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SUPERIOR COURT
OF CALIFORNIA
SACRAMENTO COUNTY

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SACRAMENTO

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13 **DAVID GENTRY, JAMES PARKER,
MARK MID LAM, JAMES BASS, and
14 CALGUNS SHOOTING SPORTS
ASSOCIATION,**

15 Plaintiffs and Petitioners,

16 v.

17
18 **XAVIER BECERRA, in his official capacity
as Attorney General for the State of
19 California; MARTHA SUPERNOR, in her
official capacity as Acting Director of the
20 California Department of Justice Bureau of
Firearms; BETTY T. YEE, in her official
21 capacity as State Controller, and DOES 1-
10,**

22 Defendants and Respondents.¹

Case No. 34-2013-80001667

23
24
25
26 **MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY ADJUDICATION AS TO
THE FIFTH AND NINTH CAUSES OF
ACTION**

27 Date: August 4, 2017
Time: 9:00 a.m.
28 Dept: 31
Judge: The Honorable Michael P.
Kenny
Trial Date: None set
Action Filed: October 16, 2013

¹ Defendants respectfully request that Martha Supernor, in her official capacity as Acting Director of the California Department of Justice Bureau of Firearms, be substituted in the place of her predecessor Stephen Lindley, who is now the Acting Chief of the Division of Law Enforcement. (See Code Civ. Proc., § 368.5.)

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1 **INTRODUCTION**

2 Plaintiffs are a firearms advocacy group and four individuals challenging the Dealer’s
3 Record of Sale (“DROS”) transaction fee, a \$19.00 fee collected by the California Department of
4 Justice (“the Department” or “DOJ”) from potential firearms purchasers. At the suggestion of the
5 Court, and as agreed to by the parties, this motion by defendants the Attorney General and the
6 Acting Director of the Department’s Bureau of Firearms and the expected cross-motion by
7 plaintiffs are limited to the merits of the fifth and ninth causes of action of the first amended
8 complaint and petition for writ of mandate.

9 The fifth cause of action seeks a writ of mandate directing the Department to set the DROS
10 fee at an amount that is no more than necessary to fund authorized activities. Such relief is
11 unwarranted because (1) plaintiffs’ request is untimely, (2) the Department has no ministerial
12 duty to act in the particular manner plaintiffs contend, and (3) the Department has already
13 satisfied its obligations in setting the DROS fee. About 13 years ago, after a required regulatory
14 process and review, the Department appropriately raised the fee to \$19.00, where it has remained
15 despite the growing number of regulatory and enforcement responsibilities of the Department.

16 The ninth cause of action seeks declaratory and injunctive relief prohibiting the Department
17 from expending DROS fee revenues on what plaintiffs claim are unauthorized activities. Yet the
18 Department does not expend DROS fee revenues on any unauthorized activities, and plaintiffs’
19 argument to the contrary asks this Court to define “possession” (as used in the statute) in a way
20 that is wholly unsupported by its dictionary definition and thwarts the public safety purposes of
21 the statute.

22 Accordingly, and for the reasons detailed below, the Court should grant this motion and
23 dismiss plaintiffs’ fifth and ninth causes of action in their entirety.

24 **FACTUAL AND LEGAL BACKGROUND**

25 **I. SUMMARY OF RELEVANT CALIFORNIA FIREARMS LAWS**

26 **A. Dealer’s Record of Sale Transactions and Related Fees In General**

27 When an individual purchases a firearm in California, state law generally requires that the
28 individual make the purchase through a licensed California firearms dealer. (Penal

1 Code, § 26500.)² State law also requires that the purchaser provide certain personal information
2 on a Dealer's Record of Sale document that the firearms dealer submits to the California
3 Department of Justice. (See §§ 28100, 28155, 28160 & 28205; see also *Bauer v. Becerra* (9th
4 Cir. June 1, 2017, No. 15-15428) ___ F.3d ___ [2017 WL 2367988, *1].)³

5 California law requires a mandatory 10-day waiting period before the firearms dealer can
6 deliver the firearm to the purchaser. (§ 26815.) During the waiting period, DOJ conducts a
7 firearms eligibility background check to ensure the purchaser is not legally prohibited from
8 possessing firearms. (§ 28220; see *Bauer*, 2017 WL 2367988, *1.) DOJ retains information
9 regarding the sale or transfer of the firearm in the Automated Firearms System (AFS), a database
10 maintained by DOJ. (§ 11106.) Generally speaking, AFS contains information about registered
11 firearms, such as information regarding the person who owns a particular firearm and whether the
12 firearm is lost, stolen, found, under observation, destroyed, retained for official use, or held in
13 evidence while a case is pending. (*Ibid.*)

14 In general, an individual purchasing a firearm from a licensed dealer must pay fees,
15 including a statutory \$19 DROS fee intended to reimburse DOJ for a variety of specified costs, as
16 discussed further below. (See § 28225; Cal. Code. Regs. Tit. 11, § 4001; see also §§ 28230,
17 28235 & 28240; *Bauer*, 2017 WL 2367988, *1.) This \$19 fee is at the heart of this case.

18 **B. Relevant History of the Amount of the DROS Fee**

19 **1. In 1982 the Department set the DROS Fee at \$2.25.**

20 The Legislature first authorized DOJ to charge a DROS fee in 1982, and it generally limited
21 use of the DROS fee to covering the cost of background checks. The relevant statute stated that

22 ² All further statutory citations are to the California Penal Code unless otherwise
23 indicated.

24 ³ *Bauer* is the related federal case where a similar group of plaintiffs, represented by the
25 same counsel as in this case, sued the Attorney General and the Chief of the Bureau of Firearms,
26 arguing that the Second Amendment prohibits them from expending the revenues of the \$19.00
27 DROS fee on the Armed Prohibited Persons System ("APPS") program. The district court
28 rejected all of plaintiffs' federal constitutional claims on the merits, granting defendants' motion
for summary judgment in its entirety. (See *Bauer, et al. vs. Harris, et al.*, Case No. 1:11-cv-
01440-LJO-MJS (E.D. Cal.) [Memo. Decision & Order filed March 2, 2015].) In a published
opinion, the Ninth Circuit recently affirmed, concluding that "California's use of the DROS fee to
fund the APPS program" survives constitutional scrutiny. (*Bauer*, 2017 WL 2367988, *8.)

1 “[t]he Department of Justice may charge the dealer a fee which it determines to be sufficient to
2 reimburse the department for the cost of furnishing this information” (i.e., the personal
3 information provided by the purchaser of a firearm to DOJ so that it may perform the background
4 check). (Stats. 1982, ch. 327, § 129, p. 1473; see Decl. of Anthony R. Hakl in Supp. of Defs.’
5 Mot. for Summ. Adjud. (“Hakl Decl.”), Ex. A.) The Legislature further directed that “[a]ll
6 money received by the department pursuant to this section shall be deposited in the Dealers’
7 Record of Sale Special Account of the General Fund, which is hereby created, to be available,
8 upon appropriation by the Legislature, for expenditure by the department to offset the costs
9 incurred pursuant to this section.” (*Ibid.*) In 1982, DOJ first set the DROS fee at \$2.25. (See
10 Hakl Decl., Ex. B [Bates no. AGIC007].)

11 **2. In 1991 the Department set the DROS fee at \$14.00.**

12 Over the next nine years, the Department periodically increased the fee. (See Hakl Decl.,
13 Ex. B [Bates no. AGIC007].) As of December 1991, the fee was \$14.00. (*Ibid.*) By that time,
14 the Legislature had expanded use of the DROS fee to cover the costs of complying with
15 additional laws, not just the cost of background checks. Specifically, the statute authorized DOJ
16 to charge a fee “sufficient to reimburse” DOJ for the cost of background check as well as to
17 reimburse local mental health facilities, the State Department of Mental Health, and local public
18 mental hospitals, sanitariums, and institutions for the costs resulting from certain reporting
19 requirements imposed by the Welfare and Institutions Code. (Stats. 1990, ch. 1090, § 2, p. 4551;
20 see Hakl Decl. Ex. C.)

21 Additionally, by this time the Legislature had directed that the amount of the fee “shall not
22 exceed” the sum of processing costs of DOJ related to the background check along with “the
23 estimated reasonable costs of the local mental health facilities,” “the costs of the State
24 Department of Mental Health,” and “the estimated reasonable costs of local public mental
25 hospitals, sanitariums, and institutions” in complying with the reporting requirements. (Stats.
26 1990, ch. 1090, § 2, p. 4551.)

1 **3. In 1995 the Legislature capped the DROS fee at \$14.00 subject to**
2 **increases to account for inflation.**

3 The Legislature first specified the amount of the DROS fee in 1995 when it capped the fee
4 at \$14.00 (i.e., the amount it had been since 1991), except that it allowed the Department to
5 increase the fee by regulation to account for inflation. In particular, as a result of Senate Bill 670
6 the relevant statute more closely resembled how it reads today, providing: “The Department of
7 Justice may charge the dealer a fee not to exceed fourteen dollars (\$14), except that the fee may
8 be increased at a rate not to exceed any increase in the California Consumer Price Index as
9 compiled and reported by the California Department of Industrial Relations.” (Stats. 1995,
10 ch. 901, § 1, pp. 6883-6884; see Haki Decl. Ex. D.)

11 The statute continued to provide that “[t]he fee shall be no more than is sufficient to
12 reimburse” certain entities for specified costs, although that list continued to grow. (Stats. 1995,
13 ch. 901, § 1, p. 6884.) In 1995, the list included the entities and costs identified in 1991 (i.e.,
14 those mentioned above) in addition to several new ones, including DOJ “for the cost of meeting
15 its obligations” under the Welfare and Institutions Code and “local law enforcements agencies”
16 for costs resulting from the Family Code and Welfare and Institutions Code notification
17 requirements. (*Ibid.*) And the statute provided that the fee “shall not exceed” the sum of the
18 costs identified in 1991 and these newer costs, which included the processing costs of DOJ in
19 meeting its Welfare and Institution Code obligations and “the estimated reasonable costs” of local
20 law enforcement agencies for complying with the notification requirements. (*Ibid.*)

21 **4. In 2004 DOJ raised the DROS fee to \$19.00 – its current amount – to**
22 **account for inflation.**

23 The DROS fee remained \$14.00 for about a decade. About 13 years ago, in 2004, DOJ
24 adopted regulations adjusting the fee to its current amount of \$19.00, based on the California
25 Consumer Price Index and as permitted by the relevant statute. (See § 28225, subd. (a); *Bauer*,
26 2017 WL 2367988, *1.) The current \$19 fee is reflected in a regulation that reads as follows: “As
27 authorized pursuant to sections 28225, 28230 and subdivisions (a) and (b) of section 28240 of the
28 Penal Code, the [DROS] fee is \$19 for one or more firearms (handguns, rifles, shotguns)

1 transferred at the same time to the same transferee.” (Cal. Code. Regs. tit. 11, § 4001.) Without
2 the 2004 fee adjustment, the Dealer’s Record of Sale Special Account was projected to run out of
3 cash to support the former Division of Firearms’ (now Bureau) regulatory and enforcement
4 programs. (See Haki Decl., Ex. E [Bauer Bates no. AG-00250].)

5 **C. California’s Armed Prohibited Persons System (“APPS”) and Its**
6 **Relationship to the DROS Fee**

7 **1. The APPS Program**

8 The Legislature established the Armed Prohibited Persons System in 2001. (§ 30000; see
9 *Bauer*, 2017 WL 2367988, *2.)⁴ That legislation established an electronic system within DOJ
10 that produces a list of armed prohibited persons⁵ by cross-referencing firearms information
11 databases with other databases containing records regarding persons prohibited from owning
12 firearms. (§ 30000.) More specifically, on a daily basis the APPS system reconciles AFS – the
13 database containing sales information retained by DOJ as a result of the DROS process – against
14 databases housing California’s criminal history, domestic violence restraining orders, wanted
15 persons, and the On-Line Mental Health Firearms Prohibition Reporting System. (See § 30000,
16 subd. (a).) Law enforcement officers throughout California can access the APPS list 24 hours a
17 day, 7 days a week, through the California Law Enforcement Telecommunications System
18 (CLETS). (See § 30000, subd. (b); see also § 30010 (“The Attorney General shall provide
19 investigative assistance to local law enforcement agencies to better ensure the investigation of
20 individuals who are armed and prohibited from possessing a firearm.”) The Department uses this
21 process to investigate, disarm, apprehend, and ensure the prosecution of persons who have
22 become prohibited from firearm possession. (*Bauer*, 2017 WL 2367988, *2.)

23
24
25 ⁴ Section 30000 was formerly codified as § 12010 (Added by Stats. 2001, c. 944
26 (S.B.950), § 2. Amended by Stats. 2004, c. 593 (S.B.1797), § 4).

27 ⁵ In general, prohibited persons are those who have been convicted of a felony or a violent
28 misdemeanor, are subject to a domestic violence restraining order, or have been involuntarily
committed for mental health care. (§ 30005.)

1 **2. Senate Bill 819**

2 The APPS program went into effect around 2006, at which time APPS was funded through
3 moneys appropriated from the General Fund. But with the passage of Senate Bill 819 in 2011,
4 the Legislature clarified that the APPS program could be funded with the DROS fees deposited
5 into the Dealer's Record of Sale Special Account. (See Assem. Com. on Appropriations,
6 Analysis of Senate Bill No. 819 (2011–2012 Reg. Sess.) July 6, 2011; Sen. Com. on Public
7 Safety, Analysis of Senate Bill No. 819 (2011–2012 Reg. Sess.) April 26, 2011.⁶) As the
8 Legislative Counsel's digest explained at the time:

9 Existing law authorizes the Department of Justice to require a firearms dealer to
10 charge each firearm purchaser a fee, as specified, to fund various specified costs in
11 connection with, among other things, a background check of the purchaser, and to
12 fund the costs associated with the department's firearms-related regulatory and
13 enforcement activities related to the sale, purchase, loan, or transfer of firearms. The
14 bill would make related legislative findings and declarations.

15 This bill would also authorize using those charges to fund the department's firearms-
16 related regulatory and enforcement activities related to the possession of firearms, as
17 specified.

18 (Senate Bill 819 (Leno), Stats. 2011, 743 (Leg. Counsel's digest).)⁷

19 Thus, with SB 819 the Legislature amended the DROS fee statute to include the costs of
20 enforcement activities related to firearms possession. To explain further, prior to SB 819 the
21 relevant provision of section 28225 provided that the DROS fee could be set at a rate to fund,
22 among other things:

23 [T]he costs associated with funding Department of Justice firearms-related
24 regulatory and enforcement activities related to the sale, purchase, loan, or transfer
25 of firearms pursuant to any provision listed in Section 16580.

26 ⁶ These analyses appear as Exhibits F and G to the Haki Declaration. Legislative
27 committee reports and analyses, including statements pertaining to a bill's purpose, are properly
28 the subject of judicial notice. (*Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d
456, 465, fn. 7.)

⁷ This Legislative Counsel's digest appears as Exhibit H to the Haki Declaration.
"Although the Legislative Counsel's summary digests are not binding, they are entitled to great
weight." (*Van Horn v. Watson* (2008) 45 Cal.4th 322, 332 fn. 11; *accord Jones v. Lodge at
Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1170.) The Legislative Counsel's digest
"constitutes the official summary of the legal effect of the bill and is relied upon by the
Legislature throughout the legislative process," and thus "is recognized as a primary indication of
legislative intent." (*Souvannarath v. Hadden* (2002) 95 Cal.App.4th 1115, 1126 fn. 9.)

1 (§ 28225, subd. (b)(11).) As a result of SB 819, that provision now states:

2 [T]he costs associated with funding Department of Justice firearms-related
3 regulatory and enforcement activities related to the sale, purchase, *possession*,
4 loan, or transfer of firearms pursuant to any provision listed in Section 16580.

4 (§ 28225, subd. (b)(11), italics added.)

5 Section 28225 has not been substantively amended since SB 819. Currently,
6 subdivision (a) continues to allow the Department to require firearms dealers to charge each
7 firearm purchaser “a fee not to exceed fourteen dollars (\$14),” subject to increases to account for
8 inflation. (§ 28225, subd. (a).) Subdivision (b) continues to read that “[t]he fee under
9 subdivision (a) shall be no more than is necessary to fund the following,” and it goes on to list
10 eleven different cost categories. (*Id.*, subd. (b).) Subdivision (c) states that the DROS fee “shall
11 not exceed the sum of” those costs. (*Id.*, subd. (c).) And with respect to all but one of those
12 categories the statute specifies those costs as “estimated reasonable costs.”⁸ (*Ibid.*)

13 3. Senate Bill 140

14 In 2013, the Legislature passed Senate Bill 140, a bill making a one-time appropriation of
15 \$24 million from the DROS Special Account to DOJ to address a growing backlog in APPS
16 cases. (Senate Bill 140 (Leno), Stats. 2013, Ch. 2; see Haki Decl., Ex. I.) The Legislature added
17 to the Penal Code section 30015, which provides, in relevant part:

18 The sum of twenty-four million dollars (\$24,000,000) is hereby appropriated from the
19 Dealers’ Record of Sale Special Account of the General Fund to the Department of
20 Justice to address the backlog in the Armed Prohibited Persons System (APPS) and
the illegal possession of firearms by those prohibited persons.

21 (§ 30015, subd. (a).)

22 II. THE CLAIMS CURRENTLY AT ISSUE

23 A. The Fifth Cause of Action for a Writ of Mandate

24 The fifth cause of action is styled “Writ of Mandate – Review Proper Amount of ‘DROS
25 Fee.’” (Compl. at p. 18.) In relevant part, plaintiffs allege that defendants have “a clear, present,
26 and ministerial duty” under section 28225, subdivisions (a) and (b), “to determine ‘the amount

27 ⁸ For convenience, a copy of the complete text of section 28225 is attached as Appendix A
28 to this brief.

1 necessary to fund' the activities enumerated at Penal Code section 28225(b)(1)-(11)" and "to only
2 charge the DROS Fee at that amount." (Compl. ¶ 90.) Plaintiffs claim that defendants "have
3 been charging the DROS Fee at the maximum amount statutorily allowed, without first
4 determining whether that amount is 'no more than is necessary to fund' the regulatory and
5 enforcement activities for which they are statutorily permitted to use DROS Fee revenues."
6 (Compl. ¶ 91.)

7 The complaint seeks a peremptory writ of mandate directing defendants "to review the
8 DROS Fee as currently imposed to determine whether the amount is 'no more than is necessary'
9 to cover its costs for the DROS program." (Compl. at p. 26.) It also seeks an injunction
10 prohibiting defendants "from imposing the 'DROS Fee' as currently imposed, at least until the
11 required review is conducted by DOJ and the appropriate amount for the DROS Fee is
12 established." (*Ibid.*)

13 **B. The Ninth Cause of Action for Declaratory and Injunctive Relief**

14 The ninth cause of action, as plaintiffs describe it, concerns the "scope of Senate
15 Bill 1819's 'possession' provision as applied to funds collected under the guise of the DROS
16 Fee." (Compl. at p. 24.) Plaintiffs allege that SB 819, assuming it is valid in the first place,⁹
17 "only authorized 'the DOJ to utilize the Dealer Record of Sale Account for the additional, limited
18 purpose of funding enforcement of the Armed Prohibited Persons System.'" (Compl. ¶ 138.) In
19 contrast, plaintiffs allege that "SB 819 did not authorize DOJ to use DROS Special Account
20 Funds to address the costs of APPS itself (as opposed to the costs of enforcement activities based
21 on data created via APPS)." (Compl. ¶ 139.) Thus, plaintiffs seek "a declaration that SB 819
22 does not authorize the appropriation of DROS Special Account funds for some use other than
23 APPS-based law enforcement activities." (Compl. ¶ 141.) Plaintiffs also seek "an injunction
24 prohibiting DOJ Defendants from utilizing DROS Fee revenues for purposes unrelated to the
25 DROS background check process or APPS-based law enforcement activities." (Compl. ¶ 143.)

26
27 ⁹ The validity of SB 819 in the first instance is challenged by way of the sixth, seventh,
28 and eighth causes of action, which are not at issue at this stage of the proceedings.

1 **ARGUMENT**

2 **I. LEGAL STANDARDS APPLICABLE TO A MOTION FOR SUMMARY ADJUDICATION**

3 This motion for summary adjudication is aimed at the fifth and ninth causes of action of the
4 first amended complaint and petition. (See Code Civ. Proc., § 437c, subd. (f).) “A summary
5 adjudication motion is subject to the same rules and procedures as a summary judgment motion.”
6 (*Lunardi v. Great–West Life Assurance Co.* (1995) 37 Cal.App.4th 807.) The motion must
7 demonstrate that the material facts are undisputed and that the moving party is entitled to
8 judgment as a matter of law. (Code Civ. Proc., § 437c, subds. (b)(1) & (c); see *Adams v. Paul*
9 (1995) 11 Cal.4th 583, 592; *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998)
10 18 Cal.4th 739, 751.)

11 The pleadings serve as the “outer measure of materiality” in a summary judgment motion,
12 and the motion may not be granted or denied on issues not raised by the pleadings. (*Laabs v. City*
13 *of Victorville* (2008) 163 Cal.App.4th 1242, 1258; see *Nieto v. Blue Shield of Calif. Life & Health*
14 *Ins. Co.* (2010) 181 Cal.App.4th 60, 74 [“the pleadings determine the scope of relevant issues on
15 a summary judgment motion”].)

16 **II. THE FIFTH CAUSE OF ACTION IS UNTIMELY.**

17 **A. The Fifth Cause of Action is Barred by the Statute of Limitations.**

18 Mandamus proceedings under Code of Civil Procedure section 1085 are subject to statutes
19 of limitations that are determined “depend[ing] on the right or obligation sought to be
20 enforced[.]” (*Howard Jarvis Taxpayers Ass’n v. City of La Habra* (2001) 25 Cal.4th 809, 821; see
21 *Branciforte Heights, LLC v. City of Santa Cruz* (2006) 138 Cal.App.4th 914, 926.) Under this
22 principle and because plaintiffs seek to enforce an alleged right under section 28225, the three-
23 year period of Code of Civil Procedure section 338 determines the timeliness of the fifth cause of
24 action. (Code Civ. Proc., § 338, subd. (a)(1) [three-year limitations period for “[a]n action upon
25 a liability created by statute”]; see *Green v. Obledo* (1981) 29 Cal.3d 126, 141, fn. 10; *Ragan v.*
26 *City of Hawthorne* (1989) 212 Cal.App.3d 1361, 1366-1367.)

27 As laid out above, the Legislature first authorized the DROS fee in 1982, at which time the
28 Department set it at \$2.25. By 1991 the fee was \$14.00. In 1995 the Legislature capped the fee

1 at \$14.00, except it authorized the Department to increase the fee to account for inflation. The
2 Department did that on one occasion, in 2004 when it raised the fee to \$19.00. Plaintiffs did not
3 file this action to enforce their alleged rights under section 28225 until approximately nine years
4 later in 2013, well beyond the applicable limitations period. Defendants' motion for summary
5 adjudication as to the fifth cause of action should be granted for this reason alone.

6 **B. The Fifth Cause of Action is Barred by the Doctrine of Laches.**

7 Laches is an alternative basis for granting defendants' motion. The equitable defense of
8 laches may be raised to deny a petition for a writ of mandate, even if the applicable statute of
9 limitations has been satisfied. (*Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d
10 351, 357, fn. 3; *Hadley v. Superior Court* (1972) 29 Cal.App.3d 389, 395.)

11 The timeline just discussed demonstrates that plaintiffs unreasonably delayed
12 approximately nine years to assert their alleged rights under section 28225. Additionally, taking
13 into account the considerable amount of time, money, and other resources defendants
14 undoubtedly will have to expend if they are directed to "review" the amount of the DROS fee –
15 effectively at a time and in a manner of plaintiffs' choosing – defendants will suffer prejudice if
16 the desired writ issues. (See *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624–
17 626 [laches requires unreasonable delay and prejudice to defendants resulting from delay or
18 acquiescence by plaintiffs]). Chief Lindley even testified at deposition that if the DROS fee were
19 to be calculated at the intervals and in the manner plaintiffs apparently contend, "it would cost a
20 whole lot more money in order to operate that program which would be passed along to the
21 DROS fee." (Depo. of Stephen Lindley ("Lindley Depo.") at 64:22-25; see Haki Decl., Ex. M.)

22 For this alternative reason, the Court should grant defendants' motion as to the fifth cause
23 of action.

24 **III. THE COURT SHOULD DISMISS THE FIFTH CAUSE OF ACTION BECAUSE**
25 **SECTION 28225 DOES NOT IMPOSE A MINISTERIAL DUTY ON DEFENDANTS.**

26 Petitioners seeking the issuance of a traditional writ of mandate must show a "clear, present
27 and usually ministerial duty on the part of the respondent." (*California Ass'n for Health Services*
28 *at Home* (2007) 148 Cal.App.4th 696, 704; see Code Civ. Proc., § 1085, subd. (a) ["[a] writ of

1 mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to
2 compel the performance of an act which the law specially enjoins, as a duty resulting from an
3 office, trust, or station . . .”].) “A ministerial act is an act that a public officer is required to
4 perform in a *prescribed manner* in obedience to the mandate of legal authority and without regard
5 to his own judgment or opinion concerning such act’s propriety or impropriety, when a given
6 state of facts exists.” (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29
7 Cal.4th 911, 916, citation omitted, italics added; see *Cty. of San Diego v. State* (2008) 164 Cal.
8 App. 4th 580, 593 [“A ministerial duty is one that is required to be performed in a prescribed
9 manner under the mandate of legal authority without the exercise of discretion or judgment”].)
10 “Discretion, on the other hand, is the power conferred on public functionaries to act officially
11 according to the dictates of their own judgment.” (*Rodriguez v. Solis* (1991) 1 Cal.App.4th 495,
12 501–02.)¹⁰

13 Section 28225 does not impose a ministerial duty on defendants, and plaintiffs misconstrue
14 the statute in contending the contrary. For example, plaintiffs varyingly allege that section 28225
15 imposes “a duty to tailor the amount of the DROS Fee to DOJ’s actual costs in administering the
16 DROS program” (Compl. ¶ 96); that SB 819 was “a major change in circumstance” that required
17 defendants “to reassess the amount being charged for the DROS Fee” (*id.* ¶ 99); and that
18 defendants’ “review of the relevant costs necessarily must include a determination of whether the
19 use of DROS Fee funds for APPS-based law enforcement activities constitutes a tax.”
20 (*Id.* ¶ 100.) None of these statements is accurate. Section 28225 plainly authorizes the DROS fee
21 to fund costs of numerous types and of numerous entities, as specified in a long list laid out by the
22 Legislature, not solely the Department’s costs in administering one program. (See § 28225,

23 ¹⁰ To be precise, plaintiffs must show (1) that defendants have a clear, present and
24 ministerial duty to act *and* (2) that plaintiffs have a clear, present and beneficial right to
25 performance of that duty. (*Kavanaugh, supra*, 29 Cal.4th at p. 916; *Loder v. Municipal Court*
26 (1976) 17 Cal.3d 859, 863.) Defendants’ do not concede that plaintiffs have the required
27 beneficial interest to seek mandamus relief. “‘Beneficially interested’ generally means the
28 petitioner has ‘some special interest to be served or some particular right to be preserved or
protected over and above the interest held in common with the public at large.’” (*Sacramento
County Fire Protection Dist. v. Sacramento County Assessment Appeals Bd. II* (1999) 75
Cal.App.4th 327, 331, citation omitted.) The complaint and petition fail to even allege such an
interest.

1 subd. (b)(1)-(11).) Nor does the statute speak in terms of any “reassessment” being required upon
2 any kind of change in circumstances, or a “review” of whether the use of DROS fee revenues on
3 an authorized program amounts to a “tax.”

4 Section 28225 does not even require the imposition of a fee in the first instance; the statute
5 is permissive: “The Department of Justice *may* require the dealer to charge each firearm
6 purchaser a fee not to exceed fourteen dollars (\$14)[.]” (§ 28225, subd. (a), italics added.) And if
7 a fee is charged, it need only be “no more than is necessary” to fund the list of entities and costs
8 identified by the Legislature (i.e., it need only fall within the range of \$0.01 up to and including
9 \$14.00). The precise manner in which the amount of the DROS fee is settled upon is not stated;
10 on the contrary, the Legislature left that to the discretion of the Department, working with the
11 other agencies mentioned in the statute (e.g., the State Department of State Hospitals and the
12 Department of Food and Agriculture). (§ 28225, subd. (b)(4) & (9).) Additionally,
13 subdivision (c) of section 28225 states that “[t]he fee established pursuant to this section shall not
14 exceed the sum” of the eleven enumerated costs listed in subdivision (b), with nearly all of those
15 costs to be quantified as “*estimated* reasonable costs.” (§ 28225, subd. (c), italics added.) Such
16 language unambiguously calls for an exercise of judgment.

17 Requiring the exercise of judgment in setting the DROS fee makes sense, given the
18 necessary expertise and knowledge of day-to-day regulatory and enforcement activities related to
19 the sale, purchase, possession, loan, and transfer of firearms in California. (See, e.g., *Watson v.*
20 *County of Merced* (1969) 274 Cal.App.2d 263, 268 [“the municipality need only apply sound
21 judgment and consider ‘probabilities according to the best honest viewpoint of informed officials’
22 in determining the amount of the regulatory fee”].) It also makes sense because fee-setting
23 inherently calls for certain predictive judgments. Calculations based on revenues and
24 expenditures, ongoing budget planning, and the like necessarily involve working with past,
25 present, and *projected* future data, and therefore, by nature, require judgment. (See, e.g., *Urban v.*
26 *Riley* (1942) 21 Cal.2d 232, 236 [license fee may be fixed at sum “sufficient to cover all expenses
27 which may be reasonably anticipated and ‘is not limited to the exact amount of the expense, as it
28 may subsequently develop”].)

1 Section 28225 does not impose a ministerial duty to calculate, review, or reassess the
2 amount of the DROS fee at the time, in the manner, or under the circumstances that plaintiffs
3 contend. On the contrary, the Legislature left those particulars to the discretion of the Department
4 and other public agencies mentioned in the statute. (See *Women Organized for Employment v.*
5 *Stein* (1980) 114 Cal.App.3d 133, 140 [“The Legislature’s silence as to method necessarily
6 imports that each of these officers is invested with discretion in selecting and taking
7 administrative action pursuant to the statutes reaching him.”]; *Brandt v. Board of Supervisors*
8 (1978) 84 Cal.App.3d 598, 601 [“the writ will not be issued to compel the performance of a duty
9 in a particular way”].) The Court should therefore grant defendants’ motion for summary
10 adjudication as to the fifth cause of action.

11 **IV. EVEN IF SECTION 28225 IMPOSES A MINISTERIAL DUTY, THE DEPARTMENT HAS**
12 **COMPLIED WITH THAT DUTY.**

13 Even assuming section 28225 gives rise to a ministerial duty of the Department to set the
14 DROS fee, the record demonstrates that defendants have discharged that duty.

15 The Department appropriately determined the current DROS fee amount of \$19.00. In
16 2004, the Department engaged in a lengthy rulemaking process, as required by the law, resulting
17 in the regulation setting the DROS fee at \$19.00, where it remains today. That entire rulemaking
18 file is in the record, but in relevant part it shows that without the 2004 cost of living adjustment
19 the Dealer’s Record of Sale Special Account was projected to run out of the cash needed to
20 support the firearms regulatory and enforcement programs mandated by law. (See Haki Decl.,
21 Ex. E [Bauer Bates no. AG-00250].) Also in the record are a series of 2004 reports (and draft
22 reports) prepared by the Department’s Budget Office. Those reports reflect further analysis by
23 the Department supporting the increase of the DROS fee to \$19.00. (See Haki Decl., Ex. B.)
24 Additionally, it is undisputed that the number of programs funded from DROS fee revenues (i.e.,
25 the costs specified in the statute) had grown before the Department revised the DROS fee rate in
26 2004 and has grown further since then. (*Compare* Stats. 1995, ch. 901, § 1, pp. 6883-6884 [the
27 law in 1995] *with* former § 12076, as amended (Stats. 2003, ch. 754, § 2 [the law in effect as of
28 the 2004 fee setting] *and with* § 28225 [effective today].)

1 Not only was the 2004 rulemaking process thorough, it built on a prior rate setting review
2 in 1995 in which the Legislature enacted Senate Bill 670 and codified the \$14.00 figure that was
3 adjusted to \$19 in 2004. At that time the Legislature recognized the Department's explanation
4 that \$14.00 was "sufficient to fund the existing authorized programs." (See Assem. Com. on
5 Appropriations, Analysis of Senate Bill No. 670 (1995-1996 Reg. Sess.) Aug. 23, 1995; Sen.
6 Third Reading, Analysis of Senate Bill No. 670 (1995-1996 Reg. Sess.) Aug. 29, 1995.)¹¹

7 Finally, although the Department has not adjusted the DROS fee since 2004, it nevertheless
8 expends considerable resources regularly monitoring, for example: the number of firearms
9 transactions in California; the amount of DROS fee revenues being generated; the condition of
10 the Dealer's Record of Sale Special Account; the annual state budget process, particularly as it
11 impacts the Department, and the resulting appropriations by the Legislature; each and every
12 expenditure by the Department to ensure that it is authorized by law; and the anticipated future
13 needs of the Department based on myriad policy and legal considerations. (See, e.g., Lindley
14 Depo. at pp. 64:9-65:65-10; 72:3-73:15; 74:2-79:25 [Hakl Decl., Ex M]; Depo. of David Harper
15 at pp. 54:14-55:17; 58:24-59:20; 60:6-61:24; 63:5-64:8; 65:2-67:23 [Hakl Decl., Ex N].)

16 For these reasons, there is no merit to plaintiffs' contention that defendants have never
17 established, after an adequate review, the proper amount of the DROS fee. Defendants have done
18 so at all appropriate times, and therefore have complied with any duty imposed by section 28225.

19 **V. THE NINTH CAUSE OF ACTION HAS NO MERIT.**

20 The ninth cause of action seeks a declaration and accompanying injunction preventing
21 defendants from expending DROS fee revenues on anything other than two categories of costs,
22 which plaintiffs describe as "the DROS background check" and "APPS-based law enforcement
23 activities," respectively. (Compl. ¶ 143.) Yet such relief is foreclosed by the plain language of
24 section 28225, which authorizes the DROS fee to cover the costs of eleven distinct entities and
25 corresponding programs, not just the costs of the DROS program and APPS. (See §§ 28225,
26 subd. (b)(1)-(11).) Indeed, section 28225 does not even mention APPS by name; it broadly

27 _____
28 ¹¹ These analyses are attached as Exhibits J and K to the Hakl Declaration.

1 speaks in terms of “costs associated with funding Department of Justice firearms-related
2 regulatory and enforcement activities related to the sale, purchase, *possession*, loan, or transfer of
3 firearms.” (§ 28225, subd. (b)(11), italics added.)

4 While the allegations of plaintiffs’ complaint and petition are somewhat unclear on the
5 issue, plaintiffs claim that the word “possession” in section 28225, subdivision (b)(11), has a
6 special meaning. Plaintiffs contend, in the language of the ninth cause of action, that
7 “possession” only means “APPS-based law enforcement activities,” or “enforcement of the
8 Armed Prohibited Persons System,” or “enforcement activities based on data created via APPS.”
9 (Compl. ¶¶ 137, 138, & 139.) In other words, in plaintiffs’ view, if the Department were to use
10 DROS fee revenues to fund any regulatory or enforcement efforts with respect to the possession
11 of firearms that did *not* result from the ordinary operation of APPS proper (i.e., efforts that were
12 *not* specifically based on the electronic cross-referencing of AFS with criminal databases, the
13 creation of a physical list of armed and prohibited persons, and actions by law enforcement
14 officers directly tied to that list), then the Department would be acting unlawfully. Plaintiffs’
15 position is untenable.

16 Chief Lindley has testified regarding APPS that “95% of the of the cases that we work
17 would be system-generated cases,” meaning that “[t]he APPS system generated the hit
18 . . . identifying the person as being armed prohibited. Analysts confirm that, agents confirm that,
19 and they go out into the field and investigate that individual.” (Lindley Depo. at pp. 26:23-
20 27:10.) In other words, the “vast majority” of APPS enforcement efforts by the Department fall
21 within a category of enforcement with which plaintiffs take no issue. (*Id.* at p. 17:25.) Thus, the
22 relief sought by the ninth cause of action is essentially a solution in search of a problem.

23 Next, section 28225, subdivision (b)(11), speaks in terms of “possession,” a discreet word
24 with a specific meaning. (See *Garcia v. McCutchen* (1997) 16 Cal. 4th 469, 476 [“As in any case
25 involving statutory interpretation, “[o]ur first step is to scrutinize the actual words of the statute,
26 giving them a plain and commonsense meaning”].) “Possession” is “[t]he fact of having or
27 holding property in one’s power; the exercise of dominion over property.” (Possession, Black’s
28 Law Dictionary (10th ed. 2014).) By definition, “possession” does not mean “APPS” alone.

1 Plaintiffs contend that their limited definition of the word “possession” is supported by
2 certain uncodified language of SB 819, specifically one of the Legislature’s findings and
3 declarations that the purpose of the measure was “to allow the DOJ to utilize the Dealer Record of
4 Sale Account for the additional, limited purpose of funding enforcement of the Armed Prohibited
5 Persons System.” (Senate Bill 819 (Leno), Stats. 2010, ch. 743, § 1(g).) When viewed in
6 context, though, this language does not advance plaintiffs’ argument. The other findings and
7 declarations demonstrate that the Legislature’s overarching concern was not solely the
8 functioning of APPS, but more broadly the growing number of “armed prohibited persons in
9 California” and their possession of “over 34,000 handguns and 1,590 assault weapons.”
10 (*Id.*, § 1(d).) As the Legislature explained, “[t]he *illegal possession* of these firearms presents a
11 substantial danger to public safety.” (*Ibid*, italics added.) And the statute needed to be amended
12 to expressly provide for “enforcement activities related to *possession*.” (*Id.*, § 1(f), italics added.)

13 The legislative history of SB 819 also reflects that the Legislature was concerned with the
14 illegal possession of firearms in general, not just APPS. (See, e.g., *Dominguez v. Superior Court*
15 (1990) 226 Cal.App.3d 524, 532 [examining legislative history after finding conflict in language
16 with uncodified portion of statute and codified sections susceptible of more than one
17 construction].) In its analysis of SB 819, the Assembly Committee on Public Safety explained
18 that the bill generally “[a]uthorizes the [sic] using the DOJ purchaser fee to fund the DOJ’s
19 firearms-related regulatory and enforcement activities *related to the possession of firearms*.” (See
20 Assem. Com. on Public Safety, Analysis of Senate Bill No. 819 (2010–2011 Reg. Sess.) June 20,
21 2011, italics added; Haki Decl., Ex. L.) In enacting SB 140, the APPS appropriation statute
22 mentioned above, the Legislature also explained that it was their intent “to allow the Department
23 of Justice to utilize additional Dealers’ Record of Sale Special Account funds for the limited
24 purpose of addressing the current APPS backlog *and the illegal possession of these firearms,*
25 *which presents a substantial danger to public safety*.” (Senate Bill 140 (Leno), Stats. 2013, ch. 2,
26 § 1, italics added; see Haki Decl., Ex. I.)

27 Finally, adhering to plaintiffs’ reading of the word “possession” defeats the general purpose
28 of the statute. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [if statutory language

1 ambiguous, courts must select construction that “comports most closely with the apparent intent
2 of the Legislature, with a view to promoting rather than defeating the general purpose of the
3 statute”].) With respect to the five percent of APPS cases plaintiffs challenge (i.e., cases that are
4 not “true” APPS-list cases), Chief Lindley testified about a typical example. He explained that on
5 occasion the Department might “get a call from a citizen, an ex-wife, sometimes, you know,
6 family members about an individual who is now prohibited for one reason or another and that
7 they have firearms that the department might not necessarily know about.” (Lindley Depo. at p.
8 18:9-18.) And, not surprisingly, in that instance the Department has “a duty for public safety” to
9 follow up on that call. (*Ibid.*) If plaintiffs had their way, they would deprive the Department of
10 the necessary resources to take those critical next steps simply because the Department became
11 aware of the armed prohibited person through a phone call instead of through the APPS list. That
12 would thwart the public safety purpose of the statute.

13 For these reasons, there is no reason for this Court to award any declaratory and injunctive
14 relief limiting the Department’s expenditure of DROS fee revenues.

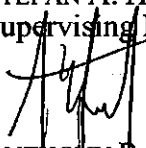
15 **CONCLUSION**

16 The Court should grant defendants’ motion and dismiss the fifth and ninth causes of action.

17 Dated: June 13, 2017

Respectfully Submitted,

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19 Attorney General of California
20 STEPAN A. HAYTAYAN
21 Supervising Deputy Attorney General

22 
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24 Deputy Attorney General
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APPENDIX A

West's Annotated California Codes
Penal Code (Refs & Annos)
Part 6. Control of Deadly Weapons (Refs & Annos)
Title 4. Firearms (Refs & Annos)
Division 6. Sale, Lease, or Transfer of Firearms (Refs & Annos)
Chapter 6. Recordkeeping, Background Checks, and Fees Relating to Sale, Lease, or Transfer of
Firearms (Refs & Annos)
Article 3. Submission of Fees and Firearm Purchaser Information to the Department of Justice
(Refs & Annos)

West's Ann.Cal.Penal Code § 28225

§ 28225. Fee charged to firearm purchaser for processing information; maximum rate

Effective: June 27, 2012
Currentness

(a) The Department of Justice may require the dealer to charge each firearm purchaser a fee not to exceed fourteen dollars (\$14), except that the fee may be increased at a rate not to exceed any increase in the California Consumer Price Index as compiled and reported by the Department of Industrial Relations.

(b) The fee under subdivision (a) shall be no more than is necessary to fund the following:

(1) The department for the cost of furnishing this information.

(2) The department for the cost of meeting its obligations under paragraph (2) of subdivision (b) of Section 8100 of the Welfare and Institutions Code.

(3) Local mental health facilities for state-mandated local costs resulting from the reporting requirements imposed by Section 8103 of the Welfare and Institutions Code.

(4) The State Department of State Hospitals for the costs resulting from the requirements imposed by Section 8104 of the Welfare and Institutions Code.

(5) Local mental hospitals, sanitariums, and institutions for state-mandated local costs resulting from the reporting requirements imposed by Section 8105 of the Welfare and Institutions Code.

(6) Local law enforcement agencies for state-mandated local costs resulting from the notification requirements set forth in subdivision (a) of Section 6385 of the Family Code.

(7) Local law enforcement agencies for state-mandated local costs resulting from the notification requirements set forth in subdivision (c) of Section 8105 of the Welfare and Institutions Code.

(8) For the actual costs associated with the electronic or telephonic transfer of information pursuant to Section 28215.

(9) The Department of Food and Agriculture for the costs resulting from the notification provisions set forth in Section 5343.5 of the Food and Agricultural Code.

(10) The department for the costs associated with subdivisions (d) and (e) of Section 27560.

(11) The department for the costs associated with funding Department of Justice firearms-related regulatory and enforcement activities related to the sale, purchase, possession, loan, or transfer of firearms pursuant to any provision listed in Section 16580.

(c) The fee established pursuant to this section shall not exceed the sum of the actual processing costs of the department, the estimated reasonable costs of the local mental health facilities for complying with the reporting requirements imposed by paragraph (3) of subdivision (b), the costs of the State Department of State Hospitals for complying with the requirements imposed by paragraph (4) of subdivision (b), the estimated reasonable costs of local mental hospitals, sanitariums, and institutions for complying with the reporting requirements imposed by paragraph (5) of subdivision (b), the estimated reasonable costs of local law enforcement agencies for complying with the notification requirements set forth in subdivision (a) of Section 6385 of the Family Code, the estimated reasonable costs of local law enforcement agencies for complying with the notification requirements set forth in subdivision (c) of Section 8105 of the Welfare and Institutions Code imposed by paragraph (7) of subdivision (b), the estimated reasonable costs of the Department of Food and Agriculture for the costs resulting from the notification provisions set forth in Section 5343.5 of the Food and Agricultural Code, the estimated reasonable costs of the department for the costs associated with subdivisions (d) and (e) of Section 27560, and the estimated reasonable costs of department firearms-related regulatory and enforcement activities related to the sale, purchase, possession, loan, or transfer of firearms pursuant to any provision listed in Section 16580.

(d) Where the electronic or telephonic transfer of applicant information is used, the department shall establish a system to be used for the submission of the fees described in this section to the department.

Credits

(Added by Stats.2010, c. 711 (S.B.1080), § 6, operative Jan. 1, 2012. Amended by Stats.2011, c. 743 (S.B.819), § 2; Stats.2012, c. 24 (A.B.1470), § 57, eff. June 27, 2012.)

West's Ann. Cal. Penal Code § 28225, CA PENAL § 28225
Current with urgency legislation through Ch. 9 of 2017 Reg.Sess

DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **Gentry, David, et al. v. Kamala Harris, et al.**
No.: **34-2013-80001667**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 13, 2017, I served the attached **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION AS TO THE FIFTH AND NINTH CAUSES OF ACTION** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

C.D. Michel
Scott Franklin
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 13, 2017, at Sacramento, California.

Eileen A. Ennis
Declarant


Signature