

No. 21-2936

**United States Court of Appeals
for the Eighth Circuit**

Thomas John Styczinski, Tom “The Coin Guy”, LLC, Treasure Island Coins, Inc.,
and Numismatist United Legal Defense,

Plaintiffs–Appellants,

v.

Grace Arnold, in her official capacity as Commissioner of the Minnesota
Department of Commerce,

Defendant–Appellee.

On Appeal from the United States District Court
for the District of Minnesota

District Court No. 0:20–cv–02019–NEB–BRT

Appellants’ Principal Brief

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Summary of the Case

Minnesota’s bullion-dealer law, Minn. Stat. ch. 80G, imposes an onerous state-level licensing and regulatory scheme on commerce in the worldwide precious-metals markets. Participation in these markets through transactions in Minnesota now requires registration with the Minnesota commissioner of commerce. This licensing requirement burdens Minnesotans’ and out-of-state dealers’ participation in interstate commerce. Moreover, the law applies extraterritorially, imposing the licensing requirement and other requirements on certain transactions conducted entirely outside of Minnesota’s borders. Appellants are participants in the precious-metals markets—both professional dealers and hobbyists—who are potentially subject to ch. 80G and who want to be free of its burdens. Some appellants are reluctant to buy or sell bullion in Minnesota for fear of violating the law. Appellants brought this 42 U.S.C. § 1983 challenge to ch. 80G, asserting both an extraterritoriality dormant Commerce Clause claim and an excessive-burden dormant Commerce Clause claim.

The district court granted Appellants’ summary judgment on their extraterritoriality claim and struck down a section of the chapter, but not the section that imposes the registration requirement. The court granted Respondent’s motion to dismiss Appellants’ excessive-burden claim. This Court should reverse. Among other reasons, Respondent has admitted that the registration requirement applies to out-of-state transactions. Appellants request twenty minutes of oral argument because of the importance of the constitutional issues involved.

Corporate Disclosure Statement

In accordance with Fed. R. App. P. 26.1(a) and Local Rule 26.1A of the United States Court of Appeals for the Eighth Circuit, Appellants Tom “The Coin Guy”, LLC, Treasure Island Coins, Inc., and Numismatist United Legal Defense, through their attorneys, state the following:

1. Tom “The Coin Guy”, LLC is a limited liability company, the ownership of which is not reflected in stock. Neither a parent corporation nor a publicly held corporation owns 10% or more of the total ownership interests in Tom “The Coin Guy”, LLC.

2. Neither a parent corporation nor a publicly held corporation owns 10% or more of the stock in Treasure Island Coins, Inc.

3. Numismatist United Legal Defense is an unincorporated association that does not have any ownership interests. Therefore, neither a parent corporation nor a publicly held corporation owns 10% or more of the total ownership interests in Numismatist United Legal Defense.

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Jurisdictional Statement

This district court had federal-question subject-matter jurisdiction under 28 U.S.C. § 1331 because this case is a challenge to the constitutionality of state statutory provisions under 42 U.S.C. § 1983. On July 23, 2021, the district court

- granted in part and denied in part Appellants' motion for summary judgment;
- granted in part and denied in part Respondent's motion to dismiss Appellants' complaint; and
- ordered that judgment be entered accordingly.

The district court's July 23, 2021 order disposed of all claims with finality.

On July 26, 2021, the district court entered judgment on the district court's July 23, 2021 order, and then, on July 27, 2021, entered an amended judgment. Appellants timely filed a notice of appeal on August 25, 2021 under 28 U.S.C. § 1291. This Court therefore has subject-matter and appellate jurisdiction to hear this case under 28 U.S.C. §§ 1291 and 1331.

Statement of Issues

The Appellants submit the following issues for this Court's disposition:

1. The dormant Commerce Clause extraterritoriality doctrine prohibits a state from regulating commerce conducted outside the state's borders. The district court determined that Minn. Stat. § 80G.02, which requires a state-issued license to buy or sell precious-metal bullion once a certain transaction threshold is reached, applies to transactions conducted outside Minnesota. But the district court held that the extraterritoriality doctrine doesn't apply to a licensing requirement. Shouldn't the district court have held § 80G.02 to be an extraterritorial regulation?

Apposite constitutional provision:

U.S. Const. Art. 1, § 8, cl. 3 (Commerce Clause)

Apposite cases:

Healy v. Beer Inst., 491 U.S. 324, 335-37 (1989)

Brown–Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 578-84 (1986)

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935)

Midwest Title Loans, Inc. v. Mills, 593 F.3d 660, 665-68 (7th Cir. 2010)

2. The dormant Commerce Clause prohibits state laws that excessively burden interstate commerce. Minnesota's bullion-dealer law, Minn. Stat. ch. 80G, imposes licensing and other requirements on participants in what are not merely national, but massive, highly liquid, worldwide commodities markets, even going so far as to require a license to buy or sell shares of precious-metal exchange-traded funds. Is ch. 80G unconstitutional?

Apposite constitutional provision:

U.S. Const. Art. 1, § 8, cl. 3 (Commerce Clause)

Apposite cases:

Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529-30 (1959)

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)

Great Atlantic & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 371-72 (1976)

Edgar v. MITE Corp., 457 U.S. 624, 643-46 (1982)

Statement of the Case

Appellants brought this 42 U.S.C. § 1983 challenge to Minn. Stat. ch. 80G because (1) the chapter imposes an extraterritorial regulatory scheme on transactions in precious metals and thus violates the dormant Commerce Clause, and (2) the chapter excessively burdens interstate commerce in violation of the dormant Commerce Clause.

In its July 23, 2021 order on the parties cross-motions for summary judgment and dismissal, J.A. 1-33, the district court granted Appellants' motion for summary judgment on its extraterritoriality claim (count 3 of Appellants' complaint), J.A. 19-20, 32-33, but struck down only one section of the chapter: § 80G.07, J.A. 19-20, 32-33. Crucially, the court refused to strike down the section that imposes an extraterritorial licensing requirement: § 80G.02. J.A. 20 n.15. The court granted Respondent's motion to dismiss Appellants' excessive-burden claim (count 1 of Appellants' complaint) and dismissed the claim with prejudice. J.A. 16-18, 33.

On July 26, 2021, the district court entered judgment on the district court's July 23, 2021 order, ETF No. 40, and then, on July 27, 2021, entered an amended judgment, J.A. 206-207. The amended judgment disposed of all claims in this case with finality. *See id.*

Appellants request that this Court reverse the district court judgment and remand with instructions to enter judgment in favor of Appellants on their extraterritoriality claim and issue a permanent injunction prohibiting enforcement of

ch. 80G. Appellants also ask this Court to reverse the district court’s dismissal of their excessive-burden claim.

A. Chapter 80G requires a license to buy or sell precious metals in a broad range of circumstances and also imposes other burdens and restrictions.

The licensing requirement that Appellants are challenging is found in Minn.

Stat. § 80G.02’s first subdivision:

Registration required. *It is unlawful for a dealer or dealer representative to solicit, market, buy, sell, or deliver bullion products or investments in bullion products to a consumer without being registered by the commissioner as provided for in this chapter.* A dealer must submit an application to register itself and each of its dealer representatives within 45 days of reaching \$25,000 in the aggregate of bullion product transactions with consumers between July 1 and June 30 of any year, as determined by the transactions’ sale or purchase prices. Once a dealer is required to register itself and its dealer representatives, the dealer must thereafter renew its registration and the registration of each of its dealer representatives in accordance with this chapter, regardless of the aggregate annual amount of transactions, unless the person ceases to be a dealer. A dealer representative may not buy, sell, solicit, or market bullion products or investments in bullion products on behalf of a dealer unless the dealer is properly registered with the commissioner under this section.

Minn. Stat. § 80G.02, subd. 1 (emphasis added).

Minnesota Statutes § 80G.01, ch. 80G’s definition section, defines “bullion product”—a key term of § 80G.02, subd. 1’s licensing requirement—broadly so that the term includes far more than gold and silver coins:

Bullion product. “Bullion product” means any coin, round, bar, or ingot containing silver, gold, platinum, palladium, or other precious metal.

Id. § 80G.01, subd. 2.

The section’s definition of “dealer” is also broad, but contains several exceptions:

Dealer. (a) *Subject to the exceptions in paragraph (b), a “dealer” means any person who buys, sells, solicits, or markets bullion products or investments in bullion products to consumers and:*

(1) *is incorporated, registered, domiciled, or otherwise located in this state;*
(2) *has a dealer representative located in this state; or*
(3) *does business with a consumer at a location in this state, or delivers or ships a bullion product or makes a payment to a consumer at an address in this state, unless the transaction occurs when the consumer is at a business location outside of this state.*

(b) A dealer does not include any of the following persons:

(1) a person who engages only in wholesale bullion product transactions with other persons who engage only in wholesale bullion product transactions or with dealers who buy or sell at retail and are properly registered under this chapter;

(2) a person who engages only in transactions at occasional garage or yard sales held at the seller’s residence, farm auctions held at the seller’s residence, or estate sales held at the decedent’s residence;

(3) a person who is properly registered pursuant to chapter 80A, or the federal Securities Exchange Act of 1934 and rules promulgated thereunder as a securities broker dealer or broker dealer agent;

(4) an auctioneer who auctions bullion products on behalf of an owner, if the auctioneer does not take title or ownership of the bullion products, or the operator of an Internet website that allows users to offer the sale of bullion products through that website, does not set the price, is not the seller of record, and does not take possession of any bullion products to be offered;

(5) a person who engages only in transactions at no more than 12 trade shows per year in this state where the consumer is present and the transaction is made at the trade show; or

(6) a federally or state-chartered bank, bank and trust, savings bank, savings association, or credit union or any operating subsidiary of them.

Id. § 80G.01, subd. 3 (emphasis added).

In conjunction, § 80G.02, subd. 1 (the registration provisions) and § 80G.01, subd. 3 (the definition of “dealer”) impose the registration requirement extraterritorially—i.e., on transactions outside of Minnesota’s borders. If a person is a “dealer” under any clause of § 80G.01, subd. 3(a), then all of the person’s bullion transactions with consumers, regardless of where they take place, count toward § 80G.02, subd. 1’s \$25,000 registration threshold. Once a “dealer” has reached that threshold and become subject to the registration requirement, an unregistered bullion transaction with a consumer anywhere in the world will violate the registration requirement. *Id.* § 80G.02, subd. 1.

Registering as a dealer—i.e., becoming licensed—requires submitting to the Minnesota commissioner of commerce an application containing detailed background information about the applicant. *Id.* § 80G.02, subd. 3. Registration also requires a fee, which the chapter sets at the initial amount of \$25, but which the commissioner may increase each year “based on the cost of processing registrations.” *Id.*, subd. 5. A dealer must renew their registration each year. *Id.*, subd. 2.

The commissioner may deny or revoke a registration for a variety of reasons. *Id.* § 80G.03, subd. 1. And “[t]he commissioner *must deny* an application for registration or renewal of a dealer, or revoke such registration, if the bullion coin dealer or its owners or officers have within the last ten years been convicted in any court of any financial crime or other crime involving fraud or theft.” *Id.* § 80G.04, subd. 1 (emphasis added).

The chapter also requires even a registered dealer to maintain a surety bond, *id.* § 80G.06, subd. 1, but the legislature amended the provision after the hearing on the parties' cross-motions, Minn. Sess. Laws – 2021, 1st Special Session, House File No. 6 (ch. 4) § 19 (J.A. 137, 157). The version in force when this case started based the amount of the bond on the amount of a dealer's transactions, regardless of where they occurred, requiring a dealer to "maintain a current, valid surety bond issued by a surety company admitted to do business in Minnesota in an amount based on the transactions (purchases from and sales to consumers at retail) during the 12-month period prior to registration, or renewal, whichever is applicable." Minn. Stat. § 80G.06, subd. 1 (pre-amendment version). The old version of the section that imposes the bond requirement contained a table showing the bond amount required for different ranges of transaction totals, and set the minimum transactional total needed to trigger the bond requirement at \$25,000. *Id.*

The new version limits the transactions that count in determining the bond requirement to transactions conducted in Minnesota:

Subdivision 1. **Surety bond requirement.** (a) Every dealer shall maintain a current, valid surety bond issued by a surety company admitted to do business in Minnesota in an amount based on the transactions conducted with Minnesota consumers (purchases from and sales to consumers at retail) during the 12-month period prior to registration, or renewal, whichever is applicable.

House File No. 6 § 19 (J.A. 157) (underlining in original to show text added by the amendment). But whereas the old version set the minimum transaction total at

\$25,000, the new version sets no minimum transaction threshold for triggering the bond requirement, and requires a \$25,000 bond for a dealer with “\$0” in transactions in the preceding 12 months. *Id.* (J.A. 157).

The chapter makes “conduct[ing] business as a dealer or as a dealer representative without [being registered]” a misdemeanor. Minn. Stat. § 80G.08.

And the one section of the chapter that the district court struck in its entirety, § 80G.07, contains a long list of requirements and prohibitions that even a licensed dealer must comply with in transactions with consumers.

The commissioner has various civil enforcement powers under the chapter. *Id.* § 80G.10. These include maintaining a civil action against any violator of ch. 80G. *Id.*, subd. 1. In such an action, the commissioner may seek several types of relief including an injunction or restraining order; a civil penalty of up to \$10,000 per violation; disgorgement of profits; and even asset forfeiture. *Id.*, subd. 2. The commissioner also has authority, without bringing a court proceeding, either to order a person to comply with ch. 80G or to cease violating ch. 80G, *id.*, subd. 4(a)(intro.), (1), and has the authority, without bringing a court proceeding, to order the revocation of a person’s registration under ch. 80G for a violation of the chapter, *id.*, subd. 4(a)(intro.), (2). If a person fails to comply with the commissioner’s order, then the commissioner may seek court enforcement of the order. *Id.*, subd. 4(e). If a court finds that a person has violated the commissioner’s order, then the court may impose a civil penalty against the person of up to \$10,000 per violation and “grant any other relief the court

determines is just and proper in the circumstances.” *Id.* The commissioner may also use her investigation and enforcement powers under Minn. Stat. §45.027 to enforce ch. 80G. *Id.* §80G.10, subd. 4(f).

No other state has a licensing or registration requirement for buying or selling bullion that resembles ch. 80G’s registration requirement. *See* J.A. 51; Olson Decl. ¶ 6, ECF No. 23.

B. Appellants are persons who seek to engage—without registering under ch. 80G—in transactions regulated by ch. 80G.

Appellant Thomas John Styczinski, a resident of Hennepin County, Minnesota, has a salaried job at a large financial institution, but he also has a numismatic side business. J.A. 42, 44; Styczinski Decl. ¶ 2, ECF No. 22. Operating through his Minnesota limited liability company, Appellant Tom “The Coin Guy”, LLC, Mr. Styczinski buys collectible coins, some of which have gold or silver content, with the goal of later selling them at a profit. J.A. 42, 44; Styczinski Decl. ¶ 2, ECF No. 22. In addition to buying collectible coins, Mr. Styczinski also sometimes invests in precious-metal bullion that has no particular numismatic value and that is a vehicle for investing in precious metal, e.g., United States Gold and Silver Eagles. J.A. 42, 44; Styczinski Decl. ¶ 2, ECF No. 22. Neither Mr. Styczinski nor his company is registered as a dealer under Minn. Stat. ch. 80G. J.A. 42, 44; Styczinski Decl. ¶ 2, ECF No. 22. Tom “The Coin Guy”, LLC has its principal place of business in Eden Prairie, Hennepin County, Minnesota. J.A. 44; Styczinski Decl. ¶ 2, ECF No. 22. Mr.

Styczinski is a founding member of Appellant Numismatist United Legal Defense.

J.A. 42, 44; Styczinski Decl. ¶ 1, ECF No. 22.

Appellant Treasure Island Coins, Inc. is incorporated under North Dakota law, and is in the business of buying and selling precious-metal coins and bars. J.A. 42, 44-45; Olson Decl. ¶ 2, ECF No. 23. The corporation has its principal place of business in Fargo, North Dakota, where it operates a brick-and-mortar coin store. J.A. 42, 44; Olson Decl. ¶ 2, ECF No. 23. In addition to selling precious-metal coins and bars at its store, Treasure Island Coins also sells precious-metal coins and bars, including Gold Eagles, Silver Eagles, Platinum Eagles, and Palladium Eagles, through its website: <https://treasureislandcoins.com>. J.A. 42, 44; Olson Decl. ¶ 2, ECF No. 23. Customers can place orders for bullion products through the website, and Treasure Island Coins ships purchased products to buyers. J.A. 44; Olson Decl. ¶ 2, ECF No. 23.

Treasure Island Coins transacts with customers throughout the United States—except that the corporation doesn't engage in transactions subject to Minn. Stat. ch. 80G and thus does not transact with persons located in Minnesota, unless transactions with those persons qualify for one of the exceptions to dealer status under Minn. Stat. § 80G.01, subd. 3(b). J.A. 45; Olson Decl. ¶ 2, ECF No. 23. The corporation's bullion sales volume greatly exceeds \$25,000 per year. J.A. 45; Olson Decl. ¶ 2, ECF No. 23. Treasure Island Coins is not registered as a dealer under Minn. Stat. ch. 80G. J.A. 45; Olson Decl. ¶ 2, ECF No. 23. The corporation regards the costs of registration as

outweighing the benefits of selling to, or buying from, persons located in Minnesota. J.A. 45; Olson Decl. ¶ 2, ECF No. 23.

No state other than Minnesota requires Treasure Island Coins to obtain a registration or license to buy or sell precious-metal coins or bars. J.A. 51; Olson Decl. ¶ 6, ECF No. 23.

Treasure Island Coins would like to be able—without registering under ch. 80G or otherwise obtaining a license—to sell precious-metal coins and bars to, and buy precious-metal coins and bars from, persons located in Minnesota, even if transactions with those persons don't qualify for one of the exceptions to dealer status under Minn. Stat § 80G.01, subd. 3(b). J.A. 42, 53-54; Olson Decl. ¶¶ 5, 12-13, ECF No. 23. More specifically, Treasure Island Coins would like to do the following things without registering as a dealer under ch. 80G, but is reluctant to do them for fear of violating ch. 80G:

- buy or sell, in a year, more than \$25,000 in “bullion products or investments in bullion products” in “transactions with consumers” located in Minnesota;
- deliver or ship, in a year, more than \$25,000 in “bullion products or investments in bullion products” to “consumers” at Minnesota addresses in the course of completing “transactions with consumers”; and
- buy “bullion products or investments in bullion products” from Minnesota “consumers” and make payments for the purchases to “consumers” at

Minnesota addresses. J.A. 53-54; Olson Decl. ¶¶ 12-13, ECF No. 23.

Appellant Numismatist United Legal Defense is an association of coin dealers and coin collectors. J.A. 42, 45; Styczinski Decl. ¶ 4, ECF No. 22. The association’s purpose is to protect Americans’ rights to buy, sell, and collect coins, including rare coins and precious-metal-containing coins. J.A. 45; Styczinski Decl. ¶ 4, ECF No. 22. The association has members throughout the country, including dealers and collectors, and including Minnesota residents and residents of other states. J.A. 45; Styczinski Decl. ¶ 4, ECF No. 22. Members engage in intrastate, interstate, and international commerce by purchasing and selling coins—including rare coins and precious-metal-containing coins—and other precious-metal-containing products such as rounds and bars. J.A. 45; Styczinski Decl. ¶ 4, ECF No. 22. The association is designed to come to the aid of dealers and collectors wherever the government tries to infringe their rights. J.A. 45; Styczinski Decl. ¶ 4, ECF No. 22.

Some members of Numismatist United Legal Defense do not regularly buy or sell bullion as part of an ongoing business and are thus not “dealers” in the ordinary sense—some are hobbyists and may well be treated as “consumers” under ch. 80G (as, in fact, might anybody). Styczinski Decl. ¶ 5, ECF No. 22.

Members of Numismatist United Legal Defense, including Mr. Styczinski, would like to do the following things without registering as a dealer under ch. 80G, but they’re reluctant to do them for fear of violating ch. 80G:

- buy or sell, in a year, more than \$25,000 in “bullion products or investments

- in bullion products” in “transactions with consumers” located in Minnesota;
- deliver or ship, in a year, more than \$25,000 in “bullion products or investments in bullion products” to “consumers” at Minnesota addresses in the course of completing “transactions with consumers”;
 - buy “bullion products or investments in bullion products” from Minnesota “consumers” and make payments for the purchases to “consumers” at Minnesota addresses;
 - buy or sell “bullion products or investments in bullion products” in Minnesota at places other than garage sales, yard sales, farm sales, estate sales, or trade shows;
 - buy or sell “bullion products or investments in bullion products” in Minnesota at more than 12 trade shows per year;
 - buy shares in a precious-metal ETF as an investment or as a hedging tool, or sell shares in a precious-metal ETF; and
 - buy or sell precious-metal futures contracts. J.A. 52-53, 54-56; Styczinski Decl. ¶¶ 7-9, ECF No. 22.

C. Defendant has aggressively enforced ch. 80G and has enforced it against Appellant Treasure Island Coins.

The commissioner has repeatedly brought administrative enforcement actions against unregistered bullion dealers and dealer representatives who have allegedly

done business with buyers or sellers located in Minnesota. J.A. 49-51, 115-16. One of the commissioner's approaches to enforcement against an unregistered person suspected of having engaged in a bullion transaction requiring registration is to use her investigative authority under § 45.027. J.A. 49-50, 116.

If the commissioner determines that she can prove that an unregistered person engaged in a bullion transaction requiring registration, the commissioner then typically offers the person the opportunity to resolve the investigation by agreeing to a consent order. J.A. 50, 116. Some consent orders require that the person, in exchange for avoiding further enforcement actions, agree either to register or to refrain from engaging in bullion transactions requiring registration. J.A. 50, 116. The order may also require the payment of a civil penalty, often some thousands of dollars. J.A. 50, 116.

The commissioner maintains an online list of her enforcement actions against persons who have allegedly violated ch. 80G. J.A. 50, 116.¹ For many of the actions,

¹ A person may reach the list by following these steps:

- a. Going to <https://www.cards.commerce.state.mn.us/CARDS/>;
- b. Selecting "Enforcement Actions" from the "Area of Interest" dropdown menu;
- c. Selecting "Bullion Coin Dealers" from the "Industry Type" dropdown menu; and
- d. Clicking on the green "Go" link button. J.A. 50, 116.

The list is arranged in a table with columns for, among other things, the names of the person subject each enforcement action, the person's state of residence, the type of enforcement action used by the commissioner, the amount of the penalty imposed, and a summary of the commissioner's allegations. J.A. 50-51, 116. The table also

the online list of enforcement actions reveals a consent order agreed to by the person targeted in the enforcement action. J.A. 50-51, 116. The table shows that many of the persons who have been subject to enforcement actions—and many of the persons who have agreed to consent orders requiring the payment of civil penalties—are out-of-state businesses. J.A. 51, 116.

Treasure Island Coins is among the businesses that the commissioner has targeted for enforcement of Minn. Stat. ch. 80G. J.A. 51; Olson Decl. ¶ 7, ECF No. 23. The Minnesota Department of Commerce sent Treasure Island Coins a letter dated October 21, 2019, in which the department told Treasure Island Coins that the department “has been auditing Individual Retirement Accounts of precious metal storage facilities/depository agents to determine which companies are conducting precious metal IRA transactions with Minnesota consumers who desire to have their precious metals placed in an IRA approved depository.” J.A. 51, 94-96, 117; Olson Decl. ¶ 7, ECF No. 23; Olson Decl. Ex. 1, ECF No. 23-1.

The letter accused Treasure Island Coins of having engaged in “transactions with Minnesota consumers that required Treasure Island Coin to have been licensed/registered and bonded, pursuant to Minn. Stat. §§ [sic] 45.027 and Chapter 80G.” J.A. 51-52, 94, 117; Olson Decl. ¶ 8, ECF No. 23; Olson Decl. Ex. 1, ECF No.

contains a column with link buttons that can be used to load a document related to each enforcement action. J.A. 50-51, 116.

23-1. The letter implied that Treasure Island Coins had engaged in at least one bullion transaction with a Minnesota “consumer” in that person’s IRA. J.A. 52, 94, 117; Olson Decl. ¶ 8, ECF No. 23; Olson Decl. Ex. 1, ECF No. 23-1. In the letter, the department requested, among other things, a spreadsheet listing all bullion transactions between Treasure Island Coins and “Minnesota consumers” from July 1, 2016 to the letter’s date and the amounts of the transactions. J.A. 52, 94, 117; Olson Decl. ¶ 8, ECF No. 23; Olson Decl. Ex. 1, ECF No. 23-1.

Treasure Island Coins resolved the commissioner’s enforcement action by agreeing to the consent order. J.A. 52, 97-99, 117; Olson Decl. ¶ 9, ECF No. 23; Olson Decl. Ex. 2, ECF No. 23-2. The consent order required Treasure Island Coins to pay a civil penalty of \$10,000 plus \$90 in “investigative costs.” J.A. 52, 98, 117; Olson Decl. ¶ 10, ECF No. 23; Olson Decl. Ex. 2, ECF No. 23-2. The order also required Treasure Island Coins to submit its application to register as a bullion dealer by a certain date or else immediately cease engaging in transactions subject to ch. 80G. J.A. 52, 98, 117; Olson Decl. ¶ 10, ECF No. 23; Olson Decl. Ex. 2, ECF No. 23-2. Treasure Island Coins paid the \$10,090 and stopped engaging in transactions with persons located in Minnesota, unless transactions with those persons qualify for one of the exceptions to dealer status under Minn. Stat § 80G.01, subd. 3(b). Olson Decl. ¶ 10, ECF No. 23.

Because of the burdens of complying with ch. 80G, Treasure Island Coins opted to discontinue doing business with persons located in Minnesota—unless

transactions with those persons qualify for one of the exceptions to dealer status under Minn. Stat § 80G.01, subd. 3(b)—rather than apply for registration. J.A. 52; Olson Decl. ¶ 11, ECF No. 23. Treasure Island Coins engages in transactions with persons—including transactions that don't qualify for one of the exceptions to dealer status under Minn. Stat § 80G.01, subd. 3(b)—in every state except Minnesota. J.A. 52; Olson Decl. ¶ 11, ECF No. 23.

D. This case's procedural history shows that, on appeal, there is no dispute about ch. 80G's extraterritorial reach.

Appellants brought this suit by filing a six-count complaint, which challenged ch. 80G on constitutional and preemption grounds. J.A. 41-93. Two of the counts are relevant to this appeal: count 3, which challenged ch. 80G on dormant Commerce Clause extraterritoriality grounds, J.A. 77-80, and count 1, which challenged ch. 80G on dormant Commerce Clause excessive-burden (*Pike* balancing) grounds, J.A. 56-74.

Despite ch. 80G's plain language imposing an extraterritorial reach—including an extraterritorial reach for Minn. Stat. § 80G.02's registration requirement—the extraterritoriality count (count 3) was perhaps the most contentious point in the district-court proceedings. Because of the subjects' importance to this appeal, Appellants will go into detail regarding what happened.

In their extraterritoriality count, Appellants challenged Minn. Stat. § 80G.02 on the straightforward ground that, under its plain terms, it imposes a licensing requirement for out-of-state transactions and is thus per se unconstitutional under the

Supreme Court's extraterritoriality caselaw. J.A. 77-80; *see also* J.A. 58 (part of count 1 explaining ch. 80g's extraterritorial reach). Appellants moved for summary judgment on this count, using the same analysis that they had in their complaint. Pls.' Mem. Supp. S.J. 27-30, ECF No. 21; *see also id.* at 17 (explaining ch. 80g's extraterritorial reach in discussing count 1).

In her memorandum in support of her motion to dismiss and in opposition to Appellants' summary-judgment motion, Respondent staked out a strange, antitextual position. Instead of either acknowledging the extraterritorial implications of ch. 80G's plain meaning, or of denying any extraterritorial application at all, Respondent urged the following text-defying reading: ch. 80G applies to out-of-state transactions by in-state dealers (those who are a "dealer" under § 80G.01, subd. 3(a)(1), such as Minnesota corporations and domiciliaries), but not out-of-state transactions by out-of-state dealers (those who are a "dealer" under § 80G.01, subd. 3(a)(3) as a result of doing business with a consumer located in Minnesota). *See, e.g.*, Def.'s Mem. Supp. Dismissal 6, 7, 8, 11, 12-13, ECF No. 29.

Respondent candidly acknowledged that transactions conducted outside Minnesota count toward the registration threshold of a Minnesota-based dealer. *E.g.*, *id.* at 12 ("Minnesota dealers are required to register once their aggregate annual transactions at out-of-state trade shows exceed \$25,000."); *see also id.* at 6, 7, 8, 11, 13. Moreover, Respondent implicitly acknowledged that, having reached the registration threshold, a Minnesota dealer can violate ch. 80G by engaging in a bullion transaction

with a consumer even if the transaction takes place at a physical location outside Minnesota. *See id.* at 12-13. But Respondent repeatedly denied that out-of-state transactions count toward an out-of-state dealer's registration threshold. *Id.* at 6, 7, 8, 11, 12-13.

In their combined response and reply memorandum, Appellants explained why this reading is untenable. Pls.' Combined Resp. to Mot. to Dismiss & Reply in Supp. of S.J. 2-7, ECF No. 31. Respondent's interpretation of ch. 80G, even if adopted, appeared to be futile to save any substantive provision of ch. 80G from being struck down on extraterritoriality grounds because Respondent's interpretation admitted that the law applies to some transactions conducted outside of Minnesota—a fatal admission in any court that applies Supreme Court caselaw. Indeed, Respondent admitted in her memorandum that the Commerce Clause imposes a *per se* prohibition on a state's regulation of out-of-state transactions. Def.'s Mem. Supp. Dismissal 4, 12, ECF No. 29.

But Respondent sought to come to the aid of her antitextual reading of statutory law with an antiprecedential (and possibly antitextual) reading of decisional law. Respondent argued that, for purposes of the extraterritoriality doctrine, no transaction, regardless of where the parties are when they enter into or conduct it, is ever really extraterritorial if one of the parties is a resident or domestic business of the regulating state. *Id.* at 13. In other words, Respondent urged the district court to hold that Minnesota can, constitutionally, jail Mr. Styczinski or some other in-state member

of United Legal Defense for an unlicensed transaction conducted in Tokyo or even in a galaxy far, far away. *See id.*

At the hearing on the cross-motions for summary-judgment and dismissal, Respondent’s attorney was remarkably forthright, admitting that ch. 80G “regulates out-of-state transactions for in-state dealers”:

MR. BARR: Turning to extraterritoriality, the statute does not regulate out-of-state transactions by out-of-state dealers. It only regulates out-of-state transactions for in-state dealers. And for those individuals, they are not operating wholly outside of the state.

Hr’g on Cross-Mot. for S.J. and Dismissal Tr. 33:13-18; *see also id.* at 33:19-34:11.

When the district court grilled him on whether this could really be correct, he doubled down:

THE COURT: But if you are a Minnesota individual who flies to -- flies to California or drives to Iowa and sells there, is that wholly extraterritorial or not?

MR. BARR: No, Your Honor, because you are -- even if you are -- you’ve gone and you’ve travelled to California, your business has still been organized under the laws of Minnesota.

Id. at 34:12-18.

Here is how the district court resolved these issues. The district court rejected Respondent’s antitextual interpretation for being antitextual and held that ch. 80G can apply extraterritorially to any person who is a “dealer” under § 80G.01, subd. 3(a), regardless of whether the person is an in-state dealer or out-of-state dealer:

Under the plain language of the bullion dealer law, once a person or entity “does business with” a consumer located in Minnesota, they qualify as a dealer, and the bullion dealer law applies to all of the dealer’s transactions—whether in Minnesota or outside it.

J.A. 19; *see also* J.A. 6-10, 20 n.15. Having adopted this plain-meaning, text-based interpretation, the district court struck down § 80G.07 as an extraterritorial law because it controls the terms on which dealers may buy or sell outside Minnesota. J.A. 19-20.

But the district court refused to strike down § 80G.02, which imposes the registration requirement. The district court refused based on a distinction between an extraterritorial regulation of *the terms* of buying and selling and an extraterritorial licensing requirement that does not restrict the terms on which a licensee may transact:

Contrary to the Coin Dealers’ arguments, no other aspect of the bullion dealer law is extraterritorial, *because the other provisions do not require regulated entities to conduct their out-of-state business according to Minnesota’s terms.* Although out-of-state transactions count toward the registration requirement, *see supra* Analysis I.A, unlike Section 80G.07, Section 80G.02 does not regulate or restrict *how dealers conduct their business outside Minnesota.* Section 80G.02 merely requires a dealer to register with the state, but it does not dictate the terms of out-of-state transactions.

J.A. 20 n.15 (emphasis added). This language, which is all in a footnote, is the extent of the district court’s analysis. The district court thus adopted a distinction that

Respondent never argued for.²

The district court granted Appellants summary judgment on their extraterritoriality count (count 3), but granted no relief except striking § 80G.07. J.A. 32-33, 206. Appellants now appeal the district court’s refusal to declare § 80G.02 unconstitutional. Respondent has not cross-appealed, and has thus not challenged the district court’s interpretation of ch. 80G.

The district court granted Respondent’s motion to dismiss Appellants’ excessive-burden dormant Commerce Clause claim with prejudice, J.A. 32-33, 206, but not based on disagreement with Appellants’ reading of ch. 80G, *see* J.A. 16-18. Respondents appeal the district court’s refusal to declare ch. 80G unconstitutional as an excessive burden on interstate commerce.

² The district court’s language might be read to uphold the registration requirement on the ground that, although out-of-state transactions count toward the registration threshold, registration is not required for an out-of-state transaction. *See* J.A. 20 n.15. But this reading appears to be wrong for two reasons. First, as explained, Respondent admitted that a Minnesota dealer who is required to be registered but isn’t can violate § 80G.02 by engaging in a bullion transaction with a consumer at a physical location outside Minnesota. *See, e.g.,* Def.’s Mem. Supp. Dismissal 12-13, ECF No. 29; Hr’g on Cross-Mot. for S.J. and Dismissal Tr. 33:13-34:18. Second, the district court held that “once a person or entity ‘does business with’ a consumer located in Minnesota, they qualify as a dealer, *and the bullion dealer law applies to all of the dealer’s transactions—whether in Minnesota or outside it.*” J.A. 19 (emphasis added).

Summary of the Argument

The district court correctly determined that, as a matter of statutory interpretation, § 80G.02's registration requirement applies extraterritorially, but the court erred by refusing to invalidate the requirement under the extraterritoriality doctrine. Apparently, the court mistakenly believed that the extraterritoriality doctrine applies to the terms of buying and selling between parties, but not a licensing requirement. Because a licensing requirement for conducting a transaction that takes place entirely outside of the requirement-imposing state directly controls out-of-state commerce and is thus per se unconstitutional, the district court made an error that this Court should reverse.

Because of the way that § 80G.06's bond requirement incorporates the registration requirement, § 80G.06 is itself unconstitutional and is not severable from the registration requirement. Without §§ 80G.02, 80G.06, and 80G.07, ch. 80G will be devoid of substance, and this Court should hold the chapter unconstitutional.

The district court also erred by refusing to strike down ch. 80G in its entirety as an excessive burden on interstate commerce. The district court never even engaged one of Appellants' main arguments, which is that ch. 80G applies to anonymous transactions in shares of precious-metal exchange-traded funds over stock exchanges and is thus impossible to comply with. This Court should reverse the district court's dismissal of Appellants' excessive-burden claim.

Argument

I. Standard of review.

This Court reviews the district court's final judgments for erroneous conclusions of law *de novo*, and this is therefore the standard of review for all issues in this case. *See Park Irmat Drug Corp. v. Express Scripts Holding Co.*, 911 F.3d 505, 512 (8th Cir. 2018) ("This Court will review *de novo* the grant of a motion to dismiss."); *Green Plains Otter Tail, LLC v. Pro-Emvtl., Inc.*, 953 F.3d 541, 545 (8th Cir. 2020) ("This Court reviews *de novo* the grant of summary judgment.").

II. Minnesota Statutes § 80G.02's registration requirement is per se unconstitutional because it applies to transactions conducted outside Minnesota, and § 80G.06's surety-bond provisions are unconstitutional and non-severable because they are tied to the registration requirement.

A. The dormant Commerce Clause prohibits extraterritorial state laws, including extraterritorial licensing requirements.

The dormant Commerce Clause prohibits states from regulating commerce extraterritorially, i.e., regulating commerce conducted outside the borders of the state with the law at issue. *E.g., Healy v. Beer Inst.*, 491 U.S. 324, 335-37 (1989); *Brown–Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-84 (1986); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935); *Edgar v. MITE Corp.*, 457 U.S. 624, 640-43 (1982) (plurality opinion); *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 665-68 (7th Cir. 2010) (striking down an extraterritorial licensing requirement, among other extraterritorial provisions); *McLemore v. Gumucio*, No. 3:19-CV-00530, 2019 WL

3305131, at *4, *8-*9 (M.D. Tenn. July 23, 2019) (granting a preliminary injunction against enforcement of an extraterritorial licensing requirement); Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause is Not Dead*, 100 Marq. L. Rev. 497-526, (Winter 2016) (explaining the dormant Commerce Clause extraterritoriality doctrine in depth).

The Supreme Court has explained that “a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature. The 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 (citing *Brown–Forman*, 476 U.S. at 579). In applying this test, “the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.” *Id.* at 336-37 (citing *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88-89 (1987)). And the Supreme Court has laid down the categorical rule “that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.” *Id.* at 337 (citing *Brown–Forman*, 476 U.S.

at 582).

Lower courts have applied the prohibition on extraterritorial regulations to state laws requiring a license to conduct a transaction outside the license-requiring state. *E.g.*, *Midwest Title Loans*, 593 F.3d at 662, 665-68; *McLemore*, 2019 WL 3305131, at *8-*9.

Midwest Title Loans is especially instructive. In that case, the plaintiff challenged, on extraterritoriality grounds, an Indiana law that regulated consumer loans made to Indiana residents, including a loan made to a resident who was physically present outside Indiana. 593 F.3d at 661-62. In addition to regulating the terms of a loan subject to the law—by, for example, imposing an interest rate cap—the law also required an Indiana business license to lend to an Indiana resident. *Id.* at 662. In an opinion by Judge Posner, the Seventh Circuit affirmed the district court’s order striking down the law’s provision for extraterritorial application, including extraterritorial application of the licensing requirement. *Id.* at 665-69. Judge Posner’s opinion explained in detail why a state law requiring a license to conduct a transaction outside the license-requiring state’s territorial boundaries is *per se* unconstitutional under *Healy*. *See id.* at 666-68.

Similarly, in *McLemore*, the United States District Court for the Middle District of Tennessee issued a preliminary injunction against enforcement of a Tennessee law requiring a Tennessee auctioneer license to conduct an online auction in which a Tennessee resident might bid because the requirement likely regulates commerce

outside Tennessee and is thus likely to be found per se invalid. *McLemore*, 2019 WL 3305131, at *4, *8-*9, *13-*14. The plaintiffs in that case are challenging Tennessee’s licensing requirement on several grounds, including extraterritoriality. *See, e.g., id.* at *2, *4, *8-*9. In discussing the plaintiffs’ likelihood of success, the district court found, as a matter of statutory interpretation, that the law likely regulates activities conducted outside Tennessee. *Id.* at *4-*8. Having made that determination, the court had no trouble concluding that the licensing requirement is likely unconstitutional because any state law that regulates commerce extraterritorially is per se unconstitutional. *Id.* at *8-*9, *9 n.9.

The court has not yet issued a judgment in *McLemore*—the court is currently considering cross-motions for summary judgment. *See McLemore v. Gumucio*, No. 3:19-CV-00530, 2021 WL 2400411, at *1, *7 (M.D. Tenn. June 11, 2021). But in light of what the court has said in its rulings already, there is a strong likelihood that the plaintiffs will prevail on their extraterritoriality challenge to the licensing requirement. *See McLemore*, 2019 WL 3305131, at *4-*9 (opinion granting preliminary injunction); *McLemore v. Gumucio*, No. 3:19-CV-00530, 2020 WL 7129023, at *8-*15, *8 n.7 (M.D. Tenn. Dec. 4, 2020) (opinion denying defendants’ motion to dismiss as to plaintiffs’ extraterritoriality claim).

B. Minnesota Statutes § 80G.02’s registration requirement is an extraterritorial state law because it applies to transactions conducted outside Minnesota.

Under the dormant Commerce Clause extraterritoriality doctrine, § 80G.02’s registration requirement is an impermissible extraterritorial regulation of commerce because it can prohibit—and create liability for—transactions that take place entirely outside of Minnesota. If a person is a “dealer” under any clause of § 80G.01, subd. 3(a), and if the person crosses the registration threshold without registering, then the person might break Minnesota law by engaging in a bullion transaction that takes place entirely outside of Minnesota. Minn. Stat. § 80G.02, subd. 1. A purchase or sale in Seattle (or Timbuktu) will do it. *See id.* For those persons who are within the definition of “dealer,” Minnesota has sought to impose its regulatory scheme on the entire universe: § 80G.02 “directly controls commerce occurring wholly outside the boundaries of” Minnesota, and is thus unconstitutional. *Healy*, 491 U.S. at 336.

Any Minnesota resident (outside of some exceptions) is a “dealer” if the person buys or sells bullion, *even if the person buys or sells only outside of Minnesota*. *See* Minn. Stat. § 80G.01, subd. 3(a)(intro.), (1). And because a “dealer” can become subject to—and then violate—the registration requirement entirely through out-of-state transactions, this means that Minnesota imposes its regulatory scheme on its residents wherever they go in the world. *See id.* § 80G.02, subd. 1. A Minnesota resident might become subject to—and then violate—the registration requirement entirely through transactions in Las Vegas. *See id.* §§ 80G.01, subd. 3(a), 80G.02, subd. 1.

Mr. Styczinski is a Minnesota resident who would like to engage in out-of-state bullion transactions with consumers, J.A. 44, 52-53; Styczinski Decl. ¶¶ 2, 7, ECF No. 22, but ch. 80G's extraterritorial reach limits his ability to do so. Likewise, the chapter's extraterritorial reach limits the ability of those members of Numismatist United Legal Defense who reside in Minnesota to engage in entirely out-of-state transactions.

Furthermore, the requirement that a "dealer" must obtain a Minnesota license to buy or sell in another state violates the categorical rule "that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Healy*, 491 U.S. at 337. This is because the registration requirement applies to the out-of-state transactions of an out-of-state merchant, such as Treasure Island Coins, who becomes a "dealer" under § 80G.01, subd. 3(a)(3) as a result of engaging in a single transaction with a consumer in Minnesota. If Treasure Island Coins shipped a single silver coin to a consumer in Minnesota, the corporation would become a "dealer," and all of its transactions would count toward the registration threshold. *See* Minn. Stat. §§ 80G.01, subd. 3(a), 80G.02, subd. 1. Because the corporation does far more than \$25,000 in business with consumers in a year, J.A. 45; Olson Decl. ¶ 2, ECF No. 23, Minnesota law would require registration. Minn. Stat. § 80G.02, subd. 1. If the corporation didn't register, then its transactions outside of Minnesota would violate the registration requirement. *Id.* If every state adopted a regulatory scheme like Minnesota's, a person might need a license from every state to

do business in any state (or in a foreign country).

Chapter 80G's registration requirement is unconstitutional under the dormant Commerce Clause's prohibition on a state's regulation of out-of-state transactions.

C. The district court erred by refusing apply the prohibition on extraterritorial laws to Minn. Stat. § 80G.02's registration requirement.

Appellants now turn to the extraterritoriality doctrine's importance for this appeal: the district court's refusal to apply the doctrine to Minn. Stat. § 80G.02's registration requirement. Before addressing why the district court refused to apply the doctrine, appellants will emphasize that the district court's refusal did not result from doubt about the requirement's extraterritorial reach. On the contrary, the district court resolved the statutory-interpretation questions related to ch. 80G's reach in Appellants' favor and thus concluded that the § 80G.02 requires registration for out-of-state transactions with consumers. *See* J.A. 7-9, 19, 20 n.15.

The district court rested its refusal on the misconception that the extraterritoriality doctrine applies only to extraterritorial regulations of *the terms* of buying and selling, and thus does not apply to an extraterritorial licensing requirement that allows a licensee to buy or sell on whatever terms the licensee agrees to with a counterparty:

Contrary to the Coin Dealers' arguments, no other aspect of the bullion dealer law is extraterritorial, *because the other provisions do not require regulated entities to conduct their out-of-state business according to Minnesota's terms.* Although out-of-state transactions count toward the registration requirement, *see supra* Analysis I.A, unlike Section 80G.07, Section

80G.02 does not regulate or restrict *how dealers conduct their business outside Minnesota*. Section 80G.02 merely requires a dealer to register with the state, but it does not dictate the terms of out-of-state transactions.

J.A. 20 n.15 (emphasis added). Strangely, this brief discussion, which appears entirely in a footnote, *see id.*, is the only place where the district court considered the extraterritoriality doctrine's application to § 80G.02, even though this is as important an issue as any in this case.

Appellants have acknowledged that the district court's opinion could be read to mean that although out-of-state transactions count toward § 80G.02's registration threshold, § 80G.02 does not actually require registration for an out-of-state transaction even after the threshold has been crossed. *See supra* 23 n.1. As explained earlier, Appellants contend that this is the wrong reading. *Id.* But, if this Court adopts this reading of what the court below said, then Appellants ask this court to reject the district court's misinterpretation of § 80G.02 for two reasons. First, Respondent herself never denied that the requirement applies to out-of-state transactions by in-state dealers—in fact, Respondent implicitly admitted this more than once. *See, e.g.*, Def.'s Mem. Supp. Dismissal 12-13, ECF No. 29; Hr'g on Cross-Mot. for S.J. and Dismissal Tr. 33:13-34:18. Second, § 80G.02 makes no geographic distinction between transactions that count toward the registration threshold and transactions that violate the registration requirement after the threshold is crossed. So if, as the district court correctly determined, an out-of-state transaction can count toward the threshold, J.A. 20 n.15, then an out-of-state transaction can violate the registration

requirement, and the requirement thus applies extraterritorially, Minn. Stat. § 80G.02, subd. 1.

From here, Appellants will proceed on the assumption that the district court correctly interpreted § 80G.02 and based its upholding of the section on the distinction between an extraterritorial regulation of contractual terms and other extraterritorial regulations, such as a licensing requirement.

With all due respect to the district court, this distinction finds no support in Supreme Court caselaw, no support in this Court's caselaw, and no support in the holding of any court opinion that Appellants have located. This lack of supporting caselaw may explain why the district court's footnote-confined analysis contains not a single citation to caselaw—the relevant caselaw is squarely on Appellants' side and does not make the distinction that the district court relied on as its sole reason for not striking down § 80G.02 as a regulation of out-of-state transactions.

The district court's reliance on this distinction is also inexplicable because Respondent never urged its adoption. Respondent never even argued that an extraterritorial licensing requirement could somehow survive the Supreme Court's *per se* prohibition on attempts to regulate out-of-state transactions. On the contrary, Respondent acknowledged that attempts to regulate out-of-state transactions are *per se* unconstitutional. Def.'s Mem. Supp. Dismissal 4, 12, ECF No. 29. Respondent's only attempt to defend against Appellants' extraterritoriality claim consisted in arguing that the registration requirement is somehow not really extraterritorial, *id.* at 6, 7, 8,

11, 12-13—argument that the district court rightly rejected. J.A. 7-10, 19, 20 n.15.

Whether the extraterritoriality doctrine applies to an extraterritorial licensing requirement wasn't even in issue until the district court issued its order.

More importantly, the district court's reasoning is directly contrary to the Supreme Court's teaching that the extraterritoriality doctrine absolutely prohibits a state from "forc[ing] an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Healy*, 491 U.S. at 337; *see also Midwest Title Loans*, 593 F.3d at 662, 665-68; *McLemore*, 2019 WL 3305131, at *8-*9, *9 n.9; *McLemore*, 2020 WL 7129023, at *8, *8 n.7, *15. Minnesota's requirement of registration by an out-of-state merchant such as Treasure Island Coins is a requirement of "regulatory approval in one State before undertaking a transaction in another." Once a bullion dealer—in-state or out-of-state—has reached the registration threshold, the bullion dealer must then register with the Minnesota secretary of state before engaging in another bullion transaction with a consumer either in Minnesota or out of Minnesota. Minn. Stat. § 80G.02. If the dealer registers, then the dealer has obtained Minnesota's "regulatory approval" for further transaction with consumers. *See id.* If the dealer doesn't register, then the dealer lacks Minnesota's "regulatory approval" for further transactions with consumers. *See id.* Thus even for in-state dealers, the registration requirement "directly controls commerce occurring wholly outside the boundaries of" Minnesota. *Healy*, 491 U.S. at 336.

Minnesota's registration requirement, like any licensing requirement for out-of-state transactions, directly offends the extraterritoriality doctrine and is per se invalid under Supreme Court caselaw, including *Healy*. See, e.g., *Midwest Title Loans*, 593 F.3d at 662, 665-68; *McLemore*, 2019 WL 3305131, at *8-*9, *9 n.9; *McLemore*, 2020 WL 7129023, at *8, *8 n.7, *15.

Appellants respectfully ask this Court to adopt the sound reasoning of the Seventh Circuit in *Midwest Title Loans* and of the *McLemore* district court and to hold that the dormant Commerce Clause's per se prohibition of extraterritorial regulations applies to an extraterritorial licensing requirement.

D. The surety-bond requirement of § 80G.06 is tied to the registration requirement in a way that makes § 80G.06 unconstitutional and non-severable.

Even the revised version of the surety-bond requirement is tied to the registration requirement in a way that will make the bond provisions inoperable or impossible to comply with in the absence of a valid registration requirement because the registration requirement defines the period during which transactions count toward the bond requirement:

Subdivision 1. **Surety bond requirement.** (a) Every dealer shall maintain a current, valid surety bond issued by a surety company admitted to do business in Minnesota in an amount based on the transactions conducted with Minnesota consumers (purchases from and sales to consumers at retail) *during the 12-month period prior to registration, or renewal, whichever is applicable.*

House File No. 6 § 19 (J.A. 157) (emphasis in italics added) (amending § 80G.06, subd. 1). Without the registration requirement to define the “12-month period” during which transactions are aggregated to determine the amount of the bond required, ch. 80G will fail to fix the amount of the required bond. Because the bond requirement incorporates the extraterritorial registration requirement, even the new version of § 80G.06, with its geographic restriction on which transactions count toward the bond requirement, is itself an extraterritorial and hence unconstitutional section.

Moreover, even if the bond provisions are not themselves extraterritorial, the registration requirement is not severable from the bond provisions because the bond provisions “are so essentially and inseparably connected with, and so dependent upon” the registration requirement “that the court cannot presume the legislature would have enacted the” bond provisions without the registration requirement. Minn. Stat. § 645.20. And the bond provisions “standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.” *Id.*

In their complaint and their initial summary-judgment memorandum, Appellants contended that the registration requirement was not severable from the rest of ch. 80G. J.A. 49; Pls.’ Mem. Supp. S.J. 23, ECF No. 21. The district court held that the rest of the chapter was severable from § 80G.07, the section that the district court struck down. J.A. 20-21. But, because the district court upheld the registration requirement, the court didn’t consider the registration requirement’s severability from

the rest of the chapter. The district court has already invalidated § 80G.07, and §§ 80G.02 and 80G.06 need to go. These sections' invalidation will effectively gut ch. 80G's substantive provisions, and Appellants therefore ask this court to hold ch. 80G unconstitutional.

III. Chapter 80G is unconstitutional because it excessively burdens interstate commerce.

Under the Supreme Court's dormant Commerce Clause jurisprudence, a law burdening interstate commerce is unconstitutional if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits"—and this is true even if the law does not discriminate against out-of-state business. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also, e.g., Edgar*, 457 U.S. at 643-46; *Great Atlantic & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371-72 (1976); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-30 (1959); *Edgar*, 457 U.S. at 640 (plurality opinion).

In arguing that ch. 80G excessively burdens interstate commerce, Appellants will focus on one extraordinarily burdensome implication of ch. 80G that the Appellants emphasized before the district court, but that the district declined to address: ch. 80G applies to stock-exchange transaction in precious-metal exchange-traded funds (ETFs).

The chapter requires a dealer to register before buying from, or selling to, "a consumer" "bullion products *or investments in bullion products*," if the dealer's "bullion product transactions with consumers" reaches the annual \$25,000 threshold. Minn.

Stat. § 80G.02, subd. 1 (emphasis added). Precious-metal ETFs such as SPDR Gold Shares (Ticker: GLD), iShares Silver Trust (Ticker: SLV), Aberdeen Standard Physical Platinum Shares ETF (Ticker: PPLT), and Aberdeen Standard Physical Palladium Shares ETF (Ticker: PALL) are not “bullion products,” but they are “*investments in bullion products.*” Each fund is organized as a trust that owns bars of the metal in which it invests, and the owner of a share in a fund has an undivided fractional beneficial interest in the precious-metal bars.³

Thus buying or selling shares in a precious-metal ETF through a stock exchange makes a person a “dealer” and counts towards the registration threshold, if the person is a Minnesota resident or transacts with a Minnesota consumer. *See id.* §§

³ *See, e.g., Welcome to SPDR Gold Shares*, SPDR Gold Shares, <https://www.spdrgoldshares.com/usa/> (“SPDR Gold Shares represent fractional, undivided beneficial ownership interests in the Trust, the sole assets of which are gold bullion, and, from time to time, cash.”).

The prospectus summary for iShares Silver Trust describes the relationship between the trust and its silver like this:

The purpose of the Trust is to own silver transferred to the Trust in exchange for Shares issued by the Trust. Each Share represents a fractional undivided beneficial interest in the net assets of the Trust. The assets of the Trust consist primarily of silver held by the Custodian on behalf of the Trust. However, there may be situations where the Trust will unexpectedly hold cash.

Prospectus, iShares Silver Trust, 1 (February 8, 2021), <https://www.ishares.com/us/library/stream-document?stream=reg&product=I-SLV&shareClass=NA&documentId=925420&iFrameUrlOverride=%2Fus%2Fliterature%2Fprospectus%2Fp-ishares-silver-trust-prospectus-12-31.pdf>.

80G.01, subd. 3(a), 80G.02, subd. 1. Once a person has reached the registration threshold, the person must register to buy or sell a single share of a precious-metal ETF regardless of how expensive the registration process is in relation to the value of the ETF shares that the person wants to buy or sell. *See id.* § 80G.02, subd. 1. And a person might reach the registration threshold through transactions in “bullion products,” “investments in bullion products,” or any combination of the two. *See id.*

The person must also comply with the surety-bond requirement, which now has no bottom threshold: you need to purchase a \$25,000 bond to buy a single ETF share from a Minnesota consumer. *See* House File No. 6 § 19 (J.A. 157) (amending Minn. Stat. § 80G.06, subd. 1).

Mr. Styczinski would like to invest in precious-metal ETFs, J.A. 52-53; Styczinski Decl. ¶ 7, ECF No. 22, but ch. 80G requires Mr. Styczinski to register before buying or selling precious-metal ETFs above the registration threshold, even if the purchase or sale takes place entirely outside of Minnesota. *See* Minn. Stat. § 80G.02, subd. 1.

Likewise, ch. 80G requires a member of Numismatist United Legal Defense who is a Minnesota resident to register before the member may buy or sell precious-metal ETFs above the registration threshold, even if the purchase or sale takes place entirely outside of Minnesota. *See id.* And ch. 80G requires a member of Numismatist United Legal Defense to register before buying or selling precious-metal ETFs above the registration threshold in transactions with Minnesota “consumers,” even if the

member has no presence in Minnesota. *See id.*

Moreover, ch. 80G burdens market participants outside of Minnesota because, once a person has reached the registration threshold, the person must be registered to buy a share of a precious-metal ETF from, or sell a share to, a “consumer” in Minnesota. *See id.* People and businesses typically trade shares of ETFs through computerized transactions in conditions in which the buyer and seller are unknown to each other. When a person places a trade through a broker, a computerized trading system anonymously matches the buyer or seller with a person on the other side of the transaction: a buyer with a seller. A person placing a trade has no idea of who is actually going to be on the other side, and thus no way of knowing whether the person will be a Minnesota “consumer.” Anybody, anywhere in the world, who buys or sells a share of a precious-metal ETF thus risks unknowingly trading with a Minnesota “consumer.” If a person has reached the registration threshold—something that the person might have done entirely through out-of-Minnesota transactions—and if the person trades a single share of a precious-metal ETF with a Minnesota “consumer,” then the person will have violated Minnesota law unless the person was registered. *See id.* Chapter 80G thus isolates Minnesotans from the national stock markets, and imposes a terrible risk of liability for anybody anywhere in the world who buys or sells a single share of a precious-metal ETF.

For these reasons alone, ch. 80G’s burdens on interstate commerce—and international commerce—are so severe that Minnesota has no local interest that can

justify them. Minnesota’s attempt to impose pervasive—and debilitating—regulations on national (and global) securities markets is far more drastic than the Illinois anti-takeover law that was struck down in *Edgar* as an excessive state-law burden on national stock-market transactions. 457 U.S. at 643-45. And these burdens on securities markets cumulate with the chapter’s burdens on the market for bullion itself. Furthermore, that no other state has a law like ch. 80G, *see* Olson Decl. ¶ 6, ECF No. 23, illustrates the lack of a need for such a law. Chapter 80G’s registration requirement is therefore unconstitutional under the dormant Commerce Clause.

Appellants relied on the application of ch. 80G to ETFs in their complaint’s excessive-burden claim (count 1) and presented these same arguments to the district court. J.A. 71-73; Pls.’ Mem. Supp. S.J. 20-22, ECF No. 21; Pls.’ Combined Resp. to Mot. to Dismiss & Reply in Supp. of S.J. 1, 17-20, ECF No. 31. In her opposition memorandum, Respondent refused to engage the relevant text—“investments in bullion products”—and instead relied entirely on a dismissive tone and a single legal non sequitur: that because transactions in these investments are regulated by other provisions of state and federal law, they’re not subject to ch. 80G. Def.’s Mem. Supp. Dismissal 6, 9-10, ECF No. 29.

Strangely, the district court never addressed the application of ch. 80G to ETFs, not even to address Respondent’s quasi-argument. The district court’s order’s discussion of the excessive-burden claim—indeed, the entire order—doesn’t contain a

single reference to ETFs. Appellants ask this Court to reverse the district court's dismissal of their excessive-burden claim (count 1).

Conclusion

Appellants respectfully ask that this Court reverse the district court's refusal to strike down all of ch. 80G as an extraterritorial, and hence unconstitutional, law. Appellants also ask that this Court reverse the district court's dismissal of their excessive-burden claim. Finally, Appellants ask that this Court remand with instructions for the district court

- to issue a declaratory judgment holding ch. 80G facially unconstitutional,
- to issue a permanent injunction prohibiting Respondent from enforcing the chapter, and
- to order that judgment be entered accordingly.

Dated October 22, 2021.

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Dated October 22, 2021.

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