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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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.

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

**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

1 dismiss.¹ Mot. to Dismiss ("Mot."), ECF No. 59. The parties are
2 certainly familiar with the procedural history leading up to this
3 latest complaint and motion and it will not be repeated here.

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

6
7 I. BACKGROUND

8 Subject to some restrictions, California permits in-state
9 gambling. Specifically, it allows both residents and non-
10 residents to operate cardrooms. Prospective cardroom owners must
11 obtain a California gambling license, and renew it every two
12 years, to operate within the state. Cal. Bus. Prof. Code
13 § 19876(a). To avoid monetary and licensing penalties,
14 California cardroom licensees must comply with California
15 gambling laws. This case arises at the intersection of three of
16 these state laws.

17 First, California prohibits cardrooms from engaging in
18 casino-like activities (e.g., blackjack, roulette, and other
19 house-banked or percentage games). Cal. Penal Code § 330.
20 Second, California prohibits a person from "hold[ing] a state
21 gambling license to own a gambling establishment if," among other
22 things, he "has any financial interest in any business or
23 organization that is engaged in any form of gambling prohibited
24 by Section 330 of the Penal Code." Cal. Bus. & Prof. Code
25 § 19858(a). This restriction applies to business investments
26

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

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

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

17 In addition, Flynt modified his ownership interest in a
18 Nevada-based exotic dance establishment because the majority
19 owner might introduce gambling there. SAC ¶¶ 61-64. If the
20 majority owner decides to either introduce gambling, or
21 independently invest in casino-style gambling, Flynt will be
22 required to relinquish his ownership rights entirely. SAC ¶¶ 65-
23 66.

24 25 II. OPINION

26 To state a § 1983 claim, "a plaintiff must allege the
27 violation of a right secured by the Constitution and laws of the
28 United States, and must show that the alleged deprivation was

1 committed by a person acting under color of state law.” West v.
2 Atkins, 487 U.S. 42, 48 (1988). Plaintiffs allege §§ 19858 and
3 19858.5 violate the dormant Commerce Clause of the United States
4 Constitution because they: (1) amount to direct regulation of
5 transactions and business relationships occurring entirely
6 outside of California; (2) prohibit cardroom licensees from
7 interstate investment in out-of-state ventures; and
8 (3) excessively burden interstate commerce. SAC ¶ 5.
9 Defendants, however, maintain Plaintiffs fail to allege a
10 cognizable theory of liability under the dormant commerce
11 doctrine. Mot. at 5-14.

12 A. Dormant Commerce Doctrine

13 “The Commerce Clause of the United States Constitution
14 assigns to Congress the authority ‘[t]o regulate Commerce with
15 foreign Nations, and among the several States.’” Sam Francis
16 Foundation v. Christies, Inc., 784 F.3d 1320, 1323 (quoting U.S.
17 Const. art. I, § 8, cl. 3) (modifications in original). This
18 affirmative grant of authority to federal lawmakers contains an
19 implied restriction on states’ powers to regulate. Id. Courts
20 refer to this limitation as either the dormant Commerce Clause
21 or, more precisely, the dormant commerce doctrine. See id.;
22 United States v. Durham, 902 F.3d 1180, 1203 (10th Cir. 2018).
23 Imposing the dormant commerce doctrine’s limits on state
24 regulation is necessary to “ensure that state autonomy over
25 ‘local needs’ does not inhibit ‘the overriding requirement of
26 freedom for the national commerce.’” Id. (quoting Great Atl. &
27 Pac. Tea Co. v. Cottrell, 424 U.S. 366, 361 (1976)).

28 The dormant commerce clause doctrine prohibits two types of

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

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

27 1. Section 19858's Applicability

28 As an initial matter, Defendants contest Plaintiffs'

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

12 There is no existing caselaw describing § 19858(a)'s reach.
13 The statute's legislative history is similarly unhelpful. Thus,
14 the analysis of this statute begins and ends with its plain
15 language. Section 19858(a) prohibits a person from "hold[ing] a
16 state gambling license" if "the person, or any partner, officer,
17 director, or shareholder of the person, has any financial
18 interest in any business or organization that is engaged in any
19 form of gambling prohibited by Section 330 of the Penal Code,"
20 whether inside or outside of California. Cal. Bus. & Prof. Code
21 § 19858(a). Section 19805(ae) describes a "person" as a
22 "natural person, corporation, partnership, limited partnership,
23 trust, joint venture, association, or any other business
24 organization." Cal. Bus. & Prof. Code § 19805(ae).

25 Defendants argue that, because "person" is defined to
26 include business entities, § 19858(a) only applies to
27 individuals, entities, and their partners who apply for or hold
28 California cardroom licenses. Mot. at 6. As such, § 19858(a)

1 does not apply to any individuals or entities that are not
2 applying for, or that do not hold, a California cardroom
3 license. Id. While this more conservative application
4 intuitively makes sense, Defendants' reasoning is not
5 persuasive.

6 The provision deems a person unsuitable to hold a state
7 gambling license if the person, "or any partner, officer,
8 director, or shareholder or the person, has any financial
9 interest" in an organization engaged in prohibited gambling.
10 Cal. Bus. & Prof. Code § 19858(a) (emphasis added). "Any" means
11 "every." Merriam-Webster Dictionary, [https://www.merriam-
13 webster.com/dictionary/any](https://www.merriam-
12 webster.com/dictionary/any), (accessed Jan. 6, 2021). It is used
14 to indicate one selected without restriction. Id. Its use here
15 suggests that a person applying for, or holding, a gambling
16 license in California cannot have a business affiliation with
17 any person or entity that has gambling interests prohibited in
18 California. This could, theoretically, prohibit a licensee from
19 forming a business partnership, unrelated to gambling, with a
20 person who has interests in a casino.

21 Thus, the scope of § 19858(a)'s applicability is left
22 somewhat uncertain. Defendants argue its reach is limited. But
23 its plain text is not so restrictive. The language of the
24 provision itself cannot be ignored. TRW Inc. v. Andrews, 534
25 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory
26 construction that a statute ought, upon the whole, to be so
27 construed that, if it can be prevented, no clause, sentence, or
28 word, shall be superfluous, void, or insignificant.") (internal
quotation marks and citations omitted). Accordingly, the Court

1 declines to follow the narrow applicability of § 19858(a)
2 requested by Defendants. The subsequent analysis is conducted
3 with the provision's broader reach in mind.

4 2. Direct Regulation of Interstate Commerce

5 "Direct regulation [of interstate commerce] occurs when
6 state law directly affects transactions that take place across
7 state lines or entirely outside of the state's borders."
8 Daniels, 889 F.3d at 614. States cannot enact laws that
9 "directly control[]" commerce occurring "wholly outside" the
10 state's boundaries. Id. (quoting Healy v. Beer Inst., 491 U.S.
11 324, 336 (1989)). State laws that regulate extraterritorially
12 are per se invalid under the dormant commerce doctrine,
13 "regardless of whether the statute's extraterritorial reach was
14 intended by the legislature." Id. In determining whether a
15 state statute directly regulates out-of-state business, "[t]he
16 critical inquiry is whether the practical effect of the
17 regulation is to control conduct beyond the boundaries of the
18 state." Healy, 491 U.S. at 336.

19 Counts One and Two of Plaintiffs' SAC are, in effect,
20 repeat extraterritorial regulation claims.² See SAC ¶¶ 83-88.
21 Count One alleges § 19858 violates the dormant Commerce Clause
22 because it "directly regulates transactions occurring wholly
23 outside of California" by "prohibit[ing] and interfer[ing] with
24 transactions . . . that have nothing to do with in-state
25 cardrooms." SAC ¶¶ 85, 86 (emphasis added). Count Two alleges

26 _____
27 ² Plaintiffs have clarified that Counts One and Two of their SAC
28 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.

1 § 19858 "restrict[s] the opportunities of cardroom licenses to
2 invest their money in out-of-state businesses." SAC ¶ 93
3 (emphasis added). These allegations of direct regulation are
4 not substantively different from those raised in Plaintiffs'
5 first amended complaint. See First Amended Complaint ("FAC"),
6 ECF No. 32. There, Plaintiffs alleged § 19858 "mandate[s]
7 extraterritorial application of [California Penal Code § 330]"
8 onto "out-of-state transactions and entities." FAC ¶ 80. The
9 FAC also alleged § 19858 prevents residents from "invest[ing]
10 their money in out-of-state businesses." Id. For this reason,
11 the Court's prior analysis of Plaintiffs' direct regulation-
12 based dormant commerce claims still stands.

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

22 Sections 19858 and 19858.5 do not regulate conduct that is
23 wholly unrelated to, or occurs wholly outside of, the state. As
24 previously explained, these provisions regulate the ownership of
25 cardrooms within California and prevent illegal gambling
26 interests from becoming too intertwined with legal gambling
27 operations. These provisions have extraterritorial effects,
28 such as requiring Plaintiffs to restructure out-of-state

1 business deals or forego them entirely. See SAC ¶¶ 55, 58, 61-
2 66, 68, 69, 72-75. But extraterritorial effects do not render a
3 law per se invalid if those effects “result from a regulation of
4 in-state conduct.” Chinatown Neighborhood Ass’n, 794 F.3d at
5 1145-46 (collecting cases). Sections 19858 and 19858.5’s out-
6 of-state consequences flow from California’s valid regulation of
7 its in-state cardrooms.

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

12 3. Indirect Regulation of Interstate Commerce

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

19 Plaintiffs allege §§ 19858 and 19858.5 impose a significant
20 burden on interstate commerce not only by preventing Plaintiffs
21 from substantially investing in casino-style gambling, but also
22 by preventing, or significantly curtailing, Plaintiffs from doing
23 business with anyone who has substantial investments in casino-
24 style gambling. See SAC ¶¶ 25-26, 66-67. As is allegedly the
25 case with Flynt and his business partner and majority owner of
26 the Nevada-based exotic dance establishment. SAC ¶¶ 66-67, 105.
27 Plaintiffs allege that, if Flynt’s business partner decides to
28 independently invest in a casino, Flynt will have to divest his

1 interest in the dance club. Id. Based on the Court's analysis
2 of the plain language of § 19858, this might be necessary.

3 Plaintiffs argue §§ 19858 and 19858.5's ability to regulate
4 industries unrelated to gambling adds to the significance of
5 their burden on interstate commerce. Opp'n at 15. Plaintiffs
6 contend these burdens are "clearly excessive" in relation to
7 California's claimed interest in crime prevention—namely because
8 this interest no longer exists. SAC ¶¶ 99, 102. They allege
9 state officials on both sides of the political spectrum have
10 repudiated the notion that §§ 19858 and 19858.5 are still
11 necessary to prevent crime. SAC ¶¶ 34-41, 45, 48-52, 100. That
12 the state has exempted various cardrooms from complying with the
13 1% rule only further undermines this putative benefit. See SAC
14 ¶¶ 43, 45, 100.

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

18 B. Leave to Amend

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

1 is DENIED.

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III. ORDER

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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.

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IT IS SO ORDERED.

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Dated: January 13, 2021

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JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

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