No. 15-15428

In the United States Court of Appeals
For the Ninth Circuit

BARRY BAUER, et al.,
Plaintiffs-Appellants,

v.

KAMALA D. HARRIS, in her official capacity
as Attorney General of the State of California, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
For the Eastern District of California
(1:11-cv-01440-LJO-MJS)

APPELLANTS' REPLY BRIEF

C.D. Michel (S.B.N. 144258)
Sean A. Brady (S.B.N. 262007)
Anna M. Barvir (S.B.N. 268728)
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
(562) 216-4444
cmichel@michellawyers.com

Paul D. Clement
Erin E. Murphy
Edmund G. LaCour Jr.
BANCROFT PLLC
500 New Jersey Ave., NW
Seventh Floor
Washington, DC 20001
(202) 234-0090

Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES (cont.)

Page(s)

CASES

TABLE OF AUTHORITIES (cont.)

Page(s)

CASES

TABLE OF AUTHORITIES (cont.)

Page(s)

TABLE OF AUTHORITIES (cont.)

Page(s)

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

The State's response brief reflects a fundamental misunderstanding of the basic constitutional principles that govern this case. It fails to even take a coherent position on which body of jurisprudence should govern here, let alone craft a cogent argument as to how California's attempt to exploit the exercise of a fundamental constitutional right to raise revenues to fund other government activities could survive scrutiny under either. Instead, the State's defense boils down to the proposition that using the fee imposed on lawful firearm transactions to fund APPS, an extensive law enforcement program dedicated to investigating and removing firearms from persons prohibited from possessing them, is constitutional because the state legislature authorized it, the fees are not prohibitively expensive, and the program furthers a legitimate government interest. None of those points, however, has the slightest bearing on the question that matters to Bauer, which is whether the law enforcement activities California seeks to fund with the DROS Fee are among the actual costs of processing a lawful firearm transaction. Of course, they are not.

Indeed, the State does not attempt to identify any meaningful link between the constitutionally protected act of engaging in a *lawful* firearm transaction and the wholly unprotected act of *unlawfully* possessing a firearm. Instead, it celebrates that which dooms any defense of the State's regime against constitutional attack,

boasting that DROS Fee monies are used to pay not just for APPS enforcement activities, but for "costs associated with enforcing *a variety* of California's firearm laws." State Br. 37-38 (emphasis added). But this is precisely the problem. A fee on the exercise of a constitutional right *must* be confined to recouping actual costs directly attributable to regulating the activity in which the person paying it seeks to engage (here, a lawful firearm transaction). The State makes no effort to demonstrate that any of those costs are attributable to the act of lawfully acquiring a firearm. Instead, it just claims its statutory authority to put DROS Fee revenues to this "variety" of purposes suffices to pass Constitutional muster. It does not.

The State then tries to change the subject, arguing that conditioning the lawful acquisition of a firearm on payment of a fee used to finance wholly unrelated law enforcement activities does not burden Second Amendment rights at all because the fee is not "prohibitively expensive." But the whole point of the Supreme Court's fee jurisprudence is that even a small fee on the exercise of a constitutional right is impermissible if it is imposed not to defray costs attributable to the fee payer, but instead just to raise revenue. The State therefore undermines its cause even further by insisting that its actions must be constitutional because using DROS Fee monies to fund APPS enforcement activities achieves the legitimate interest in funding APPS enforcement activities. Of course, every revenue-raising measure achieves the government's legitimate end of raising

revenue. But that alone is not enough to render a revenue-raising measure constitutional. The State's argument thus succeeds only in confirming that it is using the DROS Fee as a revenue-raising measure for APPS, which is precisely what makes its actions patently unconstitutional under the constitutional fee jurisprudence that governs this case.

Assuming it is even appropriate to do so, applying Second Amendment jurisprudence would change neither the relevant legal question nor the answer. Just as fee jurisprudence requires the State to demonstrate that any fee on the exercise of a constitutional right is imposed to recoup actual costs directly attributable to the fee payer's actions in exercising that right, Second Amendment jurisprudence requires the State to demonstrate that there is a meaningful nexus between the activity on which a fee is imposed and the uses to which it will be put. Thus, either way, the ultimate question remains the same: Does the *lawful acquisition* of a firearm bear any meaningful relationship to the *unlawful possession* of a firearm? Because the answer is no, the State's use of DROS Fee monies to fund APPS is unconstitutional no matter which body of jurisprudence this Court applies.

ARGUMENT

I. USING THE DROS FEE TO FUND APPS ENFORCEMENT ACTIVITIES EXCEEDS THE STATE'S POWER TO IMPOSE FEES ON THE EXERCISE OF CONSTITUTIONAL RIGHTS

A. Fees on Second Amendment Rights Must Satisfy the Same Standards as Fees on Other Fundamental Constitutional Rights

At the outset, while the State does not openly dispute the proposition that fees on the exercise of Second Amendment rights must satisfy the same standards as fees on the exercise of other fundamental constitutional rights, it cryptically suggests that "[i]t is not necessary" for this Court "to determine whether" the *Cox v. New Hampshire*, 312 U.S. 569 (1941), and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), line of cases "provide[s] an appropriate foundation for addressing fee claims under the Second Amendment." Appellees' Answering Br. ("State Br.") 33. But there can be no serious dispute that this Court must *resolve* Bauer's contention that the DROS Fee in its current form violates the standards that the Supreme Court has articulated in the *Cox* and *Murdock* line of fees jurisprudence. Contrary to the State's contentions, neither this Court nor the district court has any "discretion" to decline to answer the constitutional question that Bauer has posed.

What the State seems to be suggesting (albeit implicitly) is that this Court should *reject* the proposition that the Supreme Court's fee jurisprudence limits the State's ability to impose fees on the exercise of Second Amendment rights, despite the Court enforcing such limitations on fees in all manner of constitutional

contexts, as Bauer has noted. Appellants' Opening Br. ("AOB") 30-31; *see also Koontz v. St. Johns River Water Mgmt. Dist.*, — U.S. —, 133 S. Ct. 2586, 2599-601 (2013). The State does not even attempt to articulate any basis on which this Court could conclude that the Second Amendment is the lone exception to that otherwise generally applicable body of constitutional law. Nor could it, as the Supreme Court has expressly rejected the argument that the Second Amendment may be relegated to the status of a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality op.).

For precisely that reason, courts have repeatedly concluded that *Cox*, *Murdock*, and their progeny are just as applicable to fees on Second Amendment rights as they are to fees on every other constitutional right. State Br. 36-37 (citing *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013); *Justice v. Town of Cicero*, 827 F. Supp. 2d 835 (N.D. Ill. 2011); *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 192 (D.D.C. 2010), *rev'd in part on other grounds*, 670 F.3d 1244 (D.C. Cir. 2011) ("*Heller II*")). Indeed, the State conceded before the district court "that this case is best analyzed under the fee cases like *Cox* and *Murdock*," Opposition to Plaintiffs' Motion for Summary Judgment at 4, *Bauer v. Harris*, 94 F. Supp. 3d 1149 (2015) (No. 11-1440), ECF No. 54, and has offered no reason for this Court to conclude otherwise. Accordingly, there is no basis for this Court to reject

analyzing the DROS Fee under the Supreme Court's longstanding fees jurisprudence. *See Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003) ("we decline to create a circuit split unless there is a compelling reason to do so").[1]

B. The State Fundamentally Misunderstands the Limits on a State's Power to Impose Fees on the Exercise of Constitutional Rights

When viewed through the lens of *Cox*, *Murdock*, and their progeny, the State's use of the DROS Fee to fund APPS enforcement activities is unquestionably unconstitutional. While, as Bauer has conceded, the state may impose fees on the exercise of constitutional rights, any such fee must be designed "to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." *Cox*, 312 U.S. at 577 (quotations omitted). In other words, it must be revenue-neutral. If the government strays beyond seeking to "recover actual costs alone," and instead seeks to "profit from" a fee or use it to "finance [other] costs," then the fee ceases to pass constitutional muster. *Kaplan v. County of Los Angeles*, 894 F.2d 1076, 1081 (9th Cir. 1990); *Baldwin v. Redwood City*, 540 F.2d 1360, 1372 (9th Cir. 1976) (fee

[1] Amici agree that fee jurisprudence controls this case. Amicus Br. of Brady Ctr. ("Brady Br.") 4. However, amicus Brady Center asserts that longstanding fee jurisprudence should be somehow "adapt[ed]" to the Second Amendment because the rights it guarantees involve firearms. *Id.* at 19-20. But amicus does not indicate what this "adaptation" would look like or why it does not offend *McDonald*'s admonition that the Second Amendment is not a "second-class" right. *See id.*

must "fairly reflect costs incurred by the [state] in connection with" the payer's activity). In short, the state may not exploit the exercise of constitutional rights to "rais[e] general revenue under the guise of defraying its administrative costs." *Gannett Satellite Info. Network, Inc. v. Metro. Transp. Auth.*, 745 F.2d 767, 774 (2d Cir. 1984).

The State never meaningfully grapples with that revenue-neutrality principle. Indeed, rather than try to demonstrate that the State's use of the DROS Fee on APPS satisfies that principle, the State dismisses it in a footnote, claiming Bauer "do[es] not seriously argue" that the state's actions violate that principle because he concedes that the DROS Fee is not unconstitutionally "excessive." State Br. 38 n.8.[2] But the whole point of the *Cox*/*Murdock* line of cases is that the fee's size is not all that matters when determining whether it is constitutional.

[2] The State also makes much of the fact that the relief Bauer seeks is to enjoin *use* of the DROS fee for an unconstitutional purpose, rather than from *collecting* any particular portion of the fee. *See* State Br. 15-16, 24. But this is semantics. Bauer "emphatically asserts that the Department must confine its use of the DROS Fee to cover costs attributable to the DROS application process precisely to save it from constitutional invalidation." AOB 24. In other words, the DROS Fee itself is unconstitutional, unless its use to fund APPS is enjoined. An order to that effect will necessarily confine the fee to a constitutionally permissible level, as the DROS Fee by law can "be no more than is necessary to fund" the purposes set forth in section 28225. *See* Cal. Penal Code § 28225(b). At any rate, it is well-established that "[a] declaratory judgment can . . . be used as a predicate to further relief, including an injunction." *Powell v. McCormack*, 395 U.S. 486, 499 (1969). Accordingly, to the extent more is needed to remedy the constitutional violation, Bauer can seek, and a trial court can certainly grant, "further necessary or proper relief." 28 U.S.C. § 2202.

Those cases instead establish that, *in addition* to not being excessive, a fee must *also* be designed only to "recover actual costs" incurred by the government, attributable to the activity on which the fee is imposed. *Kaplan*, 894 F.2d at 1081. Even a "nominal" must satisfy this revenue-neutrality principle. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 137 (1992).

The State is therefore wrong to claim that *Cox* and its progeny "do not speak in . . . terms" of revenue neutrality. State Br. 38 n.8. While the words "revenue neutral" may not appear verbatim, that is exactly the distinction the Supreme Court was drawing when it contrasted "a revenue tax" with a fee "to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." *Cox*, 312 U.S. at 577. That is precisely why courts have described *Cox* and *Murdock* as permitting "only revenue-neutral fees." *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1314 (11th Cir. 2003); *see also, e.g.*, *Jake's, Ltd., Inc. v. City of Coates*, 284 F.3d 884, 890 (8th Cir. 2002) ("only revenue-neutral licensing fees may be imposed").

Though the DROS Fee may have satisfied that principle in its original form, it manifestly does not do so after the passage of SB 819. Indeed, the State does not even attempt to argue that the DROS Fee is used only to recover the Department's actual costs attributable to conducting a firearms transaction—e.g., running a background check, processing the paperwork, and reporting the transaction to the

necessary parties. To the contrary, the State trumpets the fact that the DROS Fee is used "to defray DOJ's costs associated with enforcing a variety of California's firearms laws, including but not limited to the laws related to APPS." State Br. 38. But that is precisely the problem. The only activity in which a DROS Fee payer has engaged is the perfectly lawful—and constitutionally protected—conduct of acquiring a firearm. Investigating those who may already *unlawfully* possess a firearm cannot plausibly be considered an "actual cost" of processing a transaction by a person seeking to *lawfully* obtain a firearm. And the State does not dispute that less than one half of one percent of all DROS applications ever lead to an APPS investigation, let alone a successful firearm seizure. *See* AOB 39 n.9.

California's effort to subsidize the costs of APPS enforcement activities by extorting everyone who seeks to lawfully obtain a firearm is therefore no different from Illinois' failed effort to use marriage licensing fees to pay for domestic violence shelters, *see Boynton v. Kusper*, 494 N.E.2d 135 (Ill. 1986), or the city of Duluth's effort to use adult book store licensing fees to pay for the enforcement of obscenity laws, *see Wendling v. City of Duluth*, 495 F. Supp. 1380 (D. Minn. 1980). Despite Bauer relying on these cases, the State tellingly never even acknowledges them, let alone tries to distinguish them.

Instead, the State just points to various firearm transaction and licensing fees that other courts have held constitutional. *See* State Br. 36-37. But the State ignores

the obvious distinction between the fees in those cases and the DROS Fee—namely, each of those fees was *in fact* "designed to defray (and d[id] not exceed) the administrative costs associated with" processing a firearm transaction or issuing a firearms license. *Kwong*, 723 F.3d at 166 (detailing evidence showing that the fee did not exceed the administrative costs to process handgun license applications); *see also Justice*, 827 F. Supp. 2d at 842 ("there is no indication that the [city's] fee was imposed for any other purpose" than to defray costs of registering firearms); *Heller II*, 698 F. Supp. 2d at 192 (upholding registration fee used to offset costs of "fingerprinting registrants, . . . processing applications and maintaining a database of firearms owners").[3] Here, in contrast, the State readily concedes that the DROS Fee is being put to "a variety" of "other purposes"—law enforcement purposes that are not an "actual cost" of processing a firearm transaction. *Kaplan*, 894 F.2d at 1081.

According to the State, that should not trouble the Court because "the language of the statute itself states that the DROS [F]ee is intended to fund" that "variety" of law enforcement activities. State Br. 37-38. But the question is not whether the state has the *statutory* authority to use DROS Fee revenues to fund

[3] The State's reliance on *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir. 1991), is similarly flawed. The permit fee there was not upheld because it was imposed in connection with a parade, but because there was "no evidence that the fees were charged for anything other than processing costs and traffic control,"—in other words, costs directly related to the matter licensed. *Id.* at 1137.

APPS enforcement activities. It is whether the state has the *constitutional* authority to do so. The fact that the DROS Fee is functioning as the State intended does not render it any more constitutional than the fact that the fee is only $19. The State's contrary argument is utterly circular, as it would allow the State to use the DROS Fee to fund *anything* it chooses to statutorily mandate, so long as the DROS Fee is not prohibitively high. Such an approach would eviscerate both fee jurisprudence and the constitutional rights it protects. *Cf. McCulloch v. Maryland*, 17 U.S. 316, 327 (1819) (the "power to tax" is "the power to destroy"); *Murdock*, 319 U.S. at 112 ("The power to tax the exercise of a privilege is the power to control or suppress its enjoyment.").[4]

C. The State Does Not and Cannot Show that APPS Enforcement Activities Are Costs Attributable to Processing a Lawful Firearm Transaction

The State alternatively claims the DROS Fee *is* being used to offset costs attributable to "the matter licensed" because " 'the matter licensed' is 'firearms-related regulatory and enforcement activities related to the sale, purchase, possession, loan, or transfer of firearms.' " State Br. 39 (quoting Cal. Penal Code

[4] The State is mistaken if it thinks *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107 (6th Cir. 1997), supports that untenable result. The court there did state that permitting fees were acceptable so long as their purpose "is limited to defraying expenses incurred in furtherance of a legitimate state interest." *Id.* at 1110. But it did not endorse the proposition that a state may use permitting fees to pay for any "legitimate state interest" whatsoever, no matter how far removed from the activities the state is permitting. Nor could it have without running head-on into *Murdock*.

§ 28225(b)(11)). That argument reveals how truly confused the State is about the constitutional principles at the heart of this case. The state is not "licensing" people who pay a DROS Fee to engage in "firearms-related regulatory and enforcement activities." As Bauer has explained, the State is not "licensing" people who pay a DROS Fee to do anything at all. AOB 36, *see also id.* at 6-18. The DROS Fee is simply a fee that people must pay to complete a lawful firearm transaction. People who pay that fee do not obtain a license to possess a firearm (which California does not require), and certainly do not become authorized to enforce firearm laws. They simply obtain a firearm—as is their constitutional right to do.

The ultimate question, then, is not whether the state has authority to impose a DROS Fee, or to engage in APPS enforcement activities, but whether the costs attributable to investigating and enforcing criminal prohibitions on *unlawful possession* of a firearm are "actual costs" of processing a *lawful* firearm transaction that can be imposed on the DROS Fee payer. *Kaplan*, 894 F.2d at 1081. They are not. Nor can those law enforcement activities reasonably constitute a "special benefit" to people who lawfully purchase firearms. By the State's own telling, "[i]t is in *everyone's* interest to ensure that firearms are not in the possession of prohibited persons." E.R. II 124 (emphasis added). As such, everyone, i.e., the general public, should be made to fund the program that seeks to achieve that end.

The State nonetheless repeats—and even asks this Court to "defer" to—the remarkable claim that "law-abiding firearms owners have a particularly strong interest in" enforcing unlawful firearm possession laws "to help avoid gun ownership from becoming strongly associated with the random acts of deranged individuals." State Br. 32 (quoting E.R. II 124). That is the same logic that courts have rejected as incompatible with constitutional principles in concluding that marriage license applicants may not be saddled with the cost of maintaining public domestic violence shelters or adult bookstores with the cost of obscenity prosecutions. *See supra*, p. 9. Even assuming that people cannot differentiate the exercise of constitutional rights from criminal conduct, be it purveying obscenity, domestic violence or "the random acts of deranged individuals," that purported "benefit" is nothing like the kinds of *concrete* benefits that courts have held must exist to support the imposition of a corresponding fee. *See*, *e.g.*, *Nat'l Awareness Found. v. Abrams*, 50 F.3d 1159, 1166 (2d Cir. 1995) (professional fundraising license fee); *Lauder, Inc. v. City of Houston*, 751 F. Supp. 2d 920, 943-44 (S.D. Tex. 2010) (fee for permit to place news racks in public rights-of-way); *Jacobsen v. King*, 971 N.E.2d 620, 626 (Ill. App. Ct. 2012) (marriage license fee).

The State's amici fare no better in trying to conjure up justifications for saddling people who seek to lawfully obtain a firearm with the costs of enforcing criminal prohibitions against people who unlawfully possess them. Even if post

hoc theories offered by amici could suffice to justify constitutionally problematic fees, theirs, which range from the baseless to the offensive, fall far short of that mark. Amicus Brady Center argues that lawfully acquiring a firearm is closely related to APPS because "APPS depends upon information acquired through the DROS process." Brady Br. 21. But, while that may justify using DROS Fee monies to pay for the costs of obtaining information from a DROS applicant and entering that information into the databases on which APPS relies (actions that Bauer has never suggested the State may not take), it does not begin to justify using DROS Fee revenues to cover the costs of investigating, tracking down, and confiscating firearms from the infinitesimally small number of DROS applicants who later forfeit their constitutional right to possess them.

The Brady Center alternatively contends that the "activity in question" is not just acquiring a firearm, but also maintaining possession of it. *Id*. at 22. But that reflects a basic misunderstanding of California's regulatory scheme. As explained, the DROS process is not a licensing process; it is simply the process through which California regulates the "sale, lease, or transfer of firearms." Cal. Penal Code pt. 6, tit. 4, div. 6, ch. 6 (entitled "Recordkeeping, Background Checks, and Fees Relating to Sale, Lease, or Transfer of Firearms"). Because the only activity the state is regulating through that process is the *acquisition* of a firearm, only costs directly related to *that activity* can be charged via a fee. Just as a permit fee to hold

a parade must be confined to costs associated with the parade itself (e.g., setting up traffic cones and having extra police on hand), a transaction fee must be confined to costs associated with the transaction itself. Otherwise, the fee is no longer "one to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." *Cox*, 312 U.S. at 577 (quotations omitted). It is instead an impermissible "revenue tax." *Id.*

At any rate, even if California did have an actual licensing scheme, that would *at best* support using fees to pay for the costs of occasionally confirming that licensees continue to lawfully possess the firearms that they legally acquired. *See, e.g.*, *Kwong*, 723 F.3d at 165-67 (approving license fee in light of evidence that fee did not exceed costs of administering licensing scheme); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 274 F.3d 377, 395 (6th Cir. 2001) (approving use of licensing fee to pay for annual background checks of licensees); *Keepers, Inc. v. City of Milford*, 944 F. Supp. 2d 129, 165 (D. Conn. 2013) (same). Such a scheme would not justify saddling those who *do* continue to lawfully possess their firearms with the considerable *additional* costs generated by investigating, tracking down, arresting, and prosecuting the licensee who does not. AOB 10-18; *see also* Plaintiffs' Memorandum of Points & Authorities in Support of Motion for Summary Judgment at 9-12, *Bauer v. Harris*,

94 F. Supp. 3d 1149, ECF No. 52-1. Amicus Brady Center does not—and cannot—identify any court that has held otherwise.

Amicus Law Center, for its part, contends that the costs of APPS enforcement activities can be placed on all DROS Fee payers because "APPS seeks to identify and confiscate firearms only from *DROS fee payers* who become prohibited persons, . . ." Law Center Br. 25. But that is both factually wrong and legally irrelevant. As a factual matter, people who voluntarily register their firearms or register intrafamilial firearms transfers can end up on the APPS list without ever paying a DROS Fee. E.R. II 024; E.R. III 461. And, as a legal matter, law-abiding firearm purchasers cannot be penalized for the hypothetical future illegal actions that a vanishingly small percentage of purchasers *might* commit. *See* AOB 39 n.9; *see also supra,* Argument, Part I.B.

Even where constitutional rights are not concerned, a state does not have the power to force some people " 'alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *E. Enters. v. Apfel*, 524 U.S. 498, 522 (1998) (plurality op.) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); *see also, e.g., Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty.*, 488 U.S. 336 (1989); *but see* E.R. III 494 (California's purpose in adopting SB 819 was to avoid "placing an additional burden on the taxpayers of California"). That principle applies a fortiori when the only thing that differentiates

those people from the rest of the general public is their decision to exercise a fundamental constitutional right. Accordingly, Bauer does not dispute that the State is free to impose a fee on everyone who engages in a lawful firearm transaction or that the State is free to investigate, pursue, and prosecute people who possess firearms unlawfully. But, what the state certainly may not do is saddle everyone who exercises their constitutional rights with costs attributable to the small minority of people who these rights on the theory that they might someday become part of that group.

II. THE STATE'S USE OF THE DROS FEE TO FUND APPS ENFORCEMENT ACTIVITIES FARES NO BETTER UNDER SECOND AMENDMENT JURISPRUDENCE

Because using DROS Fee revenues to fund APPS enforcement activities plainly exceeds a state's authority to impose fees on the exercise of constitutional rights, this Court need not determine whether its Second Amendment jurisprudence compels the same result. As with other constitutional rights, the *Cox/Murdock* framework protects the right at issue, so there is no need to resort to general, non-fee-specific tests. That said, all roads, including more general Second Amendment tests, lead to invalidation here. Indeed, the State barely attempts to defend the erroneous reasoning that the district court adopted in concluding otherwise. State Br. 20-33. Instead, it devotes most of its energy to trying to identify a "reasonable fit" between the DROS Fee and APPS enforcement activities. *Id.* at 27-33. But

those arguments fail for the same reasons as the State's failed attempts to demonstrate that APPS enforcement activities are an "actual cost" of processing a lawful firearm transaction.

A. Conditions on Second Amendment Rights Are Not Exempt from Constitutional Scrutiny

The State does not seriously defend the district court's erroneous conclusion that "conditions and qualifications on the commercial sale of firearms" do not implicate the Second Amendment *at all*. E.R. I 008; *see also* State Br. 25-27. And understandably so, as it is indefensible. If conditions or qualifications on the sale of arms were wholly outside the Second Amendment's scope, California could impose a $1 million DROS Fee or five-year waiting period to obtain a firearm and the Second Amendment would have nothing to say about it.

Although Bauer posited both hypotheticals in its opening brief, the State does not even acknowledge them, let alone attempt to identify any theory under which the district court's reasoning would not compel those results. *See* State Br. 25-27. Nor does the State try to reconcile the district court's holding with this Court's decision in *Jackson v. City and County of San Francisco*, 746 F.3d 953 (2014), which held that conditions "on the sale of *ammunition* do not fall outside 'the historical understanding of the scope of the [Second Amendment] right' " because "without bullets, the right to bear arms would be meaningless." 746 F.3d at 967-68 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008))

(emphasis added); *see also, e.g.*, *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010); *Ill. Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 930-31 (N.D. Ill. 2014). That reasoning applies a fortiori to restrictions on the transfer of arms; without arms, the right would be nonexistent.[5]

While the State has little to say in defense of the district court's decision, its amicus, the Law Center, takes up the district court's cause, arguing that there is a "longstanding tradition in the United States of imposing fees and taxes on firearm transactions, ownership, and possession." Law Center Br. 16. But the "tradition" the Law Center identifies is primarily associated with the shameful practice of southern states imposing firearm taxes following the Civil War because "[m]ost former slaves would not have been able to afford such a tax," Stephen P. Halbrook, *The Empire Strikes Back: The District of Columbia's Post-Heller Firearm Registration System*, 81 Tenn. L. Rev. 571, 584 (2014). *See* Law Center Br. 15 (identifying Georgia, Alabama, and Mississippi laws passed on the heels of the Civil Rights Act of 1866, which forced "the South [to] abandon[] explicitly racial laws and replace[] them with facially neutral laws designed to disarm freedmen,"

[5] The State also tellingly ignores Bauer's point that the DROS Fee, *factually* speaking, is neither a condition nor qualification "on the *commercial* sale of firearms." AOB 44-45. It applies to nearly *all firearm transactions*—including private party transfers (whether money is exchanged or not), loans over 30 days, and winning a firearm as a prize—not just *commercial sales*. Cal. Penal Code § 28055.

David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 Santa Clara L. Rev. 1113, 1138 (2010)).

The three other firearm taxes Law Center cites—an 1858 North Carolina law, an 1893 Florida law, and a 1926 Virginia law—are of a piece with those blatantly unconstitutional efforts to disarm the black population. *See* Law Center Br. 16. Florida's 1893 law, for example, "was passed for the purpose of disarming" "a great influx of negro laborers in th[e] State." *Watson v. Stone*, 148 Fla. 516, 524 (1941) (Buford, J., concurring specially). "The statute was never intended to be applied to the white population and . . . there had never been . . . any effort to enforce [its] provisions . . . as to white people." *Id*. That is "because it ha[d] been generally conceded" that such a tax was "in contravention of the Constitution and non-enforceable if contested." *Id*.; *see* Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 Tenn. L. Rev. 597, 601 (1995) (identifying Virginia's "prohibitive tax on the possession of firearms" as a measure motivated by "racism").

The six laws gathered by amicus thus are not "evidence of the public's acceptance of the conditions and qualifications they impose on the Second Amendment," Law Center Br. 17, but rather proof that if conditions and qualifications on the sale of firearms are not subject to judicial scrutiny *at all*, then

states have the power not just to tax Second Amendments rights, but to destroy them. *Cf. McCulloch*, 17 U.S. at 327; *Murdock*, 319 U.S. at 112. If anything, those laws only confirm that this Court should do explicitly what the State does implicitly by side-stepping the issue: Reject the district court's erroneous conclusion that every "condition or qualification on the commercial sale of arms" per se avoids Second Amendment scrutiny. E.R. I 008.

B. The Imposition of a Fee on the Exercise of Second Amendment Rights Is, by Definition, a Burden on Second Amendment Rights

Although the State does not seriously defend the proposition that a firearm transaction fee could *never* violate the Second Amendment, it defends a proposition almost as radical: A firearm transaction fee does not even *burden* Second Amendment rights unless it makes it *impossible* "to lawfully purchase and possess firearms." State Br. 26-27. The State cites no support for the notion that the only fees that burden constitutional rights are fees so high that they prohibit the exercise entirely. That is probably because the Supreme Court has expressly rejected the argument "that an invalid fee can be saved if it is nominal." *Forsyth*, 505 U.S. at 137; *see also, e.g.*, *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244-45 (1936); *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 988 (1992) (Scalia, J., concurring in part, dissenting in part) (recognizing that courts would not uphold "a state law requiring purchasers of religious books to endure a 24-hour waiting period, or to pay a nominal additional tax of 1¢").

Unsurprisingly, the Second Circuit's decision in *Kwong* does not embrace the State's proposition. The *Kwong* court began by considering whether the fee at issue was "a permissible licensing fee" under the Supreme Court's fee jurisprudence—in other words, whether the fee was "designed to defray (and d[id] not exceed) the administrative costs associated with the licensing fee." 723 F.3d at 165. Only *after* concluding that the fee satisfied that standard did the court turn to the question of whether the size of the fee was so high as to make it an unconstitutional burden. *Id.* at 165-69.

And when it came to deciding whether the fee imposed an undue burden on Second Amendment rights, *Kwong* did not accept the circular reasoning that a fee does not burden those right *at all* unless it is "prohibitively expensive." *Id.* at 167. Nor could it have, as the Second Circuit has recognized repeatedly that laws can unconstitutionally burden Second Amendment rights without destroying them entirely. *See, e.g.*, *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 264 (2d Cir. 2015) (holding unconstitutional a seven-round ammunition limit). The *Kwong* court instead concluded only that, while the fee at issue there plainly *burdened* the right, it did not *unconstitutionally* burden it. 723 F.3d at 167-69. That is because the fee not only furthered a sufficiently important government interest in a sufficiently tailored way (as evidenced by the court's conclusion that it was

designed to defray the actual administrative costs of issuing a license), but *also* was not "prohibitively expensive." *Id.*[6]

Kwong thus provides absolutely no support for the State's effort to conflate the inquiry into whether a law *burdens* Second Amendment rights with the inquiry into whether it burdens those rights *unconstitutionally*. Nor does it provide any support for the facially absurd proposition that requiring someone to pay a fee to utilize what for most citizens is the *only* legal avenue for exercising the core right of "defense of hearth and home," *Heller*, 554 U.S. at 635, does not even burden Second Amendment rights at all.

C. Second Amendment Precedent Demands the Same Nexus as Fee Jurisprudence Between the Activities on Which a Fee Is Imposed and the Uses to Which It Will Be Put

The ultimate question, then, is whether using the DROS Fee to fund APPS enforcement activities furthers a sufficiently important government interest in a sufficiently tailored manner. Whether this Court applies strict or intermediate

[6] The *Kwong* court did so even when bound by Second Circuit precedent, which applies heightened scrutiny only if a restriction "operate[s] as a *substantial burden* on the ability of law-abiding citizens to possess and use a firearm for self-defense . . ." *Kwong*, 723 F.3d at 173 (quoting *United States v. DeCastro*, 682 F.3d 160, 166 (2d. Cir. 2012)). Whereas *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013), which controls this case, instructs that burdens on Second Amendment conduct necessarily trigger heightened review unless the burden is de minimis. Barring Bauer from exercising his core right to acquire firearms unless he agrees to fund an unrelated government program is far from de a minimis burden. To the contrary, it is quite severe.

scrutiny, the answer is the same: It does not.[7] That is not because the State has no legitimate interest in enforcing APPS; Bauer does not dispute that it does. It is because the means the State has chosen to achieve that end are manifestly not designed "to avoid unnecessary abridgement of" constitutional rights. *McCutcheon v. FEC*, – U.S. –, 134 S. Ct. 1434, 1456 (2014). The State's attempts to demonstrate otherwise are either circular or nonsensical.

To begin, the State makes the self-serving claim that, in order to evaluate whether using the DROS Fee is a constitutionally permissible means of financing APPS enforcement activities, the Court should look at how the State is spending DROS Fee revenue, not from where it is receiving that money. State Br. 30 n.7. In other words, in the State's view, so long as using the DROS Fee achieves the State's goal of funding APPS enforcement activities, then it is necessarily a constitutional means of doing so. That circular argument would make the constitutional analysis meaningless. As the Supreme Court has held, the State's interest in "the raising of revenue . . . cannot justify the special treatment of" those engaged in constitutionally protected activity, "for an alternative means of achieving the same interest without raising concerns under the [Second]

[7] As explained in Bauer's opening brief, *see* AOB 48 & n.11, because the DROS Fee burdens the core Second Amendment right "to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635, strict scrutiny applies. To the extent this Court's cases compel a different result, Bauer reserves the right to challenge them in an appropriate forum.

Amendment is clearly available: the State could raise the revenue by taxing" Californians generally. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 586 (1983). In fact, this is how APPS was funded prior to adoption of SB 819. AOB 17 (citing E.R. II 019, 095; E.R. III 260-61, 264, 439, 441, 455). Accordingly, the only meaningful way to determine whether it is appropriate to use the DROS Fee to fund APPS is by assessing who is paying the DROS fee and why.

That California's statute allows, and the Legislature intended, for the DROS Fee to be used to pay for APPS enforcement activities is irrelevant. *See* State Br. 30-31. The same could be said of a law outsourcing the cost of APPS to everyone who purchases a cellphone or a new car. Those, too, presumably would achieve the State's legitimate interest in paying for costs attributable to "investigat[ing] . . . individuals who are armed and prohibited from possessing firearms and law enforcement's recovery of such firearms." State Br. 30-31. But that would not obviate the State's burden to prove that singling out individuals who solely seek to exercise their Second Amendment rights to shoulder those costs is a constitutionally permissible means of achieving that interest. Indeed, if all that were needed to establish the requisite means-end fit were legislative approval, then California could fund *any* "important government interest" by adopting a statute taxing the lawful acquisition of a firearm. And the next tax would survive because

"the Legislature's decision to fund [*insert government program*] with DROS fee revenues advances the interests of" funding that important program. State Br. 29.

The State next tries to make its case by block quoting SB 819's author, who conceded that "[it]t is in *everyone's* interest to ensure that firearms are not in the possession of prohibited persons," but then claimed that "law-abiding firearms owners have a particularly strong interest in this to help avoid gun ownership from becoming strongly associated with the random acts of deranged individuals." State Br. 31-32 (quoting E.R. II 124). But even accepting the dubious notion that the State has *any* interest—let alone an important or compelling one—in forcing people to help rehabilitate the reputation of a constitutional right, that interest could not justify forcing everyone who seeks to exercise their Second Amendment rights to shoulder the burden of enforcing criminal laws against those who forfeit or abuse them. If anything, that only reinforces the offensive view that everyone who seeks to obtain a firearm is only one step away from becoming a "deranged" criminal. The only other purported interest the bill's author identified is the State avoiding the pain of "plac[ing] this additional burden on the tax payer at large." E.R. II 124. But forcing some people "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *E. Enters.*, 524 U.S. at 522 (quotations omitted), just adds the Takings Clause to the list of constitutional provisions that the State is violating.

Finally, the State makes the leap of logic that because fees on firearm acquisition can be used to offset the costs of ensuring that only lawful firearm acquisitions take place, "it only makes sense" to use those fees to cover the costs of tracking down those who lawfully obtained a firearm but subsequently become prohibited from possessing it. State Br. 32. But while it plausibly "makes sense" to charge firearm purchasers for the costs of ensuring *they* can legally possess firearms—i.e., costs for running background checks and registering firearm transactions—it makes no sense to charge them for the costs generated by the exceedingly small percentage of people who lawfully purchase firearms and later become legally disabled from possessing them. Using the DROS Fee to fund APPS enforcement activities therefore fails to satisfy scrutiny under more general Second Amendment principles for the same reason that it fails to satisfy scrutiny under constitutional fee jurisprudence: because those activities have no meaningful connection to the costs of processing a lawful and constitutionally protected firearm transactions.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and remand the case with instructions to enter a permanent injunction consistent with Bauer's prayer for relief.

Date: November 13, 2015

MICHEL & ASSOCIATES, P.C.

/s/ C.D. Michel
C.D. Michel
Attorney for *Plaintiffs-Appellants*

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached opening brief complies with Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure. According to the word count feature of the word-processing system used to prepare the brief, it contains 6,984 words, exclusive of those matters that may be omitted under Rule 23(a)(7)(B)(iii).

I further certify that the attached brief complies with the typeface requirements of Rule 32(a)(5) and the type of style requirements of Rule 32(a)(6). It was prepared in a proportionately spaced typeface using 14-point Times New Roman font in Microsoft Word.

Date: November 13, 2015

MICHEL & ASSOCIATES, P.C.

/s/ C.D. Michel
C.D. Michel
Attorney for *Plaintiffs-Appellants*

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2015, an electronic PDF of **APPELLANTS' REPLY BRIEF** was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Date: November 13, 2015

MICHEL & ASSOCIATES, P.C.

/s/ C.D. Michel
C.D. Michel
Attorney for *Plaintiffs-Appellants*