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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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| **B&L PRODUCTIONS, INC., d/b/a CROSSROADS OF THE WEST, et al.,**<br><br>Plaintiffs,<br><br>**v.**<br><br>**GAVIN NEWSOM, in his official capacity as Governor of the State of California and in his personal capacity, et al.,**<br><br>Defendants. | 3:21-cv-01718-AJB-DDL<br><br>**REPLY BRIEF IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT**<br><br>Date: February 23, 2022<br>Time: 2:00 p.m.<br>Dept: 4A<br>Judge: The Honorable Anthony J. Battaglia<br>Trial Date: None<br>Case Filed: 10/4/2021 |

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## INTRODUCTION

The State Defendants' Motion to Dismiss explains why Plaintiffs' First Amended Complaint ("FAC") fails to cure the various legal deficiencies identified by this Court. Instead of rebutting this showing by highlighting new allegations or theories, Plaintiffs ignore the reasoning of this Court's prior order and repackage theories previously rejected. Specifically, Plaintiffs' First Amendment claims are still built on the incorrect premise that AB 893 regulates speech. As Plaintiffs concede, AB 893 explicitly prohibits only the sale of firearms and ammunition at the Del Mar Fairgrounds ("Fairgrounds"), and this Court has held that the law does not ban other conduct, even indirectly. Further, as this Court and the Ninth Circuit have held, prohibiting such sales does not restrict speech. Contrary to Plaintiffs' continued contentions, AB 893 does not prohibit gun shows. AB 893 does not prevent Plaintiffs or others from gathering to celebrate "gun culture," nor does it prevent vendors from offering goods other than firearms and ammunition at gun shows, as over 60 percent of vendors do currently. And even if AB 893 would make gun shows less profitable, as Plaintiffs assert, that does not convert AB 893 to a speech restriction. The equal protection claim also fails for the same reason.

The new Second Amendment claim does nothing to cure the deficiencies previously identified by this Court, and thus exceeds the scope of leave to amend. Even if the Court chooses to consider this new claim, the Second Amendment does not confer an independent right to sell firearms, particularly on public fairgrounds, and Plaintiffs fail to point to any allegations that AB 893 meaningfully restricts access to firearms. Plaintiffs concede their state-law tort claims could survive, at most, against only the 22nd District Agricultural Association ("District"), but those claims fail against the District as well for the reasons set out below. Dismissal of all claims is again warranted, and with prejudice.[1]

[1] Plaintiffs mistakenly assert that State Defendants "admit[]" that a "ban on gun sales at a gun show, is in fact an indirect ban on gun shows." Opp. 1. In doing so, Plaintiffs cite the pages in the State Defendants' Motion that merely describe, but do not agree with, Plaintiffs' legal theory.

## I. AB 893 DOES NOT REGULATE SPEECH AND, REGARDLESS, WOULD SURVIVE REVIEW AT ANY LEVEL OF SCRUTINY

### A. Failing to Address This Court's Prior Order, Plaintiffs Again Fall Short in Their Burden to Show AB 893 Impacts Speech

Plaintiffs' defense of their First Amendment claims largely ignores this Court's prior ruling and the State Defendants' arguments. They thus again fail to meet their burden of showing that AB 893 regulates speech at all. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

Indeed, Plaintiffs do not once mention or address this Court's previous holding that "AB 893 merely prohibits the sale of guns, and the sale of guns is not 'speech' within the meaning of the First Amendment." Order Granting Motions to Dismiss ("MTD Order"), ECF No. 35 at 13. Rather than respond to this point, they concede—again—that AB 893 does not expressly ban gun shows. Plaintiffs' Opposition to Motion to Dismiss ("Opp."), ECF No. 44 at 6, 9; *see also* ECF No. 28 at 4, 20. Knowing that AB 893's plain language undermines their claims, Plaintiffs continue to rely on the theory that AB 893 indirectly bans gun shows. Opp. 6, 8-9. But that is incorrect. This Court already rejected that theory when it explained that, "AB 893 covers no more than the simple exchange of money for a gun or ammunition." MTD Order at 13. Plaintiffs have not demonstrated why their theory is sufficient now when it failed before.

Instead, Plaintiffs try various forms of misdirection. They assert that AB 893 is "a scheme to knock out the commercial cornerstone of gun shows," Opp. 9, because "firearm and ammunition vendors are the backbone of the gun show business model" and "there is little financial incentive for them to attend" if sales cannot occur, Opp. 5. The contention that such vendors are the "backbone" of gun shows contradicts Plaintiffs' own allegation that more than *60 percent* of vendors at B&L gun shows *do not sell firearms or ammunition*. FAC ¶ 74. Moreover, Plaintiffs identify the faulty premise in their own theory; namely, that it is the "financial incentive[s]" of gun show vendors, not AB 893 itself, that could lead to

gun shows not being held at the Fairgrounds. *See* Opp. 5. AB 893 is not a speech restriction simply because it might impact the profitability of gun shows. State Defendants' Motion to Dismiss FAC ("Mot."), ECF 42-1 at 6; *see also* MTD Order 13; *Mobilize the Message, LLC v. Bonta*, 50 F.4th 928, 935-937 (9th Cir. 2022); *Nordyke v. King*, 319 F.3d 1185, 1191 (9th Cir. 2003) ("*Nordyke 2003*"). Plaintiffs emphasize the various forms of expressive conduct that occur at gun shows, Opp. 4-5, 10, but as Plaintiffs concede, AB 893 does not itself prevent Plaintiffs from conducting a gun show with such expressive conduct.

Plaintiffs attribute an ulterior motive to AB 893, highlighting one statement in a legislative bill analysis that AB 893 "would effectively terminate the possibility for future gun shows at the Del Mar Fairgrounds." Opp. 9, quoting FAC ¶ 154, & Exh. 7 at 60. Putting aside the fact the analysis defines a "gun show" as a "trade show for firearms," and does not specify whether AB 893 would eliminate gun shows without firearm sales, *id.*, Exh. 7 at 58, the Ninth Circuit has made clear that what matters is the "terms of the interests the state declared," not the "legislative history or stated motives of any legislator." *Nordyke v. King*, 644 F.3d 776, 792 (9th Cir. 2011) ("*Nordyke 2011*"); *see also United States v. O'Brien,* 391 U.S. 367, 384 (1968). Notably, AB 893's stated legislative findings do not mention an intent to end all gun shows at the Fairgrounds and even highlight how the Fairgrounds would consider the "feasibility of conducting gun shows for only educational and safety training purposes." FAC, Exh. 6 at 53-54.

The indirect ban theory thus fails as it did before, and Plaintiffs' other First Amendment theory fares no better. Plaintiffs surmise, with minimal detail, that the sale of firearms and ammunition is inextricably intertwined with speech. Opp. 10. They argue that it is "the business model of gun shows." Opp. 10. Yet, Plaintiffs fail to address how there is any commercial speech with which the non-commercial speech may intertwine when sales are not commercial speech at all. Mot. 7-8. Instead, Plaintiffs focus their efforts on asserting that "AB 893 is virtually identical

to the county's actions in" *Nordyke v. Santa Clara Cnty.*, 110 F.3d 707, 710 (9th Cir. 1997) ("*Nordyke 1997*"). Opp. 2. *Nordyke 1997* concerned an addendum to a lease contract that explicitly prohibited the "selling, *offering for sale*, supplying, delivering, or giving possession or control of firearms or ammunition" at the county fairgrounds. *Id.* at 708-709, italics added. The Ninth Circuit held that an offer to sell firearms constituted commercial speech, and that the contract provision did not pass constitutional muster under the applicable analytical framework. *Id.* at 710-713. But AB 893 does not apply to offers for sale, unlike the contract provision at issue in *Nordyke 1997*. The case indeed undercuts Plaintiffs' claims because the Ninth Circuit held that the "act of exchanging money for a gun," which is the conduct explicitly prohibited by AB 893, "is not 'speech' within the meaning of the First Amendment." *Id.* at 710.

Neither of Plaintiffs' theories pass muster, and they again cannot meet their initial burden of showing that AB 893 regulates speech. AB 893 prohibits only sales of firearms and ammunition, and such sales do not constitute speech.[2]

**B. In Any Event, AB 893 Survives Each Level of Scrutiny**

Because AB 893 does not regulate speech, it is subject to and easily satisfies rational basis review. Mot. 8-9. In the alternative, and contrary to Plaintiffs' contentions, AB 893 also satisfies the other possibly applicable review standards, including: (1) the reasonableness standard for a type of nonpublic forum called a limited public forum (Mot. 9-10)[3]; (2) the test for commercial speech regulations (Mot. 10-11); and (3) intermediate scrutiny (Mot. 11-12).

[2] Plaintiffs cursorily mention their association and prior restraint claims, arguing that the analysis for such claims is merged with that for free speech claims. Opp. 8. But Plaintiffs cite no authority for this proposition. Plaintiffs also have not responded to State Defendants' arguments regarding these claims, just as they failed to do so previously. *See* ECF No. 29 at 9, n.4, citing ECF No. 17-1 at 21-22. They have thus abandoned these claims, which accordingly should be dismissed. *Toranto v. Jaffurs*, 297 F. Supp. 3d 1073, 1104 (S.D. Cal. 2018) (dismissing claim as abandoned where plaintiff did not address the claim when opposing a motion).

[3] Plaintiffs wrongly assert that Judge Bencivengo held the Fairgrounds is a public forum. Opp. 11. Judge Bencivengo did not rule on this issue because the conclusion was the same "[r]egardless of the type of forum." FAC, Exh. 4 at 22.

Plaintiffs contend that AB 893 fails these levels of scrutiny because, in part, the alleged unspoken purpose behind AB 893 "is not public safety, but animus for America's gun culture." Opp. 12, 14. In Plaintiffs' view, AB 893's legislative findings further evidence this ulterior motive because the findings allegedly do not connect gun violence to gun shows. Opp. 14. But AB 893's findings indeed describe arrests at California gun shows generally—for illegal firearms trafficking and sales to prohibited persons—and note that 14 crimes were committed at Fairgrounds' B&L gun shows between 2013 and 2017. FAC, Exh. 6 at 54. Such findings are not even necessary for AB 893 to pass constitutional muster because "the government need not show that the litigant himself actually contributes to the problem that motivated the law he challenges." *Nordyke 2011*, 644 F.3d at 793; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989) ("[T]he validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case."). Plaintiffs overlook that, when applying intermediate scrutiny, courts are "weighing a legislative judgment, not evidence in a criminal trial," and will thus accord substantial deference to the Legislature's judgment in the face of policy disagreements and conflicting evidence. *Pena v. Lindley*, 898 F.3d 969, 979-980 (9th Cir. 2018) (citing First and Second Amendment caselaw). The Ninth Circuit has long held there is a substantial government interest in preventing gun violence resulting from illicit firearm and ammunition transactions—the same interest motivating AB 893. *Nordyke 1997*, 110 F.3d at 713.

Plaintiffs further assert that AB 893's sales prohibition is too broad to serve the public safety interest. Opp. 13, 15. But, as Plaintiffs allege, California has a "rigorous regulatory regime" for firearm and ammunition sales, FAC ¶ 47, and yet, illicit transactions still occur at gun shows. *Id.*, Exh. 6 at 54. This suggests that the regulatory regime in AB 893 addresses a particular concern. The Ninth Circuit has held that prohibiting firearm possession on county land was a "straightforward

response" to the risk of gun violence. *Nordyke 2011*, 644 F.3d at 794. The same is true for AB 893's prohibition of firearm and ammunition sales on public land. Dismissal of the First Amendment claims is thus warranted.

## II. PLAINTIFFS FAIL TO ADEQUATELY EXPLAIN WHY THE ADDITION OF THE SECOND AMENDMENT CLAIM WAS PROPER OR RESPOND TO ARGUMENTS AS TO WHY IT FAILS TO STATE A CLAIM FOR RELIEF

Plaintiffs broadly read this Court's prior order as giving them free rein to allege new theories. Opp. 16. But while this Court granted leave to amend, it did so on a limited basis, stating: "Should Plaintiffs choose to do so, *where leave is granted*, they must file an amended complaint *curing the deficiencies noted herein* by **August 31, 2022**." MTD Order at 16 (italics added). Leave was not granted to raise an entirely new claim, and the new claim does nothing to cure the deficiencies in the original Complaint that were identified by this Court. The new claim, which asserts an entirely new theory of liability, thus falls outside the scope of leave granted to Plaintiffs.

In any event, the FAC fails to sufficiently state a Second Amendment claim. First, Plaintiffs misapply the analytical framework set out in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, __ U.S. __, 142 S. Ct. 2111 (2022). While they acknowledge that a court must first assess whether the "Second Amendment's plain text covers an individual's conduct," *id.* at 2129-2130, Plaintiffs skip that step for the alleged right to sell firearms and ammunition at the Fairgrounds. Opp. 18-20. But the Ninth Circuit has reasoned that "[n]othing in the text of the [Second] Amendment, as interpreted authoritatively in [*District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)], suggests the Second Amendment confers an independent right to sell or trade weapons," particularly at the time and place of their choice. *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 683 (9th Cir. 2017). And, this textual analysis was confirmed by the historical evidence highlighted by the Ninth Circuit. *Id.* at 683-687. This reasoning, according to the Ninth Circuit, was "fully consistent with *Heller*." *Id.* at 687.

Plaintiffs try to reject this reasoning out of hand, postulating that *Teixeira* is of "questionable authority" because *Bruen* eliminated the use of means-end scrutiny for Second Amendment claims. Opp. 19. Specifically, Plaintiffs protest that *Teixeira* applied the two-step inquiry that *Bruen* held was "one step too many." *Bruen*, 142 S. Ct. at 2127; Opp. 19. But, as just described, *Teixeira*'s reasoning as to whether there is a standalone right to sell firearms was not based on means-end scrutiny. The reasoning was based on the first step of the former two-step inquiry, which *Bruen* held could be "broadly consistent with *Heller*," 142 S. Ct. at 2127, and in *Teixeira*, the Ninth Circuit carefully considered the historical record in analyzing whether the challenged law burdened conduct protected by the Second Amendment, *Teixeira*, 873 F.3d at 682. Because *Teixeira*'s "methodology centered on constitutional text and history," Plaintiffs cannot rely on *Bruen* to dismiss *Teixeira*'s analysis on this point.[4] *See Bruen*, 142 S. Ct. at 2128-2129.[5]

Plaintiffs also fail to explain how they have plausibly alleged that AB 893 infringes their Second Amendment right to buy and access firearms, particularly at the time and place of their choice. *See* Mot. 18-20. They contend that the "Second Amendment extends to the right to acquire" firearms and ammunition, Opp. 20, but fail to point to anything in the FAC alleging how AB 893 meaningfully restricts such conduct. Mot. 18-19, citing *Teixeira*, 873 F.3d at 678-679. In *Teixeira*, the Ninth Circuit rejected a would-be gun store owner's claim that a zoning ordinance violated the Second Amendment right of the store's potential customers. *Id.* at 673, 678. The Ninth Circuit reasoned that the "vague allegations" failed to state a claim

[4] For similar reasons, Plaintiffs also cannot disregard *United States v. Tilotta*, No. 3:19-cr-04768-GPC, 2022 WL 3924282, at *5 (S.D. Cal. Aug. 30, 2022). Opp. 20. *Tilotta* relied on the previously-described reasoning from *Teixeira* as it faithfully applied the analysis outlined in *Bruen*, noting that "a litigant could not reasonably argue that *Bruen* stands for the idea that the Second Amendment right is unfettered and that . . . state legislatures are powerless to regulate firearm possession, much less firearm sales."

[5] Plaintiffs also cannot ignore that Justice Kavanaugh's concurrence, which Chief Justice Roberts joined, reiterated *Heller*'s point that "presumptively lawful regulatory measures" included "laws imposing conditions and qualifications on the commercial sale of arms." *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring).

because it was apparent that customers could purchase firearms elsewhere in the surrounding area and customers' access to other gun stores was "not meaningfully constrained." *Id.* at 678-680. The same reasoning applies here and, as described previously, remains relevant post-*Bruen* because the reasoning is not based on means-end scrutiny. Mot. 17-20. Plaintiffs do not point to any allegations as to how AB 893 "meaningfully inhibits" their access to firearms and ammunition, *id.* at 680, nor could they because AB 893 impacts only temporary marketplaces at gun shows conducted on public fairgrounds. AB 893 does not affect access to brick-and-mortar gun stores, which customers presumably used pre-AB 893 on the vast majority of days when gun shows did not occur at the Fairgrounds. Accordingly, as in *Teixeira*, the FAC's conclusory allegations and any unreasonable inferences therefrom are insufficient to defeat this motion to dismiss. *Id.* at 678. Dismissal of the Second Amendment claim is thus warranted on several fronts.

## III. THE EQUAL PROTECTION CLAIM FAILS AS IT DID BEFORE

Plaintiffs make clear that their equal protection claim is based solely on their First Amendment claims. Opp. 15-16. The claim thus fails as it did before because, as this Court previously held, there is no merit to the free speech claims and Plaintiffs are not a protected class. MTD Order at 13-14. Plaintiffs ignore this prior ruling. AB 893 "does not classify shows or events on the basis of a suspect class." *Nordyke 2012*, 681 F.3d at 1043 n.2. Since Plaintiffs are also not a class of one, rational basis applies and is satisfied here. *See* ECF No. 17-1 at 22-23.[6]

## IV. PLAINTIFFS CONCEDE THE STATE-LAW TORT CLAIMS ARE LIMITED TO THE DISTRICT, BUT THE DISTRICT IS ALSO ENTITLED TO DISMISSAL

At the outset, Plaintiffs again concede their state-law tort claims against Governor Newsom, Secretary Ross, and Attorney General Bonta must be dismissed. Opp. 21. They did so when opposing the prior motion to dismiss (ECF

[6] Plaintiffs surmise that the State Defendants hold an "animus" toward gun culture (Opp. 8, 14), but they fail to point to anything in AB 893 demonstrating a "bare . . . desire to harm a politically unpopular group" or "discriminations of an unusual character." *United States v. Windsor*, 570 U.S. 744, 770 (2013).

No. 28 at 24, n.11); yet, Plaintiffs still alleged three tort claims in the FAC against these three state officials. FAC ¶¶ 24-25, 28, 253-280. Now, Plaintiffs again concede there is no basis for these claims and that they only raised them "to be safe." Opp. 21. Regardless of their motive, what matters is that Plaintiffs again admit that the tort claims against these three state officials fail.

This concession means the state-law tort claims could possibly survive only against the District. But once the § 1983 claims are dismissed, there is no reason for this Court to exercise its supplemental jurisdiction over three state-law claims against a single state entity. Mot. 21 (citing 28 U.S.C. § 1367(c)(3)).

In any event, California law bars the state-law claims against the District as well. First, Plaintiffs again incorrectly suggest that the only needed statutory basis for their claims is California's Government Claims Act ("GCA"). Opp. 21-22.[7] But this contention turns the GCA on its head because 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); *Searcy v. Hemet Unified Sch. Dist.*, 177 Cal.App.3d 792, 802 (1986); *see also* Cal. Gov't Code §§ 810.6, 815(a), 815.6. In the alternative, Plaintiffs also—and for the first time—point to California Government Code section 815.2 as a statutory basis, claiming the District's employees "proximately caused" them injury by failing to finalize contracts for gun shows at the Fairgrounds. Opp. 22. In addition to not alleging this in the FAC, this section fails as a statutory basis for three reasons. First, it does not change the fact that the District is immune from liability for enforcing AB 893 in good faith, even if AB 893 were found to be unconstitutional. Mot. 22 (citing Cal. Gov't Code § 820.6). Second, there must be a basis "apart from" Government Code section 815.2 that would give "rise to a cause of action against" the District's employees, but Plaintiffs have failed to identify any, which is problematic because common law

[7] Plaintiffs mischaracterize their state-law claims as "contract claims" even though they are alleged as tort claims. FAC ¶¶ 253-280.

tort liability has been abolished for public entities. *Miklosy*, 44 Cal.4th at 899. Third, the FAC fails to allege in the tort claims that an injury was "proximately caused" by the District or its employees. *See* FAC ¶¶ 253-280.

The state-law claims additionally fail because they were not timely presented to the California Department of General Services ("DGS").[8] Mot. 24-25. Contradicting their own allegations, Plaintiffs argue the tort claims do not challenge the adoption of AB 893, so their claims did not begin to accrue when AB 893 was signed into law in October 2019. Opp. 24. But within each tort claim, Plaintiffs allege the tort was caused by the defendants "adopting and enforcing AB 893." FAC ¶¶ 257, 266-267, 276. Plaintiffs cannot ignore their own allegations to avoid dismissal of their claims. They presumably do so to try to distinguish *Howard Jarvis Taxpayers Ass'n v. City of La Habra*, 25 Cal.4th 809, 815 (2001), which Plaintiffs concede held that a claim challenging the validity of a city ordinance first arose when the ordinance was adopted. Opp. 23. Plaintiffs assert their tort claims are really about the enforcement of AB 893. Opp. 24. But a statute cannot be enforced without first being adopted, and like in *Howard Jarvis*, Plaintiffs were not precluded from bringing these claims when AB 893 was signed into law. *Id.* at 817. Plaintiffs fall short in distinguishing *Howard Jarvis*.

Moreover, Plaintiffs' assertion that their claims continually accrue each time the District allegedly declined to contract for a gun show is meritless without an allegation identifying specific dates when such denials occurred. FAC ¶¶ 158-163. The state-law claims thus cannot survive even against only the District.

## V. CONCLUSION

Accordingly, dismissal of the FAC without leave to amend is warranted.

[8] Plaintiffs' assertion about the DGS letters' motive, Opp. 23, n.7, is baseless because DGS is separate from the Department of Justice and not a defendant here.

Dated: December 19, 2022

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