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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,

v.

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 T. YEE, in Her Official Capacity as State Controller, and DOES 1 - 10,

Defendants and Respondents.

Case No. 34-2013-80001667

PLAINTIFFS' OPENING TRIAL BRIEF

Hearing Date: March 16, 2018
Hearing Time: 9:00 a.m.
Judge: Honorable Richard K. Sueyoshi
Dept.: 28

Trial Date: March 16, 2018
Action Filed: October 16, 2013

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I. INTRODUCTION

Defendants/Respondents Attorney General Xavier Becerra and Chief of the California Department of Justice's Bureau of Firearms Stephen J. Lindley (collectively the "Department") oversee a state program that levies a mandatory charge on all who *lawfully* purchase firearms. The money collected via that charge is primarily used to pay for certain law enforcement activities aimed at those who *unlawfully* possess firearms. Well established law expressly prohibits the Government from effectuating the kind of cost shifting at issue here. Even assuming the Dealers' Record of Sale fee (the "DROS Fee") was originally a proper regulatory fee established to cover the costs of firearm purchasers' background checks, its current use —which is largely to pay for recently defunded general fund activities—definitively means it cannot now be considered a regulatory fee. Forcing all DROS Fee payers to fund general law enforcement activities constitutes a tax, and because that tax violates several provisions of California's Constitution, it must be struck down. Plaintiffs/Petitioners ("Plaintiffs") thus request the Court find in their favor on all matters at issue in this case.

II. STATEMENT OF FACTS

A. The DROS Fee

To purchase[1] a firearm in California, qualified individuals must pay the DROS Fee. (Decl. of Scott M. Franklin Supp. Open. Br. ("Franklin Decl.") Ex. 1, at 2:7-10.) The Department's Bureau of Firearms ("Bureau") performs background checks for all applicants seeking to purchase a firearm. (*Id.* Ex. 1, at 2:11-14.) The primary purpose of this process (the "DROS Process") is to ensure that people seeking to purchase firearms in California are not legally prohibited from possessing them. (*Id.* Ex.1, at 2:15-19.) The DROS Fee was created in 1982 to cover the costs of background checks; it was initially set at $2.25. (*Id.* Ex. 1, at 2:20-22.) In 1990, the amount of the Fee was $4.25. (*Id.* Ex. 1, at 2:23-25.) In 1995, the Legislature capped the DROS Fee at $14, subject to Consumer Price Index adjustment. (*Id.* Ex. 1, at 3:2-5.) In 2004, the

[1] References to "purchase" or "purchaser" refer to both purchase-based transfers and transfers not resulting from a purchase. Cal. Penal Code § 28200(a)-(b).

Department increased the DROS Fee from $14 to $19 for the first handgun or any number of rifles or shotguns in a single transaction. (*Id.* Ex. 1, at 3:6-10.)

Penal Code section 28225 ("Section 28225") requires the amount of the DROS Fee "shall be no more than is necessary to fund the following:" eleven classes of costs, based on what the Department determines to be "actual" or "estimated reasonable" costs to pay for the eleven costs classes identified. Cal. Penal Code § 28225(a)-(b). That is, Section 28225 places a duty on the Department to consider whether the amount currently being charged for the Fee is excessive. *Id.* Nonetheless, in evaluating the amount being charged for the DROS Fee, the Department considers only big-picture "programmatic" costs—not how the amount charged each DROS Fee payer relates to any benefits granted to, or burdens caused by, individual DROS Fee payers. (Franklin Decl. Ex. 3, at 64:20-23; Ex. 4, at 80:1-15.)

The Department deposits the revenue from the DROS Fee in the Dealers' Record of Sale Special Account of the General Fund ("DROS Fund"). Cal. Penal Code § 28235. The Department claims that it is "unable to admit or deny" whether DROS Fee money constitutes a certain percentage of the money in the DROS Fund (Franklin Decl. Ex. 5, at 9:12-16), but documents produced in this case show that the Department recognizes the DROS Fee is the primary source of money going into the DROS Fund. (*Id.* Ex. 1, at 4:17-21.) For example, DROS Fee revenue constituted approximately 88% of the money deposited in the DROS Fund in fiscal year 2014-2015. (*Id.* Ex. 6, at 3:3-4:8.)

B. The Armed Prohibited Person System ("APPS")

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. (Franklin Decl. Ex. 1, at 16:9-13.) 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 whether that person is illegally possessing a firearm. (*Id.* Ex. 1, at 16:24-17.) As is relevant here, there are only two kinds of APPS-related activities: (1) APPS itself, i.e., the maintenance of the "APPS List[,]"[2] which is created via the abovementioned cross-

[2] The APPS List is also known as the "Prohibited Armed Persons File[.]" Cal. Penal Code

referencing, and (2) law enforcement activities, e.g., removing firearms from the possession of prohibited persons identified on the APPS List.[3] It is unclear to Plaintiffs when, if ever, the Department was statutorily authorized to conduct APPS-based law enforcement activities. When APPS was created, the Department's role was statutorily limited to "provid[ing] investigative assistance to local law enforcement agencies[.]" Cal. Penal Code § 30010 (formerly Penal Code § 12012). Nonetheless, it is clear the Department's APPS-related law enforcement activities are not limited to "investigatory assistance[.]" *Id.* In support of the Department's efforts to make SB 819 law, the Department stated that "98% of the individuals removed from the "APPS L]ist are a result of D[epartment] efforts, not local law enforcement." (Franklin Decl. Ex. 6A, at 8.)

C. The Department Pushes for the Enactment of SB 819 to Mitigate a Large Budget Cut

In August 2011, the Legislature enacted the California state budget for 2011-2012, which included a 71.5 million-dollar reduction in the (Department's) Division of Law Enforcement's ("DLE") budget over two years. (Franklin Decl. Ex. 7, at 16.) The intent behind the cut to the DLE's budget was to "[e]liminate General Fund from the Division of Law Enforcement[,]" though the Legislature expressly allowed the Department to continue its use of General Fund money on APPS itself. (Franklin Decl. Ex. 7, at 16.) To help mitigate that shortfall, the Department quickly brought proposed legislation to Senator Mark Leno that ultimately became SB 819. (*Id.* at Ex. 8.) 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." (*Id.* at Ex. 9, at A – 43.) There is no denying

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§ 30000(a).

[3] As previously held in this action, Senate Bill ("SB") 819 did not provide a funding source for activities other than APPS-related law enforcement activities. (Franklin Decl. Ex. 2, at 10:12-18.) The Department has admitted that under the guise of SB 819, it sought to, and did, remove firearms from the possession of people who were not on the APPS List. (*Id.* Ex. 4, at 17:15-18:5.) The Department did not track costs related to non-APPS-based law enforcement activities separately from the costs incurred for the Department's APPS-based law enforcement activities. (*Id.* Ex. 4, at 46:3-15.) Accordingly, all the data the Department has produced as to APPS-based law enforcement activities are improperly inflated. Regardless, Plaintiffs use that improperly inflated data here because the Department has no better data on the relevant issue, and Plaintiffs expressly note that their use of such data is not an admission that non-APPS-based law enforcement activities can legally be paid for with DROS Fund money.

that the purpose of SB 819 was to shift APPS-related costs from the general public to lawful firearm purchasers. It literally states the Legislature intended to use the DROS Fund to pay for APPS-based law enforcement activities, "[r]ather than placing an additional burden on the taxpayers of California." 2011 Cal. Stat., ch. 743 § 1(g).

On May 1, 2013, the Legislature enacted SB 140, appropriation legislation providing the Department with access to $24,000,000 of DROS Fund money to address "the backlog in the Armed Prohibited Persons System (APPS) and the illegal possession of firearms by those prohibited persons." Cal. Penal Code § 30015(a). The "backlog" at issue was the approximately 20,000 people on the APPS List at that time. 2013 Cal. Stat., ch. 2 § 1(c), (3). Plaintiff assumes all $24,000,000 has already been spent by the Department. (Franklin Decl. ¶ 11; Ex. 10.)

The Department's publicly available budgetary records do not include a program-by-program breakdown of how DROS Fund money is spent. But in response to discovery requests made in this action, the Department disclosed documents that confirm the following. Prior to SB 819, an average of approximately 82% the Department's DROS Fund spending went to pay for costs purportedly related to the work done by the Department's DROS Unit,[4] and 0% went to fund APPS-related activities. (*Id.* at Exs. 11 & 12.) After SB 819, however, the percentages changed radically. Post-SB 819, an average of about 41%[5] of the Department's annual DROS Fund expenditures were on APPS-related activities, and approximately 49% was attributed to the DROS Unit. (*Id.*) In fact, in fiscal year 2015-2016, the Department spent *more* DROS Fund money on APPS-related activities than it spent on the DROS Process itself. (*Id.* Ex. 11, at AGRFP001240.)

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[4] The amount spent on the DROS Unit is greater than the amount spent on the DROS Process. For example, the DROS unit processes both DROS Applications and non-DROS Applications. (Franklin Decl. Ex. 13, at 21.) Nonetheless, even assuming that DROS and non-DROS applications take the same amount of time to process, it seems the vast majority (i.e., over 96%) of the DROS Unit's time is spent performing the DROS Process. (*Id.*)

[5] Post-SB 819, approximately 25% of the Department's DROS Fund expenditures were incurred as a result of the maintenance of the APPS List. (*See* Franklin Decl. at Exs. 11 & 12.) Similarly, since the Department started funding APPS-based law enforcement activities out of the DROS Fund in fiscal year 2013-2014, that expenditure has constituted approximately 21% of the Department's yearly DROS Fund spending. (*Id.*)

III. PROCEDURAL HISTORY

A. Judge Kenny Grants Defendants' Motion for Judgment on the Pleadings

This action was filed on October 31, 2013. (Franklin Decl. Ex. 14.) On July 25, 2015, Judge Michael P. Kenny ("Judge Kenny[,]" the judge previously assigned to this action) granted a motion for judgment on the pleadings, and dismissed Plaintiffs' First Cause of Action and one of two alternative theories pleaded in Plaintiffs' Second Cause of Action. (*Id.* Ex. 15, at 2.) The Court held that Article XIIIA, Section 3, of the California Constitution ("Proposition 26") was inapplicable and that, because the claims at issue were dependent upon Proposition 26 being applicable, those claims failed. (*Id.* Ex. 16, at 2.)

Plaintiffs alleged that SB 819 violated Proposition 26 because it constituted a "change in state statute which results in any taxpayer paying a higher tax" that did not meet Proposition 26's requirement that such tax increase "be imposed by an act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature[.]" (*Id.* Ex. 14, at 6:8-11 [citing Cal. Const. art XIIIA, § 3]). SB 819 only passed by a simple majority, not a two-thirds majority. Cal. S. B. Hist., 2011-2012 S.B. 819.

As discussed above, SB 819 purportedly changed what the DROS Fee could be used for; originally, it was intended to cover only the regulatory costs of the background check process. (Franklin Decl. Ex 1, at 2:20-22.) But SB 819's purpose was to allow DROS Fee funds to be used for new, additional, non-regulatory purposes, which increased the portion of the $19.00 DROS Fee that was being used to pay for general fund obligations. 2011 Cal. Stat., ch. 743 § 1. Therefore, because SB 819, as implemented through SB 140, *increased* the portion of the DROS Fee going to fund non-regulatory activities normally funded by all taxpayers from 0% to 41% (Franklin Decl. at Exs. 12 & 13), Plaintiffs argued that the implementation of SB 819 forced DROS Fee payers to effectively pay a new tax, even though the tax was hidden in an admittedly[6] over-inflated $19.00 DROS Fee. (*Id.* at Ex. 17, 6:4-8:6.)

[6] The Department itself instituted a rulemaking to reduce the amount of the DROS Fee in 2010, but it abandoned that rulemaking in favor of SB 819, which purports to allow the Department to siphon off the surplus created by the unnecessarily high amount being charged for the DROS Fee and use the surplus for non-regulatory activities. (Franklin Decl. at Exs. 4, 108:5-12; 20, p.1; 21, 4:21-22.)

Judge Kenny did not agree with Plaintiffs' argument. He held that because the total amount of the DROS Fee did not change as a result of SB 819, i.e., the DROS Fee remained at $19.00 after SB 819 became law, "SB 819 did not result in anyone paying a *higher* tax." (*Id.* Ex. 16, at 2.) Specifically, he stated that: [t]he language of Article XIII A, section 3, subdivision (a) was only concerned with the taxpayer paying a higher tax, and not with how the tax was being used, consequently the failure of SB 819 to raise the DROS fee amount was fatal to Petitioners' claims." (*Id.*) On December 11, 2015, Judge Kenny granted Plaintiffs leave to amend their complaint to add several new causes of action alleging that the DROS Fee currently collected constitutes, at least partially, an unconstitutional tax under other legal theories. (*Id.* Ex. 16, at 4.)

B. Judge Kenny Grants' Plaintiffs' Motion for Adjudication as to the Fifth and Ninth Causes of Action

Upon Judge Kenny's suggestion, the parties agreed to bifurcate the action such that the Fifth and Ninth Causes of Action would be tried first, with the remaining causes of action to be tried in a separate trial. (Franklin Decl. Ex.18, at 2:14-19, 6:9-15.)

The Fifth Cause of Action alleges that the Department has a ministerial duty to periodically review whether the amount charged for the DROS Fee is excessive. (*Id.* Ex. 19, at ¶¶ 90, 96.) The Department claimed it "regularly monitors" the amount being charged for the DROS Fee, but Judge Kenny held such assertion to be "vague and provide[d] no indication as to the level of review [or] steps completed[.]" (*Id.* Ex. 22, at 8:1-12.) In contrast, he found that the Department had not performed the relevant review since 2004, and that a review "every thirteen years is insufficient to comply with the ministerial Duty [Penal Code] section 28225 imposes." (*Id.*) Accordingly, Judge Kenny granted Plaintiffs' Motion for Adjudication as to the Fifth Cause of Action. (*Id.*)

The Ninth Cause of Action alleges that the Department is using a specific funding source to pay for activities outside the statutorily defined scope of the funding source. (*Id.* Ex. 22, at ¶¶ 138, 139.) As a result of SB 819, Section 28225 was amended to allow the Department to use DROS Fee money to recoup costs of "firearms-related . . . enforcement . . . activities related to the . . . possession . . . of firearms[.]" (*Id.*) Section 1(g) of SB 819 definitively explains its

purpose: "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." 2011 Cal. Stat., ch. 743 § 1(g) (emphasis added). The Department asked Judge Kenny to ignore this plain statement of legislative intent (a statement the Department itself likely drafted or reviewed) and instead adopt a different interpretation, which the Department labeled a "common sense interpretation[.]" (Franklin Decl. Ex. 23, at 9:8-14.) The Court rejected the Department's claim, holding that: "[b]ased on the uncodified declaration of legislative intent [in SB 819, it] is clear that 'possession' as used in section 28225, subdivision (b)(11) is limited to APPS-based activities." (*Id.* Ex. 23, at 10:12-20.) Accordingly, Judge Kenny also granted Plaintiffs' Motion for Adjudication as to the Ninth Cause of Action. (*Id.*)

The Order of August 9, 2017, was intended to be a final ruling on the substance of the two bifurcated causes of action, but it does not address the issues of what injunctive relief will be granted based on that ruling. Thus, as part of the final judgment yet to be entered in this matter, the issue of what injunctive relief should be granted is still before the Court as to all causes of action pleaded, including the Fifth and Ninth Causes of Action.

C. Summary of Causes of Action ("COAs") Currently Before the Court[7]

1st COA: seeks declaratory and injunctive relief as to the Department's use of funds collected prior to the enactment of SB 819, a non-retroactive bill seeking to fund activities related to the post-SB 819 "possession" of firearms by people not legally allowed to possess firearms.

2nd COA: seeks injunctive relief in the form of an order, and/or issuance of a writ of mandate, compelling the state controller stop appropriating funds pursuant to SB 140.[8]

3rd COA: seeks injunctive relief in the form of an order, and/or issuance of a writ of mandate, compelling the state controller to recover all money it disbursed pursuant to SB 140.

[7] Am. Compl., *passim*.

[8] The Department has yet to expressly confirm whether all $24,000,000 of the SB 140 appropriation has been spent.

4th COA: seeks injunctive relief in the form of an order, and/or issuance of a writ of mandate, compelling the Department to return to the state controller any funds it obtained pursuant to SB 140.

6th COA: seeks declaratory and injunctive relief because SB 819 created a tax that violates article XIII, section 1(b) of the California Constitution,[9] which requires property taxes be assessed in proportion to the value of the property being taxed.

7th COA: seeks declaratory and injunctive relief because SB 819 created a tax that violates article XIII, section 2, which requires a two-thirds vote of the legislature (SB 819 was enacted on a simple majority vote) if the legislature wants to subject a specific type of personal property (e.g., firearms) to differential taxation.

8th COA: seeks declaratory and injunctive relief because SB 819 created a tax that violates article XIII, section 3(m), which exempts "[h]ousehold furnishings and personal effects not held or used in connection with a trade, profession, or business"—e.g., firearms purchased by members of the general public—from taxation.

IV. ARGUMENT

A. Distinguishing Taxes from Regulatory Fees

"[W]hether impositions are 'taxes' or 'fees' is a question of law for the . . . courts to decide on . . . *review of the facts*[.]" *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th 866, 874 (1997) (emphasis added). So even assuming the constitutionality of a particular tax is a question that can be answered as a matter of law, the predicate question here—whether SB 819 or 140 (or both) created or increased a tax—is itself a mixed question of law and fact. *Cf. Oliver & Williams Elevator Corp. v. State Bd. of Equalization*, 48 Cal. App. 3d 890, 894 (1975) ("Since the issues here involve the applicability of taxing statutes to *uncontradicted* facts, we are confronted purely with a question of law") (emphasis added); *accord Neecke v. City of Mill Valley*, 39 Cal. App. 4th 946, 953 (1995). Once a plaintiff has made a prima facie case, the burden of showing that a particular levy is a regulatory fee, and not a tax, is on the government. *Sinclair Paint*, 15

[9] All further references to an "article" of law refer to the California Constitution, except as noted otherwise.

Cal. 4th at 878; *Cal. Farm Bureau Fed'n v. State Water Res. Control Bd.*, 51 Cal. 4th 421, 436 (2011), *as modified* (Apr. 20, 2011) ("once plaintiffs have made their prima facie case, the state bears the burden of production and must" meet the *Sinclair Paint* standard).

"[G]enerally speaking, a tax has two hallmarks: (1) it is compulsory, and (2) it does not grant any special benefit to the payor." *Cal. Chamber of Commerce v. State Air Res. Bd.*, 10 Cal. App. 5th 604, 641 (2017), *review denied* (June 28, 2017). The state's power to tax personal property is constitutional (Cal. Const. art. XIII, sec. 2), whereas the police power, which includes the power to levy regulatory fees (*Sinclair*, 15 Cal. 4th at 875), is perhaps even more fundamental: it "is an attribute of sovereignty, and exists without any reservation in the Constitution[.]" *Bent Bros. v. Campbell*, 101 Cal. App. 456, 462 (1929). A regulatory fee is one that "constitutes an amount necessary to 'legitimately assist in regulation and . . . not exceed the necessary or probable expense of . . . regulating the subject matter it covers.'" *United Bus. Comm'n v. City of San Diego*, 91 Cal. App. 3d 156, 165 (1979).

The standard used to distinguish regulatory fees from taxes has not changed dramatically over the last century. In 1906, the California Supreme Court held that

> [t]he amount of the license fee, however, must not be more than is reasonably necessary for the purpose sought, i.e., the regulation of the business. If it is so great that the court can plainly see that the purpose of its imposition was to realize a revenue under the guise of regulating the business, the provision for the fee cannot stand as an exercise of the police power.

Plumas Cty. v. Wheeler, 149 Cal. 758, 763 (1906). *Sinclair Paint* states a similar standard:

> to show a fee is a regulatory fee and not a . . . tax, the government should prove (1) the estimated cost of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity.

15 Cal. 4th at 878. The two prongs identified above are referred to here as the "reasonable cost" and "allocation" prongs, respectively. *City of San Buenaventura v. United Water Conservation Dist.*, 3 Cal. 5th 1191, 1212 (2017).

Sinclair Paint's police power analysis relies heavily on *United Business*. *Sinclair Paint*, 15 Cal. 4th at 879-80. *United Business* holds that "[t]he general rule is that a regulatory . . . fee levied cannot exceed the sum reasonably necessary to cover the costs of the regulatory purpose

sought." *United Bus.*, 91 Cal. App. 3d at 165. *Sinclair Paint* specifically recognizes that the *United* "court observed that, under the police power, municipalities may impose fees for the purpose of legitimate regulation, and not mere revenue raising, if the fees do not exceed the reasonably necessary expense of the regulatory effort." *Sinclair Paint*, 15. Cal. 4th at 880-81. In fact, the case *Sinclair Paint* itself relies on for establishing the standard Plaintiff believes to be applicable—*San Diego Gas*—also specifically relies on *United* because it describe[s the] distinctions between regulatory fee and revenue-raising tax[.]" *Id.* at 878; *San Diego Gas v. San Diego Cty. Air Pollution Control Dist.*, 203 Cal. App. 3d 1132, 1135-36 (1988).

Regarding the reasonable cost prong, it is true that "[a] regulatory fee does not become a tax simply because the fee [is] disproportionate to the service rendered to individual payors[;]" but "a fee cannot exceed the reasonable cost of regulation with the generated surplus used for general revenue collection. An excessive fee that is used to generate general revenue becomes a tax." *Cal. Farm*, 51 Cal. 4th at 438. And the forgoing dovetails with the allocation prong, which prevents a levy from being characterized as a regulatory fee when there is "no reasonable relationship" between a fee payer challenging the fee and the supposedly regulatory activity the fee payer is funding. *Sinclair Paint*, 15 Cal. 4th 881.

B. The DROS Fee Is a Tax

When presented with Plaintiffs' Proposition 26 claims, Judge Kenny could have identified the DROS Fee as one of three things: a regulatory fee, a tax, or a hybrid of the two. Judge Kenny may have also assumed, without deciding, that even if the DROS Fee is classified as a tax, it would not violate Proposition 26. His intent in this regard is unclear to Plaintiffs. Regardless, it is clear that Judge Kenny did not make a finding that the DROS Fee was a pure regulatory fee. Had he determined the entire DROS Fee was a regulatory fee—and not a tax that could be analyzed in the context of Proposition 26—he would not have explained his ruling with a Proposition 26 analysis that does not even mention the concept of regulatory fees. (Franklin Decl. Ex. 16, at 2, 4.) It is also clear that Judge Kenny necessarily held that the $19.00 DROS Fee is not partially a tax. (*Id.*) That was the patent foundation of Plaintiffs' Proposition 26 claim (*id.* Ex. 14, at 6:8-11), and Judge Kenny dismissed it (*id.* Ex. 16, at 2, 4.) Accordingly, though Plaintiffs disagree with

the analysis in the Order of July 20, 2015 (which was more clearly explained in the Order of December 16, 2015), unless the Court vacates the relevant aspect of that order,[10] it now limits the Court to either holding that the DROS Fee is a tax or a regulatory fee. (*Id.*) For the reasons stated below, the DROS Fee is a tax and not a regulatory fee.

1. The ruling of August 9, 2017, shows that the Department cannot meet the reasonable cost prong.

To satisfy the reasonable cost prong, the government must provide "evidence as to the estimated cost of any service or regulatory activity attributable to" the party or class of individuals paying a particular levy. *Nw. Energetic Servs., LLC v. Cal. Franchise Tax Bd.*, 159 Cal. App. 4th 841, 858 (2008), *as modified on denial of reh'g* (Mar. 3, 2008). This element is narrow, and only requires the government to provide an estimated cost that is mathematically justified given the particular task being funded. Whether that task is reasonably related to the relevant fee payer(s) is a separate inquiry, exclusively addressed via the allocation prong. *See, e.g., S. Cal. Edison Co. v. Pub. Utils. Comm'n*, 227 Cal. App. 4th 172, 200 (2014), *as modified* (June 18, 2014) (discussing whether a fee exceeded the amount necessary to cover the task being funded, and then separately discussing whether the fee had a reasonable relationship to fee payers); *accord Sinclair Paint*, 15 Cal. 4th at 881.

As Judge Kenny held, the Department has not properly evaluated the amount being charged for the DROS Fee in over thirteen years. (Franklin Decl. Ex. 22, at 8:1-12.) The Order of August 9, 2017, thus establishes, prima facie, that the Department cannot establish that specific costs justify the $19 DROS Fee. *Cal. Farm*, 51 Cal. 4th at 436. In addition to the age of Department's prior analysis—which alone makes it irrelevant—that analysis is also substantively insufficient because it was performed prior to SB 819, and the Department has admitted that APPS-related costs were not considered in 2004 when the DROS Fee was last changed. (Franklin Decl. Ex. 24, at 17:7-10.) Because DROS Fee funds are now being used to fund APPS-related activities, APPS-related costs are necessarily relevant to evaluating if the amount currently being

[10] I.e., that the Department can knowingly overcharge an existing regulatory fee and use the surplus to pay for general law enforcement costs without violating Proposition 26 so long as the total amount being charged to "fee" payers does not increase.

charged for the DROS Fee is reasonable. Unless the Department has performed a sufficient analysis in the months since the Order of August 9, 2017, *and* the Court allows the Department to produce evidence describing the pertinent aspect of such analysis—which would be inequitable[11]— the Department cannot meet its burden under the reasonable cost prong. Plaintiffs should thus prevail for this reason alone.

2. The DROS Fee Is a Tax because there Is No Reasonable Relationship Between the Average Fee Payer and Money Spent on APPS.

The allocation prong requires "that charges allocated to a payor bear a fair or reasonable relationship to the payor's *burdens on or benefits from the regulatory activity.*" *Sinclair Paint*, 15 Cal. 4th at 878 (emphasis added). Thus, this prong concerns whether there is a "close nexus" between a *particular* fee payer and the activity he or she is funding. *Id.* at 881; *City of San Buenaventura*, 3 Cal. 5th at 1212-13. Importantly, the costs allocation prong does not concern "the question of proportionality[, which is] measured collectively"—that inquiry is exclusively part of the reasonable cost prong. *City of San Buenaventura*, 3 Cal. 5th at 1213.

a. The vast majority of DROS Fee Payers do not create any burden vis-à-vis APPS

The percentage of DROS Fee payers that end up on the APPS List is indisputably small. (Franklin Decl. Ex. 26, at 5:11-23; Ex. 27, at 4:12-25.) The vast majority of DROS Fee payers never become legally prohibited from possessing firearms. (*Id.*) That necessarily means that most DROS Fee payers are never a burden vis-à-vis APPS, because they are never on the APPS List, and they never create any need for law enforcement to confiscate their firearms. When the payer of a particular levy can show there is "no clear nexus" between the fee payer's *own* activity (for

[11] Plaintiffs will object to any attempt by the Department to introduce any evidence of cost estimates related to the DROS Fee. Specifically, since the filing of this action, Plaintiffs have tried to obtain, inter alia, a per transaction cost estimate for the DROS Process. In fact, in response to Plaintiff's first set of special interrogatories, the Department promised it would provide a per transaction cost estimate, a promise the Department eventually admitted it would not keep. (Franklin Decl. ¶ 26, Ex. 25.) Furthermore, if the Department does attempt to produce newly created cost analysis evidence at the eleventh hour, Plaintiffs would, presumably, be allowed to perform discovery as to the newly produced evidence, but that would surely require resetting the trial date, and Plaintiffs already delayed this case once when they agreed with the Court's suggestion that the action be bifurcated. (*Id.* at Ex. 18.) Accordingly, the Court should not allow any newly created cost estimate information into evidence. Cal. Evid. Code § 352.

example, legally obtaining a firearm) and the harm the relevant regulation is intended to address (e.g., illegal possession of a firearm by a person who had previously obtained a firearm legally), that levy cannot be considered a regulatory fee. *Sinclair*, 15 Cal. 4th at 881. Similarly, a levy is a tax when "the amount of the fee [bears] no reasonable relationship to the social or economic 'burdens' . . ." generated by the fee payer's "operations[.]" *Id.* Here, the fee payer's "operations" are not manufacturing paint like the plaintiff in *Sinclair Paint*, but legally purchasing and possessing a firearm. But because legally purchasing and possessing a firearm has "no reasonable relationship to the social or economic 'burdens'" of *illegal* firearm possession, *Sinclair Paint* again shows why the DROS Fee is a tax as to, at the least, the overwhelming majority of DROS Fee payers. *Id.*

The Department claims that law-abiding DROS Fee payers create a burden by lawfully obtaining a firearm. (Franklin Decl. Ex. 28, at 4:18-5:11). But when pushed to explain that claim, the Department's evasive response proves that there is no actual APPS-related burden caused by legally purchasing and possessing a firearm.

> Yes. The transfer of a firearm to a DROS fee payer who never becomes legally prohibited from possessing a firearm results in at least one burden. For example, DROS fee payers who legally acquire firearms have certain legal responsibilities in connection with the possession, maintenance, and use of those firearms. Defendants also have certain legal responsibilities in connection with the possession, maintenance, and use of those firearms.

(*Id.*) This is a non-response, full of vague allusion but no facts. It does not include any factual evidence of a burden that could be relied on by the Court. General truisms, unanchored to relevant facts, are not enough to prove an actual burden exists. *See* Evid. Code § 140 ("'Evidence' means [something] offered to prove the existence or nonexistence of *a fact.*") (italics added).

Perhaps more importantly, however, is that it does not make any connection between *legal* firearm possession and APPS-related costs, which are incurred to address *illegal* firearm possession. Plaintiffs propounded discovery on that question as well, asking the Department to "describe, in reasonable detail, the factual and legal bases for" the Department's contention that "the costs of APPS-BASED LAW ENFORCEMENT ACTIVITIES are reasonably related to legal firearm possession[.]" (*Id.* Ex. 28, at 7:12-15.) Other than the word "Yes[,]" the

Department's response was utterly evasive.

> What plaintiffs characterize as "APPS-BASED LAW ENFORCEMENT ACTIVITES" are reasonably related to firearm possession, irrespective of whether that possession is characterized as legal or illegal. Penal Code section 28225 does not distinguish between certain kind of possession (e.g., "legal" and "illegal"); it speaks solely in terms of "possession."

(*Id.* Ex. 28, at 7:16-8:6.) This response is hard to follow, but it may be that the Department was attempting to—obliquely—argue that APPS-related costs are related to legal firearm possession because Section 28225's use of the word "possession" provides a funding source for governmental activities related to any firearm possession. First, that "response" does not actually describe the basis of the Department's position. Second, and even more troubling, is that this claim was made *after* Judge Kenny ruled that Section 28225's use of the word "possession" ***is*** limited to activities concerning illegal firearm possession—specifically, APPS-based activities. (*Id.* Ex. 22, at 10:12-20.)

Finally, it is worth pointing out that tens of thousands of DROS applications are denied each year (Franklin Decl. Ex. 13, at 21.) These DROS Fee payers create no burden as to: (1) legal firearm ownership (as they are not allowed to complete the DROS Process), or (2) APPS (because only those who have completed the DROS Process can end up on the APPS List).[12] There is *no* nexus between these fee payers and a governmental burden (or, for that matter, an APPS-related benefit) other than processing a DROS application. Thus, though Plaintiffs are not within this subset of DROS Fee payers, the existence of fee payers with *no* relationship to the burdens and benefits discussed further proves that the DROS Fee is a tax.

Because the Department does not offer evidence of a nexus, let alone a "clear nexus[,]" between law-abiding DROS Fee payers' (e.g., Plaintiffs') *legal* firearm possession and APPS-related costs resulting from *illegal* firearm possession, there is no burden upon which the Department can meet the requirements of the allocation prong. *Sinclair Paint*, 15 Cal. 4th at 878; *City of San Buenaventura*, 3 Cal. 5th at 1212-13.

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[12] They also receive no special benefit from legal firearm ownership or APPS.

b. The Department has not identified a single APPS-related benefit received by DROS Fee Payers that is different from the benefit to the general public

The purpose of SB 819 was to benefit California's taxpayers in general, not DROS Fee payers. 2011 Cal. Stat., ch. 743 § 1(g). Similarly, the APPS program was enacted to increase local law enforcement's ability to protect Californians at large. (Franklin Decl. Ex. 29, at 8-9.) And yet, the Department steadfastly claims that SB 819 provides an APPS-related benefit to DROS Fee payers that the general public does not enjoy. That supposed "benefit" is that "a person who pays a DROS fee may . . . have firearms recovered[,]"—i.e., *seized by law enforcement*— "as a result of the APPS Program . . . ." (Franklin Decl. Ex. 30, at 5:13-17.) The Department's claim does not pass the "straight face" test.

When Plaintiffs recently propounded discovery that required the Department to identify any benefits of APPS-Related Law Enforcement Activities obtained by DROS Fee payers, the Department provided the following sworn response. "[T]he APPS program helps ensure that DROS Fee payers do not cause firearm-related injuries to themselves, others, or property with a firearm despite being prohibited from owning one. It helps reduce the chance of a DROS fee payer being involved in firearms violence and firearms-related criminal activity." (*Id.* Ex. 28, at 2:6-3:13.)

First, what the Department identifies here is, if anything, a burden, not a benefit. *Sinclair Paint* proves this point. *Sinclair Paint* concerns a challenge by a paint manufacturer regarding a fee it was assessed under the Childhood Lead Poisoning Prevention Act ("CLPPA"). 15 Cal. 4th at 870. The CLPPA imposes "fees on manufacturers and other persons . . . responsible for identifiable sources of lead, which have significantly contributed and/or currently contribute to environmental lead contamination." *Id.* at 872. *Sinclair Paint* confirms that fees under the CLPPA did "not constitute payment for a government benefit or service" to "Sinclair or other manufacturers in the stream of commerce for products containing lead[,]" but were "used to benefit children exposed to lead[.]" *Id.* at 875.

Here, the purpose of APPS was plainly to benefit the *public* (like in *Sinclair Paint*) via a reduction in illegal firearm possession—not to provide DROS Fee payers the dubious "benefit" of

having their property seized. (Franklin Decl. Ex. 29, at 8-9.) Indeed, SB 819 does not refer to protecting DROS Fee payers, it concerns the "substantial danger to public safety" presented by prohibited persons possessing firearms. 2011 Cal. Stat., ch. 743 § 1(g).

To the extent DROS Fee payers receive any APPS-related benefit, it is in increased effectiveness of law enforcement activities, which is the same benefit all Californians receive from APPS. "[A]s Witkin succinctly puts it, 'no compensation is given to the taxpayer except by way of governmental protection and other general benefits.' Taxation 'promises nothing to the person taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good.'" *Cal. Chamber*, 10 Cal. App. 5th at 641 (citations omitted). Accordingly, because the "benefit" alleged is really the "burden" already shown to be insufficient to meet the allocation prong, the Department's "benefit"-based defense similarly fails.

Second, even assuming arguendo that the narrow class of DROS Fee payers who have property seized "as a result of the APPS Program" receive a *concomitant* benefit from such seizure (Franklin Decl. Ex. 30, at 5:13-17), that "benefit" is never "enjoyed" by the vast majority of DROS Fee payers. Thus, the Department's benefit-based argument also fails under the allocation prong—the California Supreme Court has made it clear that the "clear nexus" and "reasonable relationship" requirements are *not* evaluated collectively as to all payers of the challenged fee, but based on a plaintiff fee payer's actual impact on regulatory activities. *Sinclair Paint*, 15 Cal. 4th at 878; *City of San Buenaventura*, 3 Cal. 5th at 1212-13. Because Plaintiffs have not impacted APPS, and because there is no evidence they ever will (just like most DROS Fee payers), the Department cannot meet its required showing of a "clear nexus" between the Plaintiffs, as lawful firearm purchasers, and APPS.

Third, comparing the DROS Fee to a regulatory licensing fee—where all fee payers have paid the same thing and receive the same benefit—further shows why the Department's "benefit"-based analysis fails. For example, a hunting license grants "the privilege to take birds and mammals[.]" *See* Cal. Fish & Game Code § 3031(a)(1). That same section states that a hunting license "shall be issued to "[a] resident of this state, 18 years of age or older, upon the payment of a base fee"). *Id.* Importantly, Fish & Game Code section 3031(c) states hunting license fees

should be adjusted "as necessary, to fully recover, but not exceed, all reasonable administrative and implementation costs . . . relating to those licenses."

An avid shooting sports enthusiast could pay the DROS Fee five times over the course of a single year ($95) as a result of "trading up" to find just the right firearm, and yet that fee payer would receive no greater benefit (nor create any larger burden) than a DROS Fee payer that buys a single firearm for hunting and self-defense who puts only $19 in the DROS Fund.[13] In contrast, if these same two individuals wanted to hunt, they would both get the same right to hunt upon obtaining a hunting license, and they would pay the same fee to do so. Cal. Fish & Game Code § 3031(a)(1). When two fee payers get the exact same benefit (or cause the same burden), but are charged different amounts, that disparity—likely a difference of 100% or more because of how the DROS Fee is collected—is proof that the fee is not being properly allocated to at least some DROS Fee payers. *Sinclair Paint*, 15 Cal. 4th at 878.

In summary, *Sinclair Paint* provides a two-prong test to determine if a levy is a regulatory fee permissible under a government entity's police power. 15 Cal. 4th at 878. Both of those prongs point decisively toward the conclusion that the DROS Fee[14] is not a regulatory fee, but a tax. Accordingly, the DROS Fee is invalid if it does not comply with this state's constitutional taxation limits. As shown below, the DROS Fee violates three separate constitutional provisions.

C. The DROS Fee Is an Unconstitutional Tax, Thrice Over

The substance of the three constitutional tax provisions relevant here is as follows.

> **SEC. 1.** . . . (a) All property is taxable and shall be assessed at the same percentage of fair market value. . . .(b) All property so assessed shall be taxed in proportion to its full value.
>
> **SEC. 2.** . . . The Legislature may provide for property taxation of all forms of tangible personal property. . . . The Legislature, two-thirds of the membership of each house concurring, may classify such personal property for differential taxation or for exemption.

[13] Somewhat conversely, a DROS Fee payer buying one firearm pays the same $19.00 fee, and gets the same benefit, as a person who buys five firearms as part of a single transaction. Cal. Penal Code § 28240(b).

[14] The case law indicates that when a fee "exceed[s] the reasonable cost of regulation with the generated surplus used for general revenue collection[,]" that "excessive fee . . . becomes a tax." *Cal. Farm*, 51 Cal. 4th at 437–38. Thus, even assuming a portion of the DROS Fee is actually being used for legitimate regulatory costs, the entire DROS Fee is properly labeled a tax.

> **SEC. 3.** . . . The following are exempt from property taxation: . . . . (m) Household furnishings and personal effects not held or used in connection with a trade, profession, or business.

Cal. Const. art. XIII, §§ 1(b), 2 & 3(m). These provisions cannot be amended without a two-thirds vote of the legislature (Cal. Const. art. 18, § 1)—which necessarily means these provisions were unaffected by SB 819, which was enacted on a simple majority vote. Cal. S. B. Hist., 2011-2012 S.B. 819.

1. Article XIII, Section 1(b)

Section 1(b) applies to personal property. *Gen. Dynamics Corp. v. Los Angeles Cty.*, 51 Cal. 2d 59, 64 (1958) (citing sections 1 and 14). Firearms are personal property. *See, e.g.*, *People v. Beck*, 25 Cal. App. 4th 1095, 1097 (1994), *as modified* (June 17, 1994); *see also* Cal. Rev. & T. Code § 106 ("'Personal property" includes all property except real estate"). Because the DROS Fee is a tax that must be paid to legally obtain a firearm in California, it is a property tax that must be proportionally related to the value of the firearm being obtained. Cal. Const. art. XIII, § 1(b). Because the DROS Fee is a per transaction flat fee (Cal. Code Regs. tit. 11, § 4001) that is in no way tied to the value of the firearm(s) being transferred, the DROS Fee violates article XIII, section 1(b).

2. Article XIII, Section 2

Section 2 allows for differential taxation, including an exemption from taxation for certain forms of tangible property, *if* enacted by a two-thirds vote of the legislature. Plaintiff is unaware of any form of tangible property, other than firearms, that is taxed in a manner akin to how the DROS Fee has been charged after the enactment of SB 819. That differential taxation has occurred is inescapable: before SB 819, DROS Fee payers did not pay a property tax upon purchasing a firearm, but after SB 819, they do. In light of that fact, and that SB 819 was not enacted by a two-thirds vote (Cal. S. B. Hist., 2011-2012 S.B. 819), SB 819 created a differential taxation scheme that violates article XIII, section 2, and is thus invalid.

3. Article XIII, Section 3(m)

Section 3(m) exempts from taxation "[h]ousehold furnishings and personal effects not held or used in connection with a trade, profession, or business." Because firearms are commonly

purchased for, inter alia, home defense and recreational use, they are within the concepts of "household furnishings and personal effects[,]" meaning they are exempt from taxation under section 3(m) without substantial analysis. *Morgan v. Imperial Irrigation Dist.*, 223 Cal. App. 4th 892, 905–06 (2014) ("[r]ules of construction and interpretation that are applicable when considering statutes are equally applicable in interpreting constitutional provisions. . . . When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it.'").

Regardless, even if the Court looks beyond the relevant constitutional text, it will still find that firearms are within the class of property exempted from taxation via section 3(m). "On November 5, 1974, the voters approved Assembly Constitutional Amendment 32 . . . which . . . added article XIII section 3(m) to the California Constitution as presently worded . . . . Concomitantly, [Revenue and Taxation Code] section 224 was amended to its present wording." *Lake Forest Cmty. Ass'n v. Cty. of Orange*, 86 Cal. App. 3d 394, 397 (1978) (citations omitted). Thus, as to the pertinent inquiry—the scope of the exemption for household furnishings and personal effects—Revenue and Taxation Code section 224 and section 3(m) are parallel. *Lake Forest* holds that recreational property, like billiards and pool tables, is exempt from taxation under Revenue and Taxation Code section 224. *Id.* at 397. Firearms are patently akin to billiards and pool tables as recreational personal property exempt from taxation.

Further, the Board of Equalization has, by regulation, identified several subsets of "household furnishings and personal effects" that apply to firearms. California Code of Regulations title 18, part 134, states: "[h]ousehold furnishings . . . include such items as . . . appliances . . . and art objects[; p]ersonal effects is a category of personal property which includes such items as tools, hobby equipment and collections, and other recreational equipment." Finally, it is worth noting that property characterized as household furnishings or personal effects does not lose its exempt status just because it is stored for safekeeping outside the home. Cal. Code Regs. tit. 18, § 134.

Given that firearms clearly fit in the subsets described above, California's regulatory and statutory law strongly supports the conclusion that firearms are exempt from taxation under

article XIII, section 3(m). Because the passage of a statute by a simple majority cannot change that fact, SB 819 violates article XIII, section 3(m), and this Court should rule that Penal Code section 28225, as amended by SB 819, is unconstitutional. Cal. Const. art. 18, § 1.

D. There Are Sufficient Grounds for the Court to Allow Amendments According to Proof

Recently, Plaintiffs identified two arguments that they seek to have considered but that were not expressly pleaded in the operative complaint. The first argument is that SB 819 violates the separation of powers doctrine because it is effectively an impermissible delegation of the Legislature's authority to tax. The second argument is that Penal Code section 28225 created an illegal tax even before SB 819 became law. The Court should allow Plaintiff to proceed with these arguments.

"Any judge, at any time before or after commencement of trial, in the furtherance of justice, and upon such terms as may be proper, may allow the amendment of any pleading or pretrial conference order. Cal. Civ. Proc. Code § 576. Further, "[v]ariance between the allegation in a pleading and the proof shall not be deemed material, unless it has actually misled the adverse party to his or her prejudice[, in which case] the court may order the pleading to be amended, upon such terms as may be just." Cal. Civ. Proc. Code § 469. "It is well established that leave to amend a complaint is entrusted to the sound discretion of the trial court[.]" *Garcia v. Roberts*, 173 Cal. App. 4th 900, 909 (2009). "If the same set of facts supports merely a different theory—for example, an easement as opposed to a fee—no prejudice can result" from an amendment according to proof. *Id.* at 910.

The arguments raised in the two subsections below rely on a fact issue that is already squarely at issue—whether the DROS Fee is a tax. Beyond that, however, neither of these arguments requires the parties or the Court to trod new factual ground. Because Plaintiffs only seek leave to amend legal arguments that need no factual support beyond what is already in issue, there will be no prejudice to the Department if such amendment is allowed. *Id.* Therefore, Plaintiffs request the Court exercise its discretion and consider the following two arguments as if they had been pleaded in the operative complaint.

1. Penal Code Section 28225 violates the separation of powers doctrine.

By commingling what was intended to be a Department-set regulatory fee—originally intended to cover the cost of background checks—and what is effectively a special tax on firearm purchasers, Section 28225 now violates the separation of powers doctrine. Cal. Const., art. III, § 3. The Department has taken the position that it can raise the DROS Fee based on the costs being incurred due to APPS-related law enforcement activities (Franklin Decl. Ex. 3, at 66:6-68:19; Ex, 4, at 71:9-72:2), which does seem consistent with SB 819's legislative intent. (Franklin Decl. at Ex. 9, p. A - 41 & A - 42). That is, the Department effectively claims it can set the amount of a tax, which violates the aspect of the separation of powers doctrine known as the nondelegation doctrine.

The nondelegation doctrine is violated "when a legislative body (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy." *Gerawan Farming, Inc. v. Agric. Labor Relations Bd.*, 3 Cal. 5th 1118, 1146 (2017). As to the first item, both aged and recent cases show taxation is a matter of fundamental policy that cannot be delegated to another branch of the government. *See, e.g.*, *Woodward v. Fruitvale Sanitary Dist.*, 99 Cal. 554, 561 (1893) ("[t]he legislature cannot delegate to other than the municipal corporations power to assess [and] collect taxes"); *Sav. & Loan Soc. v. Austin*, 46 Cal. 415, 515 (1873) (Wallace, C.J., concurring but dissenting in part) (noting that "the power to lay taxes under our system is one of the powers of Government which does not belong to either the executive or the judicial department, [a]nd . . . the right to exercise this power cannot be delegated is self-evident"); *see also Cal. Chamber*, 10 Cal. App. 5th at 660 ("taxes must be levied by the legislative, not executive, branch"); *cf. Abbott Labs. v. Franchise Tax Bd.*, 175 Cal. App. 4th 1346, 1360 (2009), *as modified* (Aug. 6, 2009) (stating "the power to tax . . . is vested in the Legislature and cannot be delegated to the courts"). Because Section 28225 purports to authorize the Department to set the amount of a levy based on non-regulatory costs (e.g., APPS-related costs), that statute "leaves the resolution of a fundamental [legislative] policy issue to others[,]" and therefore violates the nondelegation doctrine.

Second, Section 28225 violates the nondelegation doctrine because, if taken literally, it

allows the Department to set the DROS Fee based on the Department's own conclusions about what is "necessary" to fund "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." This amorphous description, read without reference to the actual legislative purpose(s) behind the creation and amendment of the relevant statutory provision, could be interpreted to give the Department carte blanche to charge a DROS Fee to pay for *any* firearms-related activity, including purely law enforcement (as opposed to regulatory) activities, the Department claims are "necessary."

This problem is part and parcel of the fact that Section 28225 and related sections are in desperate need of reconciliation and revision. In prior motion briefing, Plaintiffs thoroughly described a portion of the convoluted legislative history of Section 28225. (Franklin Decl. Ex. 31, at 8:18-10:24.) To summarize, in 2003, the Department pushed legislation to amend the relevant statue so that the DROS Fee could be used to cover "the costs associated with funding Department of Justice firearms-related regulatory and enforcement activities related to the sale, purchase, loan, or transfer of firearms." (*Id.*) In response, the Senate Public Safety Committee made it clear that it saw the proposed legislation as an attempt to drastically increase what the Department could use DROS Fee money for. (*Id.* Ex. 32, at 9-10.) When faced with this, the Department relented and claimed the proposed change would "not authorize DOJ to spend DROS fees for purposes other than what the Legislature has already approved through Budget Act appropriations" and two other bills in the 2003-2004 Budget Bill that the Legislature planned to fund from the DROS Fund. (*Id.* Ex. 32, at 10.) In short, the 2003 legislation was only intended to ensure the DROS Fund could be used for specific purposes: (1) "to offset the costs incurred for the verification of licensure provisions" for transfers of firearms from out-of-state to in-state licensed gun dealers (per AB 2080 [Steinberg, 2002]); (2) for the inspection of dangerous device permit holders (AB 2580 [Simitian, 2002])[15]; and (3) for certain handgun safety testing (AB 2902

[15] This activity was plainly not intended to be funded with DROS Fee money, as the relevant legislation made it clear a different fee would be set up for covering the costs of the relevant inspections. 2003 Cal. Stat., ch. 910 (Legislative Counsel's Digest) ("This bill would require the department to establish a schedule of fees to cover the costs of the inspection duties imposed on the department by this bill.").

[Koretz, 2002]). 2002 Cal. Stat., ch. 912 (Legislative Counsel's Digest).

Unfortunately, the legislation enacted, SB 161 (Steinberg, 2003), fails to express those limitations. Instead, the Legislature went ahead with the language pushed by the Department, without any reference to the limitations the Department said would apply. 2003 Cal. Stat., ch. 754. This is problematic in and of itself, but the addition of the word "possession" to Section 28225 via SB 819 solidified the fact that, if Section 28225 is read literally, it seems to authorize the Department unfettered authority to fund *any* firearm-related law enforcement activity it wants to via the DROS Fund. Admittedly, Judge Kenny's ruling that SB 819 was only intended to authorize using the DROS Fee to fund "APPS-related Law Enforcement Activities" helps narrow the relevant provision somewhat. (Franklin Decl. Ex. 22, at 10:12-20.) But even with that limitation, Section 28225 still appears, on its face, to grant the Department such broad authority that it could effectively make itself a statewide police force as to every person on the APPS List—paid for by taxing DROS Fee payers. This result would be inconsistent with the separation of powers doctrine, not to mention the Department's limited role vis-à-vis APPS-based law enforcement (providing "assistance" to local law enforcement). Cal. Penal Code § 30010.

The Legislature has not provided an adequate direction for the implementation of the policies it intended to put into place via, e.g., SB 161 and SB 819. Accordingly, the Court should rule that Section 28225, as currently written, violates the nondelegation doctrine and is unconstitutional. *Gerawan*, 3 Cal. 5th at 1146; Cal. Const., art. III, § 3.

2. Even Prior to Its 2011 Amendment, the DROS Fee Authorized Under Section 28225 Was an Unconstitutional Tax

Over the last ten years, which constitutes about five years before and five years after SB 819's passage, the Department spent "millions" of DROS Fund dollars to pay for attorneys to defend the Department and its employees. (Franklin Decl. Ex. 4; Ex.33, at 1-11.) This practice dates back to 1999. (*Id.* at Ex. 4, at 108:19-109:11; Ex. 33, 2; Ex. 34, at AGRFP000502). Section 28225(b)(11) limits the costs to be considered in setting the DROS Fee to "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." Defending civil lawsuits is neither

a "regulatory" nor an "enforcement" activity, and yet the Department set the DROS Fee in 2004 based on its total prior DROS Fund expenditures— which would have included money spent on attorneys. (*Id.* at Ex. 33, at 2; Ex. 25, at 32:25-33:2.) It is also noteworthy that when Plaintiffs asked the Department to identify "any unit, section, or component . . . that performs work that was quantified in some way under Unit Code 510[, i.e., the DROS Process unit code] for fiscal year 2013-2014[,]" Defendants did not identify the Division of Civil Law, which is responsible for the largest share of "internal consultant" costs paid from the DROS Fund. (*Id.* Ex. 27, at 5:19-6:13.) Further, when asked, the Department previously stated approximately $181,486.29 of DROS Fund money was spent on attorneys in the relevant fiscal year. (*Id.* at Ex. 35, 2:26-3:4). The Department's budgetary records, which are admittedly not totally clear on this point, seem to state that $487,994.93 or $392,855.75 of DROS Fund money was actually spent on lawyers in fiscal year 2013-2014. (*Id.* at Ex. 36, pp. AGROG000003, 08.) The foregoing suggests that if a proper audit of DROS Fund expenditures is performed by an outside analyst, the scope of non-regulatory spending actually being funded from the DROS Fund will be even greater than what Plaintiffs have identified.

There is no reason to believe the Legislature intended the DROS Fee to be used to defend lawsuits just because they are brought against the Bureau of Firearms or otherwise "related to" firearms. (*Id.* Ex. 4, at 27:23-29:15.) And certainly, there is nothing in Section 28225 indicating the DROS Fee was intended to be used to pay for court-ordered attorneys' fees—but DROS Fund money has in fact been used for just that purpose. (Franklin Decl. Ex. 36, at AGROG000010.) These examples appear to represent a pattern of expenditures with "dubious" connections to the DROS Fund being paid out of the same.[16] "A fee cannot exceed the reasonable cost of regulation with the generated surplus used for general revenue collection. An excessive fee that is used to generate general revenue becomes a tax." *Cal. Farm*, 51 Cal. 4th at 438. The Department set and maintained the amount charged for the DROS Fee to cover the cost of something that is clearly a "general revenue" (i.e., General Fund) expenditure: paying for attorneys to defend the state in

[16] An internal memorandum obtained in this action, after a motion to compel was granted, shows that the Department's own internal analysis has characterized the use of DROS Funds for certain activities as "dubious." (Franklin Decl. Ex. 33, at 4.)

litigation. Because funding litigation is simply not expressly or impliedly within the scope of what the DROS Fee is intended to fund (Section 28225), the DROS Fee is a tax to the extent it has been used to fund litigation. The Court should issue a declaratory judgment stating the foregoing, enjoin the Department from using DROS Fee money in that manner, and order the Department to reimburse the DROS Fund for all monies that the Department has taken therefrom to fund any non-regulatory activity. *Id.* at 438.

E. SB 819 Did Not Allow for Retroactive Conversion of Money Collected under the Guise of a Regulatory Fee to be used to Fund Post-SB 819 Non-Regulatory Activities

"[S]tatutes do not operate retrospectively unless the Legislature plainly intended them to do so. The Legislature . . . is well acquainted with this fundamental rule, and when it intends a statute to operate retroactively it uses clear language to accomplish that purpose." *Moore v. State Bd. of Control*, 112 Cal. App. 4th 371, 378 (2003). Here, neither SB 819 nor SB 140 uses clear language to show that the Legislature intended to retroactively reclassify previously collected DROS Fee money for those new laws' purposes. 2011 Cal. Stat., ch. 743; 2013 Cal. Stat., ch. 2. Yet, the Department has undeniably used such funds to do so. (Franklin Decl. Ex. 10.)

In light of the foregoing, even if the Court finds the DROS Fee is not constitutionally impaired, it should still grant declaratory and injunctive relief to the extent the Department acquired funds pursuant to SB 140 collected prior to SB 819's enactment.

F. The Relief Sought by Plaintiff Is Appropriate

Based on the Order of August 9, 2017, which concerns the Fifth and Ninth Causes of Action in the Amended Complaint, Plaintiffs seek a declaratory judgment confirming that: (1) the Department has an ongoing ministerial duty to make sure the amount being charged for the DROS Fee is "no more than necessary" per Section 28225; (2) the Department has failed to meet that duty; and (3) SB 819, and the addition of the word "possession" to Section 28225, only address the costs of APPS-related law enforcement activities, i.e., investigating whether people on the APPS List are illegally possessing firearms—and not the costs of running APPS itself or investigating potentially armed and prohibited individuals *not* on the APPS List. Code Civ. Proc. § 1060; *see Kirkwood v. Cal. State Auto. Ass'n Inter-Ins. Bureau*, 193 Cal. App. 4th 49, 59 (2011)

("The correct interpretation of a statute is a particularly suitable subject for a judicial declaration.").

Further, based on the ruling of August 9, 2017, Plaintiffs seek a peremptory writ of mandate: (1) requiring, within 60 days of this order, the Department to review the DROS Fee as currently imposed to determine whether the amount is "no more than is necessary" to cover regulatory costs identified in Section 28225 and to return to this Court to explain what DROS Fee amount the Department identified as "no more than necessary" to fund the relevant regulatory costs, along with the calculations supporting that amount; and (2) forbidding the Department and its agents, employees, officers, and representatives, from imposing the DROS Fee at an amount greater than $14.00, at least until the required review is conducted by the Department and the appropriate amount for the DROS Fee is established. "There are two basic requirements for issuance of [a] writ: (1) A clear, present, ministerial duty owed by the agency or official, and (2) a clear, present beneficial right in the petitioner to performance of that duty." 9 Witkin, Cal. Proc. 5th Admin Proc § 140 (2008); *see also* Cal. Civ. Proc. Code § 1085. Because the Court has already identified the relevant ministerial duty (i.e., the ongoing duty to only charge a DROS Fee necessary to cover statutorily identified regulatory costs, which necessarily means the Department cannot continue using DROS Fee funds for unauthorized non-APPS law enforcement activities), and because Plaintiffs are, or represent, law-abiding DROS Fee payers who have a clear, present, and beneficial right in the relevant duty being properly performed, the issuance of the requested writ is proper. *Id.*

Similarly, Judge Kenny's ruling of August 9, 2017, also provides a basis for: (1) permanently enjoining the Department from funding non-APPS-based law enforcement activities from the DROS Fund; and (2) permanently enjoining the Department from funding APPS itself from the DROS Fund. Cal. Code Civ. Proc. § 526(a).

Furthermore, based on the argument herein and the Sixth, Seventh, and Eighth Causes of Action in the Amended Complaint, Plaintiffs seek a declaratory judgment that the DROS Fee, as currently imposed and funds therefrom used, violates article III, section 3, and article XIII, sections 1(b), 2, and 3(m), of the California Constitution. Plaintiffs further seek a peremptory writ

of mandate and/or injunctive relief forbidding the Department (1) from considering non-regulatory activities when setting the amount of the DROS Fee, and (2) from using DROS Fee money to pay for non-regulatory activities. And in light of the forgoing, Plaintiffs seek injunctive relief and/or a writ of mandate, as pleaded in their Second and Third Cause of Action in the Amended Complaint, for the Department to return, and the Controller to recoup, all DROS Fund money improperly allocated for non-regulatory activities purportedly authorized under Penal Code sections 28225-28235. Cal. Code Civ. Proc. § 526(a).

As to the First Cause of Action in the Amended Complaint, Plaintiffs seek declaratory relief stating that SB 819 did not allow the Department to use money collected prior to SB 819's enactment to fund non-regulatory activities pursuant to Section 28225, and Plaintiffs also seek issuance of a writ of mandamus and/or injunctive relief ordering the Department to return $24 million to the DROS Fund, or such amount as the Department can reasonably identify as the portion of the relevant appropriation that came from DROS Fees collected prior to SB 819 . Cal. Code Civ. Proc. § 526(a).

Finally, as to the arguments raised herein that Plaintiff requests be the subject of an amendment according to proof, Plaintiffs seek declaratory relief stating that Penal Code section 28225 violates the separation of powers doctrine and created a tax prior SB 819. Further, Plaintiffs seek relief, whether via injunctive relief or a writ of mandamus, compelling: (1) the Department to recognize the limited scope of Penal Code section 28225 identified by this Court when conducting the DROS Fee analysis required pursuant to the Fifth Cause of Action being granted; and (2) to refund to the DROS Fund, to the extent reasonably possible, the money taken from the DROS Fund for non-regulatory purposes.

V. CONCLUSION

When deposed, Defendant Stephen Lindley stated the Department's viewpoint repeatedly as to why the Department wants all DROS Fee payers to shoulder the burden of APPS-based law enforcement activities: "the problem is caused by people who purchase, possess, [and] use firearms. If you don't have a firearm, you're not going to show on the APPS system." (Franklin Decl. Ex. 4, at 67:4-19; 81;11-82:12). A person familiar with elementary logic will immediately

identify this as a "'fallacy of composition[,'which] is committed when one reasons from the properties of a 'part' to the properties of the 'whole.'" *Rosen v. Unilever U.S., Inc.*, Case No. C 09-02563 JW, 2010 WL 4807100, at *5 (N.D. Cal. May 3, 2010). "The reasoning is fallacious because things joined together may have different properties as a whole than they do separately." *Id.*

Even if the Legislature chose to adopt the Department's logically unsound position and concluded law-abiding firearm owners should be singled out for paying additional taxes to be used in illegal firearm ownership reduction activities, the Legislature was nonetheless bound to comply with generally applicable constitutional provisions related to taxation. Because they did not, the DROS Fee is invalid and the Court should grant Plaintiffs all the relief they seek.

Dated: January 30, 2018

MICHEL & ASSOCIATES, P.C.

Scott M. Franklin
Attorney for Plaintiffs and Petitioners

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

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

On January 30, 2018, the foregoing document described as

PLAINTIFFS' OPENING TRIAL BRIEF

on the interested parties in this action by placing
☐ the original
☒ a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Anthony R. Hakl
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1300 I Street, Suite 125
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Sacramento, CA 94244-2550

Attorney for Defendants

☒ (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 January 30, 2018, at Long Beach, California.

☒ (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.
Executed on January 30, 2018, at Long Beach, California.

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

LAURA PALMERIN