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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-DDL **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT** Date: February 23, 2023 Time: 2:00 p.m. Courtroom: 4A Judge: The Honorable Anthony J. Battaglia Trial Date: None Action Filed: 10/4/2021

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INTRODUCTION

This Court previously dismissed all of Plaintiffs' claims challenging California Assembly Bill 893 ("AB 893") due to various immunities and because AB 893 "does not abridge anyone's freedom of speech or expressive conduct." ECF No. 35 at 12. Although Plaintiffs were given leave to amend, their new complaint contains the same flaws that previously warranted dismissal. Plaintiffs contend that AB 893 violates the First Amendment because it indirectly prohibits all gun shows and directly prohibits speech that occurs during firearm sales, but such theories still rely on the incorrect premise that AB 893 regulates speech. This Court has already rejected this premise, recognizing that AB 893 prohibits only the sale of firearms and ammunition, and such sales do not constitute speech under the First Amendment. AB 893 continues to allow 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 Del Mar Fairgrounds. Further, although nothing in the amended complaint should change the Court's previous conclusions, even if AB 893 were viewed as a speech regulation, it would pass constitutional muster no matter the analytical test applied.

Perhaps sensing the demise of their First Amendment claims, Plaintiffs exceeded the scope of leave granted to them and now raise a new Second Amendment claim. In doing so, they try to shift the theory of the case, asserting for the first time that the prohibition on sale of firearms and ammunition at the Del Mar Fairgrounds infringes a Second Amendment right to sell and access those items. But the Second Amendment does not confer an independent right to sell firearms, and Plaintiffs do not, and cannot, allege that AB 893 meaningfully restricts access to firearms. The remaining claims, including the equal protection claim and state-law tort claims, fail for the same reasons as they did previously. For all of these

reasons, and as further explained below, Plaintiffs' claims should again be dismissed and without leave to amend.

BACKGROUND

I. THE DISMISSAL OF PLAINTIFFS' ORIGINAL COMPLAINT

In their original Complaint, Plaintiffs raised six claims under 42 U.S.C. § 1983 for violations of First Amendment and equal protection rights, and three state-law tort claims. Complaint ("Compl."), ECF No. 1, ¶¶ 155-248. All nine claims were alleged against three state officials—Governor Gavin Newsom ("Governor Newsom"), Department of Food and Agriculture Secretary Karen Ross ("Secretary Ross"), and Attorney General Rob Bonta ("Attorney General Bonta")—in their official and individual capacities, as well as against the 22nd District Agricultural Association ("District") (collectively, "State Defendants"). The § 1983 claims were also asserted against San Diego's County Counsel and District Attorney.

On August 18, 2022, this Court dismissed all of Plaintiffs' claims against all Defendants and granted Plaintiffs leave to "file an amended complaint curing the deficiencies noted herein," specifying that Plaintiffs may amend only "where leave is granted." Order Granting Motions to Dismiss ("MTD Order"), ECF No. 35 at 16. Specifically, this Court dismissed with prejudice the § 1983 claims against Governor Newsom under the doctrines of legislative immunity and sovereign immunity. *Id.* at 5-9. Sovereign immunity was also the basis for dismissing the § 1983 claims against Secretary Ross, as well as the state-law claims against Governor Newsom and Secretary Ross in their official capacities. *Id.* at 8-9. This Court also concluded that Governor Newsom, Secretary Ross, and Attorney General Bonta were "entitled to qualified immunity from Plaintiffs' claims for monetary damages." *Id.* at 10. For the individual-capacity claims against the same three state officials, this Court dismissed the claims for damages with leave to amend because Plaintiffs "have alleged no facts that relate to individual capacity." *Id.* at 10-11.

After addressing the various immunity defenses, this Court dismissed the five First Amendment claims because AB 893 "does not abridge anyone's freedom of speech or expressive conduct." MTD Order at 12-13. The equal protection claim failed for the same reason. *Id.* at 13-14. Nevertheless, Plaintiffs were given leave to amend these claims. *Id.* Because the Court had dismissed all the federal-law claims, the Court declined to assert supplemental jurisdiction over the state-law claims and dismissed such claims without prejudice. *Id.* at 15.

II. PLAINTIFFS' FIRST AMENDED COMPLAINT

Plaintiffs filed a First Amended Complaint ("FAC") that raises the same nine claims as those in the original complaint, plus a new § 1983 claim under the Second Amendment. First Amended Complaint ("FAC"), ECF No. 36. The First Amendment, Second Amendment, and equal protection claims are asserted against Attorney General Bonta in his official capacity, the District, and San Diego County District Attorney Summer Stephan.[1] FAC ¶¶ 25, 182-252. The three state-law tort claims are alleged against the District as well as Governor Newsom, Secretary Ross, and Attorney General Bonta in their individual capacities. *Id.* ¶¶ 24-25, 28, 253-280. The § 1983 claims allege that: (1) enforcement of AB 893 constitutes an impermissible content-based restriction on political, educational, and commercial speech (FAC ¶¶ 188, 201, 213; First through Third Claims); (2) AB 893 is a prior restraint on speech (*id.* ¶ 225; Fourth Claim); (3) AB 893 violates Plaintiffs' assembly and association rights (*id.* ¶ 230; Fifth Claim); (4) AB 893 "deprives Plaintiffs of their right to access firearms and ammunition" under the Second Amendment (*id.* ¶ 241; Sixth Claim); and (5) "AB 893 prevents Plaintiffs from equally participating in the use" of the Del Mar Fairgrounds (the "Fairgrounds") (*id.* ¶ 249; Seventh Claim). Plaintiffs raise a facial and as-applied challenge to AB

[1] Although the Court dismissed without prejudice the federal-law claims against San Diego County Counsel Lonnie Eldridge (MTD Order at 12), District Attorney Summer Stephan is the only remaining San Diego County defendant in the FAC (FAC ¶ 26).

893. *Id.* ¶ 248. The three state-law claims allege that the adoption of AB 893 disrupted the economic relationships that B&L Productions, Inc. ("B&L") had with the District and with its vendors. *See, e.g.*, *id.* ¶ 258. Plaintiffs seek declaratory and injunctive relief for their § 1983 claims, and punitive and nominal damages for their state-law claims. *Id.* ¶¶ 24-25, 28; *see also id.*, Prayer for Relief, ¶¶ 1-11.

The background sections in State Defendants' prior motion to dismiss remain relevant and are not repeated in full here given this Court's familiarity with the case. *See* ECF No. 17-1 at 2-6. The Plaintiffs remain the same: one gun show promoter, four gun show attendees, four gun show vendors, and three nonprofit organizations. FAC ¶¶ 12-23. Plaintiffs continue to describe gun shows at the Fairgrounds as a "celebration of America's 'gun culture,'" that "just happen[s] to include the exchange of products and ideas, knowledge, services, education, entertainment, and recreation related to the lawful uses of firearms." *Id.* ¶¶ 66, 67. Even when attendees or vendors are not interested in the sale of firearms or ammunition, "[p]articipating in 'gun culture' is an important reason people attend" gun shows, as is discussing historical firearms and recent laws. *Id.* ¶¶ 68-69, 73.

Even though AB 893 prohibits only the sale of firearms and ammunition—not gun shows or other firearms-related activity—and more than 60 percent of the vendors at B&L gun shows do not sell firearms or ammunition (FAC ¶ 74), Plaintiffs continue to allege that AB 893 *indirectly* prohibits gun shows, and thus all the speech that occurs during such shows (*id.* ¶¶ 151-153). Plaintiffs also assert a theory they argued, but did not allege, when defending their original Complaint. Specifically, they allege that AB 893 *directly* prohibits speech because "any real-world 'sale' [of firearms or ammunition] *necessarily* involves speech." *Id.* ¶ 144 (italics in original). Plaintiffs aver, "[o]n information and belief," that AB 893 also prohibits "the speech or expressive conduct necessary to initiate or engage in the sale of firearms or ammunition, including offering such products for sale." *Id.* ¶ 145.

Plaintiffs for the first time claim that AB 893 violates a Second Amendment right to sell and purchase firearms and ammunition. FAC ¶¶ 38-42, 238-245. As to the equal protection claim, Plaintiffs added a discussion of equal protection to their FAC separate from the claim itself (see FAC ¶¶ 43-46, 246-252), but the allegations are substantially the same as those in the Complaint. The state-law claims remain nearly identical as those raised in the Complaint, except Plaintiffs now allege that supplemental jurisdiction exists pursuant to 28 U.S.C. § 1367. FAC ¶ 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 FIRST AMENDMENT CLAIMS STILL FAIL TO STATE A CLAIM

A. As This Court Has Previously Held, AB 893 Does Not Regulate Speech or Expressive Conduct

As with their Complaint, Plaintiffs fail in the FAC to meet their burden "to demonstrate that the First Amendment even applies." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). They assert two theories as to how AB 893 allegedly regulates speech, the first of which this Court explicitly rejected.

The first theory is that AB 893 indirectly bans gun shows, and all the speech that occurs at such events, because prohibiting firearm and ammunition sales "has the effect of banning gun shows at the Fairgrounds." FAC ¶ 152. This is identical to the First Amendment theory asserted in the original Complaint that this Court previously rejected. *Compare id. with* Compl. ¶ 125. State Defendants argued, and this Court agreed, that "AB 893 merely prohibits the sale of guns, and the sale of guns is not 'speech' within the meaning of the First Amendment." MTD Order at

13; *see also* Cal. Food & Agric. Code § 4158(a). As this Court noted, 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*"). And, "AB 893 covers no more than the simple exchange of money for a gun or ammunition." MTD Order at 13.

Nonetheless, Plaintiffs still: (1) acknowledge that AB 893 does not itself prohibit gun shows (FAC ¶ 152); (2) assert that AB 893 has the "practical effect" of prohibiting gun shows at the Fairgrounds because firearm and ammunition sales are an "essential function" of gun shows, which would become "unprofitable and economically infeasible" without such sales (*id.* ¶¶ 76, 151-152); and (3) admit that more than 60 percent of vendors at the B&L gun shows do not sell firearms and ammunition (*id.* ¶ 74). 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. And, 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 v. King*, 319 F.3d 1185, 1191 (9th Cir. 2003) ("*Nordyke 2003*") ("It is difficult to argue then that making the sale (non[-]speech) more difficult by barring possession (non-speech) infringes speech."); *see also 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."); *Mobilize the Message, LLC v. Bonta*, No. 21-55855, 2022 WL 6632087, at *8 (9th Cir. Oct. 11, 2022) (holding that worker classification statute did not infringe First Amendment rights, even if it classified doorknockers and signature gatherers as employees, indirectly impacting the employer's speech due to increased costs and loss of such workers). This theory fails as it did before.

The second First Amendment theory is that AB 893 directly prohibits the "speech or expressive conduct necessary to initiate or engage in the sale of firearms or ammunition, including offering such products for sale." FAC ¶ 145. This is not so much a new theory as it is a detailed restatement of a contention Plaintiffs made when opposing the prior motion to dismiss. *See* ECF No. 28 at 6 ("AB 893 directly bans—it does not merely regulate—otherwise lawful speech related to the sale of legal firearms and ammunition."). Plaintiffs assert that AB 893 prohibits speech "necessary for any sale" such as the "communication of an intent to sell or buy" and "offers to sell or buy." FAC ¶ 146. Yet, Plaintiffs point to no language in AB 893 demonstrating that it prohibits offers for sale. *Id.* ¶ 145. Rather, AB 893's plain language prohibits "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." Cal. Food & Agric. Code § 4158(a).

To the extent this theory asserts that sales are inextricably intertwined with speech, such a contention fails for multiple reasons. Under the inextricably intertwined theory, when commercial speech is inextricably intertwined with non-commercial speech, the entirety of the speech is entitled to non-commercial speech protections. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989); *Hunt v. City of Los Angeles*, 638 F.3d 703, 715-716 (9th Cir. 2011). But, as stated previously, the sale of a firearm or ammunition is not even commercial speech; it is not speech at all. *Nordyke 1997*, 110 F.3d at 710. Also, "a gun itself is not speech," nor is the possession of a gun generally. *Nordyke 2003*, 319 F.3d at 1189. There is thus no commercial speech with which the non-commercial speech may intertwine. This intertwined theory also does not apply when "the two components of speech can be easily separated." *Hunt*, 638 F.3d at 715. Courts have repeatedly rejected the argument that the *sale* of a regulated item is inextricably intertwined with *speech pertaining to* that item. *Id.* at 716-717 (the plaintiffs' sale of shea butter and incense was not inextricably intertwined with the spiritual messages they

incorporated into their sales pitches); *see also Fox*, 492 U.S. at 474 (prohibiting the sale of housewares in a college dorm did not "prevent[] the speaker from conveying, or the audience from hearing" non-commercial speech about home economics). It is also not "impossible" (*id.*) under AB 893 for Plaintiffs to express their views about "gun culture" (FAC ¶ 65) without firearm sales also occurring at gun shows. AB 893 does not prohibit offers for sale, discussions about product availability, or conversations about product suitability for specified uses. And as Plaintiffs admit, AB 893 does not prohibit possession of firearms and ammunition at the Fairgrounds. *Id.* ¶ 121.

Accordingly, neither of Plaintiffs' First Amendment theories meets the initial threshold of showing that AB 893 regulates speech. AB 893's plain language and legislative findings show that it prohibits only non-speech conduct—the sale of firearms and ammunition.

B. AB 893 Passes Multiple Levels of Scrutiny

1. AB 893 Satisfies Rational Basis Review

Because AB 893 does not regulate speech, it is subject to rational basis review, which it satisfies. *See Retail Digit. Network, LLC v. Prieto*, 861 F.3d 839, 847 (9th Cir. 2017). 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. FAC, 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 safety for gun show attendees and for the surrounding communities of the Fairgrounds. 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).

2. 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, 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 Cal., 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." FAC ¶¶ 86, 92. The various events the Fairgrounds allegedly hosts (*id.* ¶ 85) demonstrate 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; *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 n.8 (9th Cir. 1984). Being a "state-owned property maintained and

opened for use by the public" (FAC ¶ 84) does not convert the Fairgrounds into a public forum or designated public forum. *See United States v. Grace*, 461 U.S. 171, 177 (1983) (public forums); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) (designated public forums).

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. AB 893 satisfies this deferential inquiry because its public safety purpose is to mitigate gun violence by preventing illegal firearm and ammunition transactions at gun shows. *See Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1223 (9th Cir. 2003). AB 893 is also viewpoint neutral because it applies to any event on the Fairgrounds, not just to gun shows. Cal. Food & Agric. § 4158. The only exception to AB 893 is for a "gun buyback event held by a law enforcement agency" (*id.*), which is consistent with AB 893's public safety purpose.

3. AB 893 Does Not Ban Protected Commercial Speech

Although this Court held that firearm sales do not constitute commercial speech (MTD Order at 13), AB 893 would also satisfy the test for commercial speech regulations. 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. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561-563 (1980). 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 does not prohibit offers. In any event, even an "offer" is not protected 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.* But

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*, 861 F.3d at 846 (notwithstanding ongoing debates about its clarity, the *Central Hudson* test still applies). There is a substantial government interest in protecting people from crimes resulting from illicit firearm transactions and AB 893 directly advances this interest by eliminating all firearm transactions. *See Nordyke 1997*, 110 F.3d at 713; *Cent. Hudson*, 447 U.S. at 566. AB 893's exemption for gun buyback events reasonably fits with its public safety interest because such events can help reduce gun violence.

4. 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 intentionally ends gun shows at the Fairgrounds (FAC ¶ 188), but AB 893's legislative findings do not disapprove of "gun culture" or 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. Cal. Food & Agric. § 4158(a). AB 893 would be content-based, and thus trigger strict scrutiny, only if it "hits speech because it aimed at it." *Nordyke v. King*, 644 F.3d 776, 792 (9th Cir. 2011) ("*Nordyke 2011*").[2] That is not the case here. If gun shows cannot be held at the Fairgrounds because they would be unprofitable (FAC ¶ 76), that is a decision made by gun

[2] 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*")

show promoters and not one mandated by AB 893. Thus, to the extent AB 893 impacts any non-commercial speech, it triggers only intermediate scrutiny.

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.*, FAC ¶¶ 106, 119, 129-131, 141, 154-156) do not change this result. The views of one official "do not necessarily bear any relation to the aims and interests" of the legislative body, and the analysis must be limited to "the statute in terms of the interests the state declared." *Nordyke 2011*, 644 F.3d at 792; *see also United States v. O'Brien,* 391 U.S. 367, 384 (1968). 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." AB 893 is accordingly content-neutral. It would also survive intermediate scrutiny under *O'Brien*, 391 U.S. at 377, because for the reasons described *ante*, in Sections I.B.1 through I.B.3, AB 893 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).[3]

C. The Prior Restraint and Associational Rights Claims Fail

Plaintiffs essentially abandoned their prior restraint and associational rights claims when opposing the prior motion to dismiss. ECF No. 29 at 9, n.9. Nevertheless, the claims fail because: (1) the Penal Code, not the District's alleged "unfettered discretion," determines what constitutes a firearm or ammunition sale (FAC ¶¶ 58, 224); and (2) there is no "generalized right of 'social association'" (*City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)), such as attending gun shows. *See also* ECF No. 17-1 at 21-22.

[3] In addition, the Second Amendment Foundation lacks standing entirely, because there is no allegation that it distributes materials at Fairgrounds' gun shows or that its members have attended the same. FAC ¶ 23; *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).

II. THE ADDITION OF THE SECOND AMENDMENT CLAIM IS IMPROPER AND, IN ANY EVENT, FAILS TO STATE A CLAIM FOR RELIEF

A. The New Second Amendment Claim Exceeds the Scope of Leave Granted By This Court

The original Complaint raised § 1983 claims under only the First Amendment and Equal Protection Clause, but Plaintiffs implied in a footnote that they could assert a claim under the Second Amendment because they alleged "in good faith, that the right to keep and bear arms necessarily includes the rights to purchase and sell them," citing *Teixeira v. Cnty. of Alameda*, 873 F.3d 670 (9th Cir. 2017). Compl. ¶ 58, n.3. Yet, Plaintiffs affirmatively stopped short of raising such a claim. They do so now in their FAC, for the first time, without leave from the Court to add a new claim.

When this Court granted State Defendants' motion to dismiss with leave to amend, it limited the scope of an amended complaint to "curing the deficiencies noted" in the order "where leave is granted." MTD Order at 16. This Court granted leave in the following areas: (1) the individual-capacity claims against Governor Newsom, Secretary Ross, and Attorney General Bonta; (2) the First Amendment and equal protection claims against the State Defendants and San Diego County Defendants; and (3) the state-law tort claims against the State Defendants and San Diego County Defendants. *Id.* at 11-15. Plaintiffs were thus limited to curing deficiencies in these three areas. No leave was granted to add an entirely new claim. At this point in the case, Plaintiffs can amend their pleading only with "the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Plaintiffs have not secured consent or obtained the court's leave to assert the Second Amendment claim in the FAC. Moreover, the Second Amendment claim does nothing to cure a deficiency in their First Amendment, equal protection, state-law tort, or individual-capacity claims. Instead, the Second Amendment claim adds a new theory of liability to the case that is wholly separate from the free speech and tort theories that were asserted in the original Complaint.

Nothing prevented Plaintiffs from raising the Second Amendment claim in the Complaint and the basis for the claim here is the same as that explained in the previously-described footnote from the Complaint. But after failing to defeat the first motion to dismiss, Plaintiffs now seek to avoid or delay another dismissal by adding an entirely new theory of liability. The Second Amendment claim exceeds the scope of this Court's leave to amend and accordingly should be dismissed. *See Hardisty v. Moore*, No. 11-cv-1591-AJB-BLM, 2012 WL 4845548, at *4 (S.D. Cal. Oct. 9, 2012) (dismissing a new federal-law claim because adding a new claim exceeded the court's order granting leave to amend).

B. The Supreme Court's Decision in *Bruen*

Other than this Court's dismissal order, the only relevant change in the law since the filing of the original Complaint is the issuance of the Supreme Court's opinion in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, __ U.S. __, 142 S. Ct. 2111 (2022). The FAC cites *Bruen* (FAC ¶ 40), and *Bruen* is presumably the reason why Plaintiffs now raise a Second Amendment claim when they did not do so before. But even if this Court were to conclude this new claim falls within the scope of its prior leave, dismissal is still warranted under *Bruen*.

In *Bruen*, the Supreme Court set forth a new analytical framework for Second Amendment claims. The Court rejected the use of means-end scrutiny in the "two-step test" that most federal courts of appeals had adopted for resolving those claims. *Bruen*, 142 S. Ct. at 2126-2127. Instead, *Bruen* held that courts must initially assess whether the "Second Amendment's plain text covers" an individual's "proposed course of conduct," in other words, whether the regulation at issue prevents any "People" from "keep[ing]" or "bear[ing]" "Arms." *Id.* at 2126, 2134. If the answer is no, there is no violation of the Second Amendment. If the answer is yes, the government can still justify its regulation—and overcome a constitutional challenge—by showing that the challenged law is "consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130.

While *Bruen* announced a new rubric for analyzing Second Amendment claims, it also made clear that governments may continue to adopt reasonable gun safety regulations. The Court recognized that the Second Amendment is not a "regulatory straightjacket." *Bruen*, 142 S. Ct. at 2133. Nor is it a right to "keep and carry any weapon whatsoever in any manner whatsoever and for whatever purposes." *Id.* at 2128 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)). And Justice Kavanaugh—joined by Chief Justice Roberts—wrote separately to underscore the "limits of the Court's decision." *Id.* at 2161 (Kavanaugh, J., concurring). Justice Kavanaugh reiterated *Heller*'s observation that "the Second Amendment allows a 'variety' of gun regulations." *Id.* at 2162 (quoting *Heller*, 554 U.S. at 636). And he emphasized that the "presumptively lawful measures" that *Heller* identified—including laws "imposing conditions and qualifications on the commercial sale of arms," "longstanding prohibitions on the possession of firearms by felons and the mentally ill," laws "forbidding the carrying of firearms in sensitive places," and laws prohibiting the keeping and carrying of "dangerous and unusual weapons"—remained constitutional, and that this was not an "exhaustive" list. *Id.* at 2162 (quoting *Heller*, 554 U.S. at 626-627, 627 n.26).[4]

C. The Second Amendment's Plain Text Does Not Confer an Independent Right to Sell Firearms and Plaintiffs Insufficiently Allege That AB 893 Meaningfully Restricts Their Access to Firearms and Ammunition

The gravamen of Plaintiffs' Second Amendment claim is that the Second Amendment protects the "right to buy and sell firearms and ammunition necessary for the effective operation of those firearms," and that AB 893 "deprives Plaintiffs of their right to access firearms and ammunition." FAC ¶¶ 240-243. Plaintiffs

[4] Justice Kavanaugh's observations in concurrence, with which Chief Justice Roberts joined, warrant special consideration because his and the Chief Justice's votes were necessary to secure a majority for the lead *Bruen* opinion. *See also Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring) ("Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kinds of weapons that people may possess.").

previously cited the Ninth Circuit's decision in *Teixeira* as support for a similar allegation in the Complaint (Compl. ¶ 58, n.3), but not so in the FAC. *Teixeira* is instructive here, but it undercuts, rather than supports, Plaintiffs' claim.

In *Teixeira*, a business partnership sought to open a gun store in an unincorporated area of Alameda County. *Teixeira*, 873 F.3d at 673-674. Before opening the store, the partnership had to obtain a conditional use permit from the county and comply with a county zoning ordinance. *Id.* The ordinance required that any business selling firearms be at least 500 feet away from a residentially zoned district, school, other gun store, and other specified properties. *Id.* Because the planned location for the partnership's gun store was less than 500 feet away from a residentially zoned district, the conditional use permit was ultimately denied. *Id.* at 674-676. The partnership was unable to identify another suitable location in unincorporated Alameda County and subsequently sued the county claiming that the ordinance infringed the Second Amendment rights of the partnership to sell firearms and the rights of the potential customers to buy firearms. *Id.* at 673, 676.

An en banc panel of the Ninth Circuit held that the county zoning ordinance "survive[d] constitutional scrutiny." *Teixeira*, 873 F.3d at 673. The Ninth Circuit separately analyzed the claims of a Second Amendment right to sell firearms and a right to purchase firearms. As to the former, the Ninth Circuit conducted a textual and historical analysis of the Second Amendment to evaluate whether there was a freestanding right to sell firearms. *Id.* at 681-683. Beginning with the Second Amendment's text, the Court concluded that "[n]othing in the specific language of the Amendment suggests that sellers fall within the scope of its protection." *Id.* at 683. Specifically, the operative language of "keep" and "bear" arms confers a right to have and carry weapons, but does not "confer[] an independent right to sell or trade weapons." *Id.* The Court's historical analysis "confirm[ed] that the right to sell firearms was not within" the historical understanding of the Second Amendment's scope. *Id.* After highlighting the relevant historical evidence, the

Ninth Circuit concluded that "no historical authority suggests that the Second Amendment protects an individual's right to sell a firearm unconnected to the rights of citizens to 'keep and bear' arms." *Id.* at 684-687.

As to whether the ordinance violated any right of potential customers to purchase firearms, the Ninth Circuit held that the complaint "did not adequately allege . . . that Alameda County residents cannot purchase firearms within the County as a whole, or within the unincorporated areas of the County in particular." *Teixeira*, 873 F.3d at 678. The "vague allegations" failed to show that the ordinance meaningfully restricted the ability of Alameda County residents to purchase firearms, and exhibits to the complaint indeed showed that residents could freely purchase firearms in the county. *Id.* at 679. The Ninth Circuit added that "gun buyers have no right to have a gun store in a particular location, at least as long as their access is not meaningfully constrained." *Id.* at 680.

The reasoning in *Teixeira* remains sound even after *Bruen*. The new analytical framework for Second Amendment claims set forth in *Bruen* eliminated the use of means-end scrutiny and focused the inquiry on the plain text and historical tradition of the Second Amendment. *Bruen*, 142 S. Ct. at 2127-2130. But, as described above, *Teixeira*'s reasoning did not rely on means-end scrutiny. Rather, the reasoning relied on the Second Amendment's text and historical record, as well as the legal sufficiency of the allegations at issue. *Teixeira*, 873 F.3d at 678-687.[5]

The reasoning from *Teixeira* applies similarly to Plaintiffs' Second Amendment claim here. First, to the extent that Plaintiffs assert AB 893 violates their Second Amendment right to sell firearms and ammunition, the Amendment's

[5] A court in this District substantively relied on *Teixeira* after *Bruen*. *United States v. Tilotta*, No. 3:19-cr-04768-GPC, 2022 WL 3924282, at *5 (S.D. Cal. Aug. 30, 2022). There, a federal firearms licensee moved to dismiss his indictment for various criminal charges, arguing that the federal regulatory scheme for the transfer of firearms violated the Second Amendment pursuant to *Bruen*. *Id.* at *1. The court rejected the argument, citing *Teixeira* and explaining that "post-*Heller*, the Ninth Circuit has stated the text of the Second Amendment does not include the right to sell or trade weapons." *Id.* at *5.

plain text does not cover a standalone right to sell firearms. *See Teixeira*, 873 F.3d at 683; *Tilotta*, 2022 WL 3924282, at *5-6. *Bruen* explained that *Heller*'s textual analysis demonstrated the Second Amendment protects the "right to possess and carry weapons in case of confrontation." *Bruen*, 142 S. Ct. at 2127, quoting *Heller*, 554 U.S. at 592. But such a right "does not imply a further right to sell and transfer firearms." *Tilotta*, 2022 WL 3924282, at *5. The Supreme Court has thrice made clear that its Second Amendment opinions "should not be taken to cast doubt . . . on laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-627; *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 787 (2010); *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring). AB 893, which prohibits the sale of firearms on a state-owned property, falls into such a category of laws. The proposed conduct is thus not protected and there is no need to review the relevant historical evidence. *Tilotta*, 2022 WL 3924282at *5-6.[6]

As to Plaintiffs' contention that AB 893 infringes their Second Amendment right to buy and access firearms, they have not plausibly alleged that AB 893 impedes them from purchasing a firearm or ammunition at a place other than a gun show at the Fairgrounds. *See Teixeira*, 873 F.3d at 673, 678-680. Plaintiffs allege that gun shows at the Fairgrounds are a "convenient forum" for Californians to buy firearms, but not that such gun shows are the only location available to them. FAC ¶ 2. Nor could Plaintiffs assert that Fairgrounds gun shows are the only place where they could purchase firearms or ammunition. The very nature of gun shows is that they are a temporary marketplace during specified dates. *See* FAC ¶¶ 74, 91; *id.*, Exh. 6 at 53 (gun shows at the Fairgrounds occur about five times per year). A gun show is not akin to a brick-and-mortar gun store with a permanent location like that at issue in *Teixeira* or an online gun store. Thus, even before AB 893, on the many days throughout the year when there was no gun show at the Fairgrounds,

[6] If the Court disagrees, then State Defendants request an opportunity to compile the relevant historical record to supplement the historical evidence examined in *Teixeira*.

Plaintiffs presumably went to other locations to purchase firearms and ammunition. Plaintiffs fail to allege that AB 893 meaningfully restricts their access to purchasing firearms and ammunition at other locations, including the ones they presumably used during the days there was no gun show at the Fairgrounds.

The four individual Plaintiffs also all appear, by their own allegations, to already own firearms. Plaintiff Bardack is a target shooter, Plaintiff Dupree is a competitive shooter, and Plaintiff Irick hunts. FAC ¶¶ 13, 15-16. Plaintiffs Bardack, Diaz, and Dupree have all purchased ammunition at gun shows in the past (*id.* ¶¶ 13-15); presumably, that means they possess a firearm. As to the vendor Plaintiffs, Plaintiff Solis has previously conducted private sales of firearms and ammunition, while Plaintiffs Walsh and LAX Ammo sell ammunition. *Id.* ¶¶ 18, 20. One of the nonprofit Plaintiffs, South Bay Rod & Gun Club, is a shooting club. *Id.* ¶ 22. Because it is apparent from these allegations that Plaintiffs possess firearms and ammunition, these allegations demonstrate the opposite of what Plaintiffs must show. In other words, these allegations show that Plaintiffs indeed do have access to firearms and ammunition despite AB 893.

Plaintiffs Bardack and Dupree allege that the "nearest vendor that could serve [their] particular ammunition needs is" two hours (Bardack) or several hours (Dupree) away from their homes. FAC ¶¶ 13, 15. But this falls short of alleging they lack access to ammunition and fails to describe what their "particular ammunition needs" are or whether the vendors at the Fairgrounds always met such needs. Therefore, these are nothing more than the type of conclusory and vague allegations that were insufficient in *Teixeira*, 873 F.3d at 678-679.[7]

Beyond the vague allegation that AB 893 "deprives Plaintiffs of their right to access firearms and ammunition" (FAC ¶ 243), the FAC fails to describe how AB 893 meaningfully blocks Plaintiffs' ability to purchase firearms and ammunition.

[7] Generally, ammunition must be purchased through an ammunition vendor, but any California-licensed firearm dealer is automatically deemed to be an ammunition vendor. Cal. Pen. Code §§ 16151, 30352, 30370.

As made clear in *Teixeira*, it is not enough to allege that Plaintiffs cannot purchase firearms and ammunition at a specified location—here, the Fairgrounds, and in *Teixeira*, a particular gun store. *Teixeira*, 873 F.3d at 680. Rather, they must allege that AB 893 "meaningfully inhibits" their access to firearms and ammunition. *Id.* For the reasons previously described, it cannot be reasonably inferred from these conclusory allegations that Plaintiffs lack the ability to purchase firearms and ammunition at locations other than the Fairgrounds, particularly when gun shows there occurred on only certain dates during the year. This claim accordingly should be dismissed.

III. THE EQUAL PROTECTION CLAIM FAILS TO STATE A CLAIM

When this Court previously dismissed Plaintiffs' equal protection claim, it held that the claim "rise[s] and fall[s] with the First Amendment claims." MTD Order at 13-14. This Court also concluded that Plaintiffs "do not allege membership in a protected class." *Id.* The FAC alleges nothing that should change these conclusions.[8] *See generally* FAC ¶¶ 43-46, 246-252. Because the FAC, like the Complaint, fails to plausibly allege any First Amendment violation by AB 893, the FAC "also fails to state equal protections claims for differential treatment that trenched upon a fundamental right." MTD Order at 14.[9]

[8] If the Court disagrees, then State Defendants incorporate the arguments made in their prior motion to dismiss. ECF No. 17-1 at 22-24.

[9] Although the allegations within the equal protection (i.e. Seventh) claim focus on differential treatment for First Amendment-related activities (speech, assembly, association), there is a single allegation elsewhere in the FAC asserting that the Equal Protection Clause "necessarily includes exercising rights to buy and sell Second Amendment artifacts . . . at any public facility owned, operated, or managed by or on behalf of any state or subdivision thereof." *Compare* FAC ¶¶ 246-262 *with id.* ¶ 46. Not only is this allegation conclusory, but it also stops short of contending that AB 893 results in differential treatment based on a Second Amendment right. Even if the FAC did so, the Second Amendment claim must be dismissed for the reasons explained *ante*, in Section II, and the equal protection claim would accordingly fall as well.

IV. THE STATE-LAW TORT CLAIMS SHOULD BE DISMISSED

A. Subject Matter Jurisdiction is Lacking for the State-Law Claims

As done previously, this Court should dismiss the state-law tort claims for lack of subject matter jurisdiction. MTD Order at 15. Plaintiffs' new allegation that exercising supplemental jurisdiction is appropriate (FAC ¶ 10) is insufficient because the § 1983 claims fail for the reasons explained above. Once the § 1983 claims are all dismissed, the "balance of the factors of 'judicial economy, convenience, fairness, and comity'" do not tip in favor of exercising supplemental jurisdiction over the state-law claims. *See Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 911 (9th Cir. 2011). This is especially true because the state-law claims are the only claims raised against Governor Newsom and Secretary Ross, and the only claims asserted against Attorney General Bonta in an individual capacity. Without the § 1983 claims, this case would solely concern the interpretation of state tort law as applied to three state officials for individual-capacity punitive damages. Such a case falls squarely within the statutory basis for declining supplemental jurisdiction. *See* 28 U.S.C. § 1367(c)(3).

B. State Statutory Immunities and the Eleventh Amendment Bars These Tort Claims

Plaintiffs previously conceded that Governor Newsom, Secretary Ross, and Attorney General Bonta "likely have no personal tort liability" due to various state law immunities; nevertheless, they alleged three tort claims against them in their individual capacities. *Compare* ECF No. 28 at 24, n.11 *with* FAC ¶¶ 24-25, 28, 253-280. When opposing State Defendants' motion to dismiss the Complaint, Plaintiffs "concede[d]" that Attorney General Bonta likely lacked personal tort liability for AB 893's adoption (because he took office after the statute took effect) and enforcement (because a "public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law" (Cal. Gov't Code § 820.4)). ECF No. 28 at 24, n.11. Plaintiffs also "concede[d]" there was likely no

personal tort liability for Governor Newsom and Secretary Ross "because they were engaged in discretionary acts" and thus immune under state law. *Id.*, citing Cal. Gov't Code § 820.2 ("[A] public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."). These concessions undercut any basis for Plaintiffs to continue asserting these claims against Governor Newsom, Secretary Ross, and Attorney General Bonta.

Another state statutory immunity also bars the state-law tort claims. Specifically, assuming that AB 893 is unconstitutional (which it is not for the reasons previously explained), a public employee is not civilly liable for enforcing an unconstitutional statute if the enforcement is in good faith and without malice. Cal. Gov't Code § 820.6;[10] *see also O'Toole v. Superior Court*, 140 Cal. App. 4th 488, 503 (2006). Plaintiffs do not allege in their tort claims that any of the State Defendants acted with malice in relation to "adopting and enforcing AB 893."[11] *See, e.g.*, FAC ¶ 257. Rather, Plaintiffs merely allege the State Defendants engaged in an "intentional act" or without "reasonable care" to disrupt Plaintiffs' prospective economic advantage and contract. *Id.* ¶¶ 257, 267, 276. But an intentional act or negligence is not the same as malice, and is thus insufficient to meet the standard set by Government Code section 820.6. *See also O'Toole*, 140 Cal. App. 4th at 503 (describing the "broad scope of this immunity"). The allegations thus fall short in precluding application of this immunity.

The Eleventh Amendment also bars the individual-capacity tort claims here. This Court previously dismissed all individual-capacity claims against Governor

[10] This section states: "If a public employee acts in good faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid or inapplicable, he is not liable for an injury caused thereby except to the extent that he would have been liable had the enactment been constitutional, valid and applicable." An "enactment" includes a statute. Cal. Gov't Code § 810.6.

[11] This immunity applies equally to the District because "[e]xcept as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." Cal. Gov't Code § 815.2.

Newsom, Secretary Ross, and Attorney General Bonta because Plaintiffs "alleged no facts that relate to individual capacity—that is, they have treated individual capacity as a 'mere pleading device.'" MTD Order at 10-11. In other words, because the "heart of Plaintiffs' claims is the passage of AB 893, [and] this was done only in State Defendants' official capacities pursuant to state law" (*id.*), Plaintiffs were in reality using the individual-capacity claims as another vehicle to sue the "official's office." *See Hafer v. Melo*, 502 U.S. 21, 26-27 (1991); *Stivers v. Pierce*, 71 F.3d 732, 749 (9th Cir. 1995). This remains true for the individual-capacity claims in the FAC as well.

This Court provided Plaintiffs with leave to amend their individual-capacity claims, but they failed to make any meaningful changes. All Plaintiffs did was assert individual capacity in the context of the state-law claims and convert into allegations arguments they made in their opposition to the prior motion to dismiss about Governor Newsom and Secretary Ross. (*Compare* FAC ¶¶ 24, 28 *with* ECF No. 28 at 17-19.) But this Court already evaluated and rejected these arguments that are now disguised as allegations. *See* MTD Order at 5-9. The gravamen of Plaintiffs' claims remains the adoption and enforcement of AB 893, and thus the individual-capacity claims are "a mere pleading device." *Hafer*, 502 U.S. at 27; *Grunert v. Campbell*, 248 F. App'x 775, 778 (9th Cir. 2007).

C. There is No Alleged Statutory Basis for the Tort Claims

As was true for the Complaint, the lack of a statutory basis for the state-law claims is another basis to dismiss them here. The gravamen of the three 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.*, FAC ¶ 258. 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 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.*, FAC ¶¶ 256-257, 266-267. But that "is a conclusion of law, not an allegation of fact." *Searcy*, 177 Cal. App. 3d at 802. Moreover, the identification of California's Government Claims Act ("GCA") in the FAC is not a sufficient statutory basis. *See, e.g.*, FAC ¶ 260. There must be a statute or enactment, *other than* the GCA, that authorizes the lawsuit. *Miklosy v. Regents of Univ. of Cal.*, 44 Cal.4th 876, 899 (2008). The Eighth, Ninth, and Tenth claims accordingly must be dismissed. *See, e.g.*, *Herd v. Cnty. of San Bernardino*, 311 F. Supp. 3d 1157, 1171 (C.D. Cal. 2018).

D. 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).[12] Plaintiffs allege they presented their claims to DGS on August 2, 2021. FAC ¶ 180; *see also id.*, Exh. 13. Because the tort claims are rooted in a facial challenge to the *adoption* of AB 893 (*id.* ¶¶ 257, 267, 276), they began accruing when Governor Newsom signed AB 893 into law on October 11, 2019 (*id.* ¶ 140). *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

[12] 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*, 73 Cal. App. 5th 417, 422 (2021).

became operative at a later date). Plaintiffs were clearly aware of when AB 893 became law because an April 2020 settlement agreement repeatedly acknowledged this (FAC, Exh. 5 at 35, 38), and some Plaintiffs 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.[13]

CONCLUSION

Accordingly, the Court should dismiss the FAC without leave to amend.

Dated: October 31, 2022

Respectfully submitted,

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[13] 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. A-E.