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Government Code §6103*

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

2018 FEB 20 PM 01:41  
ENDORSED  
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SUPERIOR COURT  
COUNTY OF CALIFORNIA  
SACRAMENTO COUNTY

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

Case No. 34-2013-80001667

16 Plaintiffs and Petitioners,

**DEFENDANTS' OPPOSITION BRIEF**

17 v.

Date: March 16, 2018  
Time: 9:00 a.m.  
Dept: 28  
Judge: The Honorable Richard K.  
Sueyoshi  
Action Filed: October 16, 2013

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

22 Defendants and Respondents.

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1 “California’s use of the DROS fee to fund the APPS program” does not violate federal  
2 constitution].)

3 California law requires a mandatory 10-day waiting period before the firearms dealer can  
4 deliver the firearm to the purchaser. (§ 26815.) During the waiting period, DOJ conducts a  
5 firearms eligibility background check to ensure the purchaser is not legally prohibited from  
6 possessing firearms. (§ 28220; see *Bauer, supra*, 858 F.3d at p. 1219.) DOJ retains information  
7 regarding the sale or transfer of the firearm in the Automated Firearms System (AFS), a database  
8 maintained by DOJ. (§ 11106.) Generally speaking, AFS contains information about registered  
9 firearms, such as information regarding the person who owns a particular firearm and whether the  
10 firearm is lost, stolen, found, under observation, destroyed, retained for official use, or held in  
11 evidence while a case is pending. (*Ibid.*)

12 In general, an individual purchasing a firearm from a licensed dealer must pay fees,  
13 including a statutory \$19 DROS fee intended to reimburse DOJ for a variety of specified costs, as  
14 discussed further below. (See § 28225; Cal. Code. Regs. Tit. 11, § 4001; see also §§ 28230,  
15 28235 & 28240; *Bauer, supra*, 858 F.3d at p. 1219.) This \$19 fee is at the heart of this case.

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

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

18 The Legislature first authorized DOJ to charge a DROS fee in 1982, and it generally limited  
19 use of the DROS fee to covering the cost of background checks. The relevant statute stated that  
20 “[t]he Department of Justice may charge the dealer a fee which it determines to be sufficient to  
21 reimburse the department for the cost of furnishing this information” (i.e., the personal  
22 information provided by the purchaser of a firearm to DOJ so that it may perform the background  
23 check). (Stats. 1982, ch. 327, § 129, p. 1473; see Decl. of Anthony R. Hakl in Supp. of Defs.’  
24 Mot. for Summ. Adjud. (“Hakl MSA Decl.”), Ex. A.)<sup>2</sup> The Legislature further directed that “[a]ll  
25 money received by [DOJ] pursuant to this section shall be deposited in the Dealers’ Record of  
26 Sale Special Account of the General Fund, which is hereby created, to be available, upon

27 \_\_\_\_\_  
28 <sup>2</sup> Defendants filed this declaration earlier in this case, on June 13, 2017. It appears on the Court’s electronic docket as item number 132.

1 appropriation by the Legislature, for expenditure by [DOJ] to offset the costs incurred pursuant to  
2 this section.” (*Ibid.*) In 1982, DOJ first set the DROS fee at \$2.25. (See Haki MSA Decl., Ex. B  
3 [Bates no. AGIC007].)

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

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

14 Additionally, by this time the Legislature had directed that the amount of the fee “shall not  
15 exceed” the sum of processing costs of DOJ related to the background check along with “the  
16 estimated reasonable costs of the local mental health facilities,” “the costs of the State  
17 Department of Mental Health,” and “the estimated reasonable costs of local public mental  
18 hospitals, sanitariums, and institutions” in complying with the reporting requirements. (Stats.  
19 1990, ch. 1090, § 2, p. 4551.)

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

22 The Legislature first specified the amount of the DROS fee in 1995 when it capped the fee  
23 at \$14.00 (i.e., the amount it had been since 1991), except that it allowed DOJ to increase the fee  
24 by regulation to account for inflation. In particular, as a result of Senate Bill 670 the relevant  
25 statute more closely resembled how it reads today, providing: “The Department of Justice may  
26 charge the dealer a fee not to exceed fourteen dollars (\$14), except that the fee may be increased  
27 at a rate not to exceed any increase in the California Consumer Price Index as compiled and  
28

1 reported by the California Department of Industrial Relations.” (Stats. 1995, ch. 901, § 1, pp.  
2 6883-6884; see Haki MSA Decl. Ex. D.)

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

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

15 The DROS fee remained \$14.00 for about a decade. About 13 years ago, in 2004, DOJ  
16 adopted regulations adjusting the fee to its current amount of \$19.00, based on the California  
17 Consumer Price Index and as permitted by the relevant statute. (See § 28225, subd. (a); *Bauer*,  
18 *supra*, 858 F.3d at p. 1219.) The current \$19 fee is reflected in a regulation that reads as follows:  
19 “As authorized pursuant to sections 28225, 28230 and subdivisions (a) and (b) of section 28240  
20 of the Penal Code, the [DROS] fee is \$19 for one or more firearms (handguns, rifles, shotguns)  
21 transferred at the same time to the same transferee.” (Cal. Code. Regs. tit. 11, § 4001.) Without  
22 the 2004 fee adjustment, the Dealer’s Record of Sale Special Account was projected to run out of  
23 cash to support the former Division of Firearms’ (now Bureau) regulatory and enforcement  
24 programs. (See Haki MSA Decl., Ex. E [Bauer Bates no. AG-00250].)

25 ///

26 ///

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

3           **1. The APPS Program**

4           The Legislature established the Armed Prohibited Persons System in 2001. (§ 30000; see  
5 *Bauer, supra*, 858 F.3d at p. 1219.)<sup>3</sup> That legislation established an electronic system within DOJ  
6 that produces a list of armed prohibited persons<sup>4</sup> by cross-referencing firearms information  
7 databases with other databases containing records regarding persons prohibited from owning  
8 firearms. (§ 30000.) More specifically, on a daily basis the APPS system reconciles AFS – the  
9 database containing sales information retained by DOJ as a result of the DROS process – against  
10 databases housing California’s criminal history, domestic violence restraining orders, wanted  
11 persons, and the On-Line Mental Health Firearms Prohibition Reporting System. (See § 30000,  
12 subd. (a).) Law enforcement officers throughout California can access the APPS list 24 hours a  
13 day, 7 days a week, through the California Law Enforcement Telecommunications System  
14 (CLETS). (See § 30000, subd. (b); see also § 30010 (“The Attorney General shall provide  
15 investigative assistance to local law enforcement agencies to better ensure the investigation of  
16 individuals who are armed and prohibited from possessing a firearm.”) DOJ uses this process to  
17 investigate, disarm, apprehend, and ensure the prosecution of persons who have become  
18 prohibited from firearm possession. (See *Bauer*, 858 F.3d at pp. 1219-1220.)

19           **2. Senate Bill 819**

20           The APPS program went into effect around 2006, at which time APPS was funded through  
21 moneys appropriated from the state’s General Fund. But with the passage of Senate Bill 819 in  
22 2011, the Legislature clarified that the APPS program could be funded with the DROS fees  
23 deposited into the Dealer’s Record of Sale Special Account. (See Assem. Com. on  
24 Appropriations, Analysis of Senate Bill No. 819 (2011–2012 Reg. Sess.) July 6, 2011; Sen. Com.

25           <sup>3</sup> Section 30000 was formerly codified as § 12010 (Added by Stats. 2001, c. 944  
26 (S.B.950), § 2. Amended by Stats. 2004, c. 593 (S.B.1797), § 4).

27           <sup>4</sup> In general, prohibited persons are those who have been convicted of a felony or a violent  
28 misdemeanor, are subject to a domestic violence restraining order, or have been involuntarily  
committed for mental health care. (§ 30005.)

1 on Public Safety, Analysis of Senate Bill No. 819 (2011–2012 Reg. Sess.) April 26, 2011.<sup>5</sup>) As  
2 the Legislative Counsel’s digest explained at the time:

3 Existing law authorizes the Department of Justice to require a firearms dealer to  
4 charge each firearm purchaser a fee, as specified, to fund various specified costs in  
5 connection with, among other things, a background check of the purchaser, and to  
6 fund the costs associated with the department’s firearms-related regulatory and  
7 enforcement activities related to the sale, purchase, loan, or transfer of firearms. The  
8 bill would make related legislative findings and declarations.

9 This bill would also authorize using those charges to fund the [DOJ’s] firearms-  
10 related regulatory and enforcement activities related to the possession of firearms, as  
11 specified.

12 (Senate Bill 819 (Leno), Stats. 2011, 743 (Leg. Counsel’s digest).)<sup>6</sup>

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

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

20 (§ 28225, subd. (b)(11).) As a result of SB 819, that provision now states:

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

24 (§ 28225, subd. (b)(11), italics added.)

25 Section 28225 has not been substantively amended since SB 819. Currently,  
26 subdivision (a) continues to allow DOJ to require firearms dealers to charge each firearm

27 <sup>5</sup> These analyses appear as Exhibits F and G to the Haki MSA Declaration. Legislative  
28 committee reports and analyses, including statements pertaining to a bill’s purpose, are properly  
the subject of judicial notice. (*Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d  
456, 465, fn. 7.)

<sup>6</sup> This Legislative Counsel’s digest appears as Exhibit H to the Haki MSA Declaration.  
“Although the Legislative Counsel’s summary digests are not binding, they are entitled to great  
weight.” (*Van Horn v. Watson* (2008) 45 Cal.4th 322, 332 fn. 11; *accord Jones v. Lodge at  
Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1170.) The Legislative Counsel’s digest  
“constitutes the official summary of the legal effect of the bill and is relied upon by the  
Legislature throughout the legislative process,” and thus “is recognized as a primary indication of  
legislative intent.” (*Souvannarath v. Hadden* (2002) 95 Cal.App.4th 1115, 1126 fn. 9.)

1 purchaser “a fee not to exceed fourteen dollars (\$14),” subject to increases to account for  
2 inflation. (§ 28225, subd. (a).) Subdivision (b) continues to read that “[t]he fee under  
3 subdivision (a) shall be no more than is necessary to fund the following,” and it goes on to list  
4 eleven different cost categories. (*Id.*, subd. (b).) Subdivision (c) states that the DROS fee “shall  
5 not exceed the sum of” those costs. (*Id.*, subd. (c).) And with respect to all but one of those  
6 categories the statute specifies those costs as “estimated reasonable costs.”<sup>7</sup> (*Ibid.*)

### 7                   **3. Senate Bill 140**

8           In 2013, the Legislature passed Senate Bill 140, a bill making a one-time appropriation of  
9 \$24 million from the DROS Special Account to DOJ to address a growing backlog in APPS  
10 cases. (Senate Bill 140 (Leno), Stats. 2013, Ch. 2; see Haki MSA Decl., Ex. I.) The Legislature  
11 added to the Penal Code section 30015, which provides, in relevant part:

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

15 (§ 30015, subd. (a).)

## 16           **II. RELEVANT PROCEDURAL HISTORY**

17           This case has been before the Court on numerous occasions, although this is the first matter  
18 to come on for hearing since the case was reassigned from the Honorable Michael P. Kenny to the  
19 Honorable Richard K. Sueyoshi. Accordingly, defendants offer a somewhat detailed procedural  
20 history below.

### 21                   **A. Plaintiffs File Their Petition and Complaint**

22           Plaintiffs initiated this action for a writ of mandate and declaratory relief on October 16,  
23 2013. The plaintiffs include a firearms rights advocacy group called the Calguns Shooting Sports  
24 Association, and four individuals.

25           As mentioned above, the defendants include Xavier Becerra, the Attorney General of the  
26 State of California, and Stephen Lindley, Director of the California Department of Justice Bureau

27 \_\_\_\_\_  
28 <sup>7</sup> For convenience, a copy of the complete text of section 28225 is attached as Appendix A  
to this brief.

1 of Firearms. The Attorney General and Lindley are generally responsible for the enforcement of  
2 a number of state laws regarding the manufacture, sale, purchase, ownership, possession, loan,  
3 and transfer of firearms, including laws related to the DROS fee and APPS.

4 The defendants also include the State Controller, Betty Yee.

5 **B. The Court Grants Defendants' Motion for Judgment on the Pleadings and**  
6 **Dismisses Plaintiffs' Proposition 26 Claim**

7 By order filed July 20, 2015, the Court granted defendants' motion for judgment on the  
8 pleadings on plaintiffs' claim that SB 140 is an unlawful appropriation because SB 819 violates  
9 Proposition 26, the 2010 measure that amended article XIII A, section 3, subdivision (a) of the  
10 California Constitution. Proposition 26 amended that provision to read, in relevant part: "Any  
11 change in state statute which results in any taxpayer paying a higher tax must be imposed by an  
12 act passed by not less than two-thirds of all members elected to each of the two houses of the  
13 Legislature[.]" As Judge Kenny would explain, in their motion for judgment on the pleadings  
14 "Respondents successfully argued that SB 819 did not result in anyone paying a *higher* tax. This  
15 was because, prior to the enactment of SB 819, firearms purchasers paid a DROS fee of \$19.00,  
16 which remained the same after the passage of SB 819. The language of Article XIII A, section 3,  
17 subdivision (a) was only concerned with the taxpayer paying a higher tax, and not with how the  
18 tax was being used, consequently the failure of SB 819 to raise the DROS fee amount was fatal to  
19 Petitioners' claims." (Order Re: Plaintiffs' Motion for Leave to File First Amended Complaint  
20 filed Dec. 23, 2015, Exh. A at p. 2, italics in original.)

21 **C. The Court Grants Plaintiffs' Motion for Leave to Amend the Complaint**

22 After the Court dismissed the Proposition 26 claim, plaintiffs move to amend the pleadings  
23 to add new theories that SB 819 is an unlawful tax. In particular, plaintiffs sought to add the three  
24 causes of action that are central to what remains of their case, the claims that SB 819 is an  
25 unlawful tax under certain provisions of article XIII of the California Constitution (i.e., the sixth,  
26 seventh, and eighth causes of action).

27 Plaintiffs also sought to add a declaratory relief claim regarding the meaning of the word  
28 "possession," which SB 819 added to section 28225, subdivision (b)(11) (i.e., the ninth cause of



1 action). Plaintiffs claimed that when the Legislature amended the DROS fee statute to include the  
2 costs of enforcement activities related to firearms “possession,” the Legislature intended to limit  
3 the scope of those activities specifically to APPS-based law enforcement activities, as opposed to  
4 any other firearms possession law enforcement activities.

5 By order filed December 23, 2015, the Court granted plaintiffs’ motion for leave to file a  
6 first amended complaint.

7 **D. The Court Grants Plaintiffs’ Motion for Summary Adjudication on the**  
8 **Fifth and Ninth Causes of Action**

9 At the suggestion of the Court, the parties agreed to bifurcate the resolution of plaintiffs’  
10 causes of action. Specifically, the parties agreed to resolve the tax causes of action (i.e., the sixth,  
11 seventh, and eighth causes of action) after the resolution of the fifth and ninth causes of action,  
12 which concerned the DOJ’s calculation of the amount of the DROS fee and the meaning of the  
13 word “possession” in section 28225, subdivision (b)(11), respectively.

14 On August 9, 2017, the Court granted plaintiffs’ motion for adjudication of the fifth and  
15 ninth causes of action. (Ruling on Submitted Matter: Motions for Adjudication of Plaintiffs’  
16 Fifth and Ninth Causes of Action filed Aug. 9, 2017.) Regarding the calculation of the amount of  
17 the DROS fee, the Court found that DOJ had not recently discharged its ministerial duty to  
18 determine the “amount necessary to fund” the activities enumerated in subdivisions (b)(1)  
19 through (11) of section 28225 and to charge the DROS fee only at that amount. (*Id.* at p. 8.)  
20 Regarding the “possession” issue, the Court agreed with plaintiffs that “‘possession’ as used in  
21 section 28225, subdivision (b)(11) is limited to APPS-based activities.” (*Id.* at p. 10.) The Court,  
22 however, did not issue any writ or award any other relief following the motion for adjudication.

23 **E. Plaintiffs Conduct Extensive Discovery**

24 In light of plaintiffs’ request in their opening brief to amend their complaint yet again, it is  
25 worth cataloging the amount of discovery plaintiffs have conducted since they filed suit. With  
26 respect to the DOJ defendants, this has included Requests for Admissions (“RFA”), including 214  
27 requests; Form Interrogatories, including Interrogatories 15.1 and 17.1 (i.e., effectively hundreds  
28

1 of additional requests);<sup>8</sup> Special Interrogatories, including 53 interrogatories; and Requests for  
2 Production of Documents, including 106 requests.

3 Plaintiffs also have deposed those persons with considerable knowledge of the Bureau of  
4 Firearms, the Department's budget and finances, and the Department's work in connection with  
5 SB 819. These individuals include defendant Stephen Lindley, the Director of the Department's  
6 Bureau of Firearms; David Harper, the Deputy Director of the Department's Division of  
7 Administrative Support; and Jessica Devencenzi, the former Deputy Attorney General assigned to  
8 the Department's Office of Legislative Affairs and SB 819.

9 With respect to the Controller, discovery has included Special Interrogatories, including 7  
10 interrogatories; and Requests for Production of Documents, including 20 requests.

11 Finally, in the related federal case challenging the expenditure of DROS fee monies on the  
12 APPS program on Second Amendment grounds, discussed below, plaintiffs also served a  
13 significant amount of discovery, including approximately 73 Special Interrogatories; 74 Requests  
14 for Production of Documents; and 42 Requests for Admissions. They also deposed defendant  
15 Lindley.

16 **F. Judgment is Entered in Favor of the Attorney General in the Related**  
17 **Federal Case *Bauer v. Becerra*, and it is affirmed by the Ninth Circuit**

18 The related federal case mentioned above is *Bauer v. Becerra*, a case filed in the United  
19 States District Court for the Eastern District of California. There, a similar group of plaintiffs,  
20 represented by the same counsel as in this case, sued the Attorney General and the Chief of the  
21 Bureau of Firearms, arguing that the Second Amendment prohibits them from expending the  
22 revenues of the \$19.00 DROS fee on the Armed Prohibited Persons System ("APPS") program.  
23 The district court rejected all of plaintiffs' federal constitutional claims on the merits, granting  
24 defendants' motion for summary judgment in its entirety. (See *Bauer, et al. vs. Harris, et al.*,  
25 Case No. 1:11-cv-01440-LJO-MJS (E.D. Cal.) [Memo. Decision & Order filed March 2, 2015].)

26 <sup>8</sup> Interrogatory 15.1 generally calls for an explanation of all of the "Denials and Special or  
27 Affirmative Defenses" in defendants' answer and Interrogatory 17.1 requires the responding party  
28 to explain each and every denial to any request for admission, which in this case includes  
214 such requests.

1 The Ninth Circuit affirmed in a published decision, concluding that “California’s use of the  
2 DROS fee to fund the APPS program” survives constitutional scrutiny. (See *Bauer v. Becerra*,  
3 858 F.3d 1216, 1218 (9th Cir. 2017).)

## 4 ARGUMENT

### 5 I. PLAINTIFFS’ CLAIM THAT THE DROS FEE IS AN UNLAWFUL TAX IS BARRED BY 6 THE DOCTRINE OF RES JUDICATA

7 This Court need not even address plaintiffs’ latest arguments that the DROS fee is an  
8 unlawful tax, because that claim is precluded by the rules of res judicata. “Res judicata’  
9 describes the preclusive effect of a final judgment on the merits. Res judicata, or claim  
10 preclusion, prevents relitigation of the same cause of action in a second suit between the same  
11 parties or parties in privity with them. Collateral estoppel, or issue preclusion, ‘precludes  
12 relitigation of issues argued and decided in prior proceedings.’ [Citation.] Under the doctrine of  
13 res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not  
14 be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further  
15 litigation of the same cause of action.” (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888,  
16 896-897; see *Louie v. BFS Retail & Commercial Operations, LLC* (2009) 178 Cal.App.4th 1544  
17 [“Under federal and California law, res judicata generally precludes parties or their privies from  
18 litigating in a second lawsuit issues that were or could have been litigated in a prior suit.  
19 [Citations.]”])

20 Claim preclusion applies here. It “prevents relitigation of the same cause of action in a  
21 second suit between the same parties or parties in privity with them. [Citation.] Claim preclusion  
22 arises if a second suit involves: (1) the same cause of action (2) between the same parties (3) after  
23 a final judgment on the merits in the first suit. [Citation.] If claim preclusion is established, it  
24 operates to bar relitigation of the claim altogether.” (*DKN Holdings LLC v. Faerber* (2015), 61  
25 Cal.4th 813, 824, italics in original.) As explained below, all of these requirements are met here.

#### 26 A. *Gentry v. Becerra* Involves the Same Cause of Action as *Bauer v. Becerra*

27 “Whenever a judgment in one action is raised as a bar to a later action under [claim  
28 preclusion], the key issue is whether the same cause of action is involved in both suits. California

1 law approaches the issue by focusing on the ‘primary right’ at stake: if two actions involve the  
2 same injury to the plaintiff and the same wrong by the defendant then the same primary right is at  
3 stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different  
4 forms of relief and/or adds new facts supporting recovery.” (*Cal Sierra Dev., Inc. v. George*  
5 *Reed, Inc.* (2017) 14 Cal.App.5th 663, 675, quoting *Eichman v. Fotomat Corp.* (1983) 147  
6 Cal.App.3d 1170, 1174, italics added.)

7 “Under the ‘primary rights’ theory adhered to in California, there is only a single cause of  
8 action for the invasion of one primary right and the harm suffered is the significant factor. A  
9 primary right is the right to be free of a particular injury. ‘The cause of action is the right to  
10 obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory  
11 (common law or statutory) advanced.’” (*Cal Sierra Dev., supra*, 14 Cal.App.5th at pp. 675–76.)

12 Finally, federal courts follow a different rule when analyzing the identity of a claim for  
13 purposes of res judicata. However, when “an action is filed in a California state court and the  
14 defendant claims the suit is barred by a final federal judgment, California law will determine the  
15 res judicata effect of the prior federal court judgment on the basis of whether the federal and state  
16 actions involve the same primary right.” (*Gamble v. Gen. Foods Corp.*, 229 Cal. App. 3d 893,  
17 898, citing *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954–955.)

18 *Bauer* involved the same cause of action as in *Gentry*. In *Bauer*, the Ninth Circuit  
19 considered whether California’s allocation of a portion of the DROS fee on the APPS program  
20 (i.e., “to fund enforcement efforts against illegal firearm purchasers”) violated the Second  
21 Amendment. (*Bauer, supra*, 858 F.3d at p. 1218.) In particular, plaintiffs challenged the DROS  
22 fee as an unconstitutional tax under two seminal United States Supreme Court cases: *Cox v. New*  
23 *Hampshire*, 312 U.S. 569 (1941), in which permit and fee requirements for parades and public  
24 rallies were upheld, and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), in which license and fee  
25 requirements for solicitors were struck down. (*Bauer, supra*, 858 F.3d at p. 1225.) “In *Cox*, the  
26 Supreme Court explained that a fee imposed on the exercise of a constitutional right must not be a  
27 general ‘revenue tax,’ but such a fee is lawful if it is instead designed ‘to meet the expense  
28 incident to the administration of the act and to the maintenance of public order in the matter

1 licensed.’ [Citation.] The Court reiterated this principle in *Murdock*, striking down the licensing  
2 fee in that case because it was ‘not a nominal fee imposed as a regulatory measure to defray the  
3 expenses of policing the activities in question.’ [Citation.]” (*Bauer, supra*, 858 F.3d at p. 1225.)  
4 The Ninth Circuit explained Bauer’s contention as follows: “Because a tax on a constitutional  
5 right may not be used to raise general revenue, [Citation], Bauer contends that the DROS fee may  
6 not exceed the ‘actual costs’ of processing a license or similar direct administrative costs.” (*Id.* at  
7 pp. 1225–26.)

8 Plaintiffs here similarly challenge the DROS fee as an unconstitutional tax, advancing a  
9 theory under the California Constitution (i.e., article XIII), as opposed to the United States  
10 Constitution. As plaintiffs allege in the first amended complaint: “By expanding the activities  
11 for which DROS Fee revenues can be used to include regulating the ‘possession’ of firearms, and  
12 thereby increasing the activities the DROS Fee payer is responsible to finance, SB 819 constitutes  
13 ‘a levy, charge, or exaction’ that the law presumes is a tax.” (First Am. Compl. para. 9; see *id.*  
14 para. 25 [“CGSSA brings this action on behalf of itself and its supporters in California who have  
15 been, are being, and will in the future be required to pay excessive DROS Fees that are used  
16 unlawfully by Defendants-Respondents for purposes other than the DROS program.”]) Just like  
17 in *Bauer*, plaintiffs claim that “the current amount of the DROS Fee exceeds DOJ Defendants’  
18 actual costs for lawfully administering the DROS program.” (First Am. Compl. para. 97.)<sup>9</sup>

19 As is apparent from the above comparison, the causes of action advanced by plaintiffs in  
20 both *Bauer* and *Gentry* concern the same legal wrong and injury—requiring payment of the  
21 \$19.00 DROS fee even though fee revenues are used to fund, according to plaintiffs,  
22 impermissible costs (i.e., the APPS program). Thus, the claims are “simply alternative legal  
23 theories for the invasion of a single primary right.” (*Cal Sierra Dev., supra*, 14 Cal.App.5th at  
24 p. 676, citing *Rancho Viejo v. Tres Amigos Viejos* (2002) 100 Cal.App.4th 550, 562, fn. 6.) That

25  
26 <sup>9</sup> If there is any doubt, and there should be none, that the causes of action are the same for  
27 res judicata purposes, consider the initial complaint in *Bauer*, where plaintiffs alleged a theory  
28 that the DROS fee was an unlawful tax under Article XIII A of the California Constitution (i.e.,  
Proposition 13). (See Hakl Opp’n Decl., Exh. A at p. 36.) Plaintiffs eventually dropped that  
claim (see *id.* Exh. B), but their inclusion of it at one point in the *Bauer* litigation further  
demonstrates that all of the “unlawful tax” issues could have been litigated in the prior suit.

1 primary right is the right to be free from unlawful taxes in connection with firearms purchases.  
2 (See First Am. Compl. para. [“The interests CGSSA seeks to protect . . . include being free from  
3 unlawful taxes imposed on law-abiding firearm purchasers”].)

4 Because the relevant causes of action advanced in *Bauer* and *Gentry* are the same, the first  
5 requirement of claim preclusion is satisfied.

6 **B. *Gentry v. Becerra* Involves Parties in Privity with the Parties in *Bauer v.*  
7 *Becerra***

8 Claim preclusion “bars a subsequent action on the same claim between, not only parties to  
9 the first action, but also their privies[.]” (*Cal Sierra Dev., Inc. v. George Reed, Inc.* (2017) 14  
10 Cal.App.5th 663, 672, quoting *Rice v. Crow* (2000) 81 Cal.App.4th 725, 735.) “Under the  
11 requirement of privity, only parties to the former judgment or their privies may take advantage of  
12 or be bound by it. A party in this connection is one who is directly interested in the subject  
13 matter, and had a right to make defense, or to control the proceeding, and to appeal from the  
14 judgment. A privy is one who, after rendition of the judgment, has acquired an interest in the  
15 subject matter affected by the judgment through or under one of the parties, as by inheritance,  
16 succession, or purchase.” (*Id.*, quoting *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 811,  
17 internal citations and quotations omitted.)

18 “[T]o maintain the stability of judgments, insure expeditious trials, prevent vexatious  
19 litigation, and to serve the ends of justice, courts are expanding the concept of privity beyond the  
20 classical definition to relationships sufficiently close to afford application of the principle of  
21 preclusion. As applied to questions of preclusion, privity requires the sharing of an identity or  
22 community of interest, with adequate representation of that interest in the first suit, and  
23 circumstances such that the nonparty should reasonably have expected to be bound by the first  
24 suit. (*Cal Sierra Dev.*, 14 Cal.App.5th at p. 672, quoting *DKN Holdings, supra*, 61 Cal.4th at p.  
25 826, internal citations and quotations omitted.)

26 Additionally, “[p]rivity is not susceptible of a neat definition, and determination of whether  
27 it exists is not a cut-and-dried exercise. . . . Whether someone is in privity with the actual parties  
28 requires close examination of the circumstances of each case.” (*Citizens for Open Access to Sand*

1 & *Tide, Inc. v. Seadrift Ass'n* (1998) 60 Cal.App.4th 1053, 1070, internal citations and quotations  
2 omitted.)

3 Here, the plaintiffs in *Gentry* are in privity with the plaintiffs in *Bauer*. First, the plaintiffs  
4 in both actions are represented by the same law firm, Michel & Associates, P.C. For the most  
5 part, the *same attorneys* within the firm handled both cases. (Compare *Bauer, et al. vs. Harris, et*  
6 *al.*, Case No. 1:11-cv-01440-LJO-MJS (E.D. Cal.) [Second Amended Complaint for Declaratory  
7 and Injunctive Relief filed July 24, 2013] [identifying Michel & Associates, P.C. as Attorneys for  
8 Plaintiffs, with C.D. Michel and Sean A. Brady listed as attorneys] with FAC filed Dec. 30, 2015  
9 [same, with Scott M. Franklin also listed].) Plaintiffs' counsel currently before this Court, Mr.  
10 Franklin, participated in both actions. For example, he conducted the deposition of Defendant  
11 Lindley in the *Bauer* litigation, and he conducted the deposition of Defendant Lindley (and  
12 others) in the *Gentry* litigation. (See Tr. of Depo. of Stephen Lindley dated Feb. 21, 2014  
13 (*Bauer*) and Tr. of Depo. of Stephen Lindley dated May 24, 2017 (*Gentry*).)<sup>10</sup> To be sure, the  
14 same counsel's representation of different plaintiffs in successive actions is a factor this Court  
15 should consider in determining privity.<sup>11</sup> (*Alvarez v. May Dep't Stores Co.* (2006) 143  
16 Cal.App.4th 1223, 1238 [finding privity where plaintiffs' counsel were the same].)

17 Second, the record indicates that the plaintiffs in *Gentry* worked in cooperation with the  
18 plaintiffs in *Bauer*. In particular, in their Requests for Production of Documents the *Gentry*  
19 plaintiffs routinely demanded the production of certain documents with the express indication that  
20 they did not need any of the documents that the Attorney General had already produced to the  
21 *Bauer* plaintiffs. (See, e.g., Plaintiffs' Requests for Production of Documents (Set One) (May 14,

22  
23 <sup>10</sup> The cover pages and appearances of counsel pages from these transcripts are attached as  
24 Exhibit D to the Declaration of Anthony Hakl in Supp. of Defs.' Opp'n Brief ("Hakl Opp'n  
Decl.")

25 <sup>11</sup> The involvement of Michel & Associates in both cases, and its strong connections to  
26 groups like the NRA and CGSSA, is not surprising. The firm is very well known in firearms law  
27 circles. Among other things, C.D. "Chuck" Michel has been described as "California's  
28 Triggerman" due to his firm being contract counsel for the NRA's California affiliate. (See  
<https://www.ammoland.com/2015/02/californias-triggerman-chuck-michel/#axzz571CPByf4> [as  
of Feb. 13, 2018], attached as Exhibit E to the Hakl Opp'n Decl.)

1 2014) at p. 3; Plaintiffs' Requests for Production of Documents (Set Four) (Aug. 31, 2016) at p.  
2 3; see Haki Opp'n Decl. Exh. F.) Obviously, the *Gentry* plaintiffs qualified their demands in this  
3 way because they had access to all of the discovery in the possession of the *Bauer* plaintiffs. It is  
4 also worth noting that the *Bauer* and *Gentry* plaintiffs – represented by the same attorneys –  
5 litigated their cases concurrently for a period of more than a year (i.e., approximately 15 months).  
6 The plaintiffs initiated *Bauer* on August 25, 2011, with judgment being entered on March 2,  
7 2015.<sup>12</sup> Plaintiffs initiated *Gentry* on October 16, 2013.

8 Finally, it cannot reasonably be questioned that the lead organizational plaintiff in *Bauer v.*  
9 *Becerra*, the National Rifle Association (NRA), and the lead organizational plaintiff in *Gentry v.*  
10 *Becerra*, the Calguns Shooting Sports Association (CGSSA), maintain a relationship of privity as  
11 a practical matter, especially when it comes to lobbying, litigating, and generally advocating to  
12 promote firearms rights. For example, the Calguns Shooting Sports Association is one of the  
13 NRA Members' Councils of California.<sup>13</sup> The NRA describes its Members Council, which  
14 includes Calguns Shooting Sports Association, as "California's ORIGINAL Grassroots Gun  
15 Lobby."<sup>14</sup> The NRA Members Council maintains a "California Alert System," which hosts  
16 messages "from our friends at the Calguns Shooting Sports Association."<sup>15</sup> CGSSA also  
17 publishes political action "alerts" from the NRA, urging CGSSA members to attend city council  
18  
19  
20

21 <sup>12</sup> A copy of the civil docket for *Bauer* is attached as Exhibit G to the Haki Opp'n Decl.

22 <sup>13</sup> (See [https://nramemberscouncils.com/directory/listing/calguns-shooting-sports-association?tab=related&view=grid&category=0&center=0%2C0&zoom=15&is\\_mile=1&directory\\_radius=20&sort=distance&p=7#sabai-inline-content-related](https://nramemberscouncils.com/directory/listing/calguns-shooting-sports-association?tab=related&view=grid&category=0&center=0%2C0&zoom=15&is_mile=1&directory_radius=20&sort=distance&p=7#sabai-inline-content-related) [as of Feb. 13, 2018], attached as Exhibit H to the Haki Opp'n Decl.)

24 <sup>14</sup> (See <http://nramemberscouncils.com/directories/MC-directory/> [as of Feb. 13, 2018], attached as Exhibit I to the Haki Opp'n Decl.)

26 <sup>15</sup> (See <http://myemail.constantcontact.com/CALIFORNIA-ALERT-SYSTEM-----CALGUNS-GLOCK-CHALLENGE-II-.html?soid=1103432343344&aid=Chv1PODTq3U> [as of Feb. 13, 2018], attached as Exhibit J to the Haki Opp'n Decl.) This particular alert included an advertisement for Michel and Associates, P.C. (See *id.* at p. 4.)



1 meetings and speak against firearms regulations, for example.<sup>16</sup> The President of CGSSA is even  
2 a NRA Instructor,<sup>17</sup> which means that the NRA has provided him with specialized training.<sup>18</sup>

3 Considering all of the circumstances of this particular case, the Court should conclude that  
4 the Gentry plaintiffs are in privity with the Bauer plaintiffs for the purposes of res judicata.

5 **C. *Bauer v. Becerra* was litigated to a final judgment on the merits**

6 “The third requirement of claim preclusion is a final judgment on the merits in the first  
7 action.” (*Cal Sierra Dev., supra*, 14 Cal.App.5th at p. 678, citing *DKN Holdings, supra*, 61  
8 Cal.4th at p. 824.) In federal court, where the parties litigated *Bauer*, the rule is that “a judgment  
9 once rendered is final for purposes of res judicata until reversed on appeal, modified or set aside  
10 in the court of rendition.[ ] (*Calhoun v. Franchise Tax Bd.* (1978) 20 Cal.3d 881, 887.)”  
11 (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954, fn. 11, disapproved on another ground in *White*  
12 *v. Ultramar* (1999) 21 Cal.4th 563, 575.) Thus, the federal judgment in the Attorney General’s  
13 favor was a final judgment for purposes of claim preclusion until reversed on appeal, and there  
14 has been no such reversal.

15 The judgment in *Bauer* was also on the merits. The substance of the claim (i.e., whether  
16 using DROS fee revenues to fund the APPS program amounts to an unlawful tax) was tried and  
17 determined by way of summary judgment. (*Burdette v. Carrier Corp.* (2008) 158 Cal.App.4th  
18 1668, 1682, as modified on denial of reh’g (Feb. 14, 2008), citing *Johnson v. City of Loma Linda*  
19 (2000) 24 Cal.4th 61, 77, 99.)

20 Accordingly, there is no question that *Bauer* was litigated to a final judgment on the merits.  
21 And all of the requirements of res judicata having been satisfied, this Court should reject the  
22 remaining causes of action in this case and enter judgment in favor of defendants.

23 \_\_\_\_\_  
24 <sup>16</sup> (See <https://www.facebook.com/calguns/posts/402605069824860> [as of Feb. 13, 2018],  
attached as Exhibit K to the Hakl Opp’n Decl.)

25 <sup>17</sup> (See <http://cgssa.org/about-us/> [as of Feb. 13, 2018], attached as Exhibit L to the Hakl  
26 Opp’n Decl.)

27 <sup>18</sup> (See <https://firearmtraining.nra.org/become-an-instructor/> [as of Feb. 13, 2018],  
28 attached as Exhibit M to the Hakl Opp’n Decl.)

1     **II.    THE DROS FEE IS A VALID REGULATORY FEE**

2           Even if plaintiffs were permitted to re-litigate issues that should have been argued and  
3     decided in *Bauer*, the record demonstrates that the DROS fee is a valid regulatory fee. As  
4     mentioned, plaintiffs argue that the DROS fee is a tax, and that it is invalid under the  
5     requirements applicable to taxes set forth in article XIII, sections 1(b), 2, and 3(m) of the  
6     California Constitution. As explained below, however, the DROS fee is not a tax. Thus, the  
7     provisions of article XIII do not apply.

8           The California Supreme Court has explained that the word “‘tax’ has no fixed meaning, and  
9     that the distinction between taxes and fees is frequently ‘blurred,’ taking on different meanings in  
10    different contexts. [Citations.]” (*California Farm Bureau Federation v. State Water Resources*  
11    *Control Bd.* (2011) 51 Cal. 4th 421, 437 (*California Farm Bureau*), quoting *Sinclair Paint Co. v.*  
12    *State Bd. of Equalization* (1997) 15 Cal.4th 866, 874 (*Sinclair Paint*)). “Ordinarily taxes are  
13    imposed for revenue purposes and not ‘in return for a specific benefit conferred or privilege  
14    granted. [Citations.] Most taxes are compulsory rather than imposed in response to a voluntary  
15    decision to develop or to seek other government benefits or privileges. [Citations.]” (*Ibid.*)  
16    Nevertheless, even “compulsory fees may be deemed legitimate fees rather than taxes.  
17    [Citation.]” (*Ibid.*)

18           A fee, on the other hand, “may be charged by a government entity so long as it does not  
19    exceed the reasonable cost of providing services necessary to regulate the activity for which the  
20    fee is charged. A valid fee may not be imposed for unrelated revenue purposes.” (*California*  
21    *Farm Bureau, supra*, 51 Cal.4th at p. 437, citing *Sinclair Paint, supra*, 15 Cal.4th at p. 876.)

22           “The scope of a regulatory fee is somewhat flexible and is related to the overall purposes of  
23    the regulatory governmental action.” (*California Farm Bureau, supra*, 51 Cal.4th at p. 438.) “A  
24    regulatory fee may be imposed under the police power when the fee constitutes an amount  
25    necessary to carry out the purposes and provisions of the regulation.’ [Citation.] ‘Such costs  
26    . . . include all those incident to the issuance of the license or permit, investigation, inspection,  
27    administration, maintenance of a system of supervision and enforcement.’ [Citation.] Regulatory  
28    fees are valid despite the absence of any perceived ‘benefit’ accruing to the fee payers.

1 [Citation.] Legislators ‘need only apply sound judgment and consider “probabilities according to  
2 the best honest viewpoint of informed officials” in determining the amount of the regulatory fee.’  
3 [Citation.]” (*Id.*, quoting *California Assn. of Prof. Scientists v. Department of Fish & Game*  
4 (2000) 79 Cal.App.4th 935, 945 (*Prof. Scientists*)).

5 While it is not the case here, the Supreme Court has also explained that “[s]imply because  
6 a fee exceeds the reasonable cost of providing the service or regulatory activity for which it is  
7 charged does not transform it into a tax.” (*California Farm Bureau, supra*, 51 Cal.4th at p. 438,  
8 quoting *Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 700.) “A  
9 regulatory fee does not become a tax simply because the fee may be disproportionate to the  
10 service rendered to individual payers.” (*Id.*, citing *Brydon v. East Bay Mun. Utility Dist.* (1994)  
11 24 Cal.App.4th 178, 194.) “The question of proportionality is not measured on an individual  
12 basis. Rather, it is measured collectively, considering all rate payors.” (*Id.*, citing *Prof. Scientists,*  
13 *supra*, 79 Cal.App.4th at p. 948.)

14 Finally, “permissible fees must be related to the overall cost of the governmental regulation.  
15 They need not be finely calibrated to the precise benefit each individual fee payor might derive.  
16 What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used  
17 for general revenue collection. An excessive fee that is used to generate general revenue becomes  
18 a tax.” (*California Farm Bureau, supra*, 51 Cal.4th at p. 438.)<sup>19</sup>

19 **A. The Relevant Statutory Language Demonstrates That the DROS Fee Is a**  
20 **Valid Regulatory Fee**

21 In *California Farm Bureau, supra*, 51 Cal.4th at p. 446, the California Supreme Court  
22 upheld the state’s water right statutes (e.g., Water Code sections 1525, 1551, and 1552) imposing  
23 annual fees on those who hold permits and licenses to appropriate water. The Court’s analysis

24 <sup>19</sup> While it touches on some of the relevant concepts, plaintiffs’ proposed two-prong  
25 framework for “distinguishing taxes from regulatory fees” (see Pls.’ Opening Trial Brief at pp.  
26 14-16) ultimately misses the mark. In fact, the case outlining that approach that plaintiffs urge  
27 this Court to follow (*see id.* at p. 16) expressly indicates that it applies to determining whether a  
28 fee is a “special tax” under Proposition 13 (i.e., article XIII A). *San Diego Gas & Electric Co. v.*  
*San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1146 [finding that  
emissions-based formula for recovering direct and indirect costs of pollution emission permit was  
not a prohibited “special tax” under Proposition 13]; *see also Sinclair Paint Co., supra*, 15  
Cal.4th at p. 878 [Proposition 13 “special tax” case].) The issue in this case is not whether the  
DROS fee is a “special tax” under Proposition 13.

1 involved “[r]eference to the statutory language,” which the Court explained “reveal[ed] a specific  
2 intention to” impose a regulatory fee. (*California Farm Bureau*, 51 Cal.4th at p. 438.) The  
3 DROS fee statute, section 28225, also reveals a specific legislative intention to impose a  
4 regulatory fee.

5 More specifically, just like the statute in *California Farm Bureau*, “[b]y its terms, [section  
6 28225] permits the imposition of [a fee] only for the costs of the functions or activities described,  
7 and not for general revenue purposes.” (*California Farm Bureau, supra*, 51 Cal.4th at p. 438.)  
8 Section 28225 “carefully sets out that the fee[] imposed shall relate to costs linked to” the eleven  
9 categories set forth in subdivision (b)(1) through (11), and it “lists the recoverable costs in some  
10 detail.” (*Ibid.*; see § 28225, subd. (b)(1)-(11).) Just like the water right statutes in *California*  
11 *Farm Bureau* “direct[ed] that the fees collected be deposited in the Water Rights Fund, not in the  
12 General Fund” (51 Cal.4th at p. 438), the Legislature has specifically directed that “[a]ll moneys  
13 received by [DOJ] pursuant to [the DROS fee statute] shall be deposited in the Dealers’ Record of  
14 Sale Special Account of the General Fund, which is hereby created, to be available, upon  
15 appropriation by the Legislature, for expenditure by [DOJ] to offset the costs incurred pursuant to  
16 [the statute].” (§ 28235.) And just like the water rights statutes considered by the Supreme  
17 Court, the DROS fee statutory framework “describes the purposes for which the money in the  
18 [Dealers’ Record of Sale Special Account] may be expended.” (51 Cal.4th at p. 439.)<sup>20</sup>

19 Also similar to the fee statute considered in *California Farm Bureau*, the DROS fee statute  
20 provides that the DROS fee “shall be no more than is necessary to fund the following,” and it list  
21 eleven categories of allowable costs. (§ 28225, subd. (b); see *California Farm Bureau, supra*, 51  
22 Cal.4th at pp. 439-440.) The next subdivision states that the DROS fee “shall not exceed the sum  
23 of” those costs. (§ 28225, subd. (c).) And with respect to all but one of those categories the

24  
25 <sup>20</sup> Moreover, and despite plaintiffs’ suggestions to the contrary, it cannot be argued that  
26 the DROS fee is excessive just because it is one of “a variety of revenues to be deposited in the  
27 [Dealers’ Record of Sale Special Account].” (*California Farm Bureau, supra*, 51 Cal.4th at p.  
28 439.) Nor does it matter what amount or portion of Dealers’ Record of Sale Special Account  
revenues are expended on one authorized program as opposed to another. Nothing in the  
statutory framework “describe[s] how the various revenues deposited in the [Dealers’ Record of  
Sale Special Account] should be allocated.” (*Ibid.*)

1 statute specifies those costs as “estimated reasonable costs.” (*Ibid.*) Like the situation in  
2 *California Farm Bureau*, this language also allows DOJ to adjust the amount of the DROS fee as  
3 needed. (51 Cal.4th at p. 440.)

4 In sum, like the fees upheld in *California Farm Bureau*, the DROS fee authorized by  
5 section 28225 is “linked to the activities” that DOJ and other specified agencies perform. (*Ibid.*)  
6 Thus, it is hardly a tax, and it is not subject to the requirements of article XIII.<sup>21</sup>

7 **B. There Is a Reasonable Relationship Between the Assessment of the DROS**  
8 **Fee and the Costs of the Firearms Regulatory Activities**

9 Like the plaintiffs here, the plaintiffs in *California Farm Bureau* claimed that the  
10 regulations at issue “impose[d] unreasonable fees because they are so disproportionate to the  
11 benefit derived by the fee payors or the burden they place on the regulatory system.” (*California*  
12 *Farm Bureau, supra*, 51 Cal.4th at p. 440). The Supreme Court explained that this question  
13 “revolves around the scope and the cost of the [relevant agency’s] regulatory activity and the  
14 relationship between those costs and the fees imposed.” (*Id.* at p. 441.) In *California Farm*  
15 *Bureau*, the trial court’s order lacked sufficient findings on this issue; therefore, the Supreme  
16 Court remanded the matter for consideration of evidence “showing that the associated costs of the  
17 regulatory activity were reasonably related to the fees assessed on the payors.” (*Id.* at 442.) As  
18 the Court stated: “The court must determine whether the statutory scheme and its implementing  
19 regulations provide a fair, reasonable, and substantially proportionate assessment of all costs  
20 related to the regulation of affected payors.” (*Ibid.*; see also *City of San Buenaventura v. United*  
21 *Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1213 [discussing the same consideration].

22 Here, the evidence shows that the DROS fee is reasonable related to all of the costs related  
23 to the regulation of DROS fee payors. For example, SB 819 was passed by the Legislature during  
24 a regular session and approved by the Governor on October 9, 2011. It became effective on  
25 January 1, 2012. Over the next five years, the approximate annual revenue generated from the  
26

27 \_\_\_\_\_  
28 <sup>21</sup> And even if article XIII were somehow implicated, plaintiffs have not cited a single  
case holding that section 1(b), 2, or 3(m) applies to firearms.

1 DROS fee, calculated by multiplying the total number of DROS transactions processed by DOJ  
2 annually by \$19.00 (i.e., the amount of the fee), was as follows:

3 2012: **\$15,537,022** (817,738 total DROS transactions processed by DOJ x \$19.00)

4 2013: **\$18,243,401** (960,179 total DROS transactions processed by DOJ x (\$19.00)

5 2014: **\$17,689,703** (931,037 total DROS transactions processed by DOJ x \$19.00)

6 2015: **\$16,731,457** (880,603 total DROS transactions processed by DOJ x \$19.00)

7 2016: **\$25,295,118** (1,331,322 total DROS transactions processed by DOJ x \$19.00).

8 (See Hakl Opp'n Decl. Exh. N.)<sup>22</sup>

9 On the other hand, DOJ's expenditure of DROS Special Account funds on authorized  
10 firearms-related programs for the fiscal years covering the same period was as follows:

11 FY 2012/2013: **\$22,741,838** (Bates number AGRFP000017)

12 FY 2013/2014: **\$29,144,382** (Bates number AGRFP000002)

13 FY 2014/2015: **\$28,616,077** (Bates number AGRFP001276)

14 FYI 2015/2016: **\$28,394,683** (Bates number AGRFP001240).

15 (See Hakl Opp'n Decl. Exh. O [for FY 2014/2015 and FY 2015/2016] and Decl. of Anthony R.  
16 Hakl in Supp. of Opp'n to Pls.' Mot. for Adjud. filed June 30, 2017 at Exhs. B & C [for FY  
17 2013/2014 and FY 2012/2013].)

18 In other words, during the approximately five years following the passage of SB 819, all of  
19 the costs associated with funding the relevant firearms-related regulatory and enforcement  
20 activities actually exceeded the amount of DROS fee revenue. This demonstrates that the \$19.00  
21 DROS fee is proportional to the costs of the regulated activities. (See *California Bldg. Indus.*  
22 *Ass'n v. State Water Res. Control Bd.*, 235 Cal.App.4th 1430, 186, as modified on denial of reh'g

23  
24 <sup>22</sup> For the sake of simplicity, this math assumes that every DROS transaction referenced  
25 involved one firearm and the payment of one \$19.00 fee per firearm. However, for reasons not  
26 relevant to the disposition of this case, in 2012 and 2013, if a DROS transaction involved multiple  
27 firearms, the first firearm came with the \$19.00 fee and any additional firearm involved a \$15.00  
28 fee. For 2014, 2015, and 2016, if a firearms purchaser bought multiple firearms, he or she only  
paid a single \$19.00 fee. In other words, these revenue figures are somewhat inflated; the actual  
figures are approximately 90 percent of these figures. (See Hakl Opp'n Decl., Exh. P.) In any  
event, what matters is that, as explained below, DOJ's costs associated with funding the relevant  
firearms-related regulatory and enforcement activities exceeds the amount of DROS fee revenues.

1 (May 11, 2015), review granted and opinion superseded sub nom. *California Bldg. Indus. Assn. v.*  
2 *State Water Res. Control Bd.*, 352 P.3d 418 (Cal. 2015) [“Although the burden of production  
3 therefore never shifted, the Board nevertheless submitted evidence that the fee imposed on storm  
4 water dischargers did bear a reasonable relationship to the burdens of regulating that program.  
5 The storm water program area’s budget for the fiscal year of 2011–2012 was \$26.6 million and  
6 projected revenue was \$19.7 million.”]<sup>23</sup>; *S. California Edison Co. v. Pub. Utilities Comm’n*  
7 (2014) 227 Cal.App.4th 172, 200, as modified (June 18, 2014) [“The PUC has demonstrated that  
8 the fees charged in connection with EPIC do not exceed that necessary to cover the RD&D into  
9 renewable energy”].)

10 The reasonableness of the DROS fee is also demonstrated by its relatively small amount  
11 (i.e., \$19.00), which a firearms purchaser need only pay whenever he or she chooses to purchase a  
12 firearm (i.e., not annually or at any regular interval). The DROS fee is *not* compulsory, whereas  
13 one of the hallmarks of a tax is that it is compulsory. (*California Chamber of Commerce v. State*  
14 *Air Res. Bd.* (2017) 10 Cal.App.5th 604, 614, review denied (June 28, 2017).) Potential DROS  
15 fee payers control when, and if, they pay any fee, by choosing to purchase, or not purchase, a  
16 firearm. (*Id.* at p. 641 [“Regulatory fees are not compulsory. Rather, fee payers have some  
17 control both over when, and if, they pay any fee, i.e., when or if they elect to engage in a  
18 regulated activity, and/or the amount of the fee they are compelled to pay.”]; see also *Pennell v.*  
19 *City of San Jose* (1986) 42 Cal.3d 365, 374–75 [“relatively minor” rental unit fee of \$3.75 per  
20 year did not “exceed the sum reasonably necessary to cover the costs of the regulatory purpose  
21 sought”]; *Bauer, supra*, 858 F.3d at pp. 1219-1220.) Moreover, as summarized at the outset  
22 above, the amount of the DROS fee has remained steady even though over the years Californians,  
23 through their elected representatives, have only expanded the categories of costs the DROS fee is  
24 to cover.

25  
26 <sup>23</sup> Like the California Building Industry Association, plaintiffs here have failed to make  
27 even a prima facie case showing the DROS fee is invalid. Nevertheless, defendants submit this  
28 evidence that the fee imposed on firearms purchasers bears a reasonable relationship to the  
burdens of firearms regulation.

1 Finally, just like in the *Bauer* litigation plaintiffs argue that the expenditure of DROS fee  
2 revenues on the APPS program in particular is unreasonable because “[t]he percentage of DROS  
3 Fee payers that end up on the APPS List is indisputably small.” (Pls.’ Opening Trial Brief at p.  
4 18.) This Court should reject that argument just like the Ninth Circuit did: “[E]ssentially  
5 everyone targeted by the APPS program was a DROS fee payer at the time he or she acquired a  
6 firearm. . . . Indeed, each instance of firearm possession targeted by APPS is a direct result of a  
7 DROS-governed transaction. . . . The APPS program is, in essence, a temporal extension of the  
8 background check program.” (*Bauer, supra*, 858 F.3d at p. 1225; see *Sinclair Paint Co., supra*,  
9 15 Cal.4th at pp. 877–78 [case law “clearly indicates that the police power is broad enough to  
10 include mandatory remedial measures to mitigate the *past, present, or future* adverse impact of  
11 the fee payer’s operations”], italics in original.)

12 For these reasons, the assessment of the \$19.00 DROS fee is reasonably related to all of the  
13 costs related to the regulation of the fee payors.

### 14 **III. THE COURT SHOULD DENY PLAINTIFFS’ BELATED REQUEST TO AMEND THE** 15 **PLEADINGS “ACCORDING TO PROOF”**

16 Presumably realizing the weakness of their “unlawful tax” causes of action, plaintiffs  
17 somewhat casually state that “[r]ecently, Plaintiffs identified two arguments that they seek to  
18 have considered but that were not expressly pleaded in the operative complaint.” (Pls.’ Opening  
19 Trial Brief at p. 26.) On this basis, plaintiffs seek to amend “according to proof” and seek  
20 permission “to proceed with these arguments.” The Court should reject these entreaties.

21 Inexcusable delay prevents plaintiffs from advancing the proposed new claims. As  
22 discussed above, plaintiffs filed this action nearly five years ago. They have engaged in  
23 seemingly endless discovery and therefore have had ample opportunity to explore their claims.  
24 They have already sought leave to amend once, more than two years ago in what was then a last-  
25 minute attempt to salvage an unlawful tax claim in the wake of the order dismissing their  
26 Proposition 26 claim. The Court previously ordered this action bifurcated in the interest of  
27 managing it effectively; adding wholly new claims now would subvert that order. This is not  
28 even the first case where plaintiffs (or at least their counsel and their privities) have had an



1 opportunity to contemplate viable challenges to the DROS fee – the *Bauer* litigation was  
2 commenced in 2011. All of this and plaintiffs give no explanation for making no mention of  
3 these newfound claims until effectively the eve of trial. Under these circumstances, the case law  
4 supports rejecting plaintiffs’ request. (See *Magpali v. Farmers Grp., Inc.* (1996) 48 Cal.App.4th  
5 471, 486 [court did not abuse discretion in denying plaintiff’s amendment “proposed on the eve  
6 of trial, nearly two years after the complaint was originally filed. He did not give an explanation  
7 for leaving [the claim] out of the original complaint or bringing the request to amend so late.”];  
8 *Del Mar Beach Club Owners Assn. v. Imperial Contracting Co.* (1981) 123 Cal.App.3d 898, 914-  
9 915 [trial court properly denied leave to amend because plaintiff inexplicably delayed requesting  
10 amendment until five months before trial, although plaintiff had known facts underlying its  
11 proposed fraud claim for two and one-half years]; *Estate of Murphy* (1978) 82 Cal.App.3d 304,  
12 311 [denial of leave to amend on the eve of trial, one and one-half years after the complaint was  
13 filed, and again after trial, because plaintiff’s amendment opened “an entirely new field of inquiry  
14 without any satisfactory explanation as to why this major change in point of attack had not been  
15 made long before trial”].)

16 If for some reason this Court is inclined to consider plaintiffs’ new claims at this late date,  
17 defendants respectfully request that the Court direct plaintiffs to file an appropriate motion for  
18 leave to file yet another amended complaint, or at least allow supplemental briefing on the merits  
19 of the new claims. Indeed, plaintiffs’ primary new argument, i.e., that “[b]y commingling what  
20 was intended to be a Department-set regulatory fee—originally intended to cover the cost of  
21 background checks—and what is effectively a special tax on firearm purchasers, Section 28225  
22 now violates the separation of powers doctrine” (Pls.’ Opening Trial Brief at p. 27), is tenuous on  
23 its face. In *California Farm Bureau*, the Supreme Court found no constitutional infirmity in the  
24 Legislature directing that revenues like DROS fee revenues be deposited in a special account  
25 along with “a variety of revenues.” (*California Farm Bureau, supra*, 51 Cal.4th at p. 439.)

#### 26 IV. REMEDIES

27 Likewise, the Court should defer imposing remedies, if any, pending its resolution of the  
28 merits of plaintiffs’ remaining claims, further discussion with counsel, and additional briefing as

1 appropriate. The proposed relief scattered throughout plaintiffs' amended complaint, as well as  
2 the assorted writs, declarations, and injunctions described in plaintiffs' most recent brief, are  
3 convoluted, and inappropriate as framed. To cite just one example, plaintiffs seek an "injunction  
4 forbidding Defendant Controller and his agents, employees, officers, and representatives, from  
5 appropriating any funds from the DROS Special Account to DOJ Defendants pursuant to SB 819  
6 or SB 140." (First Am. Compl. at p. 25.) Of course, "[t]he power of appropriation resides  
7 exclusively in the Legislature." (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1321.)  
8 Defendants also note that SB 140, which was a legislative appropriation, was a one-time  
9 appropriation of \$24 million that is now expired. (Senate Bill 140 (Leno), Stats. 2013, Ch. 2; see  
10 Hakl MSA Decl., Ex. I.)

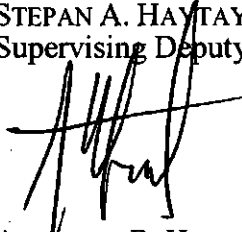
### 11 CONCLUSION

12 For the reasons set forth above, the remainder of plaintiffs' petition for writ of mandate and  
13 complaint for declaratory and injunctive relief should be denied.

14  
15 Dated: February 20, 2018

Respectfully Submitted,

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17 Attorney General of California  
18 STEPAN A. HAYTAYAN  
19 Supervising Deputy Attorney General

20  
21   
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# **APPENDIX A**

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

West's Ann.Cal.Penal Code § 28225

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

Effective: June 27, 2012

Currentness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Credits**

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

West's Ann. Cal. Penal Code § 28225, CA PENAL § 28225  
Current with urgency legislation through Ch. 2 of 2018 Reg.Sess

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

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

I declare:

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

On February 20, 2018, I served the attached **DEFENDANTS' OPPOSITION BRIEF** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

Scott Franklin  
Michel & Associates, P.C.  
180 E. Ocean Boulevard, Suite 200  
Long Beach, CA 90802  
**E-mail Address:** SFranklin@michellawyers.com

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 20, 2018, at Sacramento, California.

\_\_\_\_\_  
Tursun Bier  
Declarant

\_\_\_\_\_  
*Tursun Bier*  
Signature