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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.** **GAVIN NEWSOM, in his official capacity as Governor of the State of California and in his personal capacity, et al.,** Defendants.	3:21-cv-01718 AJB-KSC **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT** Date: April 7, 2022 Time: 2:00 p.m. Courtroom: 4A Judge: The Honorable Anthony J. Battaglia Trial Date: Action Filed: 10/4/2021

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INTRODUCTION

Plaintiffs are a gun show operator and a collection of gun show vendors and attendees claiming that California Assembly Bill 893 ("AB 893") violates their First Amendment and equal protection rights. The gravamen of their Complaint is that AB 893 entirely prohibits gun shows at the Del Mar Fairgrounds. But that is simply not the case. AB 893 prohibits only the act of selling firearms and ammunition at the Fairgrounds, while allowing all other conduct—including all expressive activity, firearms training, and the sales of other firearm-related products that *over 60 percent* of gun show vendors sell instead of firearms—to continue at the Fairgrounds. And the Ninth Circuit has long held that the sale of firearms and ammunition itself is not speech. Even if AB 893 were viewed as a speech regulation, though, it would pass constitutional muster no matter the analytical test applied. AB 893 makes clear its intent to prevent illegal firearm and ammunition transactions at gun shows that occur despite the various regulations governing such events. AB 893 is a straightforward and tailored response to addressing the gun violence that can result from illicit transactions.

Beyond misapprehending AB 893, Plaintiffs' claims against Governor Gavin Newsom ("Governor Newsom"), California Department of Food and Agriculture ("CDFA") Secretary Karen Ross ("Secretary Ross"), and Attorney General Rob Bonta ("Attorney General Bonta") fail for the threshold reasons that they are barred by legislative, sovereign, and/or qualified immunity. Finally, this Court need not even exercise its supplemental jurisdiction over Plaintiffs' state-law tort claims. But if it does, it should conclude that they are procedurally barred under California's Government Claims Act. For all of these reasons, and as further explained below, Plaintiffs' claims should be dismissed without leave to amend.

BACKGROUND

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

California's District Agricultural Associations are state institutions formed for the purpose of "[h]olding fairs, expositions and exhibitions for the purpose of exhibiting all of the industries and industrial enterprises, resources and products of every kind or nature of the state with a view toward improving, exploiting, encouraging, and stimulating them." Cal. Food & Agric. Code § 3951(a); *id.* § 3953. The Associations, which act through their Boards of Directors, "may do any and all things necessary to carry out the powers and the objects and purposes" for which the Associations were formed. *Id.*, §§ 3954, 3956. The 22nd District Agricultural Association ("District") covers San Diego County. *Id.* § 3873.

The CDFA is a state agency that provides "oversight of activities carried out by each California fair," including, for example, "[c]reating a framework for administration of the network of California fairs allowing for maximum autonomy and local decisionmaking authority." Cal. Bus. & Prof. Code § 19620. With the approval of the CDFA, the District's Board may "[m]anage the affairs of the [District]." Cal. Food & Agric. Code § 3965(b). However, the Board may, without prior approval from the CDFA, "arrange for and conduct, or cause to be conducted, or by contract permit to be conducted, any activity by any individual, institution, corporation, or association upon its property at a time as it may be deemed advisable." *Id.*, § 3965.1(a). Any such contract must accord with the District's written policies and procedures for contracting as well as all applicable state laws governing contracts. *Id.*, § 4051(a)(1). Through the Board, the District contracts with third-party event organizers to conduct events at the Del Mar Fairgrounds (the "Fairgrounds"), such as concerts, festivals, gun shows, trade shows, and sporting events. Compl. ¶ 70. The CDFA's *Contracts Manual for Agricultural Districts*

provides that "[w]hether or not a fair rents out their facilities for gun shows is a policy decision to be made by the fair board and their community." *Id.* ¶ 65.

II. PRIOR LAWSUIT ABOUT GUN SHOWS AT THE DEL MAR FAIRGROUNDS

Plaintiff B&L Productions, Inc. ("B&L") has rented the Fairgrounds and held gun shows there for the past 30 years. Compl. ¶ 11. Plaintiffs allege that in 2017 "gun-show-banning activists" began pressuring the District to prohibit gun shows at the Fairgrounds. *Id.* ¶ 85. In 2018, the District communicated with other government agencies and B&L to determine the history of legal compliance and dangers presented by gun shows at the Fairgrounds. *Id.* ¶ 87. The District appointed a committee to develop recommendations for the continued use of the Fairgrounds for gun shows. *Id.* ¶ 88. In September 2018, this committee recommended that the District not consider contracts with gun show promoters beyond December 31, 2018 until, among other things, the District could consider the feasibility of conducting gun shows focused on education and safety training, and ensure gun shows complied with state and federal laws. *Id.* ¶ 91. The District accordingly "voted to impose a one-year moratorium (for the year 2019)" on gun shows at the Fairgrounds. *Id.* ¶ 98.

B&L and some of the other Plaintiffs in this action then sued the District, the District's committee members, and Secretary Ross. Compl. ¶ 99. In June 2019, the Honorable Cathy Ann Bencivengo dismissed the claims against the committee members because they had qualified immunity, dismissed the claims against Secretary Ross because she had sovereign immunity, preliminarily enjoined the District from enforcing the moratorium, and gave the District more time to conduct discovery to oppose the plaintiffs' summary judgment motion. *Id.*, Exh. 4 at 15-19. On April 30, 2020, the plaintiffs dismissed their claims pursuant to a settlement agreement ("April 2020 Agreement") with the District. Compl., Exh. 5. Under this agreement, the District would allow B&L to reserve dates for gun shows at the Fairgrounds, but the District "maintain[ed] authority to evaluate, consider, propose,

and implement changes to its policies, consistent with state and federal law, regarding the operation of all events at the Fairgrounds, including gun show events." *Id.*, Exh. 5 at 36. Judge Bencivengo declined to retain jurisdiction to enforce the agreement's terms. Req. Judicial Notice, Ex. A.

III. BEFORE THE SETTLEMENT, AB 893 WAS ENACTED TO PROHIBIT THE SALE OF FIREARMS AND AMMUNITION AT THE DEL MAR FAIRGROUNDS

As the April 2020 Agreement acknowledged in multiple sections, AB 893 was signed into law on October 11, 2019. Compl., Exh. 5 at 35, 38 & Exh. 6.[1] AB 893 added section 4158 to the Food and Agricultural Code, which provides: "an officer, employee, operator, lessee, or licensee of the 22nd District Agricultural Association . . . shall not contract for, authorize, or allow the sale of any firearm or ammunition on the property or in the buildings that comprise the Del Mar Fairgrounds in the County of San Diego." Compl., Exh. 6 at 54; Cal. Food & Agric. Code § 4158(a). Only firearm and ammunition *sales* are prohibited, not gun shows generally. This prohibition, which did not become operative until January 1, 2021, "does not apply to a gun buyback event held by a law enforcement agency." *Id.*, § 4158(c), (d). A violation of section 4158 is a misdemeanor. *Id.*, § 9.

AB 893 listed seven legislative findings. Compl., Exh. 6 at 53-54. These findings described how the District had leased the Fairgrounds "to entities that sponsor marketplaces popularly known as 'gun shows,' at which firearms and ammunition and other items are sold to the public approximately five times a year." *Id.*, Exh. 6 at 53. The findings further explained that "[g]un shows bring grave danger to a community," in part because there were 14 crimes at B&L gun shows held at the Fairgrounds from 2013 to 2017. *Id.*, Exh. 6 at 54. There had also been incidents at gun shows where firearms were sold to prohibited persons and large-capacity magazines were illegally imported. *Id.*, Exh. 6 at 54. The April 2020

[1] AB 893 was introduced in February 2019, months before Judge Bencivengo preliminarily enjoined the District from enforcing the moratorium. Compl. ¶ 102.

Agreement acknowledged that AB 893 prohibited the sale of firearms and ammunition at the Fairgrounds, beginning January 1, 2021, and specified that "[n]o action carried out in accordance with this Agreement is intended to modify or violate the provisions of A.B. 893." *Id.*, Exh. 5 at 35, 38.

IV. BRIEF SUMMARY OF PLAINTIFFS' CLAIMS AND AB 893'S ALLEGED IMPACT ON GUN SHOWS AT THE DEL MAR FAIRGROUNDS

Plaintiffs include: a gun show event promoter that has operated gun shows at the Fairgrounds (Compl. ¶ 11); four people who regularly attend gun shows at the Fairgrounds (*id.* ¶¶ 12-15); four "regular vendor[s]" that sell firearms-related accessories and ammunition at Fairgrounds gun shows (*id.* ¶¶ 16-19); two nonprofit organizations that are "regular vendor[s]" at Fairgrounds gun shows (*id.* ¶¶ 20-21); and one nonprofit organization that offers educational materials at gun shows generally (*id.* ¶ 22). They describe gun shows at the Fairgrounds as "a modern bazaar," a "celebration of America's 'gun culture,'" and a "cultural marketplace[] for those members of the 'gun culture.'" *Id.* ¶¶ 47-48, 51. Gun shows, Plaintiffs allege, "include the exchange of products and ideas, knowledge, services education, entertainment, and recreation related to the lawful uses of firearms." *Id.* ¶ 50. An "important reason people attend" B&L gun shows at the Fairgrounds is to "[p]articipat[e] in 'gun culture,'" regardless of the vendor or attendee's interest in the sale of firearms or ammunition. *Id.* ¶ 56. People also attend gun shows "to learn about the technology and use of various firearms and ammunition when they are considering whether to buy or sell a firearm (or ammunition)." *Id.* ¶ 58.

More than 60 percent of the vendors at B&L gun shows do not sell firearms or ammunition; rather, they sell "accessories, collectibles, home goods, lifestyle products, food, and other refreshments." Compl. ¶ 57. Although AB 893 prohibits none of these activities, Plaintiffs nevertheless allege that AB 893 will render the B&L gun shows "unprofitable and economically infeasible" because without firearm and ammunition sales as well, "the events will no longer be able to draw

many of its vendors and attendees." *Id.* ¶ 59. "[O]ne of the main reasons people attend" B&L gun shows is allegedly the sale of firearms and ammunition. *Id.* ¶ 124. AB 893's prohibition allegedly removes an "essential function" of gun shows and has the "same practical effect" as the District's previous one-year moratorium on gun shows. *Id.* ¶¶ 124-125. Plaintiffs assert AB 893's "intended and practical effect" was to end gun shows at the Fairgrounds. *Id.* ¶¶ 139-145.

The Complaint raises six claims under 42 U.S.C. § 1983 for violations of First Amendment and equal protection rights, as well as three state-law tort claims. Compl. ¶¶ 155-248. The § 1983 claims are raised against the State Defendants (Governor Newsom, Attorney General Bonta, Secretary Ross, and the District) and the San Diego County Defendants (County Counsel Lonnie Eldridge and District Attorney Summer Stephan), but the state-law claims are asserted against only the State Defendants. The § 1983 claims allege that: (1) enforcement of AB 893 constitutes an impermissible content-based restriction on political, educational, and commercial speech (*id.*, ¶¶ 164, 175, 184; First through Third Claims); (2) AB 893 is a prior restraint on speech (*id.* ¶ 200; Fourth Claim); (3) AB 893 violates Plaintiffs' assembly and association rights (*id.* ¶¶ 208-210; Fifth Claim); and (4) "AB 893 prevents Plaintiffs from equally participating in the use" of the Fairgrounds (*id.* ¶ 217; Sixth Claim). Plaintiffs raise a facial and as-applied First Amendment challenge. *Id.* ¶ 184. The three state-law tort claims allege that the adoption of AB 893 disrupted B&L's economic relationship with the District and its relationship with its vendors. *See, e.g.*, *id.* ¶¶ 225-226. Plaintiffs seek declaratory and injunctive relief as well as damages. *Id.*, Prayer for Relief, ¶¶ 1-10.

LEGAL STANDARD

The standards applicable to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) are well known. In sum, dismissal may be based on either a "'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under

a cognizable legal theory.'" *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) (citation omitted).

ARGUMENT

I. THE § 1983 CLAIMS AGAINST GOVERNOR NEWSOM ARE BARRED UNDER ABSOLUTE LEGISLATIVE IMMUNITY

Plaintiffs' § 1983 claims against the Governor stem from the allegation that "[o]n October 11, 2019, Governor Newsom signed AB 893 into law." Compl. ¶ 121. But, as to the Governor, those claims are barred by absolute legislative immunity, including the requests for damages and for declaratory and injunctive relief. *Cmty. House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 959 (9th Cir. 2010).

"Absolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (citation and internal punctuation omitted). Because "legislative immunity does not depend on the actor so much as the functional nature of the act itself" (*Jones v. Allison*, 9 F.4th 1136, 1140 (9th Cir. 2021)), "officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions." *Bogan*, 523 U.S. at 55. The signing of a bill into law by a state governor is an "integral step[] in the legislative process." *See id.* (citing *Smiley v. Holm*, 285 U.S. 355, 372-373 (1932) (recognizing that a governor's signing or vetoing of a bill is part of the legislative process)). Thus, "[a] governor is entitled to absolute immunity for the act of signing a bill into law." *Nichols v. Brown*, 859 F. Supp. 2d 1118, 1132 (C.D. Cal. 2012); *see also Torres Rivera v. Calderon Serra*, 412 F.3d 205, 213 (1st Cir. 2005) ("[A] governor who signs into law or vetoes legislation passed by the legislature is [ ] entitled to absolute immunity for that act."). Indeed, *Nichols* held as much in the context of dismissing a claim against the previous Governor of California for signing a bill that banned the open carrying of an unloaded handgun in public. *Nichols*, 859 F. Supp. 2d. at 1132. Here as well,

Governor Newsom's signing of AB 893 after California's Legislature enacted it thus entitles him to absolute legislative immunity against the § 1983 claims.

Governor Newsom's intent when signing AB 893 is irrelevant to this immunity. Plaintiffs allege that Governor Newsom "has supported the closure of gun shows at other state venues," citing a letter he wrote—as lieutenant governor, before he was governor—urging the District to prohibit gun shows at the Fairgrounds. Compl. ¶¶ 89, 123 & Exh. 2. But the Supreme Court has made clear that "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan*, 523 U.S. at 54; *see also Torres Rivera*, 412 F.3d at 213 (rejecting plaintiff's similar argument against a governor).

II. SOVEREIGN IMMUNITY BARS ALL CLAIMS AGAINST GOVERNOR NEWSOM AND SECRETARY ROSS; THE *EX PARTE YOUNG* EXCEPTION DOES NOT APPLY BECAUSE THEY DO NOT ENFORCE THE LAW

The Eleventh Amendment bars a private party from suing a state and its agencies unless the state consents to the suit. *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 714 F.2d 946, 953 (9th Cir. 1983).[2] Under the exception created by *Ex parte Young*, 209 U.S. 123 (1908), sovereign immunity does not bar "actions seeking only prospective declaratory or injunctive relief against state officers in their official capacities" who are acting unconstitutionally. *L.A. County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992). For this exception to apply, however, "the state officer sued 'must have some connection with the enforcement of the [allegedly unconstitutional] act.'" *Id.* (quoting *Ex parte Young*, 209 U.S. at 157). This connection "must be fairly direct" and the state official must have more than "a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision." *Id.*

[2] Section 1983 did not abrogate a state's Eleventh Amendment immunity (*Quern v. Jordan*, 440 U.S. 332, 341 (1979)), and California has not waived that immunity with respect to claims brought under § 1983 in federal court. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985).

Plaintiffs cannot establish this connection as to Governor Newsom and Secretary Ross. Plaintiffs allege that Governor Newsom must "see that the law is faithfully executed" (Compl. ¶ 23, quoting Cal. Const. art. V, § 1), and that he is "ultimately responsible for enforcement of the law." Compl. ¶ 122. But the Ninth Circuit has repeatedly rejected such claims because California's governor lacks the "direct authority and practical ability to enforce" the law in the way *Ex parte Young* requires. *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 846-847 (9th Cir.2002); *see, e.g.*, *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013) (California governor entitled to sovereign immunity when the only connection to the challenged statute was a general duty to enforce state law). Plaintiffs further allege that Governor Newsom has the authority to prosecute violations of AB 893. Compl. ¶ 160. This is incorrect, because it is the Attorney General, not the Governor, who is the "chief law officer of the State." Cal. Const. art. I, § 13; see also Cal. Gov't Code § 12550.

Similarly, the requisite connection between Secretary Ross and AB 893 is nonexistent. Plaintiffs allege that Secretary Ross "issues guidance for governance and contracting" to the District (Compl. ¶ 28), "oversees the operation of" the District (*id.* ¶ 63), and "interpret[s], implement[s], and enforce[s] state laws and policies" as to the Fairgrounds (*id.* ¶ 161). This "general supervisory power" over the entity that must comply with AB 893, the District, is not a sufficient connection. *L.A. County Bar Ass'n*, 979 F.2d at 704. Judge Bencivengo reached a similar conclusion as to Secretary Ross (Compl., Exh. 4 at 16-17), and the same result is warranted here. Secretary Ross had no role in AB 893 becoming law and has no role in enforcing it either. There is also no allegation that she was involved in any decision by the District to reject a contract for a gun show due to AB 893.

Because Plaintiffs have not plausibly alleged facts that would allow the *Ex parte Young* exception to apply to Governor Newsom and Secretary Ross, they are entitled to sovereign immunity. This immunity applies equally to the § 1983 and

state-law claims. See *Pennhurst State Sch. & Hosp.*, 465 U.S. 89, 120-121 (1984) (the Eleventh Amendment bars state-law claims in federal court pursuant to supplemental jurisdiction).

III. THE DAMAGES CLAIMS AGAINST GOVERNOR NEWSOM, ATTORNEY GENERAL BONTA, AND SECRETARY ROSS ARE NOT COGNIZABLE UNDER § 1983

State officials sued in their official capacity for damages are not considered persons for purposes of § 1983. *See Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997). Accordingly, the damages claims against Governor Newsom, Attorney General Bonta, and Secretary Ross in their *official* capacities fail as a matter of law. *See id.* The individual-capacity claims for damages against the same three State Defendants also fail because they are "a mere pleading device" that simply repackage the official-capacity claims. *Grunert v. Campbell*, 248 F. App'x 775, 778 (9th Cir. 2007). The gravamen of Plaintiffs' claims is the adoption and enforcement of AB 893, but Governor Newsom could sign AB 893 into law only while acting in his official capacity, and Attorney General Bonta could enforce AB 893 only while doing the same. The individual-capacity claims are thus merely "damage actions against the official's office," and are barred by the Eleventh Amendment. *Id.* (internal quotation marks omitted).

IV. GOVERNOR NEWSOM, ATTORNEY GENERAL BONTA, AND SECRETARY ROSS ARE ALSO ENTITLED TO QUALIFIED IMMUNITY

Any damages claims against Governor Newsom, Attorney General Bonta, and Secretary Ross also fail based on qualified immunity. On a motion to dismiss, qualified immunity shields government officials from suits for monetary damages unless a plaintiff presents plausible factual allegations showing "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (citation omitted). This Court can decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the

circumstances in the particular case at hand," and can rule based on the second prong alone.[3] *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). In conducting the inquiry under the second prong, the dispositive issue is "whether the violative nature of particular conduct is clearly established." *al-Kidd*, 563 U.S. at 742. Courts may not define what is "clearly established law" at a "high level of generality." *White v. Pauly*, 137 S.Ct. 548, 552 (2017). There need not be a case "directly on point," but existing precedent must "be particularized to the facts of the case" and place the question at issue "beyond debate." *Id.* at 551-552.

For the reasons noted below, AB 893 is not unconstitutional even now. But when AB 893 became law in October 2019 and became operative in January 2021, it was certainly not *beyond debate* that the law violated the First Amendment or equal protection. A right is not clearly established unless, at a minimum, there is controlling appellate court precedent so that the "'right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'" *Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018) (citation omitted). Plaintiffs cannot point to any such precedent existing before AB 893 became law. Further, mere uncertainty—assuming there is *any* uncertainty—about whether AB 893 is constitutional is not enough. *See Porter v. Bowen*, 496 F.3d 1009, 1026 (9th Cir. 2007) (qualified immunity applied where court had to "wrestle with difficult and unsettled questions"). Governor Newsom, Attorney General Bonta, and Secretary Ross are thus entitled to qualified immunity from Plaintiffs' claims for monetary damages.

V. THE FIRST AMENDMENT CLAIMS FAIL TO STATE A CLAIM

A. AB 893 Does Not Regulate Speech or Expressive Conduct, and Survives Rational Basis Review

The First Amendment is not implicated if the challenged statute does not regulate speech or expressive conduct, which is conduct undertaken with an "'intent

[3] Plaintiffs cannot meet the first prong for the reasons explained in Section V.

to convey a particularized message'" when the "'likelihood was great that the message would be understood by those who viewed it.'" *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citation omitted). It is the Plaintiffs' burden "to demonstrate that the First Amendment even applies." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). Plaintiffs cannot meet their burden here.

Unlike the District's prior moratorium, which prohibited gun shows outright and which Judge Bencivengo concluded was facially a content-based restriction (Compl., Exh. 4 at 22), AB 893 solely prohibits "the sale of any firearm or ammunition on the property or in the buildings that comprise the Del Mar Fairgrounds." Cal. Food & Agric. Code § 4158(a). The Ninth Circuit has long held that "the act of exchanging money for a gun is not 'speech' within the meaning of the First Amendment." *Nordyke v. Santa Clara Cnty.*, 110 F.3d 707, 710 (9th Cir. 1997) ("*Nordyke 1997*"). Hindering actions that are not speech, such as the sale of firearms or ammunition or most other products, does not render a law unconstitutional. *Nordyke v. King*, 319 F.3d 1185, 1191 (9th Cir. 2003) ("*Nordyke 2003*") (an ordinance that banned the possession of firearms on county property did not violate the First Amendment even when the ban impaired the sale of firearms).

Plaintiffs ultimately acknowledge that the law they are challenging, AB 893, does not itself prohibit gun shows. Instead, they allege that AB 893 has the "practical effect" of prohibiting gun shows at the Fairgrounds (Compl. ¶ 125), thereby "destroying a vital outlet for the expression and exchange of ideas related to promoting and preserving the 'gun culture' in California and elsewhere" (*id.* ¶ 165). They assert that firearm and ammunition sales are an "essential function" of gun shows (Compl. ¶ 124), which would become "unprofitable and economically infeasible" without such sales (*id.* ¶ 59). Plaintiffs admit that more than 60 percent of vendors at the B&L gun shows do not sell firearms and ammunition; instead, they sell other items that contribute to all the other reasons that people allegedly attend gun shows, e.g., to exchange ideas about the lawful uses of firearms, to

engage in a "gun culture" cultural marketplace, and to learn how to comply with firearms laws. *Id.* ¶¶ 50-58. Nevertheless, Plaintiffs assert such activities are insufficient to financially justify gun shows at the Fairgrounds if there is a prohibition on the sale of firearms and ammunition. *Id.* ¶¶ 59, 124.

But AB 893 does not itself prevent Plaintiffs from putting on a gun show that allows for the exchange of ideas that they allege typically occurs at gun shows, as Plaintiffs acknowledge. Compl. ¶¶ 47-59, 124. And if third parties make their own independent business decisions not to sell accessories or provide firearms education at a site where firearms sales are prohibited, it is those parties' intervening decisions—not AB 893—that cause Plaintiffs' alleged First Amendment injuries. Said otherwise, although Plaintiffs have a First Amendment right to speak about and support a "gun culture" at the Fairgrounds (*id.* ¶ 51), they have no right to be freed from other, non-speech restrictions—whether fire-code restrictions on maximum capacity or business taxes or a prohibition on firearm sales—that might ultimately prevent their event from being *profitable*. *See Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 891, 895 (9th Cir. 2018) (rejecting argument that "[l]aws that restrict the ability to fund one's speech are burdens on speech," and concluding there "exists no standalone right to receive the funds necessary to finance one's own speech"). A restriction on non-speech conduct (the sale of firearms and ammunition) does not become a restriction on speech just because it might impact the profitability of separate and unrestricted expressive conduct (the alleged "gun culture" at gun shows). *See Nordyke 2003*, 319 F.3d at 1191 ("It is difficult to argue then that making the sale (non[-]speech) more difficult by barring possession (non-speech) infringes speech."); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.").

AB 893's legislative findings make clear that it is firearm and ammunition sales at gun shows that the law prohibits, not the exchange of ideas at gun shows.

The first finding defines "gun shows," for the purpose of AB 893, as marketplaces where these sales occur. Compl., Exh. 6 at 53. The remaining findings mainly focus on the dangers resulting from crimes connected to the sale of firearms and ammunition at gun shows. *Id.* at 53-54. The findings even highlight the District's previous effort to study the possibility of "conducting gun shows for only educational and safety training purposes." *Id.* at 54. On its face, AB 893 was aimed at prohibiting non-speech conduct—the sale of firearms and ammunition.

Because AB 893 does not regulate speech or inherently expressive conduct, it is subject to rational basis review, which it satisfies. *See Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 847 (9th Cir. 2017). Under rational basis review, duly enacted laws are presumed to be constitutional, and it is enough that "the government *could* have had a legitimate reason for acting as it did." *Nat'l Ass'n for Advancement of Psychoanalysis v. California Bd. of Psych.*, 228 F.3d 1043, 1050 (9th Cir. 2000) (internal quotation marks and citation omitted). AB 893's legislative findings describe multiple public safety concerns related to the sale of firearms and ammunition at gun shows held at the Fairgrounds and elsewhere, including: the trafficking of illegal firearms by a vendor, sales of firearms to prohibited persons, the illegal importation of large-capacity magazines, and the occurrence of 14 crimes between 2013 and 2017 at B&L gun shows at the Fairgrounds. Compl., Exh. 6 at 54. The Legislature could reasonably conclude that because the root of these public safety issues was the buying and selling of firearms and ammunition at gun shows, it was necessary to prohibit such transactions to enhance the safety for gun show attendees and for the surrounding communities of the Fairgrounds. Preventing and mitigating gun violence is an "undoubtedly important" interest. *Duncan v. Bonta*, 19 F.4th 1087, 1109 (9th Cir. 2021) (en banc). Moreover, the Ninth Circuit has recognized that some of the public safety issues identified in AB 893 are indeed important government objectives, including the harm that could result from large-capacity magazines (*id.*) and from prohibited

persons possessing firearms (*see United States v. Chovan*, 735 F.3d 1127, 1139-1140 (9th Cir. 2013)). These are "plausible reasons" for the passage of AB 893, and thus, the "'inquiry is at an end.'" *Romero-Ochoa v. Holder*, 712 F.3d 1328, 1331 (9th Cir. 2013) (citation omitted).

B. AB 893 Applies to a Limited Public Forum, a Type of Nonpublic Forum, and Satisfies the Reasonableness Standard

Although AB 893 does not regulate speech or expressive conduct, it would nevertheless satisfy the deferential standard for speech regulations in a limited public forum if that standard were to apply. Courts use "a forum based approach for assessing restrictions that the government seeks to place on the use of its property." *Int'l Soc'y for Krishna Consciousness of California, Inc. v. City of Los Angeles*, 764 F.3d 1044, 1049 (9th Cir. 2014) (internal quotation marks and citations omitted). "[T]he two main categories of fora are public (where strict scrutiny applies) and non-public (where a more lenient 'reasonableness' standard governs)." *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001). A third category is the designated public forum, which is a forum "'where the government intentionally opens up a nontraditional forum for public discourse.'" *Id.* (citation omitted). A sub-category of the designated public forum—where strict scrutiny applies—is the limited public forum—where the reasonableness test applies and which is "'a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics.'" *Id.* at 1074-1075 (citation omitted).

Use of the Fairgrounds for third-party events, such as B&L gun shows, can be done only "through contracting for available space at the Fairgrounds." Compl. ¶¶ 68-69, 73-75. The various events the Fairgrounds allegedly hosts—such as gun shows, concerts, and industry shows (*id.* ¶ 68)—demonstrates that the Fairgrounds "exists to provide a means for a great number of exhibitors temporarily to present their products or views, be they commercial, religious, or political, to a large number of people in an efficient fashion." *Heffron v. Int'l Soc'y for Krishna*

Consciousness, Inc., 452 U.S. 640, 655 (1981). Accordingly, the Fairgrounds is a limited public forum. *See id.* at 643, 655 (concluding that the Minnesota State Fair, a "major public event" on state-owned land with an average daily attendance of 115,000 to 160,000 people, was a limited public forum); *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 n.8 (9th Cir. 1984) (citing *Heffron* for the proposition that there is a "distinction between public streets and the more limited public forum of a fairground"). Being a "state-owned property maintained and opened for use by the public" (Compl. ¶ 67) does not convert the Fairgrounds into a public forum or designated public forum. "Publicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will." *United States v. Grace*, 461 U.S. 171, 177 (1983). And "the government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998).

In a limited public forum, a permissible restriction need only be "'viewpoint neutral and reasonable in light of the purpose served by the forum.'" *Hopper*, 241 F.3d at 1074 (citation omitted). This reasonableness inquiry "is a deferential one." *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1223 (9th Cir. 2003). As explained previously, AB 893's legislative findings describe its public safety purpose: to mitigate gun violence by preventing illegal firearm and ammunition transactions at gun shows. *See Nordyke v. King*, 644 F.3d 776, 792 (9th Cir. 2011) ("*Nordyke 2011*") (the reduction of gun violence on county property was a plausible purpose for an ordinance banning the possession of firearms or ammunition on county property).[4] AB 893 is also viewpoint neutral because it applies to any event on the

[4] Although the Ninth Circuit granted rehearing en banc of the *Nordyke 2011* panel decision, the en banc court "affirm[ed] the district court's ruling on the First Amendment for the reasons given by the three-judge panel." *Nordyke v. King*, 681 F.3d 1041, 1043 n. 2 (9th Cir. 2012) ("*Nordyke 2012*").

Fairgrounds, not just to gun shows. Cal. Food & Agric. § 4158(a). The only exception to AB 893 is for a "gun buyback event held by a law enforcement agency," which is tailored to and consistent with AB 893's public safety purpose. *Cf. Nordyke 2011*, 644 F.3d at 793 (exempting gun-bearing military reenactors from the ban on the possession of firearms was not constitutionally suspect). AB 893 thus meets the reasonableness standard applicable to limited public forums.

C. AB 893 Satisfies the Tests Applicable for Commercial Speech Regulations and for Content-Neutral Regulations

Although AB 893 does not regulate speech and applies in a limited public forum, it would additionally satisfy the test for regulations of commercial speech established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), as well as the test applicable to content-neutral regulations of expressive conduct set forth in *United States v. O'Brien,* 391 U.S. 367 (1968).

1. AB 893 Does Not Ban Protected Commercial Speech

Commercial speech is "expression related solely to the economic interests of the speaker and its audience," and is accorded less protection than non-commercial speech. *Central Hudson Gas*, 447 U.S. at 561-563. The Ninth Circuit has held that "[a]n offer to sell firearms or ammunition" is commercial speech. *Nordyke 1997*, 110 F.3d at 710. *Nordyke 1997* concerned a contract provision that explicitly prohibited the "offering for sale" of firearms (*id.* at 708-709), but AB 893 is silent on its application to offers. In any event, even an "offer" can be prohibited if it is an offer to engage in unlawful activity. In *Nordyke 1997*, the Ninth Circuit held that because no law banned the sale of firearms at the county fairgrounds, the offer to sell firearms there concerned a lawful activity. *Id.* at 710-711. It was "critical" to this conclusion that only a contract provision, and not any local or state law, prohibited firearm sales. *Id.*; *see also id.* at 712 ("The proscribed activity [selling firearms], to repeat, is not contrary to federal or state law."). But AB 893 is different. AB 893 indeed prohibits the sale of firearms and ammunition at the

Fairgrounds and makes it a misdemeanor to allow such sales. Accordingly, an offer to make such sales at the Fairgrounds does not concern a lawful activity and is not protected commercial speech. *See id.* at 710-711.

Nevertheless, AB 893 would still satisfy the *Central Hudson* test. *See Retail Digit. Network, LLC v. Prieto*, 861 F.3d 839, 846 (9th Cir. 2017) (notwithstanding ongoing debates about its clarity, the *Central Hudson* test still applies). First, there is a "substantial government interest in protecting the people from those who acquire guns illegally and use them to commit crimes resulting in injury or death of their victims." *Nordyke 1997*, 110 F.3d at 713. Second, AB 893 "directly advances" this government interest (*Central Hudson*, 447 U.S. at 566) because prohibiting firearm and ammunition transactions eliminates the possibility of illegal transactions that occur despite existing state laws. Compl. ¶¶ 30-46, Exh. 6 at 54. Third, AB 893's exemption for gun buyback events reasonably fits with its public safety interest because such events can help reduce gun violence. *Cf. Boyer v. City of Los Angeles*, No. CV 12-04005, 2012 WL 13013037, at *5 (C.D. Cal. Aug. 23, 2012) (in a Los Angeles gun buyback program, people voluntarily surrendered firearms to law enforcement in exchange for a gift card). AB 893 is thus the "[s]ubstantial, effective, and carefully drafted legislative act[]" the Ninth Circuit predicted could satisfy the *Central Hudson* test. *Nordyke 1997*, 110 F.3d at 713.

2. AB 893 Serves an Important Public Safety Interest and is a Straightforward Response to the Relevant Harms

Even if AB 893 restricted *non*-commercial speech, it would be content-neutral and satisfy the applicable intermediate scrutiny standard. Plaintiffs allege that AB 893 effectively and intentionally ends gun shows at the Fairgrounds, thereby destroying a vital "gun culture" platform. *See, e.g.*, Compl. ¶¶ 164-165. AB 893's legislative findings discuss the public safety issues related to gun shows, but only as it relates to gun shows where firearms are sold. *Id.*, Exh. 6 at 53-54. These

findings do not disapprove of the "gun culture" or gun shows in general, including shows of firearm-related accessories or educational gun shows without firearm sales. *Id.*, Exh. 6 at 54. Moreover, AB 893 applies to *all events* at the Fairgrounds, not just to gun shows; firearms and ammunition may not be sold at *any* event of *any* type at the Fairgrounds except for gun buyback events. Cal. Food & Agric. § 4158. AB 893 would be content-based, and thus trigger strict scrutiny, only if it "hits speech because it aimed at it." *Nordyke 2011*, 644 F.3d at 792. That is not the case here. If gun shows cannot be held at the Fairgrounds because they would be unprofitable, as Plaintiffs allege (Compl. ¶ 59), that is a decision made by gun show promoters and not one mandated by AB 893. Rather, to the extent AB 893 impacts any non-commercial speech, "it hits speech without having aimed at it," thus triggering only intermediate scrutiny. *Nordyke 2011*, 644 F.3d at 792.

Plaintiffs' allegations about the personal feelings or motivations of Governor Newsom when he was lieutenant governor, AB 893's authors, and the authors of legislative committee bill analyses (*e.g.*, Compl. ¶¶ 89-90, 102, 112-114, 122, 127-129) do not change this result. When evaluating the constitutionality of a county ban on the possession of firearms on county property, the Ninth Circuit made clear that the feelings and views of one official—there, a county supervisor—"do not necessarily bear any relation to the aims and interests" of the legislative body. *Nordyke 2011*, 644 F.3d at 792. The Ninth Circuit limited its analysis to "the statute in terms of the interests the state declared," and put aside the "legislative history or the stated motives of any legislator." *Id.*; *see also O'Brien*, 391 U.S. at 384 ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."). Here, as in *Nordyke 2011*, 644 F.3d at 792, AB 893's plain language "suggests that gun violence, not gun culture, motivated its passage"—and that is why the law targets sales of firearms and

ammunition exclusively, not the expressive activities and other conduct that makes up the majority of gun shows. AB 893 is accordingly content-neutral.

AB 893 would survive intermediate scrutiny under *O'Brien*, 391 U.S. at 377, because it furthers an important or substantial government interest "'that would be achieved less effectively absent the regulation.'" *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 67 (2006) (citation omitted). When applying intermediate scrutiny, courts "defer to reasonable legislative judgments" because "'[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable.'" *Duncan*, 19 F.4th at 1108 (citations omitted). Indeed, "history, consensus, and 'simple common sense'" can suffice. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (citation omitted).

AB 893's plain language shows that it serves the "undoubtedly important" interest of preventing and mitigating gun violence. *Duncan*, 19 F.4th at 1109. Plaintiffs allege that AB 893 does not directly serve this purpose because it fails to identify a public safety concern specific to B&L gun shows held at the Fairgrounds. Compl. ¶¶ 107-119. But such a nexus is not required. Even though AB 893 identifies the occurrence of 14 crimes at B&L gun shows (*id.*, Exh. 6 at 54), AB 893 need only generally further its public safety interest. *Nordyke 2011*, 644 F.3d at 793. "[E]ven for an as-applied challenge, the government need not show that the litigant himself actually contributes to the problem that motivated the law he challenges." *Id.* Moreover, AB 893's prohibition is no more restrictive than necessary because it "is a straightforward response" to the danger of illegal transactions occurring at the Fairgrounds. *Id.* at 794. California's existing legal framework with respect to gun shows (Compl. ¶¶ 30-46) is not a sufficient alternative because, as AB 893 shows, illegal transactions still occur at gun shows.

In sum, no matter the applied analysis, AB 893 does not violate Plaintiffs' First Amendment free speech rights as a matter of law.[5]

D. The Prior Restraint Claim Fails Because AB 893 is a State Statute That the District Has No Discretion Not to Follow

Plaintiffs additionally claim that AB 893 is a prior restraint on speech because it gives the District "unfettered discretion to determine what constitutes a 'sale' under the law and is thereby prohibited at the Fairgrounds." Compl. ¶ 201. This allegation contradicts another allegation regarding the various Penal Code provisions that govern firearm sales at gun shows. *Id.* ¶ 41 (citing Cal. Penal Code §§ 27310, 26805, 27545). As demonstrated in Plaintiffs' own allegation, it is the Penal Code, not the District's discretion, that determines what constitutes a sale under the law. Unlike the 2019 moratorium at issue in the prior litigation—which the District enacted—AB 893 is a state statute that the District has no discretion not to follow. Because AB 893 does not create a scheme placing "unbridled discretion in the hands of a government official or agency" (*FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990)), and because it does not regulate speech in the first place, there is no prior restraint violation.

Plaintiffs' reliance on the April 2020 Agreement is similarly misplaced. That agreement post-dated AB 893's enactment and expressly contemplated that the District would have to comply with generally applicable laws like AB 893. So AB 893 does not affect the District's compliance with the settlement agreement. Moreover, Plaintiffs should not be permitted to use this federal lawsuit—the brunt of which raises federal constitutional claims—as a vehicle to challenge the District's compliance with the April 2020 Agreement, particularly when Judge

[5] In addition, the Second Amendment Foundation ("SAF") lacks standing entirely, because there is no allegation the SAF distributes materials at gun shows at the Fairgrounds or that its members have attended the same. Compl. ¶ 22; *see Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012); *Haynie v. Harris*, 658 F. App'x 834, 836 (9th Cir. 2016).

Bencivengo declined to retain jurisdiction to enforce its terms. Req. Judicial Notice, Ex. A.[6]

VI. THE EQUAL PROTECTION CLAIM FAILS TO STATE A CLAIM

Plaintiffs' equal protection claim is subsumed by the First Amendment claims and does not plausibly allege a "class of one claim." First, Plaintiffs allege that AB 893 subjects them to "disparate treatment" while they are "engaged in activities that are fundamental rights," which presumably refers to the alleged First Amendment violations. Compl. ¶ 216. An equal protection claim relating to allegedly expressive conduct is evaluated through "'essentially the same'" analysis used for the First Amendment claim. *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 780 (9th Cir. 2014). The claim "rise[]s and fall[s] with the First Amendment claims" because Plaintiffs "do not allege membership in a protected class or contend that the [challenged] conduct burdened any fundamental right other than their speech rights." *OSU Student All. v. Ray*, 699 F.3d 1053, 1067 (9th Cir. 2012).

Even if the equal protection claim survives independently of the First Amendment claims, gun-show promoters and participants are not considered a suspect class. *Nordyke 2011*, 644 F.3d at 794. Plaintiffs must then rely on a "class-of-one" theory, in which no membership in a class is alleged. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Plaintiffs aver that the State Defendants refuse to allow them "equal use of the public facility while continuing to allow contracts for the use of the facility with other similarly situated legal and legitimate businesses." Compl. ¶ 219. However, a class-of-one claim requires a showing of intentional and differential treatment as compared to similarly situated persons or groups. *Vill. of Willowbrook*, 528 U.S. at 564. But as Plaintiffs admit, they are not

[6] Plaintiffs contend that AB 893 violates their First Amendment associational rights. Compl. ¶ 208. The claim fails because the conduct Plaintiffs wish to engage in is not protected expressive association. The Constitution does not recognize a "generalized right of 'social association.'" *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Plaintiffs' desire to hold, make sales at, and attend a gun show at the Fairgrounds is accordingly not protected under the First Amendment.

similarly situated to other groups because of California's "rigorous regulatory regime" for gun shows. Compl. ¶ 30. Plaintiffs' unspecified "other similarly situated legal and legitimate businesses" (*id.* ¶ 219) are presumably not gun show operators, and so are not subject to the numerous laws applicable to gun shows (*id.* ¶¶ 30-46). The class-of-one claim cannot stand without identifying a similarly situated business. *Teixeira v. Cnty. of Alameda*, 822 F.3d 1047, 1053 (9th Cir. 2016) (rejecting a class-of-one claim given appellant's acknowledgement that gun stores "are materially different from other retail businesses" due to the regulations such stores must follow).[7] Moreover, other than gun buyback events, AB 893 applies to any event at the Fairgrounds.

This claim would be subject to only rational basis review because AB 893 does not "classify shows or events on the basis of a suspect class," nor does it violate the First Amendment. *Nordyke 2012*, 681 F.3d at 1043 n.2. AB 893's prohibition, and its exception for gun buyback events, passes rational basis review for all of the reasons previously discussed in the context of the tests that could apply to the First Amendment claims. *See Nordyke 2012*, 681 F.3d at 1043 n.2 (rational basis review satisfied because the government "could reasonably conclude that gun shows are more dangerous than military reenactments"). The equal protection claim thus fails on multiple grounds.

VII. THE STATE-LAW TORT CLAIMS SHOULD BE DISMISSED

As explained in Section II, sovereign immunity bars these claims against Governor Newsom and Secretary Ross. *Pennhurst*, 465 U.S. at 121. Additionally, once the § 1983 claims are dismissed for the remaining reasons explained above, this Court need not exercise its supplemental jurisdiction over the state-law claims.

[7] Although the Ninth Circuit granted rehearing en banc of the *Teixeira* panel decision, the en banc court affirmed the district court's rejection of the equal protection claim for the reasons given in the panel opinion." *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 676 n.7 (9th Cir. 2017).

See 28 U.S.C. § 1367(c)(3); *Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 911 (9th Cir. 2011). Even if it does, dismissal of the state-law claims is still warranted.

A. There Is No Alleged Statutory Basis for The Tort Claims

The gravamen of the three state-law tort claims is that the adoption and enforcement of AB 893 disrupted B&L's economic relationships with the District and with its vendors, such as those who are also Plaintiffs here. *See, e.g.*, Compl. ¶ 236. But the fatal flaw in all three claims is the lack of a statutory basis authorizing the Plaintiffs to bring such claims against the State Defendants. To plausibly allege a government tort claim, "every fact essential to the existence of statutory liability must be pleaded with particularity, including the existence of a statutory duty." *Searcy v. Hemet Unified Sch. Dist.*, 177 Cal. App. 3d 792, 802 (1986). None of the state-law tort claims identify a *statute* or *enactment* that establishes the duty the State Defendants allegedly violated. Cal. Gov't Code §§ 815(a), 815.6. Rather, the three claims merely allege, or implicitly suggest, the State Defendants had a general duty under the law. *See, e.g.*, Compl. ¶¶ 225-226, 234. But that "is a conclusion of law, not an allegation of fact." *Searcy*, 177 Cal. App. 3d at 802. The state-law claims accordingly must be dismissed. *See, e.g.*, *Herd v. Cnty. of San Bernardino*, 311 F. Supp. 3d 1157, 1171 (C.D. Cal. 2018).

B. The Claims Were Not Timely Presented and Are Thus Barred

Claims against a public entity are barred if they are not first timely presented to the California Department of General Services ("DGS"). *Cal. Rest. Mgmt. Sys. v. City of San Diego*, 195 Cal. App. 4th 1581, 1591 (2011); Cal. Gov't Code §§ 810 et seq., 900.2(b), 945.4. The claims here had to be presented to the DGS "not later than one year after the accrual of the cause of action." Cal. Gov't Code § 911.2(a).[8] Plaintiffs allege they presented their claims to DGS on August 2, 2021. Compl.

[8] For claims accruing before June 30, 2021, this period was extended by 120 days pursuant to three executive orders issued by Governor Newsom in relation to the Covid-19 pandemic. *Coble v. Ventura Cnty. Health Care Agency*, No. B311670, 2021 WL 6132855, at *2 (Cal. Ct. App. Dec. 29, 2021).

¶ 151; *see also id.*, Exh. 13. Because the tort claims are rooted in a facial challenge to the *adoption* of AB 893 (*id.* ¶¶ 225, 234, 244), they began accruing when Governor Newsom signed AB 893 into law on October 11, 2019 (*id.* ¶ 121). *See* Cal. Gov't Code § 901; *Howard Jarvis Taxpayers Ass'n v. City of La Habra*, 25 Cal.4th 809, 815 (2001) (a claim challenging the validity of a city's utility tax "first arose when the Ordinance was adopted," even though the ordinance became operative at a later date). Plaintiffs were clearly aware of when AB 893 became law because the April 2020 Agreement repeatedly acknowledged this (Compl., Exh. 5 at 35, 38), and Plaintiffs B&L and California Rifle and Pistol Association actively opposed AB 893's passage (*id.*, Exh. 7 at 63). However, Plaintiffs presented their claims to DGS in August 2021, about six months after the statutory period—with the 120-day extension included—had passed. The three tort claims are thus time-barred and must be dismissed. *Cal. Rest. Mgmt. Sys.*, 195 Cal. App. 4th at 1591.[9]

CONCLUSION

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

[9] DGS concluded similarly when it rejected Plaintiffs' claims. Specifically, DGS stated that it "has no jurisdiction to consider claims presented more than one year after accrual of the cause of action, pursuant to Government Code section 911.2." Req. Judicial Notice, Exs. B-F.

Dated: January 24, 2022

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