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10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
12 WESTERN DIVISION  
13

14 **MICHELLE FLANAGAN, SAMUEL**  
15 **GOLDEN, DOMINIC NARDONE,**  
16 **JACOB PERKIO, and THE**  
**CALIFORNIA RIFLE & PISTOL**  
**ASSOCIATION, INC.,**

17 Plaintiffs,

18 v.

19 **XAVIER BECERRA, in his official**  
20 **capacity as Attorney General of the**  
21 **State of California, and JAMES**  
22 **McDONNELL, in his official capacity**  
**as Sheriff of Los Angeles County,**  
**California,**

23 Defendants.  
24

Case No. 2:16-cv-06164-JAK-AS

**DEFENSE RESPONSE TO**  
**OBJECTIONS TO AWARD OF**  
**COSTS OF SUIT TO DEFENSE**

25 As the Court requested by a text-only in-chambers order dated May 15, 2018,  
26 Defendant Xavier Becerra, California Attorney General, sued here in his official  
27 capacity, submits the following response to the May 14, 2018, objections to an  
28 award of costs to Defendant, interposed by Plaintiffs Michelle Flanagan, Samuel

1 Golden, Dominic Nardone, Jacob Perkio, and the California Rifle & Pistol  
2 Association, Inc. (“CRPA”).<sup>1</sup>

### 3 RELEVANT LAW

4 Federal Rule of Civil Procedure 54(d)(1) provides that the prevailing party in  
5 litigation should be allowed to recover costs of suit from the losing party. Costs are  
6 presumptively awarded to prevailing parties; the losing party must show why costs  
7 should not be awarded. *Save Our Valley v. Sound Transit*, 335 F.2d 932, 945 (9th  
8 Cir. 2003). A “district court deviates from normal practice when it refuses to tax  
9 costs to the losing party. . .” *Id.* Accordingly, a district court must specify reasons  
10 for refusing to do so—although that court would not have to specify reasons for  
11 allowing the prevailing party to recover costs. *Id.*

12 Appropriate reasons for denying costs of suit to the prevailing party include  
13 the following: (1) the substantial importance of the case; (2) the closeness and  
14 difficulty of the issues; (3) the chilling effect on future similar actions; (4) the  
15 plaintiff’s limited financial resources; and (5) the economic disparity between the  
16 parties. *Draper v. Rosario*, 836 F.2d 1027, 1087 (9th Cir. 2016).

### 17 ARGUMENT

18 Plaintiffs have established that only one *Draper* factor out of five total  
19 resolves in favor of overturning the presumption that Defendant, the undisputed  
20 prevailing party here, should recover costs of suit. Hence the Court should abide by  
21 the presumption and allow Defendant to recover such costs.

22 1. Defendant concedes that the first *Draper* factor, substantial  
23 importance, applies in Plaintiffs’ favor here. But that first factor is the only one that  
24 resolves against the presumption that costs of suit should be awarded to Defendant.

25 2. Regarding the second factor, closeness or difficulty, Plaintiffs make a  
26 faulty argument. Plaintiffs assert that, in *Peruta v. County of San Diego*, 824 F.3d  
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28 <sup>1</sup> Note that Defendant has not yet submitted a bill of costs.

1 919 (9th Cir. 2016), the en banc U.S. Court of Appeals, Ninth Circuit, “expressly  
 2 reserved the question of ‘whether the Second Amendment protects some ability to  
 3 carry firearms in public,’” which “is an unmistakable affirmation of the significance  
 4 of the issues in this litigation.” (Plfs.’ Obj. to Def. Proposed J., Dkt. 82 (“Flanagan  
 5 Obj.”), at 3.) The flaw is that this Court ruled that “this question [left open by  
 6 *Peruta*] need not be addressed to resolve the issues presented by the present [cross-]  
 7 motions” for summary judgment (In Chambers] Ord. Re Plfs.’ Mtn. for Summ. J.,  
 8 Dkt. 81 (“MSJ Ord.”), at 7 (emphasis added)), undercutting Plaintiffs’ argument  
 9 that the “*Peruta* open question” has bearing on this case.

10 It must also be remembered that, throughout this case, Plaintiffs took the  
 11 position that “[a]lthough firearm regulation cases can be complex, this one is not.”  
 12 (Memo. of P’s and A’s in Support of Plfs.’ Mtn. for Summ. J., Dkt. 48, at 1:13-  
 13 1:14.) Consequently, Plaintiffs did not designate any affirmative expert witnesses.  
 14 Plaintiffs’ current position, that the case presented close and difficult issues, such  
 15 that Plaintiffs should not have to cover Defendants’ costs of suit, contrasts directly  
 16 with Plaintiffs’ prior, long-held position about the case on the merits.

17 Furthermore, in granting summary judgment for the defense here, this Court  
 18 indicated that the case was neither close nor difficult. The Court rejected as  
 19 “unpersuasive” Plaintiffs’ preliminary argument, that the open-carry firearm  
 20 statutes in question are presumptively unconstitutional. *Id.* In the first part of the  
 21 second stage of the analysis, there was no dispute that the State of California had an  
 22 important governmental objective in enacting the open-carry laws. *Id.* at 8. And,  
 23 per the second part of the second stage of the analysis, in evaluating whether there  
 24 was a “reasonable fit” between that objective and those laws, the Court recognized  
 25 its obligation to show “substantial deference to the predictive judgment of the”  
 26 California Legislature (*id.* at 10 (quoting two cases including *Turner Broad. Sys.,*  
 27 *Inc. v. Fed. Comm’n Comm’n*, 520 U.S. 180, 195 (1997))), thereby simplifying the  
 28 Court’s role and making adjudication easier.

3. Plaintiffs have made no attempt to show that the third factor, regarding chilling effect, resolves in Plaintiffs' favor.

4, 5. Regarding the fourth and fifth factors, concerning financial resources, despite the onus being on Plaintiffs, they have not offered any evidence, e.g., declarations (deemed pertinent in, e.g., *Knox v. City of Fresno*, 208 F. Supp. 3d 1114, 1117 (E.D. Cal. 2016)). Instead, Plaintiffs offer vague, unsupported statements about the "regular" circumstances of the individual-person plaintiffs and the non-profit status of CRPA. (Flanagan Obj. at 3.) Plaintiffs also make the unclear, unexplained assertion that Defendant is the "executive branch" of "the fifth largest economy in the world." (Flanagan Obj. at 3.) In sum, Plaintiffs have not made a substantive showing as to either the fourth or fifth factors.

Moreover, Defendant has located Plaintiffs' admissions that contradict their claims of modest means. As the attached report written by Plaintiffs' counsel shows, CRPA and the National Rifle Association of America (the "NRA") jointly "invest enormous amounts of resources in" California firearms-related litigation—including, specifically, this case. (Supporting Decl. of Jonathan M. Eisenberg ("Eisenberg Decl."), filed herewith, Exh. A (Michel & Assocs., P.C., *NRA-CRPA California Legal Affairs* (Feb. 2017) at i, 3 (listing this case first among dozens of such cases) (emphasis added)).<sup>2</sup> According to the NRA's 2015 federal tax return (the most recent such return that Defendant was able to locate), attached here, the NRA generates \$337 million in annual revenues and has assets totaling \$215 million. (Eisenberg Decl., Exh. B.) Those two items of evidence establish that "[t]he amount in controversy here" is actually not "significant to Plaintiffs." (Flanagan Obj. at 3.) It certainly appears that Plaintiffs can easily afford to pay

<sup>2</sup> The report is freely available online at the Internet site for NRA-ILA, the NRA's Institute for Legislative Action, at <https://www.nraila.org/articles/20170208/california-2017-february-litigation-report>. The webpage containing the hyperlink to the report reiterates, in part, as follows: "The NRA and its state affiliate, the California Rifle and Pistol Association (CRPA), are heavily involved in a number of important legal battles in California ..."

1 Defendant's costs of suit, and that there is no disparity in resources as between  
 2 Plaintiffs and Defendant that would justify cost-shifting here.

3 In sum, of the five *Draper* factors, only one factor—by Defendant's  
 4 concession—resolves in favor of Plaintiffs' contention that the Court should deny  
 5 Defendant an award of costs of suit. All the other factors indicate that Defendant  
 6 should recover costs, as is presumptively the case for a prevailing litigant.

### 7 CONCLUSION

8 For the foregoing reasons, Defendant respectfully requests that this Court  
 9 overrule Plaintiffs' objections to having to pay Defendants' costs of suit here.

10 Dated: May 17, 2018

Respectfully submitted,

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