XAVIER BECERRA
Attorney General of California
PAUL STEIN
Supervising Deputy Attorney General
JOSHUA M. CAPLAN (SBN 245469)
Deputy Attorney General
P. PATTY LI (SBN 266937)
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3817
Fax: (415) 703-1234
E-mail: Patty.Li@doj.ca.gov
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

B & L PRODUCTIONS, INC., d/b/a CROSSROADS OF THE WEST, et al., Plaintiffs, v. 22nd DISTRICT AGRICULTURAL ASSOCIATION, et al., Defendants.	19-cv-0134-CAB-NLS **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT** Date: May 1, 2019 Judge: The Honorable Cathy Ann Bencivengo Action Filed: January 21, 2019

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INTRODUCTION

The Board of Directors of the Del Mar Fairgrounds voted to adopt a policy to temporarily refrain from considering contracts for gun shows to be held on the property, pending development of a comprehensive public safety policy for such events. Plaintiffs have challenged this policy as a violation of their First Amendment and equal protection rights, but their claims fail on multiple grounds. The claims are barred by legislative, sovereign, and qualified immunity doctrines, and fail as a matter of law to state a constitutional violation.

As made clear through the plain language of the policy, the goal of the policy is to allow the Board to study and address the public safety concerns that have been raised with respect to gun shows. A decision to temporarily refrain from considering gun show contracts so that the Board can give proper attention to important public safety issues does not regulate speech or improperly discriminate against gun show producers, vendors, or attendees based on their viewpoints. Rather, it is a neutral, reasonable, measured means of carrying out the Board's desire to ensure the safety and security of persons attending events at the Fairgrounds, and is an entirely appropriate exercise of the Board's authority. Accordingly, Plaintiffs' claims should be dismissed.

BACKGROUND

I. THE 22ND DISTRICT AGRICULTURAL ASSOCIATION AND THE DEL MAR FAIRGROUNDS

The 22nd District Agricultural Association, also known as the San Diego County Fair ("District"), is a state institution formed for the purpose of "[h]olding fairs, expositions and exhibitions for the purpose of exhibiting all of the industries and industrial enterprises, resources and products of every kind or nature of the state with a view toward improving, exploiting, encouraging, and stimulating them," as well as "[c]onstructing, maintaining, and operating recreational and cultural facilities of general public interest." Cal. Food & Ag. Code § 3951(a), (b);

id. § 3873. The District "may do any and all things necessary to carry out the powers and the objects and purposes" for which the District was formed. *Id.*, § 3954. The District acts through its Board of Directors ("Board"), which comprises nine individuals appointed by the California Governor to serve four-year terms. *Id*. §§ 3956, 3959-61.

The California Department of Food and Agriculture ("CDFA") is a state agency that provides "oversight of activities carried out by each California fair," including, for example, "[c]reating a framework for administration of the network of California fairs allowing for maximum autonomy and local decisionmaking authority" and "[s]upporting continuous improvement of fair programming to ensure that California fairs remain highly relevant community institutions." Cal. Bus. & Prof. Code § 19620; *see also id*. § 19622.2(a).

With the approval of the CDFA, the Board may "[m]anage the affairs of the [District]," and "[m]ake all necessary bylaws, rules, and regulations for the government of the [District]." Cal. Food & Ag. Code § 3965(b), (c). However, the Board may, without prior approval from the CDFA, "arrange for and conduct, or cause to be conducted, or by contract permit to be conducted, any activity by any individual, institution, corporation, or association upon its property at a time as it may be deemed advisable." *Id*., § 3965.1(a). Any such contract must accord with the District's written policies and procedures for contracting and all applicable state laws governing contracts. *Id*., § 4051(a)(1)(A). Thus, CDFA's *Contracts Manual for Agricultural Districts* provides that "[w]hether or not a fair rents out their facilities for gun shows is a policy decision to be made by the fair board and their community." Compl. ¶ 60; *see* Request for Judicial Notice in Support of Motion to Dismiss ("RJN"), Ex. A (Excerpt from CDFA Contract Manual for District Agricultural Associations). Through the Board, the District contracts with third-party event organizers and promoters to conduct events on the Del Mar Fairgrounds (the "Fairgrounds"), such as gem shows, circus shows, gun shows, horse shows,

holiday parties, cotillions, farmers markets, concerts, bingo games, and agricultural and farming-related events. Compl. ¶ 23; *id*. Ex. 2.

Third parties conducting events on District property must comply with the District's Facility Use and Rental Use Policies, which were adopted in accordance with Section 4051 of the California Food and Agricultural Code. *See* Cal. Food & Ag. Code § 4051(a)(7) [authorizing District Agricultural Associations to "[m]ake or adopt all necessary orders, rules, or regulations for governing the activities of the association"].) Among other things, the Facility Use and Rental Use Policies provide that, while the Fairgrounds are state-owned property, and while certain portions of the property are accessible to the general public, "[n]o person shall enter upon the property unless attending an event or conducting lawful business with the 22nd DAA or its leaseholders." RJN, Ex. B. That is, access to the portions of the Fairgrounds used or leased by the District to hold events may be controlled by the District or event organizers, even though other portions of the Fairground remain accessible to the general public.

II. THE DISTRICT'S CONTRACTING POLICY REGARDING GUN SHOWS

Plaintiff B&L Productions, Inc. ("B&L") has leased the Fairgrounds and held gun shows there for the past 30 years.[1] Compl. ¶ 13. Plaintiffs allege that "[i]n 2017, gun-show-banning activists began pressuring [the] District to prohibit gun show events" at the Fairgrounds and that, in response, the District "began a series of meetings and public-comment periods to determine whether [to] continue to contract . . . for gun show events." Compl. ¶¶ 80, 82; *see also* RJN, Ex. C (PowerPoint presentation presented by the District's Contracts Oversight Committee during the September 11, 2018 Board Meeting). "The District also

[1] Plaintiffs allege that on or about July 5, 2018, staff from the District confirmed over e-mail that B&L's requested dates for gun shows to be held at the Fairgrounds in 2019 were being reserved for B&L pending execution of a formal contract. *Id*. ¶ 75 (citing Ex. 4). The document cited in support of this reflects correspondence with an email address ending in "nosevents.com," which is affiliated with the National Orange Show Events Center, in San Bernardino, California. Email addresses for employees of the District end in "sdfair.com."

engaged in communications with other government agencies and with [B&L] to determine whether gun shows at the [Fairgrounds] were operated in full compliance with state and federal law, and if the events pose any real danger to the community." Compl. ¶ 83; *see also* RJN, Ex. D, 40-222 (Transcript from District's September 11, 2018 Board meeting.)

In January 2018, the Board's Contracts Oversight Committee was established and tasked with working with District staff to address contract-related issues that arise between Board meetings, and to make recommendations to the Board regarding the District's contracting policies and procedures. *See*, *e.g.*, RJN, Exs. E through I (Board Meeting Minutes and Excerpts from Board Meeting Transcripts reflecting actions by the Contracts Oversight Committee); *id*. RJN, Ex. J (Meeting minutes from January 9, 2018 District Board Meeting). The Contracts Oversight Committee consists of two Board members, Defendants Shewmaker and Richard Valdez, who is Vice President of the Board. *See id.*; Compl. ¶¶ 25-26, 84.[2] The Contracts Oversight Committee was tasked with studying the operation of gun shows at the Fairgrounds and providing a recommendation to the Board about future contracts for gun shows. Compl. ¶¶ 25-26, 84. As part of this work, the Committee and the Board considered information from a variety of sources about public safety concerns relating to past gun shows held at the Fairgrounds. *See*, *e.g.*, RJN, Ex. D, 40-42 (discussing concerns with gun show promoter's compliance with California law); 171-176 (statements regarding gun show safety-related concerns, including sales of potentially prohibited armor-piercing ammunition, AR-15 "do-it-

[2] The allegations of a purported "closed session" and "non-public, ad hoc" committee (Compl. ¶¶ 25, 26, 84) misconstrue the requirements of state law. Under the Bagley-Keene Open Meeting Act, Cal. Gov't Code, §§ 11120 *et seq*. (the "Act"), a two-person committee must satisfy the Act's notice and public meeting requirements *only if* that committee was created by another body and delegated with authority to act. Cal. Gov't Code, § 11121(b). However, a two-person committee created by the District's Board chair person, at his or her discretion, with no delegation of authority, is not required to comply with the Act's notice and public meeting requirements. Rather, the two-person committee reports back to the District's Board during a public meeting for discussion and/or action on a specific item.

yourself" kits advertising no documentation required, and illegal transfers of firearms); 184 (accidental discharge of a firearm).

At a public Board meeting held on September 11, 2018, the Contracts Oversight Committee gave its recommendation regarding gun shows to the entire Board, in a presentation entitled, "Consideration of Future Gun Shows at the Del Mar Fairgrounds Beyond December 31st 2018." Compl. ¶ 88; RJN, Ex. C. As set forth in the presentation:

> The contracts Committee recommends that the Board of the 22nd DAA not consider any contracts with producers of gun shows beyond December 31st 2018 until such time as the District has put into place a more thorough policy regarding the conduct of gun shows that:
> - Considers the feasibility of conducting gun shows for only educational and safety training purposes and bans the possession of guns and ammunition on state property
> - Aligns gun show contract language with recent changes in state and federal law
> - Details an enhanced security plan for the conduct of future shows
> - Considers the age appropriateness of such an event
> - Grants rights for the DAA to perform an audit to ensure full compliance with California Penal Code sections 171b and 12071.1 and 12071.4. These audit rights may be delegated at the discretion of the 22nd
>
> This policy shall be presented to the Board NLT [no later than] the December, 2019 Board meeting.

Id. at 28 (the "Contracting Policy").

Thus, after participating in a "lengthy process of meetings, public comment, and communications with stakeholders," Defendants Shewmaker and Valdez voted in favor of adopting the recommended Contracting Policy. Compl. ¶¶ 92, 94, 161, *id*. Ex. 7. Six other Board members also voted in favor of the recommendation, and the Contracting Policy was thereby duly adopted as the official policy of the District. Compl. ¶ 94; *see also* RJN, Ex. D at 40-222 (Transcript from District's September 11, 2018 Board meeting confirming vote of 8-1 in favor of adopting Contracts Oversight Committee's recommendation).

III. PLAINTIFFS' ALLEGATIONS

Plaintiffs are: the operator of a gun show that has produced "gun show events" at the Fairgrounds "every year for over 30 years" (Compl. ¶ 13); four persons who regularly attend gun shows at the Fairgrounds (*id*. ¶¶ 14-17); a vendor and the owner of another vendor, both of which have been regular vendors at gun shows held at the Fairgrounds (*id*. ¶¶ 18-19); and several organizations that are vendors and participants at the guns shows, or that distribute material and information at the gun shows (*id*. ¶¶ 22-24).

The Complaint asserts six claims under 42 U.S.C. section 1983 for violations of First Amendment and equal protection rights, as well as a conspiracy claim under 42 U.S.C. section 1985. Compl. ¶¶ 108-184. The Complaint asserts all claims against all Defendants, who are the 22nd District Agricultural Association; Board President Shewmaker, in his official and individual capacity; Board Vice President Valdez, in his official and individual capacity; and the CDFA Secretary, Karen Ross, in her official capacity. *Id*. ¶¶ 23-26.

The Complaint alleges that the Contracting Policy is essentially a "moratorium on gun shows at the [Fairgrounds] in 2019 with the intention of permanently banning them" (*id*. ¶ 117), and that Defendants have thereby imposed content-based restrictions on "political, educational, and commercial" speech; imposed a prior restraint on speech; infringed on Plaintiffs' First Amendment assembly and association rights; violated Plaintiffs' equal protection rights; and conspired to deny Plaintiffs their civil liberties. *Id.* ¶¶ 108-184. Plaintiffs seek declaratory and injunctive relief and damages, as to all Defendants; as well as punitive damages from the District, Shewmaker, and Valdez. *Id*., Prayer for Relief, ¶¶ 1-14.

LEGAL STANDARD

"A [Federal Rule of Civil Procedure] 12(b)(6) dismissal may be based on either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v. Riverside Healthcare Sys., LP*, 534

F.3d 1116, 1121 (9th Cir. 2008) (citation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). However, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" cannot survive a motion to dismiss. *Id*. at 678 (citation omitted).

Dismissal without leave to amend is appropriate when the court "determines that the pleading could not possibly be cured by the allegation of other facts." *Watison v. Carter*, 668 F.3d 1108, 1117 (9th Cir. 2012) (internal quotation marks and citation omitted).

ARGUMENT

All claims against Defendants Shewmaker, Valdez, and Ross fail as a matter of law, based on absolute legislative immunity, sovereign immunity, and because those Defendants are not "persons" for the purpose of actions under 42 U.S.C. section 1983. The claims against all Defendants also fail on the merits. The Contracting Policy is not a regulation of speech or expressive conduct. It applies to a limited or nonpublic forum, and satisfies both the reasonableness standard applicable to such forums, as well as the intermediate scrutiny standard that applies to content-neutral laws or regulations of commercial speech. Plaintiffs' other claims fail as well, because their theories of associational and equal protection harm have no legal basis, and Plaintiffs do not fall into a class protected by 42 U.S.C. section 1985. Finally, even if any of the claims could survive as a matter of law, none of the conduct was "clearly established" as violating constitutional rights at the time the Contracting Policy was passed, and the individual Defendants are therefore entitled to qualified immunity against the damages claims. [3]

[3] In addition, the Second Amendment Foundation lacks standing entirely, because it has not alleged "a drain on its resources from both a diversion of its resources and frustration of its mission." *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) (internal quotation

I. ALL CLAIMS AGAINST BOARD MEMBERS SHEWMAKER AND VALDEZ FAIL BASED ON ABSOLUTE LEGISLATIVE IMMUNITY

All claims against Board Members Shewmaker and Valdez are barred by the doctrine of absolute legislative immunity. "[S]tate and regional legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities." *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998). This immunity applies to actions for declaratory or injunctive relief, and for damages. *See Cmty. House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 959 (9th Cir. 2010). Legislative immunity applies not only to traditional legislation, but also to decisions encompassing discretion and policymaking. *See Bogan*, 523 U.S. at 55-56. Here, the claims against Shewmaker and Valdez are based on their votes to adopt the Contracting Policy,[4] which were cast in their roles as duly appointed Board members. *See* Cal. Gov't Code, §§ 3956, 3959. Because voting to adopt the Contracting Policy was a legislative act, absolute immunity applies.

Courts apply a four-part analysis when determining whether an action is legislative in nature: "(1) whether the act involves ad hoc decisionmaking, or the formulation of policy; (2) whether the act applies to a few individuals, or to the public at large; (3) whether the act is formally legislative in character; and (4) whether it bears all the hallmarks of traditional legislation." *Norse v. City of Santa*

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marks and citation omitted). At most, it alleges that its "publications and other . . . materials and information are offered at gun show events." Compl. ¶ 22. The organizational plaintiffs all lack associational standing, because they do not allege that their "members would otherwise have standing to sue in their own right." *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996). The Complaint does not allege that South Bay Rod and Gun Club or the Second Amendment Foundation have any members, or that members of the California Rifle and Pistol Association have attended gun shows at the Fairgrounds or are otherwise injured by the Contracting Policy

[4] *See* Compl. ¶¶ 114, 128, 143 ("imposed a content-based restriction"); ¶¶ 117, 131, 146 ("placed a moratorium on all gun shows"); ¶ 119 ("eliminated the promised dates for 2019 for the gun shows and refused to allow contracts"); ¶ 161 ("voted to prohibit promoters and vendors from contracting"); ¶ 168 ("denying [Plaintiffs] the right to use the Venue"); ¶ 177 ("refusal to permit Plainitffs equal access to the Venue"); ¶ 183 ("considered arbitrary and unlawful factors in disapproving of Plaintiffs' activities").

Cruz, 629 F.3d 966, 977 (9th Cir. 2010) (internal quotation marks and citation omitted).

In this case, the first two factors weigh in favor of finding that adoption of the Contracting Policy was legislative in nature. The Contracting Policy does not reflect an ad hoc decision about a specific event promoter; rather, it is a "binding rule of conduct" that the District *would not* consider any gun show contracts until the District adopted a more thorough policy, which applies generally to *all* contracts for gun shows (by any promoter) on District property during 2019. An ad hoc decision, in contrast, is one "taken based on the circumstances of [a] particular case"; it does not "effectuate policy or create a binding rule of conduct." *Kaahumanu v. Cnty. of Maui*, 315 F.3d 1215, 1220 (9th Cir. 2003).

The third factor—whether the challenged action was formally legislative in character—also supports a finding of legislative immunity. "The act of voting on and passing ordinances and resolutions pursuant to correct legislative procedures is 'formally and indisputably legislative.'" *Schmidt v. Contra Costa Cty.*, 693 F.3d 1122, 1137 (9th Cir. 2012) (quoting *Cmty. House*, 623 F.3d at 960); *see also Bogan*, 523 U.S. at 55 ("acts of voting . . . [are], in form, quintessentially legislative"). More specifically, when a policy is adopted by a vote of a governing body at a formal meeting, "in that there was an agenda, minutes were taken and later approved, and certain formal procedures were followed, including making motions and seconding those motions before voting on them," "the act of approving the Policy [is] legislative in character, and this factor too weighs in favor of legislative immunity." *Schmidt*, 693 F.3d at 1137. All of these indicia of formal legislative action are present here.

Finally, applying the fourth factor, the Contracting Policy bears all the hallmarks of traditional legislation, insofar as the decision followed a "lengthy process of meetings, public comment, and communications with stakeholders," was formally approved by the Board during a public meeting, and resulted in the

creation of a two-person committee that would work with District staff to develop "a more thorough policy regarding the conduct of gun shows." Compl. ¶¶ 92, 94, 161, *id*. Ex. 7. The votes of Shewmaker and Valdez reflect a discretionary, policymaking decision through which these Board members considered the priorities of the District and the services the District provides to its constituents, and the implications of the vote by the Board reached beyond the particular event contracts sought by B&L for 2019—it applied to all gun show contracts by any gun show organizer or promoter. Absolute legislative immunity therefore bars all claims against Shewmaker and Valdez, which should be dismissed with prejudice.[5]

II. THE DAMAGES CLAIMS AGAINST DEFENDANTS SHEWMAKER, VALDEZ, AND ROSS ARE NOT COGNIZABLE UNDER SECTION 1983

Officials sued in their official capacity for damages are not persons for purposes of Section 1983. *See Doe v. Lawrence Livermore Nat'l Lab*., 131 F.3d 836, 839 (9th Cir. 1997). Accordingly, the damages claims against Board members Shewmaker and Valdez and Secretary Ross fail as a matter of law. *See id*.

The individual capacity claims for damages against Shewmaker and Valdez also fail because they are "a mere pleading device" that simply repackage the official capacity claims. *Grunert v. Campbell*, 248 F. App'x 775, 778 (9th Cir. 2007). In a challenge to a regulation passed "in the Board's official capacity pursuant to state law," the individual capacity claims against individual board members are actually official capacity claims, because "regulations cannot be

[5] The declaratory and injunctive relief claims against Shewmaker and Valdez also fail for lack of redressability. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). Shewmaker and Valdez, as two of the nine Board members, do not constitute a quorum of the Board and thus cannot independently take any actions on behalf of the Board. *Cf. New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010) (under common law, majority of a body constitutes a "quorum," which is the number of assembled members that is necessary for a decision-making body to be legally competent to transact business, and if a quorum is in attendance, a vote of a majority of those present is sufficient for valid action).

promulgated by individual Board members, only by a majority of Board members **officially acting as the Board**." *Id*. The individual capacity claims fail because they simply replicate the official capacity claims, which are not cognizable.

III. SOVEREIGN IMMUNITY BARS THE CLAIMS AGAINST SECRETARY ROSS

The *Ex parte Young* exception to Eleventh Amendment sovereign immunity allows "actions for prospective declaratory or injunctive relief against state officers in their official capacities for their alleged violations of federal law." *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012). This exception applies only where "it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party." *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998) (internal quotation marks and citation omitted). *Ex Parte Young* does not apply here because Plaintiffs have not plausibly alleged that Secretary Ross has any enforcement authority over the Contracting Policy, nor have they plausibly alleged that she has any other sufficient connection to it. At most, Plaintiffs allege that CDFA "provides policies and guidance for the operation of all agricultural districts in the state, including the use of facilities as directed by [CDFA] policy," and has issued a manual stating that "[w]hether or not a fair rents out their facilities for gun shows is a policy decision to be made by the fair board and their community." Compl. ¶¶ 59, 60. Far from establishing the necessary connection between Secretary Ross and the Contracting Policy, this guidance reflects the *District's* broad discretion to make policy under state law. Cal. Food & Ag. Code § 3965.1(a). Nor does the CDFA's general oversight of the District provide the required connection to the Contracting Policy, which must be "fairly direct," and not merely an exercise of "general supervisory power." *L.A. County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992); *see also Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) ("general supervisory powers of the California Attorney General" not sufficient to qualify for *Ex parte*

Young exception). Plaintiffs have not plausibly alleged that Secretary Ross has a sufficiently direct connection to the Contracting Policy, and sovereign immunity thus bars all claims asserted against her.[6]

IV. THE FIRST AMENDMENT CLAIMS ALL FAIL

Notwithstanding the bar on all claims against Shewmaker, Valdez, and Ross, the First Amendment claims fail as against all Defendants, as a matter of law.

A. The Contracting Policy Does Not Regulate Speech or Expressive Conduct, and Survives Rational Basis Review

The Contracting Policy is not a regulation of speech or expressive conduct. Rather, it is an exercise of the District's exclusive authority to decide whether and under what conditions it will contract with third-parties to conduct events on District property. Cal. Food & Ag. Code § 3965.1(a). The Contracting Policy reflects a policy determination that the District will not consider contracts for commercial gun shows until the District has considered various public safety issues and developed and adopted a formal policy for gun show events. Compl., Ex. 7; RJN Ex. C, 28. Because a gun show was already scheduled to and did take place at the Fairgrounds in December 2018, and because the Board agreed to consider the new policy no later than December 2019, the Contracting Policy was a decision to refrain from entering into contracts for gun shows for no more than a one-year period, pending development of a comprehensive policy. *See* Compl., Ex. 2, "Events Calendar," December 2018.

This decision to temporarily refrain from entering into contracts for gun shows might impact Plaintiffs' ability to engage in their desired speech at gun shows on the Fairgrounds, but it does not directly regulate speech, nor does it regulate conduct that is inherently expressive. *See Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 891, 895 (9th Cir. 2018) (rejecting argument that "[l]aws that restrict

[6] CDFA would be entitled to sovereign immunity, which is presumably why Plaintiffs instead sued Secretary Ross in her official capacity. *See Almond Hill Sch. v. U.S. Dep't of Agric.*, 768 F.2d 1030, 1035 (9th Cir. 1985)

the ability to fund one's speech are burdens on speech," and finding that challenged law regulated "employer conduct—the payment of wages—that is not inherently expressive"). Here, the Contracting Policy regulates conduct—contracting activities of the District—not speech. Plaintiffs' assumption that the Contracting Policy regulates speech or expressive conduct simply because it impacts gun sales is incorrect. "[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Otherwise, every decision by a governmental entity that affects commercial or expressive activity—including every decision *not* to enter into a contract to lease a particular venue to a gun show, or to allow a gun store to operate in a particular property, even—would be a regulation of speech. That might be true for bookstores and tattoo parlors, which themselves engage in protected First Amendment conduct, but it is not true for other types of commercial activity that are not inherently expressive, including gun sales. *Cf., e.g., Teixeira v. Cty. of Alameda*, 873 F.3d 670, 689 (9th Cir. 2017) ("bookstores and similar retailers who sell and distribute various media, unlike gun sellers, are *themselves* engaged in conduct directly protected by the First Amendment"); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1059, 1068 (9th Cir. 2010) (finding tattooing to be purely expressive activity entitled to "full First Amendment protection," and determining that ordinance prohibiting tattooing businesses was not a reasonable time, place, or manner restriction).

Because the Contracting Policy does not regulate speech or inherently expressive conduct, it is subject to rational basis review, which it survives. *See Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 847 (9th Cir. 2017). Under rational basis review, duly enacted laws are presumed to be constitutional. *See Nat'l Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1050 (9th Cir. 2000) ("We do not require that the government's action actually advance its stated purposes, but merely look to see whether the

government *could* have had a legitimate reason for acting as it did." (internal quotation marks and citation omitted)). The District, acting through the Board, could reasonably conclude that it was necessary to develop a comprehensive policy with respect to gun shows before entering into new gun show contracts, given the public safety concerns at issue. These are "plausible reasons" for the Board's action, and thus, the "inquiry is at an end." *Romero–Ochoa v. Holder*, 712 F.3d 1328, 1331 (9th Cir. 2013) (internal quotation marks and citation omitted).

B. The Contracting Policy Applies to a Limited or Nonpublic Forum and Satisfies the Reasonableness Standard

Although the Contracting Policy does not regulate speech or expressive conduct, it nevertheless satisfies the deferential standard for regulations of speech or expressive conduct in a limited or nonpublic forum. Courts use "a forum based approach for assessing restrictions that the government seeks to place on the use of its property." *Int'l Soc'y for Krishna Consciousness of California, Inc. v. City of Los Angeles*, 764 F.3d 1044, 1049 (9th Cir. 2014) (internal quotation marks and citations omitted). Under this approach, content-neutral restrictions on the time, place, or manner of protected speech in a traditional or designated public forum must satisfy intermediate scrutiny and be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." *Id.* (internal quotation marks and citation omitted). However, in a limited or nonpublic forum (which terms may be used interchangeably), restrictions on speech "based on subject matter and speaker identity" need only be "reasonable in light of the purpose served by the forum" and "viewpoint neutral." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

The portions of the Fairgrounds that are available to rent are a limited or nonpublic forum. The Supreme Court has determined that a state fair "is a limited

public forum in that it exists to provide a means for a great number of exhibitors temporarily to present their products or views, be they commercial, religious, or political, to a large number of people in an efficient fashion." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981). The availability of comparable facilities for rent in the surrounding areas (Compl. ¶ 61) plays no role in determining whether a particular venue is a limited or nonpublic forum. Nor does the Fairgrounds' status as a "state-owned property maintained and opened for use by the public" (*id.* ¶ 62) convert it into a traditional or designated public forum. "Publicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will." *United States v. Grace*, 461 U.S. 171, 177 (1983) (citation omitted). And "the government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) (citation omitted). The Fairgrounds is thus a limited or nonpublic forum.

"[T]he exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property." *Arkansas Educ. Television Comm'n*, 523 U.S. at 682 (citation omitted). This reasonableness inquiry "is a deferential one," *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1223 (9th Cir. 2003), and the Contracting Policy easily satisfies it. *See Florida Gun Shows, Inc. v. City of Fort Lauderdale*, No. 18-cv-62345, 2019 U.S. Dist. LEXIS 26926, at *27-32 (S.D. Fl. Feb. 19, 2019) (magistrate judge's report and recommendation determining that city-owned auditorium was a nonpublic forum, and that decision not to enter into lease for a gun show was reasonable).

Here, the plain language of the Contracting Policy demonstrates that it is reasonable, based on public safety concerns, RJN, Ex. C, 28, and not viewpoint-

based. The Complaint does not plausibly allege "that the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction," *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). And, the District's decision to temporarily pause the consideration of contracts for new gun shows pending development of a comprehensive gun show policy that addresses public safety concerns is reasonable, in that it is "wholly consistent with the [government's] legitimate interest in preserv[ing] the property . . . for the use to which it is lawfully dedicated." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50-51 (1983) (second alteration in original) (internal quotation marks and citation omitted). By establishing a framework to address public safety concerns, the District is attempting to preserve its ability to lease the Fairgrounds to gun show promoters while also ensuring that the security concerns previously raised are adequately addressed. The Contracting Policy therefore satisfies the reasonableness standard applicable to limited or nonpublic forums.[7]

C. The Contracting Policy Is Content-Neutral and Survives Intermediate Scrutiny

Although the Contracting Policy does not regulate speech or expressive conduct, and applies to a non-public forum, the Policy would nevertheless satisfy the test applicable to content-neutral regulations of expressive conduct set forth in

[7] Because the Contracting Policy does not regulate speech or expressive content, it does not constitute a licensing or permitting scheme that acts as a prior restraint on speech. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990) ("a [licensing] scheme that places unbridled discretion in the hands of a government official or agency constitutes a prior restraint" (internal quotation marks and citation omitted)). Even if the Court determines that the Contracting Policy constitutes a prior restraint, because it applies to a nonpublic or limited public forum, it survives this First Amendment challenge as a viewpoint-neutral and reasonable restriction. *See Cornelius*, 473 U.S. at 813 (holding that a federal charity drive was nonpublic forum that could limit participation to a number of select charities as long as the restriction was reasonable and viewpoint neutral); *Arkansas Educ. Television Comm'n*, 523 U.S. at 683 (holding that state-sponsored televised election debate was nonpublic forum, and allowing state officials to exercise broad editorial discretion in deciding which candidates to invite as long as the decisions were reasonable and viewpoint neutral).

United States v. O'Brien, 391 U.S. 367 (1968), as well as the test for regulations of commercial speech established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

1. The Contracting Policy Is Content-Neutral

As the Ninth Circuit observed in the context of a First Amendment challenge to an ordinance prohibiting possession of firearms on county property, "[i]f a law hits speech because it aimed at it, then courts apply strict scrutiny; but if it hits speech without having aimed at it, then courts apply the *O'Brien* intermediate scrutiny standard." *Nordyke v. King*, 644 F.3d 776, 792 (9th Cir. 2011) (citing *Texas v. Johnson*, 491 U.S. 397, 407 (1989)).[8] Here, the fact that the Contracting Policy specifically applies to gun shows, and not all other types of events, does not transform it into a content-based regulation; otherwise, any legislative or regulatory action taken with respect to a particular type of activity or subject matter would be deemed to be content-based and subject to strict scrutiny. Thus, in *McCullen v. Coakley*, 573 U.S. 464 (2014), the Supreme Court determined that a law establishing "buffer zones" outside of "reproductive healthcare facilities" did not "draw content-based distinctions on its face," even if the law "has the 'inevitable effect' of restricting abortion-related speech more than speech on other subjects." *Id*. at 480. This is because "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." *Id*. Rather, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id*. (internal quotation marks and citation omitted). The Court determined that the primary purpose of the law was *not* to restrict speech with a particular viewpoint, as the Massachusetts legislature was reacting to a problem that

[8] Although the Ninth Circuit granted rehearing en banc of the *Nordyke* panel decision, the en banc court "affirm[ed] the district court's ruling on the First Amendment for the reasons given by the three-judge panel." *Nordyke v. King*, 681 F.3d 1041, 1043 n. 2 (9th Cir. 2012) ("*Nordyke II*").

was, "in its experience," limited to a certain context. *Id*. at 482 (describing "a record of crowding, obstruction, and even violence outside [abortion] clinics"). The Court found, "[i]n light of the limited nature of the problem, it was reasonable for the Massachusetts Legislature to enact a limited solution."[9] *Id*.

Here, as in *McCullen*, the Contracting Policy is a response to public safety issues that the Board has identified as arising in a certain context: gun shows. The plain language of the Contracting Policy reflects an overriding concern with public safety issues specific to gun shows. RJN, Ex. C, 28. The Policy thus "serves purposes unrelated to the content of expression," and so should be "deemed neutral," even if it impacts certain kinds of speech more than others. *McCullen*, 573 U.S. at 480 (internal quotation marks and citation omitted).

Plaintiffs' allegations about the personal feelings or motivations of Shewmaker and Valdez (e.g., Compl. ¶¶ 90, 117, 131, 146) do not change this result. In *Nordyke*, 644 F.3d at 792, the Ninth Circuit rejected the contention that a county ordinance prohibiting possession of firearms on county property was adopted "in order to prevent members of the 'gun culture' from expressing their views about firearms and the Second Amendment," finding that "the Ordinance's language suggests that gun violence, not gun culture, motivated its passage." *Id*. (citing statement in ordinance that "[p]rohibiting the possession of firearms on County property will promote the public health and safety by contributing to the reduction of gunshot fatalities and injuries in the County"). The Court declined to rely on comments made by an individual county supervisor, because "the feelings of one county official do not necessarily bear any relation to the aims and interests of the county legislature as a whole," and because "the Supreme Court has admonished litigants against attributing the motivations of legislators to legislatures." *Id*. (citing *O'Brien*, 391 U.S. at 384 ("What motivates one legislator

[9] *McCullen* ultimately determined that the buffer zone law did not survive intermediate scrutiny. *McCullen*, 573 U.S. at 490.

to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."); *Johnson*, 491 U.S. 397; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). The Ninth Circuit further determined, "This approach is particularly appropriate here, because the County has offered a perfectly plausible purpose for the Ordinance: the reduction of gun violence on County property." *Nordyke*, 644 F.3d at 793. Here, the public safety concerns motivating the Contracting Policy are apparent on the face of the policy. Plaintiffs' allegations regarding Defendants' personal feelings on gun shows cannot support a conclusion that the Contracting Policy is content-based.

2. The Contracting Policy Survives Intermediate Scrutiny

The Contracting Policy would also survive intermediate scrutiny under *O'Brien*, 391 U.S. at 377, because it furthers an important or substantial government interest "that would be achieved less effectively absent the regulation." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 67 (2006) (internal quotation marks and citation omitted). It would also satisfy the intermediate scrutiny analysis applicable to restrictions on commercial speech, which requires that the restriction directly advance an important governmental interest, and be no more restrictive than necessary to advance that goal. *See Central Hudson*, 447 U.S. at 563-66.

When applying the intermediate scrutiny standard, courts give "substantial deference to the predictive judgments of [the legislature]." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (internal quotation marks and citation omitted). Lawmakers "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Renton*, 475 U.S. at 52 (internal quotation marks and citation omitted). In making such judgments, the legislature may rely on evidence "reasonably believed to be relevant to the problem," *id.* at 51, and such evidence need not be empirical, *see, e.g., City of Los Angeles v. Alameda*

Books, Inc., 535 U.S. 425, 439 (2002) (plurality opinion) (explaining that city did not need empirical data to support its conclusion that its adult-bookstore ordinance would lower crime). Indeed, "history, consensus, and simple common sense" can suffice. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (internal quotation marks and citation omitted); *see also Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015) (accepting as "intuitive" the connection between Florida's judicial canon preventing judges from personally soliciting campaign funds and the state's interest in protecting the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary).

The Contracting Policy directly serves the important governmental interest of securing public safety. The stated purpose of the Contracting Policy is to allow for the development of "a more thorough policy regarding the conduct of gun shows that" includes "an enhanced security plan for the conduct of future shows," "proposes a safety plan," and permits the District to take steps to ensure compliance with state laws regarding unauthorized possession of weapons in public buildings, as well as requirements that apply to gun show promoters. RJN, Ex. C, 28 (citing Cal. Penal Code § 171b [regarding unauthorized possession of weapons in state or local public building or at public meeting]; former Cal. Penal Code §§ 12071.1, 12071.4, renumbered as Cal. Penal Code §§ 27200 [gun show promoters required to have certificate of eligibility issued by California Department of Justice] and 27300 ["Gun Show Enforcement and Security Act of 2000"]). Temporarily holding off on entering into new gun show contracts until this comprehensive policy has been developed and adopted allows the District to address these important public safety concerns without risking harm to the public in the meantime. And, the Contracting Policy is no more restrictive than necessary, because it will only be in

place long enough to give the Board sufficient time to formulate, consider, and adopt a comprehensive gun show policy.[10]

D. Plaintiffs Fail to Allege That They Are Engaged In Protected Expressive Association

Plaintiffs contend that the Contracting Policy violates their First Amendment associational rights by "denying them the right to use the [Fairgrounds], a 'public assembly facility', to assemble and engage in political and other types of expression." Compl. ¶ 168. As set forth above, the Fairgrounds is a limited or nonpublic forum, and any description of the Fairgrounds as a "public assembly facility" is irrelevant, as that term has no established meaning in the associational rights jurisprudence. The claim nevertheless fails because the conduct Plaintiffs wish to engage in is not protected expressive association. The Supreme Court has previously rejected the contention that "patrons of the same business establishment" who are mostly "strangers to one another," at an event that "admits all who are willing to pay the admission fee," are engaged in protected expressive association. *City of Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989). "These opportunities might be described as "associational" in common parlance, but they simply do not involve the sort of expressive association that the First Amendment has been held to protect." *Id*. at 24; *see also S. Oregon Barter Fair v. Jackson Cty., Oregon*, 372 F.3d 1128, 1135 (9th Cir. 2004) (describing "gatherings that . . . are purely recreational and devoid of expressive purpose, such as some carnivals, festivals, and exhibitions"); *IDK, Inc. v. Clark Cty.*, 836 F.2d 1185, 1194 (9th Cir. 1988) ("While the first amendment fully protects expression about philosophical, social,

[10] The Ninth Circuit's previous determination that a prohibition on leasing fairgrounds to gun shows did not survive *Central Hudson* intermediate scrutiny is not controlling here. In *Nordyke v. Santa Clara County*, 110 F.3d 707 (1997), the Court found that the prohibition did not directly serve the asserted governmental interests, which were to "avoid sending the wrong message to the community relative to support of gun usage," "to improve the Fairgrounds' image," and to reduce "the fiscal impact of criminal justice activities in response to gun-related violence." *Id*. at 709, 713. As the plain language of the Contracting Policy reflects, these are not the interests that the Contracting Policy seeks to uphold.

artistic, economic, literary, ethical, and other topics, it does not protect every communication or every association that touches these topics." (citation omitted)). Plaintiffs' desire to hold, make sales at, and attend a gun show at the Fairgrounds is not protected by the right to association, and this Court should dismiss this claim without leave to amend.

V. THE EQUAL PROTECTION CLAIM FAILS

A. The Equal Protection Claim Is Subsumed by the First Amendment Claims

Plaintiffs' equal protection claim is that the Contracting Policy subjects them to "disparate treatment" while they are "engaged in activities that are fundamental rights," which presumably refers to the alleged First Amendment violations. Compl. ¶ 174. The equal protection claim is thus "no more than a First Amendment claim dressed in equal protection clothing," and so is "subsumed by, and co-extensive with, [the] First Amendment claim[s]." *Orin v. Barclay*, 272 F.3d 1207, 1213 n.3 (9th Cir. 2001). "Where plaintiffs allege violations of the Equal Protection Clause relating to expressive conduct," this Court uses "essentially the same analysis as . . . in a case alleging only content or viewpoint discrimination under the First Amendment." *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 780 (9th Cir. 2014) (internal quotation marks and citation omitted). "Plaintiffs do not allege membership in a protected class or contend that the [challenged] conduct burdened any fundamental right other than their speech rights," and the equal protection claim thus "rise[]s and fall[s] with the First Amendment claims." *OSU Student All. v. Ray*, 699 F.3d 1053, 1067 (9th Cir. 2012). The Court should therefore dismiss this claim with prejudice.

B. Plaintiffs Have Not Plausibly Alleged a "Class of One" Claim, and the Contracting Policy Survives Rational Basis Review

Even if the equal protection claim survives independently of the First Amendment claims, the "class-of-one" equal protection claim fails. Plaintiffs'

theory is that Defendants refused to "allow Plaintiffs equal use of the public facility while continuing to allow contracts for the use of the facility with other similarly situated legal and legitimate businesses . . . ." Compl. ¶¶ 173, 177. However, a class-of-one claim requires a showing of differential treatment as compared to similarly situated persons or groups. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). As alleged in the Complaint, gun shows in California are subject to "the most rigorous regulatory regime for commerce in firearms and ammunition in the United States," and gun shows must operate in accordance with numerous requirements relating to liability insurance; providing specified information (including a list of annual events, vendors, and security plans) to the California Department of Justice and local law enforcement officials; and posting required notices at the event. *See* Compl. ¶¶ 31-44. The unspecified "other similarly situated legal and legitimate businesses" referred to in the Complaint (¶ 177) are presumably not gun show operators, and so are not subject to the numerous public safety requirements applicable to gun shows. Thus, "[i]n neglecting to identify a similarly situated business," Plaintiffs have "failed to plead a cognizable class-of-one claim." *Teixeira v. Cty. of Alameda*, 822 F.3d 1047, 1053 (9th Cir. 2016) (finding that gun stores "are materially different from other retail businesses" based on plaintiff's acknowledgment that gun stores "are strictly licensed and regulated by state and federal law").[11]

The equal protection claim is therefore subject to rational basis review, as the Contracting Policy does not "classify shows or events on the basis of a suspect class," nor does it violate the First Amendment. *Nordyke II*, 681 F.3d at 1043 n.2 (citations omitted). The Contracting Policy easily satisfies rational basis review, which requires the Court to "ask only whether there are plausible reasons for [the

[11] Although the Ninth Circuit granted rehearing en banc of the *Teixeira* panel decision, the plaintiff "did not seek rehearing of the panel's rejection of his Equal Protection claims," and the en banc court "affirm[ed] the district court on that claim for the reasons given in the panel opinion." *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 676 n. 7 (9th Cir. 2017).

legislature's] action, and if there are, [the] inquiry is at an end." *Romero–Ochoa*, 712 F.3d at 1331 (internal quotation marks and citation omitted). The District, acting through the Board, could reasonably conclude that it was necessary to develop a comprehensive policy with respect to gun shows, and not for other commercial uses of the Fairgrounds, because gun shows present unique public safety concerns. This justification is sufficient for the purposes of rational basis review. *See Nordyke II*, 681 F.3d at 1043 n.2 (rational basis review satisfied because government "could reasonably conclude that gun shows are more dangerous than military reenactments"). The equal protection claim thus fails on multiple grounds, and should be dismissed with prejudice.

VI. THE CONSPIRACY CLAIM FAILS BECAUSE PLAINTIFFS ARE NOT MEMBERS OF A PROTECTED CLASS FOR SECTION 1985 PURPOSES

To prevail on a Section 1985 claim, there must be a deprivation of a legally protected right motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffith v. Breckenridge*, 403 U.S. 88, 102 (1971). Section 1985 extends "beyond race" only if "the courts have designated the class in question a suspect or quasi-suspect classification requiring more exacting scrutiny" or if "Congress has indicated through legislation that the class required special protection." *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992) (internal quotation marks and citation omitted). Plaintiffs do not satisfy either of these requirements; courts have not recognized gun show or gun rights supporters as a suspect or quasi-suspect classification, and Congress has not passed legislation indicating that this group requires special protection. *Cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993) ("opposition to abortion" does not identify a "class" protected by § 1985(3)); *Orin*, 272 F.3d at 1217 n. 4 (same); *Sever*, 978 F.2d at 1538 ("Obviously, 'individuals who wish to petition the government' have not been

judicially designated a suspect or quasi-suspect group."). The Section 1985 claim should be dismissed without leave to amend.

VII. THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

Any damages claims against Shewmaker, Valdez, and Ross also fail based on qualified immunity. On a motion to dismiss, qualified immunity shields government officials from suits for monetary damages unless a plaintiff presents plausible factual allegations showing "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (citation omitted). This Court can decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the particular case at hand," and can rule based on the second prong alone. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). In conducting the inquiry under the second prong, courts should not define "clearly established" at a high level of generality, and although there need not be "a case directly on point," existing precedent must place the question "beyond debate." *al-Kidd*, 563 U.S. at 741. The dispositive issue is "whether the violative nature of particular conduct is clearly established." *Id*. at 742.

In September 2018, when the Board adopted the policy, it was not by any stretch "*beyond debate*" that the policy violated the First Amendment or equal protection. Further, mere uncertainty—assuming there was *any* uncertainty at all—about whether the policy was constitutional is not enough. *See Porter v. Bowen*, 496 F.3d 1009, 1026 (9th Cir. 2007) (qualified immunity applied where court had to "wrestle with difficult and unsettled questions"). Consequently, Shewmaker, Valdez, and Ross are entitled to qualified immunity from Plaintiffs' claims for monetary damages.

VIII. CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint without leave to amend.

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Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
PAUL STEIN
Supervising Deputy Attorney General
JOSHUA M. CAPLAN
Deputy Attorney General

S/ P. PATTY LI

P. PATTY LI
Deputy Attorney General
Attorneys for Defendants