

No. 21-2936

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH Circuit

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

Plaintiffs-Appellants,

vs.

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

Defendant-Appellee.

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA**

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**APPELLEE’S BRIEF**

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## **SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT**

To protect consumers and deter fraudulent conduct, Minnesota enacted laws regulating bullion-product dealers. Minn. Stat. ch. 80G (2020). Relevant to this appeal, that chapter requires certain dealers to register with the Minnesota Commissioner of Commerce and obtain a surety bond if they are either based in Minnesota or come to Minnesota to do business.

Appellants wish to engage in bullion-product transactions without regulation by the Commissioner and brought this action to challenge chapter 80G's constitutionality. The district court rejected most of Appellants' claims. It held that three words in one section and the entirety of another section were unconstitutional and struck those portions of the statute. But the court concluded that the remainder of chapter 80G, most notably its registration requirement, was constitutional.

On appeal, Appellants seek a declaration that the entire chapter is unconstitutional because they claim its registration requirement regulates wholly out-of-state conduct and otherwise imposes an undue burden on interstate commerce. The Court should reject these arguments and affirm the district court because registration is required only if a dealer first engages in regulated conduct within Minnesota. Moreover, the "investment" transactions that Appellants claim are unduly burdened are not regulated by chapter 80G in any respect.

Appellee agrees oral argument is necessary and requests fifteen minutes.

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## STATEMENT OF ISSUES

- I. Does Minnesota's requirement that a bullion-product dealer who does more than \$25,000 in business and is either based in Minnesota or has chosen to come to Minnesota to do business constitute an unconstitutionally extraterritorial law in violation of the Dormant Commerce Clause?

*The district court held that the registration requirements are not extraterritorial because they do not regulate or restrict how dealers conduct their business outside Minnesota.*

Most apposite authorities:

U.S. Const. art. I, § 8, cl. 3

*Healy v. Beer Inst.*, 491 U.S. 324 (1989)

*Nw. Airlines v. Minnesota*, 322 U.S. 292 (1944)

*Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030 (8th Cir. 2016)

*Grand River Enters. Six Nations, Ltd. v. Beebe*, 574 F.3d 929 (8th Cir. 2009)

- II. Does chapter 80G regulate the sale of shares of exchange-traded funds when those funds hold assets that include bullion products, such that the registration requirement unduly burdens interstate commerce in violation of the Dormant Commerce Clause?

*The district court held that chapter 80G did not unduly burden interstate commerce.*

Most apposite authorities:

U.S. Const. art. I, § 8, cl. 3

*Judd v. Landin*, 1 N.W.2d 861 (Minn. 1942)

- III. Even if Appellants' Commerce Clause arguments had merit, would the remedy for those constitutional issues require striking the entire chapter in light of the possibility of more modest declarations prohibiting the allegedly unconstitutional application of the chapter?

*The district court held that Appellants were entitled only to a declaration that limited portions of chapter 80G were unconstitutional, not the entire chapter.*

Most apposite authorities:

*Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008)

*Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994)

*Samuels v. Mackell*, 401 U.S. 66 (1971)

*Brakebill v. Jaeger*, 932 F.3d 671 (8th Cir. 2019)



## STATEMENT OF THE CASE

In response to concerns that fraudulent bullion-coin dealers were targeting Minnesota consumers and committing consumer fraud, in 2013, Minnesota enacted laws regulating bullion-coin dealers.<sup>1</sup> 2013 Minn. Laws ch. 120 (codified at Minn. Stat. ch. 80G (2020)); *Floor Session*, 2013 Leg., 88th Sess. May 15, 2013, pt. 2, at 39:42–:50 (statement of Rep. Debra Hilstrom).<sup>2</sup> Appellee Minnesota Commissioner of Commerce is responsible for enforcing its requirements. Minn. Stat. § 80G.10.

As enacted by the legislature, chapter 80G sought to curb dealers’ fraudulent conduct and protect consumers in three key ways: First, it required dealers to register with the Commissioner if they did more than \$25,000 in business in a year. *Id.* § 80G.02, subd. 1. Second, it required registered dealers to maintain a surety bond in an amount determined by the volume of transactions they engage in. *Id.* § 80G.06, subd. 1(b). Third, it prohibited a variety of unscrupulous practices, such as failing to timely make delivery of bullion products or payment, changing sale terms after receiving payment, misrepresenting the quality of bullion products, or continuing to contact consumers after a request to stop. *Id.* § 80G.07, subd. 1. The legislature

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<sup>1</sup> Bullion products include any coin, round, bar, or ingot containing silver, gold, platinum, palladium, or other precious metal. Minn. Stat. § 80G.01, subd. 2. The district court held, and Appellants do not challenge, that “bullion products” does not include coins when they are used as face-value currency. J.A. 28; Doc. 38, at 28.

<sup>2</sup> Available at <http://www.house.leg.state.mn.us/hjvid/88/880378>

specifically defined “dealer” and exempted six categories of persons from that definition. *Id.* § 80G.01, subd. 3.

Appellants Thomas Styczinski, Tom “The Coin Guy,” LLC, Treasure Island Coins, Inc., and Numismatist United Legal Defense (collectively, “the Coin Dealers”) are various individuals and entities that would like to engage in wholly unregulated bullion-product transactions in or from Minnesota. To that end, the Coin Dealers brought the underlying action seeking a declaration that chapter 80G was unconstitutional in its entirety on six different bases. J.A. 56–93; R. Doc. 1, at 16–53. The parties stipulated that no discovery was necessary and proceeded to file cross dispositive motions: the Coin Dealers for summary judgment and the Commissioner for dismissal. J.A. 4–5; Doc. 38, at 4–5; Doc. 15, at 5. While those motions were pending, Minnesota amended chapter 80G to provide that only transactions conducted with Minnesota consumers counted toward a dealer’s transactions for the purpose of determining the amount of the dealer’s surety bond. Minn. Stat. § 80G.06, subd. 1(a) (Supp. 2021).

The district court granted each motion in part and denied each motion in part. Relevant to this appeal, the district court first concluded that a person was a dealer as that term is defined in chapter 80G for all transactions—not just Minnesota transactions—once the statute’s criteria for dealer status are met. J.A. 7; Doc. 38, at 7. Based on that conclusion, the district court struck the portion of the statute that

prohibited dealers from engaging in unscrupulous practices, interpreting the section to prohibit those practices even when out-of-state dealers are transacting business outside of Minnesota. J.A. 18–21; Doc. 38, at 18–21.<sup>3</sup> But the court dismissed the majority of the Coin Dealers’ claims challenging other aspects of chapter 80G. J.A. 33; Doc. 38, at 33. The district court upheld the registration requirement because it is triggered only if a dealer first chooses to engage in some conduct within the state of Minnesota. J.A. 20 n.5; Doc. 38, at 20 n.5. The district court also rejected the Coin Dealers’ argument that chapter 80G unduly burdens interstate commerce, concluding that it placed only “minimal” burdens on interstate commerce. J.A. 16–18; Doc. 38, at 16–18.

The Coin Dealers appeal the district court’s conclusions that the registration requirement is not extraterritorial and does not impose an undue burden on interstate commerce.

### **SUMMARY OF ARGUMENT**

The Coin Dealers seek to have all of chapter 80G declared unconstitutional on the basis that it (1) is extraterritorial because it applies to transactions occurring outside of Minnesota and (2) imposes an undue burden on interstate commerce by supposedly regulating the buying and selling of shares of exchange-traded funds that

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<sup>3</sup> While the Commissioner disagreed with this interpretation of the statute, she does not challenge it on appeal.

hold bullion products as assets. The district court correctly rejected both of these arguments.

First, the Coin Dealers' extraterritoriality argument fails because chapter 80G's registration requirement is triggered only by conduct occurring in or from Minnesota. Chapter 80G requires a business to register only if the business chooses to come to Minnesota to engage in bullion transactions or chooses to domicile in Minnesota. And to the extent the Coin Dealers argue that Minnesota cannot consider the nationwide sales volume of a business in determining whether the business needs to register, this Court has previously held that such information may be considered and does not amount to regulation of out-of-state sales. Second, the Coin Dealers' undue-burden argument fails because chapter 80G simply does not regulate exchange-traded fund transactions. Such transactions do not transfer "bullion products or investments in bullion products," but merely shares of a fund with the buyer never obtaining any bullion product.

If nothing else, even if the Coin Dealers somehow established that the above features of chapter 80G were unconstitutional, they would not be entitled to a declaration that the entire chapter is unconstitutional. The Coin Dealers have not advanced any argument on appeal that chapter 80G is unconstitutional as applied to non-exchanged-traded-fund transactions occurring within Minnesota. Thus, even if their arguments had merit (which they do not), the Coin Dealers would be entitled

to only a declaration that the Commissioner could not enforce chapter 80G with respect to considering out-of-state sales volume or exchange-traded-fund transactions.

## **ARGUMENT**

The Coin Dealers appeal the partial denial of their summary judgment motion and partial grant of the Commissioner’s motion to dismiss. Both are reviewed de novo. *Wheeler v. City of Searcy*, 14 F.4d 843, 851 (8th Cir. 2021) (summary judgment); *Onyiah v. St. Cloud State Univ.*, 5 F.4d 926, 929 (8th Cir. 2021) (motion to dismiss).

The Court should affirm because, as a matter of law, chapter 80G is not extraterritorial nor unduly burdensome on interstate commerce. The registration requirement is triggered only if a company chooses to engage in conduct in or from Minnesota. And the “investment” transactions that the Coin Dealers claim are burdened are not regulated by chapter 80G and never have been. Thus, the district court correctly held that chapter 80G’s registration requirement is not extraterritorial and does not unduly burden interstate commerce.

### **I. CHAPTER 80G’S REGISTRATION REQUIREMENT IS TRIGGERED ONLY BY IN-STATE CONDUCT, AND IT IS THEREFORE NOT EXTRATERRITORIAL.**

Chapter 80G requires people to obtain a Minnesota bullion-products-dealer registration if they are incorporated, registered, domiciled, or otherwise located in Minnesota, if they engage in a transaction in Minnesota, or if they deliver a bullion

product or payment for a bullion product to Minnesota. Minn. Stat. §§ 80G.01, subd. 2(a), .02. Despite the obvious Minnesota connection to each condition triggering registration, the Coin Dealers argue that chapter 80G somehow regulates out-of-state transactions. But because people are required to register only if they engage in conduct in or from Minnesota, chapter 80G is not unconstitutionally extraterritorial.

Under the Commerce Clause, a state regulation is per se invalid if it has an “extraterritorial reach,” that is, it has the practical effect of controlling conduct “that takes place *wholly* outside of the state’s borders.” *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995) (emphasis added). But if an activity is not “wholly outside” the state’s borders, then the state has an interest in regulating the activity and the Commerce Clause does not preclude state regulation. *See Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng’rs*, 826 F.3d 1030, 1042 (8th Cir. 2016).

The district court correctly concluded that chapter 80G’s registration requirement does not regulate activities taking place wholly outside of Minnesota. With respect to entities based outside Minnesota, such entities are required to register only if they come to Minnesota to conduct a transaction or if they send bullion products or payments for bullion products to Minnesota. Minn. Stat. § 80G.01, subd. 3(a)(2)–(3). In either event, the conduct is not “wholly outside”

Minnesota. With respect to out-of-state entities, such entities are directing their activities into Minnesota. And with respect to in-state entities, such entities have undoubtedly availed themselves of and subjected themselves to Minnesota's laws by choosing to operate from Minnesota. The Coin Dealers acknowledged as much in the district court, claiming that transactions by businesses located in Minnesota have "almost" no connection to the state. J.A. 78 ¶ 116; Doc. 1, at 38 ¶ 116. While it is difficult to see how operating out of Minnesota can have almost no connection to the state, even the Coin Dealers concede such activities have a Minnesota component.

The Coin Dealers' first argument on appeal is that entirely out-of-state transactions can trigger chapter 80G's registration requirement. This argument lacks merit. Although not explicit in the Coin Dealers' brief, the sequence of events they have in mind appears to be along the lines of the district court's example: (1) an out-of-state entity sells a \$1 coin in Minnesota; (2) the entity then conducts \$24,999 in business in South Dakota; and then (3) because the entity has now engaged in at least \$25,000 in sales with a sale in Minnesota, the entity is required to register. J.A. 8; Doc. 38, at 8.

Assuming no statutory exemptions applied, the Commissioner agrees with the district court's analysis that this scenario would require the entity to register as a Minnesota bullion-products dealer. J.A.8; Doc. 38, at 8. But, contrary to the Coin

Dealers' characterization, it is not an extraterritorial application of Minnesota law. The South Dakota transactions are not regulated by Minnesota. Out-of-state dealers are free to engage in unlimited out-of-state sales and without registering in Minnesota. It is only after out-of-state dealers choose to transact business in Minnesota that they *may* have to register depending on their sales volume and the applicability of various exemptions. Minn. Stat. §§ 80G.01–.02. And if enforcement occurred under chapter 80G against an out-of-state dealer, it would be on the basis that the dealer met the registration criteria and engaged in a Minnesota transaction without registering. Put another way, the dealer can avoid the registration requirement by declining to do business in Minnesota without any change to the dealer's out-of-state conduct.

Second, the Coin Dealers make the related argument that Minnesota cannot consider the nationwide volume of a dealer's sales in determining whether registration is required. This argument fails because this Court has previously upheld statutes that base such calculations on nationwide sales so long as the statute does not control out-of-state commerce. *See Grand River Enters. Six Nations, Ltd. v. Beebe*, 574 F.3d 929, 943 (8th Cir. 2009).

In *Grand River*, cigarette manufacturers challenged an Arkansas statute that required them to make payments into an escrow fund to offset the costs of smoking-induced illnesses. *Id.* at 933–34. Manufacturers could potentially obtain an early



refund of escrow payments, the amount of which was determined by the manufacturer’s national market share of cigarette sales. *Id.* at 934. The plaintiffs challenged the use of national sales figures as amounting to an extraterritorial application of law. *Id.* at 943. Although the Court recognized that the calculation of the potential refund amount included considering national sales figures, it nevertheless held that the statute did not “control commerce in other states,” and therefore it was not extraterritorial. *Id.*

A more recent Second Circuit case provides additional guidance that is even more on point. *VIZIO, Inc. v. Klee*, 886 F.3d 249 (2nd Cir. 2018). In *VIZIO*, the statute at issue was even more direct in using out-state-transactions to determine an in-state obligation than the one in *Grand River*; nationwide sales were not merely a factor—national market share was the *only* factor identified by the state in determining a company’s in-state registration fees. *See id.* at 252 (citing Conn. Gen. Stat. § 22a-630(d) (2017)). The court expressly rejected the argument the Coin Dealers make now, that a “state’s fee structure . . . pegged to . . . national activities” constitutes extraterritorial regulation. *Id.* at 256. Instead, the statute “does nothing to *control* interstate commerce,” it only “*considers* out-of-state activity” when imposing in-state obligations. *Id.*

Chapter 80G operates in a similar manner. Though it looks to nationwide sales to determine whether the \$25,000 registration threshold is met, it places no

impositions on those sales. The chapter does not “control” out-of-state commerce. Consistent with *Grand River* and *VIZIO*, Minnesota may look to dealers’ total nationwide sales in deciding whether they meet the threshold for registration without violating the Commerce Clause.

Third, the Coin Dealers claim that Minnesota domiciliaries are required to register even if all bullion-product transactions take place out of state. The Commissioner agrees that chapter 80G requires registration in such circumstances; but it is not unconstitutionally extraterritorial. When a business chooses to incorporate in Minnesota (or a sole proprietorship chooses to set up shop), it inures benefits unique to that state. *See Nw. Airlines v. Minnesota*, 322 U.S. 292, 294–95 (1944) (noting home states gives their domiciliaries “the power to be as well as the power to function”). In exchange for being able to exist under the laws specific to the state, having access to the public benefits that state provides its domiciliaries, and having its preferred situs in the state, the business is subject to regulation of that state in the conduct of its business. *Cf id.* This exchange is hardly unfair or unreasonable.

In addition to these general connections to bullion-product dealers domiciled in Minnesota, Minnesota has the very specific concern that fraudulent out-of-state transactions could lead to in-state litigation regarding the transaction when a Minnesota domiciliary is involved because there is general personal jurisdiction over

such businesses in Minnesota. *See Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021) (noting that courts of the state where a party is “essentially at home” may hear “any and all claims” brought against the party). Such litigation places burdens on the state’s judicial infrastructure. *See Christiansen v. Clarke*, 147 F.3d 655, 658 (8th Cir. 1998) (recognizing burdens of litigation on judicial system as legitimate state interest). Requiring registration for Minnesota domiciliaries reduces these burdens because it allows the state to weed out bad actors that are more likely to engage in nefarious transactions resulting in Minnesota litigation.

Accordingly, the Coin Dealers’ claim that Minnesota domiciliaries’ out-of-state transactions have no connection to the state is incorrect. Such transactions are only possible because the dealer has been permitted to form and operate under Minnesota’s laws. And such transactions create a risk of Minnesota litigation and Minnesota otherwise has an interest in regulating dealers operating in or from its borders. Thus, the registration requirement, as regards Minnesota domiciliaries, does not regulate activities occurring “wholly” beyond the state’s borders. It is therefore not unconstitutionally extraterritorial.

The cases cited by the Coin Dealers are not to the contrary. For example, in *Healy*, the Supreme Court specifically noted that its Commerce Clause jurisprudence “dictates that no State may force an *out-of-state* merchant to seek regulatory

approval in one State before undertaking a transaction in another.” *Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989) (emphasis added). But the Court has never held that a state cannot regulate the activities of businesses based within the state. Unsurprisingly, the Coin Dealers do not identify any binding cases prohibiting such regulation.

As for the Seventh Circuit case and unpublished Middle District of Tennessee case cited by the Coin Dealers, they are not binding or relevant. *See Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660 (7th Cir. 2010); *McLemore v. Gumucio*, No. 3:19-cv-00530, 2019 WL 3305131 (M.D. Tenn. July 23, 2019). In *Midwest Title*, like *Healy*, an Indiana statute regulated out-of-state businesses, not in-state ones. It required Illinois companies to obtain a license to do business with Indianans even though the Illinois companies never came to Indiana. *Midwest Title*, 593 F.3d at 667. In contrast, chapter 80G regulates businesses that come into or are from Minnesota. And in *McLemore*, the court had extraterritoriality concerns because the statute regulated out-of-state auctioneers and their out-of-state auctions because the statute was so broad that the auctions came within the scope of regulation if any Tennesseans participated in them. 2019 WL 3305131, at \*8–9.<sup>4</sup> Here Minnesota

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<sup>4</sup> *McLemore* has both Tennessee and non-Tennessee plaintiffs. *Id.* at \*2. But in addressing the statute’s alleged extraterritorial effect, the court notably focused on the effects it had on the out-of-state plaintiffs, with no statement that the statute was unconstitutional as applied to the in-state plaintiffs. *See id.* at \*9.

regulates only dealers that are domiciled within the state or who engage in transactions within the state.<sup>5</sup>

In the absence of a statutory exemption, chapter 80G's registration requirement is only triggered when a dealer engages in conduct that has a Minnesota connection—either by choosing to come to Minnesota and engage in transactions, or by choosing to domicile in Minnesota. Accordingly, it does not regulate conduct occurring entirely outside the state and it is not unconstitutionally extraterritorial.

## **II. CHAPTER 80G DOES NOT REGULATE EXCHANGE-TRADED FUNDS, AND THEREFORE IT DOES NOT BURDEN INTERSTATE COMMERCE.**

The Coin Dealers incorrectly claim that chapter 80G regulates precious-metal exchange-traded funds (ETFs) and therefore unduly burdens interstate commerce. App. Br. 38. But chapter 80G does not apply, and has never applied, to ETFs. Indeed, the Coin Dealers identify no instance where the Commissioner has enforced or threatened to enforce chapter 80G against ETFs. Because there is no regulation of ETFs, there can be no burden on interstate ETF commerce.

Bullion-product dealers may not solicit, market, buy, sell, or deliver “bullion products or investments in bullion products” unless they obtain a registration. Minn. Stat. § 80G.02, subd. 1. An investment is “the asset acquired or the sum invested.”

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<sup>5</sup> *McLemore* is also both unpublished and has yet to reach final judgment. Although the court issued a preliminary injunction based on an initial determination that the plaintiffs were likely to succeed, it has yet to reach a merits determination on the Tennessee auction statute. *Id.* at \*1

*Investment*, BLACK'S LAW DICTIONARY (9th ed. 2009). Applying this definition, ETF shares are not investments in bullion products.

The Coin Dealers acknowledge that an ETF is a fund that owns bullion products, shares of which are bought and sold in the stock market. J.A. 71 ¶ 82; Doc. 1, at 31 ¶ 82. Purchasers of ETF shares only buy and sell shares of an entity that owns bullion products and do not receive any actual interest in bullion products. This distinction is significant. The “asset acquired” is not a bullion product, it is an ownership share of an entity. Although the fund may be buying or selling “bullion products or investments in bullion products,” people that buy shares of ETFs are not, no more than people who buy shares of Target are investing in household goods or groceries.

Indeed, the Coin Dealers' position that a person who buys shares of a fund has ownership of the fund's assets would have troubling consequences. For example, shares of companies that produce and sell marijuana products are available on the stock market. Under the Coin Dealers' theory, any person who has ever owned a share of such a company has possessed marijuana and is therefore potentially guilty of a federal crime. 21 U.S.C. § 844(a) (2018). More benignly, almost half of United States households own mutual funds. *Share of Households Owning Mutual Funds in*

*the United States from 1980 to 2020*, STATISTA (May 2020).<sup>6</sup> Most funds buy and sell securities such that they are required to register with the Securities and Exchange Commission as broker-dealers. 15 U.S.C. § 78l(a) (2018). Under the Coin Dealers’ absurd theory, such activities would be imputed to every person that invested in a mutual fund and those people would be required to register with the SEC.

Instead, an example of what the legislature intended by “investments in bullion products” is readily found in chapter 80G’s legislative history. Before enacting the law, the legislature heard testimony regarding complaints the Minnesota Better Business Bureau had received regarding marketing of investments in bullion products. *Hearing on H.F. 157 Before H. Comm. on Commerce*, 2013 Leg., 88th Sess. Feb. 13, 2013, at 41:08–:51 (statement of Dana Badgerow, Better Business Bureau of Minn. & N.D.).<sup>7</sup> A bullion-product company had convinced an elderly Minnesota consumer to “invest” in bullion products, not with reference to any specific bullion products selected by the consumer, but rather in exchange for “coins that may or may not have ever existed.” *Id.* After collecting money, the company claimed the coins at issue had somehow sharply dropped in value, and promised to ship the supposedly devalued coins and provide a refund of the difference in value.

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<sup>6</sup> Available at <https://www.statista.com/statistics/246224/mutual-funds-owned-by-american-households/>.

<sup>7</sup> Available at <http://ww2.house.leg.state.mn.us/audio/mp3ls88/com021313.mp3>

*Id.* But the consumer never received the coins or a refund. *Id.* In that case the investment, or “asset acquired,” was an interest in the bullion products themselves.

Additionally, other sections of chapter 80G enacted as part of the same bill that created the registration requirement for investments in bullion products confirm that the registration requirement does not apply to ETFs. *See Judd v. Landin*, 1 N.W.2d 861, 470 (Minn. 1942) (noting acts of Minnesota legislature should be read as a whole to determine intent). Section 80G.07 prohibits various types of fraudulent conduct by dealers.<sup>8</sup> Every prohibited practice related to consumer transactions contemplates an eventual transfer of physical bullion products, not shares of a fund. If the legislature had intended to regulate ETFs, the prohibited-practices list would have included practices related to such funds. The fact that it does not do so confirms that ETFs are not regulated by chapter 80G. And because ETF transactions are not regulated, such regulation cannot be a burden, undue or otherwise, on interstate commerce.

**III. EVEN IF THE COIN DEALERS’ ARGUMENTS HAD MERIT, THE REMEDY WOULD BE A MUCH NARROWER DECLARATION, NOT STRIKING THE ENTIRE CHAPTER.**

The Coin Dealers’ arguments that chapter 80G is extraterritorial or unduly burdensome are meritless. But even if they had merit, the Coin Dealers take the

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<sup>8</sup> This section was held unconstitutional by the district court. It nevertheless still provides guidance as to the legislature’s intention in enacting the registration requirement of chapter 80G.



extraordinary step of asking this Court to instruct the lower court to declare the entire chapter unconstitutional as the remedy. None of the Coin Dealers' arguments, even if substantively meritorious, would establish that chapter 80G is unconstitutional in all its applications so as to be struck entirely. Instead, the Coin Dealers would be entitled only to declarations limiting how the Commissioner could enforce it.

The scope of a declaration should be no broader than necessary to protect a party from the alleged constitutional violations. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (holding injunctions should be no more burdensome than necessary to provide complete relief to plaintiffs); *Samuels v. Mackell*, 401 U.S. 66, 73 (1971) (noting practical effect of injunction and declaration is ordinarily identical and that both implicate similar policy concerns regarding restraint). Moreover, facial challenges to statutes are disfavored. *Brakebill v. Jaeger*, 932 F.3d 671, 677 (8th Cir. 2019). To succeed, the Coin Dealers must show that there is *no* set of circumstances in which chapter 80G could be constitutionally applied. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). Error is not presumed on appeal, rather the burden is on the Coin Dealers to show that it exists. *Kirk v. St. Joseph Stock Yards Co.*, 206 F.2d 283, 287 (8th Cir. 1953). Even if the Court accepted the Coin Dealers' merits arguments, they have not met their burden of establishing that the district court should have declared the entire chapter unconstitutional.

First, the Coin Dealers make no attempt to satisfy their heavy burden to strike the entire chapter on extraterritoriality grounds, nor could they do so through new arguments in their reply brief. *See Towerly v. Miss. Cty. Ark. Econ. Dev. Opportunity Comm'n, Inc.*, 1 F.4d 570, 573 (8th Cir. 2021) (noting court does not consider arguments raised for the first time in reply briefs). Suppose the Coin Dealers were correct that considering nationwide sales volume to determine whether a dealer was required to register was an extraterritorial regulation. This could be remedied by declaring that the Commissioner could not consider such sales, but was limited to considering Minnesota sales volume. Similarly, even if chapter 80G imposed an unconstitutionally extraterritorial effect on out-of-state transactions, the remedy would be to declare that the Commissioner could not apply chapter 80G's registration requirement to such transactions. There are suitable ways to precisely address the extraterritoriality issues the Coin Dealers raise, even if they had merit, short of the blunt declaration the Coin Dealers seek.

The Coin Dealers' arguments on undue burden fare no better. Even if chapter 80G were to require a registration to buy or sell ETFs that own bullion products, at best, the Coin Dealers would have established entitlement to a declaration that the Commissioner cannot enforce chapter 80G against ETF transactions. The Coin Dealers make *no* argument on appeal that any other aspect of chapter 80G unduly

burdens interstate commerce. Thus, even if the Court accepted the Coin Dealers' undue-burden argument, striking the entire chapter would be entirely unnecessary.

## CONCLUSION

Chapter 80G regulates only businesses that direct transactions into Minnesota or that are based in the state. Moreover, it does not regulate ETF transactions at all. Therefore, it is neither extraterritorial nor an undue burden on interstate commerce. The Court should affirm the district court.

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE  
WITH Fed. R. App. P 32**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,609 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 365 in 14 pt Times New Roman font.

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The undersigned, on behalf of the party filing and serving this brief, certifies that the brief has been scanned for viruses and that the brief is virus-free.

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