

1 ROB BONTA
 Attorney General of California
 2 R. MATTHEW WISE
 Supervising Deputy Attorney General
 3 CHARLES J. SAROSY
 Deputy Attorney General
 4 NICOLE J. KAU
 Deputy Attorney General
 5 State Bar No. 292026
 300 South Spring Street, Suite 1702
 6 Los Angeles, CA 90013-1230
 Telephone: (213) 269-6220
 7 Fax: (916) 731-2125
 E-mail: Nicole.Kau@doj.ca.gov
 8 *Attorneys for Defendants Governor Gavin Newsom,
 Attorney General Rob Bonta, Secretary Karen Ross,
 9 and 32nd District Agricultural Association*

10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 12

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 14
 15 **B&L PRODUCTIONS, INC., d/b/a**
CROSSROADS OF THE WEST, et
 16 **al.,**
 17 Plaintiffs,
 18 v.
 19 **GAVIN NEWSOM, et al.,**
 20 Defendants.

8:22-cv-01518 JWH (JDEx)

**STATE DEFENDANTS' REPLY
 BRIEF IN SUPPORT OF MOTION
 FOR RECONSIDERATION OF
 STAY OF INJUNCTION PENDING
 APPEAL**

Date: December 15, 2023
 Time: 9:00 a.m.
 Courtroom: 9D
 Judge: The Honorable John W.
 Holcomb
 Action Filed: August 12, 2022

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INTRODUCTION

The Court’s denial of the State Defendants’ previous request to stay its injunction pending appeal relied in part on an allegation in the operative complaint that has since been proven incorrect. It is no longer “unlikely that any gun sales will take place at the Orange County Fairgrounds before Defendants have appealed the preliminary injunction.” Prelim. Inj. Order (Order), ECF No. 43 at 30 (citing Am. Compl., ECF 19, ¶ 90). Since this Court’s Order, Plaintiff B&L Productions (B&L) has scheduled three gun shows with firearm and ammunition sales at the Orange County Fairgrounds in January, March, and November 2024. Plaintiffs do not dispute this development but merely assert that it “changes nothing.” Opp’n to Reconsideration Mot. (Opp’n), ECF No. 50 at 9.

On the contrary, because this “emergence of new material facts” changes the calculus for a stay pending appeal, the State Defendants’ request should be reconsidered under Local Rule 7-18. The State Defendants have appealed this Court’s Order (ECF No. 51), but the appellate briefing will not be completed until February 2024. And the pending appeal of a similar statute with similar constitutional claims will not be resolved before March or April 2024, when the oral argument in that case is currently expected to occur. Because this case presents serious legal questions—as Plaintiffs concede—and the imminent sale of firearms and ammunition on state property will inflict irreparable harm, reconsideration of the court’s determination on the stay request is warranted.

ARGUMENT

I. THE SCHEDULING OF GUN SHOWS IN EARLY 2024 IS A “NEW MATERIAL FACT” SUPPORTING RECONSIDERATION

The State Defendants meet the “new material facts” basis for reconsideration under Local Rule 7-18. Under this prong, a motion for reconsideration can be based upon “the emergence of new material facts . . . occurring after the Order was entered.” C.D. Cal. L.R. 7-18.

1 *Before this Court's Order*, B&L had not reserved dates in 2024 for gun shows
2 at the Orange County Fairgrounds (Fairgrounds). Indeed, B&L had not contacted
3 the 32nd District Agricultural Association (District) about reserving dates since
4 December 3, 2021, even though the District was prepared to coordinate with B&L
5 in doing so as long as the gun shows complied with SB 264 and SB 915. J. Olvera
6 Decl., ECF No. 22-1, ¶¶ 9–10. But *after this Court's Order*, B&L immediately
7 contacted the District and scheduled three weekends in 2024 for gun shows at the
8 Fairgrounds: January 20–22, 2024, March 30–31, 2024 and November 29–
9 December 1, 2024.¹ M. Richards Decl., ECF No. 45-2, ¶ 5. In other words, two
10 gun shows with firearm and ammunition sales are scheduled to occur at the
11 Fairgrounds before the Ninth Circuit has an opportunity to resolve two relevant
12 appeals: the appeal of this Court's Order (*see* ECF No. 51), and B&L's appeal of an
13 order dismissing its complaint raising similar First and Second Amendment claims
14 against a prohibition on firearm and ammunition sales at the Del Mar Fairgrounds
15 in San Diego, *see B&L Productions, Inc., et al. v. Newsom, et al.*, 9th Cir. No. 23-
16 55431.

17 Plaintiffs do not dispute this development nor do they dispute that these are
18 “new” facts. Opp'n at 8. Plaintiffs instead argue the new facts are not “material”
19 because they are the result of the parties complying with the Court's order. Opp'n
20 at 8–9.

21 But this position ignores one of the Court's bases for denying the stay of the
22 injunction pending appeal. When explaining its reasoning for why the State
23 Defendants had failed to show irreparable injury, this Court assumed that “given
24 that Plaintiffs aver [in paragraph 90 of the operative complaint] that the 32nd DAA
25 will negotiate event dates only for the following calendar year, it is unlikely that
26 any gun sales will take place at the Orange County Fairgrounds before Defendants
27

28 ¹ B&L contacted the District the same day the Court issued its Order, October 30, 2023. M. Richards Decl., ECF No. 45-2, ¶ 4.

1 have appealed the preliminary injunction.” Order at 30. This was more than a
2 “casual observation,” as Plaintiffs suggest. Opp’n at 9. Instead, this reasoning,
3 which relied on an allegation in the operative complaint, was a key basis for
4 denying the stay. Because the factual premise underlying this Court’s denial of a
5 stay is no longer true, these new facts are plainly “material.”

6 Accordingly, it is within this Court’s discretion under Local Rule 7-18 to
7 reconsider its denial of a stay of the injunction pending appeal. *See Feltz v. Cox*
8 *Comm’n’s Cal., LLC*, 562 F. Supp. 3d 535, 539–41 (C.D. Cal. 2021) (granting a
9 motion for reconsideration under Local Rule 7-18).²

10 **II. A STAY PENDING APPEAL IS WARRANTED**

11 **A. Plaintiffs Concede that Serious Legal Questions Exist**

12 This Court previously denied the request for a stay in part because it
13 concluded that the State Defendants failed to show “a likelihood of success on the
14 merits of Plaintiffs’ constitutional claims.” Order at 30. But as explained in the
15 Motion (ECF No. 45 at 5), such a showing is not required (even though State
16 Defendants have met it). *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012)
17 (“The [stay] standard does not require the petitioners to show that ‘it is more likely
18 than not that they will win on the merits.’”). Rather, it is sufficient to demonstrate
19 that “serious legal questions” exist or that there is a “substantial case on the merits.”
20 *Id.* (noting that these two formulations “are largely interchangeable” with other
21 formulations used by the Ninth Circuit, including “reasonable probability” and “fair
22 prospect”).

23 Plaintiffs concede that this standard is met because “the legal questions at the
24 heart of this matter are ‘serious.’” Opp’n at 15. This conclusion is not only correct,
25 but inescapable. As the State Defendants previously explained (*see* ECF No. 34 at

26 ² Plaintiffs claim that the State Defendants’ motion raises arguments that
27 could have been previously raised. Opp’n 9–10. But when the State Defendants
28 requested a stay at the hearing, the Court did not ask for further argument or permit
briefing on the topic even when Plaintiffs asked for an opportunity to submit
briefing. Prelim. Inj. Hr’g Tr., 72–73.

1) a Southern District of California court recently rejected similar constitutional claims in a lawsuit challenging a similar prohibition (AB 893) on firearm and ammunition sales at the Del Mar Fairgrounds in San Diego. *B&L Prods., Inc. v. Newsom*, No. 21-CV-01718-AJB-KSC, ECF No. 51 (S.D. Cal. Mar. 14, 2023) (S.D. Cal. *B&L*). Specifically, as to the First Amendment claims, the Southern District court held that “AB 893 covers no more than the simple exchange of money for a gun or ammunition,” and as “held by the Ninth Circuit, “the act of exchanging money for a gun is not “speech” within the meaning of the First Amendment.” S.D. Cal. *B&L*, ECF No. 51 at 6. Moreover, the court concluded that there were no facts demonstrating how AB 893 “intentionally and effectively” leads to the banning of gun shows altogether,” and that AB 893 did not restrict commercial speech because “AB 893 does not prohibit offers for sale.” *Id.* As to the Second Amendment claim, the Southern District court applied the framework outlined in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), and concluded that the Second Amendment’s plain text did not cover the “sale of firearms and ammunition at a gun show” on state property. S.D. Cal. *B&L*, ECF No. 51 at 8–9. The Southern District court also held that AB 893 falls within the presumptively lawful category of “laws imposing conditions and qualifications on the commercial sale of arms.” *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)). While this Court reached different conclusions (*see* Order at 9–28), this divergence on weighty constitutional issues underscores that this case presents “serious legal questions.”

B. The Balance of Equities Favor a Stay

As explained in the Motion (ECF No. 45 at 8–9), the balance of equities additionally favors granting a stay of the injunction pending appeal. First, “there is [at least] a *probability* of irreparable injury if the stay is not granted.” *Lair*, 697 F.3d at 1214 (emphasis in original). Two California Department of Justice reports

1 concerning the Armed and Prohibited Persons System (APPS), as well as AB 893’s
2 legislative findings, demonstrate that illegal commerce occurs at gun shows in
3 California. *See* Req. for Judicial Notice, ECF No. 45-1, Exs. A–C. This Court
4 already acknowledged that “crimes committed with illegal firearms are
5 unquestionably a serious concern.” Order at 30. And Plaintiffs acknowledge that
6 there is no waiting period for ammunition purchases (Opp’n at 17), meaning that
7 gun show attendees can walk out of a gun show with ammunition without law
8 enforcement knowing that each purchaser indeed passed a background check before
9 obtaining the ammunition. *See* Cal. Penal Code § 30370 (outlining the three
10 avenues for an ammunition background check); Cal. Code Regs., tit. 11, §§ 4282–
11 4285 (same).

12 Plaintiffs raise three unpersuasive counterpoints. To begin with, they assert
13 that the two APPS reports and AB 893 constitute evidence that could have been
14 raised earlier by the State Defendants. Opp’n at 12–13, 17. Plaintiffs overlook the
15 fact that the State Defendants previously cited *all three sources* for the Court—and
16 that the 2022 APPS report was released after the parties completed briefing on the
17 preliminary injunction motion. *See* ECF No. 19-6 (operative complaint attaching
18 AB 893 as an exhibit); ECF No. 22 at 3 (describing AB 893); ECF No. 34 at 9 n.7
19 (describing 2021 APPS Report); Prelim. Inj. Hr’g Tr., 9:2–5, 18:18–21, 24:1-3
20 (describing 2021 and 2022 APPS reports generally); *California Dep’t of Justice*
21 *Releases 2022 Armed and Prohibited Persons System Program Annual Report*,
22 [https://oag.ca.gov/news/press-releases/california-department-justice-releases-2022-](https://oag.ca.gov/news/press-releases/california-department-justice-releases-2022-armed-and-prohibited-persons-system)
23 [armed-and-prohibited-persons-system](https://oag.ca.gov/news/press-releases/california-department-justice-releases-2022-armed-and-prohibited-persons-system) (Apr. 3, 2023) (press release announcing
24 release of 2022 APPS report).³

25 ³ Plaintiffs raise various objections to the 2021 and 2022 APPS Reports in
26 their Opposition brief and in a set of objections to the State Defendants’ Request for
27 Judicial Notice of the reports. *See* Opp’n at 13, n.4; ECF No. 50-1. The APPS
28 Reports, and the contents within them, are statutorily mandated and must be
provided to the Legislature annually by a certain date. Former Cal. Penal Code
§ 30012 (in effect until July 9, 2023, requiring submission by April 1 of each year);

1 Plaintiffs also suggest that the State Defendants must present evidence of
2 illegal firearms-related commerce occurring at B&L gun shows at the Fairgrounds
3 to support its defense on the merits and to show irreparable harm. Opp’n at 13–14,
4 17. But such evidence is not required. Under intermediate scrutiny in the First
5 Amendment context, “even for an as-applied challenge, the government need not
6 show that the litigant himself actually contributes to the problem that motivated the
7 law he challenges.” *Nordyke v. King*, 644 F.3d 776, 792 (9th Cir. 2011).⁴ Nor is
8 such evidence necessary to show that the State Defendants will suffer imminent
9 harm if the injunction is not stayed.

10 Lastly, Plaintiffs argue that the State Defendants need to demonstrate that
11 illegal firearms-related transactions occur more frequently at gun shows compared
12 to brick-and-mortar stores. Opp’n at 17. But the relevant analysis requires
13 comparing the Legislature’s goal for the *challenged statutes* (preventing illegal
14 firearm purchases and trafficking at gun shows) against the means implemented by
15 the *challenged statutes* (prohibiting firearm and ammunition sales on state
16 property). Eliminating some portion of illegal sales is an important goal—and
17 undermining that goal causes irreparable harm—even if unlawful conduct cannot be
18 completely eliminated. In any event, it is readily apparent that, as compared to the
19 structure provided within a brick-and-mortar store, a gun show hosting a large
20 gathering of people with vendors scattered throughout a vast property is the sort of
21 environment that is more likely to facilitate illegal transactions.

22
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Cal. Penal Code § 30012 (requiring submission by March 15 of each year).
24 Accordingly, the APPS Reports clearly fall within the scope of judicially noticeable
25 material. *See Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v.*
26 *California*, 547 F.3d 962, 968 n.4 (9th Cir. 2008) (taking judicial notice of amended
tribal-state gaming compacts because Federal Rule of Evidence 201 permits judicial
notice of state entity records). And while Plaintiffs assert that the reports contain
disputed facts, they do not identify which facts within the reports they dispute.

27 ⁴ Although the Ninth Circuit granted rehearing en banc of this panel decision,
28 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).

1 In short, Plaintiffs fail to undercut the significance of the irreparable injury
2 that would result absent a stay. Nor would Plaintiffs be harmed by a stay because
3 they can continue to engage in firearms-related speech at gun shows held on state
4 property without firearm and ammunition sales (*see* J. Olvera Decl., ECF No. 22-1,
5 ¶ 10), they can hold gun shows with such sales on private property, and they can
6 continue to purchase firearms and ammunition at any of the numerous brick-and-
7 mortar stores in Orange County licensed to sell those items.

8 **CONCLUSION**

9 The Court should reconsider its order denying a stay of the preliminary
10 injunction pending appeal and should grant a stay pending the State Defendants’
11 appeal in this case, or pending resolution of the related appeal in *B&L Productions,*
12 *Inc., et al. v. Newsom, et al.*, 9th Cir. No. 23-55431, whichever is resolved earlier.

13
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15 Dated: December 1, 2023

16 Respectfully submitted,
17 ROB BONTA
18 Attorney General of California
19 R. MATTHEW WISE
20 Supervising Deputy Attorney General
21 CHARLES J. SAROSY
22 Deputy Attorney General

23 /s/ Nicole J. Kau
24 NICOLE J. KAU
25 Deputy Attorney General
26 *Attorneys for Defendants Governor*
27 *Gavin Newsom, Attorney General Rob*
28 *Bonta, Secretary Karen Ross, and*
32nd District Agricultural Association

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendants Governor Gavin Newsom, Attorney General Rob Bonta, Secretary Karen Ross of the California Department of Food and Agriculture, and the 32nd District Agricultural Association (collectively, State Defendants), certifies that this brief contains 2,244 words, which:

X complies with the word limit of L.R. 11-6.1.
__ complies with the word limit set by court order dated ____.

Dated: December 1, 2023

Respectfully submitted,
ROB BONTA
Attorney General of California

/s/ Nicole J. Kau
NICOLE J. KAU
Deputy Attorney General
*Attorneys for Defendants Governor
Gavin Newsom, Attorney General Rob
Bonta, Secretary Karen Ross, and
32nd District Agricultural Association*

CERTIFICATE OF SERVICE

Case Name: **B&L Productions, Inc., et al. v. Gavin Newsom, et al.** No. **8:22-cv-01518 JWH (JDEx)**

I hereby certify that on December 1, 2023, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

STATE DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF STAY OF INJUNCTION PENDING APPEAL

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 1, 2023, at Los Angeles, California.

Gail Agcaoili

Declarant



Signature

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