

1 Bruce J. Berger, #133320
Frank Maul, #66737
2 STAMMER, McKNIGHT, BARNUM & BAILEY, LLP
2540 West Shaw Lane, Suite 110
3 Fresno, CA 93711
(559) 449-0571

4 Michael E. Rosman (pro hac vice motion forthcoming)
5 Christopher J. Hajec (pro hac vice motion forthcoming)
Michelle Scott (pro hac vice motion forthcoming)
6 CENTER FOR INDIVIDUAL RIGHTS
1233 20th St. NW, Suite 300
7 Washington, DC 20036
(202) 833-8400

8 Attorneys for Plaintiff, Timothy J. Desmond
9

10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA

-----x

12 Timothy J. Desmond,	:	
13 Plaintiff,	:	
14 v.	:	COMPLAINT
15 Kamala Harris, Attorney General of the State of	:	
16 California, in her official capacity,	:	
17 Karen Ross, Secretary of the California Dep't	:	
18 of Food and Agriculture, in her official capacity,	:	Civ.No. ____-_____
19 John Quiroz, Branch Chief of the Fairs &	:	
20 Expositions Branch in the Division of Marketing,	:	
21 in his official capacity,	:	
22 and	:	
23 John Alkire, Chief Executive Officer of the	:	
24 21 st District Agricultural Association,	:	
25 in his official capacity,	:	
26 Defendants.	:	

-----x

26 1. This action challenges the constitutionality of California Govt. Code § 8195, both
27 on its face and as applied to plaintiff and enforced by defendants. Defendants' enforcement
28 violates the First and Fourteenth Amendments to the United States Constitution.

1 Jurisdiction and Venue

2
3 2. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343 over this action
4 because it arises under the United States Constitution and because plaintiff seeks relief under 42
5 U.S.C. § 1983, a statute providing for the protection of civil rights.
6

7 3. Venue is proper in this Court because defendant Alkire took actions in Fresno
8 County, California, all of which is in this district, for himself and as agent for the other
9 defendants, that resulted in plaintiff being deprived of the opportunity to display an artistic work
10 in Fresno County in violation of law.
11

12 Parties

13
14 4. Plaintiff Timothy J. Desmond is a resident of Fresno, California.
15

16 5. Defendant Kamala Harris is the Attorney General of the State of California and is
17 ultimately responsible for the enforcement of the operations of the Office of the Attorney
18 General, including providing legal determinations about how other departments of the state
19 government should apply California Government Code § 8195. Her actions were taken under
20 color of state authority, and she is sued in her official capacity.
21

22 6. Defendant Karen Ross is the Secretary of the California Department of Food and
23 Agriculture (the “Department”) and is ultimately responsible for the enforcement of the
24 operations of the Department, including the Fairs and Expositions Branch within the Division of
25 Marketing in the Department. Her actions were taken under color of state authority, and she is
26 sued in her official capacity.
27

28 7. Defendant John Quiroz is the Branch Chief of the Fairs and Expositions Branch

1 and is responsible for the rules and procedures that govern fairs throughout California, including
2 the Big Fresno Fair. His actions were taken under color of state authority, and he is sued in his
3 official capacity.

4
5 8. Defendant John Alkire is the Chief Executive Officer of the 21st District
6 Agricultural Association (the “21st DAA”), an entity within the Fairs and Exposition Branch of
7 the Department. The 21st DAA operates the Big Fresno Fair, a fair held in Fresno, California, and
8 is responsible for the operation of that fair. Defendant Alkire’s actions were taken under color of
9 state authority, and he is sued in his official capacity.

10
11 First Claim For Relief

12
13 9. Plaintiff is both an artist and a civil war buff.

14
15 10. In 2015, Plaintiff created a painting called *The Attack*, which depicts a scene from
16 a battle during the 1864 Siege of Atlanta. The painting included several individuals carrying
17 flags.

18
19 11. The Big Fresno Fair is a fair that is operated by the 21st DAA under the aegis of
20 the Fairs and Expositions Branch in the Department. It is held on land owned by the County of
21 Fresno that is leased to the 21st DAA on a long-term basis.

22
23 12. Among many other activities, the Big Fresno Fair displays artwork, including
24 paintings. Any artist may submit a painting for display. As a matter of practice, the Big Fresno
25 Fair has displayed all such artwork.

26
27 13. In using its property to show paintings, the Big Fresno Fair has created a public
28 forum for such works.

1 14. Plaintiff submitted *The Attack* to the 2015 Big Fresno Fair for display.

2

3 15. California Government Code § 8195 states that the State of California may not
4 “display” certain flags associated with the Confederacy.

5

6 16. The California legislature adopted Section 8195 because it disapproved of the
7 views that it and others have associated with the Confederacy-related flags identified therein.

8

9 17. Pursuant to Section 8195, defendant Alkire refused to include *The Attack* among
10 the privately-created artwork shown at the Big Fresno Fair because it included the depiction of a
11 flag deemed prohibited by Section 8195.

12

13 18. Defendants Ross and Quiroz enforce, and are responsible for enforcing, Section
14 8195 at the Big Fresno Fair and at other similar fairs throughout California.

15

16 19. Before Plaintiff submitted *The Attack*, defendant Quiroz instructed defendant
17 Alkire to contact legal counsel at the Office of the Attorney General to obtain legal
18 determinations about Section 8195.

19

20 20. After *The Attack* was submitted, defendant Alkire contacted legal counsel at the
21 Office of the Attorney General for a legal determination on whether Section 8195 made it
22 unlawful for the Big Fresno Fair to display *The Attack*, and was told that Section 8195 did make it
23 unlawful for the fair to display it. As the Attorney General, defendant Harris made that
24 determination.

25

26 21. Defendant Alkire would have permitted *The Attack* to be displayed at the Big
27 Fresno Fair if legal counsel at the Office of the Attorney General had told him that its display was
28 not unlawful.

1 22. Plaintiff wishes to submit *The Attack* to the 2016 Big Fresno Fair.

2

3 23. As an artist and civil war buff, Plaintiff will depict other civil war scenes in his
4 paintings that include flags associated with the Confederacy and prohibited by Section 8195, and
5 will submit them to the Big Fresno Fair for display.

6

7 24. Plaintiff has written a novel, *The Doc* (Black Opal Books, 2014), about civil war
8 reenactors, on the cover of which appears a representation of a flag associated with the
9 Confederacy and prohibited by Section 8195.

10

11 25. Plaintiff wishes to seek to have his book sold, or offered free of charge, in souvenir
12 shops operated by the State of California in museums, parks, and other venues, but cannot do so
13 because of defendant Harris's interpretation and enforcement of Section 8195.

14

15 26. Defendants' enforcement of Section 8195 is a viewpoint and content-based
16 restriction on speech in violation of the First Amendment to the United States Constitution, as
17 applied to the states through the Fourteenth Amendment to the United States Constitution. If not
18 enjoined, defendants will continue to make this viewpoint and content-based restriction on
19 speech.

20

21 27. Defendants' enforcement of Section 8195 is taken under color of state authority
22 and thus also violates 42 U.S.C. § 1983.

23

24 Second Claim for Relief

25

26 28. In many applications, Section 8195 prohibits or censors, or threatens to prohibit or
27 censor, the constitutionally-protected speech of private individuals. For example, Section 8195
28 would bar the state from keeping in place certain flags that private individuals may wish to place

1 on the gravesites of Confederate veterans buried in state cemeteries, and it would bar a state
2 school from displaying a history project by a student about the civil war that included depictions
3 of flags associated with the Confederacy and banned by Section 8195.

4
5 29. The applications indicated in the preceding paragraph are substantial in
6 comparison with Section 8195's clearly legitimate sweep, which is no broader than the
7 government's freedom to speak.

8
9 30. Section 8195 has a chilling effect on those who wish to engage in expression using
10 the images it prohibits.

11
12 31. Section 8195 is thus void on its face as overbroad under the First Amendment to
13 the United States Constitution, as applied to the states through the Fourteenth Amendment to the
14 United States Constitution.

15 THEREFORE, plaintiff seeks judgment:

- 16
17 A. Declaring that Section 8195 is unconstitutional as applied to plaintiff and as
18 applied to the display of privately-created artworks at state-run fairs in California;
19
20 B. Enjoining defendants from continuing to enforce Section 8195 against plaintiff and
21 with respect to the display of privately-created artworks at state-run fairs in
22 California;
23
24 C. Declaring that Section 8195 is unconstitutional as applied to plaintiff and as
25 applied to the speech of private individuals;
26
27 D. Enjoining defendants from continuing to enforce Section 8195 against plaintiff and
28 with respect to the speech of private individuals;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- E. Declaring Section 8195 unconstitutional on its face as overbroad;
- F. Enjoining defendants from continuing to enforce Section 8195;
- G. Awarding plaintiff reasonable fees and expenses in accordance with 42 U.S.C. § 1988 and any other appropriate authority; and
- H. Granting plaintiff any other appropriate remedy.

Dated: August 15, 2016.

/s/ Bruce J. Berger
Bruce J. Berger, #133320
STAMMER, McKNIGHT, BARNUM & BAILEY, LLP
2540 West Shaw Lane, Suite 110
Fresno, CA 93711
(559) 449-0571

/s/ Frank Maul
Frank Maul, #66737
STAMMER, McKNIGHT, BARNUM & BAILEY, LLP
2540 West Shaw Lane, Suite 110
Fresno, CA 93711
(559) 449-0571

/s/ Michael E. Rosman (as authorized on 8/15/16)
Michael E. Rosman (pro hac vice motion forthcoming)
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St. NW, Suite 300
Washington, DC 20036
(202) 833-8400

/s/ Christopher J. Hajec (as authorized on 8/15/16)
Christopher J. Hajec (pro hac vice motion forthcoming)
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St. NW, Suite 300
Washington, DC 20036
(202) 833-8400

/s/ Michelle Scott (as authorized on 8/15/16)
Michelle Scott (pro hac vice motion forthcoming)
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St. NW, Suite 300
Washington, DC 20036
(202) 833-8400