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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.

CASE NO.: 3:19-cv-00134-CAB-NLS

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

[Filed concurrently with Declaration of Tiffany D. Cheuvront and Supplemental Declaration of Tracy Olcott]

Date: June 17, 2019
Time: 2:30 p.m.
Courtroom: 4C
Judge: Hon. Cathy A. Bencivengo

Action Filed: January 21, 2019

INTRODUCTION

The District's argument that it needs time to conduct discovery is as hollow and pretextual as its moratorium. The District does not claim that Plaintiffs' gun shows are dangerous events or that this assembly of like-minded individuals, celebrating "gun culture," is a lawless gathering. It does not claim to have found that gun shows present a unique public safety concern. Nor does it claim that any particular policy would address such concerns. Instead, it claims to need time to study *whether* Plaintiffs' gun shows are a public safety risk and *whether* the District could take more precautions to promote public safety at these events.

That admission alone is fatal to the District's case. For it is the District's burden to prove that indefinitely banning the gun shows, Cheuvront Decl. ISO Reply, Ex. 32—and the expressive activity and association that takes place at those events—is appropriately tailored to advance a sufficiently important end. The District's proposed discovery proves it has no evidence that Plaintiffs' gun shows pose any public safety threat. This makes the Court's task easy. Without evidence that Plaintiffs' events pose public safety risks, the imposition of a moratorium while the District studies the issue, violates Plaintiffs' rights to free speech, assembly, and equal protection. The Court should enter summary judgment for Plaintiffs.

I. The Moratorium Violates Plaintiffs' Right to Free Speech and No Amount of Discovery Would Help the District Prove Otherwise

A. The Moratorium Bars Plaintiffs from Engaging in Protected Speech and Expressive Conduct in a Designated Public Forum

The District does not (and cannot) reasonably dispute that Plaintiffs seek to engage in protected speech and expressive conduct at the Venue. First, it is indisputable that the Venue is a species of public forum. *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 655 (1981). The Court needs no further evidence on this issue. For it is a well-settled matter of law that fairgrounds, opened by the state to different groups for expressive activities, are public fora. *Id.* at 658, n.2. Plaintiffs presented evidence that the District maintains the state-owned Venue

and holds it open to the public for all sorts of expressive events. Pls.' Opp'n at 12 (citing Compl. ¶ 63, Ex. 2 at 45-76; Barvir Decl., Exs. 2-3). They did not simply "rely on assertions in their non-verified papers." Defs.' Opp'n at 9. What's more, if any evidence disputing Plaintiffs' claim that the Venue is a public forum exists, the District would have it. After all, the District manages the Venue. If it does not know what events occur there, who would? The District either chose not to submit evidence contrary to Plaintiffs', or it does not exist. Either is fatal to the District's claim.

Second, the District's argument that the Court can dispense with Plaintiffs' First Amendment claims because the moratorium "does not regulate speech or expressive conduct" must fail. Defs.' Opp'n at 8. The moratorium, while expressly halting just the approval of gun-show contracts, restricts speech because it necessarily closes the Venue's doors to those seeking to engage in the sorts of protected expression that take place at gun shows.[1] This is not a case, like *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2019), where the government has restricted conduct that only incidentally involves some speech.[2] Instead, the moratorium directly attacks speech by denying access to a public forum to those whose purpose for accessing the forum is to engage in political, educational, and commercial speech.

Indeed, the sale and display of firearms and ammunition at gun shows on public

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[1] The undisputed record is clear that B & L's gun shows involve all manner of lawful expression. Plaintiffs submitted declarations attesting to the types of commercial, political, educational, and other speech they engage in or have witnessed. Bardack Decl. ¶¶ 5-6; Diaz Decl. ¶ 5; Dupree Decl. ¶¶ 5-6; Gottlieb Decl. ¶ 4; Irick Decl. ¶¶ 5-6; Olcott Decl. ¶¶ 7, 9, 11; Redmon Decl. ¶¶ 5, 7; Sivers Decl. ¶ 12; Travis Decl. ¶¶ 3, 9-10; Walsh Decl. ¶¶ 5-6. *See also* 27 C.F.R. § 478.100(b) Even Defendants admitted that protected speech occurs at gun shows. Defs.' RJN, Ex. D at 47-48 (proposing limiting gun shows to the "educational or safety or other types of programs that those folks come to the fairgrounds to enjoy" and admitting "[t]here is a lot more [than gun sales] to the gun show events . . . for those folks"); *id.* at 48 (recognizing that a ban on firearm sales affects commercial speech).

[2] There, the Ninth Circuit upheld an ordinance barring unlawful booking transactions for short-term vacation rentals. *HomeAway.com*, 918 F.3d at 685-86. The court recognized that speech was not regulated, but the unlawful commercial transactions, in part because the law did not bar the same speech on other platforms that did not process those transactions. *Id.* at 686. Here, the District, refusing to contract with gun-show promoters, has shut down gun shows at the Venue entirely, sweeping up all the expression that takes place at those events.

property is protected. Pls.' Opp'n at 13, 17 (discussing *Nordyke v. Santa Clara Cnty.*, 110 F.3d 707 (9th Cir. 1997); *Nordyke v. King*, 681 F.3d 1041, 1044-45 (9th Cir. 2012) (en banc)). Subtract those activities and all that is left is the expressive activities that take place at gun shows, like firearm education, the political speech associated with Second Amendment advocacy, and the sale of other merchandise, including books, political bumper stickers and t-shirts, and historical memorabilia. *Id.*

Finally, whether the moratorium restricts non-commercial speech that is "inextricably intertwined" with commercial speech is *not* "central to the First Amendment analysis" here. Defs.' Opp'n at 11. Even if the commercial speech that takes place at gun shows is not so "intertwined," intermediate scrutiny *still* applies—as even the District concedes. *Id.* at 10. And, as explained below, the moratorium cannot survive such review. More important, the moratorium does not just bar commercial speech at gun shows. It bans *all* speech at gun shows. The District needs no discovery about whether it is feasible for Plaintiffs to engage in that speech "separate and apart" from the commercial sale of firearms. *See id.* at 11. Plaintiffs concede that they can. But that is irrelevant. For the moratorium does not allow Plaintiffs to engage in that purely expressive speech even *absent* the sale of firearms. The ban's restriction on *that* speech is certainly entitled to the most exacting review.

B. The Moratorium Is a Content-based Restriction and Prior Restraint on Speech Subject to Heightened Scrutiny

Content-based restrictions on speech or other expressive conduct at designated public forums, like the Venue, are subject to the most exacting scrutiny. *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45-46 (1983). Viewpoint-based restrictions are an especially egregious form of content-based discrimination where state actors target not just subject matter, but the speaker's views. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015). The undisputed record is clear that the District's moratorium is a content-based restriction. Heightened scrutiny must apply.

What's more, when a government refuses to allow some groups to use a

designated public forum based on disapproval of the content of the message, courts consider the government's action a "prior restraint" on free speech. *Se. Promos., Ltd. v. Conrad*, 420 U.S. 546 (1975). "Prior restraints" naturally abridge speech and are particularly suspect. Indeed, "[a]ny system of prior restraints of expression . . . bear[s] a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Only in the face of an acute government interest, and only when the limitation is no broader than necessary, should the Court uphold a prior restraint. *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 203 (1981).

The District does not dispute that it has not closed the Venue to all events while conducting a global study of security and public safety. Its choice to permit some events while excluding gun shows is dispositive. A choice among alternatives by a government official with decision-making authority may serve as the basis of liability. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83 (1986). By singling out the expressive activities of Plaintiffs' gun shows *qua* gun shows for its moratorium, the District engaged in content-based regulation as a matter of law.

Any claim that the District requires discovery as to whether the moratorium is content based can be easily discarded. Plaintiffs presented evidence demonstrating the content-based nature of the restriction. *See, e.g.*, Defs.' RJN, Ex. D at 171-76, 190-96, 203-09, 212-16; Barvir Decl., Ex. 7, Exs. 10-11, Exs. 21-22. Any other evidence of the District's motivations would be within its possession. Yet, the District does not provide even a declaration disputing any of Plaintiffs' claims.

C. The District Has Effectively Conceded That It Cannot Meet Its Burden to Justify the Moratorium Under Heightened Scrutiny

Again, under either form of heightened scrutiny, a challenged law is presumed unconstitutional, and the government bears the burden of justifying it. Pls.' Opp'n at 14. Under strict scrutiny, this requires the government to prove "that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231. Under intermediate scrutiny, the government must prove it is

"narrowly tailored to serve a significant government interest." *Madsen v. Women's Health Ctr. Inc.*, 512 U.S. 753, 764 (1994). This requires the restriction to be "closely drawn" to avoid "unnecessary abridgment" of protected conduct. *McCutcheon v. FEC*, 572 U.S. 185, 199 (2014). The District's own briefing shows that it had *neither* a compelling interest *nor* means appropriately tailored to that end.

First, the District claims to need discovery into several categories of facts about whether guns shows at the Venue, and gun shows generally, pose a public safety risk. Defs.' Opp'n at 16. Because the District must produce evidence of its alleged public safety interest, the claim that discovery is necessary to determine the public safety effects of gun shows is an admission that the District banned the events without evidence supporting its claim that they pose unique public safety concerns. It's one thing to require discovery about whether a restriction is likely to advance a compelling government interest. It is quite another to require discovery about *whether* the District had a compelling interest in the first place. Essentially, the District seeks temporarily to enjoin Plaintiffs' speech rights while it scours the earth for a compelling government interest to justify doing so. This is a perverse argument that flips the First Amendment analysis on its head.

Trying to walk back that admission, the District sows confusion about the existing evidence, cherry-picking any comment that might support its contradictory position that might raise a public safety concern. First, it cites unsubstantiated "concerns with the gun show promoter's compliance with California law." *Compare* Defs.' Opp'n at 9 (citing Defs.' RJN, Ex. D at 40-43), *with* Barvir Decl., Ex. 20 at 1177. Even though those same comments reveal that the District had placed restrictions on the promoter and, satisfied that its concerns were addressed, allowed the shows to continue. Defs.' RJN, Ex. D at 43. The District then points to claims that the events have included sales of "potentially prohibited armor-piercing ammunition" and "AR-15 'do-it-yourself' kits," as well as illegal firearm transfers. *Id.* (citing Defs.' RJN, Ex. D at 171-76). But these remarks are only Shewmaker's uninformed

opinions. It is not evidence of any legitimate concern. For instance, Shewmaker admits that he does not know whether the "potentially prohibited" ammunition was legal—he just thinks it's "wrong" to sell it at the Venue. Defs.' RJN, Ex. D at 174-75. Worse yet, his statements conflict with the findings of the District's Chief of Security, as well as comments from an expert in gun-show compliance with the San Diego County Sheriff's Department, both of whom have made clear B & L gun shows are in full compliance with all relevant laws.[3] At best, the District has identified questions about the public safety impact of gun shows. It has not established that it *currently* has a compelling public safety interest in banning protected speech while it searches for answers to those questions.

But even if the District had evidence that gun shows pose a risk to public safety, countless laws and regulations (short of a ban) were already in place. Defs.' RJN, Ex. D at 150-55; Barvir Decl., Ex. 20 at 1176-1200. These more tailored time, place, and manner restrictions had not proven inadequate to address any particular risks associated with B & L's events. Defs.' RJN, Ex. D at 150-55; Barvir Decl., Ex. 20 at 1176-79. The District provides no reason it could not maintain the 30-year status quo or adopt measures short of a ban while the District conducted its assessment.

II. THE MORATORIUM VIOLATES PLAINTIFFS' RIGHT TO ASSEMBLE AND NO AMOUNT OF DISCOVERY WOULD HELP DEFENDANTS PROVE OTHERWISE

The District argues that B & L's gun show does not implicate protected associative activity. Defs.' Opp'n at 17. The argument is built on a misunderstanding

[3] Barvir Decl., Ex. 20 at 1176-77 (Detective Tom Morton reported that B &L's "gun show is one of the best gun shows for compliance with all state and federal regulatory statutes that apply to the sale and transfer of firearms."); *id.* at 1177 ("Morton said [the promoter] was in full compliance with the requirements set forth in Penal Code section 12071."); *id.* ("Detective Morton said that all vendors that participate in the gun show are in compliance with all the state and federal regulations."); *id.* at 1178 ("[T]he Criminal Justice Information Services Division of the State Attorney General's Office also stated that [B & L's] Gun Show was in full compliance with all applicable laws of the state and federal government."); *id.* at 1179 (The "Chief of Security for the [District] for the last 17 years," stated that the shows "are in compliance with all the local, state and federal regulatory statutes and have operated without any violations of those laws."); Defs.' RJN, Ex. D at 176-184.

of relevant authorities and an incorrect view of the record.

There are two types of protected association. The one at issue here protects "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."). Precedent confirms that expressive conduct takes place at gun shows. Pls.' Opp'n at 13, 17. That is enough to trigger protection.

In any event, the argument that Plaintiffs cite no evidence to support their associational claim results either from the District's innocent misunderstanding that the same evidence supporting Plaintiffs' speech claim applies here or its intentional obfuscation. Defs.' Opp'n at 17. There is clear evidence of the political, social, and cultural nature of the activities gun-show attendees participate in together. *See* Part I.A, *supra*. The District's observation that B & L's events admit all who pay a fee and that attendees are largely strangers is thus irrelevant—as is its proposed discovery on the issue. Defs.' Opp'n at 17. The only relevant question is whether gun-show participants are exercising their right to associate. Because that right "is largely dependent on the right to own or use property . . . any denial of access to public facilities must withstand close scrutiny and be carefully circumscribed." *Gilmore v. City of Montgomery*, (1974) 417 U.S. 556, 575. For the same reasons the moratorium fails heightened scrutiny for restricting speech, it fails here.

III. THE MORATORIUM VIOLATES EQUAL PROTECTION AND NO AMOUNT OF DISCOVERY WOULD HELP DEFENDANTS PROVE OTHERWISE

The District singling out Plaintiffs because of the content of their speech also violates their right to equal protection. Indeed, *both* the Equal Protection Clause *and* the First Amendment forbid the government from granting "the use of a forum to

people whose views it finds acceptable, but deny[ing] use to those wishing to express less favored or more controversial views." *Mosley*, 408 U.S. at 96. When the unequal treatment burdens the exercise of a fundamental right, heightened scrutiny applies. *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012) (citing *Romer v. Evans*, 517 U.S. 620, 631 (1996)). And when the restriction is steeped in animus, a "bare desire to harm a politically unpopular group," *even rational basis review cannot save it*. *Trump v. Hawaii*, __ U.S. __, 138 S. Ct. 2392, 2420 (2018).

Contrary to the District's claim, the record shows that the District banned Plaintiffs' gun shows *because* of the content of Plaintiffs' speech. That is, because Plaintiffs' commercial and non-commercial speech promotes the "perpetuation of gun culture." *See, e.g.*, Defs.' RJN, Ex. D at 171-76, 190-96, 203-09, 212-16; Barvir Decl., Ex. 7, Exs. 10-11, Exs. 21-22. The record is bursting with references to the controversial nature of guns, gun shows, and gun culture. And the District does not dispute that it has not barred similar events to study public safety, even when those events have proven dangerous. For instance, after an intentional shooting outside a concert at the Venue last year, the District took no action to restrict future concerts. Defs.' RJN, Ex. D at 35-38. Yet the District cites a *single accidental discharge in the history of gun shows at the Venue* as justification to banish those events. Opp'n at 9 (citing Defs.' RJN, Ex. D at 184). The differential treatment is clear.

The District's claim that it requires discovery on Plaintiffs' equal protection claim is unavailing. How to define "similarly situated persons or groups" is a matter of law. Because the District cannot bar the sale or display of firearms, all those seeking access to the Venue for purely expressive conduct, like Plaintiffs, are similarly situated. What's more, the District needs no evidence about who its moratorium targets or how the District has treated other groups seeking to use the Venue. Defs.' Opp'n at 18-19. To the extent that it is not part of the record, any such evidence would, of course, be in the District's possession. No one could be better situated to provide evidence on this issue than defendants themselves.

Again, just as the District cannot justify its moratorium under heightened scrutiny for the First Amendment, it cannot justify it under equal protection either.

IV. DEFENDANTS ARE NOT ENTITLED TO ANY FORM OF IMMUNITY

The District argues that Shewmaker and Valdez enjoy both legislative and qualified immunity for their actions, and that sovereign immunity precludes Plaintiffs' suit against Ross. Defs.' Opp'n 19-21. Each argument fails.

Legislative Immunity: The parties agree that an ad hoc committee existed and that the Board voted after Shewmaker and Valdez made their pitch. But they disagree on whether those actions qualify for legislative immunity. The District, however, ignores not only the test for determining legislative immunity but also Plaintiffs' application of it. *Compare* Defs.' Opp'n at 19, *with* Pls.' Opp'n at 21-22. Because it is the District's burden to prove immunity, this omission dooms the District's defense. *See Trevino v. Gates*, 23 F.3d 1480, 1482 (9th Cir. 1994). Even if it does not, there is no need for discovery on "statewide practices concerning subcommittees of public agency boards." Defs.' Opp'n at 20. Common practice is irrelevant; what matters is whether the defendants' conduct harbors the indicia of legislative action. That is a question this Court can decide on the record now before it.

Qualified Immunity:[4] Defendants' own statements reveal that Shewmaker and Valdez knew of the moratorium's First Amendment issues before adopting it. Defs.' RJN, Ex. D at 48 ("We also considered the possibility of prohibiting the sale of firearms and ammunition at these events. The contracts Oversight Committee felt that could affect commercial speech, and we felt that it wasn't the best option to take in this situation."). *See also id.*, Ex. D at 200-01. Because Defendants knew banning firearm sales violated speech rights, qualified immunity is off the table. *Shoshone-Bannock Tribes v. Fish & Game Comm'n*, 42 F.3d 1278, 1285 (9th Cir. 1994).

[4] Plaintiffs did not waive rebuttal to this defense. The Court granted the District an opposition to Plaintiffs' summary judgment motion and Plaintiffs a reply. ECF No. 18. Plaintiffs may rebut the arguments raised in opposition to their motion.

Absolute Immunity: Plaintiffs argue that the District is not an "arm of the state," *Ex Parte Young* does not apply, and so Ross is a proper defendant. Pls.' Opp'n at 24. Even though the District "bears the burden of asserting and proving those matters necessary to establish its defense" of Eleventh Amendment immunity, *Del Campo v. Kennedy*, 517 F.3d 1070, 1075 (9th Cir. 2008), the District does not respond to Plaintiffs' argument. Plaintiffs should thus prevail on this question. In any event, it is purely a question of law for the Court not requiring any discovery.

V. PLAINTIFFS ARE ENTITLED TO DAMAGES AND INJUNCTIVE RELIEF

The District does make one valid point. Discovery on the amount of damages Plaintiffs have sustained is needed. But the existence of harm is the threshold issue in a 42 U.S.C. § 1983 action. The *amount* of damages can be subjected to discovery and decided in a later proceeding. The District also points out that Plaintiffs referenced the wrong emails to support their claims that the District had secured B & L's dates for 2019. Defs.' Opp'n at 22-23; *see* Cheuvront Decl. ISO Reply ¶¶ 2-3 (explaining the mistake). And thus it claims to need discovery about whether dates were reserved and what those dates were. *Id.* Wrong. First, the dates were listed in the Gun Show Policy report already in evidence. Barvir Decl., Ex. 19 at 1167. Second, if the emails exist, the District would have them. If they did not exist, surely the District would have provided *something* rebutting Olcott's testimony that dates were reserved. Olcott Decl., ¶ 15. In any event, the correct emails exist. Olcott Suppl. Decl., Ex. 31.

CONCLUSION

For the reasons set forth above and in Plaintiffs' opposition to the District's motion to dismiss, the Court should treat Plaintiffs' opposition as a summary judgment motion and grant summary judgment as to each of Plaintiffs' claims.

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Dated: June 7, 2019

CERTIFICATE OF SERVICE
IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case Name: *B & L Productions, Inc., et al. v. 22nd District Agricultural Association, et al.*
Case No.: 3:19-cv-00134 CAB (NLS)

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

I am not a party to the above-entitled action. I have caused service of:

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed June 7, 2019.

/s/ Laura Palmerin
Laura Palmerin