No. 24-598

In the Supreme Court of the United States

B&L PRODUCTIONS, INC., D/B/A CROSSROADS OF THE WEST, ET AL.,

Petitioners,

v.

GAVIN NEWSOM, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF CALIFORNIA AND IN HIS PERSONAL CAPACITY, ET AL.,

Respondents.

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

PETITIONERS' REPLY BRIEF

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March 31, 2025

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REPLY BRIEF

California's hostility to the Second Amendment is well-pleaded and well-documented. This Court has dealt with recalcitrant governors and state legislatures in response to its decisions before, and California is certainly not alone. *See Wilson v. Hawaii*, 145 S.Ct. 18 (2025) (Thomas, Alito, & Gorsuch, JJ., respecting denial of certiorari). Arkansas's rejection of this Court's Fourteenth Amendment decisions, while of greater magnitude, is a close analog to California's treatment of this Court's Second Amendment decisions.

In 1958, a federal district court approved a desegregation plan for Little Rock public schools. A state court countermanded that order. The governor ordered the Arkansas National Guard to enforce the state court's order, but President Eisenhower ordered the National Guard to stand down. When the situation escalated, the President sent the 101st Airborne to escort (and protect) the Little Rock Nine. Amid the chaos, the district court agreed to delay the desegregation plan for 30 months. That delay conflicted with this Court's order that public schools desegregate with "all deliberate speed." *Brown v. Bd. of Educ.*, 349 U.S. 294, 300-01 (1955). The circuit court reversed the delay order. *Cooper v. Aaron*, 358 U.S. 1, 13 (1958). This Court affirmed the circuit court's faithful applications of its precedent and then issued a unanimous opinion explaining why the Supremacy Clause applies to this Court's Decisions. *Id.* at 14-15, 17-19.

California's defiance of this Court's Second Amendment jurisprudence mirrors Arkansas's hostility to the Fourteenth. In this case the state has found a sympathetic circuit court that is willing to undermine its own precedent and upend settled circuit law about commercial speech rights related to

firearm sales on government land. *Nordyke v. Santa Clara Cnty.*, 110 F.3d 707 (9th Cir. 1997).

In *Cooper*, two conflicting orders were issued by the same district court; one appeared to respect this Court's precedents, while the other defied them. Here, the conflicting orders are from separate district courts. The Southern District dismissed the case, entering judgment for the government under Rule 12(b)(6). The Central District issued a preliminary injunction faithful to this Court's precedents—after taking evidence of historic legal analogs through supplemental briefing and a contested hearing. Unlike the circuit court in *Cooper*, the circuit court here sided with the reactionary state government in defiance of this Court's controlling decisions.

First, the Ninth Circuit created a whole new category of speech subject to state censorship while simultaneously contradicting circuit precedents. Whether an "acceptance" is commercial speech or not, such a finding is not a license to create—by judicial fiat—a new category of speech outside the protection of the First Amendment. *See United States v. Stevens*, 559 U.S. 460, 472 (2010).

Second, the court applied a judicial interest-balancing test to a new infringement of a previously recognized right in the Ninth Circuit (to engage in lawful firearm transactions on state property). That circuit's Second Amendment "meaningful constraint" test contradicts this Court's holdings in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).[1]

[1] Respondents concede that neither California nor the lower courts in this matter were applying the "meaningful constraint" test as part of an Article III standing analysis. Cal.BIO.14. That means the decision below is a clear act of defiance against the *Bruen* decision.

When the petition for certiorari was filed, there was no post-*Bruen* circuit split over whether otherwise lawful commerce in arms is protected by the Second Amendment. But the Fifth Circuit supplied one on January 30, 2025. *Reese v. BATF*, 127 F.4th 583, 590 (5th Cir. 2025).

Finally, without evidence from the Southern District case, and contradicting the evidence in the Central District case, the Ninth Circuit offended equal protection and First Amendment doctrines forbidding the government from granting "the use of a forum to people whose views it finds acceptable but deny[ing] use to those wishing to express less favored or more controversial views." *Police Dep't of the City of Chic. v. Mosley*, 408 U.S. 92, 95-96 (1972).

The Court should grant the writ because this case:

> [R]aises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution.

Cooper, 358 U.S. at 4. The Southern District and the Ninth Court failed to faithfully apply "this Court's considered interpretation" of the Constitution. The case for granting certiorari is compelling. The governments' briefs in opposition do not show otherwise.[2] At best, the State merely cheerleads the Ninth Circuit's flawed opinion.

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[2] The San Diego District Attorney merely filed a two-paragraph joinder, adding no arguments of her own. This reply

I. The Court Should Grant Certiorari to Resolve the First Amendment Question

Is commercial speech some lesser form of speech? This is the heart of the controversy over whether "there is [any] 'philosophical or historical basis for asserting that "commercial" speech is of "lower value" than "noncommercial" speech,'" or "whether it is even possible to draw a coherent distinction between commercial and noncommercial speech." *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J., concurring) (quoting *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996)).

After the Petition was filed, this Court reaffirmed that First Amendment scrutiny applies to "'cases involving governmental regulation of conduct that has an expressive element,' and to 'some statutes which, although directed at activity with no expressive component, impose a disproportionate burden upon those engaged in protected First Amendment activities.'" *TikTok Inc. v. Garland*, -- U.S. --, 145 S.Ct. 57, 65 (2025) (quoting *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 703-04 (1986)). This case involves both types of regulation.

Gun shows are assemblies where people "engage in commerce related to, and necessary for, the lawful and regulated exercise of Second Amendment rights." App.19a. Retailers display and sell firearms, ammunition, and related products, while patrons engage in firearms-related speech and assemble to enjoy the fellowship of like-minded people. App.20a. Gun shows are events for both noncommercial expressive conduct and the commercially expressive conduct necessary to engage in Second Amendment commerce. While the challenged laws do not *explicitly* "ban" the noncommercial expression that takes place at gun shows; by outlawing firearm and ammunition

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responds solely to California's brief in Opposition for State Respondents ("Cal.BIO").

sales—the financial underpinning of gun shows—California effectively bans the events on state-owned property altogether. It is immaterial whether gun shows are themselves expressive, or they have expressive components. What is material is that the challenged statutes "impose a disproportionate burden upon those engaged in protected First Amendment activities." *TikTok*, 145 S.Ct. at 65.

The *TikTok* decision held that facially content-neutral regulations must be "treated as a content-based regulation of speech if [they] 'cannot be justified without reference to the content of the regulated speech' or [that] was 'adopted by the government because of disagreement with the message the speech conveys.'" *Id.* at 67 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015)) (internal quotations omitted).

California adopted the challenged laws because of its disagreement with the message that gun shows convey. That message is that the Second Amendment is an ordinary right, the people exercising that right are engaged in constitutionally virtuous conduct, and the products necessary to exercise that right are a societal good. The complaints in both cases alleged that California's anti-gun animus inspired legislators to target otherwise lawful gun shows for banishment from state-owned venues open to the public for commercial and expressive activity. C.D.2-ER-277-81; S.D.2-ER-158-66.

Respondents try to cast doubt on Petitioners' well-plead allegations that B&L's gun shows are safe and legal, glibly announcing that the state legislature has "found evidence of firearm-related crimes at gun shows." Cal.BIO.1. They even allege a four-year period where "law enforcement officials recorded '14 crimes at the Crossroads of the West Gun Shows.'" Cal.BIO.1. Respondents have never produced evidence of these "crimes," nor do they reveal any

details of the alleged incidents in its brief. They certainly don't bother to show whether those 14 incidents were "firearm-related" or run-of-the-mill crimes that might occur at any large event at a fairground. Nor have these claims been subjected to discovery and cross-examination. Aside from being rank hearsay, the allegations were already disposed of by the Central District judge's findings[3] and are completely outside the record in the Southern District case.

Under current doctrine, the correct response to California's disembodied statistics is this one made to the dissent in *Bruen:*

> [T]he dissent chronicles, in painstaking detail, evidence of crimes committed by individuals with firearms. (Citation omitted.) The dissent invokes all of these statistics presumably to justify granting States greater leeway in restricting firearm ownership and use. But, as Members of the Court have already explained, "[t]he right to keep and bear arms ... is not the only constitutional right that has controversial public safety implications."

Bruen, 597 U.S. at 17, n.3 (quoting *McDonald*, 561 U.S. at 783 (plurality op.)).

If the state opens its commercial venues to car shows, home shows, and concerts and their consummated commercial activities, it must likewise open them for gun shows and address any alleged

[3] As part of his *Central Hudson* analysis, Judge Holcomb found that California's interest in preventing illegal gun sales was substantial, but "[b]y banning gun sales only at the Fairgrounds," it "achieves nothing in the way of curtailing the overall possession of guns in the County," let alone illegal firearms. App.38a.

crimes by enforcing existing laws. *See* Cal. Penal Code §§ 27200-27245. Otherwise, California is engaged in viewpoint censorship—a more obvious and egregious form of content-based censorship. *Reed*, 576 U.S. at 168. And content-based regulation of even commercial speech is subject to heightened scrutiny. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976).

II. The Court Should Grant Certiorari to Resolve the Second Amendment Question

Petitioners contend that the Ninth Circuit's decision "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Pet.10 (quoting Sup. Ct. R. 10(a)).

After the Court directed the government to respond to the petition, the Fifth Circuit provided a post-*Bruen* circuit split from the Ninth Circuit's holding that the Second Amendment's plain text does not cover the sale and purchase of arms. *Compare Reese*, 127 F.4th at 590 (rejecting the government's argument that the plain text of the Second Amendment does not "'establish[] a right' to purchase firearms 'at any time from any source'"), *with* App.93a ("The plain text of the Second Amendment directly protects one thing—the right to 'keep and bear' firearms…. On its face, that language says nothing about commerce, let alone firearm sales on state property."). The Fifth Circuit implicitly rejected the Ninth Circuit's "meaningful constraint" analysis in favor of an analysis consistent with *Bruen*:

> The threshold textual question *is not whether the laws and regulations impose reasonable* or historically grounded *limitations*, but whether the Second Amendment *"covers"* the conduct (commercial purchases) to begin with.

> Because constitutional rights impliedly protect corollary acts necessary to their exercise, we hold that it does.

Reese, 127 F.4th at 590.

The District Court for the District of Columbia followed *Reese*, finding that the "essential precursors" of an explicitly protected right are implicitly protected, *Sedita v. United States*, No. 24-cv-00900, 2025 WL 387962, at *8 (D.D.C Feb. 4, 2025) (citing *Biden v. Nebraska*, 600 U.S. 477, 511 (2023) (Barret, J., concurring), "*buying a firearm falls within the* ***plain text*** *of the Second Amendment*," *id.* (citing *Reese*, 127 F.4th at 588-90; *Gazzola v. Hochul*, 88 F.4th 186, 197 (2d Cir. 2023); *Drummond v. Robinson Twp.*, 9 F.4th 217, 227 (3d Cir. 2021), *abrogated on other grounds by Bruen*, 597 U.S. at 19; *Ezell v. Chicago*, 651 F.3d 684, 704 (7th Cir. 2011))(emphasis added). The *Sedita* court also discussed (and rejected) the Ninth Circuit's "meaningful constraint" test:

> The Ninth Circuit pays lip-service to textualism when it insists on a highly literal understanding of "keep and bear arms" stripped of pertinent context. But then it adds an extra-textual flair by permitting plaintiffs to satisfy *Bruen* Step One [only] if they can show that "a regulation 'meaningfully constrain[s]' the right to keep and bear arms for the purpose of self-defense.

Id. at *9-10 (citations omitted).

Reese, *Sedita*, and the court below all cite *Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc), for the obviously correct proposition that "the core Second Amendment right to keep and bear arms for self-defense wouldn't mean much without the ability to acquire arms." App.10a;

Reese, 127 F.4th at 590; *Sedita*, 2025 WL 387962, at *8. But what the Ninth Circuit got wrong in citing *Teixeira*, the Fifth Circuit got right. *Reese* ignored the patently anti-*Bruen* holding of *Teixeira* that governments may still infringe on the Second Amendment, as long as the infringement is not "meaningful." As *Sedita* recognized, the Second Amendment is not only implicated when it "has been infringed to a threshold degree (which presumably lies in the discretion of judges)." *Id.* In relying on that part of *Teixeira*, the Ninth Circuit's "approach looks suspiciously like the pre-*Bruen* interest-balancing analysis that has since been condemned." *Id.* (citing *Bruen*, 597 U.S. at 19).

Teixeira is a walking contradiction doing more harm than good. For example, it is cited at least 20 times—scattered throughout the majority, the concurrence, and the dissent—in a recent Ninth Circuit case striking down Hawaiian gun control laws. *See Yukutake v. Lopez*, No. 21-16756, 2025 WL 815429 (9th Cir. Mar. 14, 2025). *Teixeira* is so ambiguous that it gets cited in adversarial opinions trying to achieve conflicting results. It should be overruled.

The Ninth Circuit's chaotic (and defiant) Second Amendment jurisprudence begs out for intervention by this Court. Sup. Ct. R. 10(a), (c). That chaos has escalated to an internecine intra-circuit conflict, most recently in *Duncan v. Bonta*, No. 23-55805, 2025 WL 867583 (9th Cir. Mar. 20, 2025) (en banc). The case generated three dissents on the merits, including a first-of-its-kind video dissent. *Id.* at *49. The *Duncan* dissenters didn't mince words: "[T]he majority didn't just butcher the Second Amendment **and give a judicial middle finger to the Supreme Court**. It also spurned statutory procedure for en banc proceedings." *Id.* at *85-86 (Nelson, J., dissenting)(emphasis added).

This Court could take a minimalist approach and grant review, summarily vacate the decision below, and explicitly overrule *Teixeira*, and then remand this matter with instructions to follow *Bruen* without further embellishments. The Central District decision below should be affirmed on all theories adjudicated by that court.

III. Respondents Waived Any Response to Petitioners' Equal Protection Claim

This petition raises three distinct questions of constitutional law. Pet.i-ii. Respondents, while appearing to merge the Equal Protection question into the First Amendment question, have understated and—like the decision below—misunderstood the equal protection theory of this case. By limiting their opposition to the two questions they put forth, Cal.BIO.i, Respondents have waived any response to Petitioners' actual equal protection question: whether differential treatment, based on legislative animus, of even non-expressive commercial conduct at gun shows violates the Fourteenth Amendment.

The unequal treatment arising out of legislative animus of commercial activities by state actors is the core of Petitioners' third question. It was explicitly spelled out in section IV of the petition. The California Legislature made no secret of its disdain for commercial activity associated with Second Amendment rights and the people who exercise those rights openly at gun shows, while California also opened its state fairgrounds to host other commercial activities, including the consummated sales of goods and services, by other subcultures, including car shows, home shows, and state fairs. App.45a-46a (citing Am.Compl. ¶¶ 131, 137-138, 141-144, 152).

Respondents did not identify any perceived misstatements of facts or law in the Petition. Sup. Ct. R. 15. They even highlight the Ninth Circuit's finding that Petitioners' characterization that California

sought the curtailment of Second Amendment commerce and no other commerce was largely true. *See* Cal.BIO.5 (citing App.93a (finding that "the authors of the Challenged Statutes [being] primarily concerned with [Second Amendment] commerce, rather than speech"). What the Ninth Circuit (and the Southern District) failed to grasp is that under Rule 12(b)(6), Petitioners' allegation of animus as the motivation for the law must be accepted as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

California and the Ninth Circuit may wish to limit the well-plead allegation of legislative animus and unequal treatment solely to a First Amendment analysis that was rendered impotent by a flawed commercial speech ruling. But that is not the law. There were no First Amendment issues at stake in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (laundry), *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (housing), or *Romer v. Evans*, 517 U.S. 620 (1996) (civil rights). The government's animus alone was enough to trigger a valid equal protection claim that was already a borderline bill of attainder. This Court has also applied heightened scrutiny in a case where government animus was directed at those engaged in commerce for goods and services. *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617 (2018).

California has conceded, and thus waived any argument against, the proposition that Petitioners adequately alleged that they were targeted for disfavored treatment out of animus for the "gun culture" and the exercise of Second Amendment rights. The hostility of California's governor and legislature to the Second Amendment, and gun shows in particular, was a well-pleaded fact entitled to a presumption of truth. Pet.12a-13a; Pet.38a-39a.

The Court should grant review to determine whether legislative animus can ever form the basis for

unequal treatment under the law. That was the essence of Petitioners' equal protection claim.

CONCLUSION

For these reasons, this Court should grant the petition.

Respectfully submitted,

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