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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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| B & L PRODUCTIONS, INC., d/b/a CROSSROADS OF THE WEST, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>22nd DISTRICT AGRICULTURAL ASSOCIATION, et al.,<br><br>Defendants. | 3:19-cv-0134-CAB-NLS<br><br>**REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT**<br><br>Date: May 1, 2019<br>Judge: The Honorable Cathy Ann Bencivengo<br>Action Filed: January 21, 2019 |

Because all claims in this challenge to the District's Contracting Policy are legally insufficient, the Court need not consider Plaintiffs' improper request for entry of summary judgment in their favor. That request is simply an attempt to preclude Defendants from conducting discovery and putting on a case if the Court finds that the Complaint states any potentially viable claims, but the Complaint does not. Plaintiffs ignore the numerous authorities establishing that the Contracting Policy does not regulate speech or expressive conduct; applies to a limited or nonpublic forum; and nonetheless survives intermediate scrutiny. The associational, equal protection, and conspiracy claims also all fail as a matter of law, based on well-established precedents. Finally, the claims are barred by various immunities, and because Plaintiffs concede that actions preceding the passage of the Contracting Policy were "merely advisory." Opp. 22. The Court should dismiss all claims without leave to amend.

## I. CONVERSION OF DEFENDANTS' MOTION TO DISMISS INTO AN ADVERSE MOTION FOR SUMMARY JUDGMENT IS UNNECESSARY AND WOULD BE HIGHLY PREJUDICIAL TO DEFENDANTS.

Relying solely on the plausible factual allegations in the Complaint, the documents submitted with or properly incorporated in the Complaint, and material that is judicially noticeable, the Court should determine that all claims fail as a matter of law. *See In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014). But even if the Court concludes otherwise, the Court should decline Plaintiffs' request for entry of summary judgment in their favor, because it is procedurally improper and highly prejudicial to Defendants.

Plaintiffs' submission of extraneous materials in opposition to the motion to dismiss does not automatically convert that motion into a summary judgment motion, *see Swedberg v. Marotzke*, 339 F.3d 1139, 1146 (9th Cir. 2003), let alone into a *cross-motion* for summary judgment that could permit entry of judgment *against Defendants*. And, consideration of a summary judgment motion at this stage would be extremely premature. Plaintiffs have not noticed any motion, and

because this Court's local rules provide only seven days between the filing of opposition briefs and reply briefs, Defendants would have just seven days to oppose the purported summary judgment motion. Even if Defendants had sufficient time for briefing, Defendants would still be prejudiced by early consideration of whether a genuine dispute of material fact exists. As reflected in the 1,356 pages of declarations and associated exhibits Plaintiffs have submitted, Plaintiffs contend that numerous undisputed factual matters weigh in their favor. But any assessment of Plaintiffs' factual assertions would be premature and prejudicial to Defendants, because Defendants have had no opportunity to conduct discovery or test Plaintiffs' factual allegations and evidence. *Cf.* Fed. R. Civ. P. 56(d) (upon a showing that party opposing summary judgment "cannot present facts essential to justify its opposition," a party may request that the Court "defer considering the motion or deny it" or "allow time to obtain affidavits or declarations or to take discovery"). Thus, the Court should disregard Plaintiffs' request to convert Defendants' motion into a motion for summary judgment against Defendants, as well as the declarations and exhibits submitted therewith.[1] *Cf.* Fed. R. Civ. P. 12(f) (motion to strike by party or the court). The only motion that is properly before the Court is Defendants' motion to dismiss the Complaint for failure to state a claim, and all of Plaintiffs' claims fail as a matter of law.

## II. THE FIRST AMENDMENT CLAIMS ALL FAIL

### A. The Contracting Policy Does Not Regulate Speech or Expressive Conduct

The Contracting Policy does not regulate speech or expression regarding "gun culture," even if it impacts the circumstances under which individuals might engage with "gun culture" or express themselves. The Supreme Court recently reaffirmed that "regulations of . . . conduct that incidentally burden speech" are constitutional. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018)

[1] *See* Defs.' Objs. to Evid. ISO Opp. Br., filed herewith.

(citations omitted). "That is why a ban on race-based hiring may require employers to remove 'White Applicants Only' signs; why 'an ordinance against outdoor fires' might forbid 'burning a flag'; and why antitrust laws can prohibit 'agreements in restraint of trade'"—even though all of these restrictions undoubtedly have secondary or practical effects on speech or expressive activity. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (citations omitted).

Nor does the Contracting Policy regulate speech simply because it impacts whether and under what circumstances firearms can be sold at the Fairgrounds. Otherwise, all regulations impacting the sale of firearms—including the numerous laws described in the Complaint and the Opposition Brief—would constitute regulations of speech. Plaintiffs cite no case establishing that firearms are "inextricably intertwined with a religious, political, ideological, or philosophical message" such that a restriction on the sale of firearms constitutes a direct restriction on First Amendment activity. Opp. 11 (quoting *Hunt v. City of Los Angeles*, 601 F. Supp. 2d 1158 (C.D. Cal. 2009)). To the contrary, courts have rejected the argument that firearms, in and of themselves, carry a message. *See, e.g.*, *Nordyke v. King*, 319 F.3d 1185, 1190 (9th Cir. 2003) ("Typically a person possessing a gun has no intent to convey a particular message, nor is any particular message likely to be understood by those who view it.").

**B. The Fairgrounds Is A Limited Or Nonpublic Forum**

Plaintiffs' insistence that the Fairgrounds is a designated public forum fails to acknowledge that numerous federal courts have treated fairgrounds as a limited public forum, including the Supreme Court. *See Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981) (contrasting city streets, which have "immemorially been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," with fairgrounds hosting "temporary event[s] attracting great numbers of visitors who come . . . for a short period to see and

experience the host of exhibits and attractions at the Fair"); *Powell v. Noble*, 36 F. Supp. 3d 818, 833 (S.D. Iowa 2014), *aff'd and remanded*, 798 F.3d 690 (8th Cir. 2015) ("Several other courts have similarly held that regional, county, and state fairgrounds should be considered limited public fora.") (collecting cases); *Angeline v. Mahoning Cty. Agr. Soc.*, 993 F. Supp. 627, 633 (N.D. Ohio 1998) (finding fairgrounds to be a "limited public forum").

Plaintiffs rely on *Cinevision* to argue that simply holding a venue open to the public creates a designated public forum (Opp. 12), but that case involved a government contract with a concert promotor "for the presentation of music by a variety of performers" at a municipally owned amphitheater, which thereby "transformed publicly owned property into a public forum for expressive activity, even if the expressive activity is promoted by a single entity." *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 570 (9th Cir. 1984). Municipal theaters are "public forums designed for and dedicated to expressive activities," *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975), but the Fairgrounds is not "designed for and dedicated to expressive activities." The Fairgrounds hosts many events that would not be considered expressive activities—such as horse racing, bingo games, and marathons (Compl., Ex. 2)—even if persons attending those events might engage in expressive activity while at the Fairgrounds.

In addition, the fact that the government owns the Fairgrounds and allows those who rent the Fairgrounds to provide access to members of the public does not, without more, convert the Fairgrounds into a designated public forum. Opening Br. 15. The gun shows that Plaintiffs wish to hold at the Fairgrounds would be "secured . . . event[s] with ticketed admission," which is consistent with a finding of "a limited or nonpublic forum." *McMahon v. City of Panama City Beach*, 180 F. Supp. 3d 1076, 1099 (N.D. Fla. 2016). "Courts have not hesitated to hold that exclusive, ticketed, or otherwise nonpublic events held on public property are not traditional public fora." *Id.* (citing *Powell*, 36 F. Supp. 3d at 833).

**C. The Contracting Policy is Content-Neutral**

Plaintiffs contend that the Contracting Policy is a content-based speech restriction that singles out "gun culture," because the Policy applies only to gun shows, and not to any other kind of event involving a subject matter that might also raise public safety concerns. Opp. 13-14. This overly simplistic approach would mean that any attempt by the government to regulate a particular subject matter must satisfy heightened scrutiny. However, "[r]egulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring).

Thus, the Ninth Circuit has declined to find that an ordinance singled out "gun culture" simply because it restricted firearms possession. *See Nordyke v. King*, 644 F.3d 776, 792 (9th Cir. 2011) (finding that "the Ordinance's language suggests that gun violence, not gun culture, motivated its passage").[2] Instead, the Ninth Circuit examined the language of the ordinance itself to determine that a concern with "gun violence, not gun culture, motivated its passage." *Id.* Likewise, the language of the Contracting Policy makes clear that it was passed so that the Board could study and then address the public safety issues implicated by gun shows.

**D. The Contracting Policy Survives Intermediate Scrutiny**

The Contracting Policy satisfies intermediate scrutiny because it directly serves the important government interest in protecting public safety, Opening Br. 20-21, an interest that Plaintiffs acknowledge as "compelling," Opp. 15. But Plaintiffs characterize the Policy as "just a pretext" to "cover up the District's animus for 'gun culture' and those who participate in it," relying primarily on

[2] 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) (en banc).

correspondence involving then-Lieutenant Governor Gavin C. Newsom and Defendant Shewmaker, as well as on a public comment and other actions by Defendant Shewmaker. *Id.* at 15, 16. But Newsom is not a member of the Board, and the opinions he expressed in that correspondence are not the Board's. And, even if Plaintiffs have accurately characterized Defendant Shewmaker's statements and actions—which Defendants do not concede[3]—Plaintiffs ignore the Ninth Circuit authority rejecting reliance on comments made by an individual legislator, when trying to determine the purpose of an ordinance regulating the possession of firearms. *See* Opening Br. 18-19 (citing *Nordyke*, 644 F.3d at 792). Plaintiffs have thus failed to plausibly allege that the Contracting Policy is pretextual.

Plaintiffs further object that the Contracting Policy is not narrowly tailored, because a ban is "necessarily overbroad," given that "Crossroads has operated safe and legal gun shows at the Venue for decades," and that the shows "are largely incident-free." Opp. 16 (emphasis removed), 17. But this objection wrongly assumes that the Contracting Policy is a "gun show ban," when, by its plain terms and by Plaintiffs' own admission, it is a temporary pause on entering into new gun show contracts. Compl. ¶¶ 88, 94.

Plaintiffs are also incorrect that intermediate scrutiny requires the government to "target the exact wrong it seeks to remedy, and no more." Opp. 16. To satisfy intermediate scrutiny, "the regulation need not be the least restrictive or the least intrusive means available . . . ." *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 580-

[3] Plaintiffs' contention that the Board had "no evidence that gun shows present a public safety concern" (Opp. 15) should not be credited, because the Court need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112, 1115 (9th Cir. 2014) (internal quotation marks and citation omitted). *See* Opening Br. 4-5 (citing Defs.' RJN, Ex. D, 40-42, 171-176, 184) (transcript of September 11, 2018 Board meeting describing various public safety incidents and concerns). The Court should also disregard Plaintiffs' characterization of Defendant Shewmaker's response to Newsom's letter, which does not promise to "'do something' to end the shows at the Venue," (Opp. 16), but simply states that the District plans to "take action" on "[t]he issues" that have been raised in connection with gun shows at the Fairgrounds. Barvir Decl., Ex. 11, 489.

81 (9th Cir. 2014) (internal quotation marks and citation omitted). Rather, the regulation need only "promote[] a substantial government interest that would be achieved less effectively absent the regulation." *Id.* (internal quotation marks and citation omitted). A law does not fail intermediate scrutiny "simply because there is some imaginable alternative that might be less burdensome on speech." *United States v. Albertini,* 472 U.S. 675, 689 (1985).

Thus, even viewing the Board's decision to temporarily refrain from entering into new gun show contracts as a safety precaution, rather than as a response to a specific incident or concern, that decision would still satisfy intermediate scrutiny. The Board need not wait until a tragedy occurs before deciding to study and formulate a policy to address public safety issues. The Contracting Policy thereby directly promotes the substantial government interest in protecting public safety, and so satisfies intermediate scrutiny.[4]

## III. PLAINTIFFS FAIL TO ALLEGE THAT THEY ARE ENGAGED IN PROTECTIVE EXPRESSIVE ASSOCIATION

The type of associational conduct that occurs at commercial events such as a gun show is not protected expressive association under the First Amendment. Opening Br. 21-22; *see also New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 13 (1988) (constitutional right of expressive association is not implicated by every instance in which individuals choose their associates); *Roberts v. United States Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring) ("there is only minimal constitutional protection of the freedom of commercial association," because "the State is free to impose any rational regulation on the commercial transaction itself"). Plaintiffs do not address this, and instead simply

[4] Plaintiffs' reliance on the *Nordyke* cases (Opp. Br. 17) is misplaced. As explained in the Opening Brief (at 21 n.10), 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 are not the same interests asserted here. *Id*. at 709, 713. And, *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012) (en banc), did not address whether an ordinance banning possession of firearms on county property would be invalid if interpreted to ban the display of firearms at gun shows.

argue that the Contracting Policy restricts their ability "to assemble with like-minded people to engage in expressive activities[.]" Opp. 18. But just as the Contracting Policy does not regulate speech or expressive activity, even though it might impact the conditions for such activity, so the Policy does not regulate association, even though it might affect the conditions for association. For example, laws requiring a permit for "outdoor mass gatherings," or a juvenile curfew ordinance, directly regulate expressive association. *S. Oregon Barter Fair v. Jackson Cty., Oregon*, 372 F.3d 1128, 1131 (9th Cir. 2004); *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 951 (9th Cir. 1997). A policy to temporarily forgo new contracts to allow commercial sales of firearms does not.

## IV. The Equal Protection Claim Fails

Plaintiffs do not acknowledge the multiple Ninth Circuit cases holding that an equal protection claim will be subsumed by a duplicative First Amendment claim. Opening Br. 22. Nor do Plaintiffs address their failure to plausibly allege differential treatment as compared to similarly situated persons or groups, as required for a "class-of-one" claim. *Id.* at 22-23. The equal protection claim should therefore be dismissed without leave to amend.

## V. The Conspiracy Claim Fails

As Plaintiffs acknowledge, the Ninth Circuit recognizes Section 1985 claims in contexts beyond race only when "there has been a governmental determination" that the class in question requires special protection. Opp. 20 (citing *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (1992)). Plaintiffs do not cite any case finding that gun show promoters, people who attend and/or do business at gun shows, or supporters of the Second Amendment require special protection. The case Plaintiffs rely on (*Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499 (9th Cir. 1979)) predates Ninth Circuit and Supreme Court cases rejecting attempts to apply Section 1985 to advocates or supporters of various constitutional rights. Opening Br. 24-25. The conspiracy claim should be dismissed without leave to amend.

## VI. THE DAMAGES CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS FAIL

### A. The Individual Defendants Are Entitled to Qualified Immunity

The Opposition Brief makes no mention of qualified immunity, which bars all damages claims against the individual Defendants. Opening Br. 25. Plaintiffs have thus waived this issue, *see Walsh v. Nev. Dep't of Human Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006), and the claims should be dismissed without leave to amend.

### B. The Individual Defendants Are State Officers That Cannot Be Sued in Their Official Capacities Under Section 1983

Plaintiffs contend that Defendants Shewmaker and Valdez are not state actors, but California law provides otherwise. Cal. Food & Agric. Code § 3962 ("The directors [of district agricultural associations] are state officers."). Because "a suit against a state official in his official capacity is no different from a suit against the State itself . . . state officials sued in their official capacities are not 'persons' within the meaning of § 1983." *Doe v. Lawrence Livermore Nat. Lab.*, 131 F.3d 836, 839 (9th Cir. 1997) (internal quotation marks and citation omitted). The official capacity claims against Defendants Shewmaker and Valdez fail for this reason.

### C. All Claims Based On the Alleged Conduct of the Contracts Oversight Committee Must Fail

Plaintiffs attempt to salvage their claims against Defendants Shewmaker and Valdez by alleging individual capacity liability based on the actions of the Contracts Oversight Committee. But as Plaintiffs acknowledge, this committee "could take no votes" and "was merely advisory."[5] Opp. 22. Thus, by Plaintiffs' own admission, none of the Committee's alleged actions could restrict speech or expressive conduct, or violate associational, equal protection, or other civil rights, because the Committee could not (and did not) effectuate any policy or undertake

[5] As explained in the Opening Brief (at 4 n. 2) and reflected in judicially noticeable documents submitted therewith, the two-person Contracts Oversight Committee was not delegated with any authority to act on behalf of the Board, and is not subject to the Bagley-Keene Open Meeting Act (Cal. Gov't Code §§ 11120 *et seq.*).

1 any actions on behalf of the Board or the District. Plaintiffs therefore cannot rely
2 on the Committee's conduct as a basis for the individual (or official) capacity
3 claims against Defendants Shewmaker and Valdez.

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## VII. LEGISLATIVE IMMUNITY BARS ALL CLAIMS AGAINST DEFENDANTS SHEWMAKER AND VALDEZ

6 Plaintiffs contend that because B&L is the only gun show promoter that
7 currently desires to lease the Fairgrounds, the Contracting Policy is an ad hoc
8 executive decision, rather than a legislative act that confers absolute immunity.
9 Opp. 21-22. But the Contracting Policy applies to "any contracts with producers of
10 gun shows." Defs.' RJN, Ex. C, 28. If any other gun show promoter sought to
11 lease the Fairgrounds, the Contracting Policy would apply to that promoter in the
12 same manner. The Policy displays the "essential" features of legislative activity,
13 because it is "a defined and binding rule of conduct" about establishing rules
14 applicable to gun shows by *any* promoter. *Cinevision Corp.*, 745 F.2d at 580.

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## VIII. SOVEREIGN IMMUNITY BARS ALL CLAIMS AGAINST SECRETARY ROSS

16 Contrary to Plaintiffs' assertions (Opp. 24-25), Secretary Ross is a state
17 official entitled to sovereign immunity, because she is the head of a state agency
18 that exercises oversight over state institutions. Cal. Food & Ag. Code § 3953
19 ("Each [district agricultural] association is a state institution."). And, Secretary
20 Ross's connection to the Contracting Policy does not satisfy the *Ex parte Young*
21 exception to sovereign immunity. The District could have passed the Contracting
22 Policy even without the statement in the California Department of Food and
23 Agriculture's *Contracts Manual for Agricultural Districts* providing that district
24 agricultural associations have discretion as to whether to enter into contracts to hold
25 gun shows, because such discretion exists under state law, regardless of what is
26 stated in the manual. Opening Br. 2, 11 (citing Cal. Food & Ag. Code § 3965.1(a)).

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## IX. CONCLUSION

28 The Complaint should be dismissed without leave to amend.

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2 Dated: April 24, 2019

Respectfully Submitted,

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