**No.**

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

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In re: Junior Sports Magazines Inc., Raymond Brown, California Youth Shooting Sports Association, Inc., Redlands California Youth Clay Shooting Sports, Inc., California Rifle & Pistol Association, Incorporated, The CRPA Foundation, Gun Owners of California, and Second Amendment Foundation,

*Plaintiffs-Petitioners*,

v.

United States District Court for the Central District of California,

*Respondent,*

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

*Real Parties in Interest.*

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From the United States District Court for the Central District of California
Case No. 2:22-cv-04663-CAS-JC

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# EMERGENCY PETITION FOR WRIT OF MANDAMUS
**Emergency Motion Under Circuit Rule 27-3**
**Relief Required by August 26, 2022**

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August 24, 2022

## CIRCUIT RULE 27-3 CERTIFICATE

1. Pursuant to Circuit Rule 27-3, I certify that, through the emergency motion that accompanies this certificate, Petitioners Junior Sports Magazines Inc., Raymond Brown, California Youth Shooting Sports Association, Inc., Redlands California Youth Clay Shooting Sports, Inc., California Rifle & Pistol Association, Incorporated, The CRPA Foundation, Gun Owners of California, and Second Amendment Foundation (collectively, "Petitioners") ask this Court to grant a writ of mandamus, ordering the district court to immediately conduct a hearing and rule on their pending motion for preliminary injunction or decide the matter on the parties' moving and opposing papers already filed.

2. Relief is needed no later than August 26, 2022. If the Court requires more time to consider this petition, however, effective relief could be had if the district court either (1) agrees to hear Petitioners' motion for preliminary injunction on a day not usually reserved for law and motion, or (2) elects to decide the matter without hearing on the parties' papers already on file.

3. If relief is not granted within the requested time, Petitioners will suffer ongoing and irreparable harm—i.e., the loss of their fundamental First and Fourteenth Amendment rights—until the district court elects to hear and rule on Petitioners' pending motion for preliminary injunction. The district court only hears motions at 10:00 am on each Monday of the month. And because of the upcoming Labor Day holiday, if the district court does not hear the pending motion on August 29, 2022 (i.e., the next available hearing date), it could not normally be heard until at least September 12, 2022, violating Petitioners' First and Fourteenth Amendment rights for at least another three weeks, having already been subject to the state's unconstitutional enforcement of AB 2571 since June 30, 2022.

4. Pursuant to Circuit Rule 27-3(c)(iii), I certify that I could not have filed

this motion earlier because Petitioners exhausted several avenues in the district court to have their preliminary injunction motion decided—first on an expedited basis, then under the normal timeline for such motions—before opting to seek this extraordinary relief. The district court indefinitely removed the motion hearing from calendar on August 19, 2022, and Petitioners immediately began preparing this petition and emergency motion—working through the weekend to have it filed in this Court as soon as reasonably possible.

5. Pursuant to Circuit Rule 27-3(c)(v), I certify that I requested similar relief in the district court. Instead of expeditiously hearing and ruling on the motion for preliminary injunction as requested in Petitioners' motion for preliminary injunction, in their ex parte motion for an order shortening time to hear their motion for preliminary injunction, and in their ex parte motion for leave to file a supplemental brief, the Court denied the request to shorten time, granted the state's request for an extension to file their opposition, then removed the August 22, 2022, hearing from the calendar altogether, setting a case management conference for September 12, 2022, not to hear the motion but to schedule a new date to hear it.

6. Pursuant to Circuit Rule 27-3(a)(1), I certify that I directed my paralegal to notify Ninth Circuit court staff via voicemail about the filing of this motion. She did so on August 24, 2022.

7. Pursuant to Circuit Rule 27-3(a)(iv), I certify that I notified counsel for the Real Party in Interest, Attorney General Rob Bonta, by email on August 24, 2022, of Petitioners' intent to file this petition and emergency motion. He stated that the Attorney General opposes this petition and emergency motion. The petition and motion are being served on the Attorney General simultaneously with filing via this Court's CM/ECF system. The district court will be served at CAS_Chambers@cacd.uscourts.gov.

8. The name and contact information for each counsel/party is:

**Plaintiffs-Petitioners Junior Sports Magazines Inc., Raymond Brown, California Youth Shooting Sports Association, Inc., Redlands California Youth Clay Shooting Sports, Inc., California Rifle & Pistol Association, Incorporated, The CRPA Foundation, and Gun Owners of California**

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

Date: August 24, 2022

**MICHEL & ASSOCIATES, P.C.**

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

## CORPORATE DISCLOSURE STATEMENT

Under Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Petitioners Junior Sports Magazines Inc., Raymond Brown, California Youth Shooting Sports Association, Inc., Redlands California Youth Clay Shooting Sports, Inc., California Rifle & Pistol Association, Incorporated, The CRPA Foundation, Gun Owners of California, and Second Amendment Foundation make these disclosures:

Junior Sports Magazine, Inc., certifies that it has no parent corporation and no publicly held corporation owns more than ten percent of its stock.

California Youth Shooting Sports Association, Inc., certifies that it is a nonprofit organization. It has no parent corporation and no stock, so no publicly held corporation owns more than ten percent of its stock.

Redlands California Youth Clay Shooting Sports, Inc., certifies that it is a nonprofit organization. It has no parent corporation and no stock, so no publicly held corporation owns more than ten percent of its stock.

California Rifle and Pistol Association, Incorporated, certifies that it is a nonprofit membership organization. It has no parent corporation and no stock, so no publicly held corporation owns more than ten percent of its stock.

The CRPA Foundation certifies that it is a nonprofit organization. It has no parent corporation and no stock, so no publicly held corporation owns more than ten percent of its stock.

Gun Owners of California, Inc., certifies that it is a nonprofit organization. It has no parent corporation and no stock, so no publicly held corporation owns more than ten percent of its stock.

Second Amendment Foundation certifies that it is a nonprofit organization. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Date: August 24, 2022

**MICHEL & ASSOCIATES, P.C.**

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

Date: August 24, 2022

**Law Offices of Donald Kilmer, APC**

s/ Donald Kilmer
Donald E. J. Kilmer, Jr.
*Attorneys for Plaintiff-Petitioner Second Amendment Foundation*

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## INTRODUCTION

This case presents issues of first impression relating to the suppression and prior restraint of Petitioners' freedom of speech, press, and association rights by the state of California. Assembly Bill 2571 (AB 2571), which added section 22949.80 to the California Business & Professions Code,[1] makes it unlawful for any "firearm industry members" to "advertise, market, or arrange for placement of an advertising or marketing communication concerning any firearm-related product in a manner that is designed, intended, or reasonably appears to be attractive to minors." Cal. Bus. & Prof. Code § 22949.80(a)(1). The law authorizes the Attorney General or any district attorney, city attorney, county counsel, or *private person* claiming to have been harmed by any such "advertising or marketing," to bring a civil action against the speaker. *Id.* § 22949.80(e)(1), (e)(3)-(5).

The law is fraught with vague definitions, overbroad classifications, and ambiguities. And, on its face, it is both a content-based and viewpoint-based restraint on the speech, press, and associational rights of citizens participating in lawful activities relating to the exercise of Second Amendments rights. No doubt, minors may be subject to more onerous regulations relating to the actual sale and possession of firearms. But they (and their parents) are no less entitled to receive information about a fundamental right that they will eventually exercise as adults (and may lawfully exercise as minors), than they are on any other controversial topic. *See generally Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Brown v. Entm't Merchs. Assn,* 564 U.S. 786 (2022). AB 2571 clearly strips the rights of adults to engage in firearm-related speech and the rights of both adults and minors to hear it.

[1] Throughout this petition, Petitioners refer to California Business & Professions Code section 22949.80 as AB 2571.

Petitioners thus sued in the Central District of California, challenging the law under the First and Fourteenth Amendments. And because AB 2571 went into immediate effect upon adoption, Petitioners filed a motion for preliminary injunction asking the court to halt the enforcement of the law, preserving the status quo while the case proceeds. The court denied Petitioners' request to hear the motion on shortened notice and granted the State's request for an extension to file their opposition. Then, citing rumored amendments to AB 2571 that had not even been introduced in the Legislature at that time, the court removed the hearing from the calendar indefinitely and scheduled a case management conference for September 12, 2022, to discuss setting a new date to hear Petitioners' preliminary injunction motion.

The substantive merits of the matter (which involve, among other things, violations of First Amendment rights) must be determined as soon as possible to allow already-scheduled events to proceed and to allow protected speech to be lawfully distributed by its authors and read by its consumers without fear of substantial civil liability under AB 2571. The district court committed plain error by indefinitely postponing consideration of Petitioners' preliminary injunction motion—indefinitely subjecting Petitioners to the irreparable loss of their constitutional rights.

Petitioners thus ask this Court to issue a writ of mandamus directing the district court to either (1) decide Petitioners' motion for preliminary injunction now, without a hearing, on the briefs already filed by the parties, based on the law as written at the time of the decision, or (2) hold a hearing on the motion and issue its opinion at once.

## STATEMENT OF JURISDICTION

The Court has jurisdiction to consider this petition under 28 U.S.C.S. § 1651 and Rule 21 of the Federal Rules of Appellate Procedure.

## STATEMENT OF RELIEF SOUGHT

Petitioners request a writ of mandamus, ordering the United States District

Court for the Central District of California in the matter of *Junior Sports Magazines Inc. v. Bonta*, Case No. 2:22-cv-04663-CAS (JCx) to either: (1) forthwith conduct a hearing and rule on Petitioners' pending motion for preliminary injunction, or (2) decide the fully briefed matter on the parties' papers already filed.

## STATEMENT OF ISSUE PRESENTED

Whether the district court clearly erred by indefinitely postponing consideration of Petitioners' motion for preliminary injunction in light of yet-to-be-adopted amendments to AB 2571, while the State's continued enforcement of AB 2571, as it exists today, patently violates Petitioners' First Amendment rights to free speech, association, and assembly, as well as their Fourteenth Amendment right to equal protection under the law.

## STANDARD OF REVIEW

AB 2571 was adopted as an urgency measure and took immediate effect on June 30, 2022. Exs. Supp. Petit. for Writ of Mand. Petit. ("Petit. Exs.") Vol. 2, Ex. D at 51. The law is *already* abridging the fundamental speech, assembly and press rights of Petitioners. *See* Petit. Exs. Vol. 2, Ex. C at 25-40; Petit. Exs. Vol. 4, Ex. S at 613-31. This Court should thus "conduct an independent, de novo examination of the facts," *Daily Herald Co. v. Munro,* 838 F.2d 380, 383 (9th Cir. 1988), to "ensure the appropriate appellate protection of the First Amendment values." *See Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 670 (9th Cir. 1990).

## BACKGROUND

### I. STATEMENT OF FACTS

#### A. California's Assembly Bill 2571 (Bauer-Kahan)

AB 2571 makes it unlawful for "firearm industry members" to "advertise, market, or arrange for placement of an advertising or marketing communication

concerning any firearm-related product in a manner that is designed, intended, or reasonably appears to be attractive to minors." Cal. Bus. & Prof. Code § 22949.80(a)(1). Because the law creates new statutory definitions for otherwise common words and phrases, making this a case of first impression under a California law that impacts First (and by implication Second) Amendment rights, it is important to discuss each definition to better understand the full breadth of California's ban on speech.

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

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

> composed of minors and not intended for a more general audience composed of adults.

*Id.* § 22949.80(a)(2).

Second, AB 2571 does not bar all speakers from "advertising and marketing" "firearm-related products." Rather, section 22949.80(c)(4) targets only "firearm industry members," which the law defines in two ways:

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

Finally, the law defines "marketing or advertising" as "mak[ing] a communication [in exchange for compensation] to one or more individuals, or to arrang[ing] for the dissemination to the public of a communication, about a product *or service* the primary purpose of which is to encourage recipients of the communication to purchase *or use* the product or service." *Id.* § 22949.80(c)(6) (emphasis added). The law is thus not limited to traditional advertising of "firearm-related products." Rather, it applies to any communication made in exchange for monetary compensation that "concern[s] a firearm-related product" and is "designed, intended or reasonably

appears to be attractive to minors" if the communication is made by a "firearm industry member" for the purpose of encouraging "recipients of the communication to purchase or use the product or service." *Id.* § 22949.80(a)(1), (c)(6).

AB 2571 thus restricts honest commercial speech promoting lawful activities and services, including, but not limited to, traditional advertisements for youth shooting competitions and recreational events, firearm-safety classes, shooting skills courses, and youth shooting programs and organizations. But it also bans a broad category of pure speech, including, *but not limited to:*

a. All (or nearly all) aspects of youth hunting and shooting magazines and the websites, social media, and other communications promoting those magazines;

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

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

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

e. Signage, flyers, posters, discussions, merchandise, and/or other communications generally depicting minors enjoying or otherwise encouraging minors to enjoy their Second Amendment right to possess and use lawful firearms for lawful purposes at youth recreational and

competitive shooting events, as well as communications promoting such events.

Any person who violates AB 2571 is "liable for a civil penalty not to exceed twenty-five thousand dollars ($25,000) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction." *Id.* § 22949.80(e)(1). AB 2571 also authorizes any "person harmed by a violation of this section" to "commence a civil action to recover their actual damages," as well as attorney's fees and costs. *Id.* § 22949.80(e)(3)-(5).

### B. The Impact of AB 2571 on Petitioners' Protected Conduct

AB 2571 was adopted by the Legislature and signed by the governor on June 30, 2022. Adopted as an "urgency measure,"[2] the law went into effect immediately upon adoption—instead of January 1, 2023, when non-urgency legislation adopted during the 2022 legislative session will become law. Petit. Exs. Vol. 2, Ex. D at 51. The Legislature's choice to make AB 2571 immediately enforceable, sent industry members scrambling to comply with the law's nearly indecipherable restrictions on their speech. Petitioners and other "firearm industry members" throughout the country immediately postponed or canceled youth shooting events and hunter's safety courses, scrubbed advertising for such events from their websites, and terminated magazine subscriptions for minors living in California. *See, e.g.*, Petit. Exs. Vol. 2, Ex. C at 22; Petit. Exs. Vol. 3, Ex. F at ¶¶ 16-17; Petit. Exs. Vol. 4, Ex. J at ¶¶ 8, 15.

Petitioners are a group of "firearm industry members," as defined by AB 2571, that regularly "advertise, market, or arrange for placement of an advertising or marketing communication concerning … firearm-related product[s] in a manner that

[2] In other words, the State itself considers these issues urgent and of the utmost importance. On that, Petitioners agree.

is designed, intended, or [might] reasonably appear[] to be attractive to minors." Petit. Exs. Vol. 2, Ex. E at ¶¶ 2-8; Petit. Exs. Vol. 3, Ex. F at ¶¶ 2-3, 9-15, Ex. H at ¶¶ 2-9, Ex. I at ¶¶ 6-15; Petit. Exs. Vol. 4, Ex. J at ¶¶ 2-15, Ex. K at ¶¶ 2-8, Ex. L at ¶¶ 2-6.

Petitioner Junior Sports Magazines publishes and distributes the online and print magazine *Junior Shooters*, a shooting sports magazine that promotes, encourages, and advocates for the lawful use of firearms—especially by young people. Petit. Exs. Vol. 3, Ex. F at ¶ 3. The magazine is specifically for young people, and it is dedicated to promoting the participation and achievements of youth in the shooting sports. *Id.* *Junior Shooters* regularly includes articles, images, and other depictions of minors using "firearm-related products," as well as endorsements of specific products appropriate for young and beginner shooters. *Id.* ¶¶ 10-13. *Junior Shooters* also includes articles and advertisements promoting youth shooting competitions and recreational events, youth shooting organizations, firearm-safety courses, and shooting skills courses, as well as traditional advertisements for "firearm-related products." *Id.* ¶¶ 11, 14-15. Because AB 2571 bans all of this otherwise protected speech, the website for *Junior Shooters* now warns visitors that youth in California may not access the site and future editions will not be available for distribution in California. *Id.* ¶¶ 16-17. Indeed, *Junior Shooters* is no longer available for purchase in or shipment to minors in California.

Petitioner Raymond Brown is a firearms trainer who regularly engages in the planning, advertising, and facilitation of firearm education courses specifically for youth or where youth are extremely likely to be in attendance and where youth lawfully use, handle, observe, or otherwise possess firearms, ammunition, and firearm parts. Petit. Exs. Vol. 4, Ex. T. His firearm training and coaching sessions focus on various aspects of competitive and recreational shooting, including discussion and recommendations about "firearm-related products" that are most suitable for young and beginner shooters. *Id.*

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

Petitioner California Rifle & Pistol Association, a nonprofit member organization, not only promotes, sponsors, and hosts youth programs like those described above, Petit. Exs. Vol. 3, Ex. I at ¶¶ 2, 5, 8, 12-13, it is also rolling out paid memberships for youth and uses CRPA-branded merchandise and giveaways to promote the organization and solicit memberships and financial support, as well as to spread pro-gun messages. *Id.* ¶¶ 14-15. CRPA also publishes a bi-monthly magazine that has included and, but for the enforcement of AB 2571, would continue to include cartoons (including political cartoons), as well as articles and depictions of the use of "firearm-related products" by minors. *Id.* ¶¶ 9-11. These publications also include advertisements promoting youth shooting competitions, youth recreational shooting and outdoors events, and firearm safety courses, as well as traditional advertisements for "firearm-related products." *Id.*

Petitioner CRPA Foundation is a 501(c)(3) nonprofit organization that not only supports, promotes, sponsors, and participates in programs for youth like those described above, it also solicits funds for and provides scholarships to individual youth shooters and youth shooting teams, publishes a variety of informational bulletins, brochures, and articles promoting the possession and use of firearms, and (in response to countless requests from CRPA and CRPAF supporters) is launching

an activity book about the shooting sports for children. Petit. Exs. Vol. 3, Ex. H at ¶¶ 1-9.

Petitioner Gun Owners of California is a nonprofit organization that regularly supports youth shooting teams and individual talented young shooters through sponsorships and other support. Through this work, GOC engages with minors through advertisements, sponsorships, and other communications promoting events where "firearm-related products" are used. Petit. Exs. Vol. 4, Ex. L at ¶ 4.

Petitioner Second Amendment Foundation, a nonprofit member organization, sponsors and supports an initiative called 2AGaming, an outreach program to help grow the Second Amendment community. Petit. Exs. Vol. 3, Ex. I at ¶¶ 2, 10-14. 2AGaming functions by reaching out to people who play video games, especially people who play games that focus on guns. *Id.* ¶ 11. This outreach necessarily includes minors and young adults who play such games. *Id.* SAF also produces and distributes branded merchandise to promote itself, increase paid memberships, encourage participation in shooting sports, and spread its Second Amendment message. *Id.* ¶ 15.

## II. PROCEDURAL HISTORY

Petitioners sued in the district court on July 8, 2022, challenging AB 2571 as violative of their First Amendment rights to speech, association, and assembly, as well as their Fourteenth Amendment right to equal protection under the law. Petit. Exs. Vol. 2, Ex. C at 25-40; Petit. Exs. Vol. 4, Ex. S at 613-31. Soon after, Petitioners filed a motion for a preliminary injunction and sought an order shortening time for a hearing, in part, because the law had an immediate effect on their rights. Petit. Exs. Vol. 2, Ex. B; Petit. Exs. Vol. 4, Exs. O-P. The lower court denied the request to shorten time and instead gave the State an extra week to file their opposition, while maintaining the normally noticed hearing date of August 22, 2022. Petit. Exs. Vol. 4,

Ex. Q. The parties filed timely opposition and reply briefs pursuant to the court's order. Petit. Exs. Vol. 4, Exs. R-S.

Two days after Petitioners filed their reply on August 15, 2022, counsel for the State notified Petitioners that the Legislature was considering amending AB 2571. Petit. Exs. Vol. 4., Ex. U at 647, 649, 651, 654-55; *see also id.* at 657-61 (draft of proposed amendment to AB 2571). Because of that development, the State asked Petitioners to agree to postpone the August 22, 2022, hearing. *Id.* at 651-52. Petitioners rejected any postponement without the consideration of a stipulated order making AB 2571 unenforceable in the interim. *Id.* at 649, 652. The parties reached an impasse. Petitioners then notified the district court of this development, providing a copy of the email from the Attorney General's office and the draft language of the proposed amendment to AB 2571. *Id.* Petitioners also requested leave to file a short memorandum to address the postponement issue. *Id.*

The State never did request a continuance, but the district court—sua sponte—postponed the preliminary injunction hearing indefinitely, setting a status conference for September 12, 2022, to "discuss[] a new hearing date for plaintiffs' motion for preliminary injunction." Petit. Exs. Vol. 1, Ex. A at 4. In a remarkably candid finding it its minute order, the district court held that the "proposed amendments, if enacted, might clarify claimed ambiguities in AB 2571. Because these amendments may be material to the pending motion for preliminary injunction, the Court vacates the hearing set for August 22, 2022." *Id.* The court also granted Petitioners' motion to file their supplemental memorandum. *Id.*

## LEGAL STANDARD

This Court determines the "availability of writ relief" by reference to five factors first set out in *Bauman v. United States District Court* (*Union Oil Co.*), 557 F.2d 650

(9th Cir. 1977).[3] Known as the *Bauman* factors, they are:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. … (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

*Id.* at 654-55.

"Satisfaction of all five factors is not required" before mandamus may issue. *Admiral Ins. Co. v. U.S. Dist. Ct. for D. Ariz.* (*King Ranch Properties*), 881 F.2d 1486, 1492 (9th Cir. 1989). Instead, "[t]he factors serve as guidelines, a point of departure for our analysis of the propriety of mandamus relief." "[R]arely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable." *Bauman*, 557 F.2d at 655; *see also Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for D. Mont.* (*Kapsner*), 408 F.3d 1142, 1146 (9th Cir. 2005) (same). Indeed, "the considerations are cumulative and proper disposition will often require a balancing of conflicting indicators." *Bauman*, 557 F.2d at 655.

Application of the *Bauman* factors is especially flexible in cases, like this one, implicating the "duty of appellate courts to exercise supervisory control of the district courts in order to insure proper judicial administration." *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1301, 1304-05 (9th Cir. 1982). When a case involves that duty, "concepts relat[ed] to the traditional use of mandamus are not necessarily applicable … or, at the least, are applied differently." *Id.* This approach is appropriate because "in supervisory mandamus cases involving questions of law of major

[3] Petitioners note that *Gonzales v. Schriro*, 2013 U.S. Dist. LEXIS 92033 (July 1, 2013) takes the position that *Bauman* has been reported as overruled. *Cf. Dan Farr Prods. v. United States Dist. Ct. for S.D. Cal.* (*S.D. Comic Convention*), 874 F.3d 590, 597 n.9. (9th Cir. 2017).

importance to the [ ] district courts, the purpose of [the Court's] review . . . is to provide necessary guidance to the district courts and to assist them in their efforts to ensure that the judicial system operates in an orderly and efficient manner." *Id.* at 1307.

This approach applies even to the third factor—whether district court's order is clearly erroneous. While a lack of clear error ordinarily defeats a petition for writ of mandamus, in supervisory mandamus cases like this one, this Court has "no legitimate reason for refraining from exercising [its] supervisory authority where we can determine that an error has been made but cannot, for whatever reason, characterize the error as 'clearly' erroneous." *In re Cement Antitrust Litig.*, 688 F.2d at 1307.

Applying the *Bauman* factors, Petitioners meet the requirements for mandamus. This Court should thus grant this petition.

## REASONS FOR GRANTING THE PETITION

This Court should issue a writ of mandamus because the district court erred when it issued an order indefinitely postponing consideration of Petitioners' fully briefed motion for preliminary injunction—a motion that raises important questions related to the suppression of speech, press, and association. The district court's error has caused, and continues to cause, irreparable harm to Petitioners (and to those countless other Americans who wish to engage in the speech AB 2571 bans).

On the other hand, directing the lower court to consider Petitioners' motion now will cause no harm to the State or to the district court. Petitioners' motion has been fully briefed since August 15, 2022, and the parties and the court were prepared to hear the motion on Monday, August 22, 2022, before the court removed the matter from its calendar one business day before the schedule hearing. No judicial or party resources are conserved by refusing to hear Petitioners' fully briefed motion until sometime after the September 12, 2022, status conference. Any potential change to

the law that *might* impact Petitioners' claims should be considered if and when it is adopted. But the rumor of such an amendment is not enough to indefinitely withhold judgment on Petitioners' motion for preliminary injunction, thus judicially ratifying the irreparable harm inherent in AB 2571's violation of Petitioners' First Amendment rights.

Thus, this Court should issue a writ directing the district court to forthwith hold a hearing and rule on Petitioners' pending motion for preliminary injunction or to decide the fully briefed matter on the parties' papers already filed.

## I. PETITIONERS HAVE NO OTHER ADEQUATE REMEDY AT LAW

Petitioners satisfy the first *Bauman* factor because the Court's scheduling order, Petit. Exs. Vol. 1, Ex. A, indefinitely postponing the hearing on Petitioners' fully briefed motion for preliminary injunction is not itself an appealable order. *Medhekar v. U.S. Dist. Ct. for N.D. Cal.*, 99 F.3d 325, 326 (9th Cir. 1996) ("Petitioners have satisfied the first Bauman factor, in that the district court's published opinion denying their motion to stay the disclosure requirements under the Act is not immediately appealable."). Nor are there any grounds for Petitioners to file a motion for reconsideration of this postponement. There are no new facts that have not already been submitted to the district court on the urgency of this matter. And any "new" law that might impact the proceedings is, at best, inchoate right now. Thus, mandamus is the only avenue for review of the district court's sua sponte order taking Petitioners' motion for preliminary injunction off calendar.

To be clear, Petitioners do not ask this Court to issue a writ on the substantive law now, though the analysis is straightforward. AB 2571 violates the First Amendment in so many conceivable ways it would make a great hypothetical on a constitutional law exam. *See generally* Petit. Exs. Vol. 2, Ex. C. Rather, Petitioners ask this Court to direct the lower court to timely review their motion for preliminary

injunction because that is what the law of the First Amendment demands, even when the speech is about the Second Amendment.

## II. PETITIONERS' ARE PREJUDICED BY THE TRIAL COURT'S DELAY AND THAT IRREPARABLE HARM CANNOT BE CORRECTED ON APPEAL

"The second *Bauman* factor … is also satisfied" because "the damage resulting from a prior restraint—even a prior restraint of the shortest duration—is extraordinarily grave." *Columbia Broad. Sys., Inc. v. U.S. Dist. Ct. for C.D. Cal.*, 729 F.2d 1174, 1177 (9th Cir. 1983). Indeed, the deprivation of constitutional rights "unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); 11A Charles Alan Wright et al., Federal Practice and Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). In the First Amendment context, such harm is particularly acute. Indeed, both the Ninth Circuit and the Supreme Court have long held that "[t]he loss of First Amendment freedoms, *for even minimal periods of time*, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373 (emphasis added).

As a result of the adoption and immediate enforcement of AB 2571, Petitioners (and businesses across the country) have begun to curtail these activities, as well as all manner of speech that might fall under AB 2571's broad ban—fearing the draconian penalties that attach. *See* Petit. Exs. Vol. 2, Ex. E at ¶¶ 8-10; Petit. Exs. Vol. 3, Ex. F at ¶¶16-19, Ex. H at ¶ 10; Petit. Exs. Vol. 4, Ex. J at ¶¶ 7-8, 11, 15, Ex. L at ¶ 6; Ex. K at ¶¶ 9-11; *see also* Petit. Exs. Vol. 4, Ex. M at ¶¶ 8-12, Ex. N at ¶¶ 4-10 (for further discussion of the speech and expressive conduct Petitioners engage in and how AB 2571 has impacted their ability to engage in that protected speech and conduct).

## III. THE DISTRICT COURT'S ORDER IS CLEAR ERROR

To be sure, district courts have the inherent authority to manage their calendars and control the proceedings before them. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). But their discretion to do so is not unlimited. To the contrary, the court must exercise its discretion soundly, and its authority must be tempered by the courts' fundamental obligation to ensure that litigation proceeds expeditiously. *See* Fed. R. Civ. P. 1 ("[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."). That obligation is all the more acute when the matter concerns important questions of constitutional law and where postponing adjudication will necessarily result in the loss of First Amendment freedoms.

Here, the failure of the district court to adjudicate Petitioners' First Amendment rights, once that court had determined that the law is ambiguous today, is plain error. Indeed, when a district court postpones hearing and ruling on a motion for a preliminary injunction that raises First Amendment concerns, it necessarily endorses the restriction on speech raised by that pending motion. Judicial officers may not—through delay or a failure to act—trench on the constitutional rights of the parties before them. "[C]onstitutional rights … can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes…." *Cooper v. Aaron*, 358 U.S. 1, 16-17 (1958). *See also Shelley v. Kraemer*, 334 U.S. 1 (1948).

As explained above, AB 2571 was signed into law as an urgency measure by the Governor of California and took effect on June 30, 2022. Petit. Exs. Vol. 2, Ex. D at 51. It is *already* abridging, through the chilling effect of self-censorship, the speech, press, and association rights of Petitioners and countless other Americans similarly situated. Petit. Exs. Vol. 2, Ex. C at 25-40; Petit. Exs. Vol. 4, Ex. S at 613-31. If the district court's finding is that AB 2571 is ambiguous today, Petit. Exs. Vol. 1, Ex. A, it

should adjudicate the law as it exists today and enter the appropriate orders based on the facts and arguments before it. The onus should then shift to the State to seek to modify or dissolve the preliminary injunction if ever the Legislature passes the rumored amendments to AB 2571. For "[i]t is clear … that First Amendment interests were either threatened or in fact being impaired at the time relief was sought. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 374 (citing *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971)).

## IV. THE DISTRICT COURT'S ORDER RAISES IMPORTANT ISSUES OF FIRST IMPRESSION

The remaining *Bauman* factors, as well as other considerations discussed below, also favor granting this petition. As to factors four and five, this Court has recognized that "[i]t is unlikely that both of these factors would be present where a petition for mandamus presents a single issue . . . ." *In re Cement Antitrust Litig.*, 688 F.2d at 1304. Indeed, "it is difficult to envision a case that involves both an oft-repeated error as well as an issue of first impression." *Valley Broad. Co. v. United States Dist. Ct. for D. Nev.*, 798 F.2d 1289, 1292 n.3 (9th Cir. 1986). This case implicates the fifth *Bauman* factor—i.e., whether the "district court's order raises new and important problems, or issues of law of first impression."

That the district court's delay raises "important problems" is evidenced by the impact it has on Petitioners' First Amendment claims. That the delay raises issues of "first impression" is evidenced by the breathtaking scope of AB 2571's enforcement provisions. The operative law today (whether the amendments pass or not) allows civil enforcement of this new category of unprotected speech (speech about firearm-related products that is "attractive to minors"—whatever that means) by anybody in California with a filing fee and the will to disrupt commerce in firearms. This is an invitation to vexatious litigation designed to drive firms that supply the means of

exercising Second Amendment rights into bankruptcy defending frivolous lawsuits in every courthouse throughout California.

Whether the State's gambit to amend AB 2571 was instigated after this lawsuit was filed on July 8, 2022, or before that filing, these inchoate amendments to AB 2571 appear to address aspects of the law's overbroad, vague, and ambiguous language—deficiencies that Petitioners noted in their pleadings and moving papers. Petit. Exs. Vol. 2, Ex. C at 19-25, 28, 33-38. This suggests that the State's proposal to amend AB 2571 is being made in response to this lawsuit. There are at least four reasons that postponement of the process to rule on the motion for preliminary injunction, based on these proposed amendments, undermines First Amendment values.

First, the effort to amend AB 2571 constitutes an admission by a party opponent under Federal Rule of Evidence 801(d)(2). The logical inference of that admission is itself an acknowledgement that AB 2571, in its current form, is fatally overbroad and thus is likely unconstitutional. Furthermore, these proposed "changes" to the law are not effective now, may never be effective, and should not impact the district court's analysis, except to the extent that they evidence the State's recognition that the law is unconstitutional. For if the potential amendments are truly non-substantive and have nothing to do with this lawsuit, then why did the State ask Petitioners to agree to postpone the hearing? On the other hand, if AB 2571 is flawed and requires amendment, then Petitioners' pending motion for a preliminary injunction should be granted now—in part—based on the admission by the defendants that the current law is overbroad.

Second, this proposed "fix-it" bill, whether it is expressly intended to address the constitutional deficiencies of AB 2571 or is only intended to create additional exceptions to the legislative policy, will make this a more narrowly tailored law.[4] This

[4] Narrow*er* perhaps, but not nearly narrow enough. For example, if AB 2571 merely defined firearm marketing to minors, and rather than banned that speech

concession by the State—that the law is overbroad as it exists today—is enough to suspend enforcement of AB 2571. Any (further) delay in addressing the ongoing irreparable harms that Petitioners have been suffering under this ill-conceived law is a continuing violation of the First Amendment. And recall, these harms were invited upon Petitioners because the State chose to pass AB 2571 as an urgency measure, taking effect right after adoption. Petit. Exs. Vol. 2, Ex. D at 51. This kept Petitioners from availing themselves of the normal procedures for seeking preliminary relief before the law would take effect on January 1, 2023. Thus also, California is hoisted on its own petard because it passed AB 2571 as an urgency measure, stripping tens or hundreds of thousands of people of their free speech rights immediately upon the law taking effect on June 30, 2022, and must now pass urgency clean-up legislation.

Third, even if the proposed amendments are introduced, the defendants' lawyers did not (because they cannot) give any assurance that the Legislature will pass the proposed bill, what the final language of the bill will be, or whether the Governor will even sign the bill into law once it gets to his desk. Petitioners should not be expected to accept a delay in seeking redress or spend time and limited resources to address any new legal issues raised by a bill that is not yet (and may never become) law, nor should Petitioners be forced to live with their rights restricted while the State goes through its legislative process.

Fourth, and perhaps most importantly, even the rumored amendments do not cure the constitutional deficiencies of this law. The new law, if ever passed, and depending on its actual language, still unconstitutionally censors both pure speech and commercial speech because: (1) it is still both a content based and viewpoint based

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outright, required a warning label directing viewers and readers of any marketing material to California's laws restricting firearms sales to adults, and penalizing possession and sales to minors without parental consent, the law might be less offensive to the First Amendment, though probably still unconstitutional with its whole-cloth creation of an entirely new category of prohibited speech.

regulation of speech, (2) it is still overbroad, vague, and ambiguous, (3) the law is not narrowly tailored or substantially related to the public safety policy it purports to address, and (4) it is still an animus-based law discriminating against people exercising a fundamental right that violates the First and Fourteenth Amendments. *See generally* Petit. Exs. Vol. 2, Ex. C.

Lastly, this "fix-it" legislation undermines the State's position in the district court. If the current language of AB 2571 requires amendment to appease certain interest groups or to cure (some of) its constitutional defects, then the State should have filed a non-opposition to Petitioners' motion for preliminary injunction (or stipulated to its entry) and then filed notice of the impending change to the law in their answer. But the State didn't do that. If they had, the lawsuit could have been temporarily stayed after entry of the injunction (whether by court order or stipulation) pending any changes in the law that actually comply with the Constitution. That way the status quo—a full and robust protection of First Amendment values—could be maintained while the Legislature and Governor take their time to try to salvage this intrinsically unconstitutional policy of censoring free speech about Second Amendment rights. They will no doubt fail because their premise that censoring speech that is neither obscene nor advocates imminent lawless conduct is unconstitutional. But they can try, and while they try, the First Amendment must continue to provide Petitioners' with the safe harbor required under our Constitution.

If the right to keep and bear arms is not a "second-class right" to be "singled out for special—and specially unfavorable—treatment," *McDonald v. City of Chicago*, 561 U.S. 742, 778-78, 780 (2010), then neither can exercise of the First Amendment rights to freely speak about and associate around the exercise of Second Amendment rights be afforded second-class status. "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: 'If the

legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery…." *Cooper*, 358 U.S. at 18-19 (quoting *United States v. Peters*, 9 U.S. 115, 136, 5 Cranch 115, 136 (1809)). The text from *Peters* quoted in *Cooper* continues:

> [A]nd the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the union, and in averting consequences so fatal to themselves.

*Peters*, 9 U.S. at 136.

## CONCLUSION

For the reasons set forth above, this Court should grant Petitioners' petition for writ of mandate and enter an order directing the district court to either (1) decide the case now, without a hearing, on the briefs already filed by the parties, based on the law as written at the time of the decision, or (2) forthwith hold a hearing in this matter and issue its opinion with all deliberate speed.

Date: August 24, 2022

**MICHEL & ASSOCIATES, P.C.**

s/ Anna M. Barvir

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

Date: August 24, 2022

**Law Offices of Donald Kilmer, APC**

s/ Donald Kilmer

Donald E. J. Kilmer, Jr.
*Attorneys for Plaintiff-Petitioner Second Amendment Foundation*

## NOTICE OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs-Petitioners Junior Sports Magazines Inc., Raymond Brown, California Youth Shooting Sports Association, Inc., Redlands California Youth Clay Shooting Sports, Inc., California Rifle & Pistol Association, Incorporated, The CRPA Foundation, Gun Owners of California, and Second Amendment Foundation state they are unaware of any related cases pending before this Court.

Petitioners are, however, aware that a case challenging the constitutionality of AB 2571 on similar grounds was filed in the United States District Court for the Eastern District of California on August 5, 2022. That case is *So Cal Top Guns, Inc. v. Bonta*, Case No. 2:22-at-819.

Date: August 24, 2022

**MICHEL & ASSOCIATES, P.C.**

s/ Anna M. Barvir

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## CERTIFICATE OF COMPLIANCE

1. This document complies with the length requirements of Fed. R. App. P. 21(d) and 9th Cir. R. 21-2(c), excluding the parts of the document exempted by Fed. R. App. P. 21(a)(2)(C) and Fed. R. App. P. 32(f), because it does not exceed 30 pages.

2. This document complies with the form requirements of Fed. R. App. P. 32(c)(2), the typeface requirements of Fed. R. App. P. 32(a)(5), and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond type.

Date: August 24, 2022

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## CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2022, I electronically filed the foregoing **EMERGENCY PETITION FOR WRIT OF MANDAMUS** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I further certify that the foregoing was served on the following counsel of record and District Court Judge by electronic mail and/or facsimile.

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Date: August 24, 2022

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