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VIA ELECTRONIC MAIL

August 27, 2018

Donna O'Leary  
22nd District Agricultural Association  
Attn: Board of Directors  
2260 Jimmy Durante Blvd.  
Del Mar, CA 92014  
[doleary@sdfair.com](mailto:doleary@sdfair.com)

Re: Gun Show at Del Mar Fairgrounds

Dear Ms. O'Leary,

I understand the question has arisen whether there is a First Amendment right to hold a gun show involving possession, display, and sale of firearms at the Del Mar Fairgrounds. While the Board of Directors may wish to seek legal advice from its own counsel, I write to state my office's position on that question. This letter addresses only First Amendment issues and does not concern Second Amendment or other legal questions.

The First Amendment protects speech, expressive conduct, and expressive association. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995); *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). The scope of protected expression is broad but not limitless. "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

In general, the conduct involved in the possession, use, and sale of firearms, or the gathering of individuals for such conduct, is not protected by the First Amendment. See *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 883 F.3d 45, 67–68 (2d Cir. 2018) (noting "[t]ypically a person possessing a gun has no intent to convey a particular message, nor is any particular message likely to be understood by those who view it" and holding "participation in recreational and competitive shooting events ... does not constitute expressive association under the First Amendment").

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As the Ninth Circuit has noted, "a gun itself is not speech." *Nordyke v. King*, 319 F.3d 1185, 1189 (9th Cir. 2003). In addition, "the sale itself" of a firearm "is not commercial speech." *Id.* at 1191. "As possession itself is not commercial speech and a ban on possession at most interferes with sales that are not commercial speech," a prohibition on the possession or sale of firearms in a given place "does not infringe [a person's] right to free commercial speech." *Id.*

"Where the symbols on the gun (not the gun itself) convey a political message," the First Amendment is implicated, but the mere presence of a few such decorated guns "at a show at which the vast majority of the prohibited guns bear no message whatsoever" does not necessarily mean a prohibition on possessing guns would violate the First Amendment. *Id.* at 1190. Assuming the display of firearms at a gun show may involve certain elements of speech or expressive conduct, it does not violate the First Amendment to prohibit gun shows on government property. *Nordyke v. King*, 681 F.3d 1041, 1043 n.2 (9th Cir. 2012).

Different issues would be presented if the government prohibited speech about guns on government property, as opposed to the possession, sale, or use of guns themselves, but I see no First Amendment obstacle to prohibiting gun shows on government property.

Thank you for your attention to this matter. Please feel free to contact me if you have any questions.

Sincerely,



David Loy  
Legal Director