No. 17-719

In the Supreme Court of the United States

BARRY BAUER; NICOLE FERRY; JEFFREY HACKER; NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.; CALIFORNIA RIFLE PISTOL ASSOCIATION FOUNDATION; HERB BAUER SPORTING GOODS, INC.,

Petitioners,

v.

XAVIER BECERRA, Attorney General of the State of California, in his official capacity; and STEPHEN LINDLEY, Chief of the California Bureau of Firearms, in his official capacity,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held that the State's allocation of $5 from a $19 firearm-sales fee to fund law enforcement activities targeting illegal firearm possession does not violate the Second Amendment.

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STATEMENT

1. When an individual obtains a firearm in California, state law generally requires that the purchase or other transfer go through a licensed firearms dealer. Cal. Penal Code § 26500. The dealer generally must wait at least 10 days after receipt of an application before delivering the firearm. *Id.* § 26815. During this time, California Department of Justice (DOJ) agents conduct a background check to ensure the purchaser is not prohibited from possessing firearms. *Id.* § 28220. DOJ retains information regarding the sale or transfer of the firearm in a database. *Id.* § 11106.

California's Dealer's Record of Sale (DROS) system has existed for 100 years. Pet. App. 2. The system requires dealers to maintain standardized records of transactions and currently requires an individual purchasing a firearm from a licensed dealer to pay a $19 DROS fee. *See* Cal. Penal Code §§ 28100, 28160, 28225; Cal. Code. Regs. tit. 11, § 4001. Use of the DROS fee was originally limited to funding background checks, but the State later expanded use of the funds to include "costs associated with funding Department of Justice firearms-related regulatory and enforcement activities related to the sale, purchase, loan, or transfer of firearms." Pet. App. 3.

Since 2004, the DROS fee has been set at $19. Cal. Penal Code § 28225(a); *see also* Pet. App. 3. All DROS fees are deposited into the Dealer's Record of Sale Special Account. Cal. Penal Code § 28235. Without the 2004 fee adjustment, the Special Account was projected to run out of funds. *See* C.A. Supp. Excerpts of Record 2 (ECF No. 17-2, Oct. 15, 2015).

In 2001, the California Legislature established the Armed Prohibited Persons System. Cal. Penal Code § 30000. APPS is a program within DOJ to enforce

prohibitions on firearm possession by some persons, such as convicted felons. Pet. App. 4. APPS cross-references information regarding the sale or transfer of firearms (obtained primarily at the time of payment of the DROS fee) with databases containing records regarding people prohibited from owning firearms. Cal. Penal Code § 30000. In general, prohibited persons are those who have been convicted of a felony or a violent misdemeanor, are subject to a domestic violence restraining order, or have been involuntarily committed for mental health care. *Id*. § 30005. The system produces a list of potentially armed prohibited persons, and DOJ staff check the list for accuracy. Pet. App. 4. Law enforcement officers throughout California can access the APPS list 24 hours a day, 7 days a week. *See* Cal. Penal Code § 30000(b); *see also id*. at § 30010 ("The Attorney General shall provide investigative assistance to local law enforcement agencies to better ensure the investigation of individuals who are armed and prohibited from possessing a firearm.")

In 2011, the California Legislature clarified that the APPS program, as enforcement activity related to firearms possession, could be funded with money from DROS transfer fees. Pet. App. 3-4; Cal. Penal Code § 28225(b)(11) (allowing the DROS fee to be used for "firearms-related regulatory and enforcement activities related to the sale, purchase, *possession*, loan, or transfer of firearms" (emphasis added)). In 2013, the Legislature appropriated $24 million from the DROS Special Account to address a growing backlog in APPS cases. Pet. App. 5 n.2. At that time, the Legislature estimated there were more than 18,000 armed prohibited persons in California. *Id*. at 12.

2. Petitioners are individuals and gun-rights organizations who filed suit in 2011 seeking declaratory and injunctive relief prohibiting the use of DROS fees

to fund the APPS program. Pet. App. 5. They argued that use of the fee violated the Second Amendment because identifying and disarming persons who became prohibited persons after an initially lawful transfer was a general law enforcement activity not specifically related to the lawful transfers on which the fee was imposed. *Id.*; *see also id.* at 27.

The district court addressed petitioners' Second Amendment claim using a widely-adopted two-step approach under which courts (1) ask whether a challenged law burdens conduct protected by the Second Amendment and (2) if so, apply an appropriate level of heightened scrutiny. *See Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 960 (9th Cir. 2014) (citing *United States v. Chovan*, 735 F.3d 1127, 1136-1137 (9th Cir. 2013)). At step one, the district court held that the DROS fee is a condition on the commercial sale of firearms and is therefore one of the "presumptively lawful regulatory measures" recognized by this Court in *District of Columbia v. Heller*, 554 U.S. 570, 627 n.26 (2008). Pet. App. 35. The court thus concluded that the DROS fee "f[ell] outside the historical scope of the Second Amendment." *Id.*

Even though it found no burden on the Second Amendment, the district court went on to explain that for purposes of step two "the DROS fee imposes only a $19.00 fee on firearm transactions." Pet. App. 35. Thus, "[u]nder any level of scrutiny, the DROS fee is constitutional because it places only a marginal burden on 'the core of the Second Amendment,' which is 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" *Id.*

The district court declined to assess petitioners' Second Amendment claim under First Amendment "fee jurisprudence" cases cited by petitioners. Pet.

App. 35 n.6. The court reasoned that "the Ninth Circuit ha[d] not indicated that First Amendment precedent concerning whether and to what extent a state may impose a fee as a precondition to exercising a constitutional right is appropriate in the Second Amendment context[.]" *Id.* at 36.

3. The court of appeals affirmed. Pet. App. 1-20. Applying the same two-step Second Amendment framework as the district court (*id.* at 7), the court acknowledged the parties' dispute over whether the DROS fee was properly considered "a condition on the commercial sale of arms and thus [fell] outside the scope of the Second Amendment under *Heller*'s first step" (*id.* at 7-8). The court found it unnecessary to resolve that dispute because it concluded that use of the fee to fund the APPS program would survive review even if heightened scrutiny applied. *Id.* at 8. The court noted that petitioners had not alleged that the $19 DROS fee (let alone the $5 portion of it that they argued was being used in an improper way) had "any impact on [their] actual ability to obtain and possess a firearm." *Id.* at 9-10. Thus, any burden on Second Amendment rights was "exceedingly minimal." *Id.* at 9. In the absence of any severe burden, the court applied intermediate rather than strict scrutiny. *Id.* at 9-10.

Applying a standard intermediate scrutiny analysis, the court required that "(1) the government's stated objective . . . be significant, substantial, or important; and (2) there . . . be a 'reasonable fit' between the challenged regulation and the asserted objective." Pet. App. 12. Acknowledging that "[i]t is self-evident that public safety is an important government interest, and reducing gun-related injury and death promotes public safety," the court found that the public interests underlying use of the DROS fee for the

APPS program met the first prong. *Id.* at 12-13 (internal quotation marks omitted).

Turning to the second prong, the court noted that "'intermediate scrutiny does not require the least restrictive means of furthering a given end.'" Pet. App. 13. In this case, "the DROS fee is intended to fund 'costs associated with funding Department of Justice firearms-related regulatory and enforcement activities related to the sale, purchase, possession, loan, or transfer of firearms.'" *Id.* (quoting Cal. Penal Code § 28225(b)(11).) "Because the APPS program involves the investigation of illegally armed individuals and enforcement of firearms laws," the court reasoned, there was "certainly a fit between the legislative objective and the use of the DROS fee." *Id.* Indeed, "the unlawful firearm possession targeted by APPS is the direct result of certain individuals' prior acquisition of a firearm through a DROS-governed transaction." *Id.* at 13-14. The court concluded that "with the limited burden and the close relationship between firearm acquisition and monitoring of illegal possession, the State ha[d] established the requisite 'reasonable fit' to satisfy the second prong of the intermediate scrutiny test." *Id.* at 14-15.

Finally, the court addressed petitioners' argument based on First Amendment "fee jurisprudence." Pet. App. 15-19. Again, the court assumed without deciding that these cases could be applied in the Second Amendment context, because it concluded that, even if they did apply, the challenged use of the DROS fee would "easily survive[]" the resulting inquiry. *Id.* at 15. Looking to this Court's precedent, the court reasoned that the DROS fee applies to "essentially *all* means of acquiring a firearm in California" (*id.* at 16); that "DROS-regulated firearm transactions are in fact a close proxy for subsequent firearm possession" (*id.*);

and that "targeting illegal possession under APPS is closely related to the DROS fee" (*id*. at 16-17). The APPS program—"in essence, a temporal extension of the background check"—could therefore fairly be considered an "expense[] of policing the activities in question." *Id*. at 17 (quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 113-114 (1943)). Accordingly, "the enforcement activities carried out through the APPS program are sufficiently related to the DROS fee" to pass muster under this form of analysis. *Id*. at 19.

ARGUMENT

Petitioners argue that the decision below conflicts with this Court's precedents addressing the imposition of fees on activities protected by the First Amendment, and with decisions of lower courts applying those precedents. Pet. 13-22. But the few cases that have considered this issue in the Second Amendment context have all sustained the challenged fees. And if there is any tension among lower-court decisions concerning what sorts of enforcement activities may properly be funded by fees on expressive activity, review by this Court would be complicated by the Second Amendment context of this case.

1. As petitioners and the decision below explain (*see* Pet. 13; Pet. App. 15-16), in the First Amendment context this Court has long held that governments may impose on expressive activities licensing fees designed "to meet the expense incident to the administration of the [licensing statute] and to the maintenance of public order in the matter licensed." *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (internal quotation marks omitted). Conversely, the Court struck down a fee imposed on door-to-door solicitation as applied to distributors of religious materials, where it was "not a nominal fee imposed as a regulatory

measure to defray the expenses of policing the activities in question." *Murdock v. Pennsylvania*, 319 U.S. 105, 113-114 (1943). The ordinance in *Murdock*, the Court explained, was not "narrowly drawn to prevent or control abuses or evils arising from that activity," and the fee was not "calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors." *Id.* at 116-117.

Following *Cox* and *Murdock*, the Ninth Circuit has held that a "state may . . . impose a permit fee that is reasonably related to legitimate content-neutral considerations, such as the cost of administering the ordinance, the cost of public services for an event of a particular size, or the cost of special facilities required for the event." *S. Oregon Barter Fair v. Jackson Cty.*, 372 F.3d 1128, 1139 (9th Cir. 2004). In *Kaplan v. County of Los Angeles*, 894 F.2d 1076 (9th Cir. 1990), the court held that a statute requiring political candidates to pay a pro rata share of the cost of an election pamphlet was "narrowly drawn" because it allowed local agencies to "recover actual costs alone," not to profit from the assessment or to finance other election costs. *Id.* at 1081. But in *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976), the court rejected an "arbitrary" inspection fee for political posters, where "the absence of apportionment suggest[ed] that the fee [was] not in fact reimbursement for the cost of inspection but in fact an unconstitutional tax upon the exercise of First Amendment rights." 540 F.2d at 1371.

In the decision below the court of appeals assumed, without deciding, that these and similar First Amendment precedents could be applied directly in the Second Amendment context. Pet. App. 15, 19. On that assumption, the court correctly held that a portion of DROS transfer fees could be used to fund the APPS system, because identifying firearm recipients who

later become prohibited persons and then taking steps to remove previously-transferred firearms from their possession "can fairly be considered an 'expense[] of policing the activities in question,' *Murdock*, 319 U.S. at 113-14, or an 'expense incident to . . . the maintenance of public order in the matter licensed,' *Cox*, 312 U.S. at 577." Pet. App. 17.

As the court of appeals observed, petitioners' contrary argument turns on defining the "regulated activity" relevant to the DROS fee as "limited to firearm acquisition." Pet. App. 16; *see, e.g.*, Pet. 20-21. Petitioners acknowledge, however, that the DROS fee applies to essentially all lawful acquisitions of firearms in California. Pet. 6 & n.2; Pet. App. 16. Thus, DROS-regulated transfers "are in fact a close proxy for subsequent firearm possession, and targeting illegal possession under APPS is closely related to the DROS fee." Pet. App. 16-17. "The APPS program is, in essence, a temporal extension of the background check program" funded by the DROS fee (*id.* at 17); and especially "where the initial fee enables an activity that has ongoing impacts, such as the purchase of firearms" (*id.* at 18), closely related later enforcement costs "are properly considered part of the 'expense[] of policing the activities in question' permitted under *Murdock* and *Cox*" (*id.* at 19). Despite petitioners' repeated assertions to the contrary, use of a portion of DROS fees to engage in the carefully targeted activities of the APPS program does not convert the initial fee to a "general revenue-raising measure" that is being used to fund "general law enforcement activities." Pet. 1, 3; *see id.* at i, 9-11, 13, 22.

2. Petitioners argue that the decision below conflicts with decisions of other courts applying *Cox* and *Murdock*, including in the Second Amendment context. Pet. 15-19. As to cases involving firearms, however,

the only other appellate decision upheld a $340 fee to obtain a residential handgun license in New York City. *Kwong v. Bloomberg*, 723 F.3d 160, 165-167 (2d Cir. 2013). On the record before it, the Second Circuit held that the fee was "designed to defray (and does not exceed) the administrative costs associated with the licensing scheme." *Id.* at 166. The court did not address any dispute concerning what could properly be considered recoverable "costs of regulating the protected activity." *Id.* at 165. Indeed, it expressly observed that "[a] licensing fee might also be permissible, for example, when it defrays the cost of enforcing the licensing scheme, and the propriety of such a fee must be evaluated on a case-by-case basis." *Id.* at 166 n.10. There is no basis for concluding that the Second Circuit would disagree with the result reached by the court below on the different facts of this case.[1]

More generally, petitioners suggest (Pet. 18-19) that there is divergence among the lower courts over whether or when ongoing enforcement costs may be considered part of the "expense incident to . . . the maintenance of public order in the matter licensed" for purposes of a *Cox* analysis. *See Cox*, 312 U.S. at 577. As petitioners acknowledge (Pet. 18), the decision below draws support in this regard from those of other courts in First Amendment cases. In *National Awareness Foundation v. Abrams*, 50 F.3d 1159, 1166 (2d Cir. 1995), the Second Circuit upheld a registration fee on charitable organizations, fundraisers, and solicitors, reasoning in part that "it is permissible to include the costs of both administering and enforcing [the relevant licensing or permitting statute] in determining the constitutionality of [a] registration fee." And the

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[1] The two other Second Amendment cases cited by petitioners are district court decisions that likewise upheld challenged fees. Pet. 17; *see also Kwong*, 723 F.3d at 165.

Sixth Circuit upheld a licensing fee on nude dancing venues that included an accounting for ongoing enforcement costs related to limiting felons from working in or operating such establishments. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 274 F.3d 377, 395-96 (6th Cir. 2001).

Petitioners seek to contrast these decisions with others that have addressed fee challenges under the First Amendment. *See* Pet. 15-16, 19. But none of the decisions they cite actually considered and rejected a fee that defrayed documented enforcement costs of an ongoing regulatory program. For example, in *iMatter Utah v. Njord*, 774 F.3d 1258 (10th Cir. 2014), the Tenth Circuit held that the State could not require prohibitively expensive insurance policies as a condition of obtaining permits for street marches. The court noted that Utah had failed to show how the costs imposed aligned with its actual expenses. *Id.* at 1269. In *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1315 (11th Cir. 2003), the Eleventh Circuit rejected a $1250 licensing fee for nude dancing establishments where the city conceded it had conducted no accounting of the costs of administering its program. Similarly, the Fifth Circuit rejected a $6 solicitation fee imposed by airport authorities where they offered no support that the fee was needed to defray administrative costs of operating the permit system. *See Fernandes v. Limmer*, 663 F.2d 619, n.11 (5th Cir. 1981). And the First Circuit rejected a city's attempt to justify a $500 parade fee overcharge for traffic control as "de minimis" or as belatedly applicable to unspecified, unsubstantiated permit-processing costs. *See Sullivan v. City of Augusta*, 511 F.3d 16, 37-38 (1st Cir. 2007). These decisions do not reveal any developed doctrinal conflict over when it is permissible to use a portion of a fee for the documented costs of ongoing enforcement activities, or make clear that any of these

courts would disagree with the Ninth Circuit's resolution of the Second Amendment question at issue in this case.[2]

Finally, even if there were a divergence among the lower courts in their approach to fee issues in First Amendment cases, this case would hardly be an "ideal vehicle" (Pet. 23) for this Court to consider that issue. Because this case involves firearm transfer fees and the Second Amendment, before the Court could resolve any question about the scope of permissible fees under *Cox* and *Murdock*, it would first have to consider whether or how that line of First Amendment cases should be applied in the very different Second Amendment context. Similarly, the Court would have to address the State's threshold argument that the transfer fee at issue here is the sort of "condition[] and qualification[] on the commercial sale of arms" that this Court has indicated is "presumptively lawful." *Heller*, 554 U.S. at 626-627 & n.26; *see* Pet. App. 8.[3] The court of appeals correctly concluded that it did not need to address those issues because the use of a portion of the DROS transfer fee challenged here would survive constitutional scrutiny under any potentially applicable rubric. Pet. App. 8, 15. That was a reasonable way of resolving this case, and the matter does not warrant further review.

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[2] Notably, petitioners did not mention *iMatter Utah* or *Sullivan* before the court of appeals, and cited *Fly Fish* and *Fernandes* only briefly, without elaborating on the argument they now make before this Court. *See, e.g.*, Pet. C.A. Br. 26, 28 (ECF No. 7, July 15, 2015); Pet. C.A. Reply Br. 7 (ECF No. 35, Nov. 13, 2015).

[3] While the court of appeals found it unnecessary to address this argument, it was fully preserved below and would be available for the State to advance as a ground for affirmance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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