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 AND PISTOL ASSOCIATION FOUNDATION; HERB BAUER SPORTING GOODS, INC.,

Petitioners,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California; STEPHEN LINDLEY, in his official capacity as Acting Chief of the California Department of Justice; DOES 1-10,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

C.D. MICHEL
SEAN A. BRADY
ANNA M. BARVIR
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
(562) 216-4444
cmichel@michellawyers.com

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
EDMUND G. LACOUR JR.
MATTHEW S. BROOKER
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioners

January 31, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
REPLY BRIEF 1
I. The Decision Below Deepens A Conflict Among The Lower Courts 2
II. The Decision Below Is Profoundly Wrong 5
III. This Is An Ideal Vehicle To Address This Important Constitutional Question 8
CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Cox v. New Hampshire,
312 U.S. 569 (1941).. 7

Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.,
274 F.3d 377 (6th Cir. 2001)................................... 5

District of Columbia v. Heller,
554 U.S. 570 (2008)... 11

Duncan v. Becerra,
265 F. Supp. 3d 1106 (S.D. Cal. 2017) 10

Ezell v. City of Chicago,
651 F.3d 684 (7th Cir. 2011)................................. 11

Fernandes v. Limmer,
663 F.2d 619 (5th Cir. 1981)................................... 5

Fly Fish, Inc. v. City of Cocoa Beach,
337 F.3d 1301 (11th Cir. 2003)............................... 5

Forsyth Cty. v. Nationalist Movement,
505 U.S. 123 (1992)... 10

Heller v. District of Columbia,
698 F. Supp. 2d 179 (D.D.C. 2010).......................... 9

Heller v. District of Columbia,
801 F.3d 264 (D.C. Cir. 2015)................................. 6

iMatter Utah v. Njord,
774 F.3d 1258 (10th Cir. 2014)............................... 4

Jackson v. City & Cty. of San Francisco,
746 F.3d 953 (9th Cir. 2014)................................. 11

Justice v. Town of Cicero,
827 F. Supp. 2d 835 (N.D. Ill. 2011)....................... 9

Kwong v. Bloomberg,
723 F.3d 160 (2d Cir. 2013) 9

McCulloch v. Maryland,
17 U.S. 316 (1819).. 8

McDonald v. City of Chicago,
561 U.S. 742 (2010).. 11

Murdock v. Pennsylvania,
319 U.S. 105 (1943)....................................... *passim*

Nat'l Awareness Found. v. Abrams,
50 F.3d 1159 (2d Cir. 1995) 5

Sullivan v. City of Augusta,
511 F.3d 16 (1st Cir. 2007) 4

REPLY BRIEF

For years, California statutorily limited fees charged to those who sought to lawfully obtain a firearm to the administrative costs of processing the application. But when the fees generated a surplus in a cash-strapped state, California diverted the surplus from exactions on those who *lawfully* acquire a firearm to fund a criminal law enforcement task force charged with tracking down and confiscating firearms from people who *unlawfully* possess them. That policy change and clear diversion of funds crossed a constitutional line—namely, the bedrock rule that "[a] state may not impose a charge for the enjoyment of a right granted by the federal constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). A special tax on newspapers to facilitate state efforts to limit libel and defamation would be a constitutional non-starter, and the diversion of fees here is no different.

California's only rejoinder is a vague suggestion that the Second Amendment is or should be treated differently. But every court (save the Ninth Circuit) to consider the issue has had no trouble concluding that this Court's jurisprudence limiting fees on the exercise of constitutional rights is fully applicable to Second Amendment rights. Likewise, every court (again, save the Ninth Circuit) has had no trouble concluding that the Second Amendment protects the right to *acquire* the firearms that it entitles the people to keep and bear. That neither the state nor the Ninth Circuit was willing to embrace *either* of those unremarkable positions only underscores the need for this Court's review. Indeed, it is no accident

that most of this Court's fees cases have involved constitutional rights disfavored in some circles, whether door-to-door solicitation or nude dancing. "[T]he Second Amendment context of this case," BIO.6, is thus a reason to grant review, not deny it, as the troubling tendency of states to try to use fees and taxes to "control or suppress [the] enjoyment" of controversial constitutional rights is precisely why "the power to tax the exercise of a privilege" must be so carefully constrained. *Murdock*, 319 U.S. at 112.

In sum, this case squarely presents an important constitutional question that has divided the circuits and is of pressing importance to *all* constitutional rights. Left standing, the decision below will supply cash-strapped states with a roadmap for how to profit from—and chill—the enjoyment of federal constitutional rights disfavored in those states. That is antithetical to the whole notion of a uniform, nationwide Bill of Rights. This Court should grant review.

I. The Decision Below Deepens A Conflict Among The Lower Courts.

The decision below exacerbates a conflict among the circuits over whether the exercise of a constitutional right may be conditioned on the payment of a fee used to defray costs that bear no relation to the fee-payer's own conduct—in other words, whether the government may leverage the exercise of a constitutional right as a general revenue-raising measure. *See* Pet.15-19. The state first tries to resist that conclusion by claiming that this is not what it has done, insisting that "targeting illegal possession under APPS is closely related to

the DROS fee" because most people who lawfully obtain a firearm will pay a DROS fee. BIO.8 (quoting Pet.App.16-17). But that kind of exceedingly loose connection is not enough. It may well be that most violators of libel laws are newspapers, and that most violators of public nudity ordinances are adult nightclubs. But the First Amendment still would not allow a tax on newspapers or nightclubs to finance efforts to enforce such laws. To the contrary, the supposition that those who engage in constitutionally protected activity are likely to abuse their constitutional privileges, and so should be forced to fund related law enforcement efforts, is not one the Constitution indulges.

In all events, to the extent any question is relevant, it is not whether most people who become the target of an APPS investigation will have paid a DROS fee. It is whether most people who pay a DROS fee will become the target of an APPS investigation. And on that question, the state does not and cannot deny that the odds are infinitesimally small—roughly 0.3%. *See* Pet.21. Accordingly, there can be no serious dispute that California is conditioning its citizens' exercise of their Second Amendment rights on the funding of law enforcement activities that bear no meaningful relationship to their own constitutionally protected conduct.

The Ninth Circuit nonetheless sanctioned this fee, concluding that funding efforts to track down criminals who unlawfully possess firearms is a cost that those who seek to exercise their Second Amendment rights can and should be forced to pay. That conclusion cannot be reconciled with this

Court's precedents, or with decisions from other courts holding that the government may not saddle those who seek only to exercise their constitutional rights with costs attributable to the conduct (or, worse still, misconduct) of third parties.

The state tries to deny that division of authority by noting that the cases with which the decision below conflicts did not involve "a fee that defrayed documented enforcement costs of an ongoing regulatory program." BIO.10. But that misses the point. The problem in those cases was not that the costs of a separate regulatory program were insufficiently "documented." No matter how well a state documents its anti-libel efforts, it cannot fund such enforcement efforts via a special fee on newspapers. Doing so not only would condition the exercise of a constitutional right on costs *not attributable to the fee-payer*, but would send the troubling and rights-chilling message that the state sees no meaningful difference between exercising and abusing a constitutional right. Other circuits correctly understand this Court's precedents and preclude such constitutionally problematic fees.

For example, the Tenth Circuit struck down a parade fee because the costs the government sought to recoup exceeded the applicant-specific processing costs and included costs generated by the "conduct of a third party." *iMatter Utah v. Njord*, 774 F.3d 1258, 1270 (10th Cir. 2014). Likewise, the First, Fifth, and Eleventh Circuits struck down licensing fees because the government "charged … more than the actual administrative expenses of the license." *Sullivan v. City of Augusta*, 511 F.3d 16, 38 (1st Cir. 2007); *see*

also Fly Fish, Inc. v. City of Cocoa Beach, 337 F.3d 1301, 1314 (11th Cir. 2003); *Fernandes v. Limmer*, 663 F.2d 619, 633 (5th Cir. 1981). It did not matter whether the additional uses to which the government sought to put the fee were important, well-documented, or tangentially related, in that they flowed from the misuse of the constitutional right the fee-payer sought to exercise. All that mattered was that they exceeded the costs reasonably attributable to the fee-payer.

In sharp contrast, the court below, consistent with the mistaken approach of two other circuits, declared that a fee imposed on a constitutional right need not be limited to the "'actual costs' of processing a license or similar direct administrative costs"—*i.e.*, costs attributable to the activity of the fee-payer. Pet.App.17-18; *see Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 274 F.3d 377, 395-96 (6th Cir. 2001); *Nat'l Awareness Found. v. Abrams*, 50 F.3d 1159, 1166 (2d Cir. 1995). Accordingly, in the Second, Sixth, and Ninth Circuits, individuals who wish to exercise their constitutional rights can be forced to shoulder costs that could not be imposed in the First, Fifth, Tenth, and Eleventh Circuits. The state's efforts to deny that division among the lower courts fall flat.

II. The Decision Below Is Profoundly Wrong.

The decision below not only exacerbates a circuit split, but is profoundly wrong. The state does not and cannot deny that it is using tens of millions of dollars in DROS fees to cross-subsidize a special task force charged with tracking down those who illegally possess firearms. Instead, it embraces the Ninth

Circuit's novel suggestion that confiscating firearms from people who unlawfully possess them *is* a cost incident to a lawful firearm transaction because "[t]he APPS program is, in essence, a temporal extension of the background check program." Pet.App.17.

That recharacterization of the APPS program defies reality—not to mention the California Legislature's contemporaneous explanation of the program. Even accepting the premise that the state could charge a perpetual background "re-checking" fee, *but see Heller v. District of Columbia*, 801 F.3d 264, 278 (D.C. Cir. 2015) (striking down requirement to "re-register" firearm every three years), that is not what the APPS program involves. The APPS program does not simply re-run the initial background check on the anniversary of a firearm purchase or after some other interval. After all, such periodic re-checks would hardly consume $24 million in DROS fees. Instead, what the dozens of sworn peace officers assigned to the APPS program are tasked with doing is "disarming, apprehending, and ensuring the prosecution of persons who are prohibited or become prohibited from purchasing or possessing a firearm." E.R.II.025. That comprehensive effort to track down and confiscate firearms from people who unlawfully possess them can no more plausibly be likened to "a temporal extension of the background check" than the California Highway Patrol could be characterized as a temporal extension of the initial driver's test. Pet.App.17.

Indeed, the California Legislature never even tried to claim that APPS enforcement activities are actually a cost attributable to a lawful firearm transaction, or to characterize the APPS program as a "temporal extension" of the initial background check. Instead, when the legislature reallocated the DROS-fee surplus to the APPS program, it candidly admitted that its goal was simply to avoid "placing an additional burden on the taxpayers of California," by instead placing that burden on those who exercise their constitutional right to acquire a firearm. E.R.II.102. In other words, the legislature *admitted* that it was converting the DROS fee into "a revenue tax" to fund law enforcement activities, rather than a fee imposed only "to meet the expense incident to the administration of" processing lawful firearm transactions. *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941). And far from suggesting that APPS activities are closely connected to DROS fee-payers, the legislature suggested that DROS fee-payers should welcome the opportunity to *disassociate* themselves from unlawful firearm possession and "help *avoid* gun ownership from becoming strongly associated with the random acts of deranged individuals." E.R.II.124 (emphasis added).

The California Legislature gets points for candor, but not for constitutionality. Its explanation makes clear beyond cavil that DROS fees have been diverted to fund a separate law enforcement task force that would otherwise be funded by general revenues. It likewise makes clear that the legislature fully embraced the constitutionally forbidden rationale that those who lawfully exercise constitutional rights should pay for the law enforcement costs associated

with those who might abuse those constitutional rights. But this Court has already rejected the notion that the government may subtly stigmatize, and thereby chill, the exercise of constitutional rights by impermissibly lumping law-abiding citizens together with lawbreakers. The government cannot force nude dancers to fund obscenity prosecutions, or churches to fund efforts to police unlawful animal sacrifices, or those who insist on a jury trial to fund new court construction. Instead, fees imposed on constitutionally protected activity must be strictly limited to costs associated with the particular fee-payer. "A state may not impose a charge for the enjoyment of a right granted by the federal constitution." *Murdock*, 319 U.S. at 113 (1943).

III. This Is An Ideal Vehicle To Address This Important Constitutional Question.

This case provides an ideal vehicle for the Court to address the scope of the government's power to single out constitutional rights for special monetary exactions. The state does not and cannot contest the importance of the issue. This Court has recognized for centuries that "the power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819), and for at least 75 years that "[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment," *Murdock*, 319 U.S. at 112. Nor does the state dispute that this is the rare case in which it is clear on the face of the challenged law that the fee is being diverted, as California affirmatively amended the DROS fee statute to eliminate the restriction that any fees collected be confined to offsetting costs associated

with the firearm transaction itself. This case arose only because the legislature could not resist the temptation to divert an unanticipated surplus to a different use. There is thus no need to decide exactly how high a fee the state may charge, or how much leeway a state should get when approximating the costs reasonably attributable to the fee-payer. The state has *admitted* that it is using its firearm transaction fee to pay for costs not attributable to a firearm transaction, so the only question is whether it is permissible for the state to do so.

The state nonetheless raises two purported "vehicle" problems, but each actually reinforces the need for this Court's review. First, the state claims that this is a poor vehicle because the Court "would first have to consider whether or how" its fee jurisprudence "should be applied in the very different Second Amendment context." BIO.11. But if the state thinks that the Second Amendment context is "very different" for these purposes, or that the existence of *any* limit on the diversion of DROS fees is an open question, then that is a reason to grant certiorari now. Indeed, while the state is quick to note that other courts have upheld other firearm-related fees, it ignores the fact that every court to consider the issue (save those below) has "agree[d] that the Supreme Court's First Amendment fee jurisprudence provides the appropriate foundation for addressing … fee claims under the Second Amendment." *Kwong v. Bloomberg*, 723 F.3d 160, 165 (2d Cir. 2013) (citing *Justice v. Town of Cicero,* 827 F. Supp. 2d 835, 842 (N.D. Ill. 2011); *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 190-92 (D.D.C. 2010)).

Second, California suggests that the uncertain nature of the Ninth Circuit's Second Amendment jurisprudence and the assumption, rather than firm conclusion, of the decision below that DROS fees implicate the Second Amendment counsel against review. To be sure, the Ninth Circuit has badly contorted its general test for Second Amendment claims—a test that one court has aptly described as "a tripartite binary test with a sliding scale and a reasonable fit …. that is little different from a rational basis test." *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1117 (S.D. Cal. 2017). But that is entirely beside the point since, whatever the general test for other Second Amendment claims, this Court has made clear that efforts "to tax the exercise of a privilege," *Murdock*, 319 U.S. at 112, demand a distinct constitutional analysis.[1]

Moreover, however the Ninth Circuit would classify the burden imposed by attaching to firearm transactions a fee used to fund law enforcement activities, there is no question that such a fee would trigger the distinct fee jurisprudence applied by this Court in every other court that has considered the issue. Thus, while the Ninth Circuit's reluctance to squarely hold that DROS fees burden "conduct falling

---

[1] That said, petitioners do not agree that the result would be any different under any permissible form of Second Amendment scrutiny. The whole point of the fee cases is that charging a fee "for the enjoyment of a right granted by the federal constitution," *Murdock*, 319 U.S. at 113, is *always* an unconstitutional burden on that right, no matter the size of the fee. *See, e.g.*, *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 136 (1992) ("A tax based on the content of speech does not become more constitutional because it is a small tax.").

within the scope of the Second Amendment," Pet.App.8, is revealing, it is not an argument against certiorari.[2]

Ultimately, then, the state's "vehicle" arguments succeed only in revealing its (and the Ninth Circuit's) stubborn insistence on continuing to "treat the right recognized in *Heller* as 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.). And unfortunately, California does not stand alone in that endeavor. Cook County and the City of Seattle have openly embraced the position that they may impose special taxes on the purchase of firearms for *the express purpose* of discouraging individuals from exercising their Second Amendment rights, *see* Pet.24-25—a proposition that would be dismissed out of hand were free speech, religion, access to courts, or abortion at stake. *See Murdock*, 319 U.S. at 108 ("a

---

[2] In all events, there can be no serious dispute that the DROS fee burdens conduct protected by the Second Amendment. The panel's caveat notwithstanding, even the Ninth Circuit has recognized that the Second Amendment would be "meaningless" if it did not encompass a right to acquire the means necessary to exercise the right to self-defense that it protects. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) ("the right to possess firearms for protection implies a corresponding right to obtain the bullets necessary to use them"); *see also, e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011). And *Heller*'s dicta stating that "conditions and qualifications on the commercial sale of arms" are "presumptively lawful," *District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008), does not remotely suggest that such laws are immune from constitutional scrutiny.

tax laid specifically on the exercise of [constitutionally protected] freedoms would be unconstitutional"). And if the decision below is left standing, those certainly will not be the last cash-strapped jurisdictions to attempt to tax this fundamental constitutional right. Accordingly, this Court should grant certiorari and confirm that "[a] state may not impose a charge for the enjoyment of [*any*] right granted by the federal constitution." *Murdock*, 319 U.S. at 113.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

C.D. MICHEL
SEAN A. BRADY
ANNA M. BARVIR
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
(562) 216-4444
cmichel@michellawyers.com

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
EDMUND G. LACOUR JR.
MATTHEW S. BROOKER
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioners

January 31, 2018