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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 **DEFENDANTS' OPPOSITION TO SUMMARY JUDGMENT MOTION AND APPLICATION PURSUANT TO FED. R. CIV. P. 56(d); DECLARATION OF P. PATTY LI FILED HEREWITH** Date: June 17, 2019 Time: 2:30 p.m. Courtroom: 4C Judge: The Honorable Cathy Ann Bencivengo Action Filed: January 21, 2019

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United States District Court, Southern District of California
Local Rule 7.1 1

INTRODUCTION

As set forth in Defendants' motion to dismiss, all of Plaintiffs' claims fail as a matter of law, and the Court can make this determination without consulting the declarations and documents submitted by Plaintiffs in opposition. However, if the Court converts Plaintiffs' opposition into a motion for summary judgment,[1] it should deny that motion.[2] Proper application of the summary judgment standard would require the Court to credit Defendants' version of the facts, which is supported by the judicially noticeable documents filed with the motion to dismiss. Applying this standard, Plaintiffs have failed to carry their burden of showing no genuine issues of material fact on any of their multiple claims.

If the Court is not inclined to dismiss the case on the pleadings or deny Plaintiffs summary judgment outright, it should grant Defendants' request under Federal Rule of Civil Procedure 56(d) to defer consideration of Plaintiffs' motion to allow time for Defendants to take discovery from Plaintiffs and third parties. Proper application of the summary judgment standard requires that Defendants have an opportunity to conduct the necessary discovery. *See Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 271 (4th Cir. 2013) (reversing summary judgment on a free speech claim, finding that "the summary judgment decision was laden with error, in that the court denied the defendants essential discovery and otherwise disregarded basic rules of

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[1] In response to Plaintiffs' opposition brief, Defendants filed a 10-page reply brief seven days later, consistent with the page and time limits established by Local Rules 7.1.e.3 and 7.1.h. The Court then advised the parties that it "is inclined to adopt Plaintiffs' proposal to treat Defendants' motion and Plaintiffs' opposition as cross-motions for summary judgment," and gave Defendants two weeks to "file a brief opposing summary judgment in favor of Plaintiffs." ECF No. 18, at 2. The Court specified that the brief "may include a declaration pursuant to Federal Rule of Civil Procedure 56(d) identifying what essential facts Defendants are unable to present[.]" *Id.*

[2] Alternatively, the Court should enter summary judgment in Defendants' favor. Even considering the materials submitted by Plaintiffs, all claims fail as a matter of law, for the reasons set forth in Defendant's motion to dismiss papers and as supported by the judicially noticeable documents submitted therewith.

civil procedure”). Thus, the Ninth Circuit has made clear that where, as here, discovery has yet to commence,[3] Rule 56(d) requests are to be granted as a matter of course. *See Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003) (“before a party has had any realistic opportunity to pursue discovery relating to its theory of the case,” Rule 56(d) requests should be granted “fairly freely”).

In support of summary judgment, Plaintiffs offer their own testimony regarding numerous inherently factual matters, including the alleged targeting of “gun culture” and the “viewpoint” expressed by gun show attendees and vendors; the supposed lack of legitimate public safety concerns surrounding gun shows; and the purportedly “secret” subcommittee that recommended adoption of the Contracting Policy being challenged here. Opp. 13-17, 19, 21-22. Plaintiffs also claim that protected expression is “inextricably intertwined” with commercial speech at gun shows; that gun shows at the Fairgrounds involve a host of associational activities protected by the First Amendment; and that Plaintiffs have been subjected to differential treatment as compared to similarly situated persons or groups. *Id*. 11, 18-19. Rule 56(d) and basic fairness require that Defendants be permitted to challenge all of these factual claims through depositions or other means, and to develop their own evidence on these topics.

In addition, First Amendment jurisprudence makes clear that, at the summary judgment stage, Defendants should be afforded an opportunity to supplement the legislative record justifying the Contracting Policy. Evidence (beyond what is already in the legislative record) regarding the public safety interests at stake, the manner in which the Contracting Policy supports such interests, and alternative methods of promoting those interests, would be crucial to the application of reasonableness review or any kind of heightened scrutiny on summary judgment.

[3] The parties have not yet conferred as required by Federal Rule of Civil Procedure 26(f), and are thus not yet permitted to “seek discovery from any source.” Fed. R. Civ. P. 26(d).

As set forth below and in the accompanying Rule 56(d) declaration, the facts sought by Defendants exist, are not in Defendants' possession, and are essential to Defendants' opposition to any motion for summary judgment. *See* Declaration of P. Patty Li in Support of Defendants' Application Pursuant to Fed. R. Civ. P. 56(d) ("Li Decl."), ¶¶ 9-13. Therefore, if the Court is inclined to entertain Plaintiffs' motion for summary judgment instead of dismissing the case or denying summary judgment outright, it should grant Defendants' Rule 56(d) application and allow adequate discovery before disposing of the case.[4]

LEGAL STANDARD

Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In considering a motion for summary judgment, the Court must draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A court may convert a Rule 12(b)(6) motion to dismiss into a Rule 56 summary judgment motion, but "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). The standard for converting a motion to dismiss into a summary judgment

[4] "All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion," if a court is to convert a motion to dismiss into a summary judgment motion. Fed. R. Civ. P. 12(d). For the reasons described below, Defendants do not agree "that most or all of the relevant evidence is in the public record or in Defendants' possession." ECF No. 18, at 1. But even if this were true, two weeks is not sufficient time for Defendants to assemble and prepare all relevant evidence that is in the public record or in Defendants' possession. Such evidence includes declarations offering testimony by Defendants and their agents or employees, as well as documentary evidence reflecting numerous public comments and investigatory efforts carried out over many months. Testimony by or documents from third parties who communicated with Defendants or their agents or employees would also be relevant to Defendants' adoption of the Contracting Policy, but such evidence is not in Defendants' possession. *See* Li Decl. ¶ 6.

motion thus requires that parties be afforded the opportunity to obtain and present all discovery necessary to properly oppose the motion.

A party may seek this opportunity through a request under Rule 56(d),[5] which provides "a device for litigants to avoid summary judgment when they have not had sufficient time to develop affirmative evidence." *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002). Rule 56(d) states: "If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Although this rule "facially gives judges the discretion to disallow discovery when the non-moving party cannot yet submit evidence supporting its opposition, the Supreme Court has restated the rule as requiring, rather than merely permitting, discovery 'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.'" *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (quoting *Anderson*, 477 U.S. at 250 n.5). When "a summary judgment motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue discovery relating to its theory of the case, district courts should grant any Rule [56(d)] motion fairly freely." *Burlington N. Santa Fe R. Co.*, 323 F.3d at 773.

Thus, it is an abuse of discretion to enter summary judgment against a party who has not had the opportunity to develop evidence needed to establish the existence of an essential element to that party's case. *See Burlington N. Santa Fe R. Co.*, 323 F.3d at 774. "[S]ummary judgment in the face of requests for additional discovery is appropriate only where such discovery would be 'fruitless' with respect to the proof of a viable claim." *Jones v. Blanas*, 393 F.3d 918, 930 (9th Cir. 2004) (citation omitted).

[5] "Federal Rule of Civil Procedure 56(d) was, until December 1, 2010, codified as Federal Rule of Civil Procedure 56(f)." *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 676 n. 8 (9th Cir. 2018)

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ARGUMENT

As set forth in Defendants' motion to dismiss papers, all claims fail as a matter of law.[6] If the Court does not agree or deny summary judgment outright, it should nevertheless postpone consideration of any summary judgment motion. In order to properly oppose summary judgment, Defendants need discovery into numerous factual matters that Plaintiffs have raised, or that are needed for proper consideration, at the summary judgment stage, of the free speech, associational, equal protection, and conspiracy claims. Defendants have identified the specific facts that would be sought through discovery; demonstrated that the facts exist; and explained how those facts are essential to oppose summary judgment. The Court should therefore grant the Rule 56(d) request.

I. THE COURT SHOULD EITHER DENY SUMMARY JUDGMENT BASED ON PLAINTIFFS' FAILURE TO SATISFY THEIR EVIDENTIARY BURDEN, OR GRANT DEFENDANTS' RULE 56(D) REQUEST.

If the Court does not rule for Defendants as a matter of law, proper application of the summary judgment standard requires the denial of Plaintiffs' motion. Summary judgment is a "drastic device" that prevents a party from presenting its case to a jury, and the moving party thus bears a "heavy burden of showing that there are no genuine issues of material fact . . . ." *Ambat v. City & County of San Francisco*, 757 F.3d 1017, 1031 (9th Cir. 2014). On a motion for summary judgment, the Court must determine "whether the evidence present[s] a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52. "In making this determination, we view the evidence in the light most favorable to [the non-movant]. All justifiable inferences are to be drawn in his favor and his evidence is

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[6] Defendants hereby incorporate into this summary judgment opposition and Rule 56(d) application all documents submitted in support of their motion to dismiss, including the Opening Brief and Defendants' Request for Judicial Notice and exhibits attached thereto (ECF No. 12), and the Reply Brief and Defendants' Objections to Evidence Filed in Opposition to Motion to Dismiss (ECF No. 15).

to be believed." *McSherry v. City of Long Beach*, 584 F.3d 1129, 1135 (9th Cir. 2009).

As set forth below, the evidence submitted by Plaintiffs, although voluminous, is insufficient to carry their burden on summary judgment.[7] Their motion relies entirely on untested factual assertions and misinterpretations of documents that actually support Defendants' position. Thus, when applying the proper summary judgment standard and drawing all justifiable inferences in Defendants' favor, Plaintiffs have failed to establish that the evidence "is so one-sided that [Plaintiffs] must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

If the Court does not deny Plaintiffs' summary judgment motion, Rule 56(d) requires that Defendants be afforded an opportunity for discovery before the Court may properly consider summary judgment. To meet the Rule 56(d) standard, the "requesting party must show: (1) it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment." *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortgage Corp.*, 525 F.3d 822, 827 (9th Cir. 2008). This is not a high bar, particularly when "no discovery whatsoever has taken place." *Burlington N. Santa Fe R. Co.*, 323 F.3d at 774. In that situation, "the party making a Rule [56(d)] motion cannot be expected to frame its motion with great specificity as to the kind of discovery likely to turn up useful information, as the ground for such specificity has not yet been laid." *Id.*

Thus, where a party "has provided declarations from counsel explaining that she is unable to present facts essential to her opposition because discovery has yet to begin in this case," those declarations "are sufficient for the Court to grant [the Rule 56(d)] application." *Lizarraga-Montoya v. Lincoln Benefit Life Co.*, No. 14-

[7] Neither the Complaint nor the Opposition Brief (which serves as Plaintiffs' summary judgment motion) is verified, and thus none of the arguments or assertions therein constitute admissible evidence. *See Lopez v. Smith*, 203 F.3d 1122, 1132, n.14 (9th Cir. 2000) (en banc); *Johnson v. Meltzer*, 134 F.3d 1393, 1399 (9th Cir. 1998).

1 CV-3037-CAB-WVG, 2015 WL 12670508, at *1 (S.D. Cal. July 1, 2015). This
2 Court has previously determined that when a party's early summary judgment
3 motion "is premised predominantly on a declaration" by that party, "[a]t a
4 minimum," the opposing party "is entitled to depose [the declarant] and obtain any
5 relevant documents that could contradict his declaration or impact his credibility."
6 *Id*. at *2. *See also Doyle v. City of Medford*, 327 F. App'x 702, 703 (9th Cir. 2009)
7 (finding denial of Rule 56(d) request to be abuse of discretion when counsel
8 submitted "an affidavit listing six topic areas in which discovery was necessary in
9 order to defend properly against the summary judgment motion"); *cf*. *Stevens*, 899
10 F.3d at 678 (affirming denial of Rule 56(d) request when "[e]xtensive discovery
11 had taken place before the district court ruled on [the] motion for summary
12 judgment," including 16 depositions, 42 interrogatories, and 114 requests for
13 production taken or served by non-moving party).

14 There is no exception to these principles for First Amendment cases, or for
15 cases involving government defendants seeking discovery that goes beyond the
16 legislative record of the challenged enactment. In considering just such a case, the
17 Fourth Circuit reversed summary judgment entered for plaintiffs on a First
18 Amendment free speech claim, finding that the district court improperly "rebuffed
19 [defendant's] request for discovery, characterizing it as an improper 'attempt to
20 generate justifications for the Ordinance following its enactment.'" *Greater*
21 *Baltimore Ctr.*, 721 F.3d at 277. "[U]nder the Federal Rules of Civil Procedure and
22 controlling precedent, it was essential to the [defendant's] opposition to the
23 [plaintiff's] summary judgment motion—and to a fair and proper exercise of
24 judicial scrutiny—for the district court to have awaited discovery and heeded the
25 summary judgment standard." *Id*. at 288–89. Such an approach would have been
26 consistent with "the Federal Rules of Civil Procedure, which, as the Supreme Court
27 has underscored, 'are designed to further the due process of law that the
28 Constitution guarantees.'" *Id*. at 290 (quoting *Nelson v. Adams USA, Inc.,* 529 U.S.

460, 465 (2000)). Thus, as set forth more fully below, proper consideration of Plaintiffs' summary judgment motion requires that Defendants be permitted discovery on the numerous factual issues that Plaintiffs have raised, that are relevant to the scrutiny that the Court applies to Plaintiffs' constitutional claims, or that are otherwise essential to Defendants' opposition. *See* Li Decl. ¶¶ 9-13.

II. PLAINTIFFS' SUMMARY JUDGMENT MOTION ON THE FREE SPEECH CLAIMS FAILS, OTHERWISE DEFENDANTS REQUIRE DISCOVERY ON MULTIPLE KEY ISSUES.

A. Plaintiffs' Summary Judgment Motion on the Free Speech Claims Fails.

As set forth in the motion to dismiss papers, the free speech claims fail as a matter of law, because the Contracting Policy does not regulate speech or expressive content;[8] the Fairgrounds are a limited or nonpublic forum; and the Contracting Policy satisfies reasonableness review, as well as intermediate scrutiny.[9]

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[8] This Court can determine, as a matter of law, that the First Amendment does not apply to the Contracting Policy because it does not regulate speech or expressive conduct. The Ninth Circuit recently made such a determination in affirming the granting of a motion to dismiss a First Amendment challenge to a local housing and rental regulation. *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 685–86 (9th Cir. 2019). In doing so, the court considered "whether conduct with a significant expressive element drew the legal remedy or the ordinance has the inevitable effect of singling out those engaged in expressive activity." *Id*. at 685 (internal quotation marks and citations omitted). The court concluded, as a matter of law, that the housing and rental regulation "does not implicate speech protected by the First Amendment." *Id*. at 686.

[9] Even if the Court determines that some form of heightened scrutiny is appropriate, such an analysis can be performed as a matter of law here. Indeed, courts regularly resolve First Amendment challenges as a matter of law while applying heightened scrutiny, as evidenced by numerous recent Ninth Circuit opinions. *See*, *e.g.*, *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 884-85 (9th Cir. 2018) (affirming dismissal of claims, including First Amendment claims, on motion to dismiss and motion for judgment on the pleadings); *San Francisco Apartment Ass'n v. City & Cty. of San Francisco*, 881 F.3d 1169, 1177-78 (9th Cir. 2018) (affirming granting of motion for judgment on the pleadings, and finding that ordinance requiring certain disclosures by landlords to tenants satisfied *Central Hudson* intermediate scrutiny test applicable to commercial speech); *Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 460-61 (9th Cir. 2018), as amended (Feb. 2, 2018), (affirming dismissal of First Amendment claim, and finding that statute criminalizing prostitution satisfied *Central Hudson*); *Taub v. City and County of San Francisco*, 696 Fed.Appx. 181, 182 (9th Cir. 2017) (affirming dismissal of First Amendment claim, and finding public nudity

If the Court does not agree, Plaintiffs have nevertheless failed to carry their summary judgment burden on these claims. They offer no factual evidence regarding forum analysis (which determines the appropriate level of scrutiny), and instead rely on assertions in their non-verified papers (*see* Opp. 11-12) that do not constitute evidence and are irrelevant under the governing legal standard (*see* Opening Br. 14-16; Reply 3-4). With respect to whether the Contracting Policy is a content-based regulation of speech and whether the public safety reasons offered in support of the Contracting Policy are pretextual—such that the Policy would not survive any level of First Amendment scrutiny—Plaintiffs again offer untested assertions made in non-verified papers. Opp. 12-13, 16 ("a ban is necessarily overbroad," emphasis omitted). This is insufficient to establish a lack of genuine issues of material fact on the factors relevant to reasonableness review, intermediate scrutiny, or strict scrutiny. Plaintiffs also rely on an academic study and on documents reflecting statements from advocacy groups and public officials that, when drawing factual inferences in favor of Defendants, actually support a finding that legitimate public safety concerns motivated the passage of the Contracting Policy. Opp. 13-14. And, Defendants have also offered judicially noticeable documents that are consistent with such a finding. *See, e.g.*, Defts.' Req. for Jud. Not., Ex. D, 40-43 (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-yourself" kits advertising no documentation required, and illegal transfers of firearms); 184 (accidental discharge of a firearm); *id*. Exs. C-J; Opening Br. 3-5, 16-21; Reply 5-7. Drawing factual inferences in Defendants' favor, and given the lack of evidence submitted by Plaintiffs on these key issues, Plaintiffs have failed to

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ordinance to be a valid, content-neutral regulation under *O'Brien*); *Contest Promotions, LLC v. City and County of San Francisco*, 704 Fed.Appx. 665, 667-68 (9th Cir. 2017) (affirming dismissal of First Amendment claim, and finding that signage ordinance satisfied *Central Hudson*).

carry their "heavy burden" of establishing no genuine issue of material fact on their free speech claims, and the Court should thus deny summary judgment.

B. If the Court Does Not Deny Plaintiffs Summary Judgment, Defendants Require Discovery on Multiple First Amendment Issues.

If the Court does not deny summary judgment on the free speech claims, it should permit Defendants to develop facts regarding at least three issues that are essential to determining and applying the appropriate level of First Amendment scrutiny at the summary judgment stage: (1) to what extent the commercial gun sales that take place at gun shows are "inextricably intertwined" with fully protected speech; (2) whether the Contracting Policy targets "gun culture"; and (3) whether the public safety justifications found in the plain language and legislative record of the Contracting Policy are pretextual.

1. Defendants Require Discovery on Whether the Contracting Policy Regulates Non-Commercial Speech that Is "Inextricably Intertwined" with Commercial Speech.

Plaintiffs contend that the Contracting Policy regulates non-commercial speech that is "inextricably intertwined" with commercial speech, such that the Policy warrants strict scrutiny, rather than the intermediate scrutiny that normally applies to regulations of commercial speech.[10] Opp. 10-11. This argument is contrary to Supreme Court and Ninth Circuit precedent. *See Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 473–74 (1989) (commercial speech aspect of "Tupperware parties" was not inextricably intertwined with noncommercial instruction on "how to be financially responsible and how to run an efficient home," because "[n]o law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares"); *Nordyke v. King*, 319 F.3d 1185, 1190 (9th Cir. 2003)

[10] This argument assumes that the Fairgrounds are not a limited or nonpublic forum, which requires only reasonableness review. Opening Br. 14-16. As stated above, Plaintiffs offer no evidence on this issue and the Court can rule for Defendants on this basis, as a matter of law.

("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.").

However, if the Court does not deny summary judgment for Plaintiffs, then Defendants are entitled to discovery on this precise factual issue—whether activity that takes place at gun shows consists of commercial speech that is "inextricably intertwined" with fully protected (what Plaintiffs refer to as "political") speech. *See Greater Baltimore Ctr.*, 721 F.3d at 287–88 ("Discovery might . . . . show that any commercial aspects of [plaintiff's] speech are not 'inextricably intertwined' with its fully protected noncommercial speech.") (citing *Hunt v. City of L.A.,* 638 F.3d 703, 715 (9th Cir. 2011)). If the Court does not rule for Defendants on this issue as a matter of law, these facts are central to the First Amendment analysis and are thus essential to Defendants' summary judgment opposition. These facts exist, and are not in Defendants' possession. Rather, a significant portion of the facts regarding the topics of discussion at gun shows, and the feasibility of engaging in those discussions separate and apart from the commercial sale of guns, are in Plaintiffs' possession.

2. Defendants Require Discovery on Whether the Contracting Policy is a Content-Based Speech Restriction that Targets "Gun Culture."

Even if the Court determines that the Contracting Policy is a regulation of non-commercial speech, it would then need to consider Plaintiffs' argument that the Contracting Policy is a content-based restriction, because it regulates speech based on its subject matter.[11] Opp. 12-13. But before the Court enters judgment against Defendants on this basis, Defendants should have an opportunity to properly test this factual assertion.

[11] Plaintiffs' contention is an erroneous oversimplification, and the Court may determine as a matter of law that the Contracting Policy is not content-based. *See* Opening Br. 12-13; Reply 5; *see also Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 762–63 (1994) (declining to apply strict scrutiny to "an injunction that restricts only the speech of antiabortion protestors" because "the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based").

1 Plaintiffs contend that the Contracting Policy targets "gun culture," and was
2 enacted "based on the viewpoint of the expressive activities that take place at gun
3 shows." Opp. 13, 14. Defendants should be allowed to determine through
4 discovery exactly what that "viewpoint" is; such facts would be essential to
5 deciding the ultimate question of whether the Contracting Policy actually targets
6 that "viewpoint." The depiction of "gun culture" currently before the Court is
7 based entirely on the bare allegations of the Complaint, which are not admissible
8 evidence, and the untested assertions in Plaintiffs' own declarations. It may be that
9 there is a diversity of opinions among those who attend and participate in the gun
10 shows held at the Fairgrounds. For example, it may be that some attendees and
11 participants support the consideration of additional public safety measures. This
12 would allow Defendants to raise a triable issue of material fact as to whether the
13 Contracting Policy truly targets "gun culture." *Cf. Greater Baltimore Ctr.*, 721
14 F.3d at 282 ("the district court merely accepted the Center's description of itself,
15 and then assumed that all limited-service pregnancy centers share the Center's self-
16 described characteristics"). Discovery regarding the scope and content of the
17 alleged "gun culture" that Plaintiffs contend has been "diminish[ed]" by the
18 Contracting Policy would entail, at a minimum, depositions of the Plaintiffs who
19 allege that they are members of "gun culture." *See* Bardack Decl. ¶ 8; Diaz Decl. ¶
20 9; Dupree Decl. ¶ 9; Irick Decl. ¶ 9; Redmon Decl. ¶ 12; Travis Decl. ¶ 12; Sivers
21 Decl. ¶ 11; Olcott Decl. ¶ 18. It would also require discovery on the effect of the
22 Contracting Policy, including whether pausing gun shows to study public safety
23 issues actually hurts members of "gun culture"; the quantity and location of bulk
24 ammunition vendors or firearms vendors with comparable "expertise and variety
25 available at the Crossroads gun shows" (Compl. ¶ 15; *see also id.* ¶¶ 11, 16); the
26 amount of business a vendor like Plaintiff Lawrence Walsh does at a typical gun
27 show held at the Fairgrounds versus gun shows at "any of the other state venues"
28 (Compl. ¶ 18); and whether Defendants have "a monopoly on venues of [the] size

and type [of the Fairgrounds] in the area" (Compl. ¶ 61; *see also id*. ¶ 98; Olcott Decl. ¶ 6).

In support of their contention that the Contracting Policy targets gun culture by "singl[ing] out Plaintiffs' gun shows because of their content," Plaintiffs also argue that "[t]he District has not closed the Venue to all events to conduct a comprehensive study of security and public safety at the Venue." Opp. 13. Plaintiffs then cite statistics regarding the dangers of automobiles, pools and spas, and alcohol. *Id*. (citing Pltfs.' Req. for Jud. Not., Ex. 26). If the Court does not deny Plaintiffs summary judgment on this issue, the reasonableness of studying public safety issues relating to gun shows is a topic that is crucial to Defendants' opposition. In assessing whether there is a genuine issue of material fact as to whether the Contracting Policy is content-based, the Court cannot weigh the comparative dangers of firearms or gun shows, versus the dangers posed by pools, spas, and alcohol, without first permitting Defendants to develop and present evidence as to the dangers of firearms or gun shows.

The facts relevant to this issue, as described above, do exist, and they are not in Defendants' possession. Discovery regarding those facts requires depositions of and other discovery from Plaintiffs, as well as discovery involving other sources, such as academic studies or experts.

3. Defendants Require Discovery on How the Contracting Policy Serves the Compelling Governmental Interest of Protecting Public Safety.

In support of their First Amendment claims, Plaintiffs repeatedly argue that the Contracting Policy's public safety rationale is pretextual, i.e., that there are no public safety concerns with gun shows, and that Defendants have acted to "ban" gun shows because of animus toward "gun culture."[12] Plaintiffs' pretext argument

[12] As alleged in the Complaint, "[t]his discrimination is based on irrational public policies that are based on flawed reasoning and dubious conclusions relating to gun show operations and gun shows' impact on public safety." Compl. ¶ 4. Plaintiffs also argue that gun shows "are largely incident-free and there is no

relates not only to whether the Contracting Policy is content-based (as described above), but also to whatever level of First Amendment scrutiny the Court ultimately applies. If the Court does not deny summary judgment, Defendants require discovery into whether and to what extent public safety concerns are justified in the context of gun shows, as well as discovery on the extent to which a temporary pause on holding gun shows pending the development of a public safety policy would address those concerns.

Discovery into these issues is crucial to proper application of any level of First Amendment scrutiny, at the summary judgment stage, where the Court has already determined that the Complaint sufficiently alleges a First Amendment violation. If the Court determines that the Fairgrounds is a limited or nonpublic forum, the Contracting Policy must 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). If the Court determines that intermediate scrutiny applies, the Contracting Policy must further an important or substantial governmental 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); *see also Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 580-81 (9th Cir. 2014) (same). And, if the Court determines that strict scrutiny apples, the Contracting Policy must be "the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014).

Evidence as to whether there is a legitimate basis for temporarily pausing gun shows in order to study and formulate a comprehensive public safety policy regarding future gun shows at the Fairgrounds is therefore essential for opposing summary judgment. Defendants' position is that the Contracting Policy is subject

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evidence that they create a unique risk to public safety." Opp. 17 (citing Compl. ¶¶ 90-95; Barvir Decl., Ex. 5, Exs. 8-9, Ex. 18 at 127-131, Ex. 20 at 1-4).

to, at most, intermediate scrutiny, and that the public safety concerns brought to the Board's attention during consideration of the Contracting Policy are sufficient to satisfy intermediate scrutiny as a matter of law. Opening Br. 4-5, 20-21; Reply 5-7. However, in defending the Contracting Policy on summary judgment, Defendants should not be limited to the evidence that was actually before the Board at the time the Policy was adopted. "[C]ourts have routinely admitted evidence . . . to supplement a legislative record or explain the stated interests behind challenged regulations." *Greater Baltimore Ctr.*, 721 F.3d at 282-83 (internal quotation marks and citation omitted). Defendants should have the opportunity to develop evidence on whether there are sufficient public safety concerns to justify the Contracting Policy, and whether the Contracting Policy is appropriately tailored to address those public safety concerns. *See Minority Television Project, Inc. v. F.C.C.*, 736 F.3d 1192, 1199 (9th Cir. 2013) ("As a matter of course, in multiple First Amendment cases, the [Supreme] Court has looked beyond the record before Congress at the time of enactment.") (citing *FCC v. League of Women Voters*, 468 U.S. 364, 387 & n. 18, 390 & n. 19, 392 n. 21, 393 n. 22 (1984); *United States v. Playboy Ent. Grp.,* 529 U.S. 803, 821–22 (2000)). As the Fourth Circuit observed in *Greater Baltimore Center*, "[e]ven if strict scrutiny proves to be the applicable standard, the City must be afforded the opportunity to develop evidence relevant to the compelling governmental interest and narrow tailoring issues, including, inter alia, evidence substantiating the efficacy of the Ordinance in promoting public health, as well as evidence disproving the effectiveness of purported less restrictive alternatives to the Ordinance[.]" *Id*. at 288 (citing *Playboy Ent. Grp.*, 529 U.S. at 816).

Thus, to properly oppose summary judgment on the issue of whether the Contracting Policy satisfies any or all of these levels of First Amendment scrutiny, Defendants need to develop evidence that would supplement the legislative record, and that is "relevant to the compelling governmental interest and narrow tailoring

issues." *Greater Baltimore Center*, 721 F.3d at 288. This includes, but is not limited to, evidence "substantiating the efficacy" of the Contracting Policy in promoting public safety, "as well as evidence disproving the effectiveness of purported less restrictive alternatives." *Id.* Defendants require discovery into facts regarding public safety incidents at or in close proximity to gun shows; public safety incidents arising from transactions at gun shows; illegal firearms sales taking place at or in close proximity to gun shows; gun show practices encouraging illegal firearms modifications or illegal sales downstream from gun shows; the effect of pausing or prohibiting gun shows on gun violence or public safety; and the impact on public safety from continuing to hold gun shows pending the development of a public safety policy. Defendants need discovery as to all of these topics for gun shows held at the Fairgrounds, as well as for gun shows generally.

There can be no dispute that evidence on these topics exists, and that such evidence is not solely or even primarily in Defendants' possession. Rather, demonstrating that there are genuine public safety concerns with gun shows and otherwise exploring the public safety issues relating to gun shows would require evidence in Plaintiffs' possession, as well as expert reports and testimony. In the context of intermediate scrutiny, "[r]eliance on experts is particularly understandable" when "a government 'considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because the solution would, by definition, not have been implemented previously.'" *Pena v. Lindley*, 898 F.3d 969, 984 (9th Cir. 2018) (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439–40 (2002)).

Because the evidence needed to supplement the legislative record, and so to properly oppose summary judgment, does exist and is not currently in Defendants' possession, Rule 56(d) requires that Defendants be given the opportunity to develop this evidence—including through the use of expert reports and testimony—before

the Court can appropriately consider whether to grant summary judgment to Plaintiffs.

III. Plaintiffs' Summary Judgment Motion on the Associational Claim Fails, Otherwise Defendants Require Discovery on Whether Protected Association Occurs at Gun Shows.

Plaintiffs argue that the Contracting Policy restricts their ability "to assemble with like-minded people to engage in expressive activities[.]" Opp. 18. But neither "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," nor attendees at "gatherings that . . . are purely recreational and devoid of expressive purpose, such as some carnivals, festivals, and exhibitions" are engaged in protected association. *City of Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989); *S. Oregon Barter Fair v. Jackson Cty., Oregon*, 372 F.3d 1128, 1135 (9th Cir. 2004); *see also* Opening Br. 21-22. Plaintiffs cite no evidence to support their assertion that they are engaged in protected association, and in light of *City of Dallas*, Plaintiffs' summary judgment motion on this claim should be denied.

If the Court does not deny summary judgment on this claim, Defendants will need discovery into the types of associational activities that have occurred at past gun shows held at the Fairgrounds, in order to properly oppose summary judgment. This includes discovery regarding the conditions for "assembl[y] with like-minded people to engage in expressive activities" by organizers, vendors, and attendees of past gun shows, which covers factual issues such as the fees or costs associated with participation or attendance at gun shows; whether and to what extent organizers, vendors, and attendees of past gun shows are "strangers to one another"; and the recreational versus expressive nature of the activities at issue. Opp. 18. These facts exist, and are squarely in Plaintiffs' possession, not Defendants'.

And, if the Court does find that the Contracting Policy regulates protected association, it would apply some form of heightened scrutiny. *See Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2465 (2018)

(declining to decide whether to apply strict scrutiny to associational claim because challenged law failed more permissive "exacting scrutiny"); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("Infringements on [the right to associate] may be justified by regulations adopted to serve compelling state interests ... that cannot be achieved through means significantly less restrictive of associational freedoms."). The same factual issues relevant to reasonableness review or intermediate or strict scrutiny in the First Amendment free speech context (*see supra*, Argument II.B.3) would be relevant to whatever form of scrutiny that applies to the associational claim. Defendants would also need discovery on those issues in order to properly oppose summary judgment on the associational claim.

IV. PLAINTIFFS' SUMMARY JUDGMENT MOTION ON THE EQUAL PROTECTION CLAIM FAILS, OTHERWISE DEFENDANTS REQUIRE DISCOVERY ON WHETHER THE CONTRACTING POLICY TARGETS "GUN CULTURE."

The only evidence Plaintiffs cite in support of their equal protection claim is in the context of their argument that the Contracting Policy was "passed at the direction of the politically popular (and powerful) governor of California." Opp. 19 (citing Compl. ¶ 19; Barvir Decl., Ex. 10). However, the equal protection claim fails as a matter of law. Opening Br. 22-24; Reply 8. And, Plaintiffs' reading of this letter is not plausible. Reply 5-6. Drawing factual inferences in Defendants' favor, this letter is insufficient to satisfy Plaintiffs' "heavy burden" on summary judgment.

If the Court disagrees, Defendants need discovery on whether Plaintiffs have been subjected to differential treatment as compared to similarly situated persons or groups, as required for a "class-of-one" claim. Opening Br. 22; Reply 8. This requires discovery on how to define similarly situated persons or groups, and how those persons or groups have been treated. Defendants also need evidence on whether the Contracting Policy "targets only members of the 'gun culture' who attend Crossroads gun shows" or is "undeniably infused with Defendants' desire to

harm this politically unpopular group." Opp. 18-19. Thus, the same types of facts required to properly oppose summary judgment on the free speech claims are also required to properly oppose summary judgment on the equal protection claim. *See supra*, Argument II.B.2.-B.3.

V. PLAINTIFFS HAVE FAILED TO SATISFY THE SUMMARY JUDGMENT STANDARD REGARDING LEGISLATIVE IMMUNITY, SECTION 1983 LIABILITY, AND THE SECTION 1985 CONSPIRACY CLAIM, BUT IF THE COURT DOES NOT AGREE, DEFENDANTS REQUIRE DISCOVERY ON THESE ISSUES.

Plaintiffs' arguments on legislative immunity, Section 1983 damages,[13] and the Section 1985 conspiracy claim[14] consist of "allegations of the unique involvement that Shewmaker and Valdez" had when they "conspired together in closed meetings" of a "secret ad hoc committee." Opp. 22, 19, 23. The evidence cited in support consists of Plaintiffs' counsel's factual speculation and legal conclusions. Opp. 19, 22 (citing Cheuvront Decl. ¶¶ 10, 11, 14, 15, 18); Cheuvront Decl. ¶ 9 ("I understood the use of the ad hoc committee to be an intentional abuse of power because the committees can do what they want with no transparency and they can move faster because they do not have the time-restraints that come from having to notice public meetings for a specific number of days.") Legal conclusions offered by counsel are not sufficient to satisfy a movant's summary judgment burden. *See Wicker v. Oregon ex rel. Bureau of Labor*, 543 F.3d 1168, 1177–78 (9th Cir. 2008) (portions of declaration consisting of attorney's legal conclusions were not admissible summary judgment evidence). And, Defendants have provided statutory authority and judicially noticeable documents showing that the Contracts Oversight Committee's formation and operation were entirely consistent with state law. Opening Br. 4 & n. 2; Defts.' Req. for Jud. Not., Exs. E-I (Board Meeting Minutes and Excerpts from Board Meeting Transcripts reflecting

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[13] Plaintiffs' opposition brief does not address qualified immunity, and they have thus waived that issue. Reply 9.

[14] Under controlling Ninth Circuit precedent, this claim fails as a matter of law. Opening Br. 24-25; Reply 8.

actions by the Contracts Oversight Committee); *id*. Ex. J (Meeting minutes from January 9, 2018 District Board Meeting). The Court cannot grant summary judgment for Plaintiffs by crediting such insufficient evidence over Defendants' version of the disputed facts. In any event, Plaintiffs have conceded that "[t]he committee was merely advisory," and this concession is fatal to any claim that they were harmed in any way by its activities. Opp. 22; Reply 9.

If, however, the Court does not deny summary judgment on this basis, Defendants will need to develop evidence on statewide practices concerning subcommittees of public agency boards. This will permit Defendants to oppose Plaintiffs' contention that a two-person ad-hoc subcommittee is improper under state law such that Defendants' presence on such a subcommittee undercuts legislative immunity, supports a finding of Section 1983 liability, or is consistent with Section 1985 conspiracy liability. These facts exist and are not currently in Defendants' possession. There are numerous public agency boards in California, and evidence on their practices would be in their records, not Defendants'.

VI. PLAINTIFFS HAVE FAILED TO SATISFY THE SUMMARY JUDGMENT STANDARD REGARDING SOVEREIGN IMMUNITY, BUT IF THE COURT DOES NOT AGREE, DEFENDANTS REQUIRE DISCOVERY ON THIS ISSUE.

The only evidence Plaintiffs rely on to show that Secretary Ross has the "specific connection" to the Contracting Policy required under *Ex parte Young* is a California Department of Food and Agriculture ("CDFA") manual that simply reflects the District's discretion under state law.[15] Opp. 24-25; Opening Br. 11-12; Reply 10. However, Plaintiffs contend that the Contracting Policy is a determination that "gun shows are a hazardous activity" within the meaning of section 3965.1 of the Food & Agriculture Code such that the District has exceeded

[15] CDFA is entitled to sovereign immunity. *See Almond Hill Sch. v. U.S. Dep't of Agric.*, 768 F.2d 1030, 1035 (9th Cir. 1985). A suit against Secretary Ross in her official capacity as the head of CDFA requires a "fairly direct" connection to the challenged enactment, in order for the *Ex parte Young* exception to sovereign immunity to apply. Opening Br. 11-12 (citing *L.A. County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992)).

its authority, which "[i]mplicates [CDFA], and thus Ross." Opp. 25. This ignores the fact that the statute refers to "[r]evenue-generating contracts involving hazardous activities, *as determined by the department*." Cal. Food & Agric. Code § 3965.1(a)(1) (emphasis added). Thus, the statement in the CDFA manual that district agricultural associations have discretion as to whether to hold gun shows necessarily reflects a determination by CDFA that gun shows are not hazardous activities subject to section 3965.1 of the Food & Agriculture Code. Plaintiffs' sovereign immunity argument thus rests entirely on erroneous interpretations of state law and the CDFA manual—with no supporting factual material—which are not sufficient to permit entry summary judgment in their favor, especially when Plaintiffs' "evidence" is interpreted in the light most favorable to Defendants. Plaintiffs have therefore failed to carry their burden on summary judgment.

However, if the Court does not agree, Defendants require discovery in order to develop evidence as to Plaintiffs' interpretations of state law and the CDFA manual. The facts to be developed relate to the discretion exercised by district agricultural associations, and whether and to what extent their contracts for "hazardous activities" have complied with section 3965.1 of the Food & Agriculture Code. This evidence exists, and is not solely in Defendants' possession, because there are 52 district agricultural associations in California. Cal. Food & Ag. Code §§ 3852-3904.

VII. PLAINTIFFS HAVE FAILED TO SATISFY THE SUMMARY JUDGMENT STANDARD WITH RESPECT TO DAMAGES AND THE REQUESTED INJUNCTION COMPELLING DEFENDANTS TO ALLOW GUN SHOWS ON PARTICULAR DATES, BUT IF THE COURT DOES NOT AGREE, DEFENDANTS REQUIRE DISCOVERY ON THESE ISSUES.

The current record is entirely insufficient for the Court to provide any kind of relief with respect to damages. Plaintiffs' evidence regarding damages consists of general statements in Plaintiffs' declarations that Plaintiffs "will sustain and ha[ve] sustained lost profits and lost opportunity" as a result of the Contracting Policy. Olcott Decl. ¶ 19; *see also* Walsh Decl. ¶ 8; Redmon Decl. ¶ 9; Travis Decl. ¶ 13;

Sivers Decl. ¶ 12; Gottlieb Decl. ¶ 8. These untested, non-specific assertions do not satisfy Plaintiffs' burden on summary judgment with respect to damages. And, because Plaintiffs possess most, if not all, of the evidence necessary for Defendants to properly oppose summary judgment on the issue of damages, Defendants are entitled to discovery as to whether and to what extent Plaintiffs have suffered any damages as a result of the Contracting Policy.

Nor can the Court grant Plaintiffs' requested injunction "compelling Defendants to allow Plaintiff Crossroads to contract for, promote, and hold its gun shows at the Venue on the 2019 dates promised via email from Defendants to Plaintiff Crossroads on or about July 5, 2018." Compl., Prayer for Relief, ¶ 10. As noted in the motion to dismiss, the document Plaintiffs cite in support of the alleged promise to reserve 2019 dates does not actually support this allegation. Opening Br. 3 n. 1 (citing Compl. ¶ 75, Ex. 4). This document 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." *See* Li Decl. ¶ 14. Plaintiffs had the opportunity to address this deficiency when opposing the motion to dismiss and moving for summary judgment, but they did not do so.

Construing all factual inferences in Defendants' favor, Plaintiffs have failed to establish the absence of a genuine issue of material fact with regard to the purported promise by District staff to reserve dates for gun shows in 2019, and the Court should decline to provide relief with respect to the unspecified dates that were allegedly reserved for 2019.[16] If the Court does not agree, it should at a minimum provide the opportunity for discovery as to whether Plaintiff Crossroads actually

[16] Even if Plaintiffs had provided evidence of the dates that were allegedly reserved, those dates might very well be unavailable now. And, because there might be other circumstances that limit the Fairground's capacity to hold a gun show on any given date, the Court should not enter mandatory injunctive relief as to particular dates without more information about other events and circumstances at the Fairgrounds on the particular dates under consideration.

requested that any dates be reserved; whether any dates were actually reserved; and what those dates were. This information likely exists, but it might be in either Plaintiffs' or Defendants' possession, depending on whether a request was actually made.

VIII. CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint without leave to amend; deny Plaintiffs' summary judgment motion on all claims; or grant Defendants' application under Federal Rule of Civil Procedure 56(d) to defer consideration of Plaintiffs' motion for summary judgment or deny it, or to allow time for Defendants to obtain affidavits or declarations or to take discovery.

Dated: May 30, 2019

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