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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

DAVID GENTRY, JAMES PARKER, MARK MIDLAM, JAMES BASS, and CALGUNS SHOOTING SPORTS ASSOCIATION, Plaintiffs and Petitioners, vs. XAVIER BECERRA, in His Official Capacity as Attorney General for the State of California; STEPHEN LINDLEY, in His Official Capacity as Acting Chief for the California Department of Justice, BETTY YEE, in her official capacity as State Controller for the State of California, and DOES 1-10. Defendants and Respondents.	CASE NO. 34-2013-80001667 **NOTICE OF MOTION AND MOTION FOR ADJUDICATION OF PLAINTIFFS' FIFTH AND NINTH CAUSES OF ACTION PURSUANT TO THE BIFURCATION ORDER OF NOVEMBER 4, 2016** Date: August 4, 2017 Time: 9: 00 a.m. Dept.: 31 Judge: Hon. Michael P. Kenny Action filed: 10/16/13

PLEASE TAKE NOTICE that on August 4, 2017, at 9:00 a.m. or as soon thereafter as the matter may be heard, in Department 31 of the Sacramento County Superior Court, located at 720 9th Street, Sacramento, CA 95814, Plaintiffs/Petitioners David Gentry, James Parker, Mark Midlam, James Bass, and Calguns Shooting Sports Association (collectively "Plaintiffs") will and hereby do move this Court for an order granting Plaintiffs' Motion for Adjudication of Plaintiffs' Fifth and Ninth Causes of Action Pursuant to the Bifurcation Order of November 4, 2016.

The Motion is made pursuant to California Code of Civil Procedure sections 473(a)(1), 1060, and 1085 and is based on this Notice of Motion, the Memorandum of Points and Authorities, the First Amended Complaint, all of the files and records of this action, and on any additional material that may be elicited at the hearing of the Motion.

Please take further notice that

> [p]ursuant to Local Rule 1.06 (A), the court will make a tentative ruling on the merits of this matter by 2:00 p.m., the court day before the hearing. The complete text of the tentative rulings for the department may be downloaded off the court's website. If the party does not have online access, they may call the dedicated phone number for the department as referenced in the local telephone directory between the hours of 2:00 p.m. and 4:00 p.m. on the court day before the hearing and receive the tentative ruling. If you do not call the court and the opposing party by 4:00 p.m. the court day before the hearing, no hearing will be held.

Sac. Super. Ct. L.R. 106(A).

Dated: June 13, 2017

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Sources

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

When Governor Jerry Brown took office in 2011, California faced a major budgetary deficit. In response, he prepared a proposed budget slashing funding for many governmental agencies, including the Department of Justice's ("Department") Division of Law Enforcement ("DLE"). Governor Brown proposed that the DLE's General Fund resources be cut, which would have decimated funding for the Bureau of Firearms' ("Bureau") activities related to, inter alia, the Armed & Prohibited Persons Program ("APPS"). In response to this threat, the Department—well aware that it had for years overcharged firearm purchasers for background checks resulting in a surplus in excess of $14 million—sought the assistance of the legislature to siphon off the improperly accumulated funds to partially mitigate the Department's expected budget shortfall.

Accordingly, newly-elected Attorney General Kamala Harris convinced Senator Mark Leno to introduce a bill—Senate Bill 819 (Leno, 2011) ("SB 819")— that the Department claimed, *at the time*, would allow it "to utilize the Dealer Record of Sale Account ["DROS Fund"] for the additional, limited purpose of funding enforcement of the Armed Prohibited Persons System." Senator Leno told the Senate Public Safety Committee that "in this time of great recession . . . we have to be creative in how we fund programs[,]" and that SB 819 would "give[] the attorney general the authority, which she does not currently have, for this purpose of confiscating weapons from those who are illegally in possession of them . . . to request DROS funds for this very specific purpose." Whether SB 819 was "creative"—as opposed to an unlawful tax—is a question for another day. SB 819 became law soon after the 2011-2012 final budget was passed, a budget that included a $71.5 million cut to the DLE's budget—which effectively eliminated the General Fund as a funding source for APPS-based law enforcement activities.

Plaintiffs' Ninth Cause of Action seeks a declaratory judgment from this Court that confirms SB 819 authorized the use of DROS Fund money for nothing other than the costs of APPS-based law enforcement activities. The legislature and the people of this state were promised SB 819's cost shift was for a "very specific" and "limited" purpose: funding APPS-based law enforcement activities. SB 819 was even amended after its introduction to clarify the

limited scope of SB 819. Notwithstanding the patent narrowness of SB 819, the Department now claims it can use money for anything related to illegal firearm possession. SB 819 is not a "blank check," something the Department and Senator Leno made clear when they sought public support for SB 819 and votes in the legislature. Because the Department's conduct and legal interpretations are not consistent with the law, Plaintiffs respectfully request declaratory relief as to the proper interpretation of the word "possession" in Penal Code section 28225.[1]

As to the Fifth Cause of Action, Plaintiffs ask the Court to rule that the Department has failed and continues to fail to properly analyze the amount being charged for the Dealers' Record of Sale ("DROS") fee ("Fee"), and further requests the Court order the Department to undertake a proper analysis based only on the costs identified in section 28225. The Department's method is unacceptable because it is based on the *total amount* actually leaving the DROS Fund in a given time frame—not, as required by section 28225, the amount *necessary* to cover the *specific* costs referred to in section 28225. In just six years, the Department's failure to properly review the amount charged for the Fee resulted in a surplus in excess of $14 million. Section 28225 requires the Department to estimate reasonable costs in analyzing the amount being charged for the Fee, something the Department simply does not do. The Department is effectively putting a thumb on the scale when it considers how much the Fee should be by using a calculation method that is not authorized by, nor consistent with, section 28225.

Accordingly, Plaintiffs request the Court (1) declare that SB 819's scope is limited to funding the costs of APPS-based law enforcement activities, and (2) require the Department to perform a proper Fee review consistent with section 28225.

II. STATEMENT OF FACTS

A. The Fee

To purchase a firearm in California, qualified individuals must pay the Fee. (UF #1) The Bureau performs extensive background checks for all applicants seeking to purchase firearms. (UF# 2) The primary purpose of this "DROS Process" is to ensure that people seeking to purchase firearms in California are not legally prohibited from possessing them. (UF# 3) The Fee was

[1] All statutory references herein are to the Penal Code except as stated otherwise.

created in 1982 to cover the costs of background checks; it was initially set at $2.25. (UF# 4) In 1990, the amount of the Fee was $4.25. (UF# 5) In 1995, the legislature capped the Fee at $14.00, subject to Consumer Price Index adjustment. (UF# 6) In 2004, the Department increased the Fee from $14 to $19 for the first handgun or any number of rifles or shotguns in a single transaction. (UF# 7) Section 28225 provides the rules for how the Fee should be set, i.e., that the fee "shall be no more than is necessary to fund the following:" eleven classes of costs, based on what the Department determined to be "actual" or "estimated reasonable" costs to pay for the eleven costs classes identified. (UF# 8). That is, section 28225 places a duty on the Department to consider whether the amount currently being charged for the Fee is excessive. (UF# 9).

The Department deposits the revenue from the Fee in the "Dealers' Record of Sale Special Account of the General Fund" ("DROS Fund"). (UF# 10) Revenue from multiple fees is pooled in the DROS Fund. (UF# 11) Because of that pooling, however, it is impossible to trace if money paid via a particular fee is actually used for costs related to a particular activity. For example, it is impossible to determine if a cost listed in section 28225 is funded from Fee Revenue, money from a mix of fee sources, or from fee sources exclusive of the Fee .(UF# 12) The Department claims that it is "unable to admit or deny" whether Fee money constitutes a certain percentage of the money in the DROS Fund (UF# 13), but documents produced herein show that the Department recognizes the Fee is the primary source of money going into the DROS Fund. (UF# 14)

B. How the Fee Is Analyzed by the Department

During discovery, the Department contended that the per transaction cost (i.e., the average cost of performing a given transaction, including a proportional share of overhead costs) of the DROS process is currently at least the amount charged for the Fee: $19.00. (UF# 15) And though the Department did offer to produce a current per transaction cost for the DROS process, after two years of requests from Plaintiffs, the Department repudiated its promise during a meeting in this Court's chambers. (UF# 16) In reality, the Department does not set the Fee based on a per transaction cost, but with what is referred to herein as the Macro Review Process. (UF#s 17, 18)

1. The Macro Review Process

It was only after years of discovery in this action that the Department finally admitted that

it does not actually consider any of the specific costs listed in section 28225 when evaluating how much should be charged for the Fee. (UF# 17) Instead, for at least the last thirteen years, the Department has used the "Macro Review Process[,]" which consists of the following: occasionally,[2] two people in the Department look at (1) how much money is in the DROS Fund, (2) then they estimate the *total* amount of money going into and coming out of the DROS Fund in the next year, and (3) as long as the DROS Fund remains in the black and will have a surplus to cover up to one year's worth of operating expenses, the Fee will not be increased. (UF# 18) The specific purpose of the Macro Review Process is *fund* condition analysis, not Fee analysis. (*Id.*)

As to the eleven cost classes referred to in section 28225(b): (1) the Department is unaware of the amount spent yearly for eight of those categories, one of which is the particularly relevant class stated in section 28225(11) (and four categories in this group concern costs the Department has not been requested to pay since at least 2004), (2) the Department has identified two categories that are funded from a source other than the DROS Fund, and (3) one is known: the amount spent for electronic information transfer (83 cents per transaction). (UF# 20) This lack of knowledge as to all but one cost—which presumably is known only because the Department had to calculate the cost when it was deciding whether it internalize the work relating to electronic information transfer (UF# 21)—is caused by the use of a review process that ignores all of the costs the legislature said should be identified or estimated so as to make sure the amount charged for the Fee is not excessive. Indeed, because the Department uses the Marco Review Process, it cannot even provide the total amount of section 28225 costs for any year since 2002. (UF# 22)

The Department claims its process does contemplate the possibility of the Fee being reduced (UF# 23), but the facts say otherwise. The Fee has never been lowered (UF# 24), and yet, between 2005 and 2011, the surplus in the DROS Fund slowly grew to over $14

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[2] The Department does not have a protocol for determining when it should examine if the amount currently being charged for the Fee is excessive. (UF# 19) Stephen Lindley's testimony is "it's not like we're reexamining it every single year to increase it" and "[i]s it a consideration every year for reduction, no[;]" but he also testified that "Dave Harper and I talk constantly about expenditures out of th[e DROS Fund] and we at least look at it on an annual basis. "

million—something the Department never saw as a problem it wanted to fix. (UF# 25) It was only when the Department got pressure from the legislature about the surplus that the Department instituted a rulemaking to reduce the Fee (the "2010 Rulemaking[,]") (UF# 26), and, regardless, the Department secretly abandoned the plainly justified rulemaking. (UF# 27)

C. The 2005 Rulemaking

The amount of the Fee was most recently increased in 2005 via an emergency rulemaking ("2005 Rulemaking")[3] intended to resolve an anticipated negative balance in the DROS Fund. (UF# 28) That is, the decision to raise the amount being charged for the Fee from $14 to $19 was based on the Department's use of the Macro Review Process. (*Id.*).

Nonetheless, in 2004, the Department stated that the proposed increase was "only up to a level to cover actual costs as specified in statute[,]" e.g., section 28225. (UF# 29) The Department concedes that the cost of APPS was not a cost considered in the calculations used to set Fee. (UF# 30) The Department claims that it "created a written document that utilized specific cost data to provide an explanation as to why a $19.00 . . . FEE was appropriate[;]" but the Department refuses to produce that document, claiming it is privileged. (UF# 31) Accordingly, there is no evidence before the Court showing the Department utilized "specific cost data" to justify the 2005 increase. Documents ordered produced by this Court, however, show that the Macro Review Process was used in the 2005 Rulemaking. (UF# 32)

Finally, it should be noted that a DROS Fund deficit does not necessarily mean the Fee was set at too low an amount. The Department's own internal audit recommended cost cutting as an element of a solution to the DROS Fund deficit. (UF# 33) But the Department chose to not adopt that recommendation and raised the Fee as the sole remedy for the deficit. (UF# 34)

D. The Secretly Abandoned 2010 Rulemaking

During the summer of 2009 then-Assemblyman Jim Nielsen contacted the Department

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[3] To be clear, Plaintiffs do not specifically challenge the 2005 Rulemaking in this action, even though the use of the Macro Review Process in that rulemaking indicates the rulemaking violated section 28225. Rather, this case is about whether, from the commencement of the 2010 Rulemaking on, the Department failed to comply with the requirements of section 28225. Whether the 2005 Rulemaking violated section 28225 is a question that is not before the Court.

about the unchecked growth of the DROS Fund surplus, which was over $8 million at the time. (UF# 35) In a letter dated September 2, 2009, the Department admitted to the assemblyman that the then $10.5 million dollar surplus in the DROS Fund was more than necessary. (UF# 36) In response to the assemblyman's inquiry, the Department stated that it was "currently exploring numerous administrative and statutory options to reduce the surplus[, and that "[s]hould [the Department] decide to pursue statutory changes to reduced the surplus[, the Department would] welcome an opportunity to meet with [the assemblyman] to discuss the specifics of any proposal." (UF# 37) As a result of the pressure from the legislature, on July 9, 2010, the Department formally commenced the 2010 Rulemaking regarding the possibility of reducing the amount charged for the Fee from $19.00 to $14.00. (UF# 38)

The 2010 Rulemaking was initiated while the Department was headed by Attorney General Jerry Brown. (UF# 39) The Department stated that the purpose of the 2010 Rulemaking was to make the amount of the Fee "commensurate with the actual costs of processing a DROS [application]." (UF# 40) And yet, the Department did not actually perform an analysis to determine that the proposed $14.00 DROS Fee would be "commensurate with the actual costs of processing a DROS [application;]" instead, it performed only the Macro Review Process, which necessarily did not include "a specific, more detailed analysis[.]" (UF# 41)

At deposition, Stephen Lindley admitted the 2010 Rulemaking was based on a determination that the surplus in the DROS Fund was "excessive" and that, with the "$19 fee structure . . . there was a surplus at the end of every fiscal year[.]" (UF# 42) I.e., "at that point the $19 was more than what was needed." (*Id.*) Nonetheless, when asked about this during discovery in this action, the Department claimed that: (1) it never made even a preliminary determination that $19 was excessive (UF# 43), and (2) at the conclusion of the 2010 Rulemaking, the Department was of the opinion that the total amount collected as a result of the $19.00 fee was reasonably related to the total amount of costs referred to in section 28225 that were being incurred by the Department at the time. (UF# 44)

The Department held a public hearing on the proposed rulemaking, and it appears to have completed most of the paperwork to conclude the rulemaking; i.e., the 2010 Rulemaking file even

includes a final statement of reasons. (UF# 44) So why didn't the rulemaking become law? Notwithstanding that the Department had basically completed the clearly justified rulemaking, the Department sat on the 2010 Rulemaking until SB 819 passed, at which time the rulemaking was abandoned in favor of SB 819, without any explanation to the public. (UF# 45)

When Stephen Lindley was asked in a deposition in a prior lawsuit why the 2010 Rulemaking was abandoned, he said it was because all of the public comment was against it.[4] (UF# 46) When deposed in this matter, however, he admitted that it was abandoned in favor of SB 819. (UF# 48) Similarly, when Defendant Lindley was asked who made the decision to abandon the 2010 rulemaking, he indicated the decision had been made by then Attorney General Kamala Harris (UF# 49), which was contrary to his prior discovery response where he claimed that *he* made the decision to abandon the rulemaking. (UF# 50) The pattern of inconsistency goes to the core of the information the Department has provided regarding the 2010 Rulemaking. Even though the initial statement of reasons for the 2010 Rulemaking literally states its purpose was to reduce the Fee to "$14, commensurate with the actual cost of processing a DROS" (UF# 51), and even though Defendants herein admitted during discovery that the Department initiated the 2010 Rulemaking to reduce the amount of the Fee from $19 to $14 (UF# 52), Defendant Lindley now claims he does not "think there was an intent to lower it to $14[.]" (UF# 53)

E. SB 819 Passes after Assurances that Its Scope Was "Limited"

By winter 2010/2011, the DROS Fund surplus was over $14 million. (UF# 54) In January 2011, newly elected Governor Jerry Brown released his proposed budget, which included almos

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[4] This statement is odd for two reasons: (1) public opinion has little to no relevance regarding any of the considerations listed in section 28225, and (2) firearms groups were not against the fee reduction at all; Groups like the Calguns Foundation not only stated they supported a fee reduction, they wanted the reduction to even greater than what was proposed. (UF# 47) Regardless of the reason(s) given by the Department for the abandonment, the only proper basis for abandoning the rulemaking would have been that, pursuant to a proper analysis under section 28225, the amount of the fee was proven appropriate—something the Department never even attempted to prove before the abandonment of the 2010 Rulemaking. Thus, based on the language of section 28225, Plaintiffs contend that it was an abuse of discretion to abandon the rulemaking without budgetary and analytical proof that, per the limitations of section 28225, the amount being charged for the Fee was appropriate.

$62 million in cuts, over two years, to the Department's Division of Law Enforcement.[5] (UF# 55)

Shortly after Kamala Harris became California's Attorney General (UF# 56), the Department, acting on her specific instruction, brought proposed legislation to Senator Mark Leno that ultimately became Senate Bill 819 (Leno, 2011). (UF# 58) Setting aside a spot bill, the first version of SB 819, introduced March 21, 2011, did nothing other than addition the word "possession" to two passages in section 28225. (UF# 59) In the opinion of a Department attorney who was involved in the drafting of SB 819, "as the sponsor I think I can say that we felt that it [i.e., adding only the word "possession"] was a sufficient clarification of existing law." (UF# 60) Senator Leno, or perhaps the legislators whose votes he needed to pass SB 819, did not agree with the Department. On April 14, 2011, Senator Leno introduced a new, and what was ultimately the final, version of SB 819. (UF# 61) That version included a new section, and specifically the subsection limiting SB 819 to providing a funding source for APPS-based law enforcement activities: Section 1(g). (UF# 62) Senator Leno's "Q&A" packet for SB 819 expressly stated that the proponents of the bill had "added declarations and findings to make it clear that [SB 819 wa]s intended to address the APPS enforcement issue." (UF# 63) A parenthetical note in the Q&A packet also shows that the Department was involved in the revision of SB 819 when new declarations and findings section was added. (UF# 64)

Put simply, APPS is a system that cross-references two things: (1) firearm purchaser background check records and (2) criminal or other records that indicate if an individual is prohibited from possessing firearms. (UF# 65) If the system produces a "hit" that is later verified by human analysis, it provides a basis for law enforcement to contact the person identified to determine that person is illegally possessing a firearm. (UF# 66)

Senator Leno and the Department worked together extensively in promoting SB 819. (UF# 67) While discussing SB 819 with the legislature and the public, Senator Leno and the

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[5] In August 2011, the legislature enacted the California state budget for 2011/2012, which included a $71.5 million dollar reduction in the DLE's budget over two years. (UF# 56) The intent behind the $71.5 million cut to the DLE's budget was to "[e]liminate General Fund from the Division of Law Enforcement[;]" previously, the General Fund was used to pay for the Division of Law Enforcement's APPS-based law enforcement activities, among other things. (UF# 57)

Department both made it very clear that SB 819 *only* applied to funding for APPS-based law enforcement activities. (UF# 68) Specifically, when they were pushed on why SB 819's proposed statutory change was limited to one word—the addition of the word "possession" to section 28225—the response was clear: SB 819 was amended with a non-codified section to provide the needed context to understand what "possession" would mean in section 28225 if SB 819 was enacted. (UF# 69) In October 2011, the Legislature passed SB 819, which added the word "possession" to Section 28225, with the following uncodified intent language: "it is the intent of the Legislature in enacting this measure to allow the DOJ to utilize the Dealer Record of Sale Account for the additional, ***limited*** purpose of funding enforcement of the Armed Prohibited Persons System." (UF# 70; emphasis added).

F. How the Department used the DROS Fund before and after SB 819.

The Department was improperly utilizing the DROS Fund even before SB 819 became law. Since 1999, the Department has usedthe DROS Fund to pay for attorney services in over 50 cases. (UF# 71) In fiscal year 2013/2014, $181,486.29 of DROS Fund money was spent on litigation attorneys (UF# 72); the total costs of attorney services paid for out of the DROS Fund is in the millions. (UF# 73) Further, as noted in an internal document from 2004 that this Court ordered the Department to produce, *five* positions within the Department, but outside the Bureau, were being funded from the DROS Fund as of 2004. (UF# 74) The State's auditor stated the DROS Fund was a "dubious funding source for these positions. While they may somewhat contribute to the goals of the DROS program, an overwhelming majority of their time is spent on non-DROS workload." (UF# 75) And once SB 819 became law, the Department started to use the DROS Fund not only for APPS-based law enforcement actives, it also used DROS Fund money to pay for APPS itself (e.g., generating the APPS list) (UF# 76), and for investigations of people who were *not* on the APPS list. (UF# 77) Prior to SB 819, APPS and APPS-based law enforcement activities were funded out of the General Fund. (UF# 78)

The list of costs now funded from the DROS Fund but not referred to in section 28225 also includes the cost of legislative analysis done by the department (UF# 79), and the cost of certain high-level Bureau executives' entire salaries. (UF# 80) If those executives were only

working on matters listed in section 28225, then this allocation might make sense. But the Bureau does not just perform the DROS Process (and the extent relevant, APPS-based law enforcement); it administers over thirty state mandated programs, many of which have their own regulatory fees. (UF#s 11, 81) For example Defendant Lindley stated that approximately 25% of his time as chief of the Bureau was spent working on matters related to APPS (UF# 82), admittedly a General Fund program prior to SB 819. (UF# 78)

Though the Department's failure to separately track record expenses for Non-APPS-based law enforcement activities (UF# 83) makes financial analysis of that spending difficult, based on the Department's own data and estimation (UF# 84), some reasonable investigation of this issue is possible. Assuming APPS-based and non-APPS-based law enforcement activities take the same time,[6] the amount spent on Non-APPS-based activities in a single year equals the yearly salary for approximately 2.84 special agents— somewhere between $131,272.16 to 262,859.04, depending on pay grade. (UF# 85) And that calculation does not include overtime nor support staff (e.g., non-sworn criminal identification specialists), and support staff do a large amount of investigatory work prior to special agents going into the field to contact people who may be armed but legally prohibited from possessing firearms. (UF# 86)

III. ARGUMENT

A. The Court Should Grant Declaratory Relief As to the Proper Interpretation of SB 819's Impact on Section 28225 (Ninth Cause of Action)

1. Plaintiffs Are Authorized to Bring a Declaratory Relief Action

Code of Civil Procedure section 1060 authorizes a party to bring an action for declaratory relief to obtain a judicial declaration of the party's rights vis-à-vis another party. "To qualify for declaratory relief under section 1060, "[P]laintiffs [a]re required to show . . . two essential elements: '(1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to the rights or obligations of a party." *Lee v. Silveira*, 6 Cal. App. 5th 527, 546 (2016).

[6] This assumption is made for the purpose of argument only. Indeed, it is reasonable to assume that people on the APPS list, who have voluntarily given their names and contact information to the Department, are going to be, on average, easier to locate than those people who have not.

As to the first element, "[t]he correct interpretation of a statute is a particularly suitable subject for a judicial declaration. Resort to declaratory relief therefore is appropriate to attain judicial clarification of the parties' rights and obligations under the applicable law." *Kirkwood v. Cal. State Auto. Assn. Inter-Ins. Bureau*, 193 Cal. App. 4th 49, 59 (2011) (citation omitted). As to the second element, "[a]n actual controversy is 'one which admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts[; t]he judgment must decree, not suggest, what the parties may or may not do." *In re Claudia E.*, 163 Cal. App. 4th 627, 638 (2008).

Both elements are plainly met by Plaintiffs. First, because the parties dispute the proper interpretation of the word "possession" in section 28225 (UF# 77), a statute, the dispute is a proper subject of declaratory relief. *Kirkwood*, 193 Cal. App. 4th at 59. Second, because the judgment sought will "decree . . . what [the Department] may not do[,]" e.g., it may not interpret section 28225 in the manner it currently does (UF# 77), both elements are met and Plaintiffs are qualified to seek declaratory relief herein.

2. When Read as a Whole, SB 819 Is Unambiguous and Must Be Interpreted According to Its Plain Meaning

When "the intent of the statute is clearly and unambiguously apparent in the context of the statutory language as a whole, it is unnecessary to resort to indicia of the intent of the Legislature." *In re David S.*, 133 Cal. App. 4th 1160, 1166 (2005) (citing *Lungren v. Deukmejian*, 45 Cal. 3d 727, 735 (1988) and *State Bd. of Edu. v. Levit*, 52 Cal. 2d 441, 462 (1959)). Here, SB 819 added one word to the text of section 28225: "possession." Section 1(g) of SB 819 definitively explains the purpose of this addition: "it is the intent of the Legislature in enacting this measure to allow the DOJ to utilize the Dealer Record of Sale Account for the additional, *limited purpose of funding enforcement of the Armed Prohibited Persons System*." (Emphasis added). Because the limited nature of SB 819's amendment of section 28225 is "clearly and unambiguously apparent in the context of the statutory language as a whole[,]" the Court should issue a declaratory judgment stating that the word "possession" in section 28225 refers to the potential or actual possession of a firearm by someone on the APPS list.

a. The Department's New Interpretation of "Possession" Is Not Reliable and Should Be Ignored: The Department Offered a Materially Different Interpretation When It Sponsored SB 819

Here, Plaintiffs contend the text of SB 819 is clear and there is no need to look beyond the face of the bill. If, however, the Court considers SB 819 ambiguous and decides to look outside the four corners of the bill to determine its meaning, Plaintiff provides the following.

"When reviewing an administrative agency's interpretation of a governing statute," a court "must 'independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning.'" *S. Cal. Cement Masons Joint Apprenticeship Comm. v. Cal. Apprenticeship Council*, 213 Cal. App. 4th 1531, 1541 (2013) (citing *Yamaha Corp. of Am. v. State Bd. of Equalization,* 19 Cal. 4th 1, 7 (1998)). "[T]he binding power of an agency's *interpretation* of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation." *Yamaha*, 19 Cal. 4th at 4. "Courts must . . . independently judge the text of the statute, taking into account and respecting the agency's interpretation . . . , whether embodied in a formal rule or less formal representation[: d]epending on the context, an [agency's interpretation] may be helpful, enlightening, even convincing. It may sometimes be of little worth." *Id.* at 7-8.

Prior to the enactment of SB 819, the Department publicly acknowledged that the scope of the funding authorization at issue would be limited to APPS-based law enforcement (UF# 68). Tellingly, SB 819 did not have section 1 in the version introduced May 21, 2011 (UF# 59). But the next, and final, amendment of SB 819, introduced April 14, 2011, *did* include Section 1 and its limiting language. (UF#s 61, 62) Senator Leno made it clear that he "added declarations and findings to make it clear that [SB 819 wa]s intended to address the APPS enforcement issue." (UF# 63) Inasmuch as Senator Leno specifically amended SB 819 to preclude exactly the interpretation the Department offers now is strong proof the relevant legislative history confirms the Department's interpretation of the *enacted* version of SB 819 is incorrect.

In this situation, the Court has two mutually exclusive agency interpretations before it. One is completely consistent with Section 1(g) of SB 819, and the other is patently not. (UF# 77) Given that: the Department was heavily involved in drafting SB 819 (UF#s 58, 60, 64); the bill

was amended to add limitation language (UF# 62); and that Department is pushing for the interpretation that will provide it greater access to a consistent revenue stream, the Department's prior interpretation, and not its current, post hoc interpretation, should be the only one given respect if the Court finds SB 819 ambiguous. *See United States v. One Bell Jet Ranger II Helicopter*, 943 F.2d 1121, 1126 (9th Cir. 1991).

B. Writ Relief Should Be Granted Under Code of Civil Procedure Section 1085 Because the Department Has and Continues to Materially Exceed the Fee Setting Authority in Section 28225 (Fifth Cause of Action)

Plaintiffs' Fifth Cause of Action seeks a writ of mandate under Code of Civil Procedure section 1085(a), which states: "[a] writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station." To establish a right to relief under section 1085, a petitioner must show "(1) A clear, present and usually ministerial duty on the part of the respondent . . . ; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty[.]" *Santa Clara Cnty. Counsel Attys. Ass'n v. Woodside*, 7 Cal. 4th 525, 539-40 (1994). Because (1) section 28225 creates a "clear, present and . . . ministerial duty"[7] that the Department use specific data to analyze whether the Fee is being charged is no more than the amount "necessary" to cover statutorily enumerated costs, and because (2) Defendants have not produced any evidence to dispute Plaintiffs' "beneficial right . . . . to the performance of that duty' via past and likely future payment of the Fee, Code of Civil Procedure section 1085 is applicable here. *Santa Clara*, 7 Cal. 4th at 539–540. And though there is no dispute that the Department cannot legally increase the amount charged for the Fee to an amount that is greater

[7] Plaintiffs recognize that *if* the Department had actually calculated actual or estimated costs for each of the activities listed in section 28225 *and* utilized them in analyzing the propriety of the amount being charged for the Fee, that might have an impact on determining whether the essence of the fifth cause of action is a failure to perform a ministerial duty versus an abuse of discretion in performing a discretionary task. *Cf. Cal. Pub. Records Research, Inc. v. Cty. of Stanislaus*, 246 Cal. App. 4th 1432, 1454 (2016) (holding that county had "some discretionary authority when setting ... fees [but that such] discretion [wa]s limited by the phrase" in the relevant statute that limited the fee to an amount necessary to recover "direct and indirect costs.") But as the Department made no potentially discretionary calculations, the abuse of discretion standard does not apply here. And regardless, the failure to do the required calculations *at all* is patent abuse of the Department's limited discretion.

than is necessary to fund the coats referenced in section 28225 (UF# 9), the parties do dispute whether the Department is failing its duty to set the Fee within it statutory Authority. (UF# 77)

1. The Independent Judgment Standard of Review Applies to Petitioner's Writ Claim

"As a general rule, courts in California exercise independent judgment on review of agency interpretations of law, whether the interpretation is contained in a regulation or other generally applicable determination, an adjudicatory decision, or some other form of agency action." California Practice Guide: Administrative Law § 17.10 (Rutter 2016); *accord Yamaha*, 19 Cal. 4th at 7. Indeed, courts are not bound to agency interpretations of ambiguous statutes, even if the court accepts the agency's interpretation as reasonable. California Practice Guide: Administrative Law § 17.10 (Rutter 2016). And if a reviewing court finds the relevant statutory language is unambiguous, "it should give no deference to the agency's contrary interpretation[.]" *Id.* § 17.41 (citing *Bonnell v. Medical Bd. of Cal.*, 31 Cal. 4th 1255, 1264-1265 (2003)).

This rule expressly applies to the question of whether an agency action is within the scope of its statutorily delegated authority. "[I]n determination-of-necessity cases[,] the discretion granted an agency by the legislation authorizing its duties, and hence the appropriate standard of review, may vary depending on the language and intent of that legislation." *San Francisco Fire Fighters Local 798 v. City & County of San Francisco*, 38 Cal. 4th 653, 669 (2006) (explaining, in dicta, that its decision to apply a deferential standard of review in that case should not be interpreted as such standard invariably applying in all "determination-of-necessity cases"). "In other words, the [authorizing] provision may define the scope of the [authorized entity]'s discretion, and this in turn shapes not only *what* is to be reviewed but *how* it should be reviewed: legislation with a narrow definition of necessity would not be served by a deferential standard of review." *Id.* at 670.

For example, when a court is reviewing a quasi-legislative action,[8] "the first duty is to

[8] Petitioners do not concede that the failure to properly monitor and adjust the amount being charged for the Fee is a quasi-legislative act. Nonetheless, regardless of whether the challenged conduct is characterized as quasi-legislative or not appears to be of no import because, as discussed above, the relevant standard of review of an agency's statute interpretation is going to be independent judgment in either scenario.

determine whether the agency exercised its quasi-legislative authority within the bounds of the statutory mandate. (*Morris v. Williams* (1967) 67 Cal.2d 733, 748, 63 Cal.Rptr. 689, 433 P.2d 697 (*Morris*).)" *Yamaha*, 19 Cal. 4th at 16. (J. Mosk, concurring) (Brackets and internal quotation marks omitted); *see also* Gov't Code § 11342.1 ("Each regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law."). "As the *Morris* court made clear, this is a matter for the independent judgment of the court." *Yamaha*, 19 Cal. 4th at 16. (J. Mosk, concurring). Stated differently, "[e]ven in substantive areas of the agency's expertise, . . . deference to an agency's statutory interpretation is limited; determining statutes' meaning and effect is a matter "lying within the constitutional domain of the courts." *Ctr. for Biological Diversity v. Cal. Dep't of Fish & Wildlife*, 62 Cal. 4th 204, 236 (2015), *as modified on denial of reh'g* (Feb. 17, 2016). It is only if the reviewing court gets to the second step of the analysis ("whether the regulations are reasonably necessary to effectuate the purpose of the statute") that the extremely deferential "arbitrary and capricious" standard of review becomes relevant. *Yamaha*, 19 Cal. 4th at 17. (J. Mosk, concurring).

2. The Department's Interpretation of Its Authority Regarding the Fee Is Materially beyond the Scope of what Section 28225 Provides

If the Department chooses to collect the Fee, it "shall be no more than is necessary to fund the following [eleven classes of costs]." Penal Code § 28225(b). "In the law, the word 'necessary' has not a fixed meaning, but is flexible and relative." *San Francisco Fire Fighters Local 798 v. City & County of San Francisco,* 38 Cal. 4th 653, 671 (2006). The word cannot be analyzed in a vacuum, and should be considered in light of the relevant statutory context. *See id.* at 672. One court defined it as follows: "The word 'necessary[]' . . . has a broader meaning than that 'which is absolutely indispensable,' but includes that which is reasonable, convenient, and appropriate for carrying out the purposes expressed in the section following the use of that word." *Danley v. Merced Irr. Dist.*, 66 Cal. App. 97, 105 (1924).

The two subsections *infra* show that the Department has failed to even analyze what is "necessary" to pay for the cost specifically listed in section 28225, let alone show that the

cumulative totals of amounts spent and estimated to be spent are necessary and justify charging $19.00 for the Fee. The Court should grant the relief Plaintiffs seek on their Fifth Cause of Action because the Department is not meeting its duty to monitor and adjust the amount of the Fee.

a. The Department's Longstanding Macro Review Process Fails to Meet the Statutory Requirements of Section 28225

i. Macro Analysis Is Materially Inconsistent with the Authority Bestowed by Section 28225

The Legislature did not grant the Department broad authority as to how the Fee shall be calculated. It limited the Department to considering what is "necessary" to fund eleven classes of costs. Penal Code §2825(b). Further, section 28225(c) states that "the fee established pursuant to this section shall not exceed the sum of [multiple types of costs liste in section 28225(b), including] 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" ("firearms-related costs"). (Emphasis added.)

The statutory authorization here was plainly intended to be, and is, narrow. First, the Department can only consider its "estimated" firearms-related costs in setting the Fee, meaning that the Department cannot consider firearms-related costs in this context *unless* an estimate thereof has occurred. Penal Code § 28225(c). As shown in Section II.B.1., *infra*, the Macro Review Process does not include any estimation of specific cost categories. (UF#s 18, 20, 22) Interrelatedly, the Department can only consider firearms-related costs in setting the Fee if they are reasonable. Penal Code § 28225(c). The Department, however, cannot identify what is reasonable for the firearms-related costs, or any of the other costs specified in section 28225, because the Department does not make the relevant estimates or examine actual costs incurred as statutorily required. *See, e.g.,* Penal Code § 28225(c). For example, the Department internally concluded that five employees were being paid out of the DROS Fund that should not have been (UF# 74) By using the Macro Review Process, this type of "dubious" spending is hidden, meaning the result of that processes' use is not "reasonable" as required by section 28225(c). The fact that the Macro Review Process obfuscates what amount of money is necessary for *specific*, statutorily identified cost categories—categories the legislature specifically identified—is strong evidence that the

Department's process is not an acceptable way to determine whether a particular amount is "no more than is necessary" to fund the costs identified in section 28225.

ii. The Department's Fee Analysis Is Improper Because It Is Based on Cost Data Inflated with Costs Not Identified in Section 28225

Though the DROS Fund was originally intended to be used for funding the DROS process via Fee money (UF# 74), revenue from over a dozen different fees is currently pooled in that account. (UF# 11) Accordingly, it is impossible to specifically track how Fee revenue is being spent. (UF# 12) Nonetheless, because the Fee is clearly the primary source of funds in the DROS Fund (UF# 14), it is safe to assume the Fee payers are paying for a significant portion of every activity paid for out the DROS Fund.

Fee payers do not pay just for the costs of the DROS Process. Even before SB 819 became law, the DROS Fund was being used to fund activities not mentioned in section 28225, including millions of dollars for attorney services (UF# 73) and five positions within Criminal Justice Information Services ("CJIS"). (UF# 74) As to the CJIS positions, the state's auditor stated the DROS Fund was a "dubious funding source for these positions[; w]hile they may somewhat contribute to the goals of the DROS program, an overwhelming majority of their time is spent on non-DROS workload." (UF# 75) And after SB 819 became law, the Department started funding both APPS-based *and* non-APPS-based firearm law enforcement activities out of the DROS Fund. (UF# 77) Based on the Department's own data and estimation (UF# 84), and assuming both kinds of enforcement activities take the same time,[9] this amounts to the yearly salary for approximately 2.84 special agents— somewhere between $131,272.16 to 262,859.04, depending on pay grade—not to mention overtime and support staff (e.g., non-sworn criminal identification specialists). (UF# 85)

The Macro Review Process considers the amount being charged for the Fee in light of not only the costs *actually* authorized for consideration in section 28225, but potentially millions of

[9] This assumption is made for the purpose of argument only. Indeed, it is reasonable to assume that people on the APPS list, who have voluntarily given their names and contact information to the Department, are going to be, on average, easier to locate than those people who have not.

dollars spent on activities that are *outside* the permitted scope of the DROS Fee. The effect of this is clear: by inflating the total costs considered "necessary" during the Marco Review Process, the Department can claim that because the amount being charged for the DROS Fee currently is needed to meet the (improperly inflated) sum of the "necessary" costs, there is no need to lower the amount charged. Even assuming arguendo the legislature had authorized the Department to consider only the total of the individual costs referred to in section 28225 when analyzing the amount being charged for the DROS Fee (which it did not, see *supra* Section II.B.2.A.ii.), the legislature nonetheless did not authorize the Department to do what it currently does: set the DROS Fee to recoup costs in excess of what is statutorily allowed. Because the Department continues to disregard section 28225 in a materially improper way, this Court should order the Department to perform a proper analysis under the specific requirements of section 28225.

3. The Court Should Order the Department to Perform a Proper Review of the "Necessity" of the Fee Being Kept at $19.00

Based on the argument above, the Court should find in favor of Petitioners on their Fifth Cause of Action and order the Department to individually calculate the incurred and estimated cost categories in section 28225 and to make the documents reflecting such calculations public. The factors discussed below may impact the scope of and reasonable completion date for such work.

For example, resolution of Petitioner's Ninth Cause of Action prior to the commencement of the abovementioned analysis is preferable because it could impact the scope of activities that can be funded as a result of the addition of the word "possession" to section 28225(b)(11). That is, if the Court agrees with Petitioner that SB 819 provided a funding source for nothing other than APPS-based law enforcement activities, then it will be clear that when the Department performs the relevant calculations, it cannot consider the costs—which it is already funding from the DROS Fund—of law enforcement activities related to people not on the APPS list. Petitioners do not expect any difficulty on the temporal aspect of this issue, as this Court will presumably rule on the Fifth and Ninth Causes of Action at the same time. Resolution of Petitioner's remaining causes of action, however, has been bifurcated from the two at issue in this motion, and the resolution of one or several of those causes of action (e.g., the Sixth, Seventh, and Eighth Causes of Action), may

change how the Department must perform the relevant calculations.

Petitioner's Sixth, Seventh, and Eighth Causes of Action are all premised on SB 819 creating a tax that violates a provision of the California Constitution.[10] If Plaintiffs are successful on any of those challenges, it would, presumably, mean that the costs of *both* APPS-based and non-APPS-based law enforcement activities should not be considered in the Department's cost analysis. If Petitioners are unsuccessful on these causes of action, on the other hand, then the bounds of the analysis will be the same as they will be if the Court finds in favor of Petitioners on the Ninth Cause of Action.

Accordingly, in light of the bifurcation of the issues, Petitioners request that if the Court finds in their favor on the two causes of action now before the Court, that the Court issue an order requiring the Department to perform a proper DROS Fee cost analysis now, even though the remaining bifurcated causes of action have yet to be tried. This course of action is justified for at least three reasons.

First, whether or not the Department is charging an illegal tax is a separate question from whether the DROS Fund and the Fee are being used appropriately. The latter question should be resolved now, regardless of how the Court rules on the bifurcated tax claims. Petitioner contends this is especially important vis-a-vis how the Department is, or will, make a "reasonable estimate" of the amount "necessary" to fund APPS-based law enforcement activities. As described in the statement of facts above, APPS-based law enforcement is not a regulatory process (e.g., the DROS Process) with relatively well-defined boundaries, so it makes sense for the Department to explain how, after the Court rules on this motion, the Department plans to shoehorn its activities related to "possession" into the fee-setting limitations stated in section 28225. Second, Petitioner suspects one issue that will be of great importance as to the tax claims is the proportion of DROS Fund money being used for, inter alia, APPS-based law enforcement activities, *non*-APPS-based law enforcement activities, and costs legitimately related to DROS. Production of a proper DROS Fee analysis now should answer many questions that are sure to otherwise arise in preparation for trial

[10] Petitioner also brought a claim that SB 819 violated the 2/3 vote requirement created by Proposition 26, but the Court previously dismissed that claim on a motion for judgment on the pleadings.

of the remaining causes of action. Third, this action is nearly four years old, and it largely concerns statutory language the Department drafted. Language that the Department interpreted one way when it was trying to obtain funding authorization, and in another—contradictory— way in response to scrutiny about whether the Department was exceeding the authority it helped create.

Even setting aside Petitioner's illegal tax claims, the Department's refusal to properly interpret SB 819 over the last several years has resulted in potentially millions of DROS Fund dollars being use for law enforcement activities unrelated to the APPS program. These reasons provide a sufficient basis upon which the Court should order the Department, within 90 days of the Court's ruling, to produce to Petitioners calculations for each cost category, including estimated cost categories, stated in section 28225, with such calculations annotated or otherwise accompanied by information regarding the sources from which raw data were taken and an explanation as to what amount the Department contends should be charged for the DROS Fee.

IV. CONCLUSION

Section 28225 is not a blank check; the legislature went to great pains to make it clear that *if* the Department chooses to collect the DROS fee, it must set the amount of the fee based on actual costs and, particularly, "the estimated reasonable costs of department firearms-related regulatory and enforcement activities related to the sale, purchase, possession, loan, or transfer of firearms." Penal Code § 28225(c). The Department skips this statutorily required step and now asks the Court to ignore that detrimental nonconformity.

This is not a case about the merits of APPS, nor is it a case about whether it was fair that the Department's budget was slashed. Rather, the issues before the Court are (1) whether the Macro Review Process is a proper mechanism to meet the requirements of section 28225, and (2) whether SB 819's clear limitation language should be ignored. Because the answer to both of these questions is "no," Petitioners request the Court grant this motion.

Dated: June 13, 2017

MICHEL & ASSOCIATES, P.C.

Scott M. Franklin
Attorneys for Plaintiffs/Petitioners

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Laura Palmerin, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

On June 13, 2017, I served the foregoing document(s) described as

NOTICE OF MOTION AND MOTION FOR ADJUDICATION OF PLAINTIFFS' FIFTH AND NINTH CAUSES OF ACTION PURSUANT TO THE BIFURCATION ORDER OF NOVEMBER 4, 2016

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy

thereof by the following means, addressed as follows:

Office of the Attorney General
Anthony Hakl, Deputy Attorney General
1300 I Street, Suite 1101
Sacramento, CA 95814
Anthony.Hakl@doj.ca.gov

X (BY OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance with ordinary business practices.
Executed on June 13, 2017, at Long Beach, California.

X (BY ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic transmission. Said transmission was reported and completed without error.
Executed on June 13, 2017, at Long Beach, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

LAURA PALMERIN