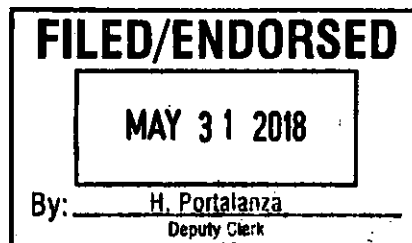


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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

DAVID GENTRY; JAMES PARKER;
MARK MIDLAM; JAMES BASS; and
CALGUNS SHOOTING SPORTS
ASSOCIATION,

Plaintiffs and Petitioners,

vs.

XAVIER BECERRA, in His Official
Capacity as Attorney General For the State
of California; STEPHEN LINDLEY, in His
Official Capacity as Acting Chief for the
California Department of Justice, BETTY T.
YEE, in Her Official Capacity as State
Controller, and DOES 1 - 10,

Defendants and Respondents.

CASE NO. 34-2013-80001667

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR LEAVE TO FILE SECOND
AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF AND SECOND AMENDED
PETITION FOR WRIT OF MANDAMUS
[CONCURRENTLY FILED WITH
DECLARATION OF SCOTT M.
FRANKLIN IN SUPPORT THEREOF;
{PROPOSED} ORDER]**

Date: June 22, 2018
Time: 10:00 a.m.
Dept.: 28
Judge: Hon. Richard K. Sueyoshi
Action filed: 10/16/13

PLEASE TAKE NOTICE that on June 22, 2018, at 10:00 a.m. or as soon thereafter as the matter may be heard, in Department 28 of the Sacramento County Superior Court, located at 720 9th Street, Sacramento, CA 95814, Plaintiffs/Petitioners David Gentry, James Parker, Mark Midlam, James Bass, and Calguns Shooting Sports Association (collectively "Plaintiffs") will and hereby do move this Court for an order granting Plaintiffs leave to file their Second Amended Complaint for Declaratory and Injunctive Relief and Second Amended Petition for Writ of Mandamus (collectively the "Second Amended Complaint") and that the proposed Second Amended Complaint submitted with this Motion be deemed filed.

1 The Motion is made pursuant to California Code of Civil Procedure section 473(a)(1) and
2 is based on this Notice of Motion, the Memorandum of Points and Authorities, the proposed
3 Second Amended Complaint and proposed order filed herewith, all of the files and records of this
4 action, and on any additional material that may be elicited at the hearing of the Motion.

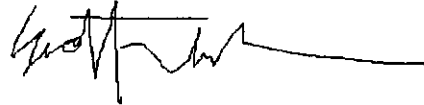
5 Please take further notice that

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

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

16 Dated: May 31, 2018

17 MICHEL & ASSOCIATES, P.C.

18 

19 _____
20 Scott M. Franklin, attorney for Plaintiffs

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15 Cal. Penal Code § 28225 8, 9

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs seek leave to file the Second Amended Complaint pursuant to California Code
4 of Civil Procedure section 473(a)(1). The proposed Second Amended Complaint filed herewith
5 (Declaration of Scott M. Franklin [“Franklin Decl.”] ¶ 2, Ex. 1), is the same as Plaintiffs’ prior
6 pleading, except that two new causes of action have been added, and the prayer is amended to
7 reflect the relief sought via the new causes of action. No unfair prejudice will result from the
8 proposed amendment, which is intended to add new legal theories that do not require any
9 additional factual development. Because granting the requested leave will not cause prejudice to
10 any party, and denial of the Motion will unfairly prejudice Plaintiffs, the Motion should be
11 granted.

12 **II. STATEMENT OF FACTS/PROCEDURAL HISTORY**

13 Plaintiffs’ Opening Brief on the Merits, filed January 30, 2018, provides a detailed factual
14 and procedural history for this matter. Nonetheless, a summary of that history, in addition to relevant
15 recent events, is provided below.

16 Plaintiffs filed their Complaint for Declaratory and Injunctive Relief and Petition for Writ of
17 Mandamus (the “Complaint”) on October 16, 2013. On June 5, 2015, the Court heard argument
18 regarding Defendants’ Motion for Judgment on the Pleadings (the “MJOP”). During the hearing, the
19 Court requested the parties draft a proposed order regarding the MJOP ruling and other issues that
20 were before the Court. (See Franklin Decl. ¶ 3.) Defendants submitted a proposed order to the Court,
21 along with an explanation of Plaintiffs’ objections thereto, on July 2, 2015. The Court issued an order
22 on July 20, 2015 (the “Order After Hearing”), dismissing Plaintiffs’ First Cause of Action and a
23 portion of Plaintiffs’ Second Cause of Action, based on a finding that the First Cause of Action
24 (alleging that Senate Bill 819 [2011, Leno] violated article XIII A, section 3, of the California
25 Constitution) failed to state facts sufficient to state a cause of action. (Order After Hearing at 2:11-
26 21.)

27 Soon after the issuance of the Order After Hearing, Plaintiffs moved for, and obtained, leave
28 to file the First Amended Complaint. (Order of December 23, 2015.) Later, and upon Judge Michael

1 P. Kenny's suggestion, the parties agreed to bifurcate the action such that the Fifth and Ninth Causes
2 of Action would be tried first, with the remaining causes of action to be tried in a separate trial. (*See*
3 Bifurcation Order of November 4, 2016, at 2:3-5 in the attached stipulation.) In a ruling issued
4 August 9, 2017, Judge Kenny granted Plaintiffs' Motion for Adjudication as to the Fifth and Ninth
5 Causes of Action, and denied Defendants' motion seeking to have those causes of action dismissed.

6 The docket herein reflects the fact that the parties have had multiple discovery disputes. It is
7 Plaintiffs position that Defendants, especially in written discovery responses, have been intentionally
8 vague or evasive (or both) over the course of this action, in an attempt to prevent Plaintiffs from
9 having a clear view of how the Department spends DROS Fee funds, and relatedly, how the
10 Department interprets Penal Code section 28225. For example, it took years for Defendants to even
11 take a partial position as to a keystone issue in this case: how, if at all, law abiding DROS Fee payers
12 (e.g., Plaintiffs) created a burden on, or received a special benefit from, APPS-based law enforcement
13 activities funded via the DROS Fee. (Franklin Dec. ¶ 4, Ex. 2.)

14 But when depositions of Department employees were taken in 2017, Plaintiffs learned of key
15 evidence relevant to the proposed claims. Namely, that: (1) the Department believes it can adjust the
16 amount of the DROS Fee based on the costs of a general fund program, i.e., APPS, and (2) the
17 Department has spent millions of DROS Fee dollars to pay for defense attorneys. (Franklin Decl. ¶
18 5; Ex. 3.) In light there of, Plaintiffs' Opening Brief, filed January 30, 2018, sought leave to amend
19 the First Amended Complaint to include the new claims in this Action. By order of March 15, 2018,
20 this Court ruled that if Plaintiffs wanted the Court to grant leave to amend to include the new claims
21 in this action, such leave could only be sought by a noticed motion pursuant to Code of Civil
22 Procedure section 473, subdivision (a)(1). Plaintiffs now brings that motion.

23 Plaintiffs' counsel proposed to Defendants' counsel that this hearing for this Motion be set
24 on June 22, 2018, and that trial in this matter be rescheduled for August 24, 2018, which was the first
25 hearing date the Court had available after June 22, 2018. (Franklin Decl. ¶ 6.) Counsel for Defendants
26 agreed to the two hearing dates proposed by Plaintiffs' counsel. (*Id.*) That agreement specifically
27 included an agreement as to a briefing schedule for supplemental briefing if this motion is granted.
28 (*Id.*)

1 **III. ARGUMENT**

2 **A. Background Law Regarding Motions for Leave to Amend a Complaint**

3 “The court may, in furtherance of justice, and on any terms as may be proper, allow a
4 party to amend any pleading[.]” Cal. Civ. Proc. Code § 473(a)(1); *see also* Cal. Civ. Proc. Code §
5 576 (“Any judge, at any time before or after commencement of trial, in the furtherance of justice,
6 and upon such terms as may be proper, may allow the amendment of any pleading.”). “There is a
7 strong policy in favor of liberal allowance of amendments.” *Mesler v. Bragg Mgmt. Co.*, 39 Cal.
8 3d 290, 296 (1985). “It requires no citation of authority that our decisional law holds that the
9 [statutory law regarding the amendment of pleadings is] to be construed liberally so that cases
10 might be tried upon their merits in one trial where no prejudice to the opposing party or parties is
11 demonstrated.” *Rainer v. Buena Cmty. Mem’l Hosp.*, 18 Cal. App. 3d 240, 254 (1971). “It has
12 even been held that no abuse of discretion transpired even though an amendment was permitted at
13 the outset of the trial even though the neglect was not excusable but no prejudice resulted to the
14 opposing party[; s]imilar rulings have been made where the parties objecting to the amendment
15 were not taken by surprise.” *Id.* “Where additional investigation and discovery is not required to
16 meet the new issue, it would appear that it would constitute an abuse of discretion not to permit
17 the amendment of a complaint even at the outset of a trial,” if “the amendment merely adds a
18 new theory of recovery on the same set of facts constituting the cause of action.” *Id.*

19 And even though Plaintiffs are not seeking leave to amend *during* trial, the cases
20 addressing that scenario are persuasive in showing that the timing of a request for leave to amend
21 is not itself the critical inquiry when considering if leave to amend should be granted. “The cases
22 on amending pleadings during trial suggest trial courts should be guided by two general
23 principles: (1) whether facts or legal theories are being changed and (2) whether the opposing
24 party will be prejudiced by the proposed amendment.” *N. 7th St. Assocs. v. Constante*, 92 Cal.
25 App. 4th Supp. 7, 10 (2001) (quoting *City of Stanton v. Cox*, 207 Cal. App. 3d 1557, 1563
26 (1989)). “Frequently, each principle represents a different side of the same coin: If new facts are
27 being alleged, prejudice may easily result because of the inability of the other party to investigate
28

1 the validity of the factual allegations while engaged in trial or to call rebuttal witnesses.” *Id.* “If
2 the same set of facts supports merely a different theory ... no prejudice can result.” *Id.*

3 **B. Adding the Proposed Claims to this Action Will Not Prejudice Defendants**

4 That the amendment sought will not prejudice Defendants is readily apparent from the
5 fact that Defendants agreed to the trial of this action to be scheduled for August 24, 2018,
6 *regardless* of whether Plaintiffs are granted leave to amend. (Franklin Decl. ¶ 6.) When Plaintiffs’
7 counsel spoke with this Court’s clerk to confirm the June 22, 2018, hearing date for this Motion,
8 she indicated that August 24, 2018, was the first available hearing date available after the hearing
9 date reserved for this Motion. (*Id.*) Accordingly, Defendants’ agreement to have this matter tried
10 on the earliest available date—irrespective of whether it has to prepare supplemental briefing or
11 not— shows the proposed amendment will not delay this action at all, which impliedly proves, as
12 otherwise explained below, that there is no potential for prejudice that could justify the denial of
13 this Motion.

14 **1. Adding a Separation of Powers Claim Will Not Prejudice Defendants**

15 Plaintiffs seek leave to amend to add a cause of action alleging that Penal Code section
16 28225, and specifically the Department’s interpretation thereof, violates the separation of powers
17 doctrine. To prove their proposed separation of powers claim, Plaintiffs will have to show the
18 Department’s Penal Code section 28225-based conduct violates the nondelegation doctrine. The
19 nondelegation doctrine is violated “when a legislative body (1) leaves the resolution of
20 fundamental policy issues to others or (2) fails to provide adequate direction for the
21 implementation of that policy.” *Gerawan Farming, Inc. v. Agric. Labor Relations Bd.*, 3 Cal. 5th
22 1118, 1146 (2017).

23 Both aged and recent cases show taxation is a matter of fundamental policy that cannot be
24 delegated to another branch of the government. *See, e.g., Woodward v. Fruitvale Sanitary Dist.*,
25 99 Cal. 554, 561 (1893) (“[t]he legislature cannot delegate to other than the municipal
26 corporations power to assess [and] collect taxes”); *Sav. & Loan Soc. v. Austin*, 46 Cal. 415, 515
27 (1873) (Wallace, C.J., concurring but dissenting in part) (noting that “the power to lay taxes
28 under our system is one of the powers of Government which does not belong to either the

1 executive or the judicial department, [a]nd . . . the right to exercise this power cannot be
2 delegated is self-evident”); *see also Cal. Chamber v. State Air Resources Bd.*, 10 Cal. App. 5th
3 604, 625 (2017) (stating “taxes must be levied by the legislative, not executive, branch”); *cf.*
4 *Abbott Labs. v. Franchise Tax Bd.*, 175 Cal. App. 4th 1346, 1360 (2009), *as modified* (Aug. 6,
5 2009) (stating “the power to tax . . . is vested in the Legislature and cannot be delegated to the
6 courts”).

7 Here, the question of whether the DROS Fee is, at least in part, a tax, is already squarely
8 before the Court because of Plaintiffs’ Sixth, Seventh, and Eighth Causes of action, which are
9 allege the DROS Fee is an unconstitutional tax in one way or another. Thus, whether the DROS
10 Fee is operates as a tax, also central to Plaintiffs’ proposed nondelegation argument, will be
11 resolved without the need to introduce additional evidence to support that particular argument. In
12 light of that reality, analysis under the standard stated in *Gerawan Farming* would not require the
13 introduction of any factual allegations not already before the Court, meaning there will be no
14 undue prejudice on Defendants if the Court allows leave to amend so Plaintiffs can plead a
15 separation of powers argument. *Rainer*, 18 Cal. App. 3d at 254.

16 2. Adding a New Illegal Tax Claim Will Not Prejudice Defendants

17 Plaintiffs also seek leave to add a cause of action alleging that even prior to its
18 amendment Senate Bill (“SB”) 819 (Leno, 2011), Penal Code 28225 operated as a illegal tax in
19 the guise of a regulatory fee, and would continue to operate as a tax regardless of whether the SB
20 819-based revisions to Penal Code section 28225 are held to violate one of the constitutional
21 provisions identified in Plaintiffs’ Sixth, Seventh, and Eighth causes of Action. Put simply, this
22 argument is in part parallel to Plaintiffs’ previously adjudicated Ninth Cause of Action, which
23 alleged the Department was improperly interpreting the word “possession” (added to Penal Code
24 section 28225(b)(11) via SB 819) much more broadly than the legislature intended, leading to the
25 Department using DROS Fee money for activities outside what the legislature intended SB 819 to
26 cover.

27 Specifically, Plaintiffs now seek to add a cause of action challenging the Department’s
28 overbroad interpretation of other language in Penal Code section 28225(b)(11)—“the costs

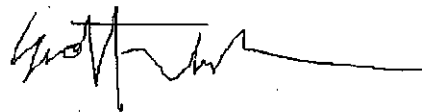
1 activities related to the sale, purchase, [] loan, or transfer of firearms”—which results in the
2 Department spending DROS Fee money on activities beyond the what the Legislature intended
3 the quoted language to address. This argument is primarily legal, as it concerns the scope of what
4 the Legislature intended the relevant statutory language to address. Regardless, to the extent it is
5 relevant, Plaintiffs have already developed the factual record about how, separate from the
6 spending at issue in Plaintiffs’ SB 819-based claims, the Department was and is using DROS Fee
7 money on statutorily unauthorized costs, e.g., defense attorneys. (Franklin Decl. at ¶ 5, Ex. 3.)
8 Because the addition of the relevant cause of action will not prejudice Defendants, leave to amend
9 should be granted. *Rainer*, 18 Cal. App. 3d at 254.

10 **IV. CONCLUSION**

11 In light of Plaintiffs’ good faith, and the fact that the amendment sought will not prejudice
12 Defendants nor delay this Action, Plaintiffs respectfully request the Court grant this Motion and
13 allow Plaintiffs to file the proposed Second Amended Complaint.

14
15 Dated: March 31, 2018

MICHEL & ASSOCIATES, P.C.

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17 

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19 _____
Scott M. Franklin, attorney for Plaintiffs

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 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 May 31, 2018, I served a true and correct copy of the foregoing document(s) described as:

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND SECOND AMENDED PETITION FOR WRIT OF MANDAMUS [CONCURRENTLY FILED WITH DECLARATION OF SCOTT M. FRANKLIN IN SUPPORT THEREOF; {PROPOSED} ORDER]

on the interested parties in this action as follows:

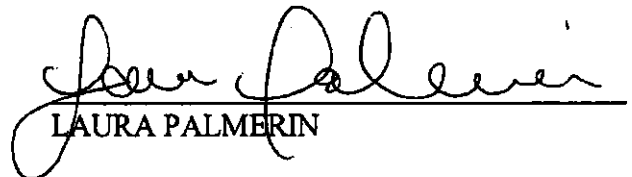
Anthony R. Hakl
anthony.hakl@doj.ca.gov
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

X **(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 May 31, 2018, at Long Beach, California.

X **(VIA ELECTRONIC MAIL)** As follows: I served a true and correct copy by electronic transmission. Said transmission was reported and completed without error.
Executed on May 31, 2018, at Long Beach, California.

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

 (FEDERAL) I declare that I am employed in the office of the member of the bar of this court at whose direction the service was made.


LAURA PALMERIN