

Case No. 25-693

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ADAM RICHARDS, et al.

Plaintiffs-Appellants,

v.

GAVIN NEWSOM, et al.

Defendants-Appellees

On Appeal from the United States District Court
for the Central District of California
No. 8:23-cv-02413-JVS-KES
The Honorable James V. Selna, District Judge

**BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT
OF APPELLANTS' PETITION FOR REHEARING EN BANC**

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RULE 26.1 DISCLOSURE STATEMENT

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TABLE OF CONTENTS

RULE 26.1 DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
IDENTITY AND INTEREST OF AMICUS CURIAE	1
INTRODUCTION	1
ARGUMENT	3
I. The panel’s approval of a year-long audiovisual archive authorizes a dangerous intrusion into constitutionally protected privacy rights that requires en banc correction.	4
A. The mandate here is far more burdensome than a mere rule requiring the installation of security cameras.	4
B. <i>Kyllo</i> ’s technology-neutral principle forecloses treating remote observation as constitutionally inconsequential.	7
II. The panel erred by treating compelled recording as First Amendment-neutral until formal disclosure or retaliation.	9
A. Supreme Court precedent forecloses the panel’s assumption that absent a formal membership list, there’s no First Amendment burden.	10
B. This Court’s conversational privacy precedents require review of the burden that recording imposes on speech, rather than merely speculating about future retaliation.	12
C. Notice of the recording does not justify the government’s decision to compel and preserve it.	13
III. The panel’s license-based rationale would erase privacy boundaries in mixed-use homes and offices.	14
A. Richards’ mixed-use office shows that the mandate records unrelated professional and family matters.	14

B. <i>Rush</i> requires limits tied to the regulated activity and <i>Burger</i> does not erase that requirement.	16
C. The panel’s rule has no limiting principle.	18
CONCLUSION	19
CERTIFICATE OF COMPLIANCE	20
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

Cases

<i>Blackwelder v. Safnauer</i> , 689 F. Supp. 106 (N.D.N.Y. 1988)	6
<i>California v. Ciraolo</i> , 476 U.S. 207 (1986).....	5
<i>Carpenter v. United States</i> , 585 U.S. 296 (2018)	8
<i>Carr v. Young</i> , 331 S.W.2d 701 (1960)	10
<i>Clapper v. Amnesty International USA</i> , 568 U.S. 398 (2013).....	13
<i>Coons v. Lew</i> , 762 F.3d 891 (9th Cir. 2014).....	1
<i>Florida v. Jardines</i> , 569 U.S. 1 (2013).....	8
<i>Harper v. Lindsay</i> , 616 F.2d 849 (5th Cir. 1980)	3, 6, 18
<i>Kyllo v. United States</i> , 533 U.S. 27 (2001).....	7, 9
<i>Laird v. Tatum</i> , 408 U.S. 1 (1972).....	13
<i>Lamont v. Postmaster General</i> , 381 U.S. 301 (1965)	9, 10
<i>Mendez v. City of Chicago</i> , 228 N.E.3d 774 (Ill. App. 2023)	1
<i>Mohawk Indus., Inc. v. Carpenter</i> , 558 U.S. 100 (2009).....	16
<i>Myrick v. Bd. of Pierce Cnty.</i> , 677 P.2d 140 (Wash. 1984).....	3, 6
<i>New York v. Burger</i> , 482 U.S. 691 (1987).....	16, 17
<i>Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer</i> , 961 F.3d 1062 (9th Cir. 2020).....	12
<i>Players, Inc. v. City of New York</i> , 371 F. Supp.2d 522 (S.D.N.Y. 2005).....	18
<i>Presbyterian Church (U.S.A.) v. United States</i> , 870 F.2d 518 (9th Cir. 1989)	13

<i>Project Veritas v. Schmidt</i> , 125 F.4th 929 (9th Cir. 2025)	12, 14
<i>Rush v. Obledo</i> , 756 F.2d 713 (9th Cir. 1985).....	6, 14, 15, 16
<i>Segura v. United States</i> , 468 U.S. 796 (1984)	15
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960).....	9, 10, 11
<i>State v. Mixton</i> , 478 P.3d 1227 (Ariz. 2021)	1
<i>Techtow v. City Council of N. Las Vegas</i> , 775 P.2d 227 (Nev. 1989).....	3, 6, 18
<i>Vondra v. City of Billings</i> , 736 F. Supp.3d 933 (D. Mont. 2024), <i>aff'd</i> , 2025 WL 3654684 (9th Cir. Dec. 17, 2025).....	15, 16, 18

Statutes

California Penal Code § 26806	passim
California Penal Code § 26806(a).....	4
California Penal Code § 26806(b)	2

Rules

Fed. R. App. P. 40(b)(2)(D)	4
-----------------------------------	---

Regulations

12 C.F.R. § 326.3(a)(2)	5
California Code Regs. tit. 4 § 12396(a)(1)	5
California Code Regs. tit. 4 § 12372(a)(3)	5
California Code Regs. tit. 4 § 15000.3(c)	5
California Code Regs. tit. 4 § 15044(a)	5

IDENTITY AND INTEREST OF AMICUS CURIAE

The Goldwater Institute (“GI”) is a nonprofit, nonpartisan public policy and research foundation established in 1988, dedicated to advancing the principles of limited government, economic freedom, and individual liberty. GI advances these principles through litigation, research, and policy briefings. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when its or its clients’ objectives are affected. Among GI’s main objectives are the protection of the right to engage in businesses in one’s own home, and the right of privacy. To that end, GI has litigated and participated as amicus in courts nationwide in cases involving these rights. *See, e.g., State v. Mixton*, 478 P.3d 1227 (Ariz. 2021); *Coons v. Lew*, 762 F.3d 891 (9th Cir. 2014). Notably, GI has litigated cases in which the government has attempted to force home-based businesses to record everything going on in the owner’s home. *See, e.g., Mendez v. City of Chicago*, 228 N.E.3d 774 (Ill. App. 2023).

All parties have consented to the filing of this brief, which is accompanied by a motion for leave to file. No party or party’s counsel authored this brief in whole or in part, and no one other than amicus or its counsel funded it.

INTRODUCTION

The Court should grant rehearing because the panel has approved something no American legislature had ever done before: a government command that private

conversations be continuously recorded, without probable cause or even suspicion, and that these recordings be preserved for a year, all as the price of operating a lawful business. If that is constitutional here, it is constitutional any time a license is required. The protection of private conversations—including family conversations or legal or medical consultations—cannot depend on whether the premises also happen to contain a licensed business. To hold otherwise would do extraordinary damage to the First, Fourth, Fifth, and Ninth Amendments.

California Penal Code § 26806 requires firearms dealers to record designated interior areas continuously, with sound, and retain the recordings for at least one year. That mandate reaches home-based dealers, too, including where an attorney uses the same detached office for his firearms business, legal practice, and family visits. 2-ER-248-49 ¶ 10. Yet the panel affirmed dismissal of the constitutional challenges. Op. 56–57.¹

This case involves a law that mandates round-the-clock recording—and preservation—of both camera footage *and everything said* in designated areas. The statute’s access provisions (Cal. Penal Code § 26806(b)(1)–(3)), do not change that, and as Judge Lee explained in dissent, they offer little practical protection for

¹“Op.” refers to the August 27, 2026 panel opinion, using its printed page numbers. “Pet.” refers to appellants’ October 13, 2026 rehearing petition. “ER” refers to appellants’ excerpts of record; the preceding numeral identifies the volume.

privacy. Op. 71-72. More fundamentally, restricting later access to the recordings cannot cure the constitutional offense of compelling recording in the first place. The constitutional injury begins when state commands that the microphone be turned on.

The precedent set here will not stay confined to firearms. A rule whereby the state can mandate such extraordinarily intrusive surveillance *inside private homes*—including the preservation of unrelated conversations because the premises are licensed for the operation of a firearms business will also apply to situations in which other purportedly dangerous, or even just politically unpopular, businesses operate. *Cf. Harper v. Lindsay*, 616 F.2d 849, 855 (5th Cir. 1980) (anti-privacy law for massage parlors); *Techtow v. City Council of N. Las Vegas*, 775 P.2d 227, 229-30 (Nev. 1989) (same); *Myrick v. Bd. of Pierce Cnty.*, 677 P.2d 140, 143-44 (Wash. 1984) (same). The full Court should confront this question now, before that happens.

ARGUMENT

The Court should grant rehearing en banc because the panel erred in at least three determinations with consequences far beyond this case: First, it treated the State's mandate that licensees record every conversation and maintain those recordings in an archive for a year as constitutionally insignificant *until an official later accesses it*, despite the fact that the statute authorizes warrantless

examinations of that archive. Second, it treated that archive requirement as if it imposes no First Amendment burden absent the creation of some formal membership list or other form of retaliation—even though retaliation is not necessary to establish a First Amendment violation. Third, the panel decision allows the State to treat a business license as *carte blanche* to mandate intrusions into constitutionally protected privacy rights even with respect to activities unrelated to the licensed practice, which just happen to share the same space.

Rehearing is warranted when a panel decision creates an issue of exceptional importance. Fed. R. App. P. 40(b)(2)(D). This decision does so three times over.

I. The panel’s approval of a year-long audiovisual archive authorizes a dangerous intrusion into constitutionally protected privacy rights that requires en banc correction.

A. The mandate here is far more burdensome than a mere rule requiring the installation of security cameras.

Section 26806 imposes a qualitatively different intrusion from the comparators on which the State relied. Surpassing all analogous mandatory-recording schemes, that law requires permanently mounted cameras covering specified areas, including the interiors of entrances and exits, firearm displays, and points of sale. These recording systems must capture sound along with video, twenty-four hours a day, and dealers must retain the footage for at least one year. Cal. Penal Code § 26806(a)(1)-(6). The statute applies to *home-based* dealers as well as storefronts. Its operation therefore preserves not only images useful after a

theft, but also conversations occurring in covered areas of homes when no transaction is underway—despite the fact that “privacy expectations are most heightened” in the home. *California v. Ciraolo*, 476 U.S. 207, 213 (1986). As Judge Lee noted, the law provides a simple mechanism for “inspections” whereby the archived footage can be reviewed without a warrant. Op. 71-72 (Lee, J., dissenting).

This is unprecedented, and although the State proposes two analogues, they are not even superficially similar. *See* Answering Br. 50-51. California’s cardroom rules, for example, require video surveillance, but not audio recording. Cal. Code Regs. tit. 4, §§ 12372(a)(3), 12396(a)(1). The cannabis rules likewise require video recording, but California generally bars licensed cannabis premises from private residences, and the rule exempts premises used exclusively for cultivation from its video requirement. *Id.* §§ 15000.3(c), 15044(a). As for federal banking regulations, they only list maintaining a camera as among procedures a security program “*may* include.” 12 C.F.R. § 326.3(a)(2) (emphasis added). None of these laws require licensees to record conversations inside a home-office, including conversations having nothing to do with the licensed transactions, and to maintain such recordings for a year. “Neither the federal government nor the other 49 states have ever enacted such an intrusive audio-recording requirement for any business

activity.” Op. 58-59 (Lee, J., dissenting). The panel’s determination that the requirement doesn’t offend the Constitution thus warrants en banc review.

State and federal courts have already declared other types of suspicionless surveillance mandates in businesses unconstitutional—for example, holding in *Harper, supra*, that forcing massage parlors to have an unobstructed window into every massage room violated the rational basis test, and violated the customers’ reasonable expectations of privacy. 616 F.2d at 855; *accord, Tectow, supra; Myrick, supra*. Similarly, in *Rush v. Obledo*, 756 F.2d 713, 721 (9th Cir. 1985), this Court said it was unconstitutional for California to require home-based day-care centers to allow searches of the premises “at any time” without a warrant. The Court acknowledged the “administrative search” doctrine and held that it could only apply to “those portions of the provider’s home where day care activities take place only when the home is being operated as a family day care business,” not otherwise. *Id. Accord, Blackwelder v. Safnauer*, 689 F. Supp. 106, 137-39 (N.D.N.Y. 1988).

Here, the mandate is even more constitutionally offensive, as it mandates not only constant audio recording of every conversation, even of home-based businesses, but it applies to a business—firearms dealers—which, unlike the business of cannabis sellers or massage parlors, is bound up with an *enumerated constitutional right*. In effect, the intrusion into privacy is triggered by the

engagement in constitutionally protected activity. This is more than a dispute about cameras on commercial property. The full Court should review this decision.

B. *Kyllo*'s technology-neutral principle forecloses treating remote observation as constitutionally inconsequential.

The fact that no government officer actually enters the premises also does not resolve the constitutional question. *Kyllo v. United States*, 533 U.S. 27, 36 (2001), instructs courts to account for “more sophisticated [surveillance technologies] that are already in use or in development.” That means constitutional protections against unreasonable searches cannot erode as advanced technology makes it easier to intrude into private life. And that technology-neutral principle means courts must examine what a surveillance requirement records and preserves, as opposed to simply concluding that the mandate is acceptable as long as the government agent stands far from the premises. Here, however, the panel concluded that because there’s no “physical intrusion or actual access of audiovisual recordings” at the time they’re made, no search has taken place at the time of recording. Op. 22.

But looking at Section 26806 with a realistic—not formalistic—eye, it is plainly a search mandate. The recordings it requires transform transient verbal exchanges into a durable record. A high-resolution recording preserves a person’s face, voice, companions, repeated visits, and words for replay and later analysis. That changes a passing encounter into a searchable history, especially where voice

matching and facial recognition technology are available. The statute requires dealers to create that history and maintain it for government inspection. The technological improvements that make this possible only magnify the intrusion—they don’t justify it.

The constitutional analysis must keep three acts distinct. First, the State commands dealers to record and retain. Second, an official may later acquire or inspect a recording. Third, the government may analyze what it obtains. Appellants explain why the first act itself constitutes a search. Pet. 9-14. But aside from that, an access rule cannot make the State’s command to create the archive irrelevant until the moment a government official looks at the file. After all, the Fourth Amendment prohibits unreasonable *searches*—it does not address the question of subsequent examination of search *results*. A search occurs when an official “obtains information by physically intruding on persons, houses, papers, or effects,” *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (cleaned up), or when an official intrudes into a person’s “private sphere,” *Carpenter v. United States*, 585 U.S. 296, 304 (2018), both of which certainly occur when a person is forced to record conversations in her home as a condition of running her business.

And even if the search only occurred when an official examines the search results—i.e., reviews the recording—that hardly resolves the First Amendment burden imposed by the recording mandate. Under the statute, speakers and listeners

must accept the fact that they’re being recorded, and those recordings kept for a year (risking all the possible misinterpretations or misunderstandings that might later occur) at the moment they exchange ideas. The resulting chill or other burdens on speech thus occur at that moment—and that cannot be cured by the fact that officials only listen to the recording later.

This distinction answers the panel’s focus on the lack of physical entry. Technology now enables the State to obtain the functional benefit of persistent searching without keeping an agent on-site. But *Kyllo* makes clear that this cannot be dispositive: “obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area,’ constitutes a search.” 533 U.S. at 34 (citation omitted). In other words, technological innovations that place a degree of separation between the search and the officer cannot end the inquiry. By treating physical distance and delayed access as dispositive, the panel dangerously weakened constitutional protections.

II. The panel erred by treating compelled recording as First Amendment-neutral until formal disclosure or retaliation.

A State can burden the exchange of ideas in ways more profound and subtle than overtly demanding a membership list or retaliating against a speaker. *See, e.g., Lamont v. Postmaster General*, 381 U.S. 301 (1965), *Shelton v. Tucker*, 364 U.S. 479 (1960). A chill can work quite effectively even without actual retaliation or a

demand for a list, because the mandate to record is itself a threat. This Court’s conversational-privacy precedents also explain why recording and preservation of those recordings alters speech.

A. Supreme Court precedent forecloses the panel’s assumption that absent a formal membership list, there’s no First Amendment burden.

The First Amendment protects the receipt of ideas against deterrent government conditions, not only against formal disclosure demands. In *Lamont, supra*, the government instructed the Post Office not to deliver mail it deemed “communist propaganda” unless the addressee requested it in writing. The Court acknowledged that there was “no list” of recipients being kept, 381 U.S. at 305, and there was no indication of retaliation—yet this was still unconstitutional because recipients “might think they would invite disaster” to request delivery. *Id.* at 307.² Likewise, in *Shelton*, 364 U.S. 479, public school employees were required to declare what organizations they donated money to. The information was “treated as confidential and ... kept under lock and key.” *Carr v. Young*, 331 S.W.2d 701, 704 (1960). Indeed, just as in this case, there was no evidence that the government would take what the panel here called “affirmative, adverse action against them.”

² The panel distinguished *Lamont* because the statute imposed an affirmative obligation on the recipient. Op. 54-55. Section 26806, however, imposes an affirmative obligation on the dealer to record every covered exchange.

Op. 48. Yet it still chilled speech because it had an “unmistakable tendency” to frighten teachers into not contributing to organizations they supported, for fear of the information later becoming known. *Shelton*, 364 U.S. at 487.

Section 26806 imposes its burden through a different mechanism, but the relevant principle is the same. The deterrent consequence of the mandate cannot be brushed aside by saying that the government does not maintain a conventional “list.” Licensed dealers must create and keep audiovisual records of conversations which the government can later review and which might even be leaked to the public. A patron who wishes to discuss legislation, litigation, or constitutional rights in a covered area must accept that condition or remain silent. And even private conversations in the home are subject to being recorded and perhaps disclosed. The ability to choose silence does not cure the burden. It *is* the burden. That’s just what “chill” means.

This is not a new claim. Appellant-Petitioner Clark alleges that the mandate interferes with discussions about litigation, legislation, and constitutional rights and has curtailed his attendance, instruction, and participation. 2-ER-249-50 ¶ 12. Forcing participants to record conversations can burden information exchange before the State even tries to compile names. The panel, however, disregarded this entirely.

B. This Court’s conversational privacy precedents require review of the burden that recording imposes on speech, rather than merely speculating about future retaliation.

Forcing people to record conversations and preserve those recordings for a year for possible review by the government can inhibit candid speech even when no official has yet acted against a speaker. Just recently, in *Project Veritas v. Schmidt*, 125 F.4th 929 (9th Cir. 2025), this Court recognized that recording presents concerns “different in kind, and more corrosive” than merely hearing a conversation. *Id.* at 954. A recording can be stored, replayed, disseminated, and manipulated, or taken out of context. *Id.* at 954-55. The Court therefore treated conversational privacy as an interest that protects the uninhibited exchange of ideas. *Id.* at 953-54.

Other precedents do likewise. *Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer* recognized the rights of willing speakers and would-be listeners in vocational instruction. 961 F.3d 1062, 1069-70 (9th Cir. 2020). The content-based restriction at issue there differed from Section 26806, but the point remains: calling a rule “commercial regulation” does not answer whether it burdens protected exchange.

The pleaded application makes those principles concrete. Clark identifies specific examples of political discussion, teaching, and participation that California’s mandate has impaired. 2-ER-249-50 ¶ 12. Recording a person’s face,

voice, repeated attendance, and discussion can expose participation and association even without a written “membership list.” Facial-recognition and artificial-intelligence tools can magnify that exposure, but the argument does not depend on any particular system; the burden arises from *present* recording and retention.

That is why *Laird v. Tatum*, 408 U.S. 1 (1972), and *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), pose no obstacle to plaintiffs here. Those cases rejected claims based on *subjective* chill or *speculative* surveillance. But there’s no uncertainty about whether Section 26806 requires recording, and that recording has already resulted in actual chill. This case is therefore more like *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 522-23 (9th Cir. 1989), which recognized a concrete injury when government recording of services produced a demonstrable decline in church attendance.

Contrary to those precedents, the panel’s rule would protect speech only after the State uses the archive against someone. Yet the First Amendment does not require speakers to wait. Because Section 26806 changes the conditions under which willing speakers and listeners exchange ideas now, the full Court should review the burden now.

C. Notice of the recording does not justify the government’s decision to compel and preserve it.

Likewise, notice cannot cure the constitutional invasion. Notice only answers whether a speaker knows about the recording; not whether the government

may require that recording. While *Project Veritas* upheld Oregon’s notice rule, and said that a person given notice may speak or remain silent, it only addressed a private recorder’s failure to give notice. 125 F.4th at 956. Here, California’s law doesn’t let a person engage in the covered conduct in any place or manner absent recording. So, unlike the Oregon law in *Project Veritas*, California’s law does not afford anybody wishing to engage in constitutionally-protected activity a meaningful choice.

That distinction is the only way to make sense of a “chill” allegation. A posted sign tells people the State is recording their conversations; it doesn’t justify that recording. And a patron’s so-called freedom to choose not to speak under those conditions is hardly a solution to the problem—it just *is* the problem.

III. The panel’s license-based rationale would erase privacy boundaries in mixed-use homes and offices.

A license does not convert everything occurring in the same space into part of the regulated business. *Rush*, 756 F.2d at 721-22. Section 26806 ignores that boundary because cameras and microphones capture whatever occurs within range—including in home-based businesses.

A. Richards’ mixed-use office shows that the mandate records unrelated professional and family matters.

Even if the recording regime were appropriate in a standalone business during business hours, the great number of mixed-use spaces in which small

Federal Firearms Licensees (“FFLs”) operate underscores the overreach.

Appellant-Petitioner Richards’s FFL operates in a separate structure at his residence, where he also performs roughly half of his legal work—including client telephone calls—and where family members visit. 2-ER-248-49 ¶ 10. Thus he is required, even in his home—which “is sacred in Fourth Amendment terms ... because of [people’s] privacy interests in the activities that take place within,” *Segura v. United States*, 468 U.S. 796, 810 (1984)—to place an always-on microphone, paired with a camera that records footage (that could easily be turned into a diary of client meetings) and to retain copies of those recordings for the government to examine later.

The recording system, of course, cannot distinguish among uses. It captures a firearms transaction, a client call, and a family conversation all the same. And, of course, clients and family members did not choose to hold an FFL. So a rule limited to “business premises” is no limit at all when the premises host several forms of work and private life.

In *Rush, supra*, this Court confronted the question of whether the state can treat a home-based business as a mere office for Fourth Amendment purposes, and it said no. 756 F.2d at 721. Other courts have likewise said that when a business takes place in a home, the government cannot disregard the intense privacy interests of the home when regulating the business. In *Vondra v. City of Billings*,

736 F. Supp.3d 933, 947-48 (D. Mont. 2024), *aff'd*, 2025 WL 3654684 (9th Cir. Dec. 17, 2025), for example, the court found that a statute regulating masseurs, and which required even home-based massage businesses to submit to warrantless searches at any time, violated the Fourth Amendment. The state had a legitimate interest in regulating that industry, but that did not justify a rule that “permit[ted] warrantless inspections of the private areas of a solo practitioners’ homes, including their private bedrooms, drawers, and bathrooms.” *Id.* at 947.

The law office overlap heightens the concern, since confidentiality not only covers the content of conversations between attorneys and their clients, but even the fact that any conversation took place. This privilege promotes candid attorney-client communication. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009). But other highly sensitive matter is also subject to recording under this law. Marital communications between spouses are also privileged and may occur in any home-based business. So the mere fact that a licensed business occurs on the premises cannot determine—or deny—the constitutional protection accorded to every other use.

B. *Rush* requires limits tied to the regulated activity and *Burger* does not erase that requirement.

Even where courts have allowed inspection mandates in home businesses, they have always required some limiting principle tied to the regulated activity—but the panel here failed to articulate one. *Rush*, *supra*, required that the law

preserve a boundary between business and private life, by upholding properly limited inspections but invalidating statutory authority that allowed general searches without adequate limits on time and place. 756 F.2d at 721-22. The valid regulations confined inspection to areas children could access and to times when daycare occurred. *Id.* at 721. The invalid provision did not. *Id.* at 721-22. Thus, “[t]he state’s warrantless inspection authority should not extend beyond the ‘closely regulated business’ in which the provider engages,” and a license alone supplies no basis for an exception. *Id.*

New York v. Burger likewise requires a regulatory scheme to define the scope of inspection and limit an officer’s discretion. 482 U.S. 691, 703 (1987). The cases do not require identical business-hours rules for every industry. But they do require meaningful limits suited to the activity being regulated.

California’s answer that firearms may remain on-site after hours is insufficient to justify the scope of the recording requirement. The mere presence of firearms cannot justify the compulsory recording of every conversation that occurs near the sale stock, nor does it automatically greenlight after-hours inspections of security equipment. If the presence of inventory were enough, a home-based licensee’s privacy would disappear whenever inventory remained on-site. And a possible theft after closing also does not transform a client call or family visit into regulated firearms activity. That rule should not stand.

C. The panel’s rule has no limiting principle.

That California applied this regulation first to firearms dealers hardly limits the panel’s holding from applying to numerous other business types. Firearms are hardly the only “closely regulated” business; given that “the food industry is a quintessential example of an industry that is ‘closely regulated,’” *Players, Inc. v. City of New York*, 371 F. Supp.2d 522, 537 (S.D.N.Y. 2005) (collecting cases), the panel’s reasoning would just as easily authorize intrusive recording requirements in homes that are used for food-preparation—which would inevitably cross critical First and Fourth Amendment lines. A state might just as easily invoke food safety or crime prevention as justifying a similar recording requirement for restaurants or coffeeshops or home-based kitchens, even though such places are notorious hosts for the free exchange of ideas protected by the First Amendment. Suppose a licensee produces food in the same kitchen where her family eats, receives visitors, and discusses private matters after business hours. A similar recording requirement would intrude on private domestic activity just because commercial and private uses share the room.

The panel’s decision also opens the door for intrusive surveillance requirements targeted at politically unpopular businesses. It is no coincidence that so many precedents in this area of law involve massage parlors—*Harper*, *Techtow*, *Vondra*, and others. Politically unpopular industries, or businesses whose clientele

constitute an unpopular minority—religious bookstores, for example, or halal or kosher grocery stores, for example—could easily find themselves targeted for such intrusion with the same public-safety rationalization.

There must, therefore, be *some* limiting principle the panel omitted. A court must examine whether surveillance tracks the regulated activity, what unrelated private and expressive conduct it captures, how long it operates and retains content, and what safeguards cabin government access.

Absent at least some limits, the panel’s rule invites States to accomplish through licensing what they could not demand directly. Because its effect reaches home-based entrepreneurs and their families across occupations, the panel committed an error of exceptional and wide-reaching importance.

CONCLUSION

The Court should grant rehearing en banc.

RESPECTFULLY SUBMITTED this 23rd day of October 2026 by:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that:

This brief complies with the type-volume limitation of Cir. R. 29-2(c)(2) because this brief contains 4,200 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

/s/ Anthony Napolitano
Anthony Napolitano

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Document Electronically Filed and Served on counsel for all parties by ECF this 23rd day of October 2026.

/s/ Anthony Napolitano
Anthony Napolitano