No. 25-

IN THE

Supreme Court of the United States

ELIZABETH FLYNT,

Petitioner,

v.

ROB BONTA, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state law that discriminates against firms engaged in interstate commerce by forcing firms to choose between being part of the enacting state's intrastate market, or the interstate markets of the other states, but not both violates the dormant Commerce Clause?

PARTIES TO THE PROCEEDING

Petitioner Elizabeth Flynt was the plaintiff below.

Respondents Rob Bonta, in his official capacity as Attorney General of the State of California, Yolanda Morrow, Paula D. Labrie, Eric C. Heins, Edward Yee Cathleen Galgiani, and William Liu, in their official capacities as Commissioners of the California Gambling Control Commission, were the defendants below. Respondents Haig Kelegian, Sr., and Haig T. Kelegian, Jr. were plaintiffs below.

STATEMENT OF RELATED CASES

Flynt v. Bonta, No. 16-cv-02831, U.S. District Court for the Eastern District of California. Judgment entered August 11, 2022.

Flynt v. Bonta, No. 22-16376, U.S. Court of Appeals for the Ninth Circuit. Judgment entered March 14, 2025.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Elizabeth Flynt, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 131 F.4th 918 and is reproduced in Petitioner's Appendix ("Pet. App.") at Pet.App.1a-29a.

The district court's order is reported at 620 F. Supp. 3d 1089 and is reproduced at Pet.App.30a-41a. The district court's prior order is unpublished and is reproduced at Pet. App.42a-54a. It also is available at 2021 U.S. Dist. 7809. The district court's other prior order is published at 466 F. Supp. 3d 1102 and is reproduced at Pet.App.55a-68a.

JURISDICTION

The Ninth Circuit issued its decision on March 14, 2025. This Court granted an unopposed motion to extend the deadline to August 11, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause authorizes Congress "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. Art. I, § 8, cl. 3.

California Business and Professions Code Section 19858 states:

> [A] person shall be deemed unsuitable to hold a state gambling license to own a gambling establishment if the person, or any partner, officer, director, or shareholder of the person, has any financial interest in any business or organization that is engaged in any form of gambling prohibited by Section 330 of the Penal Code, whether within or without this state.

California Business and Professions Code section 19858.5 states:

> [T]he Commission may, pursuant to this chapter, deem an applicant or licensee suitable to hold a state gambling license even if the applicant or licensee has a financial interest in another business that conducts lawful gambling outside the state that, if conducted within California, would be unlawful, provided that an applicant or licensee may not own, either directly or indirectly, more than a 1 percent interest in, or have control of, that business.

INTRODUCTION

Elizabeth Flynt operates two highly reputable cardrooms in the State of California ("California"), among other business ventures. Like all other cardroom operators, Mrs. Flynt applied for and must maintain a California gaming license to operate her cardrooms. Notably, California gaming licenses come with severe (and

unconstitutional) strings attached. First, all applicants and licensees must make the choice of whether to be part of California's intrastate market or the interstate markets of the other states that have authorized gaming, but licensees cannot do both. This requirement is so restrictive that it bars licensees from investing revenue earned outside of California—that has never entered California—in lawful gaming ventures operating entirely outside of California.

Second, licensees are prohibited from receiving investment of any kind from members of the gaming industry who operate in and are licensed by the other states that have authorized gaming. As a result, licensees are cut off from investment from those best suited to invest in their operations—successful and well-regarded members of the gaming industry, including officers and shareholders of publicly-traded gaming companies.

There is no way to square these restrictions—which categorically preclude cross-border investment within the gaming industry—with this Court's dormant Commerce Clause precedent. First, since our Nation's inception, it has been understood that merchants have the right to "have free access to every market in the Nation," *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949); *see also Dennis v. Higgins*, 498 U.S. 439, 448 (1991); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 355 (1977).

Second, this Court has consistently recognized that the dormant Commerce Clause prohibits states from enacting laws that discriminate against interstate commerce, including laws that single out, target, or impose burdens on firms engaged in interstate commerce. *See Hughes v. Oklahoma*, 441 U.S. 332, 336-37 (1979);

Philadelphia v. New Jersey, 437 U.S. 617, 627-29 (1978); *see also South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 173 (2018); *Comptroller of the Treasury of Md. v. Wynne*, 575 U.S. 542, 551 (2015).

This Court's opinion in *Nat'l Pork Prods. Council v. Ross*, 598 U.S. 356 (2023) ("*Pork Producers*") did not disturb these bedrock principles. To the contrary, this Court noted that state laws that "appl[y] solely to interstate firms," like the cardroom restrictions at issue here, are invalid because they "clearly discriminate[] against interstate commerce." *See Pork Prods.*, 598 U.S. at 373 (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 340-41 (1989)). Although a law with this type of discrimination was not before the Court and, in fact, the pork producers conceded the absence of discrimination altogether, this Court's instruction that laws that "appl[y] solely to interstate firms" are discriminatory, *see id.*, should have guided the decision below. Instead, the Ninth Circuit held that challenges to such laws, like Petitioner's challenge to the cardroom restrictions, are not actionable.

The Ninth Circuit's errors warrant this Court's review. The decision below blesses a state law that strips merchants of the right to free access to every market in the Nation, discriminates against firms engaged in interstate commerce, and prevents, on its face, a licensee's ability to participate in lawful economic opportunities in other states with capital that has never entered the enacting state's jurisdiction. No opinion from this Court, including *Pork Producers*, has ever endorsed such a restrictive law.

Additionally, the decision below conflicts with decisions from other Circuits.

Finally, the decision below is in no way cabined to rules affecting cardroom licensees or even the gaming industry at large. Instead, the decision below gives cover to each state to meddle with any industry of its choosing in this manner. It is not hard to imagine how states will exploit this newfound regulatory power to push their policy preferences nationwide, including on hot-button issues like access to abortion-inducing medications and gun control.

This Court should grant the petition and reverse.

STATEMENT OF THE CASE

I. Background

A. Statutory framework

Gaming is a large and highly regulated industry. Forty-seven states, including California, have opened their markets to some form of gaming. *See* Am. Gaming Assoc., *State of Play*, https://www.americangaming.org/research/state-of-play-map/ (last updated Feb. 27, 2025). California has allowed the operation of certain types of gaming establishments within its borders for more than 100 years, including cardrooms. Pet.App.3a.

Cardrooms offer patrons the opportunity to play "controlled game[s]" where the house takes a fee but does not have a stake in the outcome of the play. Cal. Pen. Code § 337j(e). However, no one, cardroom operators or others, may offer patrons casino-style gambling. Under California Penal Code Section 330 ("Section 330"), it is unlawful to offer patrons "bank[ed]" or "percentage game[s]," such as roulette, blackjack or slot machines. *Id.* § 330.

California has enacted comprehensive regulations concerning the gaming establishments that operate within its borders under the Gambling Control Act, Cal. Bus. & Prof. Code §§ 19800 *et seq.* ("GCA"). With respect to cardrooms, the GCA mandates that any person who owns, operates or receives compensation from a cardroom must obtain a state gaming license. *Id.* §§ 19850, 19851, 19855. To obtain a license to own a cardroom, applicants must complete a rigorous background check, including scrutiny of their finances, character, and business activities. *See id.* §§ 19856, 19864, 19865, 19867.

In addition to those licensing requirements, under the GCA:

> [A] person shall be deemed unsuitable to hold a state gambling license to own a gambling establishment if the person, or any partner, officer, director, or shareholder of the person, has any financial interest in any business or organization that is engaged in any form of gambling prohibited by Section 330 of the Penal Code, *whether within or without this state.*

Id. § 19858(a) ("Section 19858") (emphasis added). This provision applies both to individual and entity applicants and licensees. *See id.*; *see also id.* § 19805(ae).

Subsequently, California enacted a limited, discretionary exemption to Section 19858, providing that:

> [T]he Commission may, pursuant to this chapter, deem an applicant or licensee suitable to hold a state gambling license even if the

> applicant or licensee has *a financial interest in another business that conducts lawful gambling outside the state* that, if conducted within California, would be unlawful, provided that an applicant or licensee may not own, either directly or indirectly, more than a 1 percent interest in, or have control of, that business.

Id. § 19858.5 ("Section 19858.5") (emphasis added) (collectively, Sections 19858 and 19858.5 are referred to as the "Statutes").

Section 19858 is notable for several reasons. First, because the forty-six other states to have authorized gaming have authorized casino-style gambling, it is not possible to be part of California's in-state market and the lawful markets of any of the other gaming states. *See* Decl. of Elizabeth Flynt, Dkt. 89 ("Flynt Decl.") ¶¶6-14. Section 19858 forces members of the gaming industry to make the choice between being part of California's in-state market, or the markets of the other states, but no one can do both. *Id*. Section 19858 is so restrictive that there is no cross-border investment between members of California's in-state market and the rest of the gaming industry. *Id*. The flow of investment capital stops at California's borders. *Id*.

Second, although Section 19858 appears to apply to economic activity occurring "whether within or without" California, that language is misleading. California criminalizes the operation of casino-style gambling facilities within its borders under Section 330. Consequently, Section 19858 only applies when California is preventing lawful economic activity from occurring in the gaming markets of the other gaming States or when

California is preventing out-of-state industry members from investing in California's in-state market. Indeed, Section 19858.5, the limited discretionary exemption to Section 19858, clarifies that the Statutes apply when California is considering whether to allow a licensee to obtain a one-percent investment in a "business that conducts lawful gambling *outside*" California. Cal. Bus. & Prof. Code § 19858.5 (emphasis added).

Third, California, itself, conducted a detailed study of Section 19858 and found that it served no valid purpose. In 2002, the Little Hoover Commission, an independent California agency, conducted a detailed study of Section 19858 and published a report entitled, *Card Clubs in California, A Review of Ownership Limitations*. *See* Third Amended Complaint, Dkt. 81 ("TAC"), Ex. A. The agency explained that the "primary purpose" of Section 19858 was to prevent "organized crime syndicates" from entering California's gaming market. *Id*. at 10. California enacted Section 19858 to "forbid business entities that own out-of-state casinos from" obtaining licenses to participate in California's gaming market. *Id*. at 1. However, by 2002, things had changed. California had developed a comprehensive regulatory scheme for in-state gaming, publicly-traded companies with transparent operations owned most out-of-state casinos, and many of those companies managed or financed the new casinos cropping up on Indian territory within California. *Id*. at 5, 11-13. Consequently, the agency concluded that Section 19858 was "illogical," "anachronistic," and "no longer necessary." *Id*. at 15, 17. It recommended that the Legislature "eliminate" Section 19858. *Id*. at 17. Despite these harsh findings, Section 19858 remains in effect. (Pet.App.4a.)

B. Petitioner

Petitioner is a California cardroom licensee. Flynt Decl. ¶2. She operates two highly successful cardrooms in Los Angeles County. *Id*. ¶3. The Statutes prevent Petitioner, and all cardroom licensees, from participating in investment opportunities both inside and outside of California. *Id*. ¶¶6-26.

Petitioner desires to participate in the markets of other gaming states, in addition to her participation in California's market, but the Statutes force her to forgo her constitutional right to participate in interstate commerce. *Id*. For example, Petitioner has routinely declined offers to invest in licensed out-of-state casinos for fear of losing her California cardroom licenses. *Id*. ¶¶8-13.

Conversely, Petitioner desires to partner with other successful members of the gaming industry in the operation of her in-state cardrooms, but Section 19858 prevents investment from any out-of-state industry members because she cannot have any partners or officers in her cardrooms that have control over or more than a 1% ownership interest in out-of-state casinos. Flynt Decl. ¶14. As a result, the owners and executives of prominent and highly reputable publicly-traded companies like Caesars Entertainment, Inc. or MGM Resorts, Intl. are barred from investing in California cardrooms and cardroom owners, like Petitioner, cannot receive investment from the most reputable and talented members of the industry. *See* Br. of Amicus Curiae, Ninth Cir. Dkt. 21 ("Am. Br.") at 22-24.

As the foregoing shows, the Statutes prohibit cross-border investment in the gaming industry. On the one hand, the Statutes force members of California's in-state market (licensees) to keep their capital within California's in-state gaming market. Am Br. at 20-21. On the other hand, the Statutes prevent members of the gaming markets of other states from investing in California's in-state market. *Id*. at 22-24.

In addition to blocking the cross-border flow of investment capital, Section 19858 interferes with California cardroom licensees' ability to recruit talent. *Id*. 24-27. Some of the most successful and talented employees in the gaming industry receive compensation in the form of ownership interests in the businesses they help develop. *Id*. at 24. Section 19858's stringent restriction means that someone who worked at an out-of-state casino and retains a small ownership interest in that casino cannot serve as a director, officer, or partner of any California cardroom licensee. *Id*. at 24-27.

Moreover, Section 19858 allows California to exercise control over investment capital that has never entered California to prevent lawful economic transactions from occurring in other States. Petitioner operates dozens of retail stores located in other gaming states. Flynt Decl. ¶16. She is precluded from using capital earned from those retail stores to invest in casinos located in those states, even though casino-style gambling is lawful in those states, and the investment capital at issue has never entered California. *Id*. Petitioner cannot add a single slot machine to one of her retail stores in Nevada even though retail establishments in Nevada regularly offer slot machines amid merchandise. *Id*. ¶¶17-18.

II. Procedural History

Petitioner filed a complaint asserting that the Statutes violate the dormant Commerce Clause. Among other things, she asserted that the Statutes were invalid because they discriminate against firms engaged in (or who seek to engage in) interstate commerce. TAC ¶¶2-3, 53-67, 76-82¶¶. The Statutes, Petitioner explained, force merchants to choose between being part of California's in-state market, or the markets of other States, but no one could do both. *Id.* Petitioner asserted that no State has the power to force merchants to make such a choice. *Id.* ¶5, 26-27.

Petitioner asserted that the Statutes constituted an unconstitutional and discriminatory use of in-state licensing authority. *Id.* ¶5. The Statutes force licensees to forgo lawful investment opportunities in the markets of other States, even when the investment capital at issue had never entered California, simply because one party to an out-of-state transaction holds a California cardroom license. *Id.* ¶¶53-67, 76-82.

The District Court entered judgment in favor of the California Defendants on all claims. Pet.App.42a-68a.

In a decision that vastly expanded state regulatory power at the expense of the constitutional right to engage in interstate commerce in every market in the Nation, the Ninth Circuit affirmed. Pet.App.1a-29a. In reaching that outcome, the Ninth Circuit appeared to be reluctant to apply dormant Commerce Clause principles of any kind after this Court's opinion in *Pork Producers*. *See* Pet.App.12a (explaining that *Pork Producers* mandates

that courts use "extreme caution" in "deploy[ing] its implied authority to reject a state law under the dormant Commerce Clause" (quotations omitted)); Pet.App.6a-7a (summarizing this Court's dormant Commerce Clause doctrine, including *Producers*, as nothing more than a "judge made and enforced doctrine" that has "ebbed and flowed over time").

For example, the Ninth Circuit recognized the well-settled principle that no state has the power to "discriminate against interstate commerce," but then limited this broad antidiscrimination principle to "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." Pet.App.7a. The Statutes did not violate the antidiscrimination principle, as narrowly defined by the Ninth Circuit, because they did not "favor[] in state economic interests." Pet.App.13a. Instead, held the Court, the Statutes applied "evenly to Californians and non-Californians alike." *Id.*

With respect to Petitioner's assertion that the Statutes discriminated against firms engaged in (or who desire to engaged in) interstate commerce, the Ninth Circuit found no such discrimination. Pet.App.16a-19a. It reached this conclusion by sleight of hand, framing the relevant market not as that of the members of the regulated industry, *i.e.* members of the gaming industry, but instead, as the public at large. *See* Pet.App.16a ("Companies engaged in the interstate gambling markets can invest in California businesses, and Californians can invest in the interstate gambling industry."). The Ninth Circuit dismissed this claim as a challenge to a law that "prevent[ed]" licensees from "structuring or operating their business as they prefer," which was not actionable. Pet.App.16a-17a.

REASONS FOR GRANTING THE PETITION

The ruling below conflicts with more than a century of this Court's dormant Commerce Clause precedent, including bedrock principles of law not at issue in *Pork Producers*. This Court should grant the petition to clarify that *Pork Producers* did not diminish those principles or mandate the result in the decision below. Further, the decision below conflicts with rulings from other circuits. This Court's resolution of this conflict will greatly aid lower courts in applying the dormant Commerce Clause in the manner intended by the Framers, which is to protect the well-settled right of merchants to have free access to every market in the Nation. Finally, this Court should grant the petition to make it clear that states do not have the power to push their policy preferences nationwide, as California has done here.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

The decision below conflicts with this Court's dormant Commerce Clause precedent in two important ways. First, the decision below disregards decisions from this Court recognizing that merchants have the right to "free access to every market in the Nation." *H.P. Hood & Sons*, 336 U.S. at 539; *Dennis*, 498 U.S. at 448. The decision below gutted this right even though this Court has previously recognized the protection of this right as the driving force behind the Constitutional Convention. *See*, *e.g.*, *Hughes*, 441 U.S. at 326. No fair reading of *Pork Producers* supports abolition of this right or its corresponding economic liberty.

Second, this Court's decisions make clear that the antidiscrimination principle at the core of the dormant Commerce Clause encompasses both a prohibition on laws that discriminate based on residency, ***and*** laws that discriminate against firms engaged in interstate commerce regardless of residency. This second form of discrimination has been recognized in numerous opinions, *see*, *e.g.*, *Philadelphia*, 437 U.S. at 623-629, none of which were displaced by *Pork Producers*. Until now, no state has ever had the authority to force merchants to forgo the right to engage in interstate commerce altogether, as California has done here with the Ninth Circuit's blessing. The Statutes are invalid because they force merchants to make the decision of whether to be part of California's intrastate market or the interstate markets of the other states, but not both, which no state can do. *See Wynne*, 575 U.S. at 542; *Hughes*, 441 U.S. at 336-37.

A. The decision below strips merchants of the right to free access to every market in the Nation in contravention of this Court's precedent.

The decision below endorsed a state law that forces merchants to choose between being part of the enacting state's in-state market or the markets of the other states, but not both. Forcing merchants to make that intrastate-versus-interstate choice conflicts with this Court's precedent which has uniformly recognized that merchants have the right to engage in interstate commerce in every market in the Nation.

For more than a century, this Court has explained that the Commerce Clause provides merchants with the constitutional right and economic liberty to engage in

interstate commerce. The right to "carry on interstate commerce" was not understood to be "a franchise or a privilege granted by the States," but instead, "it is a right which every citizen of the United States is entitled to exercise under the Constitution." *Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891); *see also Dennis*, 498 U.S. at 448 (recognizing that the Commerce Clause "confer[ed] a right to engage in interstate trade free from restrictive state regulation" (quotations omitted)); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) ("Engaging in interstate commerce" is a "constitutional" right.).

This Court defined the scope of the right to engage in interstate commerce as the right to participate in "every market in the Nation." *H.P. Hood & Sons*, 336 U.S. at 539 ("Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation."). Indeed, free trade "is not confined to the freedom to trade with only one State." *Boston Stock Exch.*, 429 U.S. at 355. Instead, this Court has defined free trade as "a freedom to trade with any State, *to engage in commerce across all state boundaries*." *Id.* (emphasis added). Critically, "fostering free trade among the States was prominently cited as a reason for ratification" of the Constitution. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 516 (2019).

Although the right to engage in interstate commerce is not expressly enumerated in the Constitution, this Court has always grounded this right in the Commerce Clause. *See id.* at 515 (explaining that "by the latter half of the 19th century the dormant Commerce Clause was firmly established, and it played an important role in the economic history of our Nation" (citations omitted)).

This Court has explained that the Framers intended the Commerce Clause "to benefit those who . . . are engaged in interstate commerce." *Dennis*, 498 U.S. at 449. This Court further elaborated that:

> "[T]he Commerce Clause . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."

Hughes, 441 U.S. at 326. Notably, James Madison wrote that the Commerce Clause "grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventative provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994) (quoting 3 Max Farrand, Records of the Federal Convention of 1787, 478 (1911)).

Consequently, this Court has explained that "without the dormant Commerce Clause, we would be left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising." *Tenn. Wine & Spirits*, 588 U.S. at 515. Indeed, more than 200 years ago, this Court recognized that, "[i]f there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."

Gibbons v. Ogden, 22 U.S. 1, 231 (1824) (Johnson, J., concurring); *see also Bowman v. Chi. & N. Ry.*, 125 U.S. 465, 479 (1888) ("[T]he transportation of articles of trade from one State to another was the prominent idea in the minds of the framers of the Constitution when Congress was committed the power to regulate commerce among the several States.").

The decision below has endorsed a discriminatory state law that, on its face, strips merchants of this well-settled constitutional right. If a merchant enters California's in-state market, he or she must forfeit the right to "engage in commerce across all state boundaries," *Boston Stock Exch.*, 429 U.S. at 355, because he or she cannot enter the market of any of the other gaming states.

Although it appears that the Ninth Circuit was reluctant to apply the dormant Commerce Clause in the wake of this Court's opinion in *Pork Producers*, *see* Pet. App.6a, 12a, no fair reading of *Pork Producers* supports the erosion of this constitutional right. Critically, the law at issue in *Pork Producers*—a California regulation banning the importation and sale of crated pork—did not require the forfeiture of the right to engage in interstate commerce as a condition to entering California's pork market. Under that regulation, pork producers had the right to enter California's market to sell compliant pork (*i.e.*, non-crated pork) to Californians. If they did so, they were not required to forfeit their right to sell crated pork in the states where such sales were lawful. They had the right and economic liberty to do both under the challenged law, meaning they *retained* the right to "engage in commerce across all state boundaries." *Boston Stock Exch.*, 429 U.S. at 355. Consequently, this Court's opinion upholding that

regulation did not diminish (let alone address) the right at issue in this case, which this Court has recognized as actionable for more than a century.

In contrast, under the Statutes, members of the gaming industry have no such right. Industry members can be part of California's in-state market, or the market of the other gaming states, but not both. The Statutes prohibit licensees from entering the markets of the other gaming states, and members of those markets cannot enter California's market. No opinion from this Court has ever endorsed a law that operated this way.

No one, including Petitioner, disputes that states have the power to require merchants to obtain licenses to conduct business within their borders.[1] But "[t]he general power of the State to impose . . . licenses upon all pursuits and occupations within its limits . . . must be exercised

1. Likewise, Petitioner does not dispute that states have the power to set the criteria for determining whether an applicant for a state professional license is suitable for in-state operations. California has laws that enable it to screen applicants for suitability based on criteria such as alleged association with crime, perceived threats to public safety, or unfavorable information uncovered during background checks, *see* Cal. Bus. & Prof. Code §§ 19859(e), 19856, 19876, 19852, which Petitioner did not challenge. Instead, Petitioner asserts that the Statutes—which render an applicant unsuitable for a license based on participation in interstate commerce—are an unconstitutional criterion for suitability. If laws like the Statutes are excepted from dormant Commerce Clause scrutiny, a state could always discriminate against interstate commerce simply by declaring the interstate activity at issue an unsuitable activity for its licenses. The very point of this Court's dormant Commerce Clause doctrine; however, is that States do not get to make judgments of that sort about activity occurring outside their borders.

in subordination to the requirements of the Federal Constitution." *Welton v. Mo.*, 91 U.S. 275, 278 (1875).

No state has the authority to require "a party to take out a license for carrying on interstate commerce." *Crutcher*, 141 U.S. at 58. Further, states "may not impose conditions which require the relinquishment of constitutional rights." *Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 594 (1926). "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Id.*; *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 608 (2013) (reaffirming that states lack power "to condition permit approval on [a party's] forfeiture of his constitutional rights"); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996) (plurality) ("Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right.").

As pertinent here, "[b]ecause the right of an out-of-state corporation to do business in another State is based on the dormant Commerce Clause, it stands to reason that this doctrine may also limit a State's authority to condition that right." *Mallory v. Norfolk Southern Ry.*, 600 U.S. 122, 158-59 (2023) (Alito, J., concurring); *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988) (recognizing that an Ohio law that "force[d] a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the [statute of] limitations defense" violated the dormant Commerce Clause).

The Ninth Circuit's decision is incompatible with this Court's recognition of the right to engage in commerce in every market in the Nation. This Court should grant certiorari to reaffirm the principle that no state has the power to force a merchant to forfeit the right to engage in interstate commerce, even when the state is exercising its authority to license members of its in-state market.

B. The Court should grant review because the Ninth Circuit misread *Pork Producers* to preclude challenges to state laws that discriminate against firms engaged in interstate commerce.

The decision below conflicts with this Court's consistent rulings that no state has the power to discriminate against firms engaged in interstate commerce. In blessing such a law, the Ninth Circuit misread *Pork Producers* as limiting the antidiscrimination principle to discrimination based on residency, alone. To the contrary, *Pork Producers* expressly recognized that a state law that "applie[s] solely to interstate firms . . . clearly discriminate[s] against interstate commerce." *Pork Prods.*, 598 U.S. at 373 (quotations omitted). As discussed below, this Court's recognition of that type of discrimination is not new. Instead, the Ninth Circuit's limitation of the antidiscrimination principle to discrimination based on residency conflicts with more than a century of precedent from this Court, none of which was displaced by *Pork Producers*. Clarification from this Court on the scope of the antidiscrimination principle—which lies at the "core" of every dormant Commerce Clause case—is needed.

Although *Pork Producers* elaborated on precedent addressing challenges to laws that discriminated on the basis of residency, *see id.* at 369-70, this Court has consistently recognized a distinct but equally problematic form of discrimination—discrimination against interstate commerce itself. This Court has consistently stated that "state regulations may not discriminate against interstate commerce." *Wayfair*, 585 U.S. at 173; *Pork Prods.*, 598 U.S. at 370 (recognizing that "discrimination against interstate commerce" constitutes a "violation of the dormant Commerce Clause" (quoting *Northwest Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 373 n.18 (1994))). "The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause." *Boston Stock Exch.*, 429 U.S. at 329; *Lyng v. Michigan*, 135 U.S. 161, 166 (1890) (holding that a state law that regulated "commerce among the States . . . was invalid because [it was] repugnant to the Constitution.").

Further, this Court has explained that a state law "is no less discriminatory because in-state or in-town processors are also covered by" the law's restriction or prohibition. *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 391 (1994) (rejecting the claim that a law lacked discriminatory features because it applied to in-town or in-state waste processors as well as those located out-of-state); *Dean Milk v. City of Madison*, 340 U.S. 349, 354 n.4 (1945) ("[I]t is immaterial that Wisconsin milk from outside the Madison area is subject to the same proscription as that moving in interstate commerce.").

This Court has identified many ways that state laws have violated this antidiscrimination principle. First and foremost, a law that "applie[s] solely to interstate firms

. . . clearly discriminate[s] against interstate commerce." *Pork Prods.*, 598 U.S. at 373 (quotations omitted). Second, a state regulation "on its face discriminates against interstate commerce" if it "overtly blocks the flow of interstate commerce at [the] State's borders." *Hughes*, 441 U.S. at 336-37. Third, "discriminat[ion] in favor of intrastate over interstate economic activity" is barred by the Clause. *Wynne*, 575 U.S. at 551. Finally, a law that "creates an incentive" for residents "to opt for intrastate rather than interstate activity" violates the antidiscrimination principle. *Id.* at 545; *see also Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 (1996) (explaining that a law that "discourage[s] domestic corporations from plying their trades in interstate commerce" discriminates against interstate commerce).

This Court has not hesitated to invalidate state laws under this antidiscrimination principle. For example, in *Philadelphia v. New Jersey*, this Court found that a New Jersey law that banned the importation of waste that originated from or was collected from outside the state, violated the dormant Commerce Clause even though the waste-importation law applied equally to in-state and out-of-state waste hauling companies. *See Philadelphia*, 437 U.S. at 627-29. This Court explained that, regardless of the residency of the members of the regulated industry, when a law "overtly blocks the flow of interstate commerce at a State's borders," it discriminates against interstate commerce, and thus, violates the Clause. *Id.* at 623; *accord id.* at 629 ("The Commerce Clause prevents "efforts by one State to isolate itself in the stream of interstate commerce.").

More recently, this Court explained that the problem with the Connecticut regulation that the Court invalidated in *Healy*, was that the law applied "solely to interstate firms." *Pork Prods.*, 598 U.S. at 373. In doing so, Connecticut "clearly" violated the antidiscrimination principle. *See id.*

The Ninth Circuit erred in upholding the Statutes. The Statutes discriminate against firms engaged in interstate commerce in several ways. First, the Statutes apply "solely to interstate firms." *Id.* The Statutes only apply when one of two things is contemplated: (1) an in-state licensee wants to engage in interstate commerce by investing in an out-of-state casino; or (2) an out-of-state casino owner wants to engage in interstate commerce by investing in a California cardroom. Absent the intent to participate in interstate commerce, the Statutes do not apply. Laws that target firms who engage in (or who desire to engage in) interstate commerce, regardless of residency, squarely violate the antidiscrimination principle. *See id.* at 373 (quoting *Healy*, 491 U.S. at 340-41); *Philadelphia*, 437 U.S. at 627-29.

Second, not only do the Statutes "create[] an incentive" for in-state licensees to "opt for intrastate rather than interstate activity," *Wynne*, 575 U.S. at 545, they mandate it, which no state can do. Anyone who holds an in-state license to participate in California's intrastate market is prohibited from participating in the interstate markets of the other states. If laws that encourage members of an industry to "opt for intrastate rather than interstate activity" violate the Commerce Clause, *see Wynne*, 575 U.S. at 545; surely the Statutes—which ***mandate*** that licensees restrict their operation to intrastate

commerce—violate the antidiscrimination principle at the heart of the dormant Commerce Clause. *See Pork Prods.*, 598 U.S. at 370; *Wynne*, 575 U.S. at 551; *Philadelphia*, 437 U.S. at 623-29; *Faulkner*, 516 U.S. at 333.

Third, the Statutes "overtly block[] the flow" of investment capital in the gaming market at California's borders, *Hughes*, 441 U.S. at 336-37, which no state can do. Indeed, "the Commerce Clause was designed to prevent States from engaging in economic discrimination so they would not divide into isolated, separable units." *Wayfair*, 585 U.S. at 179. "Avoiding . . . economic Balkanization, and the retaliatory acts of other States that may follow, is one of the central purposes of [this Court's] negative Commerce Clause jurisprudence." *Camps Newfound/ Owatonna v. Town of Harrison*, 520 U.S. 564, 577 (1997); *see also Lewis v. BT Invest. Mgrs., Inc.*, 447 U.S. 27, 35 (1980) (The Commerce Clause "limits the power of the States to erect barriers against interstate trade.").

Here, the Statutes stop the flow of investment capital within the gaming industry at California's borders. Members of the in-state market, cardroom licensees like Mrs. Flynt, are categorically prohibited from investing in casinos, all of which are located outside of California. Likewise, members of the gaming markets of other states are categorically banned from investing in or participating in California's in-state market.

Critically, this balkanization of California's market did not happen by chance. California knew that it had no casinos within its borders when it enacted Section 19858 because it had already prohibited the operation of casino-style facilities under Section 330. Consequently,

California knew that its ban on licensees investing in casinos or partnering with casino owners "whether within or without" the State would apply solely to cross-border transactions involving cross-border investment because there were no casinos in California. If there were any doubt, Section 19858.5 states that the Statutes apply when licensees seek to invest in or partner with businesses operating "outside" California.

No state can isolate its market like California has done here, purposefully or accidentally. "[S]tates are not separable economic units." *H.P. Hood & Sons*, 336 U.S. at 537-38. States "cannot prohibit" items of commerce "from being a subject of interstate commerce." *Id.* at 535. To the contrary, this Court has consistently held that this type of market isolation violates the Commerce Clause. *See Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334, 339-40 (1992) ("No State may attempt to isolate itself from a problem . . . by raising barriers to the free flow of interstate trade."); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1940) ("The very purpose of the Commerce Clause was to create an area of free trade among the several States.").

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

The decision below directly conflicts with decisions from other Circuits in three distinct but related respects.

A. The Second and Eleventh Circuits have recognized that a law that targets firms engaged in interstate commerce, regardless of residency, violates the dormant Commerce Clause. In contrast, the Ninth Circuit ruled that this type of discrimination was not actionable.

Because the antidiscrimination principle is at the "core" of every dormant Commerce Clause challenge, *Pork Prods.*, 598 U.S. at 369, guidance from this Court on the type of discrimination that is actionable is needed.

In *Cachia v. Islamorada*, 542 F.3d 839 (11th Cir. 2008), the Eleventh Circuit ruled that a municipal zoning ordinance that prohibited "formula" or chain restaurants, defined as restaurants with three or more locations operating under the same name, discriminated against firms engaged in interstate commerce because the regulation was "an explicit barrier to the presence of national chain restaurants" in the enacting municipality. *See id.* at 842-844. "[T]he ordinance [did] not facially discriminate between in-state and out-of-state interests" because it applied to "formula" restaurants operating solely in-state just as it did to those operating out of state. *Id.* at 843. However, it was discriminatory because it "disproportionately target[ed] restaurants operating in interstate commerce" by blocking them entirely from the municipality's market. *Id.* The Eleventh Circuit rejected the claim that the statute did nothing more than regulate "methods of operation," which this Court had said was permissible in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). *Id.* Instead, the regulation was a "complete prohibition of chain restaurants sharing certain characteristics," which was impermissible discrimination against firms engaged in interstate commerce. *Id.*

The decision below directly conflicts with *Cachia*. Like the "formula" restaurant ban, the Statutes provide "an explicit barrier to the presence of" members of the interstate gaming industry in California's gaming market. As the Eleventh Circuit correctly explained, this type of

regulation is a barrier to entry, not a regulation of methods of operation. *See id.* The Statutes are discriminatory because they "target" firms that are "operating in interstate commerce" (or entrepreneurs like Petitioner who desire to operate in interstate commerce). Indeed, the Statutes have no application whatsoever to merchants who either (1) operate solely in California's in-state market; or (2) operate in the markets of other states, but have no interest in entering California's market.

More recently, the Second Circuit explained that a law violates the dormant Commerce Clause when it "discriminates against interstate commerce in favor of intrastate commerce." *Nat'l Shooting Sports Found., Inc. v. James*, 2025 U.S. App. LEXIS 17075, ___ F.4th ___, at *30 (2d Cir. 2025). There, the challenged law impacted gun retailers and its application was triggered by third-party use of "a firearm . . . that has been shipped or transported in interstate or foreign commerce." *Id.* at *31. However, while the action was pending, the Legislature amended the regulation to "remove[] any reference to interstate commerce." *Id.* In doing so, the Second Circuit explained that the state had "eliminate[d] the basis of [the] facial dormant Commerce Clause challenge. *Id.* Although the challenge to the gun law was resolved on other grounds, the Second Circuit's recognition of this type of discrimination directly conflicts with the Ninth Circuit's rejection of such a claim. Like the firearm regulation prior to its amendment, the Statutes expressly reference interstate commerce.

B. The decision below also conflicts with rulings from the First, Fifth, Sixth, Seventh, and Tenth Circuits recognizing that state laws that block the flow

of interstate commerce—such as the Statutes, which categorically prohibit cross-border investment in the gaming industry—discriminate against firms engaged in interstate commerce. In contrast with the decision below, those courts of appeal have found state laws that "overtly block[] the flow of interstate commerce at a State's border" to be constitutionally infirm. *Energy Mich., Inv. v. Mich. Pub. Serv. Comm'n*, 126 F.4th 476, 486 (6th Cir. 2025); *accord NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 317 (5th Cir. 2022).

As the Tenth Circuit explained, a law that blocks the flow of commerce at the enacting state's border discriminates against interstate commerce even when the aggrieved party is a resident of the enacting state. *See Dorrance v. McCarthy*, 957 F.2d 761, 765 (10th Cir. 1992) (finding that a state law that prohibited private citizens, but allowed public entities to import big game "discriminate[d] against interstate commerce on its face" because it "overtly block[ed] the flow of interstate commerce at a State's borders" for private citizens); *see also Energy Mich.*, 126 F.4th at 487 ("[W]hile our focus is on discrimination between in-state and out-of-state commerce or entities, that a law may also discriminate against in-state commerce is immaterial." (quotations and citation omitted)).

Likewise, as the Sixth Circuit ruled, such a law discriminates against interstate commerce even when the law benefits industry members of some states and burdens those of other states. In *Foresight Coal Sales, LLC v. Chandler*, 60 F.4th 288 (6th Cir. 2023), the Sixth Circuit ruled that a law that forced in-state utilities to discount coal bids by "any coal severance tax imposed by

any jurisdiction" was discriminatory. *Id.* at 297. Because a severance tax taxed the extraction of coal, it could only be imposed by the state where the coal was extracted, which meant that the differential treatment of coal bids based on severance taxes was "a near perfect proxy for the coal's state of origin." *Id.* The Sixth Circuit rejected the idea that a law that benefits industry members in some states, but burdens others has no actionable effect on industry members located in the burdened states because those market participants lost their competitive advantages. *See id.* at 298-99.

Notably, in *Alliant Energy Corp. v. Bie*, 330 F.3d 904 (2003), the Seventh Circuit invalidated a Wisconsin law that prevented cross-border investment in the energy market. *See id.* at 912-14. The law at issue, which limited ownership of Wisconsin utilities to Wisconsin companies, was invalid because "investment in the utility [was] stopped at the border." *Id.* at 912. As the Seventh Circuit recognized, "[i]f every State adopted this rule there would be no interstate investment in public utilities at all." *Id.*

Moreover, the First Circuit invalidated a law strikingly similar to the Statutes. In *Nat'l Revenue Corp. v. Violet*, 807 F.2d 285 (1st Cir. 1986), an Ohio debt buyer challenged a Rhode Island law that restricted debt collecting operations to persons licensed to practice law. Rhode Island claimed that the law was not discriminatory because it applied to "all debt collection activities . . . whether the companies engaged in those activities [were] located *within the state or without*." *Id.* at 289 (emphasis added). Further, admission to the Rhode Island bar was not limited to Rhode Island's citizens. *See id.* at 290. Nonetheless, the law was discriminatory because it singled

out a particular type of interstate firm—commercial debt collectors—categorically prohibiting them from entering the state's market—while at the same time, shielded the in-state debt collection market from competition from members of the interstate debt collection industry. *See id.*

In *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F.3d 1151 (7th Cir. 1999) (per curiam), the Seventh Circuit held that a law that prohibited the in-state disposal of waste unless the place where the waste was generated enacted recycling rules like those required in Wisconsin discriminated against interstate commerce. *See id.* at 1152-54. The Seventh Circuit explained that, if every state enacted laws like that one, "[t]he resulting conflict" of state laws "could stop all traffic [in waste] at state borders." *Id.* at 1153. But that is exactly what the Statutes do to the gaming industry. The Statutes stop all cross-border investment within the gaming industry.

In each of these opinions, the courts of appeals recognized that a state law that erects a barrier around an in-state market discriminates against firms engaged in interstate commerce. The Ninth Circuit's decision below—which blesses such a use of state power—directly conflicts with these opinions.

C. The decision below conflicts with an opinion from the Fifth Circuit recognizing that a merchant's right to free access to every market in the Nation is violated even when the burdens of the challenged law fall on both in-staters and out-of-staters. In *NextEra Energy*, the Fifth Circuit ruled that a law that limited the operation of new power lines connecting to existing utility facilities to the owners of those existing facilities discriminated against

interstate commerce. *See NextEra Energy*, 48 F.4th at 320-26. The law at issue said, in essence, that if a firm was not already part of the in-state market, the firm had no right to enter the in-state market. *See id.* As a result, NextEra, "[l]ike the farmers and craftsmen of old," was deprived of the right to participate in interstate commerce in every market in the Nation. *Id.* at 318. Notably, the Fifth Circuit held that a law can discriminate against interstate commerce, and violate a merchant's right of access to free markets, even when the burden of the law falls on both in-staters and out-of-staters.

III. THE ISSUE PRESENTED IS OF CRITICAL IMPORTANCE AND THIS CASE IS THE IDEAL VEHICLE FOR RESOLVING IT.

The importance of this Court's resolution of the issue presented cannot be overstated. Although the decision below addressed a state regulation concerning the type of people who are suitable for cardroom licenses in California, nothing cabins that decision to state regulation of the gaming industry. Instead, every state now has the authority to regulate any industry of its choice in this same manner with the decision below providing cover for misuse of state power.

When other states seek to exploit the decision below to push their policy preferences nationwide like California has done here, the result will be a complete fracturing of other sectors of our economy. Absent intervention by this Court, states will be free to completely shield their markets from members of the markets of other states. In addition to the economic balkanization that will occur, just as it has in the gaming industry due to the Statutes,

no businessperson in any industry will have the certainty of the right to participate in every market in the Nation. That well-documented right can be cast aside for the members of any industry, just as California has cast it aside for members of the gaming industry.

Two examples are illustrative. Currently, Connecticut prohibits the possession and sale of a wide range of assault weapons within its borders. *See* Conn. Gen. Stats. §§ 53-202a, 202c. Firearm retailers are free to sell rifles that meet Connecticut's standards in Connecticut, and then retailers also have the liberty to sell firearms in other states under the rules of those states, which in many states, allows the sale of assault rifles. Under the decision below, Connecticut now has the authority to enact a law that says that any gun retailer who sells disfavored rifles anywhere in the world is "unsuitable" to obtain a license to sell rifles of any kind in Connecticut. Gun retailers would be forced to choose between being part of Connecticut's intrastate market or the interstate markets of the other states where the sale of disfavored rifles is lawful, but not both.

Likewise, several states, including West Virginia, ban the sale of mifepristone, commonly referred to as the abortion drug. *See*, *e.g.*, W.Va. Code §§ 16-2R-2, 3. Under the ruling below, West Virginia now has the authority not only to ban the sale of mifepristone within its borders, but to condition the issuance of retail pharmacy licenses in West Virginia on pharmacies forgoing the sale of mifepristone in states where such sales are lawful. As a result, retail pharmacies would lose the economic liberty to go to West Virginia and follow its rules and then go to the markets of other states to follow their rules, which, in some states, would include the ability to sell mifepristone.

These are just examples. States now have the authority to enact regulations like these in every industry. Further, there is no reason to believe that the states that are passionate about these two issues will exercise restraint and decline to enact statutes like these because the Ninth Circuit has said that rules like these are a permissible use of state regulatory authority. Moreover, beyond industry-specific regulations, states now have the authority to condition in-state licensure on a company's nationwide compliance with a broader array of laws, such as minimum wage laws or health insurance coverage for specified medical procedures. Undoubtedly, the entrepreneurs subjected to these statutes will lose the constitutional right to engage in interstate commerce in every market in the Nation.

Consumers, too, will lose the ability to exercise certain constitutional rights. If Connecticut enacts a law like that discussed above, gun retailers may cease the sale of assault rifles in states where the sale of such rifles is lawful to avoid forfeiting the license to participate in Connecticut's firearms market. Consumers in those states would lose the opportunity to exercise their Second Amendment right to purchase and possess such rifles even though the purchase and possession of such rifles is lawful in their home states. Likewise, if West Virginia enacts a law like that discussed above, retail pharmacies may decline to sell mifepristone in states where women have the constitutional right to purchase such drugs to avoid forfeiting the ability to participate in West Virginia's retail pharmacy market. Here, again, a consumer in another state may be unable to exercise a constitutional right simply because a state enacted a restrictive law like Section 19858.

In the decision below, the Ninth Circuit has said, in essence, that any time a state licenses a merchant to conduct in-state commerce, the state has total control over what that merchant does in the market of every other state in the Nation, including the power to force that merchant to forgo the right to participate in interstate commerce altogether. Further, the decision below allows states to prevent licensees from using capital that the licensees earned outside the enacting state from investing in lawful economic activities in other states. No opinion from this Court has ever authorized such a restrictive state law.

This petition is the ideal vehicle for addressing these important issues of law because the facts and principles of law at issue are not complicated. Typically, dormant Commerce Clause cases involve mastering complexities of one kind or another, such as applying pre-existing precedent to a regulation involving a new technology or industry, *Wayfair*, 585 U.S. at 172-89; the interplay between state regulation, the dormant Commerce Clause, and other constitutional provisions, *see Tenn. Wine & Spirits*, 588 U.S. at 510-43; or analysis of the outer boundaries of claims brought under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), with which this Court grappled just three terms ago, *see Pork Prods.*, 598 U.S. at 377-89; 391-403.

None of that typical complexity is present here. Instead, this petition presents one straightforward issue with minimal factual background. In the wake of *Pork Producers*, the lower courts appear to be apprehensive about invalidating state laws under the dormant Commerce Clause, *see Flynt*, 131 F.4th at 923, 926; even when challenges are premised on bedrock principles of

law not impacted by *Pork Producers*. To clarify the scope of the *Pork Producer* rulings, this Court should grant the petition to aid the lower courts in resolving dormant Commerce Clause challenges.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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August 11, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 14, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-16376

ELIZABETH FLYNT; HAIG KELEGIAN, SR.; HAIG T. KELEGIAN, JR.,

Plaintiffs-Appellants,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; YOLANDA MORROW; PAULA D. LABRIE; ERIC C. HEINS; EDWARD YEE; CATHLEEN GALGIANI; WILLIAM LIU, IN THEIR OFFICIAL CAPACITY AS COMMISSIONERS OF THE CALIFORNIA GAMBLING CONTROL COMMISSION,

Defendants-Appellees.

Filed March 14, 2025

OPINION

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding
D.C. No. 2:16-cv-02831-JAM-JDP

Appendix A

Argued and Submitted August 22, 2024
San Francisco, California

Before: Daniel A. Bress and Lawrence VanDyke, Circuit Judges, and Robert S. Lasnik,* District Judge.

BRESS, Circuit Judge:

Under California Business and Professions Code §§ 19858(a) and 19858.5, a person is ineligible for a California cardroom license if he owns more than a 1% financial interest in a business that engages in casino-style gambling or if he has control over such a business. We must decide whether this limitation on cardroom licensure violates the dormant Commerce Clause. We hold it does not.

I

The constitutional challenge in this case arises from California's effort to limit gambling, and the influence of unlawful gambling, in the state. With the exception of Indian casinos on tribal lands, California's Constitution provides that "[t]he Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey." Cal. Const. art. IV, § 19(e); *see also id.* § 19(f) (exception for tribal gaming). California has otherwise made it a crime to conduct various forms of gambling, including "any banking or percentage game."

* The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

Cal. Penal Code § 330. In a banked or percentage game, the casino competes in the games as the "house" and profits at the expense of losing players. *See In re Indian Gaming Related Cases*, 331 F.3d 1094, 1097 n.1 (9th Cir. 2003).

California does, however, allow cardrooms. *See* Cal. Bus. & Prof. Code §§ 19800, *et seq.* Cardrooms, or card clubs, have existed in California since the Gold Rush and remain permitted, subject to state regulation. Cardrooms cannot offer banked or casino-style games. *See Flynt v. Shimazu* (*Flynt I*), 940 F.3d 457, 459 (9th Cir. 2019) (explaining that California law "prohibits cardrooms from engaging in casino-like activities, including blackjack, roulette, and other house-banked or percentage games"). Instead, at cardrooms, "players play against each other and pay the cardroom a fee to use its facilities." *Id.*

California cardroom operators must comply with the state's restrictions on gambling as well as the requirements of the state Gambling Control Act. Cal. Bus. & Prof. Code §§ 19800, *et seq.* Under this regulatory framework, every person who owns, operates, or receives compensation from a cardroom must obtain a license. Cal. Bus. & Prof. Code §§ 19850, 19851, 19855. The California Gambling Control Commission (CGCC) has authority to issue, deny, and revoke licenses. *Id.* §§ 19811, 19823.

Some persons are automatically disqualified from obtaining a cardroom license under California law. As relevant here,

> a person shall be deemed unsuitable to hold a state gambling license to own a gambling establishment if the person, or any partner, officer, director, or shareholder of the person, has any financial interest in any business or organization that is engaged in any form of gambling prohibited by Section 330 of the Penal Code, whether within or without this state.

Id. § 19858(a); *see also id.* § 19805(ae) (defining "person" to include corporate entities and partnerships). The reference in § 19858(a) to "Section 330 of the Penal Code" is a reference to California's above-noted criminal prohibition against operating banked and percentage games.

In part because of the growth of tribal casinos, California has considered repealing the § 19858(a) licensing restriction. In 2002, the Governor directed the Little Hoover Commission, an independent state agency, to study the issue. The Commission's report acknowledged that the rationale for § 19858(a) was crime-prevention: keeping "organized crime syndicates" out of California, preventing embezzlement associated with gambling, and protecting "chronic losers" from turning to criminal activity. But the report was generally skeptical of the link between crime and gambling and concluded that "the limitations are no longer necessary to protect the public safety."

Despite the Commission's recommendation, the California Legislature declined to repeal § 19858(a).

Instead, in 2007, the Legislature enacted a limited exception to § 19858(a), under which the CGCC may

> deem an applicant or licensee suitable to hold a state gambling license even if the applicant or licensee has a financial interest in another business that conducts lawful gambling outside the state that, if conducted within California, would be unlawful, provided that an applicant or licensee may not own, either directly or indirectly, more than a 1 percent interest in, or have control of, that business.

Cal. Bus. & Prof. Code § 19858.5. Combining this exception with the general prohibition in § 19858(a), the "upshot" under California law is "that a licensee of a California cardroom may not own more than a one-percent interest in any out-of-state entity that engages in casino-style gambling activities, even if such activities are lawful where the entity operates." *Flynt I*, 940 F.3d at 460.

Plaintiffs Elizabeth Flynt, Haig Kelegian, Sr., and Haig Kelegian, Jr. are California residents and cardroom operators. They are pursuing this lawsuit against the Attorney General of California, the Director of the Bureau of Gambling Control, and the Commissioners of the CGCC, claiming that §§ 19858(a) and 19858.5 violate the dormant Commerce Clause. *See Flynt I*, 940 F.3d at 460. The district court initially dismissed the complaint as untimely, but we reversed that ruling in *Flynt I*. *Id.* at 464. On remand, the district court rejected plaintiffs' various dormant Commerce Clause theories in several well-considered decisions.

Plaintiffs appeal for a second time. Our review is de novo. *See Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1322 (9th Cir. 2015) (en banc).

II

The Constitution grants Congress the power to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. From this affirmative grant of authority to Congress, the Supreme Court has inferred a limitation on the states. Under Supreme Court precedent, the Commerce Clause " 'contains a further, negative command,' one effectively forbidding the enforcement of 'certain state economic regulations even when Congress has failed to legislate on the subject." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 368, 143 S.Ct. 1142, 215 L.Ed.2d 336 (2023) (brackets omitted) (quoting *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995)). This implied mandate restricts states' ability to restrain the free exchange of goods and services in an interstate market. *See, e.g., Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 514, 139 S.Ct. 2449, 204 L.Ed.2d 801 (2019); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 370, 96 S.Ct. 923, 47 L.Ed.2d 55 (1976). Although it is not a clause in the Constitution, this limitation on the states has come to be known as the dormant Commerce Clause. *See Pork Producers*, 598 U.S. at 368, 143 S.Ct. 1142; *Sam Francis*, 784 F.3d at 1323.

As a judge-made and enforced doctrine, the strictures of the dormant Commerce Clause have ebbed and flowed

over time through case law, with the Supreme Court refining the doctrine's proper scope. *See South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 172, 138 S.Ct. 2080, 201 L.Ed.2d 403 (2018) ("[T]his Court has observed that 'in general Congress has left it to the courts to formulate the rules' to preserve 'the free flow of interstate commerce.'") (quoting *S. Pac. Co. v. Ariz. ex rel. Sullivan*, 325 U.S. 761, 770, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945)). In recent years, three key strands of dormant Commerce Clause jurisprudence have emerged that are relevant to this case.

First, "state regulations may not discriminate against interstate commerce." *Id.* at 173, 138 S.Ct. 2080. This non-discrimination principle has long been considered significant in this area of law, but the Supreme Court's recent decision in *Pork Producers* reaffirmed that "[t]oday, this antidiscrimination principle lies at the 'very core' of our dormant Commerce Clause jurisprudence." 598 U.S. at 369, 143 S.Ct. 1142 (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997)). Under this reading, the dormant Commerce Clause principally "prohibits the enforcement of state laws 'driven by . . . economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Id.* (quoting *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008)).

State laws that discriminate in this manner "face 'a virtually *per se* rule of invalidity.'" *Wayfair*, 585 U.S. at 173, 138 S.Ct. 2080 (quoting *Granholm v. Heald*, 544 U.S.

460, 476, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005)). Thus, "if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to 'advance a legitimate local purpose.'" *Tenn. Wine & Spirits Retailers Ass'n*, 588 U.S. at 518, 139 S.Ct. 2449 (quoting *Davis*, 553 U.S. at 338, 128 S.Ct. 1801, and citing *Oregon Waste Sys., Inc. v. Dep't of Env'tl Quality of Ore.*, 511 U.S. 93, 100-101, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994), and *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986)).

A second line of cases concerns state laws that operate extraterritorially beyond the state's borders. *Pork Producers* substantially clarified this area of dormant Commerce Clause doctrine. In *Pork Producers*, the Supreme Court affirmed our court's dismissal of a dormant Commerce Clause challenge to a California law forbidding the in-state sale of pork from pigs "confined in a cruel manner," a standard defined with reference to certain welfare specifications. 598 U.S. at 365-66, 143 S.Ct. 1142 (quoting Cal. Health & Safety Code Ann. § 25990(b)(2)). Invoking an extraterritoriality principle, and relying on the fact that almost all pork eaten in California is shipped in from elsewhere, the challengers in *Pork Producers* contended that Supreme Court case law imposed "an additional and almost *per se* rule forbidding enforcement of state laws that have the practical effect of controlling commerce outside the State, even when those laws do not purposely discriminate against out-of-state economic interests." *Id.* at 367, 371, 143 S.Ct. 1142 (quotations omitted). In the challengers' view, California's law was unconstitutional because it would "impose

substantial new costs on out-of-state pork producers who wish to sell their products in California." *Id.* at 371, 143 S.Ct. 1142.

The Supreme Court rejected this argument. Addressing its past decisions in *Healy v. Beer Institute*, 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989), *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986), and *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1935), the Court explained that these cases "reveal[ ] nothing like the rule petitioners posit." *Pork Producers*, 598 U.S. at 371, 143 S.Ct. 1142. Rather, "each typifies the familiar concern with preventing purposeful discrimination against out-of-state economic interests." *Id.* In each case, "the challenged statutes had a *specific* impermissible 'extraterritorial effect'—they deliberately 'prevented out-of-state firms from undertaking competitive pricing' or 'deprived businesses and consumers in other States of whatever competitive advantages they may possess.'" *Id.* at 374, 143 S.Ct. 1142 (quoting *Healy*, 491 U.S. at 338-39, 109 S.Ct. 2491) (alterations omitted). Thus, these cases turned on "an impermissible discriminatory purpose," and not on any broader, freestanding extraterritoriality principle. *Id.* at 373, 143 S.Ct. 1142; *see also id.* at 394, 143 S.Ct. 1142 (Roberts, C.J., concurring in part and dissenting in part) (agreeing on this point).

Pork Producers also rejected the proposed extraterritoriality rule based on its unsustainable implications. The rule failed in view of "our interconnected

national marketplace," in which "many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior." *Id.* at 374, 143 S.Ct. 1142. According to the Supreme Court, petitioners' extraterritoriality theory was untenable because it would "cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers." *Id.* at 375, 143 S.Ct. 1142. Nevertheless, the Court left open the possibility that "a law that *directly* regulated out-of-state transactions by those with *no* connection to the State" could violate the dormant Commerce Clause or some other constitutional limitation. *Id.* at 375-76 & n.1, 143 S.Ct. 1142 (discussing *Edgar v. MITE Corp.*, 457 U.S. 624, 641-43, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982) (plurality op.)).

Third, under what has been termed "*Pike* balancing," "[s]tate laws that 'regulate even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Wayfair*, 585 U.S. at 173, 138 S.Ct. 2080 (alterations omitted) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970)). This aspect of dormant Commerce Clause doctrine has proven perhaps the most challenging to administer. Most recently, in *Pork Producers*, the Supreme Court reiterated that " 'no clear line' separates the *Pike* line of cases from our core antidiscrimination precedents," and that many *Pike* cases, including *Pike* itself, " 'turned in whole or in part on the discriminatory character of the challenged state regulations.'" 598 U.S. at 377, 143 S.Ct. 1142 (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12, 117 S.Ct. 811, 136 L.Ed.2d

761 (1997)); *see also, e.g., Nat'l Ass'n of Optometrists & Opticians v. Harris* (*Optometrists II*), 682 F.3d 1144, 1149 (9th Cir. 2012) ("The cases therefore are not clear or consistent in terms of when a regulation is considered discriminatory and virtually *per se* invalid and when and how a regulation is subjected to *Pike*'s 'clearly excessive' burden test.").

Under *Pike*, a plaintiff must demonstrate that a challenged law imposes a "substantial" or "significant" burden on interstate commerce before *Pike* balancing can occur. *See, e.g., Ass'n des Éleveurs de Canards et d'Oies du Quebec v. Bonta* (*Éleveurs II*), 33 F.4th 1107, 1119 (9th Cir. 2022); *Optometrists II*, 682 F.3d at 1156. The Justices in *Pork Producers* likewise agreed that whether a law imposes a substantial burden on interstate commerce is a threshold inquiry, although given the fractured nature of the Court's decision on the *Pike* question, there is no portion of any opinion on this point that commanded a majority. *See* 598 U.S. at 383, 143 S.Ct. 1142 (plurality); *id.* at 393, 143 S.Ct. 1142 (Sotomayor, J., concurring) ("Alleging a substantial burden on interstate commerce is a threshold requirement that plaintiffs must satisfy before courts need even engage in *Pike*'s balancing and tailoring analyses."); *id.* at 394, 143 S.Ct. 1142 (Barrett, J., concurring) (similar); *id.* at 395, 143 S.Ct. 1142 (Roberts, C.J., concurring in part and dissenting in part) (similar).

Under the *Pike* test, if plaintiffs show a substantial burden on interstate commerce, the court proceeds to determine whether that burden is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at

142, 90 S.Ct. 844. At this stage, and unless the benefits of the state's law are "illusory," courts typically accept the state's articulation of the law's claimed benefits. *See Optometrists II*, 682 F.3d at 1156. Further, courts have sometimes said that state regulations justified on public safety grounds enjoy a "strong presumption of validity." *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 670, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981) (plurality) (quoting *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959)); *see also, e.g., Pharm. Rsch. & Mfrs. of Am. v. Cnty. of Alameda*, 768 F.3d 1037, 1045 (9th Cir. 2014) (same).

III

Although their arguments bleed together at times, plaintiffs effectively argue that the cardroom licensing restrictions in California Business and Professions Code §§ 19858(a) and 19858.5 violate the dormant Commerce Clause under each of the three theories just outlined: by discriminating against interstate commerce, by controlling out-of-state activities, and by unduly burdening interstate commerce. We address each theory in turn, keeping in mind the Supreme Court's clear instruction, repeated in *Pork Producers*, that " 'extreme caution' is warranted before a court deploys" its "implied authority" to reject a state law under the dormant Commerce Clause. 598 U.S. at 390, 143 S.Ct. 1142 (quoting *Gen. Motors Corp.*, 519 U.S. at 310, 117 S.Ct. 811).

Appendix A

A

We first consider whether §§ 19858(a) and 19858.5 violate the dormant Commerce Clause because they discriminate against interstate commerce. They do not: these provisions are not facially discriminatory, nor do they have a discriminatory purpose or effect that favors in-state economic interests. *See Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013).

The cardroom licensing restrictions at issue here do not implicate the core concern at the heart of the dormant Commerce Clause: laws that "benefit in-state economic interests by burdening out-of-state competitors." *Pork Producers*, 598 U.S. at 369, 143 S.Ct. 1142 (quoting *Davis*, 553 U.S. at 337-38, 128 S.Ct. 1801). The laws do not "advantage in-state firms or disadvantage out-of-state rivals." *Id.* at 370, 128 S.Ct. 1801. Sections 19858(a) and 19858.5 apply evenly to Californians and non-Californians alike who own 1% or more of a covered gambling business or who control such a business. They do not, as plaintiffs suggest, exclude all out-of-state market participants and interstate capital from California's cardroom market.

Nor do §§ 19858(a) and 19858.5 suggest a discriminatory purpose against out-of-state competitors. Plaintiffs' primary evidence of discriminatory purpose is that § 19858's statutory predecessor permitted the denial of a cardroom license if the applicant "[h]as any financial or other interest in any business or organization *outside the State of California* which is engaged in any form of gambling or gaming not authorized [in California]."

(Emphasis added). Plaintiffs rely on similar language in the Little Hoover Report.

But setting aside that the current version of the statute refers to persons who have financial interests in covered gambling businesses, "whether within or without this state," Cal. Bus. & Prof. Code § 19858(a), the historical language on which plaintiffs rely is consistent with California's asserted interest in regulating gambling and preventing gambling-related crime. The state's desire to prevent crime and gambling-related corruption does not amount to the kind of economic protectionism that would support a finding of discriminatory purpose. *See Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown* (*Optometrists I*), 567 F.3d 521, 525 (9th Cir. 2009) (explaining that a law lacks a discriminatory purpose where the evidence does not "suggest[ ] that the purpose [of a challenged state law] is to protect California [businesses] from competition from out-of-state interests, as opposed to commercial interests generally"). That is especially so considering that federal law traditionally "respect[s] the policy choices of the people of each State on the controversial issue of gambling." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 484, 138 S.Ct. 1461, 200 L.Ed.2d 854 (2018).

Plaintiffs also have not shown that §§ 19858(a) and 19858.5 create discriminatory effects against out-of-state economic interests. Plaintiffs generally maintain that the statutes "unconstitutionally restrict the flow of interstate capital by erecting a barrier around California's gambling market." To the extent plaintiffs are claiming

that out-of-state companies cannot invest in California cardrooms, the district court concluded that plaintiffs, as California cardroom licensees, lack standing to assert a claim on behalf of non-California casino owners. *Flynt v. Shimazu*, 466 F. Supp. 3d 1102, 1105, 1108 (E.D. Cal. 2020). Plaintiffs did not challenge this determination on appeal and so forfeited the issue. *See, e.g., Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 989 (9th Cir. 2023).

Regardless, whether premised on out-of-state economic interests or the interests of those within the state who cannot invest in out-of-state gambling businesses, plaintiffs' "interstate capital" theory does not demonstrate an improper discriminatory effect. That is because "there is no discrimination between similarly situated entities" within and outside the state. *Optometrists I*, 567 F.3d at 525. Anyone—whether in-state or out-of-state—is ineligible to obtain a California cardroom license if he maintains more than a 1% interest in, or control over, a covered gambling business. And that is true regardless of whether the gambling enterprise is located outside of California or within it.

Although plaintiffs point out that the casino market in which they would invest is outside the state, that is because California generally does not allow casinos. And nothing in the dormant Commerce Clause would require California to desist from its view that these types of gambling operations are harmful. *See Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 737 (9th Cir. 2003) (noting that the regulation of gambling as a " 'vice' activity . . . lies at the heart of a state's police powers").

Plaintiffs concede that California could deny a cardroom license based on an assessment of the applicant's poor character. California here has reached the equivalent judgment based on ownership of more than 1% or control of a gambling business deemed illegal under state law, without distinguishing between the in-or out-of-state nature of either the cardroom licensee or the gambling business in which the licensee would invest. That there are no (non-Indian) casinos in California does not mean §§ 19858(a) and 19858.5 unlawfully discriminate against interstate commerce. The resulting limit on interstate investment is a function of California's decision not to allow casinos within its state, a judgment to which it is fully entitled.

Plaintiffs' repackaged discrimination argument—that §§ 19858(a) and 19858.5 discriminate against companies engaged in interstate commerce—fares no better. Even assuming this is not a *Pike* balancing argument by another name, there is no actionable dormant Commerce Clause discrimination. Companies engaged in the interstate gambling markets can invest in California businesses, and Californians can invest in the interstate gambling industry; all that is prevented is certain firms engaging in certain co-ownership activities when a California cardroom license is involved. That plaintiffs may have to forgo other business opportunities does not mean §§ 19858(a) and 19858.5 discriminate in a way that the dormant Commerce Clause prohibits. Indeed, we have previously rejected arguments that state laws treating out-of-state and in-state entities similarly, but which prevent them from structuring or operating their business

as they prefer, reflect improper discrimination in favor of in-state interests. *See Rocky Mt. Farmers*, 730 F.3d at 1092 ("[T]he dormant Commerce Clause does not guarantee that ethanol producers may compete on the terms they find most convenient."); *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 731 F.3d 843, 847 (9th Cir. 2013) ("What is really at issue is the shifting of business from one competitor to another, not a burden on interstate commerce.").

The Supreme Court's decision in *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978), is instructive. In *Exxon*, the Supreme Court considered a Maryland law that prevented a gasoline producer or refiner from operating retail gas stations in the state, and that required divestiture of in-state gas stations, based on concerns that producers and refiners were favoring their own service stations during a time of gasoline shortage. *Id.* at 119, 98 S.Ct. 2207. Exxon, which produced and refined gasoline outside of Maryland and which owned 36 retail stations in Maryland, claimed the Maryland law violated the dormant Commerce Clause. *Id.* at 121, 98 S.Ct. 2207. In particular, Exxon pointed out that because all gasoline was produced and refined outside of Maryland, "the burden of the divestiture requirements f[ell] solely on interstate companies." *Id.* at 125, 98 S.Ct. 2207.

The Supreme Court held that Maryland's law did not violate the dormant Commerce Clause. It observed that interstate firms who did not produce or refine gasoline could still operate within Maryland. *Id.* at 125-26, 98

S.Ct. 2207. Although some interstate firms like Exxon were disadvantaged, "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Id.* at 126, 98 S.Ct. 2207. Nor did the dormant Commerce Clause "protect[ ] the particular structure or methods of operation in a retail market." *Id.* at 127, 98 S.Ct. 2207. Maryland's law survived review because it did not "prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market." *Id.* at 126, 98 S.Ct. 2207.

Similar to *Exxon*, California here has decided that a single person or entity owning or controlling two kinds of businesses is problematic. In *Exxon*, Maryland forced companies to decide whether they would rather operate in-state service stations or gasoline production and refining businesses. California has required plaintiffs and others to decide whether to engage in cardroom operations or to invest in gambling businesses that California regards as unlawful. In *Exxon*, the gasoline production and refining took place entirely out of state. *Id.* at 123, 98 S.Ct. 2207. Here, the casino businesses in which plaintiffs would invest are located entirely out of state as well. As in *Exxon*, this does not constitute discrimination against interstate commerce, especially when here, the reason the casinos are located outside of California is because California has exercised its traditional authority to limit casino gambling within the state. Although plaintiffs argue that Maryland in *Exxon* was regulating an in-state problem, the same can be said here, given that §§ 19858(a) and 19858.5 pertain to cardrooms operating within California.

In short, nothing in the text, history, or operation of §§ 19858(a) and 19858.5 suggests discrimination against interstate commerce, which is the focus of the dormant Commerce Clause. *See Pork Producers*, 598 U.S. at 369, 143 S.Ct. 1142.

B

Plaintiffs next argue that the statutes are unconstitutional because they "impermissibly regulate interstate commerce occurring wholly outside of California," in that plaintiffs are precluded from investing in out-of-state casinos with no connection to the state. *Pork Producers* confirms that this extraterritoriality theory lacks merit.

In advancing their position, plaintiffs rely on a line of Supreme Court cases suggesting that "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336, 109 S.Ct. 2491. Even before *Pork Producers*, we would have met this argument with skepticism. *See Rocky Mt. Farmers*, 730 F.3d at 1101 ("In the modern era, the Supreme Court has rarely held that statutes violate the extraterritoriality doctrine.").

But *Pork Producers* sealed it. As we discussed above, the Supreme Court in *Pork Producers* specifically rejected an "almost *per se* rule forbidding enforcement of state laws that have the practical effect of controlling commerce outside the State, even when those laws do not purposely discriminate against out-of-state economic interests." 598

U.S. at 371, 143 S.Ct. 1142 (quotations omitted). And the Court clarified that cases like *Healy*, on which plaintiffs here rely, turned on an impermissible discriminatory purpose against out-of-state economic interests, not any freestanding extraterritoriality principle. *Id.* at 373-74, 143 S.Ct. 1142.

In this case, §§ 19858(a) and 19858.5 do not offend the dormant Commerce Clause under *Pork Producers* because they regulate conduct within the state, namely, the licensing and operation of California cardrooms. California has therefore validly exercised "the usual 'legislative power of a State to act upon persons and property within the limits of its own territory.'" *Id.* at 375, 143 S.Ct. 1142 (quoting *Hoyt v. Sprague*, 103 U.S. 613, 630, 26 L.Ed. 585 (1881)). It is of course true that compliance with §§ 19858(a) and 19858.5 results in extraterritorial spillover effects on what plaintiffs may do outside the state. But these effects are simply a function of California's non-discriminatory "terms of doing business . . . in the state." *Monarch Content Mgmt. LLC v. Ariz. Dep't of Gaming*, 971 F.3d 1021, 1031 (9th Cir. 2020).

As the Supreme Court explained in *Pork Producers*, "many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior," but in the absence of economic protectionism, the nearly inevitable extraterritorial effects that state laws produce does not mean these laws run afoul of the Commerce Clause's negative proscription. 598 U.S. at 374, 143 S.Ct. 1142. Indeed, we recognized this same point a decade ago: "[E]ven when state law has significant extraterritorial effects, it passes [dormant] Commerce Clause muster when, as

here, those effects result from the regulation of in-state conduct." *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1145 (9th Cir. 2015).

Nor is this a case involving laws that "*directly* regulate[ ] out-of-state transactions by those with *no* connection to the State." *Pork Producers*, 598 U.S. at 376 n.1, 143 S.Ct. 1142 (discussing *Edgar*, 457 U.S. at 641-43, 102 S.Ct. 2629). Plaintiffs have connections with California because they operate cardrooms there. And the transaction that California law most directly regulates is the licensing of cardrooms in the state. Sections 19858(a) and 19858.5 say nothing about the general ability of persons to invest in out-of-state casino businesses; they merely place limits on that ability in the case of persons who operate cardrooms within the state, to prevent assertedly deleterious in-state effects. As the work of the Little Hoover Commission shows, reasonable minds can debate whether California's cardroom licensing restrictions are necessary to prevent the perceived ills of casino gambling from intruding into the state. But that debate is one for state policymakers, not the courts, to resolve. The California Legislature's judgment that the licensing of in-state cardrooms should not coincide with ownership or control over gambling operations that are prohibited in California—whether those businesses are located "within or without this state," Cal. Bus. & Prof. Code § 19858(a)—does not violate any dormant Commerce Clause command.

Indeed, just as in *Pork Producers*, plaintiffs' position here would seemingly lead to the sweeping invalidation

of laws long thought permissible. In *Pork Producers*, the Supreme Court rejected a per se dormant Commerce Clause bar on state regulation with extraterritorial effects because it would disqualify "laws long understood to represent valid exercises of the States' constitutionally reserved powers," such as " '[i]nspection laws, quarantine laws, [and] health laws of every description' that have a 'considerable' influence on commerce outside their borders." 598 U.S. at 375, 143 S.Ct. 1142 (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 203, 6 L.Ed. 23 (1824)).

To this list we could add state licensing laws, for the plaintiffs' position would ostensibly prevent states, in the name of the dormant Commerce Clause, from conditioning a state license on the licensee foregoing some other activity. *But see, e.g., Exxon*, 437 U.S. at 119-21, 127-29, 98 S.Ct. 2207 (rejecting dormant Commerce Clause challenge to Maryland law prohibiting petroleum producers from operating retail gas stations in the state); *Monarch Content Mgmt.*, 971 F.3d at 1025, 1031 (rejecting dormant Commerce Clause challenge to Arizona law requiring any simulcast of horse racing that originates from within or outside Arizona to be offered to all covered waging facilities in the state, because this is merely a requirement of "doing business if [simulcast companies] choose[ ] to provide simulcasts in the state"). Invalidating non-discriminatory state licensing laws would be a significant expansion of the dormant Commerce Clause and, in this case, a serious intrusion on states' traditional ability to regulate gambling activity. *See Murphy*, 584 U.S. at 484, 138 S.Ct. 1461; *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 187, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999).

In pressing their extraterritoriality argument, plaintiffs heavily rely on two of our past cases, *Sam Francis Foundation v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015) (en banc), and *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608 (9th Cir. 2018). But neither case supports our finding a dormant Commerce Clause violation here based on supposedly improper extraterritorial effects.

In *Sam Francis*, we held that a California law requiring royalties to be paid to an artist for fine art sales "whenever 'the seller resides in California *or* the sale takes place in California'" violated the dormant Commerce Clause. 784 F.3d at 1323 (quoting Cal. Civ. Code § 986(a)). Applying *Healy*, we concluded that the first part of the law had an impermissible extraterritorial effect because it "regulate[d] sales that take place outside of California" that "ha[d] no necessary connection with the state other than the residency of the seller." *Sam Francis*, 784 F.3d at 1323. The law in this respect regulated entirely out-of-state activities, requiring the payment of a royalty "even if the sculpture, the artist, and the buyer never traveled to, or had any connection with, California." *Id.* But unlike the statute in *Sam Francis*, which we characterized as "involv[ing] regulation of wholly out-of-state conduct," the California statutes at issue here "regulate[ ] *in-state conduct* with allegedly significant out-of-state practical effects." *Id.* at 1324. *Sam Francis* is therefore distinguishable. *See Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021, 1030 (9th Cir. 2021) (distinguishing *Sam Francis* on the same basis). Although California questions whether *Sam Francis* remains good law after the Supreme Court's decision in *Pork Producers*, we leave that matter for another day.

Daniels Sharpsmart is also distinguishable. There we considered California's requirement that medical waste treatment facilities in California must incinerate all medical waste generated in the state, regardless of where it is disposed. *Daniels Sharpsmart*, 889 F.3d at 612-13. If the waste was transported out of state for disposal, California still required it to be incinerated, "even if the law of another state permitted an alternative method." *Id.* at 613. Relying on *Healy*, we held that this violated the dormant Commerce Clause. *Id.* at 614-16.

Although *Daniels Sharpsmart* contains extraterritoriality-type language on which plaintiffs here understandably rely, *Daniels Sharpsmart* was a different case. There we were concerned with "an attempt to reach beyond the borders of California and control transactions that occur wholly outside of the State after the material in question—medical waste—has been removed from the State." *Id.* at 615. Because the medical waste had already left the state by this point, "[t]here [was] nothing to indicate that the transactions had any effect whatsoever in California." *Id.* at 616.

That is not the case here, because California's cardroom licensing laws regulate the ownership of cardrooms operating in the state. Unlike in *Daniels Sharpsmart*, §§ 19858(a) and 19858.5 are "an attempt" by California "to protect California and its residents," *id.* at 615, from the perceived harms of commingling cardroom licensure with the non-negligible ownership or control over gambling operations deemed illegal under state law. The provisions at issue here do not reach out and purport to

regulate wholly-of-state conduct; they instead condition a state license for conducting in-state activities on plaintiffs foregoing certain business interests, whether within or outside the state.

Especially in light of *Pork Producers*, we lack a sound basis to extend *Daniels Sharpsmart* to the distinct situation before us. As we noted in our own *Pork Producers* decision, which the Supreme Court later affirmed, "[w]e have not extended the *Daniel[s] Sharpsmart* line of cases to a situation where the state law had an upstream effect only as a practical matter on out-of-state transactions." 6 F.4th at 1031. That logic holds true here. Although we appreciate California's position that *Daniels Sharpsmart* is in tension with *Pork Producers*, that is not an issue we must resolve today.

In sum, plaintiffs' reliance on a dormant Commerce Clause-backed extraterritoriality principle fails.

C

Finally, plaintiffs argue that §§ 19858(a) and 19858.5 violate the dormant Commerce Clause under *Pike*'s balancing test. Plaintiffs here face a heavy burden: "the Supreme Court 'has not invalidated a law under *Pike*' in more than 30 years." *Truesdell v. Friedlander*, 80 F.4th 762, 773 (6th Cir. 2023) (quoting *Garber v. Menendez*, 888 F.3d 839, 845 (6th Cir. 2018)). Under *Pike*, plaintiffs must first show that the challenged laws impose a "substantial burden on interstate commerce"; if so, we determine whether that burden is "clearly excessive" in relation to

the law's putative local benefits. *See, e.g., Wayfair*, 585 U.S. at 173, 138 S.Ct. 2080; *Optometrists II*, 682 F.3d at 1155.

As we discussed above, the Supreme Court in *Pork Producers* recently reemphasized that the *Pike* line of cases can largely be justified under the dormant Commerce Clause's core anti-discrimination principle. *See* 598 U.S. at 377-78, 143 S.Ct. 1142. Indeed, "most statutes that impose a substantial burden on interstate commerce do so because they are discriminatory." *Nat'l Pork Producers Council*, 6 F.4th at 1032 (alteration omitted) (quoting *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris* (*Eleveurs I*), 729 F.3d 937, 952 (9th Cir. 2013)). Because plaintiffs have not demonstrated that §§ 19858(a) and 19858.5 discriminate against out-of-state economic interests, their "claim falls well outside of *Pike*'s heartland." *Pork Producers*, 598 U.S. at 380, 143 S.Ct. 1142.

Even so, plaintiffs' claims otherwise fail under *Pike* because plaintiffs have not demonstrated a significant or substantial burden on interstate commerce. *See Nat'l Pork Producers Council*, 6 F.4th at 1032 ("We have held that a statute imposes such a significant burden [under *Pike*] only in rare cases."). Absent discrimination that favors in-state economic interests, state laws can create a substantial burden against interstate commerce based on "inconsistent regulation of activities that are inherently national or require a uniform system of regulation." *Eleveurs I*, 729 F.3d at 952 (quoting *Optometrists II*, 682 F.3d at 1148). Gambling does not involve an inherently national system of regulation, given the states' long-

understood authority in this area. *See Murphy*, 584 U.S. at 484, 138 S.Ct. 1461; *Greater New Orleans Broad. Ass'n*, 527 U.S. at 187, 119 S.Ct. 1923; *Artichoke Joe's*, 353 F.3d at 737-40.

More generally, whatever effects §§ 19858(a) and 19858.5 have on interstate commerce, those effects cannot be regarded as substantial. The challenged laws prevent only a small band of persons—those holding California cardroom licenses—from investing in gaming enterprises that are illegal under California law. And even if we were to consider putative investors in California cardrooms who are not before the court and who face limitations in their abilities to devote capital to California cardrooms, there is no indication that this population of persons is especially large, either.

As California fairly points out, both we and the Supreme Court rejected a *Pike* argument in *Pork Producers*, even though "California's required changes to pig-farming and pork-production practices throughout the United States will cost American farmers and pork producers hundreds of millions (if not billions) of dollars." *Pork Producers*, 598 U.S. at 405-06, 143 S.Ct. 1142 (Kavanaugh, J., concurring in part and dissenting in part). If the *Pike* challenge was unsuccessful in *Pork Producers*, it cannot succeed here. That is especially so considering that the district court also construed §§ 19858(a) and 19858.5 to allow plaintiffs to "enter into a business arrangement with an entity that engages in prohibited gambling so long as their joint venture does not also engage in illegal gambling." Neither side contests the district court's statutory interpretation,

which further limits the effect that §§ 19858(a) and 19858.5 will have on interstate commerce.

Ultimately, plaintiffs' burden argument comes down to the fact that §§ 19858(a) and 19858.5 impose a burden on them. But *Pike* "protects the interstate market, not particular interstate firms, from . . . burdensome regulations." *Exxon*, 437 U.S. at 127-28, 98 S.Ct. 2207; *see also Pork Producers*, 598 U.S. at 383-84, 143 S.Ct. 1142 (plurality); *Nat'l Pork Producers Council*, 6 F.4th at 1032. In other words, "a loss to some specific market participants does not, without more, suggest that the state statute impedes substantially the free flow of commerce from state to state." *Nat'l Pork Producers Council*, 6 F.4th at 1033 (brackets omitted) (quoting *Burlington N. R.R. Co. v. Dep't of Pub. Serv. Regul.*, 763 F.2d 1106, 1114 (9th Cir. 1985)). The burden on plaintiffs thus does not alone demonstrate a substantial burden on interstate commerce. And because plaintiffs have not made this required showing under the first part of the *Pike* framework, like the district court, we "need not determine whether the benefits of the challenged law are illusory." *Id.* at 1033 (quoting *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 452 (9th Cir 2019)).

* * *

"Preventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of 'extreme delicacy,' something courts should do only 'where the infraction is clear.'" *Pork Producers*, 598 U.S. at 390, 143

S.Ct. 1142 (quoting *Conway v. Taylor's Ex'r*, 66 U.S. 603, 634, 1 Black 603, 17 L.Ed. 191 (1862)). For the reasons we have explained, the cardroom licensing restriction in California Business and Professions Code §§ 19858(a) and 19858.5 does not violate the dormant Commerce Clause.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, FILED AUGUST 11, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. 2:16-cv-02831-JAM-JDP

ELIZABETH FLYNT, *et al.*,

Plaintiffs,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *et al.*,

Defendants.

Signed August 10, 2022
Filed August 11, 2022

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Plaintiffs' motion for summary judgment and Defendants' cross-motion for summary judgment. *See* Pl.'s Mot. for Summary Judgment

("PMSJ"), ECF No. 86; Def.'s Cross-Motion for Summary Judgement ("DMSJ"), ECF No. 94. Plaintiffs oppose the Defendants' cross-motion. *See* Pl.'s Opp'n, ECF No. 95. Defendants replied. *See* Def.'s Reply, ECF No. 96. For the reasons set forth below, the Court DENIES Plaintiffs' motion for summary judgment and GRANTS Defendants' cross-motion for summary judgment.[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are California residents who possess state-issued gambling licenses to operate card clubs in California. Plaintiffs' Statement of Undisputed Facts (PSUF) ¶ 34, ECF No. 87. Plaintiffs claim that certain provisions of the licensing statute limit their ability to invest in and/or operate out-of-state casinos. PSUF ¶ 45; Cal. Bus. Prof. Code §§ 19858-19858.5. To comply with the challenged provisions, Plaintiffs have restructured or divested themselves from otherwise attractive business opportunities when such investments would cost them their California gambling licenses. PSUF ¶¶ 49 (disputed on other grounds), 61-62, 69-71. Plaintiffs move for summary judgment, contending that the challenged provisions place a burden on interstate commerce that excessively outweighs the local benefits of the law in violation of the dormant Commerce Clause. Defendants filed a cross-motion for summary judgment.

The Court previously dismissed two of Plaintiffs' three claims in its order granting Defendants' motion to dismiss at ECF No. 67. The only remaining claim for

1. The matter was heard on June 28, 2022.

summary judgment purposes is Plaintiffs' claim that §§ 19858 and 19858.5 indirectly regulate interstate commerce in violation of the dormant Commerce Clause. *See* Third Amended Complaint ("TAC") at 34, ECF No. 81.

II. OPINION

A. Judicial Notice

Federal Rule of Evidence 201 allows the Court to notice a fact if it is "not subject to reasonable dispute," such that it is "generally known" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The Court may take judicial notice of matters of public record. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). Plaintiffs' Exhibits G-L, ECF No. 92, are matters of public record and therefore suitable for judicial notice. The Court grants judicial notice of these Exhibits.

B. Legal Standard for Summary Judgment

Summary judgment is proper if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment should be granted cautiously, with due respect for a party's right to have its factually grounded claims and defenses tried to a jury. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265, (1986). The Court must view the facts and draw inferences in the manner most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369

U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1161 (9th Cir. 1992). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial, but it need not disprove the other party's case. *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548.

C. Scope of Challenged Statutory Provisions

California prohibits gambling for monetary gain in the form of banking or percentage games played with cards, dice, or any other device. Cal. Penal Code § 330. Commonly banned games include blackjack, monte, roulette, faro, and the like. Subject to specific restrictions, however, California permits the operation of cardrooms that host non-prohibited forms of gambling. Cal. Bus. Prof. Code § 19876. Both residents and non-residents may obtain a California gambling license. *Id.*

To be deemed suitable to hold a California gambling license, a prospective licensee may not hold "any financial interest in any business or organization that is engaged in any form of gambling prohibited by Section 330 of the Penal Code, whether within or without this state." Cal. Bus. Prof. Code § 19858. California carved out a limited exception to this restriction to allow licensees to hold up to a 1% financial interest in entities that engage in prohibited forms of gambling so long as it is legal in the state where it occurs. Cal. Bus. Prof. Code § 19858.5.

Plaintiffs claim that these provisions prevent them from entering *any* business relationships with an

individual or entity that holds more than a 1% interest in a gambling operation prohibited in California, even if that business relationship is not itself connected to a prohibited gambling operation. PMSJ at 15. Defendants argue that Plaintiffs' interpretation is too broad and that the statute applies only to licensees and applicants for a license, not potential business partners. DMSJ at 9. While this Court previously entertained Plaintiffs' broad statutory interpretation for the purpose of resolving their motion to dismiss, it finds that it is appropriate to revisit the issue in light of the parties' summary judgment briefings.

To start, § 19858 bars "financial interest[s]" in businesses engaged in prohibited gambling and not, as Plaintiffs contend, all business affiliations with such businesses. Therefore, a California gambling licensee may enter into a business agreement with an entity that engages in prohibited gambling so long as their joint venture does not also engage in illegal gambling. The second entity's illegal gambling interests would not be imputed to the licensee. The primary consideration is thus whether the licensee or prospective licensee has a more than 1% interest in a business that engages in illegal gambling, irrespective of the gambling interests of the other entities involved in that business.

Further, though Plaintiffs insist on their broad reading of the statute, the statute has never been enforced in such a way. As Defendants submit, "[t]he California agencies tasked with implementing the card room licensing scheme, the Commission and the Bureau, have consistently interpreted and applied the Statutes [narrowly]." DMSJ at

9; Defendants' Statement of Undisputed Facts ("DSUF") ¶ 6, ECF No. 94-1.[2] Defendants have supplied declarations to support their contention that the Commission has never denied a California gambling license for the reasons Plaintiffs suggest. *See* Decl. of Stacy Baxter, ECF No. 94-2. The Bureau of Gambling Control has likewise never taken enforcement action against cardroom licensees for such reasons. *See* Decl. of Yolanda Morrow, ECF No. 94-3. In the absence of contravening evidence, the Court finds there is no question of material fact as to how the statute has been enforced since its enactment.

For the forgoing reasons, the Court concludes that the challenged provisions apply only to licensees and prospective licensees. Further, the provisions do not bar licensees and prospective licensees from any and all business affiliations with entities holding more than a 1% illegal gambling interest; the provisions only bar licensees and prospective licensees from themselves holding more than a 1% interest in a business engaged in illegal gambling.

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2. The relevance of how an agency has applied a particular statute is limited to deciding the scope of the statute and not its constitutionality. *See United States v. Hansen*, 25 F.4th 1103, 1111 (9th Cir. 2022) (observing courts do not "uphold an unconstitutional statute merely because the government promised to use it responsibly"); *see also Doe v. San Diego*, 313 F. Supp. 3d. 1212, 1217 (S.D. Cal. 2018) ("[A] facial attack does not raise questions of fact related to the enforcement of the statute in a particular instance").

D. Dormant Commerce Clause Analysis

Plaintiffs allege that §§ 19858 and 19858.5 indirectly regulate interstate commerce in violation of the dormant Commerce Clause. PMSJ at 1. The Commerce Clause is an affirmative grant of power to Congress to regulate interstate and foreign commerce. The inverse of this affirmative grant is an implied, "self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012). This limitation on the states to regulate commerce is "known as the dormant Commerce Clause." *Id.* The dormant Commerce Clause prohibits states from enacting statutes that discriminate against interstate commerce by "burdening out-of-state competitors" to protect in-state economic interests. *Id.* at 1148 (quoting *Dep't of Revenue v. Davis*, 553 U.S. 328, 337, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008)).

"When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests . . . [it] is virtually *per se* invalid under the Commerce Clause." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986) (original emphasis). When, on the other hand, the state statute regulates evenhandedly and only indirectly affects interstate commerce, courts must engage in *Pike* balancing and consider "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits."

Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). A statute, however, is not "invalid merely because it affects in some way the flow of commerce between the States." *Nat'l Ass'n of Optometrists*, 682 F.3d at 1148 (quoting *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371, 96 S.Ct. 923, 47 L.Ed.2d 55 (1976)). "[A] plaintiff must first show that the statute imposes a substantial burden before the court will determine whether the benefits of the challenged laws are illusory." *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 951-52 (9th Cir. 2013) (internal citations omitted).

1. Sections 19858 and 19858.5 Are Not Per Se Invalid

The Court has previously held that the statutes do not directly regulate interstate commerce. Order at 9, ECF No. 67. Further, it is undisputed that the Statutes are not discriminatory on their face. The parties agree that the Statutes apply equally to residents and non-residents and that there is no bar to out-of-state ownership or operation of cardrooms in California. DSUF ¶ 1. Further, Plaintiffs have not shown that the provisions' effect is to "benefit in-state economic interests by burdening out-of-state competitors." *Nat'l Ass'n of Optometrists*, 682 F.3d at 1148 (quoting *Dep't of Revenue*, 553 U.S. at 337-38, 128 S.Ct. 1801.). If anything, the fact that California licensees are subject to more restrictions on their investments in the gambling industry than non-California licensees cuts against any potential economic protectionism that is the chief concern for modern dormant Commerce Clause

jurisprudence. For these reasons, the Court holds that §§ 19858 and 19858.5 are not per se invalid under the dormant Commerce Clause.

2. Sections 19858 and 19858.5 Do Not Substantially Burden Interstate Commerce

The remaining question for the Court is whether the Statutes, though non-discriminatory, nevertheless impose a significant burden on interstate commerce in violation of the dormant Commerce Clause. It is Plaintiffs' burden to show there is a substantial burden on interstate commerce before the Court will determine whether the benefits of the challenged laws are illusory under *Pike*. *Ass'n des Eleveurs de Canards*, 729 F.3d at 951-52.

Most statutes that impose a substantial burden on interstate commerce do so because they are discriminatory. *See Nat'l Ass'n of Optometrists*, 682 F.3d at 1148. As discussed above, this Court has held that the Statutes are not discriminatory. Other statutes that have been found to impose significant burdens on interstate commerce do so because they seek to regulate an activity that is inherently national or require a uniform system of regulation. *Id.* The Supreme Court has held that the Commerce Clause precludes state regulation where "a lack of national uniformity would impede the flow of interstate goods." *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 128, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978). The classic example of an inherently national field that requires a uniform system of regulation is interstate transportation and its

instrumentalities. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997).

Plaintiffs have failed to identify a similar national market for gambling investment. Plaintiffs claim that the Statutes "operate as a roadblock to the transfer of investments and expertise in and out of California with respect to the gambling industry," but have not supplied any authority to show that a flow of capital or expertise is subject to the same level of protections under the dormant Commerce Clause as a flow of tangible goods in a national market. PMSJ at 15. To the contrary, dormant Commerce Clause jurisprudence has suggestively focused on the flow of material goods to the exclusion of considering monetary profits. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978) (focusing on the free flow of petroleum into the state and not on who ultimately profited); *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981) (where the Court's analysis turned on the change in the flow of goods into the state and not on profits). Accordingly, the Court finds Plaintiffs have not shown that the gambling market is inherently national and that a uniform system of regulation is required.

To the extent that Plaintiffs argue the state licensing provisions imposes a substantial burden on interstate commerce by impeding investment opportunities, commercial transactions and commercial relationships, the Court acknowledges that the provisions do in fact force a choice between holding a California gambling license and a greater than 1% interest in a business engaged

in gambling prohibited in California. Plaintiffs have not shown, however, how this choice represents a substantial burden on interstate commerce and not, as Defendants point out, merely lost individual economic interests. Def.'s Reply at 9. In Plaintiffs' own words, "you can either invest in California's gambling market or the market outside of California, but you cannot do both." Pl.'s Opp'n at 4. If so, while it is true that Plaintiffs and other card room licensees have been limited in kinds of gambling investments they can make, it is also true that they have in turn received the privilege of participating in California's cardroom industry. It is not for the Court to say if one is better than the other. The Supreme Court in *Exxon* made clear that the dormant Commerce Clause does not protect a particular company's profits. *Exxon*, 437 U.S. at 127-28, 98 S.Ct. 2207. To the extent Plaintiffs are arguing that a loss of business opportunity or profits constitute a burden on interstate commerce, that argument has no merit.

As the Supreme Court observed, beyond the contours of facial discrimination, the "negative-Commerce-Clause jurisprudence becomes (and has long been) a quagmire." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994) (Scalia, J., concurring). At this stage in the proceedings, the Court relies on the Plaintiffs to marshal evidence that there is a substantial burden on interstate commerce. The Court finds that Plaintiffs have not made a sufficient showing that the challenged provisions impose a substantial burden on interstate commerce. Given this finding the Court need not reach the parties' arguments on *Pike* balancing. *See Nat'l Ass'n of Optometrists*, 682 F.3d at 1155 ("If a

regulation merely has an effect on interstate commerce, but does not impose a significant burden on interstate commerce, it follows that there cannot be a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits' under *Pike*.").

There being no issues of material fact, the Court grants summary judgment to Defendants as a matter of law.

III. ORDER

For the reasons set forth above, the Court DENIES Plaintiffs' Motion for Summary Judgment and GRANTS Defendants' Cross-Motion for Summary Judgment.

IT IS SO ORDERED.

Dated: August 10, 2022

/s/
John A. Mendez
Senior United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, FILED JANUARY 14, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. 2:16-cv-02831-JAM-JDP

LARRY C. FLYNT; HAIG KELEGIAN, SR.; HAIG T. KELEGIAN, JR.,

Plaintiffs,

v.

STEPHANIE K. SHIMAZU, IN HER OFFICIAL CAPACITY AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF JUSTICE, BUREAU OF GAMBLING CONTROL, *et al.*,

Defendants.

Filed January 14, 2021

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

Larry Flynt, Haig Kelegian, Sr., and Haig Kelegian Jr. ("Plaintiffs") own cardrooms in California. Plaintiffs want to substantially invest in out-of-state casinos, but

California law prohibits them from owning more than a 1% interest in facilities that host casino-style gambling. They challenge the constitutionality of this prohibition, arguing it violates the dormant commerce doctrine. *See generally* Second Am. Compl. ("SAC"), ECF NO. 57. On August 6, 2020, Plaintiffs filed their SAC. *Id.* In response, Defendants filed another motion to dismiss.[1] Mot. to Dismiss ("Mot."), ECF No. 59. The parties are certainly familiar with the procedural history leading up to this latest complaint and motion and it will not be repeated here.

For the reasons discussed below, the Court GRANTS IN PART AND DENIES IN PART Defendants' motion to dismiss.

I. BACKGROUND

Subject to some restrictions, California permits in-state gambling. Specifically, it allows both residents and non-residents to operate cardrooms. Prospective cardroom owners must obtain a California gambling license, and renew it every two years, to operate within the state. Cal. Bus. Prof. Code § 19876(a). To avoid monetary and licensing penalties, California cardroom licensees must comply with California gambling laws. This case arises at the intersection of three of these state laws.

1. This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for October 13, 2020.

First, California prohibits cardrooms from engaging in casino-like activities (e.g., blackjack, roulette, and other house-banked or percentage games). Cal. Penal Code § 330. Second, California prohibits a person from "hold[ing] a state gambling license to own a gambling establishment if," among other things, he "has any financial interest in any business or organization that is engaged in any form of gambling prohibited by Section 330 of the Penal Code." Cal. Bus. & Prof. Code § 19858(a). This restriction applies to business investments "within [and] without [the] state." *Id.* Finally, California carves out a limited exception to § 19858's prohibition. *See* Cal. Bus. & Prof. Code § 19858.5. Section 19858.5 allows California cardroom licensees to hold up to a 1% financial interest in entities that host gambling prohibited by California law, so long as the gambling is legal in the state where it occurs.

Plaintiffs are California residents who possess state-issued gambling licenses to operate card clubs in California. SAC ¶¶ 7–9. Plaintiffs stand "ready, willing, and able to compete for the opportunity to invest in and/or operate out of-state-casinos," but §§ 19858 and 19858.5 limit their ability to do so. SAC ¶ 4. On various occasions, Plaintiffs have declined, or divested themselves from, otherwise attractive business opportunities because the investments would cost them their California gambling licenses. SAC ¶¶ 55, 58, 68, 69, 72–75.

In addition, Flynt modified his ownership interest in a Nevada-based exotic dance establishment because the majority owner might introduce gambling there. SAC ¶¶ 61–64. If the majority owner decides to either

introduce gambling, or independently invest in casino-style gambling, Flynt will be required to relinquish his ownership rights entirely. SAC ¶¶ 65–66.

II. OPINION

To state a § 1983 claim, "a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988). Plaintiffs allege §§ 19858 and 19858.5 violate the dormant Commerce Clause of the United States Constitution because they: (1) amount to direct regulation of transactions and business relationships occurring entirely outside of California; (2) prohibit cardroom licensees from interstate investment in out-of-state ventures; and (3) excessively burden interstate commerce. SAC ¶ 5. Defendants, however, maintain Plaintiffs fail to allege a cognizable theory of liability under the dormant commerce doctrine. Mot. at 5–14.

A. Dormant Commerce Doctrine

"The Commerce Clause of the United States Constitution assigns to Congress the authority '[t]o regulate Commerce with foreign Nations, and among the several States.'" *Sam Francis Foundation v. Christies, Inc.*, 784 F.3d 1320, 1323 (quoting U.S. Const. art. I, § 8, cl. 3) (modifications in original). This affirmative grant of authority to federal lawmakers contains an implied

restriction on states' powers to regulate. *Id.* Courts refer to this limitation as either the dormant Commerce Clause or, more precisely, the dormant commerce doctrine. *See id.; United States v. Durham*, 902 F.3d 1180, 1203 (10th Cir. 2018). Imposing the dormant commerce doctrine's limits on state regulation is necessary to "ensure that state autonomy over 'local needs' does not inhibit 'the overriding requirement of freedom for the national commerce.'" *Id.* (quoting *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371, 96 S. Ct. 923, 47 L. Ed. 2d 55 (1976)).

The dormant commerce clause doctrine prohibits two types of state lawmaking: (1) direct regulation of interstate commerce and (2) discrimination against interstate commerce. *Daniels Sharpsmart, Inc. v. Smith ("Daniels")*, 889 F.3d 608, 614 (9th Cir. 2018). "If a state statute 'directly regulates or discriminates against interstate commerce, or . . . its effect is to favor in-state economic interests over out-of-state interests,' it is 'struck down . . . without further inquiry.'" *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1145 (9th Cir. 2015) (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986)).

If, however, a state statute "regulates evenhandedly" and "has only indirect effects on interstate commerce," courts proceed to ask whether those indirect effects "impose[] a 'significant burden on interstate commerce.'" *Id.* at 1146. If not, Ninth Circuit precedent "preclude[s] any judicial 'assessment of the benefits of [a state] law[] and the . . . wisdom in adopting' it." *Id.* (quoting *Nat'l*

Ass'n of Optometrists & Opticians v. Harris, 682 F.3d 1144, 1156 (9th Cir. 2012)) (modifications in original). But if the statute imposes a "significant burden" on interstate commerce, courts must weigh that burden against the law's intrastate benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). *Chinatown Neighborhood Ass'n*, 794 F.3d at 1145–46. A state law will survive "*Pike* balancing" so long as the burden it imposes on interstate commerce is not "clearly excessive in relation to the putative local businesses." *Pike*, 397 U.S. at 142.

1. Section 19858's Applicability

As an initial matter, Defendants contest Plaintiffs' description of § 19858(a)'s reach. Mot. at 5–7. Throughout the SAC, Plaintiffs claim the statute prevents them from entering a business relationship with any individual or entity that has a more than 1% interest in a gambling operation prohibited in California, even if that business relationship is not connected to that gambling operation. *See* SAC ¶¶ 4, 25–26, 66–67, 82, 86, 93, 95, 105. Defendants argue this interpretation of the statute is too broad and that, instead, it "applies only to licensees and applicants for a license, and partners, officers, directors, or shareholders in the business entity that holds or is applying for a license." Mot. at 5.

There is no existing caselaw describing § 19858(a)'s reach. The statute's legislative history is similarly unhelpful. Thus, the analysis of this statute begins and ends with its plain language. Section 19858(a) prohibits a

person from "hold[ing] a state gambling license" if "the person, or any partner, officer, director, or shareholder of the person, has any financial interest in any business or organization that is engaged in any form of gambling prohibited by Section 330 of the Penal Code," whether inside or outside of California. Cal. Bus. & Prof. Code § 19858(a). Section 19805(ae) describes a "person" as a "natural person, corporation, partnership, limited partnership, trust, joint venture, association, or any other business organization." Cal. Bus. & Prof. Code § 19805(ae).

Defendants argue that, because "person" is defined to include business entities, § 19858(a) only applies to individuals, entities, and their partners who apply for or hold California cardroom licenses. Mot. at 6. As such, § 19858(a) does not apply to any individuals or entities that are not applying for, or that do not hold, a California cardroom license. *Id.* While this more conservative application intuitively makes sense, Defendants' reasoning is not persuasive.

The provision deems a person unsuitable to hold a state gambling license if the person, "or *any* partner, officer, director, or shareholder or the person, has *any* financial interest" in an organization engaged in prohibited gambling. Cal. Bus. & Prof. Code § 19858(a) (emphasis added). "Any" means "every." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/any, (accessed Jan. 6, 2021). It is used to indicate one selected without restriction. *Id.* Its use here suggests that a person applying for, or holding, a gambling license in California cannot have a business affiliation

with *any* person or entity that has gambling interests prohibited in California. This could, theoretically, prohibit a licensee from forming a business partnership, unrelated to gambling, with a person who has interests in a casino.

Thus, the scope of § 19858(a)'s applicability is left somewhat uncertain. Defendants argue its reach is limited. But its plain text is not so restrictive. The language of the provision itself cannot be ignored. *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word, shall be superfluous, void, or insignificant.") (internal quotation marks and citations omitted). Accordingly, the Court declines to follow the narrow applicability of § 19858(a) requested by Defendants. The subsequent analysis is conducted with the provision's broader reach in mind.

2. Direct Regulation of Interstate Commerce

"Direct regulation [of interstate commerce] occurs when state law directly affects transactions that take place across state lines or entirely outside of the state's borders." *Daniels*, 889 F.3d at 614. States cannot enact laws that "directly control[]" commerce occurring "wholly outside" the state's boundaries. *Id.* (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989)). State laws that regulate extraterritorially are per se invalid under the dormant commerce doctrine, "regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* In determining

whether a state statute directly regulates out-of-state business, "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the state." *Healy*, 491 U.S. at 336.

Counts One and Two of Plaintiffs' SAC are, in effect, repeat extraterritorial regulation claims.[2] *See* SAC ¶¶ 83–88. Count One alleges § 19858 violates the dormant Commerce Clause because it "directly regulates transactions occurring *wholly* outside of California" by "prohibit[ing] and interfer[ing] with transactions . . . that have nothing to do with in-state cardrooms." SAC ¶¶ 85, 86 (emphasis added). Count Two alleges § 19858 "restrict[s] the opportunities of cardroom licenses to invest their money in *out-of-state* businesses." SAC ¶ 93 (emphasis added). These allegations of direct regulation are not substantively different from those raised in Plaintiffs' first amended complaint. *See* First Amended Complaint ("FAC"), ECF No. 32. There, Plaintiffs alleged § 19858 "mandate[s] extraterritorial application of [California Penal Code § 330]" onto "out-of-state transactions and entities." FAC ¶ 80. The FAC also alleged § 19858 prevents residents from "invest[ing] their money in out-of-state businesses." *Id.* For this reason, the Court's prior analysis of Plaintiffs' direct regulation-based dormant commerce claims still stands.

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2. Plaintiffs have clarified that Counts One and Two of their SAC are not discrimination claims. *See* Opp'n at 8 n.6. As such, the Court need not address Defendants' arguments at pages 10–12 of their motion.

Appendix C

Plaintiffs, as before, hinge their extraterritorial-regulation argument on *Daniels*, 889 F.3d at 615–616. *See* Opp'n at 9–10. This is misguided. In *Daniels*, California used the Medical Waste Management Act to "attempt to reach beyond the borders of California and control transactions that occur wholly outside of the state after the [medical waste] . . . ha[d] been removed from the state." *Daniels*, 889 F.3d at 615. There, the state tried to use its own law to regulate the way medical waste was being disposed of in other states. Not so here.

Sections 19858 and 19858.5 do not regulate conduct that is wholly unrelated to, or occurs wholly outside of, the state. As previously explained, these provisions regulate the ownership of cardrooms within California and prevent illegal gambling interests from becoming too intertwined with legal gambling operations. These provisions have extraterritorial effects, such as requiring Plaintiffs to restructure out-of-state business deals or forego them entirely. *See* SAC ¶¶ 55, 58, 61–66, 68, 69, 72–675. But extraterritorial effects do not render a law per se invalid if those effects "result from a regulation of in-state conduct." *Chinatown Neighborhood Ass'n*, 794 F.3d at 1145–46 (collecting cases). Sections 19858 and 19858.5's out-of-state consequences flow from California's valid regulation of its in-state cardrooms.

The Court finds Plaintiffs lack a cognizable legal theory for their claim that §§ 19858 and 19858.5 directly regulate interstate commerce. Counts One and Two of Plaintiffs' SAC are dismissed.

3. Indirect Regulation of Interstate Commerce

A state's evenhanded regulation of intrastate activity will nonetheless violate the dormant commerce doctrine if its indirect effects on interstate commerce impose a "significant burden" that is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142; *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d at 1156–57.

Plaintiffs allege §§ 19858 and 19858.5 impose a significant burden on interstate commerce not only by preventing Plaintiffs from substantially investing in casino-style gambling, but also by preventing, or significantly curtailing, Plaintiffs from doing business with anyone who has substantial investments in casino-style gambling. *See* SAC ¶¶ 25–26, 66–67. As is allegedly the case with Flynt and his business partner and majority owner of the Nevada-based exotic dance establishment. SAC ¶¶ 66–67, 105. Plaintiffs allege that, if Flynt's business partner decides to independently invest in a casino, Flynt will have to divest his interest in the dance club. *Id.* Based on the Court's analysis of the plain language of § 19858, this might be necessary.

Plaintiffs argue §§ 19858 and 19858.5's ability to regulate industries unrelated to gambling adds to the significance of their burden on interstate commerce. Opp'n at 15. Plaintiffs contend these burdens are "clearly excessive" in relation to California's claimed interest in crime prevention—namely because this interest no longer exists. SAC ¶¶ 99, 102. They allege state officials on both

sides of the political spectrum have repudiated the notion that §§ 19858 and 19858.5 are still necessary to prevent crime. SAC ¶¶ 34–41, 45, 48–52, 100. That the state has exempted various cardrooms from complying with the 1% rule only further undermines this putative benefit. *See* SAC ¶¶ 43, 45, 100.

Defendants again fail to illustrate how these allegations are insufficient as a matter of law. The Court denies Defendants' motion to dismiss Count Three of Plaintiffs' SAC.

B. Leave to Amend

Plaintiffs request leave to amend any portion of the SAC deemed deficient. *See* Opp'n at 15. The Court need not grant leave to amend where amendment would be futile. *Deveraturda v. Globe Aviation Sec. Servs.*, 454 F.3d 1043, 1049 (9th Cir. 2006). Plaintiffs have amended their complaint twice. They have, nonetheless, failed to present a cognizable legal theory in support of their claim that §§ 19858 and 19858.5 directly regulate interstate commerce. Amendment, at this point, would be futile. Accordingly, dismissal of Counts One and Two with prejudice is appropriate. Plaintiffs' request for leave to amend is DENIED.

III. ORDER

For the reasons set forth above, Counts One and Two of Plaintiff's SAC are DISMISSED WITH

PREJUDICE. Defendants' motion to dismiss Count Three is DENIED.

IT IS SO ORDERED.

Dated: January 13, 2021

/s/ John A. Mendez
JOHN A. MENDEZ
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, FILED JUNE 15, 2020

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. 2:16-cv-02831-JAM-EFB

LARRY C. FLYNT; HAIG KELEGIAN, SR.;
HAIG T. KELEGIAN, JR,

Plaintiffs,

v.

STEPHANIE K. SHIMAZU, IN HER OFFICIAL CAPACITY AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF JUSTICE, BUREAU OF GAMBLING CONTROL, *et al.*,

Defendants.

Filed June 15, 2020

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

Larry Flynt, Haig Kelegian, Sr., and Haig Kelegian Jr. own card clubs in California. Flynt and the Kelegians want to substantially invest in out-of-state casinos, but California law prohibits them from owning more than a one-percent interest in facilities that host casino-style gambling. In

2016, Plaintiffs challenged the constitutionality of this prohibition, arguing it violates the Due Process Clause and the dormant commerce doctrine. Compl., ECF No. 1. Plaintiffs have since abandoned their due process claim. *See Flynt v. Shimazu*, 940 F.3d 457, 460 n.2 (9th Cir. 2019)

This Court previously dismissed Plaintiffs' suit with prejudice, finding the two-year statute of limitations barred their claims. Order Granting Defendants' Motion to Dismiss with Prejudice, ECF No. 40. The Ninth Circuit disagreed. *See Flynt*, 940 F.3d at 462–63. Adopting the Sixth and Seventh Circuit's approach to the continuing violations doctrine, the Ninth Circuit found that "the continued enforcement of a statute inflicts a continuing or repeated harm" such that plaintiffs suffer a new injury each time they abstain from prohibited conduct. *Id.* Applying this doctrine, the Ninth Circuit found Plaintiffs' claims fell within the applicable limitations period. *See id.* 462–63.

On remand, Defendants filed another motion to dismiss.[1] Mot. to Dismiss ("Mot."), ECF No. 50. Plaintiffs oppose the motion. Opp'n, ECF No. 51; *see also* Defs.' Reply, ECF No. 52. For the reasons discussed below, the Court grants in part and denies in part Defendants' motion to dismiss. To the extent that Plaintiffs' dormant commerce doctrine claims rest upon the theory that California Business and Professions Code Sections 19858 and 19858.5 directly regulate or discriminate against

1. This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for May 5, 2020.

interstate commerce, the Court dismisses them without prejudice. Plaintiffs lack standing to allege Sections 19858 and 19858.5 improperly discriminate against out-of-state investors. Moreover, their allegations that these provisions directly regulate interstate commerce fail as a matter of law. Plaintiffs do, however, adequately allege that Sections 19858 and 19858.5 indirectly regulate interstate commerce. To the extent that Plaintiffs' dormant commerce claims rests upon this theory of liability, the Court denies Defendants' motion to dismiss.

I. BACKGROUND

Subject to some restrictions, California permits in-state gambling. Specifically, it allows both residents and non-residents to operate cardrooms. Prospective cardroom owners must obtain a California gambling license, and renew it every two years, to operate within the state. Cal. Bus. Prof. Code § 19876(a). To avoid monetary and licensing penalties, California cardroom licensees must comply with California gambling laws. This case arises at the intersection of three of these state laws.

First, California prohibits cardrooms from engaging in casino-like activities (e.g., blackjack, roulette, and other house-banked or percentage games). Cal. Penal Code § 330. Second, California prohibits a person from "hold[ing] a state gambling license to own a gambling establishment if," among other things, he "has any financial interest in any business or organization that is engaged in any form of gambling prohibited by Section 330 of the Penal Code." Cal. Bus. & Prof. Code § 19858(a).

This restriction applies to business investments "within [and] without [the] state." *Id.* Finally, California carves out a limited exception to § 19858's prohibition. *See* Cal. Bus. & Prof. Code § 19858.5. Section 19858.5 allows California cardroom licensees to hold up to a 1% financial interest in entities that host gambling prohibited by California law, so long as the gambling is legal in the state where it occurs.

Flynt and the Kelegians are California residents who possess state-issued gambling licenses to operate card clubs in California. First Amended Compl. ("FAC") ¶¶ 8–10, ECF No. 32. Plaintiffs stand "ready, willing, and able to compete for the opportunity to invest in and/or operate out of-state-casinos," but Sections 19858 and 19858.5 limit their ability to do so. At various points since 2014, Plaintiffs have declined otherwise attractive business opportunities because the investments would cost them their California gambling licenses. FAC ¶ 4.

II. OPINION

To state a section 1983 claim, "a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988). Plaintiffs allege Defendants violated their rights to be free from California's regulation of, and discrimination against, interstate commerce. FAC ¶ 5. Defendants, however, maintain Plaintiffs failed to allege a cognizable theory of liability under the dormant commerce doctrine. Mot. at 5–10. Moreover, Defendants contend Kelegian, Jr.'s failure to exhaust his state administrative remedies bars his claim. Mot. at 14–15.

Appendix D

A. Exhaustion Requirement

California law provides that "[a]ny person aggrieved by a final decision or order of the commission that limits, conditions, suspends, or revokes any previously granted license" may petition the Sacramento County Superior Court for review. Cal. Bus. & Prof. § 19932(a). "Under California law, exhaustion of administrative remedies is a jurisdictional requirement and 'absent a clear indication of legislative intent [a court] should refrain from inferring a statutory exemption from [the State's] settled rule requiring exhaustion of administrative remedies.'" *City of Oakland, Cal. v. Hotels.com LP*, 572 F.3d 958, 961 (9th Cir. 2009).

In 2014, the California Bureau of Gambling Control found that Kelegian, Jr. violated California's 1% rule. FAC ¶¶ 69–70, ECF No. 32. As a result, Kelegian, Jr. had to pay $210,000 in fines and assessments. FAC ¶ 71. Moreover, the state bureau required him to "refrain from any and all investment in out-of-state casino-style gambling facilities." FAC ¶ 71. Kelegian, Jr. did not petition for review of this decision.

Defendants argue this failure to exhaust administrative remedies precludes judicial review. Mot. at 14–15. Plaintiffs disagree, arguing Defendants waived their exhaustion argument by not raising it in their original motions to dismiss. Opp'n at 6 n.5. Neither argument controls. Rather, it is well-established that plaintiffs need not exhaust state administrative remedies before initiating a section 1983 suit in federal court. *Knick v.*

Township of Scott, Pennsylvania, 139 S. Ct. 2162, 2167–68, 204 L. Ed. 2d 558 (2019) (citing *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 501, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982)). The Court therefore declines to dismiss Kelegian, Jr.'s claims on this ground.

B. Dormant Commerce Doctrine

"The Commerce Clause of the United States Constitution assigns to Congress the authority '[t]o regulate Commerce with foreign Nations, and among the several States.'" *Sam Francis Foundation v. Christies, Inc.*, 784 F.3d 1320, 1323 (quoting U.S. Const. art. I, § 8, cl. 3) (modifications in original). This affirmative grant of authority to federal lawmakers contains an implied restriction on states' powers to regulate. *Id.* Courts refer to this limitation as either the dormant Commerce Clause or, more precisely, the dormant commerce doctrine. *See id.; United States v. Durham*, 902 F.3d 1180, 1203 (10th Cir. 2018). Imposing the dormant commerce doctrine's limits on state regulation is necessary to "ensure that state autonomy over 'local needs' does not inhibit 'the overriding requirement of freedom for the national commerce.'" *Id.* (quoting *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371, 96 S. Ct. 923, 47 L. Ed. 2d 55 (1976)).

The dormant commerce doctrine prohibits two types of state lawmaking: (1) direct regulation of interstate commerce and (2) discrimination against interstate commerce. *Daniels Sharpsmart, Inc. v. Smith ("Daniels")*, 889 F.3d 608, 614 (9th Cir. 2018). "If a state statute 'directly regulates or discriminates against interstate commerce, or . . . its effect is to favor in-state economic interests over

out-of-state interests,' it is 'struck down . . . without further inquiry.'" *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1145 (9th Cir. 2015) (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986)).

If, however, a state statute "regulates evenhandedly" and "has only indirect effects on interstate commerce," courts proceed to ask whether those indirect effects "impose[] a 'significant burden on interstate commerce.'" *Id.* at 1146. If not, Ninth Circuit precedent "preclude[s] any judicial 'assessment of the benefits of [a state] law[] and the . . . wisdom in adopting' it." *Id.* (quoting *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1156 (9th Cir. 2012)) (modifications in original). But if the statue imposes a "significant burden" on interstate commerce, courts must weigh that burden against the law's intrastate benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). *Chinatown Neighborhood Ass'n*, 794 F.3d at 1145–46. A state law will survive "*Pike* balancing" so long as the burden it imposes on interstate commerce is not "clearly excessive in relation to the putative local businesses." *Pike*, 397 U.S. at 142.

1. Discrimination Against Interstate Commerce

Within the context of the dormant commerce doctrine, "discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Mgt. Auth.*, 550 U.S. 330, 338, 127 S. Ct. 1786, 167 L. Ed. 2d 655 (2007) (internal

quotations omitted). A statutory scheme can discriminate against out-of-state interests in three ways: facially, purposefully, or in effect. *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009). Although Plaintiffs contend an earlier iteration of Section 19858 was discriminatory on its face, they do not allege that the law in its current form is facially discriminatory. Correctly so. California law prohibits both residents and non-residents with California cardroom licenses from owning more than a 1% interest in casino-style gambling entities. Cal. Penal Code § 330; Cal. Bus & Prof. Code §§ 19858, 19858.5 The text of these provisions does not discriminate.

Plaintiffs do, however, argue that the purpose and effect of these laws are discriminatory. *See* Opp'n at 9–11; FAC ¶¶ 3, 5.a, 6, 26, 29, 41, 44–45. The complaint alleges that state officials, including former-Governor Gray Davis have said that Section 19858 was "primarily [] intended to prohibit out-of-state gambling interests from owning cardrooms in California." FAC ¶ 45. Plaintiffs argue discovery will show that "the only businesses that would be interested in obtaining [California] cardroom licenses are indeed casinos." Opp'n at 11. If true, the laws serve as a barrier to all out-of-state competition with in-state cardrooms. *Id.* But this injury does not align with the injury Plaintiffs claim.

The standing doctrine's "'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (quoting *Sierra*

Club v. Morton, 405 U.S. 727, 734–735, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972)). Plaintiffs are California residents with California gambling licenses. Their alleged injury is that California law prevents them from substantially investing in out-of-state casinos while retaining their licenses. *See* FAC ¶¶ 72, 75. Plaintiffs are not out-of-state casinos barred from procuring a California gambling license and competing with local cardrooms. They therefore lack standing to allege discrimination on an out-of-state investor's behalf. *See Lujan*, 504 U.S. at 563; *see also RK Ventures, Inc. v. City*, 307 F.3d 1045, 1056 (9th Cir. 2002) (addressing the issue of standing sua sponte). To the extent that Plaintiffs' dormant-commerce claim rests on this theory of liability, the Court grants Defendants' motion to dismiss.

2. Direct Regulation of Interstate Commerce

"Direct regulation [of interstate commerce] occurs when state law directly affects transactions that take place across state lines or entirely outside of the state's borders." *Daniels*, 889 F.3d at 614. States cannot enact laws that "directly control[]" commerce occurring "wholly outside" the state's boundaries. *Id.* (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989)). State laws that regulate extraterritorially are per se invalid under the dormant commerce doctrine, "regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.*

In determining whether a state statute directly regulates out-of-state business, "[t]he critical inquiry is whether the practical effect of the regulation is to control

conduct beyond the boundaries of the state." *Healy*, 491 U.S. at 336. Plaintiffs contend their extraterritorial-regulation argument directly mirrors the one recognized in *Daniels*, 889 F.3d at 615–616. *Daniels* addressed a medical waste handler's dormant commerce challenge to the California Medical Waste Management Act (MWMA). *Id.* at 612. Plaintiff sought and obtained a preliminary injunction against the Department's MWMA enforcement. *Id.* at 613. The Ninth Circuit upheld the injunction. In doing so, it found Plaintiff was likely to succeed on his claim that the Department's extraterritorial application of the MWMA violated the dormant commerce doctrine. *Id.* at 615–616.

But *Daniels* is not a perfect match for this case. In *Daniels*, the Ninth Circuit found itself "faced with an attempt to reach beyond the borders of California and control transactions that occur wholly outside of the state after the material in question . . . ha[d] been removed from the state." *Id.* at 615. Put simply: the state was regulating activity it had no business regulating. Sections 19858 and 19858.5 do not, however, regulate conduct that is wholly unrelated to, or occurs wholly outside of, the state. These provisions regulate the ownership of cardrooms within California's borders and prevent illegal gambling interests from becoming too intertwined with legal gambling operations. These provisions have extraterritorial effects, such as requiring Plaintiffs to restructure out-of-state business deals or forego them entirely. *See* FAC ¶¶ 49–77. But extraterritorial effects do not render a law per se invalid if those effects "result from a regulation of in-state conduct." *Chinatown Neighborhood Ass'n*, 794 F.3d at

1145–46 (collecting cases). Sections 19858 and 19858.5's out-of-state consequences flow from California's valid regulation of its in-state cardrooms.

Plaintiffs argue this case differs from cases like *Chinatown Neighborhood* Ass'n *and Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown* where the Ninth Circuit upheld state statutes with extraterritorial effects. Opp'n at 8–9. Specifically, they argue the laws upheld in those cases did not bar California residents from going to another state and engaging in business that was lawful outside California. This argument misgauges the scope of Sections 19858 and 19858.5. Plaintiffs do not allege these provisions restrict all California residents from investing in out-of-state casinos. Nor do Plaintiffs allege these laws prevent all California residents from owning casinos in states where casino-style gambling is lawful. California law only restricts these business practices when they intersect with the ownership or operation of a card club located in California.

Finally, Plaintiffs argue Sections 19858 and 19858.5 impermissibly regulate wholly out-of-state conduct because "the Statutes' effect is not only on the cardroom licensees, but instead, applies to *all* of the licensee's partners, officers, directors, and shareholders, regardless of their location." Opp'n at 8 (citing FAC ¶¶ 26, 57–63) (emphasis in original). The Court declines to address the merits of this argument. To sufficiently allege a facial challenge, a plaintiff "must establish that no set of circumstances exist under which the Act would be valid."

United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). Plaintiffs therefore had to allege Sections 19858 and 19858.5 directly regulated interstate commerce with respect to licensees and non-licensees. As previously discussed, Plaintiffs fail to allege Sections 19858 and 19858.5 directly regulate interstate commerce with respect to California cardroom licensees. The laws' application to non-licensees cannot, in itself, revive Plaintiffs' facial challenge. Nor can it serve as the basis for an as-applied challenge. Plaintiffs, as licensees, lack standing to challenge Sections 19858 and 19858.5 on non-licensees' behalf. *Lujan*, 504 U.S. at 563.

The Court finds Plaintiffs lack a cognizable legal theory for their claim that Sections 19858 and 19858.5 directly regulate interstate commerce. To the extent that Plaintiffs' dormant commerce claims rest upon a direct-regulation theory, the Court grants Defendants' motion to dismiss.

3. Indirect Regulation of Interstate Commerce

A state's evenhanded regulation of intrastate activity will nonetheless violate the dormant commerce doctrine if its indirect effects on interstate commerce impose a "significant burden" that is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142; *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d at 1156–57.

Plaintiffs allege Sections 19858 and 19858.5 impose a significant burden on interstate commerce in two respects.

First, the State's 1% rule not only prevents Plaintiffs from substantially investing in casino-style gambling; it also prevents Plaintiffs from doing business with anyone who has substantial investments in casino-style gambling. FAC ¶ 83. As enforced, this restriction all but completely bars California cardroom licensees from investing in out-of-state gambling ventures. Opp'n at 12–13. Second, the laws restrict Plaintiffs' ability to invest in businesses unrelated to gambling. Flynt, for example, owns an out-of-state "exotic dance establishment." FAC ¶ 83. If Flynt's business partner independently invests in a Nevada casino, Flynt will have to divest his interest in the dance club—even though the dance club itself does not host gambling that is illegal under California law. *Id.* Plaintiffs argue Sections 19858 and 19858.5's ability to regulate industries unrelated to gambling adds to the significance of their burden on interstate commerce. Opp'n at 3.

Plaintiffs contend these burdens are "clearly excessive" in relation to California's claimed interest in crime prevention—namely because this interest no longer exists. FAC ¶ 85. They allege state officials on both sides of the political spectrum have repudiated the notion that Sections 19858 and 19858.5 are still necessary to prevent crime. FAC ¶¶ 39, 44–46. That the State has exempted various cardrooms from complying with the 1% rule only further undermines this putative benefit. *See* FAC ¶¶ 28, 36, 40–41. Defendants fail to illustrate how these allegations are insufficient as a matter of law. To the extent that Plaintiffs' dormant commerce doctrine claims rest upon an indirect-regulation theory of liability, the Court denies Defendants' motion to dismiss.

Appendix D

III. ORDER

For the reasons set forth above, the Court GRANTS IN PART and DENIES IN PART Defendants' motion to dismiss. To the extent that Plaintiffs' dormant commerce doctrine claims rest upon the theory that Sections 19858 and 19858.5 directly regulate or discriminate against interstate commerce, the Court DISMISSES them WITHOUT PREJUDICE. Plaintiffs lack standing to allege Sections 19858 and 19858.5 improperly discriminate against out-of-state investors. Moreover, their allegations that these provisions directly regulate interstate commerce fail as a matter of law. Plaintiffs do, however, adequately allege that Sections 19858 and 19858.5 indirectly regulate interstate commerce. To the extent that Plaintiffs' dormant commerce claims rests upon this theory of liability, the Court DENIES Defendants' motion to dismiss.

If Plaintiffs amend their complaint, they shall file an Amended Complaint within twenty (20) days of this Order. Defendants' responsive pleading is due twenty days thereafter.

IT IS SO ORDERED.

Dated: June 12, 2020

/s/ John A. Mendez
JOHN A. MENDEZ
UNITED STATES DISTRICT JUDGE