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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

SCOTT HERNDON, JEFF AVERY, IDAHO SECOND AMENDMENT ALLIANCE, INC., and SECOND AMENDMENT FOUNDATION, INC.,

Plaintiffs-Appellants,

vs.

CITY OF SANDPOINT, FESTIVAL AT SANDPOINT, INC., DOES 1 to 100,

Defendants-Appellees.

Supreme Court Docket No. 48975-2021

Bonner County District Court
Case No: CV09-20-0692

RESPONDENT CITY OF SANDPOINT'S BRIEF

Appeal from the District Court of the
First Judicial District for Bonner County

Honorable Lansing L. Haynes, District Judge, presiding

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A. Nature Of The Case.

This was an action instituted by Plaintiffs-Appellants (hereinafter collectively referred to as "Herndon") stemming from the individual plaintiffs' attempt to enter the 2019 Festival at Sandpoint with firearms. The Festival at Sandpoint is a multi-day summer concert series (the "festival") held at War Memorial Field Park ("War Memorial Field"), a public park owned by the City of Sandpoint (hereinafter the "City"). In 2019, the City leased War Memorial Field to the Festival at Sandpoint, Inc. (hereinafter the "Festival"), a private non-profit corporation, for its use to put on the festival. The Festival has a longstanding policy of prohibiting festival patrons from bringing weapons, including firearms, into the festival. When Scott Herndon and Jeff Avery attempted to enter the Festival on August 9, 2019, while in possession of firearms, they were denied entrance by the Festival's security personnel.

Believing that the City wrongfully delegated its police power to the Festival and neither the City nor the Festival had the legal authority to regulate the possession of firearms on the leased property, Herndon asserted several causes of action arising out of this incident, which included claims for declaratory and injunctive relief, claims pursuant to 42 U.S.C. § 1983 for violations of the Second and Fourth Amendments to the U.S. Constitution and the Equal Protection clause, and a federal claim for conspiracy to deprive the individual plaintiffs of their federal rights.

The district court granted summary judgment in favor of the City and the Festival on all claims. Judgment was entered in favor of the City and the Festival, and Herndon timely appealed the summary judgment decision. In addition to their challenge of the district court's dismissal of

all claims, Herndon also appeals the award of attorneys' fees to the City and the Festival, despite there being no cognizable legal basis to do so.

B. Course Of Proceedings Below.

On May 29, 2020, Scott Herndon, Jeff Avery, the Idaho Second Amendment Alliance, Inc., and the Second Amendment Foundation, Inc. filed a complaint in the district court for Bonner County. In their complaint, Herndon asserted that the City had entered into a written agreement – a contract or lease – with the Festival to rent War Memorial Field to it for the summer music festival. Herndon believed the denial of entry to the Festival violated both state and federal law, and sought a declaration from the court that either (a) the City lacked the power to convey police powers, and specifically the power to prohibit firearms at War Memorial Field, to the Festival, or (b) that the Festival was bound by the preemption doctrine contained in Idaho Code § 3302J, which prohibits political subdivisions in the state from regulating the possession of firearms in any manner.

Herndon also sought an injunction from the court which would compel the City to insist on contract terms with the Festival that guaranteed compliance with Idaho laws that regulate the possession and carrying of firearms in public or which compelled the Festival to comply with such laws. In addition to the state law claims for relief, Herndon asserted a claim pursuant to 42 U.S.C. § 1985 for an alleged conspiracy between the City and the Festival to violate the right to bear arms as guaranteed by the Idaho and U.S. Constitutions, and three claims pursuant to 42 U.S.C. § 1983 for a violation of the Second Amendment of the U.S. Constitution, a violation of the Fourth Amendment of the U.S. Constitution for unlawful searches, and a violation of the Equal Protection

clause for discriminating against Herndon's access to a public event held on public property based on their exercise of a fundamental right protected by the Idaho and U.S. Constitutions. R. at pp. 9-23.

During the pendency of the case, Herndon never served discovery on either the City or the Festival. All parties filed motions for summary judgment on March 29, 2021. A hearing was held on April 26, 2021, and during oral argument, counsel for Herndon advised they were abandoning the claim for the alleged violation of the Fourth Amendment. Aug. at p. 104. The district court granted summary judgment in favor of the City and the Festival on all of Herndon's claims on June 1, 2021. R. at pp. 676-87. Judgment was entered on June 10, 2021, for the City and June 14, 2021, for the Festival dismissing all claims brought by Herndon with prejudice. R. at pp. 688-91.

Following the entry of judgment, the City and the Festival timely moved for the award of costs and attorneys' fees. R. at pp. 692-745. On July 12, 2021, Herndon filed a Notice of Appeal. R. at pp. 749-53. Herndon did not file an objection to the motions for attorneys' fees until August 31, 2021. Aug. at pp. 2-4. In that objection, Herndon did not contest an award of costs, stated, "Plaintiffs object to both Defendants' request for attorney fees in this matter", and indicated that if the parties were unable to stipulate to a stay of the proceedings on the motions for attorneys' fees, then Herndon would file a formal motion to request relief from their "tardy response" to the motions for attorneys' fees and a formal response. Aug. at p. 3. On September 9, 2021, Herndon filed a Motion for Extension of Time or Relief from Deadline to Object to the City's and the Festival's motions for costs and attorneys' fees along with a supporting memorandum and declarations. Aug. at pp. 5-55. On October 29, 2021, a hearing was held on the City's and the

Festival's motions for attorneys' fees and costs, and Herndon's motion for relief. Aug. at pp. 96, 101. Subsequent to the hearing, the City filed a supplemental memorandum of costs and attorneys' fees and supporting affidavit. Aug. at pp. 90-95. Herndon objected to the supplement on November 12, 2021. Aug. at pp. 100-02.

Prior to Herndon's objection, the district court entered an order denying Herndon's motion for extension of time or relief from deadline to object to the City's and the Festival's motions for costs and attorneys' fees since Herndon had failed to timely object to the requests and therefore waived all objections. Aug. at pp. 96-99. Thereafter, the district court entered its memorandum decision and order awarding costs and attorneys' fees to the City and the Festival. Aug. at pp. 103-09. Amended judgments were entered by the district court on February 7, 2022, for the award of costs and attorneys fees. Aug. at pp. 113-18. A satisfaction of judgment as to the award of costs and attorneys to the Festival was filed on March 17, 2022, and a satisfaction of judgment as to the award of costs and attorneys fees to the City was filed on March 22, 2022. Aug. at pp. 126-31.

C. Statement Of Facts.

The facts of the case presented to the district court and supported by admissible evidence are undisputed. In July 2019, the City executed a written lease agreement with the Festival for the lease of War Memorial Field from July 28, 2019, through August 15, 2019. During the term of the lease, the Festival put on a series of concerts at War Memorial Field known as The Festival at Sandpoint. R. at p. 358, ¶ 8.

Pursuant to the lease, the City leased and set over unto the Festival the entirety of War Memorial Field for the Festival's occupancy and use, subject to certain considerations, covenants, restrictions, and agreements. The Festival was granted possession, use, and occupancy of War Memorial Field. At the conclusion of the term of the lease, War Memorial Field reverted back to the City. In consideration for the City leasing War Memorial Field to the Festival, the Festival was to pay the sum of $1.25 assessed against each ticketed day on multiple-day tickets and $1.25 for each single-day ticket sold by the Festival, with payment made to the City after the end of the lease term. The maximum allowable attendance at any concert during the festival was 4,000 people, pursuant to the self-imposed limits established by the Festival. R. at pp. 358-59, 361, ¶¶ 9-11, 21.

The lease of the property was governed by several agreements contained within the lease. The City and the Festival agreed that the Festival would pay for electrical charges incurred for usage during the term of the lease, the Festival would provide sanitation services which would include collection and disposal of debris, litter, and waste on a daily basis during, and the City would be responsible for the cost of water and sewer. The Festival would provide its own general liability insurance to cover any losses or damage resulting to any persons from the operation and presentation of the festival, would name the City as an additional insured, and such policy would provide coverage of not less than $1,000,000. The Festival was prohibited from assigning, selling, transferring, or setting over unto any person(s), business, or group, any or all of the rights to use the leased premises, any interest in the premises, or any rights of the Festival acquired through the lease, without the prior consent of the City. R. at p. 359-61, ¶¶ 12-13, 17, 22.

As the lessee, the Festival was responsible for the security of the festival, while City police retained responsibility for public safety within the City of Sandpoint. To this end, the Festival would provide adequate security at no cost to the City to protect the property of the City and the property of the Festival. The Festival was to exercise and provide site security during the duration of the festival, and such security personnel were responsible for control measures concerning members of the audience and performers. The provision in the lease requiring the Festival to provide adequate security was explicit so that there was no expectation that the City would provide security for the Festival. While the City's police officers were to provide additional assistance to the Festival's security personnel, the Festival would pay the City for the cost of such police services. R. at pp. 359-60, ¶¶14-16.

The City and the Festival also agreed that the Festival would develop a security plan for the duration of the festival with the City's Chief of Police, Corey Coon, and such plan would include traffic management. The security plan, which was to be approved by Chief Coon, outlined the planned start and end times for the concerts, the traffic revisions which would be made during the concerts, and the Festival's needs for police services. The Festival was also responsible for working with the City's police and street departments concerning its parking plan, and the Festival was responsible for arranging public transportation, parking, and proper signage. R. at pp. 359-61, ¶¶14-16, 20.

In accordance with the Festival's security plan, only two police officers were needed as support for the concerts that occurred on Thursday, Friday, and Saturdays nights from 5:30 to 11:00 p.m., and no support from police officers was needed for the Sunday concerts. The City's

police officers, and any law enforcement officers assisting the City's police officers, were to have access to the leased premises at any time, and such access was to follow established rules and protocols, pursuant to the U.S. Constitution, Idaho State Constitution, and Idaho Statutes. The City's police officers that were requested by the Festival as support simply walked the festival grounds, walked through the crowd, and were not stationed at any particular place on the festival grounds, including the gate entrance to the festival. The City and the Festival agreed that the Festival would be solely responsible for ensuring that all activities performed at the festival complied with Idaho law, including compliance with any noise level requirements. R. at pp. 359-61, ¶¶14-16, 19.

Finally, the City and the Festival agreed that the Festival would provide concessions for sale to the public during the festival, the Festival would obtain necessary catering permits, and it would make arrangements for the disposal of waste liquids. The Festival would also work with Chief Coon to design appropriate signage and announcements concerning the consumption of alcohol or the use of any illegal controlled substances. R. at p. 360, ¶ 18.

Prior to 2019, the Festival had a longstanding policy of prohibiting festival patrons from bringing weapons, including firearms, into the festival. This policy had been in place for over twenty years. In 2019, the Festival utilized an additional festival security team to screen festival patrons for weapons, including firearms, as they entered the festival gates. The Festival and the security force utilized by the Festival did not allow festival patrons carrying weapons, including firearms, to enter the festival. The Festival implemented a policy allowing a patron in possession of a firearm or other weapon to return it to their vehicle if they wanted to attend a concert. The

decisions related to site and stage security, gate security, the hiring of Crowd Management Services, and the respective responsibilities of each security team were made solely by the Festival. R. at 361-62, ¶¶24-26

In developing the City police's planning and preparation for the festival, representatives of the police department historically have several meetings with representatives of the Festival to discuss the Festival's traffic control, the performers who will be at the festival, alcohol sales and areas within the festival where that will occur, entrance points to the festival, and security. In developing the City police's plan for the 2019 festival, the Festival's prohibition on firearms entering the festival was not a factor. Rather, the focus of the City police's plan was on ensuring public safety. As part of the City police's plan development, Chief Coon instructed City police officers that the prohibition on bringing firearms into the festival was the policy of the Festival and that it was up to the Festival to enforce their policy. No City police officer would assist the Festival in the enforcement of their policy. City police officers would become involved only if and when the Festival's security personnel initiated a citizen's arrest. R. at p. 363, ¶¶ 29-30.

Mr. Herndon and Mr. Avery, both residents of Idaho, attempted to enter the festival on August 9, 2019, and were denied entrance. Mr. Herndon and Mr. Avery caused a video recording to be made documenting their attempt to enter the festival on August 9, 2019. It is available at https://www.youtube.com/watch?v=vUtlpU8saSs. It accurately reflects Mr. Herndon's and Mr. Avery's interactions with the Festival's security personnel, the City Attorney, and a City police officer. R. at pp. 363-64, ¶¶ 31-34. The following undisputed facts are established in the video:

Mr. Herndon and Mr. Avery purchased tickets to the festival for August 9, 2019. The Festival had a well-publicized prohibition on entering the festival with a firearm. Mr. Herndon and Mr. Avery knew that the Festival prohibited festival patrons from entering the festival with a firearm. Mr. Avery was openly carrying a firearm. Mr. Herndon was carrying a bag, and Mr. Herndon does not indicate whether he is openly carrying a firearm, or whether he is carrying a concealed firearm. R. at p. 364, ¶¶ 35(a-c).

Mr. Herndon and Mr. Avery proceeded to the entrance of the festival. The Festival security personnel at the gate wore red shirts with both the Festival's logo and the word 'SECURITY' on the front. A member of the Festival security personnel said to Mr. Herndon and Mr. Avery's group, "Sorry, sir, no firearms." At this time, Mark Ogg, the lead of the gate security team for the Festival, was called over. Mr. Ogg was wearing a red shirt with both the Festival's logo and the word 'SECURITY' on the front. R. at pp. 364-65, 369-70, ¶¶ 35(d-e, g-h), 36.

Mr. Ogg, Mr. Herndon, and Mr. Avery engaged in a discussion about the prohibition on brining weapons into the venue. During this discussion, Mr. Ogg informed Mr. Herndon and Mr. Avery that the Festival's rule was that no weapons were allowed in the venue and that he would trespass them from the venue if they insisted on entering the festival with their firearms. During the interaction between Mr. Herndon and Mr. Ogg, other Festival security wearing red shirts with both the Festival's logo and the word 'SECURITY' on the front were standing nearby observing. R. at pp. 365-66, ¶¶ 35(i-m).

When Mr. Herndon asked, "If we were black, would you let us into the festival?" Mr. Ogg stated, "Let me get the police officers, they can deal with it." When a uniformed police officer

came over to Mr. Ogg and Mr. Herndon, Mr. Ogg informed the officer, "They're refusing to leave." Mr. Herndon indicated he was not refusing to leave, but instead was asking for an explanation of the law. The uniformed police officer stated to Mr. Herndon, "As long as you're not past the gate, you're not my issue." Mr. Herndon tried to speak further with the officer, but the officer walked away without answering Mr. Herndon. R. at p. 366, ¶¶ 35(n-p).

Mr. Ogg repeatedly told Mr. Herndon what the rules were and that such rules and policies were made by the Festival. At one point, Mr. Herndon asked if the City Attorney had reviewed the policy. Will Herrington, the City Attorney, was attending the festival on August 9, 2019, as a private person and not as a representative of the City[1]. Mr. Herrington was wearing a white polo shirt and a hat with the 'Titleist' logo on it. He was not wearing any clothing that identified him as being Festival security personnel or a representative of the City. Mr. Herndon turned to Mr. Herrington who had been observing the interaction with Mr. Ogg and attempted to explain to Mr. Herrington his legal argument of why he believed he could enter the festival with a firearm. Mr. Herndon and Mr. Herrington proceeded to discuss the Festival's prohibition on firearms. Mr. Herrington told Mr. Herndon it was up to the Festival to decide to prohibit firearms. R. at pp. 358, 366-68, 370, ¶¶ 5, 35(q-s, u-y), 39.

Mr. Herndon tried to get Mr. Ogg to engage in further discussion about why the Festival prohibited firearms. Mr. Ogg reiterated to Mr. Herndon, "You have a firearm, you're not entering

[1] Prior to the 2019 Festival, Mr. Herrington became aware that Mr. Herndon desired to enter the festival grounds during a concert in possession of a firearm. The City Attorney is not a policymaker for the City and does not set policy. R. at pp. 358, 362, ¶¶ 5, 27.

the property." Mr. Herndon asked for an explanation of what the City's position would be if he and Mr. Avery insisted on entering the festival. Mr. Ogg responded to Mr. Herndon that he had answered that already. Mr. Herndon stated that he wanted to "hear it from the City." Mr. Herrington responded that it was his understanding that the Festival would sign a citizen's complaint for trespassing. R. at pp. 368-69, ¶ 35(z, bb).

Mr. Herndon confirmed with Mr. Ogg and Mr. Herrington that if he entered the festival as he believed he could, that the Festival would then sign a citizen's complaint and he would thereafter be prosecuted for trespass. Mr. Herndon and Mr. Avery then thanked Mr. Ogg and Mr. Herrington, and then proceeded with Mr. Ogg to receive refunds for their tickets. R. at p. 369, ¶ 35(ee-ff).

No City police officer denied Mr. Herndon or Mr. Avery entrance to the festival or assisted the Festival in enforcing its policy of prohibiting firearms at the festival. Mr. Herrington did not assist the Festival in enforcing its policy of prohibiting firearms at the festival and he did not have any authority in his personal capacity to turn people away from the festival. At no time did the City require or encourage the Festival to prohibit firearms at the festival. At no time did the City request, advise, require, or include any provision in the lease prohibiting the possession of weapons, including firearms, at War Memorial Field during the term of the Festival's lease. The City has not adopted or enforced any law, rule, regulation, or ordinance which regulates in any manner the possession or carrying of firearms on property leased from the City, including properties leased by the Festival. R. at p. 370, ¶¶ 37-42.

The prohibition on weapons, including firearms, was solely the policy of the Festival and no other person or entity and was solely enforced by the Festival and the security personnel utilized by the Festival. The City did not enforce the Festival's policy prohibiting firearms. R. at 370, ¶ 41.

II. ISSUES PRESENTED ON APPEAL

The City restates Herndon's issues on appeal as follows:

A. Whether the district erred when it applied the doctrine of judicial estoppel to prevent Herndon from engaging in impermissible contradictory positions to attack the validity of the lease between the City and the Festival on the basis that Herndon had previously invoked the existence of a valid lease in the Complaint so as to gain entry to the courts on their claims for a judicial declaration and injunctive relief, and whether Herndon was entitled to a judicial declaration on the status of the lease.

B. Whether the district court erred in dismissing Herndon's claim alleging a violation of the Second Amendment to the U.S. Constitution based on its determination that there was insufficient evidence of state action presented by Herndon.

C. Whether the district court erred when it determined that Herndon's Equal Protection clause claim failed as a matter of law because existing case law holds that a claim for the infringement of the Second Amendment is not a cognizable claim under the Equal Protection clause.

D. Whether the district court erred when it denied Herndon's motion for extension of time or relief from deadline to object to the City's and the Festival's motions for costs and attorneys' fees.

E. Whether the City is entitled to an award of costs and attorneys' fees on appeal.

III. ATTORNEYS' FEES ON APPEAL

Pursuant to Idaho Appellate Rule 40, the City requests an award of costs on appeal. Pursuant to Idaho Appellate Rule 41, the City requests an award of attorneys' fees on appeal. The City seeks attorney fees on this appeal pursuant to Idaho Code § 12-117. The basis of the City's claim for attorney fees in set forth in Section IV., F. below.

IV. ARGUMENT

Under Idaho law, the Festival, as lessee of War Memorial Field, was entitled to exclude third parties from the premises. Idaho law does not limit the Festival's right to exclude persons carrying firearms from War Memorial Field. The City granted exclusive possession of War Memorial Field to the Festival for the lease term and did not adopt or enforce any law, rule, regulation, or ordinance which regulated the possession or carrying of firearms.

The claims alleged by Herndon were not supported with sufficient admissible evidence or pertinent legal authority. Instead, Herndon proffered unsubstantiated accusations and conclusory arguments, and now contends that the district court erred in not agreeing with their legally flawed and unsupported positions. Herndon did not, and still has not, demonstrated the essential elements of each claim alleged in their case, and summary judgment in favor of the City on all claims was proper. This Court should affirm the ruling of the district court.

A. Standards Of Review.

1. Summary Judgment.

When the Supreme Court reviews a lower court's ruling on a summary judgment motion, it applies the same standard of review the lower court utilized when ruling on the motion. *Idaho*

First Bank v. Bridges, 164 Idaho 178, 182, 436 P.3d 1278, 1282 (2018). A motion for summary judgment is proper when the party bringing the motion proves that there is no genuine issue as to any material fact and it is entitled to judgment as a matter of law. Idaho R. Civ. P. 56(a). The defendant will be entitled to judgment when the plaintiff fails to make a showing sufficient to establish the existence of an essential element of its claim and on which it bears the burden of proof. *See Thompson v. City of Lewiston*, 137 Idaho 473, 476, 50 P.3d 488, 491 (2002). Mere denials unaccompanied by facts admissible in evidence, affidavits of counsel based upon hearsay rather than personal knowledge, and conclusory assertions are all insufficient to raise genuine issues of fact. *See Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 401, 987 P.2d 300, 313 (1999); *Camp v. Jiminez*, 107 Idaho 878, 882, 693 P.2d 1080, 1084 (Idaho App. 1984).

2. Judicial Estoppel.

The district court's decision concerning the application of judicial estoppel is reviewed for an abuse of discretion. *Sword v. Sweet*, 140 Idaho 242, 252, 92 P.3d 492, 502 (2004). In determining whether a district court has abused its discretion, this Court asks (1) whether the district court correctly perceived the issue as one of discretion; (2) whether it acted within the outer boundaries of its discretion; (3) whether it acted consistent with applicable legal standards; and (4) whether it reached its decision by an exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

B. War Memorial Field Was Leased To A Private Party That Could Control The Premises And Exclude Others From The Premises. The Festival, As The Lessee Of War Memorial Field, Could Lawfully Exclude Persons Carrying Firearms From Festival Grounds.

1. Nature of Rights of the Festival as Lessee of Real Property.

The authority to lease War Memorial Field is derived from Idaho Code § 50-301 empowering municipal corporation to "sue and be sued; contract and be contracted with;…acquire, hold, lease, and convey property, real and personal;…and exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws of the constitution of the state of Idaho." The power to lease city property is "a purely discretionary function entrusted to the elected officials…and absent a clear abuse of that discretion, any decision made thereunder will not be overturned on appeal." *Bopp v. Sandpoint*, 110 Idaho 488, 491, 716 P.2d 1260, 1263 (1986).

The lease of real property gives a leasehold interest in realty in exchange for the promise to pay rent periodically. *Krasselt v. Koester*, 99 Idaho 124, 125, 578 P.2d 240, 241 (1978); *West v. Brenner*, 88 Idaho 44, 396 P.2d 115 (1964); *Miller v. Belknap*, 75 Idaho 46, 266 P.2d 662 (1954). The leasehold interest accords the lessee "both contract rights and a limited ownership interest in the real property," *Krasselt*, 99 Idaho at 125, 578 P.2d at 241, and entitles the lessee to exclusive possession of the property. *Devereaux Mortgage Co. v. Walker*, 46 Idaho 431, 436, 268 P. 37, 39 (1928). While the landlord still owns the real property in fee title and has a reversionary interest, the lessee has the possessory interest. *Bedard & Musser v. City of Boise*, 162 Idaho 688, 690, 403 P.3d 632, 634 (2017); *Wing v. Martin*, 107 Idaho 267, 272, 688 P.2d 1172, 1177 (1984); *Krasselt*, 99 Idaho at 125, 578 P.2d at 241.

The Idaho Supreme Court analyzed the meaning of the term "possessory interest" in *McKay v. Walker*:

> Black's Law Dictionary defines 'possessory interest' as 'the present right to control property, including the right to exclude others, by a person who is not necessarily the owner.' The Restatement (First) of Property states that a possessory interest in land exists where a person has: '(a) a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land . . ..'

160 Idaho 148, 152, 369 P.3d 926, 930 (2016) (citing Black's Law Dictionary 1284 (9th ed. 2009), Restatement (First) of Property § 7 (1936)). It follows that, during the term of the lease, the lessee is in control of the premises and thereby has control over third parties who enter the premises. *Stiles v. Amundson*, 160 Idaho 530, 533, 376 P.3d 734, 737 (2016). By having control of the premises, the lessee is deemed, "so far as third parties are concerned, to be the owner." *Id*.

There is nothing in the statutes granting the City the authority to lease its property that indicates that the leasehold interest it conveys is excluded from the applicable existing jurisprudence in Idaho defining the nature of rights of a lessee. *See also discussion infra*. Nothing in the applicable statutory authority or case law indicates that a private lessee of public property enjoys any less or different rights than a private lessee of private property. As the lessee of War Memorial Field, the Festival's leasehold interest entitled the Festival to possession of the property. The Festival had the right to exercise a certain degree of control over War Memorial Field, including the rights to exercise control over third parties and exclude others from War Memorial Field. Under controlling Idaho law, the Festival was essentially the owner of War Memorial Field during the lease term, so far as third parties were concerned.

2. The Idaho Legislature Recognized the Nature of Real Property Rights When It Codified Idaho Code § 18-3302. Section 18-3302 Does Not Limit a Private

Lessee's Right to Exclude Persons Carrying Firearms on Leased Public Property.

There are two fundamental concepts which underscore the interpretation of Idaho Code § 18-3302. One is the understanding of the intersection of the right to bear arms and property rights. The second is the Court's adherence to the primary canons of statutory construction.

While there are no cases in Idaho that interpret Section 18-3302 in the context of a private property owner's or private tenant's right to exclude, and Article I, § 11 of the Idaho Constitution has only been interpreted by Idaho courts a handful of times, there is guidance from other courts which this Court may rely upon in deciding the case at bar. One such decision is the Eleventh Circuit case *GeorgiaCarry.Org, Inc. v. Georgia* which arose from a challenge to a Georgia statute which barred the unrestricted carrying of weapons or long guns in eight specific locations, one of which was places of worship. 687 F.3d 1244 (11th Cir. 2012), *cert. denied* 568 U.S. 1088 (2013). While the underlying facts of *GeorgiaCarry* are not particularly germane to this matter, the Eleventh Circuit's analysis of the historical context of the right to bear arms as it relates to property rights illuminates an issue that is central to this Court's decision.

Beginning with an examination of the historical background of the Second Amendment, the court quoted William Blackstone's *Commentaries on the Laws of England*:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

687 F.3d at 1261-62. In that regard, the court reflected that a guest is only able to enter or stay on private property with the owner's permission and is removable at the owner's direction, while also

observing that the Georgia statute at issue recognized the right of a private actor in control of property through a lease to forbid the possession of a weapon on the property. *Id.* at 1262 n. 37. As the court noted, an action for trespass flows from the right to exclude, and criminal law principles of trespass "drawn from the common law reinforce the fundamental nature of a property owner's rights." *Id*. at 1263. The court went on to state:

> Property law, tort law, and criminal law provide the canvas on which our Founding Fathers drafted the Second Amendment. A clear grasp of this background illustrates that the pre-existing right codified in the Second Amendment does not include protection for a right to carry a firearm in a place of worship against the owner's wishes. **Quite simply, there is no constitutional infirmity when a private property owner exercises his, her, or its…right to control who may enter, and whether that invited guest can be armed and the State vindicates that right**….
>
> By codifying a pre-existing right, **the Second Amendment did not expand, extend, or enlarge the individual right to bear arms at the expense of other fundamental rights**; rather the Second Amendment merely preserved the status quo of the right that existed at the time….
>
> **An individual's right to bear arms as enshrined in the Second Amendment, whatever its full scope, certainly must be limited by the equally fundamental right of a private property owner to exercise exclusive dominion and control over its land.** The Founding Fathers placed the right to private property upon the highest of pedestals, standing side by side with the right to personal security that underscores the Second Amendment.

687 F.3d at 1264-65 (emphasis added). The court concluded that the Second Amendment "codified a pre-existing right that was circumscribed by the common law rights of an owner under property law, tort law, and criminal law." *Id.* at 1266.

The pre-existing right to bear arms enshrined in the Second Amendment and Article I, § 11 of the Idaho Constitution is fully recognized in Section 18-3302. The statute provides in

relevant part:

> No person shall carry concealed weapons on or about his person without a license to carry concealed weapons, except:
> …
> (b) On property in which the person has any ownership or leasehold interest;
> (c) On private property where the person has permission to carry concealed weapons from any person with an ownership or leasehold interest;
> (d) Outside the limits of or confines of any city, if the person is eighteen (18) years of age or older and is not otherwise disqualified from being issued a license under subsection (11) of this section.

I.C. § 18-3302(3). Subsection (3), however, is limited by the provisions of subsection (4):

> Subsection (3) of this section shall not apply to restrict or prohibit the carrying or possession of:
> (a) Any deadly weapon located in plain view;
> (b) Any lawfully possessed shotgun or rifle;
> …
> (f) Any deadly weapon concealed by a person who is:
> (i) Over age eighteen (18) years of age;
> (ii) A resident of Idaho or current member of the armed forces of the United States; and
> (iii) Is not disqualified from being issued a license under paragraphs (b) through (n) of subsection (11) of this section.

I.C. § 18-3302(4). When read together, these two provisions of Section 18-3302 allow, among other permitted conduct, persons with a license to carry a concealed firearm or persons carrying a firearm in plain view to carry such firearm on public property.

Canons of statutory construction require the Court to give the "literal words" of a statute "their plain, usual, and ordinary meaning" and construe the statute as a whole. *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011) (internal quotations and citations omitted). When construing section 18-3302 as a whole, the Court is bound to give effect

to subsection (25) which provides, "Nothing in subsection (3) or (4) of this section shall be construed to limit the *existing rights* of a private property owner, *private tenant*, private employer or *private business entity*." (emphasis added).

When considering the language of Section 18-3302(25), the Court must assume that the legislature, when enacting the statute, had "full knowledge of the existing judicial decisions and case law of the state." *George W. Watkins Family v. Messenger*, 118 Idaho 537, 540, 797 P.2d 1385, 1388 (1990), *overruled in part on other grounds by Verska*, 151 Idaho at 895-96, 265 P.3d at 508-09. Likewise, the Court presumes that, unless it is plain from an express declaration or the language of the statute does not allow any other interpretation, the legislature does "not intend to overturn long established principles of law." *Id*.

Idaho Code § 18-3302 must be read to encompass the well-established law defining the landlord – tenant relationship, and specifically, the fundamental rights enjoyed by a lessee of real property. The statute explicitly declares that the *existing rights* of a *private tenant* are not limited by subsections (3) or (4), meaning that the legislature unambiguously and expressly recognized the rights of a private tenant to control the leased property, exclude others from the leased property, and to control third parties who enter upon the leased property. These rights of a lessee are undoubtedly as fundamental to preserving the public peace as much as the rights of the owner. *See GeorgiaCarry*, 687 F.3d at 1263. The commonsense interpretation of Section 18-3302 is that the Legislature codified that the right to bear arms was circumscribed by the right to exclude. So far as Herndon and other third parties are concerned, during the Festival at Sandpoint, the Festival was the owner of the property and had the right to exclude other members of society in general

from any occupation of the leased premises.

This Court should also assume that the legislature was fully aware of a municipality's authority to lease public property to private lessees. Thus, the legislature was aware that in some instances, a private lessee would lease public property and have the right to exclude persons carrying firearms from such property. Section 18-3302(25) necessarily subordinates the right of the people to carry firearms to the rights of the private property owner, private tenant, private employer or private business entity. The only logical conclusion to be reached by this Court is that during the lease term of War Memorial Field, the Festival could exclude persons carrying firearms from the property.

Herndon has offered no persuasive and applicable authority to support the argument that a private party leasing public property enjoys any less rights in the property than if the private party leased private property. *Cf. Mountain States Tel. & Tel. Co. v. City of Boise*, 95 Idaho 264, 266, 506 P.2d 832, 834 (1973) ("A municipality may lease its property to a private concern when the lease does not conflict with the public's use or need for the property."). Whatever right the City does not have or the Festival has to exclude persons carrying a firearm from War Memorial Field is by virtue of their respective status as a public or private entity. The Second Amendment, Article I, § 11 of the Idaho Constitution, and Section 18-3302 are meant to protect the right to bear arms from *governmental* infringement. The Festival is not a governmental entity, and as more fully discussed below, Herndon failed to provide the district court with any evidence of governmental action.

Herndon's conception of the law leads to the conclusion that a private party is subject to

all of the laws and restrictions which only apply to the government if the private party is a lessee of public property. According to Herndon, "Idaho Code § 18-3302J imposes an *encumbrance* on public property in this state, that forbids local governments from burdening the right to self-defense in any way not authorized by the Idaho Legislature." Appellants' Brief at pp. 27-28. That interpretation is simply not supported by law.

The rationale that a private lessee of public property may properly exclude persons carrying firearms from the leased property has already been accepted by our neighboring jurisdiction, the Oregon Court of Appeals. In *Starrett v. City of Portland*, the City of Portland entered a lease with a private company, wherein the private company leased Pioneer Courthouse Square from the City for an event. 196 Or. App. 534, 536, 102 P.3d 728, 730 (2004). The City passed an ordinance authorizing the private company to "adopt and enforce rules of conduct for the event." *Id.* Accordingly, the private company adopted a rule that denied entry to persons who possessed weapons, including firearms, with no exception for persons who were licensed to carry a concealed handgun. 196 Or. App. at 536-37, 102 P.3d at 730.

Under Oregon law, a city is prohibited from regulating the carrying of concealed handguns, pursuant to a license, on public property. ORS 166.170, ORS 166.173; 196 Or. App. at 541, 102 P.3d at 733. The plaintiff, who was licensed to carry a concealed handgun, had planned to attend the event and carry his concealed handgun. 196 Or. App. at 537, 102 P.3d at 730. The plaintiff sued the City of Portland alleging that the City unlawfully allowed private lessees of public property to prohibit people licensed to carry concealed handguns from doing so at events on the leased property. 196 Or. App. at 536, 102 P.3d at 730.

The trial court granted the City's motion for summary judgment, and the Court of Appeals affirmed. 196 Or. App. at 537-38, 544, 102 P.3d at 730-31, 734. In doing so, the Court of Appeals answered the question of "whether the city may lease public property to private parties on terms that permit private parties to decide to prohibit persons licensed to carry concealed handguns from carrying the handguns into the event on the property so leased." 196 Or. App. at 541, 102 P.3d at 732-33. The plaintiff argued that, because the City lacked the authority to enact a regulation prohibiting the licensed concealed carry of a handgun, then the City could not lease public property to private persons on terms that allowed the private lessees to do what the City could not do. 196 Or. App. at 541, 102 P.3d at 733. Specifically, the plaintiff reasoned that "[T]he city 'may not transfer by lease those property rights which are forbidden it by virtue of statutory prohibition…. Simply put, what the city cannot do on its property, the lessee of city property cannot do. This is a function of basic property law. Property rights are a finite "bundle of sticks" and whatever stick a conveyor of property lacks, the subsequent grantee will lack.'" 196 Or. App. at 541, 543, 102 P.3d at 733, 734.

The Oregon Court of Appeals disagreed with the plaintiff's position. 196 Or. App. at 542-44, 102 P.3d at 733-34. The court noted that the relevant statutory provisions[2] limited the City's

[2] ORS § 166.170 provides:
(1) Except as expressly authorized by state statute, the authority to regulate in any matter whatsoever the sale, acquisition, transfer, ownership, *possession*, storage, transportation or *use* of firearms or any element relating to firearms and components thereof, including ammunition, is vested solely in the Legislative Assembly.
(2) Except as expressly authorized by state statute, no county, city or other municipal corporation or district may enact civil or criminal ordinances, including but not limited to zoning ordinances, to regulate, restrict or prohibit the sale, acquisition, transfer, ownership, *possession*,

authority to *enact ordinances* that *regulated* firearms, but those statutes did not limit the right of private parties to exercise control over property they rented, leased, or owned. 196 Or. App. at 542, 102 P.3d at 733. The court explained that "[a]n ordinance leasing public property to a private person, on terms that permit the private person to decide whether to permit persons carrying concealed handguns (even with a license) to enter the leased property or participate in an event on that property, is not an exercise of governmental regulatory authority." *Id*.

With respect to the plaintiff's "bundle of sticks" line of reasoning, the Court of Appeals concluded that the argument advanced by the plaintiff confused property rights with municipal authority to exercise governmental regulatory power. 196 Or. App. at 543, 102 P.3d at 734. The court stated:

> Restrictions on a municipality's regulatory authority are not the legal or logical equivalent of restrictions on its property rights. ORS 166.170 and ORS 166.173 do not alter a city's *title* to property. Rather, those statutes limit a city's *regulatory* authority--that is, a city's organic authority as a governmental entity. If a city possesses fee title to property, it can convey fee title to property (assuming, of course, that it has authority to possess and sell property in the first place). Nothing in either ORS 166.170 or ORS 166.173 serves to prevent a private purchaser of formerly public property from both receiving and exercising the full rights of the title conveyed, which would include the right to exclude from the property persons who carry concealed handguns pursuant to a license to do so. The same is true when

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storage, transportation or *use* of firearms or any element relating to firearms and components thereof, including ammunition. Ordinances that are contrary to this subsection are void. *Cf*. I.C. § 18-3302J(2).

ORS § 166.173 provides in relevant part:
(1) A city or county may adopt ordinances to regulate, restrict or prohibit the possession of loaded firearms in public places as defined in ORS 161.015.
(2) Ordinances adopted under subsection (1) of this section *do not apply to or affect*:
…
(c) A person licensed to carry a concealed handgun. …

> a city rents or leases property--that is, the statutes do not limit private property rights in property rented or leased from a city or other governmental entity.

196 Or. App. at 543-44, 102 P.3d at 734 (emphasis in original).

Like the plaintiff in *Starrett*, Herndon has confused "property rights with municipal authority to exercise governmental regulatory power." 196 Or. App. at 543, 102 P.3d at 734. Herndon's position that Section 18-3302J is an encumbrance on public property evidences a clear misunderstanding of the law. Like ORS 166.170 and ORS 166.173, Sections 18-3302 and 18-3302J are limitations on a city's authority to adopt or enforce a law, rule, regulation or ordinance which regulates the possession or carrying of firearms. That limitation of a city's regulatory authority is not a limitation of fundamental property rights. Herndon's conception of the law which solely focuses on the public ownership of the property to limit the fundamental rights of any party that may lease the property, or even later own the property, is wholly unsupported in the law.[3]

To adopt Herndon's viewpoint that Section 18-3302J is an encumbrance on public property that runs with the land, despite no express language or authority which would support such an interpretation, would mean that if the City conveyed War Memorial Field to a private party, the private party purchaser would receive the property and be unable to exclude persons carrying firearms from the property simply because, in Herndon's view, the City lacked the property right

[3] This Court recognizes that the public does not enjoy an unfettered right to enter publicly owned property. Under Idaho's criminal trespass statutes, there is no distinction made between property which is publicly owned as opposed to privately owned; the government may trespass individuals from public property. *See State v. Clark*, 161 Idaho 372, 376, 386 P.3d 895, 899 (2016); *State v. Korsen*, 138 Idaho 706, 713, 69 P.3d 126, 133 (2003); *see also State v. Pentico*, 151 Idaho 906, 911-12, 265 P.3d 519, 524-25 (Idaho App. 2011).

and could not convey such a right. That result is clearly not contemplated anywhere in Idaho law.

Herndon has offered no authority which supports the proposition that the Festival, as a private tenant, could not lawfully exclude persons carrying firearms from the premises it leased. With no cogent argument or authority for such a position, Herndon's argument should not be considered. *Lamprecht v. Jordan, Ltd. Liab. Co.*, 139 Idaho 182, 187, 75 P.3d 743, 748 (2003).

3. The Lease of War Memorial Field to the Festival was Lawful and Proper. Herndon's Arguments Regarding the Validity of the Lease Are Unsupported in the Law.

Herndon continues to advance the argument that the 2019 lease between the City and the Festival should not be classified as a lease at all because, according to Herndon, the City did not comply with Idaho Code § 50-1409 when it executed the 2019 lease. Appellants' Brief at pp. 15-18, 24-26. Herndon claims the City could not lease War Memorial Field to "anyone unless its 'Mayor and council…, by resolution, authorizes the lease of the property as not needed for city purposes, and upon such terms as may be just and equitable." Appellants' Brief at p. 16. Herndon contends that in order for the lease of municipally owned property to be valid there must be a resolution, a finding that the property is "not needed for city purposes," and a finding that the lease terms are "just and equitable" and relies on the *Bopp v. Sandpoint* case in support thereof. *Id*.

Idaho Code § 50-1409 provides that the mayor and council are authorized to lease any city property not needed for city purposes, and the city council "may, by resolution, authorize the lease of any property *not needed for city purposes*, upon such terms as may be just and equitable", "may set apart portions of the public parks, playgrounds or other grounds to be used from time to time for athletic contests, golf links, agricultural exhibits, ball parks, fairs, rodeos, swimming pools and

other amusements", and may "make and enter into proper contracts with organizations and associations necessary and proper to carry out the purpose of this provision." (emphasis added).

The provisions of Section 50-1409 cannot be read in isolation nor may particular provisions of the statute be ignored. *Nelson v. Evans*, 166 Idaho 815, 820, 464 P.3d 301, 306 (2020). Likewise, courts have a duty to ascertain the purpose and intent of the legislature by reading the whole act, without separating one statutory provision from another. *George W. Watkins Family*, 118 Idaho at 539, 797 P.2d at 1387. The court is thus bound to give effect to Idaho Code § 50-1401 which provides:

> It is the intent of this *chapter* that cities of the state of Idaho shall have general authority to manage real property owned by the city in ways which the judgment of the city council of each city deems to be in the public interest. The city council shall have the power to sell, exchange or convey, by good and sufficient deed or another appropriate instrument in writing, any real property owned by the city *which is underutilized or which is not used for public purposes*.

(emphasis added). The statutory provisions contained in Title 50, Chapter 14 pertain to the requirements for conveying property which is "underutilized or which is not used for public purposes", to wit, a city's surplus property. I.C. § 50-1401. Herndon's contention that the City was required to comply with Section 50-1409 by passing a resolution which specifically found that War Memorial Field was not otherwise needed for City purposes and specifically stated that the terms of the lease with the Festival were just and equitable demonstrates a misunderstanding of the law.

To begin with, War Memorial Field is not property which is underutilized, not used for public purposes, or not needed for public purposes. R. at pp. 95-96, 521, ¶ 9. The requirements

set forth in Section 50-1409 would appear to be inapplicable to the lease of city property which is used or needed for public purposes. The City could have authorized the lease of War Memorial Filed to the Festival by a specific resolution, but it was not required to do so.

What the City did do was pass Resolution 18-54 on November 20, 2018, which adopted the City's Special Events Policy and Procedures. R. at pp. 122-149. On the same day, the City also amended Title 6, Chapter 6 of the Sandpoint City Code, which amendments set forth the requirements for permitting special events, like concerts, festivals, parades, rallies, and public assemblies pursuant to the adopted Special Events Policy and Procedures. R. at pp. 539-41. For the 2019 festival, the City and the Festival executed the lease on or about July 30, 2019. R. at pp. 524-37. Prior to the execution of the lease, the Festival was issued a Special Event Permit pursuant to City Code and the Special Events Policy and Procedures. R. at pp. 524.

The City exercised its discretion and statutory authority to lease city property through the council-approved Special Events ordinance and Special Events Policy and Procedures, which set forth the standards by which the 2019 festival, or any other special event on City property, could take place. *See* I.C. § 50-301; *Bopp*, 110 Idaho at 491, 716 P.2d at 1263; R. at p. 157, ln. 20-22. The City is authorized to delegate special event permitting, and because of the need to ensure an efficient process in permitting special events which varied in scope, purpose, cost, and complexity, the City created a blanket policy for all special events that occupy streets or other public property managed by the City. R. at pp. 519-20, ¶ 3. After the City Council adopted the Special Events ordinance and passed the Special Events Policy and Procedures resolution, the City delegated the authority for permitting special events and such permits were issued administratively. R. at p. 519,

¶ 4. The adoption of the Special Events ordinance and the Special Events Policy and Procedures was the authorization by the City Council to enter into agreements, such as the 2019 lease with the Festival. R. at p. 157, ln. 20-22. The 2019 lease was executed on the authority of the properly adopted ordinance and Special Events Policy and Procedures resolution. *Id*. In accordance with such delegated authority, the City issued a special event permit to the Festival and executed the 2019 lease. R. at pp. 523-37.

An examination of Title 50 further underscores the propriety of the City's actions. Idaho Code § 50-301 contains the initial grant of broad general authority to lease city property. Thereafter, the statutory provisions relating to leases speak to specific circumstances. *See* §§ 50-220 (lands outside corporate limits); 50-234 (mining property); 50-305 (hospitals); 50-321 (aviation facilities); 50-324, 50-326 (city-owned water, electric, and natural gas systems); 50-1030 (public works systems); 50-1401 *et seq*. (surplus property); 50-1803 (city's water stock); 50-1904 (housing authority); 50-2011, 50-2015 (lease of property by or to urban renewal agency); 50-2623, 50-2624 (property within a business improvement district); 50-2716 (industrial development facility). For these specific circumstances, the specific statute will control. *State v. Roderick*, 85 Idaho 80, 84, 375 P.2d 1005, 1007 (1962). For leases where no specific statute addresses the circumstance, the general statute, Section 50-301, will control. *Id*.

The execution of the 2019 lease with the Festival was lawful and proper. Even if this Court were to agree with Herndon that compliance with Section 50-1409 was required, Herndon has failed to provide any admissible evidence of "glaring informality or illegality in the proceedings" or evidence of a clear abuse of discretion relating to the execution of the lease, and instead has

relied solely upon conclusory, unsupported arguments. *Bopp*, 110 Idaho at 491, 716 P.2d at 1263 (internal quotations omitted). Contrary to Herndon's position, *Bopp* does not impose any specific requirements in addition to those set forth by statute upon a municipality when leasing city property, whether the property is surplus or not. *See id*. The City adopted an ordinance and passed a resolution to streamline the process for special events. Neither at the district court, nor before this Court, has Herndon presented any legal authority for their conclusion that, absent the specific resolution they contend should have been passed, the contract between the City and the Festival cannot be classified as a lease. *See Krasselt*, 99 Idaho at 125, 578 P.2d at 241 ("A lease is a particular kind of contract wherein (generally) a leasehold interest in realty is given in return for a promise to pay rent periodically.").

In any event, Herndon lacked standing to challenge the lease of War Memorial Field in 2019. To have standing, a litigant "must allege or demonstrate an injury in fact and substantial likelihood the relief requested will prevent or redress the claimed injury." *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). Standing requires a showing of a "distinct palpable injury" and a fairly traceable causal connection between the claimed injury and the challenged conduct." *Id*. Standing is lacking when the asserted harm is "a generalized grievance shared by all or a large class of citizens." *Id*. "An interest, as a concerned citizen, in seeing that the government abides by the law does not confer standing." *Troutner v. Kempthorne*, 142 Idaho 389, 391, 128 P.3d 926, 928 (2006). Concerning the process of how the 2019 lease was executed, Herndon failed to show that they suffered some injury which was one not generally

shared by all residents alike nor did they demonstrate how the district court could remedy any injury.

4. The Lease of War Memorial Field to the Festival Did Not Violate Public Policy.

Herndon advances two theories to argue that the lease of War Memorial Field violated public policy. Appellants' Brief at pp. 30-34. First, it was, or would be, against public policy for the City to make a finding that a public park was not needed for city purposes. *Id*. at p. 31. Second, the City acted contrary to the public interest because the Festival's weapons policy violates the Second Amendment and the City could not circumvent state and federal law through a lease. Id. at pp. 32-34.

Herndon's first argument is nonsensical and unsubstantiated by any law. On the one hand, Herndon argues that the City had to make a finding that War Memorial Field was not needed for City purposes, and then turns and says it would be a "gross violation" of the public trust and a misappropriation of public property for it do so. Appellants' Brief at p. 31. Even if the City had made the determination that War Memorial Field was not needed for City purposes, nothing in Section 50-1409 excepts public property which may honor service members from its purview.

The second argument is legally flawed, flatly wrong, and only supported by superficial analysis and cherry-picked quotations from inapplicable cases. It is evident that Herndon either misunderstands or misinterprets property rights and governmental action.

Nordyke v. Cty. of Santa Clara is inapposite since, in that case, restrictions were imposed on the sale of guns in an addendum to a lease of county fairgrounds (which indisputably did not occur here), and the constitutional infirmity alleged by the plaintiffs was a violation of the First

Amendment. 933 F. Supp. 903 (N.D. Cal. 1996); *see Nordyke v. Santa Clara Cty.*, 110 F.3d 707 (9th Cir. 1997). There was no Second Amendment analysis by the court, and the analysis of the propriety of including such restrictions in a lease addendum was centered on the curtailment of commercial speech. 933 F. Supp. at 906-09; 110 F.3d at 710-13.

O'Bryant v. Idaho Falls concerned an attack on the validity of an ordinance granting an exclusive franchise and has no application to this case. 78 Idaho 313, 303 P.2d 672 (1956). *Mountain States Tel. & Tel. Co. v. Boise* does not support Herndon's position, but the City's. 95 Idaho at 266, 506 P.2d at 834 ("Whether property will or will not be needed for city purposes, presently or in the future, is within the power of the City Council to decide.").

What Herndon continually fails to acknowledge is that not a single provision in the 2019 lease between the City and the Festival speaks to the Festival's weapons prohibition, the City did not adopt or enforce the Festival's rule, the Festival at all times acted as a private entity, and Section 18-3302J does not apply to private actors. The City has repeatedly asserted that the Festival, as a private entity, had the right to exclude people from War Memorial Field, including those in possession of firearms, during the term of its lease, and that such action by the Festival was not proscribed by Section 18-3302J. It cannot be against public policy for the City to recognize the existing property rights of the Festival and to not interfere with those rights when it leased War Memorial Field.

5. Herndon's Unclean Hands Argument Was Not Argued to the District Court and May Not Be Considered by this Court.

"The unclean hands doctrine stands for the proposition that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue." *Countrywide Home Loans, Inc. v. Sheets*, 160 Idaho 268, 273, 371 P.3d 322, 327 (2016) (internal citations omitted). On appeal, Herndon argues that the City chose to deal with the Festival through a defective lease which was executed in violation of Idaho law, and such conduct is evidence of unclean hands. Appellants' Brief at pp. 24-26. Herndon made no argument to the district court that it should apply the doctrine of unclean hands against either the City or the Festival. R. at pp. 278-301, 436-99, 556-91, 664-68. It is well established that this Court "will not consider issues raised for the first time on appeal." *ABK, Ltd. Liab. Co. v. Mid-Century Ins. Co.*, 166 Idaho 92, 101, 454 P.3d 1175, 1184 (2019) (internal quotations omitted). Herndon may only present theories which were argued to the court below. *Id*.

C. The District Court Correctly Determined That Herndon's Attacks On The Lease Between The City And The Festival Were Improper.

Judicial estoppel is an equitable doctrine intended to protect the dignity of the judicial process which is invoked by a court at its discretion. *Med. Recovery Servs., Ltd. Liab. Co. v. Eddins*, --- Idaho ----, 494 P.3d 784, 791 (2021). Judicial estoppel is not an affirmative defense that must be raised by a defendant in a responsive pleading. *Med. Recovery Servs., Ltd. Liab. Co. v. Siler*, 162 Idaho 30, 35, n.2, 394 P.3d 73, 78 (2017). Judicial estoppel serves several purposes. It "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Frost v. Gilbert*, --- Idaho ---, 494 P.3d 798, 817 (2021) (internal quotations omitted). It is intended to protect against litigants "playing fast and

loose with the courts." *McKay v. Owens*, 130 Idaho 148, 152, 937 P.2d 1222, 1226 (1997). It is also intended to "prevent abuse of the judicial process by deliberate shifting of positions to suit the exigencies of a particular action." *Eddins*, --- Idaho ---, 494 P.3d at 791 (internal quotations omitted).

This Court has applied factors from the U.S. Supreme Court which "inform a court on whether to apply judicial estoppel in a particular case". *See Safaris Unlimited, Ltd. Liab. Co. v. Jones*, --- Idaho ---, 501 P.3d 334, 340 (2021) (citing *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001)). These factors include: "(1) whether a party's later position is clearly inconsistent with its earlier position, (2) whether the party has succeeded in persuading a court to accept the party's earlier position, 'so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled,' and (3) 'whether the party seeking to assert an inconsistent position would derive an unfair advantage on the opposing party if not estopped.'" *Id* (quoting 532 U.S. at 750-51).

Herndon's complaint alleged that, "[t]he City of Sandpoint leases a public park to the Festival at Sandpoint, Inc., every August", and "Currently, and for several decades now, [the City] has entered into a written agreement (contract or lease) with [the Festival] to rent the War Memorial Park for a series of music concerts and art/cultural events (the Festival) for approximately two weeks during the month of August", and "As evidenced by the written agreement between the City [] and the Festival []…" R. at pp. 10, 14, 20. The allegation that the City and the Festival had a written agreement for the rental of War Memorial Field for two weeks

during the summer for the music festival was expressly incorporated into every cause of action. R. at pp. 14, 16, 19-22.

In their summary judgment briefing, however, Herndon claimed they were challenging the classification of the agreement between the City and the Festival as a "lease". R. at p. 284. Herndon argued that the City did not comply with Section 50-1409 for the lease of War Memorial Field to the Festival, and so, the City lacked the power to lease War Memorial Field and the Festival could not be a leaseholder. R. at p. 481. As Herndon put it, the "lease" was invalid and the City was unauthorized to lease War Memorial Field to anyone unless it complied with Section 50-1409. R. at p. 461.

Herndon argues that Idaho R. Civ. P. 8 allows the inconsistent factual positions and the courts are required to construe their pleadings so as to do justice. Appellants' Brief at pp. 19-20. While Rule 8 permits a party to plead inconsistent claims or defenses, it has not been construed as blanket authority for pleading any set of differing facts by a party. *See Murr v. Odmark*, 112 Idaho 606, 608, 733 P.2d 827, 829 (Idaho App. 1987) ("The right to plead alternative or inconsistent facts under Rule 8 does not include a right to plead a set of facts known to be untrue…Rule 8 allows the pleading of differing facts only when there is good faith doubt as to which set of facts ultimately will be found upon the evidence adduced at trial.").

Here, Herndon relied on the representation to the court that the City and the Festival had a written agreement, described as a contract or lease, for the rental of War Memorial Field to seek declaratory and injunctive relief. Nothing in the complaint alleged that the lease was invalid or that the City lacked authority to lease War Memorial Field to the Festival. R. at pp. 9-23. Herndon

also was not seeking a judicial determination of the validity of the lease. R. at pp. 14-19. Herndon sought a determination that an alleged provision or agreement in the lease was precluded by Section 18-3302J. R. at pp. 18-19.

Herndon's position at summary judgment is clearly inconsistent with the facts as alleged in the complaint. The two positions – first, that the City leased War Memorial Field to the Festival through a written agreement and had done so for several years, and second, whatever arrangement the City and the Festival had entered into for the Festival's use of War Memorial Field for the summer music festival was not a lease – are incompatible. Herndon did not merely state inconsistent claims in their pleadings; they deliberately advanced inconsistent positions at different stages of litigation. The district court's application of judicial estoppel was proper and it did not abuse its discretion when it determined that Herndon was precluded from attacking the validity of the lease.

Even if the Court determines that the district court should not have applied judicial estoppel, the error was harmless. *See Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 750, 215 P.3d 457, 470 (2009) ("When a decision is based upon alternative grounds, the fact that one of the grounds may be in error is of no consequence and may be disregarded if the judgment can be sustained upon one of the grounds."). As set forth above, Herndon's arguments attacking the validity of the lease were and are factually and legally unsupported, and the district court had no obligation to consider them. *Lamprecht*, 139 Idaho at 187, 75 P.3d at 748.

D. There Was A Complete Lack of Proof On Which A Deprivation Of Herndon's Federal Constitutional Rights Could Be Found, and Even When the Facts Were Viewed in a Light Most Favorable to Herndon, the Claims Failed as a Matter of Law.

1. Nature of 42 U.S.C. § 1983 Cause of Action.

For a plaintiff to succeed on a § 1983 claim, the plaintiff must establish the violation of a right secured by the Constitution or a federal statutory law, and that such deprivation occurred under color of state law. *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002); *see also Hoagland v. Ada Cty.*, 154 Idaho 900, 910, 303 P.3d 587, 597 (2013). Accordingly, only those who "represent the state in some capacity, whether they act in accordance with their authority or misuse it", are proper defendants in a § 1983 case. *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) (internal citations and quotations omitted).

To hold a municipality liable for an alleged constitutional violation requires more than mere employment of a tortfeasor. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691-92 (1978). The Supreme Court recognized that the language of § 1983 only imposes liability when "some official policy 'causes' an employee to violate another's constitutional rights." *Id*. at 692. Plainly then, a municipality will not be held liable under § 1983 unless the constitutional violation "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id*. at 690.

Alternatively, for a plaintiff to succeed on a municipal liability claim, he must demonstrate that (1) the constitutional tort was the result of a "longstanding practice or custom which constitutes the standard operating procedure of the local government entity;" (2) the tortfeasor was an official whose acts fairly represent official policy such that the challenged action constituted official policy; or (3) an official with final policy-making authority "delegated that authority to, or ratified the decision of, a subordinate." *Ulrich v. City & County of San Francisco*, 308 F.3d 968,

984-85 (9th Cir. 2002). Whether by pointing to an official policy or a custom, the plaintiff may only seek to hold the municipality liable for acts which it has officially sanctioned or ordered and not for the acts of its non-policymaking employees. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986).

2. The State Action Doctrine.

There are important principles underlying the constitutional distinction between state action and purely private conduct. "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). Likewise, the state action requirement prevents the government from being held liable for the conduct of private parties for which it cannot be fairly blamed. *Id*. The state action requirement "reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments.'" *Id* (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978))

The Supreme Court has applied a variety of tests to aid courts in identifying state action: "(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus." *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) (internal quotations and citations omitted). The "[s]atisfaction of any one test is sufficient to find state action," but "[a]t bottom, the inquiry is always whether the defendant has exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747-48 (9th Cir. 2020). "In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to

the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action." *Tarkanian*, 488 U.S. at 192. Herndon has claimed that the Festival is a state actor under either the public function or nexus tests, or both. Appellants' Brief at p. 40.

"Under the public function test, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Lee v. Katz*, 276 F.3d 550, 554-55 (9th Cir. 2002). The public function test is satisfied only on a showing that the function at issue is "both traditionally and exclusively governmental." *Id*. at 555. The relevant inquiry is whether the private actor was performing a public function at the time of the alleged constitutional violation. *Kirtley*, 326 F.3d at 1092. The functions considered to fall traditionally within the exclusive prerogative of the state comprise a very narrow category, subject to "carefully confined bounds." *Flagg Bros*., 436 U.S. at 163.

Under the nexus text, the relevant question is whether "there is such a close nexus between the State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Acad. v. Tennessee Secondary Sch. Athletics Ass'n.*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). It is ultimately the plaintiff's burden to establish state action under one of the foregoing tests. *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 922 (9th Cir. 2011).

3. There was No Governmental Action.

The undisputed facts demonstrated that Herndon could not meet their burden of establishing governmental action in any of the alleged Constitutional violations. The video

evidence created by Herndon, standing on its own, foreclosed any possibility of success. Nonetheless, in deciding whether there was state action here, "examples may be the best teachers". *Brentwood*, 531 U.S. at 296.

In *Villegas v. Gilroy Garlic Festival Ass'n*, the Ninth Circuit decided the question of whether attendees at the Gilroy Garlic Festival could hold the City of Gilroy, California and the Gilroy Garlic Festival Association liable in a civil rights action where certain attendees were escorted from the Garlic Festival by a Gilroy police officer for violating the festival's dress code. 541 F.3d 950, 952 (9th Cir. 2008). The Garlic Festival was held in a public park in Gilroy for two days in the summer. *Id*. at 953. The Garlic Festival entered into a facility reservation contract with Gilroy, and under the terms of the agreement, the Garlic Festival was required to "understand and agree" that the Gilroy Police Department could require security and traffic control. *Id*.

The Garlic Festival had a chair of security, along with an assistant chair, who were unpaid volunteers; one of these positions was usually a law enforcement officer with Gilroy's Police Department or another law enforcement agency. *Id*. After the festival was over, Gilroy typically submitted a bill to the Garlic Festival for providing city law enforcement officers to staff the festival. *Id*.

The Garlic Festival had an unwritten policy that prohibited attendees from wearing "gang colors or other demonstrative insignia, including motorcycle club insignia." 541 F.3d at 953. The dress code did not allow persons wearing clothing with gang colors or insignia to remain at the festival; instead, these persons were allowed to attend the festival if they removed such clothing. *Id*. at 954. The dress code policy was adopted in response to increased gang-related violence that

had occurred at the festival in the years prior. *Id*.

The plaintiffs, members of a motorcycle club, entered the festival wearing vests with the club's insignia displayed. *Id*. at 953, 954. The plaintiffs were informed by two Gilroy police officers that the Garlic Festival had a dress code policy, and if they refused to remove their vests, then they would be asked to leave and would be refunded their entry fee into the festival. *Id*. at 954. The plaintiffs refused to remove their vests and the police officers escorted them out of the festival to the ticket booth where the plaintiffs were refunded their entry fee. 541 F.3d at 954.

The plaintiffs filed suit, alleging that the Garlic Festival was a state actor and that Gilroy was liable for enforcing an unconstitutional dress code which it had impliedly adopted. *Id*. In support of these arguments, the plaintiffs relied on the following facts: the festival was held in a public park, owned by Gilroy; Gilroy issued a written permit to the Garlic Festival which was signed by all of the city council members, and which required Gilroy to provide some of its police officers as security for the festival; Gilroy submitted a bill to the Garlic Festival for the use of its police officers; the 'chair of security' for the Garlic Festival was typically a police officer with the Gilroy Police Department; at the time of the incident, the chair of security was an active member of the Gilroy Police Department; and the police officer utilized the command post of the Gilroy Police Department at the festival grounds. *Id*. at 955.

The Ninth Circuit was not persuaded by the plaintiffs' arguments. *Id*. Relying on the factors from *Lugar* and *Brentwood* for determining whether private behavior may be treated as state action, the Court also found support from the Fourth Circuit case *United Auto Workers v. Gaston Festivals, Inc*., 43 F.3d 902 (4th Cir. 1995). *Id*. at 954-56. The *Villegas* Court concluded

that the Garlic Festival was not a state actor for a number of reasons: running festivals was not a traditional municipal function; Gilroy required a permit, which showed that it retained control of the park and provided security services; Gilroy billed the Garlic Festival for its security services; security activity was not a dominant or major purpose of the Garlic Festival; and there was no evidence that Gilroy played a dominant role in controlling the actions of the Garlic Festival or the content of the festival. *Id*. at 956.

The Ninth Circuit also disagreed with the plaintiffs' contention that Gilroy was liable for violating their First Amendment rights by enforcing the Garlic Festival's dress code. 541 F.3d at 957. The Court observed that "it is generally not a constitutional violation for a police officer to enforce a private entity's rights." *Id*. Finding that there was no constitutional violation, the Court stated that, "if the ability to exclude others from public property during the course of a limited, permitted use were found to be a constitutional violation, every picnic, wedding, company outing, meeting, rally, and fair held on public grounds would be subject to constitutional scrutiny." *Id* (internal quotation and citation omitted).

Even assuming that the plaintiffs could establish a constitutional violation, the Ninth Circuit found that they would be unable to establish municipal liability under *Monell*. *Id*. The Court noted that the plaintiffs pointed to the "fact that the permit requires that the City's police provide a portion of the Festival's security, that the City is reimbursed for providing such security, and that [one of the police officers] complied with the request of the [Garlic Festival's] chair of security to remove individuals who did not comply with [the] dress code." *Id*. at 958. The Court also observed that while the chair of security was a police officer, the plaintiffs had made no

showing that the police officer was acting other than in his private capacity as the chair of security. 541 F.3d at 958, n. 5. In light of these facts, the Court reached the conclusion that the plaintiffs could not establish that Gilroy had a policy or custom of enforcing the dress code, there was no evidence in the record of a custom or official policy of Gilroy to enforce the dress code, and there was no evidence that any Gilroy officials participated in forming the dress code. *Id*. at 958.

In *Gallagher v. Neil Young Freedom Concert*, the University of Utah leased a campus facility for a concert performed by Neil Young. 49 F.3d 1442, 1444 (10th Cir. 1995). United Concerts, Inc. leased the facility and promoted the concert, and hired a security company to provide certain security services for the concert. *Id*. at 1444-45. As part of the lease of the facility, the University required United Concerts to pay specified rental charges and expenses incurred by the University; the rental charge was a base rental fee and an additional fee calculated as a percentage of gross ticket sales. *Id*. at 1445. For security, the University was to provide personnel for crowd control, building security, public safety and fire control, traffic control, and other services. *Id*. United Concerts would pay the University costs it incurred for providing certain support personnel for the concert, and United Concerts would also pay for security and police services provided by officers from the University's public safety department. 49 F.3d at 1445.

The decision of which security company was hired for crowd management services was made by United Concerts personnel and not by University officials. *Id*. For its services in providing crowd management for certain concerts, the security company had a policy to always conduct a full pat down search. *Id*. The security also had a policy of prohibiting certain items into events, which included bottles, cans, drugs, and weapons. The security company followed its

policies unless it was directed by the hiring party to do otherwise. *Id*. Prior to the concert, in a meeting among University officials, United Concerts, and the security company, United Concerts directed the security company personnel to perform the pat down searches at the upcoming concert. *Id*.

On the day of the concert, the security company's personnel performed pat down searches of concert attendees. 49 F.3d at 1445-46. The personnel wore yellow jackets with the initials of the security company on the front and the words 'Event Staff' on the back of the jackets. *Id*. at 1446. Uniformed officers from the University's public safety department observed the concert attendees entering the facility, and were approximately six to ten feet away from where the pat down searches were occurring. *Id*. The security company's personnel also distributed fliers to concert attendees that advised them of prohibited items, and that if the individual did not wish to be searched, they could obtain a refund for their ticket. *Id*. After the concert began, the security company personnel assisted University officers with security and crowd control. *Id*.

The plaintiffs filed suit against the Director of the facility, United Concerts, and the security company pursuant to 42 U.S.C. § 1983, alleging the pat down searches violated the Fourth Amendment. 49 F.3d at 1444. The *Gallagher* court applied the nexus, public function, joint action, and symbiotic relationship tests for finding whether there was state action. *Id*. at 1448-57. The court found that under the nexus test, the fact that the University had a duty to provide security, that the Director of the facility was aware of the decision to perform pat down searches, and the observation of the pat down searches by uniformed officers from the University's public safety department were all insufficient to establish the nexus required for finding state action. *Id*. at 1449-

50. The court concluded that the plaintiffs could not demonstrate a specific causal link between the pat down searches and a University policy that influenced the formulation or execution of the security company's policy to conduct the pat down searches. *Id*. at 1450.

In applying the symbiotic relationship test, the court was unpersuaded by the plaintiff's arguments focusing on the fact that the pat down searches occurred on University property and that the University profited from the concert. 49 F.3d at 1452. The court emphasized that merely because objectionable conduct occurs on public property does not establish state action. *Id*. The court also found that the pat down searches did not generate profits that "were indispensable elements in the University's financial success." *Id*. Simply because there were some benefits that resulted from the University leasing the facility to United Concerts, such benefits did not establish state action. *Id*.

When analyzing the joint action test, the court found that even though the Director of the facility had broad authority over security for the center and that the University, United Concerts, and the security company shared a common goal to produce a profitable concert, such facts were insufficient to establish state action. 49 F.3d at 1455-56. The court pointed out that the University's policies to provide security were general in nature and left the specific kind of security to be provided by United Concerts to its discretion. *Id*. at 1455. The court also noted that a common goal to produce a profitable concert was not the same as a common, specific goal to violate a person's constitutional rights by engaging in a particular course of action, which was what was required to show concerted action. *Id*. Reiterating that the pat down search policy was adopted by the security company and approved by United Concerts, the court found that there was

no evidence that such policy was influenced in any manner by a University official. *Id*. Additionally, the court disagreed with the plaintiff's contention that the observation of the pat down searches by the University officers could establish state action, explaining that the officers' mere presence at the scene with no participation or assistance did not transform the private act into a public one. 49 F.3d at 1455.

Finally, under the public function test, the court concluded that "providing security for a company that leases a government-owned facility for an evening" did not constitute a traditionally exclusive state function, even when the government required security measures to be taken, and thus the plaintiffs did not satisfy the requirements for establishing state action. *Id*. at 1457.

Turning to the instant case, Herndon has argued that the City and the Festival engaged in profit sharing, arranged their affairs and implemented mutually reinforcing policies, acted as if they were partners in the music festival, and actually were partners in the music festival. Appellants' Brief at pp. 39-40. Herndon concludes with cursory references to legal authority that state action was clearly established under either the nexus or public function tests. *Id*. at pp. 39-43. Herndon has never provided any legal support or evidence that the City and the Festival engaged in profit sharing, acted as partners, or engaged in collusion. R. at pp. 89-274, 278-301, 436-99, 556-91, 664-68. To support the claim that there was state action, Herndon has proffered the following assertions as evidence of such:

- The Festival, as an Idaho non-profit corporation, is bound by Art. I, Sec. 11 and Art. XII, Sec. 2 of the Idaho Constitution and is foreclosed from banning guns at War Memorial Field;

- The City and the Festival sought to establish War Memorial Field as a gun-free zone during the music festival because that is what the artists wanted;
- The City received a "cut" of the gate;
- The City and the Festival shared certain utility costs, and the City paid for water and sewer utilities; the security agreements were "intertwined" with the Festival responsible for security and payment to the City for additional assistance from City police officers; the Festival's security plans had to be approved by the City's Chief of Police and the Festival had to permit City police officers complete access to War Memorial Field at all times during concerts; the City's Chief of Police was to approve signage for the consumption of intoxicating beverages; the sound levels of music were regulated; the City and the Festival cooperated to maintain traffic control and parking facilities;
- Mr. Herndon and Mr. Avery were "threatened" by the Festival security and City police officers with a charge of criminal trespass if they insisted on entering War Memorial Field while armed; a City police officer told Mr. Herndon and Mr. Avery, "As long as you're out past the gate, you're not my issue," and "don't pass the gate"; the City Attorney "got in on the act";
- The Festival claimed to have the power to search people.

Appellants' Brief at pp. 34-35, 40-43. Herndon claims that the district court's finding that the lease between the City and the Festival allowed the festival to provide its own security with police officers standing by in case Festival security made a citizen's arrest is a disputed fact. *Id*. at p. 41.

The district correctly found that Herndon provided insufficient evidence of state action, even when the record was viewed in the light most favorable to Herndon. The record before the district court demonstrates that Herndon disregarded the law and advanced legal theories unsupported by well-established law, ignored the City's Special Events Policy and Procedures, distorted the events of August 9, 2019, and failed to provide admissible evidence to support their contentions.

Like the City of Gilroy in *Villegas*, the City here contracted with the Festival for its use of

War Memorial Field, the City required the Festival to have plans for security and traffic control, had police officers on scene at the 2019 festival that were paid for by the Festival, and similar to the Gilroy police officer, Mr. Herrington was at the 2019 in his personal capacity and was not acting other than in his private capacity. 541 F.3d at 953-54, 956, 958 n. 5; R. at pp. 358-61, 370, ¶¶ 6-23, 37; R. at pp. 383-88.

In accordance with the City's Special Events Policy and Procedures, the Festival, like any other event applying for a special event permit, was required to submit a detailed event plan, which provided information to the City relating to the event's parking and traffic control, the police and fire protection needed, the event's electricity plan, road closures and barricades needed, and the event's plans for security and clean up. R. at pp. 122-147. The Special Events Policy and Procedures informs event applicants of the necessity for parking and traffic control plans, and the event organizer's responsibilities relating to security. *Id*. at pp. 136-38. Specifically, event organizers are to ensure their event is safe and secure and it is their responsibility to hire security. *Id*. at p. 137. While City police officers may be present at the event, it is not the City's responsibility to provide the services of private security; the police officers are there to enforce the law[4]. *Id*. at pp. 137-38. Such actions do not support a finding of state action. *Villegas*, 541 F.3d at 958; *see also Lansing v. City of Memphis*, 202 F.3d 821, 829-34 (6th Cir. 2000) (no state action

[4] In any event, it would not be a constitutional violation for the City to enforce a private entity's rights, meaning it would not be a constitutional violation for the City to enforce the Festival's rights. 541 F.3d at 957. The *Villegas* court recognized that, "if the ability to exclude others from public property during the course of a limited, permitted use were found to be a constitutional violation, every picnic, wedding, company outing, meeting, rally, and fair held on public grounds would be subject to constitutional scrutiny." *Id*.

on similar facts as instant case).

Likewise, there are other similarities to the *Villegas* case: running festivals is not a traditional municipal function, security activity was not a dominant or major purpose of the Festival, and the City did not play a dominant role in controlling the actions of the Festival or the content of the 2019 festival. *See* 541 F.3d at 956; R. at pp. 358-63, 370, ¶¶ 6-23, 25-26, 28-30, 38-42. Such actions did not amount to state action in *Villegas* nor did such actions subject the City of Gilroy to liability. *Id*. at 956, 958. Those same actions in this case do not support a finding of state action or that such actions subject the City to liability.

The *Gallagher* case is also instructive. Like the security company personnel there, the security personnel at the 2019 festival wore shirts that identified them as representatives of the Festival at Sandpoint and had the word 'SECURITY' on the front; the security personnel for the Festival performed the searches outside the entrance gates to the festival, and no City police officers participated; and decisions related to the Festival's security personnel were made by the Festival. 49 F.3d at 1445-46; R. at pp. 359-69, ¶¶ 14-16, 25-26, 29-35(a-ff). Additionally, merely because the searches performed by the Festival security personnel may have been observed by a City official with no participation or assistance does not transform that private act into a public one. 49 F.3d at 1449-50; *see Lansing*, 202 F.3d at 831 (mere approval or acquiescence of the state in private activity does not render a private entity a state actor or justify holding state responsible for the private activity).

With respect to rules for the consumption of alcohol and noise levels, such requirements are found in the Sandpoint City Code, and regardless of whether an event is held on public or

private property, such ordinances remain in effect. R. at pp. 542-52. Likewise, event organizers must comply with laws pertaining to use and distribution of electrical power. R. at pp. 139-40. For all events, and not just the Festival, the City pays for water and sewer utilities. *Id*. at p. 140. Finally, the "cut of the gate" is not profit sharing. R. at p. 375, ¶ 12. The Festival pays a portion of each ticket sold as consideration for the lease of the property. R. at pp. 404-13; R. at p. 375, ¶ 12. The manner in which the Festival pays for the lease of War Memorial Field is based on the City's fee schedule which applies to all other special events using City property. R. at pp. 112, 129. As the Court can easily verify, the terms of the 2019 Lease reflected the policies set forth in the City's Special Events Policy and Procedures. None of these facts support a finding of state action. *See Lansing*, 202 F.3d at 829-32 (state regulation, utilization of public services, mere economic benefit to public entity, lease of public facility, and coordination of traffic control and security all insufficient to satisfy state action test).

The City, just like any other private property owner leasing its property, has the power to preserve its property for the use to which it is lawfully dedicated. *See Greer v. Spock*, 424 U.S. 828, 836-37 (1976). The Special Events Policy and Procedures and the terms of the 2019 lease reflect such prudence. That the City requires private parties using its public property for events to have security plans, or comply with City ordinances and state law, or cooperate with the City to develop a traffic control and parking plan are not indications that the City and the private party are joint actors, but evidence of the City's intent to establish respective roles and expectations of the parties. The City is responsible for public safety regardless of whether a special event is being held on its property. *See Lansing*, 202 F.3d at 832 (conditioning the lease, use agreement, and

council resolution on private entity's compliance with city regulations, city and private entity "clearly established separate spheres of responsibility".).

None of the actions relied upon by Herndon amount to state action under any test. Herndon's reasoning that the Festival is bound by Art. I, Sec. 11 and Art. XII, Sec. 2 and is thereby a state actor is plainly unsound. The suggestion that searches for contraband are only authorized if the entity is statutorily authorized to conduct such activities is erroneous, as is the contention that the search policy of the Festival constituted state action.

The public function test is satisfied only on a showing that the function at issue is "both traditionally and exclusively governmental." *Lee*, 276 F.3d at 555. Herndon cites a 1977 Fifth Circuit case that indicates that "parks" are a function usually reserved to the state in support of their conclusion that the Festival was a state actor under the public function test. Appellants' Brief at p. 43; *see Roberts v. Cameron-Brown Co.*, 556 F.2d 356, 358 (5th Cir. 1977). The idea that the operation of parks is traditionally and exclusively a governmental function has long been disavowed by the U.S. Supreme Court and Circuit courts. *See Flagg Bros.*, 436 U.S. at 159 n.8; *Villegas*, 541 F.3d at 955-56; *United Auto Workers*, 43 F.3d at 908. The district court correctly found that conducting a music festival was in no way a governmental function.

With respect to the nexus test, the private conduct may be treated as that of the state itself when the plaintiff can establish a close nexus between the state and the challenged action. *Brentwood*, 531 U.S. at 295. As discussed above, the *Villegas* case applied the nexus test and on markedly similar facts, found no state action. The district court heeded the rationale in *Villegas*

and properly determined that Herndon had not presented sufficient evidence to establish the required nexus.

The facts here do not support a finding that the conduct of the Festival may be treated as that of the City. The City and the Festival had defined roles and responsibilities; the Festival put on the concert series; the Festival was responsible for security; the Festival was responsible for parking and traffic; the Festival promulgated and solely enforced the policy of prohibiting festival patrons from bringing firearms into the festival; and the Festival's security team did not allow Mr. Herndon and Mr. Avery to enter the festival. Furthermore, Herndon did not and cannot establish that the City had a policy or custom of enforcing the Festival's firearms prohibition, there is no evidence of a custom or policy of the City to enforce the Festival's firearms prohibition, and there is no evidence that any City official participated in forming the Festival's firearms prohibition. 541 F.3d at 958.

For Herndon to have succeeded on their § 1983 claims, they were required to demonstrate (1) the violation of a right secured by the Constitution or a federal statutory law, and (2) that such deprivation occurred under color of state law. *Jones*, 297 F.3d at 934. Herndon failed to establish the necessary state involvement to succeed on their claim. For this reason alone, all of their federal claims failed. Notwithstanding that there was no deprivation of a constitutional right under color of state law, Herndon's federal claims were also properly dismissed because there was no violation of any right secured by the U.S. Constitution or a federal statutory law.

4. There Was No Deprivation of Herndon's Second Amendment Rights.

Herndon claimed that they were denied access to a public event, on public property, based

on their exercise of a fundamental right to bear arms in public for self-defense purposes, and thus their Second Amendment right secured by the U.S. Constitution was infringed. R. at p. 21. The Second Amendment of the U.S. Constitution protects "the right of the people to keep and bear Arms." The U.S. Supreme Court[5] has recognized that the Second Amendment guarantees an individual right to possess and keep a firearm in one's home for self-defense. *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008). The right to keep and bear arms is not unlimited, however. 554 U.S. at 626. The Second Amendment does not guarantee "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*.

In 2019, there was no clearly established right guaranteeing Mr. Herndon or Mr. Avery the right to openly carry a firearm in public for their individual self-defense, nor was there a clearly established right to carry a concealed firearm in public. *Young v. Hawaii*, 992 F.3d 765, 821 (2021); *Peruta v. Cty. of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016), *cert. denied Peruta v. California*, 137 S. Ct. 1995 (2017). Notably, while the Idaho Constitution recognizes the "right to keep and bear arms," there is nothing in Article I, § 11 which grants a person a constitutional right to carry a concealed weapon. I.C. § 18-3302(1)[6]; Idaho Attorney General Opinion 90-03.

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[5] The Second Amendment analysis provided in this brief reflects the applicable law in August 2019, and does not incorporate analysis of the recent U.S. Supreme Court decision *New York State Rifle & Pistol Association, Inc. v. Bruen*, --- S. Ct. ---, 2022 U.S. LEXIS 3055 (2022), since *Bruen* cannot be considered clearly established law for purposes of this Court's analysis. *See Sandoval v. Las Vegas Metro. Police Dep't*, 756 F.3d 1154, 1160 (9th Cir. 2014) (right allegedly violated must be clearly established at the time of the alleged violation).

[6] In any event, Herndon's § 1983 claims cannot be based on alleged violations of state law. *Smith v. City & Cty. of Honolulu*, 887 F.3d 944, 952 (9th Cir. 2018).

Herndon's claim for violations of their Second Amendment rights fails as a matter of law. In 2019, there was no guaranteed right under the Second Amendment which would allow Mr. Herndon or Mr. Avery to carry a firearm, whether openly or concealed, into the 2019 Festival. *Young*, 992 F.3d at 821; *Peruta*, 824 F.3d at 939. Where there is no violation of a right secured by the Constitution, there can be no liability under § 1983. *Jones*, 297 F.3d at 934

5. Existing Case Law Precludes Herndon's Equal Protection Clause Claim.

Herndon contended that the City and the Festival violated the Equal Protection clause of the Fourteenth Amendment by discriminating against their access to a public event, on public property, based on their exercise of a fundamental right protected by the Idaho and United States Constitution. R. at p. 22. Herndon's claim is primarily a Second Amendment claim, not a viable Equal Protection clause claim, and was properly dismissed.

The Ninth Circuit has previously addressed such "Second Amendment claim[s] dressed in equal protection clothing". *Teixeira v. Cty. of Alameda*, 822 F.3d 1047, 1052 (9th Cir. 2016), *vacated in part by*, 854 F.3d 1046 (9th Cir. 2016), *and reh'g en banc*, 873 F.3d 670 (9th Cir. 2017) (affirming dismissal of Equal Protection clause claims), *cert. denied*, 138 S. Ct. 1988 (2018). In *Teixeira*, the Court noted that "[m]erely infringing on a fundamental right" does not implicate the Equal Protection clause, and "because the right to keep and bear arms is not only a fundamental right…but an enumerated one, it is more appropriately analyzed under the Second Amendment than the Equal Protection Clause." 822 F.3d at 1052 (citing *Albright v. Oliver*, 510 U.S. 266, 273 (1994); *Graham v. Connor*, 490 U.S. 386, 395 (1989)). The *Teixeira* court concluded that an equal protection challenge based on the alleged infringement of the Second Amendment was "subsumed

by, and coextensive with" the Second Amendment claim and therefore was not a cognizable claim under the Equal Protection clause. 822 F.3d at 1052.

The claim for a violation of the Equal Protection clause is entirely duplicative of the Second Amendment claim, and Herndon cannot simply recharacterize their Second Amendment claim as an Equal Protection clause claim. Furthermore, Herndon has failed to identify what fundamental right they have been denied while others were permitted to exercise such right. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). There is no legal authority which guarantees Herndon the right to "equal access to the public parks in Sandpoint" or a right to "full participation in the arts and culture" of Sandpoint. Appellants' Brief at p. 45. For these reasons, Herndon's Equal Protection clause claim was properly dismissed by the district court.

6. Herndon Failed to Present Any Argument or Authority in Support of the Conspiracy Claim and Has Waived the Issue.

Herndon has alleged that the City and the Festival conspired to deprive them of the equal protection of the laws, and/or equal privileges and immunities under the law, based on their exercise of the fundamental right to bear arms as guaranteed by the Second Amendment, and alleged such claim pursuant to 42 U.S.C. § 1985(3). R. at pp. 20-21. In order for Herndon to prove the claim, they were required to show "(1) that some racial, or perhaps otherwise class-based, invidiously discriminatory animus lay behind the conspirators' action and (2) that the conspiracy aimed at interfering with rights that are protected against private as well as official encroachment." *Butler v. Elle*, 281 F.3d 1014, 1028 (9th Cir. 2002) (internal quotations and citations omitted) (quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68 (1993).

The claim fails as a matter of law for numerous reasons. "The Supreme Court has not defined the parameters of a class beyond race, but the term unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors." *Butler*, 281 F.3d at 1028. Herndon has failed to present any factual basis or legal authority to support that they were members of a suspect or quasi-suspect class to be afforded special scrutiny or protection. *See Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992). Herndon has likewise failed to provide any evidence that the actions of the City and the Festival were aimed at depriving Herndon of any constitutional rights. *See Butler*, 281 F.3d at 1028.

Notably, the guarantees of the Second Amendment are not insulated from private infringement. *See McDonald*, 561 U.S. at 753, 778-91 (recognizing that the Second Amendment originally applied only to the federal government in its holding that the Second Amendment was made applicable to the States through the Fourteenth Amendment). The failure to establish a violation of the Second Amendment, Fourth Amendment, or the Equal Protection clause forecloses any chance of success on the § 1985 claim. *Caldeira v. Cty. of Kauai*, 866 F.2d 1175, 1182 (9th Cir. 1989) ("The absence of a section 1983 deprivation of rights precludes a section 1985 conspiracy claim predicated on the same allegations.").

On appeal, Herndon proffers a passing argument in support of the conspiracy claim mixed in with their argument on the Equal Protection clause claim. Conclusory statements that there was a conspiracy are wholly insufficient. Herndon has thus waived the claim and the Court should

affirm the lower court's dismissal. *Hodge v. Waggoner*, 164 Idaho 89, 92 n.4, 425 P.3d 1232, 1235 (2018); *Gallagher v. State*, 141 Idaho 665, 669, 115 P.3d 756, 760 (2005).

E. Herndon Failed to Timely Object to the City's and the Festival's Motions for Costs and Attorneys' Fee and Thus Waived Any and All Objections. Herndon Voluntarily Paid the Judgments and Rendered the Issue Moot.

Following the district court's entry of judgment, the City filed its motion for costs and attorneys' fees, along with the memorandum of costs and supporting affidavit of counsel on June 24, 2021. R. at pp. 692-720. In accordance with Rule 54, Herndon should have filed their objection to the motion on July 8, 2021. Herndon did not file an objection until August 31, 2021. Aug. at pp. 2-4. In that filing, Herndon only stated that they objected to both the City's and the Festival's requests for attorney fees, and advised that they would file a "formal motion" to request relief from their "tardy response" if needed. *Id*. On September 9, 2021, Herndon filed a memorandum of points and authorities in support of a motion for extension of time or relief from the deadline to object to the City's and the Festival's motions for attorney fees and costs, citing Idaho Rules of Civil Procedure 2.2, 55, and 60 in support thereof. Aug. at pp. 5-55.

The district court heard Herndon's motion on October 29, 2021, and denied the motion. Aug. at pp. 96-99. The district court found that Herndon's objection was untimely, the reasons presented for their failure to timely object unsatisfactorily explained the late filing, and Herndon had thus waived their right to object. *Id*.

Idaho Rules of Civil Procedure 54(d)(4) and (e)(5) require the prevailing party to file and serve its memorandum of costs and attorney fees on the adverse party within 14 days of the entry of judgment. If the prevailing party fails to timely file a memorandum of costs, the party waives

its right to costs. I.R.C.P. 54(d)(4). The adverse party may object to the memorandum of costs and attorney fees by filing and serving a motion to disallow costs within 14 days of service of the prevailing party's memorandum. I.R.C.P. 54(d)(5), (e)(6). Similar to Rule 54(d)(4), if the adverse party fails to timely object to the memorandum of costs and attorney fees, such failure constitutes a waiver of the party's right to contest the award of attorney fees. I.R.C.P. 54(e)(6); *Siler*, 162 Idaho at 35, 394 P.3d at 78. The district court's denial of Herndon's motion was proper since it was clear that appellants had failed to object in a timely manner in accordance with Rule 54.

The failure to timely object at the trial court also precludes a challenge on appeal. *See Conner v. Dake*, 103 Idaho 761, 761, 653 P.2d 1173, 1173 (1982) (The failure to timely object waives the "right to further contest the award of attorney fees."); *Long v. Hendricks*, 114 Idaho 157, 162, 754 P.2d 1194, 1199 (Idaho App. 1988) ("Lack of a timely objection precludes a party against whom fees are awarded from challenging the award on appeal."). Not only has Herndon waived the right to any and all objections at the lower court, but Herndon is also precluded from objecting at this Court.

Notwithstanding the preceding, the issue is now moot because Herndon voluntarily paid the judgment. "When a judgment debtor voluntarily pays the judgment, the debtor's appeal becomes moot, and it will be dismissed." *Frantz v. Osborn*, 167 Idaho 176, 180, 468 P.3d 306, 310 (2020) (quoting *Quillin v. Quillin*, 141 Idaho 200, 202, 108 P.3d 347, 349 (2005)). Even if Herndon had timely objected to the requests for attorneys' fees, Herndon would have had to pay the judgment to the clerk of the court pursuant to Idaho Code § 10-1115 in order to have preserved the issue on appeal. *Id*. This Herndon did not do. Aug. at pp. 126-31. Instead, Herndon tendered

payment to the City in the amount of the judgment awarded plus accrued post-judgment interest in the amount of $32,208.65. Aug. at pp. 129-31. The City filed a Satisfaction of Judgment on March 22, 2022. *Id*. Upon the filing of the Satisfaction of Judgment, Herndon's appeal was rendered moot. *Frantz*, 167 Idaho at 181, 468 P.3d at 311. Since the issue is moot, the Court need not consider any of Herndon's arguments regarding the appropriateness of the attorney fee award by the district court. *Id*.

F. The City Should Be Awarded Costs and Attorneys' Fees on Appeal.

Idaho Appellate Rules 40 and 41 permit an award of costs and attorney fees, respectively, to the prevailing party on appeal. An award to the City of costs and attorneys' fees is provided for in Idaho Code § 12-117(1). Under that section, attorney's fees, witness fees, and other reasonable expenses shall be awarded to the prevailing party when the Court finds that the nonprevailing party acted without a reasonable basis in fact or law. I.C. § 12-117(1).

Typically, attorney fees are not awarded in matters of first impression. *Ada Cty. v. Browning*, 168 Idaho 856, 861, 489 P.3d 443, 448 (2021); *Arnold v. City of Stanley*, 158 Idaho 218, 224, 345 P.3d 1008, 1014 (2015); *Saint Alphonsus Reg'l Med. Ctr. v. Ada Cnty*., 146 Idaho 862, 863, 204 P.3d 502, 503 (2009). However, an award of attorney fees on issues of first impression is appropriate in certain circumstances. *Wagner v. Wagner*, 160 Idaho 294, 302, 371 P.3d 807, 815 (2016); *see Browning*, 168 Idaho at 861-63, 489 P.3d at 448-50; *Arnold*, 158 Idaho at 223-24, 345 P.3d at 1013-14.

A "matter of first impression" may be an "issue that 'has never been addressed by an Idaho appellate court.'" *Browning*, 168 Idaho at 861, 489 P.3d at 448 (quoting *Wheeler v. Idaho Dep't*

of Health & Welfare, 147 Idaho 257, 266, 207 P.3d 988, 997 (2009)). Even when a case involves a matter of impression, litigants do not get a "'free pass' to bring issues based on unreasonable arguments." *Id.* (quoting *Arnold*, 158 Idaho at 224, 345 P.3d at 1014) (cleaned up). "The purpose of I.C. § 12-117 is to serve as a deterrent to groundless or arbitrary action and to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never have made." *Canal/Norcrest/Columbus Action Comm. v. City of Boise*, 136 Idaho 666, 671, 39 P.3d 606, 611 (2001).

The "touchstone" of this Court's analysis under Section 12-117(1) must be whether the nonprevailing party "acted reasonably in bringing suit and through its arguments." *Browning*, 168 Idaho at 861, 489 P.3d at 448. The Supreme Court has found that a nonprevailing party acts unreasonably when the party's position contradicts the plain reading of a statute; where the nonprevailing party does not appear to have suffered actual harm from the prevailing party's actions; where the nonprevailing party advances an argument unsupported by a factual basis in the record; where the nonprevailing party advances an argument with no basis in law, fact, or common sense; where the non-prevailing party takes a position contrary to well-settled law and does not support that position with facts or law; where the nonprevailing party mischaracterizes and misapplies the law; and where the nonprevailing party pursues an unsuccessful test case despite clearly established law. *See Browning*, 168 Idaho at 861, 489 P.3d at 448; *Idaho Dep't of Envtl. Quality v. Gibson*, 166 Idaho 424, 448, 461 P.3d 706, 730 (2020); *Arnold*, 158 Idaho at 224, 345 P.3d at 1014; *Rammell v. State*, 154 Idaho 669, 678, 302 P.3d 9, 18 (2012).

Herndon has exhibited a pattern of advancing unreasonable arguments throughout the litigation of this case. R. at pp. 700-09. On appeal, Herndon relies on the same baseless arguments proffered to the district court, essentially doubling down on their legally flawed and unsupported positions. Herndon again advances the contradictory argument that the lease was not a "lease" and ignores the body of law applicable to the leasing of municipal property. Appellants' Brief at pp. 15-18, 24-34; R. at pp. 701-02. The state action arguments are near verbatim recitations of the factually unsupported claims argued to the district court which were contrary to well-settled law and relied upon mischaracterizations and the misapplication of the law. Appellants' Brief at pp. 7, 9, 30, 40-43; R. at pp. 702-04. Herndon's claims of collusion, profit sharing, and the Respondents acting as partners are unsupported by any admissible evidence. The material facts of the August 2019 incident are misstated throughout brief and are contradicted by Herndon's own video evidence.

Herndon again disregards that the Festival is a private entity and not subject to the constraints of Art. I, § 11 of the Idaho Constitution, Idaho Code § 18-3302J, or the Second and Fourth Amendments which apply to governmental entities. Herndon posits that the Fourth Amendment claim, even though clearly abandoned at the district court and not even addressed on appeal, is still viable. The arguments proffered in support of the Equal Protection clause and § 1985 conspiracy claims, again, have no support in the facts or the law. Herndon continues to deliberately mischaracterize the operative provisions of Idaho Code §§ 18-3302(25) and 18-3302J.

Herndon's opening brief provides this Court with an ample basis upon which an award of attorneys' fees to the City is proper. Herndon has taken positions which contradict the plain

reading of the U.S. and Idaho Constitutions, and Idaho Code §§ 18-3302, 18-3302J; advanced arguments unsupported by a factual basis in the record; advanced arguments with no basis in law, fact, or common sense; taken positions contrary to well-settled law without supporting that position with facts or law; and mischaracterized and misapplied the law. On top of these actions, Herndon has not suffered actual harm. The record demonstrates that Herndon has acted without a reasonable basis in fact or law. Should the City prevail, it is entitled to an award of attorneys' fees pursuant to Idaho Code § 12-117(1).

V. COMMENT ON AMICUS CURIAE BRIEF

Amicus Curiae commit several of the same errors as Herndon. Idaho Code § 18-3302(25) is misstated. The well-settled law pertaining to the existing rights of a lessee is disregarded. Speculative arguments are proffered without any evidentiary support. The fact that the lease does not contain a single provision regarding firearms is purposely omitted.

The analogy that a similar lease between another public entity and a private party could be used to discriminate against a protected class is flawed as well. Private entities are not free to discriminate against people based on race, color, religion, ethnicity, national origin, sex, or disability. *See* 42 U.S.C. § 2000a *et seq*.; 42 U.S.C. § 12181 *et seq*.; I.C. § 67-5909. The Second Amendment, however, is only protected from governmental infringement. The Legislature understood this.

As the City pointed out to the district court, when Section 18-3302 was amended in 2015 to include the language in subsection 25, the State Affairs Committee specifically discussed the

preservation of private property rights. R. at p. 597. Prior to H 301[7] being introduced, Senators Werk and Hill, serving on the Senate State Affairs Committee, both expressed their concerns that the amended version of Section 18-3302 would infringe on "private interest's ability to restrict" and "impose on the rights of the property owner to restrict weapons being brought on his private property." R. at pp. 634-36. After the bill was passed in the House, it was referred to the Senate State Affairs Committee, where the committee further discussed how the amendments would affect property rights. R. at pp. 639-48. In the committee meeting minutes, it is noted that the language in subsection 25 was "inserted to provide clear direction that private property owners and *persons with a legal interest in real property retain all rights and remedies that exist under current law*." R. at p. 654.

The plain language of the statute reflects such intent. The words "private property" do not modify "private tenant," "private employer," or "private business entity." If the Legislature had meant for the statute to state a "tenant of private property" it would have done so. The statute expresses the clear intent of the Legislature to protect the property rights of any private party, and that it was not just concerned with the rights of the private property owner. This is evident by the choice to identify private persons and entities with a legal interest in real property as retaining "all rights and remedies that exist under current law", and not merely the rights that exist for the owner of private property.

[7] H 301 was the bill to amend Idaho Code § 18-3302.

This Court has repeatedly adhered to the principal that, when interpreting a statute, it must give effect to the clear expressed intent of the legislature. *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho at 895, 265 P.3d at 508. Section 18-3302(25) is plain, clear, and unambiguous, and any argument that a private tenant leasing public property has any less right to exclude is unsupported by the Legislature's own findings.

VI. CONCLUSION

For the reasons set forth herein, the City respectfully requests this Court to affirm the decision of the district court.

RESPECTFULLY SUBMITTED this 29th day of July, 2022.

LAKE CITY LAW GROUP PLLC

/s/ *Katharine B. Brereton*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of July, 2022, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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I declare under penalty of perjury under the laws of Idaho and the United States of America, that the foregoing is true and correct of my own personal knowledge, and that this declaration for Certificate of Service was executed on July 29th, 2022.

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