" in the market. *Kleinsmith*, 571 F.3d at 1071. But plaintiffs' evidence fails to show that out-of-state sellers are experiencing disproportionate losses as compared to California online vendors whose business model of direct shipment to California buyers is now identically foreclosed. Besides not amounting to "substantial evidence," the plaintiffs' declarations present insufficient data to establish discrimination.

Depriving some businesses of "a preferred method" of commerce for non-protectionist reasons does not automatically equate to giving others "a competitive advantage." *N. Am. Meat Inst. v. Becerra*, 420 F. Supp. 3d 1014, 1027 (C.D. Cal. 2019); *see also Optometrists I*, 567 F.3d at 527 ("a state may prevent businesses with certain structures or methods of operation from participating in a retail market without violating the dormant Commerce Clause"). Instead, *substantial evidence* must be presented of that competitive advantage to prove a Dormant Commerce Clause violation. This means the district court erred not only by not holding Plaintiffs to their high evidentiary burden, but also by not recognizing what the evidence needed to show. The District Court, for example, suggested that "how a state disfavors its resident online sellers compared to [] resident brick-and-mortar sellers is of no moment for Commerce Clause analysis." ER 102-103. As a legal matter, the opposite is true. It matters a great deal, as it suggests where a court should be looking for comparison purposes. "Because states may legitimately distinguish between business structures in a retail market, a business entity's structure is a material characteristic for determining if entities are similarly situated." *Optometrists I*, 567 F.3d at 527.[9]

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[9] The district court's theory may have been, and Plaintiffs may try to argue, that out-of-state sellers and California brick-and-mortar sellers are similarly situated simply insofar as they compete for ammunition sales. First, this argument fails because it forgets that "competing in the same market is not sufficient to

Here, the District Court should have compared "its [California's] online sellers" to non-resident online sellers to see if there was substantial evidence of a discriminatory effect. The law by its terms treats those groups the same, and plaintiffs failed to introduce *any* evidence—let alone *substantial* evidence—of an actual discriminatory effect between them.

D. Application of Strict Scrutiny Threatens A Broad Class of Legitimate Public Safety Measures

As this Court has advised, Dormant Commerce Clause analysis "must reflect the fact that [s]tate autonomy in the regulation of economic and social affairs is central to our system because of the recognized role states have as laboratories" for democratic lawmaking. *Rocky Mountain Farmers Union v. Corey* ("*RMFU II*"), 913 F.3d 940, 955 (9th Cir. 2019); *see also Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (noting that "the Framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy").

With no showing of facial discrimination, and Plaintiffs having failed to show discrimination in effect, the district court erred in concluding that strict

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conclude that entities are similarly situated." *Optometrists I*, 567 F.3d at 527. But second, even if the proper comparator were all in-state ammunition sellers, there is no discrimination. All sellers must conduct (or arrange with a third party to conduct) in-person background checks, and must incur costs to provide that service. The fact that some in-state sellers have already incurred those costs of regulatory compliance, and out-of-sellers now have to do so, does not constitute discrimination.

scrutiny applies. The court's erroneous conflation of all ammunition sellers as similarly situated regardless of sales method is especially dangerous given the stakes here. It would mean that states are now unable to impose in-person background check and transaction requirements—long constitutionally unproblematic, *see supra* p. 19—unless they can prove that no "reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available." *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). This will chill "grave[ly] need[ed] . . . state experimentation," *RMFU I*, 730 F.3d at 1097, in this area. It suggests the Internet has foreclosed all such restrictions, even where non-protectionist and directed at legitimate (here, indeed, dire) public safety problems. This seriously threatens state attempts to raise internal standards for those goods and services it is dangerous to sell online and whose commercial regulation is not preempted. *See RMFU II*, 913 F.3d at 956; *see also* 18 U.S.C. § 927 (noting no field preemption by federal firearms and ammunition laws).

The district court's flawed approach—measuring discriminatory effect against all California vendors rather than similarly situated vendors, and then declaring Proposition 63 a "per se" violation of the Commerce Clause that it must "strike … down without further inquiry," ER at 104 (internal quotation marks and citation omitted))—would effectively extinguish a State's power to require face-to-face transactions for all buyer-restricted hazardous goods and high-risk services,

including not only guns and ammunition but alcohol, fireworks, gambling, and cigarettes. *See supra* p. 19. Nothing in the Dormant Commerce Clause handcuffs such legitimate exercise of the police power. Nothing suggests this Court should create such a deep Circuit conflict as to this general Dormant Commerce Clause rule.

II. CALIFORNIA'S AMMUNITION LAWS PASS THE *PIKE* TEST

The District Court did not limit its analysis to strict scrutiny and facial discrimination. It also held that Proposition 63 failed the *Pike* test. ER 104-106. This, too, was error.

As a threshold matter, the District Court seems to have confused the *Pike* test with heightened constitutional scrutiny by describing an allegedly available nondiscriminatory scheme whereby California could require out-of-state dealers to comply with its laws and transact through its background-check system. *See* ER 105-106; *see also* ER 106 (citing the strict scrutiny test from *Maine v. Taylor*, 477 U.S. 131, 138 (1986)). But the *Pike* test is solely about comparing burdens and benefits, not about considering whether less burdensome alternatives are available (as under intermediate or strict constitutional scrutiny).

At the threshold, the district court should have considered whether California's ammunition background check law poses a substantial burden, not

whether there is any conceivable easier alternative. This level of burden must be established *before* the court may move on to find that in light of it the asserted benefits "are all illusory or illegitimate." *Rosenblatt*, 940 F.3d at 452.[10] Further, as this Court has explained, invalidation under *Pike* is limited to laws whose alleged "substantial burden" involves "interfere[nce] with activity that is inherently national or that requires a uniform system of regulation." *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1147 (9th Cir. 2015). There neither has been nor could be a credible showing that the ammunition market qualifies as "inherently national." *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 952 (9th Cir. 2013) (noting that a colorable *Pike* "substantial burden" must be to something like the interstate transportation system or a national professional sports league).

The district court's *Pike* analysis was thus structurally flawed. Even assuming, however, that the court properly considered the ammunition market to be inherently national, its analysis must be rejected. First, the district court did not identify or balance specific burdens and benefits—it simply concluded that "[t]he

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[10] At this *Pike* stage, the district court's suggestion that the California regime will fail to achieve its goals is irrelevant. *See, e.g.*, *Nat'l Ass'n of Optometrists & Opticians v. Harris* ("*Optometrists II*"), 682 F.3d 1144, 1156 (9th Cir. 2012) (". . . it would be inappropriate for us to determine the constitutionality of the challenged laws based on our assessment of the benefits of those laws and the State's wisdom in adopting them").

isolationist burdens on interstate commerce . . . far outweigh whatever benefit it is designed to achieve," ER 106—after suggesting an allegedly more workable alternative system. But the existence of conceivable alternatives is not the *Pike* question. Second, as with the discrimination-in-effect analysis, the district court's assumption that Proposition 63 poses an impermissible "isolationist burden" under *Pike* is incorrect. Such burdens are gauged based on "the interstate *flow of goods,* not on where the retailers were incorporated [or] what the out-of-state market shares of sales and profits were." *Optometrists II*, 682 F.3d at 1153 (emphasis in original). Thus, the district court could not appropriately consider the supposedly disadvantaged position of out-of-state sellers for *Pike* purposes, without a showing that the interstate flow of goods has shifted to in-state sales by similarly situated businesses—that is, to the California online sellers whose business model of direct shipment to buyers was now similarly foreclosed.

As to benefits, it is possible the District Court made no findings because it meant to rely upon its critique of the law's effectiveness in the prior Second Amendment analysis. *See, e.g.*, ER 29-33 (predicting the regulations will fail because of criminal evasion). That would be error even if the critique were legitimate: the *Pike* test is akin to rational basis review, not any heightened level of scrutiny, and the purported benefits are weighed against incidental burdens on *commerce*, not alleged burdens to separate constitutional rights. That is why under

Pike, as long as an enactment addresses a "legitimate matter[] of local concern," it is sustained unless its purported benefits "are not just minimal, but illusory or nonexistent." *Yakima Valley Mem'l Hosp. v. Washington State Dep't of Health*, 731 F.3d 843, 849 (9th Cir. 2013).

Properly framed, the *Pike* test must go California's way. Proposition 63 addresses a legitimate matter of concern: California offered uncontroverted evidence that the law blocked over 100 ammunition transactions by prohibited persons in the months after it became effective. *See* ER 978; ER 955. Given the potential harms involved, this is surely more than the state was required to prove; 100 blocked transactions is by definition not "illusory or nonexistent" benefit. Following the preliminary injunction ruling, the State announced that hundreds more additional unlawful transactions had been blocked. The ammunition background checks law also helped state law enforcement identify and apprehend people in possession of untraceable "ghost guns" and illegal assault weapons. *See* Press Release, "Attorney General Becerra Announces Recent Firearms Operations, Seizure of Ghost Guns, Assault Weapons, Drugs, and Tens of Thousands of Rounds of Ammunition" (May 19, 2020), https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-recent-firearms-operations-seizure-ghost-guns. The law's benefits are thus ongoing and substantial, and more than outweigh the unproven burdens to a market that is insufficiently national in nature

for such burdens to be cognizable. *See Ass'n des Eleveurs de Canards et d'Oies du Quebec*, 729 F.3d at 952.

CONCLUSION

In its "recognized role" as a laboratory for democratic lawmaking, California enjoys wide "autonomy in the regulation of economic and social affairs." *RMFU II*, 913 F.3d at 955. Upholding the district court's preliminary injunction ruling and expansive, precedent-defying interpretation of the Dormant Commerce Clause would gravely undermine this autonomy. The district court's reasoning jeopardizes states' ability to adopt public safety restrictions on the internet sales of weapons, tobacco, and alcohol, as well as consumer protection laws regulating the provision of services susceptible to online fraud. And this ruling would make Californians less safe from gun violence by letting "no questions asked" online ammunition sales continue unchecked. For these reasons and those argued above, the Court should reverse the district court's holding that plaintiffs are likely to succeed on their Dormant Commerce Clause challenge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2020, I electronically filed the foregoing document with Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system which will send a Notification of Electronic Filing to all parties in this case.

Dated: June 19, 2020

/s/ Stephen B. Kinnaird
Stephen B. Kinnaird

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