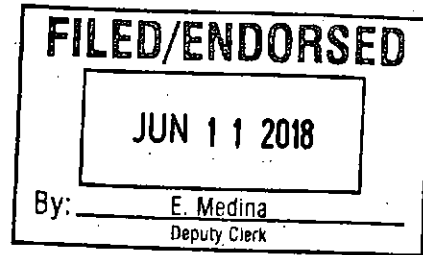


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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF SACRAMENTO

12 **DAVID GENTRY, JAMES PARKER,  
13 MARK MIDLAM, JAMES BASS, and  
14 CALGUNS SHOOTING SPORTS  
ASSOCIATION,**

15 Plaintiffs and Petitioners,

16 v.

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

21 Defendants and  
22 Respondents..

Case No. 34-2013-80001667

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' MOTION FOR LEAVE TO  
FILE A SECOND AMENDED  
COMPLAINT**

Date: June 22, 2018  
Time: 9:00 a.m.  
Dept: 28  
Judge: The Honorable Richard K.  
Sueyoshi  
Action Filed: October 16, 2013

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1 **INTRODUCTION**

2 Plaintiffs seek relief from this Court that would stop the Attorney General of California and  
3 the Director of the Bureau of Firearms of the California Department of Justice from using any  
4 portion of the revenues from a \$19.00 firearms transaction fee – known as the Dealer’s Record of  
5 Sale (DROS) fee – to fund California’s Armed Prohibited Persons System (APPS) program.  
6 Each year the APPS program recovers thousands of firearms from persons prohibited from  
7 possessing them due to criminal behavior or mental illness. Plaintiffs have been challenging the  
8 expenditure of DROS fee revenues on the APPS program for years. But their efforts have been  
9 frustrated at every turn. And rightly so.

10 This case was last before the Court in March, at which time plaintiffs improperly embedded  
11 in their trial brief a request to file yet another amended complaint in this case, which at this point  
12 is four years and eight months old. Plaintiffs now have filed a formal motion to amend the  
13 complaint. But as was the case in March, the request for leave to file an amended pleading comes  
14 after a prolonged period of inexcusable delay. The proposed new claims lack merit. And adding  
15 them now would prejudice defendants. The Court therefore should deny plaintiffs’ motion.

16 **FACTUAL AND LEGAL BACKGROUND**

17 Defendants’ Opposition Brief filed on February 20, 2018, summarizes the California  
18 firearms laws relevant to this case, including those that govern DROS transactions, related fees,  
19 and the APPS program. That background discussion is incorporated by reference. (See Defs.’  
20 Opp’n Brief at pp. 9-15.)

21 Defendants’ earlier brief also details the relevant procedural history, which need not be  
22 repeated in full here. (See Defs.’ Opp’n Brief at pp. 15-19.) But because plaintiffs’ instant  
23 motion comes so late in these proceedings, it is worth summarizing the key events that have  
24 occurred over the course of the last number of years:

- 25 • August 25, 2011: Plaintiffs represented by the same counsel as in this case file a  
26 lawsuit in federal district court, claiming, among other things, that expending revenues  
27 of the DROS fee on the APPS program violates the Second Amendment of the United  
28

1 States Constitution. (See *Bauer, et al. vs. Harris, et al.*, Case No. 1:11-cv-01440-LJO-  
2 MJS (E.D. Cal.))

- 3 • October 16, 2013: Plaintiffs file this suit in Sacramento County Superior Court,  
4 claiming that expending revenues of the DROS fee on the APPS program violates the  
5 California Constitution. (Doc. no. 1.)
- 6 • May 14, 2014: Plaintiffs begin discovery in this action by serving their first set of  
7 written discovery. (See Doc. no. 18 at p. 2 & Doc. no. 19 at p. 2.)
- 8 • March 2, 2015: In *Bauer*, the federal district grants defendants' motion for summary  
9 judgment, rejecting plaintiffs' Second Amendment claim on the merits. (See *Bauer, et*  
10 *al. vs. Harris, et al.*, Case No. 1:11-cv-01440-LJO-MJS (E.D. Cal.) [Memo. Decision &  
11 Order filed March 2, 2015].)
- 12 • July 20, 2015: This Court grants defendants' motion for judgment on the pleadings on  
13 plaintiffs' claim asserting that SB 819 violates Proposition 26, the 2010 tax-related  
14 measure that amended article XIII A, section 3, subdivision (a) of the California  
15 Constitution. (Doc. no. 56.)
- 16 • December 23, 2015: Over defendants' objection, this Court grants plaintiffs' motion for  
17 leave to file a first amended complaint, authorizing plaintiffs to add three claims that  
18 SB 819 is an unlawful tax under certain provisions of article XIII of the California  
19 Constitution (i.e., the current sixth, seventh, and eighth causes of action) and another  
20 declaratory relief claim regarding the meaning of the word "possession," which SB 819  
21 added to Penal Code section 28225, subdivision (b)(11) (i.e., the ninth cause of action).  
22 (Order Re: Plaintiffs' Motion for Leave to File First Amended Complaint filed Dec. 23,  
23 2015.)
- 24 • November 4, 2016: The Court bifurcates the trial of plaintiffs' remaining causes of  
25 action, ordering that the merits of the fifth and ninth causes of action be heard and  
26 resolved before the other remaining causes of action. (Doc. no. 115.)
- 27 • June 1, 2017: In the related federal case, the Ninth Circuit affirms the district court in a  
28 published decision, concluding that "California's use of the DROS fee to fund the APPS

1 program” survives constitutional scrutiny. (See *Bauer v. Becerra*, 858 F.3d 1216, 1218  
2 (9th Cir. 2017).)

- 3 • August 9, 2017: This Court grants plaintiffs’ motion for adjudication of the fifth cause  
4 of action (regarding the calculation of the amount of the DROS fee) and the ninth cause  
5 of action (regarding the meaning of the word “possession” as used in section 28225,  
6 subdivision (b)(11)), but the Court does not issue any writ or award any other relief.  
7 (Ruling on Submitted Matter: Motions for Adjudication of Plaintiffs’ Fifth and Ninth  
8 Causes of Action filed Aug. 9, 2017.)
- 9 • November 3, 2017: The Court issues the last of a number of orders resolving the  
10 parties’ discovery disputes. (Doc. no. 171.)
- 11 • December 15, 2017: The Court holds the last of several in camera conferences with  
12 counsel to address outstanding discovery issues, effectively concluding discovery,  
13 which involved several hundred written discovery requests by plaintiffs, and  
14 depositions. (See Doc. nos. 172 & 173.)
- 15 • January 30, 2018: Plaintiffs file their opening trial brief. (Doc. no. 178.)
- 16 • February 20, 2018: Defendants file their opposition brief. (Doc. no. 181.)
- 17 • March 15, 2018: The Court vacates the hearing on the merits and directs plaintiffs to  
18 file a proper motion if they wish to seek leave to amend. (Doc. no. 186.)
- 19 • May 31, 2018: Plaintiffs file the instant motion to add new claims. (Doc. no. 189.)

## 20 ARGUMENT

### 21 I. LEGAL STANDARDS APPLICABLE TO MOTION FOR LEAVE TO FILE AN AMENDED 22 COMPLAINT.

23 When a desired amendment to a complaint requires a change in the nature of the claims, a  
24 formal motion to amend must be served and filed. (*Dye v. Caterpillar, Inc.* (2011) 195  
25 Cal.App.4th 1366, 1380.) Motions for leave to amend the pleadings are directed to the sound  
26 discretion of the judge. “The court may, in furtherance of justice, and on any terms as may be  
27 proper, allow a party to amend any pleading.” (Code Civ. Proc., § 473(a)(1); see *id.*, § 576.)  
28

1 The court's discretion will *usually* be exercised liberally to permit amendment of the  
2 pleadings, but denial is justified if the motion is not timely or the moving party has been dilatory,  
3 granting the motion will prejudice the opposing party, or the proposed amendment fails to state a  
4 cause of action, for example. (See generally *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939;  
5 *Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428; *Mabie v. Hyatt* (1998)  
6 61 Cal.App.4th 581, 596; *Hirsa v. Sup. Ct.* (1981) 118 Cal.App.3d 486, 490.)

7 A court also has discretion to impose conditions on any leave to amend the complaint  
8 including any "conditions which are just, i.e., intended to compensate the defendants for any  
9 inconvenience belated amendment may cause." (*Armenta ex rel. City of Burbank v. Mueller Co.*  
10 (2006) 142 Cal.App.4th 636, 642; see *Sanai v. Saltz* (2009) 170 Cal.App.4th 746, 769–770.)

## 11 **II. THE COURT SHOULD NOT ALLOW PLAINTIFFS TO AMEND THEIR COMPLAINT AT** 12 **THE FINAL STAGE OF THESE PROCEEDINGS.**

### 13 **A. The Motion for Leave to Amend is Untimely.**

14 As summarized above, plaintiffs have been challenging the expenditure of DROS fee  
15 revenues on the APPS program in the context of this case for nearly five years, and their counsel  
16 represented plaintiffs challenging such expenditures in federal court as far back as 2011. All  
17 along, those challenges have contained various iterations of the theory that the DROS fee is an  
18 alleged illegal tax. (See, e.g., Doc. no. 182, Exh. A (*Bauer* complaint filed Aug. 25, 2011) at  
19 p. 36.) Yet none of those iterations has resulted in success for plaintiffs. So, pointing to a  
20 deposition that occurred more than a year ago, plaintiffs now claim that they have "learned of key  
21 evidence" (Pls.' Mot. at p. 6) that they contend supports at least two more versions of their illegal  
22 tax theory – versions they have not yet pled, but which they would like to add to their complaint  
23 effectively during the trial of this matter.<sup>1</sup> The timing of plaintiffs' motion is fundamentally  
24 unfair, and this Court should deny the motion on that basis alone. (See *Green v. Rancho Santa*  
25 *Margarita Mortgage Co.* (1994) 28 Cal.App.4th 686, 693–694 ["Given lack of any excuse for not  
26 pleading the defense earlier – the decision not to plead negligence was legal gamesmanship in its

27 <sup>1</sup> The relevant assertion in plaintiffs' trial brief was even more vague, stating that  
28 "[r]ecently, Plaintiffs identified two arguments that they seek to have considered but that were not  
expressly pleaded in the operative complaint." (Pls.' Opening Trial Brief at p. 26.)



1 purest sense – we cannot say the trial court abused its discretion in denying the request to  
2 amend”]).

3 Plaintiffs could have plead all relevant theories at the outset – or at any time during the last  
4 five years, including at the time of their first motion to amend in 2015 when they added the  
5 current sixth, seventh, and eighth causes of action claiming that SB 819 is an unlawful tax under  
6 certain provisions of article XIII of the California Constitution. Their claim of new “key  
7 evidence” rings hollow. Again, in this regard plaintiffs point solely to a deposition that occurred  
8 in May of 2017, well over a year ago. (See Doc. no. 182, Exh. D.) Additionally, plaintiffs’  
9 characterization of that evidence is unfounded. According to plaintiffs, “the Department believes  
10 it can adjust the amount of the DROS Fee based on the costs of a general fund program, i.e.,  
11 APPS[.]” (Pls.’ Mot. at p. 6.) While it is not entirely clear what plaintiffs mean when they  
12 characterize APPS as a “general fund program,” the Legislature directed in the relevant Penal  
13 Code section that “[a]ll money received by [DOJ] pursuant to this section shall be deposited in  
14 the Dealers’ Record of Sale *Special Account* of the General Fund, which is hereby created, to be  
15 available, upon appropriation by the Legislature, for expenditure by [DOJ] to offset the costs  
16 incurred pursuant to this section.” (Penal Code, § 28235, italics added.) Moreover, plaintiffs  
17 misstate the evidence upon which plaintiffs themselves rely. At his deposition, the Director of the  
18 Bureau of Firearms actually testified: “If the department chose to expand the APPS unit, the  
19 enforcement unit, . . . they could choose to increase the fee to pay for that expansion *provided the*  
20 *legislature provided the additional spending authority to go along with the fee increase.*”  
21 (Franklin Decl. ¶ 5; Exh. 3, italics added.) Thus, while plaintiffs attempt to paint the Director’s  
22 testimony as endorsing some sort of ability of the Department to unilaterally raise and spend  
23 revenue, that was hardly the nature of the testimony. Not to mention that the Penal Code  
24 expressly authorizes the Department to set the amount of the DROS fee, and periodically adjust  
25 that amount. (See Penal Code, § 28235 [“The Department of Justice may require the dealer to  
26 charge each firearm purchaser a fee not to exceed fourteen dollars (\$14), except that the fee may  
27 be increased at a rate not to exceed any increase in the California Consumer Price Index as  
28 compiled and reported by the Department of Industrial Relations”].)

1 Plaintiffs also claim that they have only recently learned, according to plaintiffs, that “the  
2 Department has spent millions of DROS Fee dollars to pay for defense attorneys.” (Pls.’ Mot. at  
3 p. 6.) But again – and putting aside plaintiffs’ coloring of the alleged situation – plaintiffs’ claim  
4 of this recent discovery is based on deposition testimony that occurred more than a year ago.  
5 Moreover, beginning years ago in the *Bauer* litigation defendants have been producing all of the  
6 relevant reports itemizing the Department’s expenditure of DROS fee revenues. (See Doc. no.  
7 143, Exhs. B-L; see also *id.*, Exh. A at p. 7 [2014 report produced in 2014 listing “AG DEPTL  
8 LEGAL SERVICE” as expenditure item].) Thus, the details of how the Department expends  
9 funds is hardly new information. That plaintiffs may have failed to consider the relevant  
10 documents at any time before now does not make the Director’s testimony about those reports  
11 years after they were produced revelatory.

12 Inexcusable delay prevents plaintiffs from advancing their proposed new claims. As  
13 discussed, plaintiffs filed this action nearly five years ago. They have engaged in seemingly  
14 endless discovery and therefore have had ample opportunity to explore their claims. They have  
15 already sought leave to amend once, more than two years ago in what was then a last-minute  
16 attempt to salvage an unlawful tax claim in the wake of the order dismissing the Proposition 26  
17 claim. The Court previously ordered this action bifurcated in the interest of managing it  
18 effectively; adding wholly new claims now would subvert that order. This is not even the first  
19 case where plaintiffs (or at least their counsel and their privities) have had an opportunity to  
20 contemplate viable challenges to the DROS fee – as mentioned the *Bauer* litigation was  
21 commenced in 2011. All of this and plaintiffs give no explanation for waiting to raise these  
22 newfound claims until now. Under these circumstances, ample authority supports denying  
23 plaintiffs’ motion. (See *Magpali v. Farmers Grp., Inc.* (1996) 48 Cal.App.4th 471, 486 [court did  
24 not abuse discretion in denying plaintiff’s amendment “proposed on the eve of trial, nearly two  
25 years after the complaint was originally filed. He did not give an explanation for leaving [the  
26 claim] out of the original complaint or bringing the request to amend so late.”]; *Del Mar Beach  
27 Club Owners Assn. v. Imperial Contracting Co.* (1981) 123 Cal.App.3d 898, 914-915 [trial court  
28 properly denied leave to amend because plaintiff inexplicably delayed requesting amendment

1 until five months before trial, although plaintiff had known facts underlying its proposed fraud  
2 claim for two and one-half years]; *Estate of Murphy* (1978) 82 Cal.App.3d 304, 311 [denial of  
3 leave to amend on the eve of trial, one and one-half years after the complaint was filed, and again  
4 after trial, because plaintiff's amendment opened "an entirely new field of inquiry without any  
5 satisfactory explanation as to why this major change in point of attack had not been made long  
6 before trial"].)

7 **B. The Proposed Amendments Fail to State a Cause of Action.**

8 The Court should deny plaintiffs' motion also because the proposed amendments do not  
9 state a cause of action. Plaintiffs characterize the proposed tenth cause of action as an "illegal tax  
10 claim." (Pls.' Mot. at p. 9.) The proposed eleventh cause of action also concerns taxation,  
11 alleging that the DROS fee statute improperly delegates the taxing power to the Department, and  
12 it is premised on the idea that the DROS fee is in fact a tax. (Pls.' Mot. at pp. 8-9.) However,  
13 these proposed new claims, just like plaintiffs' current claims that the DROS fee is an unlawful  
14 tax, are precluded by the rules of res judicata. (See Defs.' Opp'n Brief at pp. 14-20.) In addition,  
15 and as also fully briefed by defendants, the DROS fee is a valid regulatory fee, not a tax. (See *id.*  
16 at pp. 19-26.) For these reasons, the proposed amendments fail to state a cause of action.

17 The proposed tenth cause of action is also destined to fail considering the plain language of  
18 Penal Code section 28225, which provides that the DROS fee "shall be no more than is necessary  
19 to fund the following," and goes on to broadly list eleven categories of allowable costs. (Pen.  
20 Code, § 28225, subd. (b).) The proposed eleventh cause of action also lacks merit because it is  
21 based on plaintiffs' argument that "[b]y commingling what was intended to be a Department-set  
22 regulatory fee—originally intended to cover the cost of background checks—and what is  
23 effectively a special tax on firearm purchasers, Section 28225 now violates the separation of  
24 powers doctrine." (Pls.' Opening Trial Brief at p. 27.) Yet, in *California Farm Bureau*  
25 *Federation v. State Water Resources Control Bd.* (2011) 51 Cal. 4th 421, 439, the Supreme Court  
26 found no constitutional infirmity in the Legislature directing that revenues like DROS fee  
27 revenues be deposited in a special account along with "a variety of revenues."  
28

1 Finally, plaintiffs' proposed amended petition and complaint is fatally flawed because it  
2 lacks the required verification. (See Code. Civ. Proc., § 186 ["The writ must be issued in all  
3 cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It  
4 must be issued upon the verified petition of the party beneficially interested."]; *Krueger v.*  
5 *Superior Court* (1979) 89 Cal.App.3d 934, 939 ["A fatally defective verification 'is treated as a  
6 failure to verify.' . . . It is thus our conclusion, right or wrong, that petitioners are not entitled to  
7 the extraordinary writ they seek because they have not carried their pleading burden".])

8 For all of these reasons, the proposed amendments fail to state a cause of action and the  
9 Court should deny the motion. (See *California Casualty General Ins. Co. v. Sup. Ct.* (1985) 173  
10 Cal.App. 274, 280–281, *disapproved on other grounds in Kransco v. American Empire Surplus*  
11 *Lines Ins. Co.* (2000) 23 Cal.4th 390, 407 [judge has discretion to deny leave to amend where  
12 proposed amendment fails to state valid cause of action].)

13 **C. Granting Plaintiffs' Motion Will Prejudice the DOJ Defendants.**

14 Plaintiffs initiated litigation challenging the DROS fee and the APPS program  
15 approximately seven years ago, first in federal court and then, more than four years ago, in state  
16 court. The litigation has already been through several iterations. The proposed second amended  
17 complaint here, when viewed in context, would be plaintiffs' sixth operative pleading, with the  
18 previous five pleadings including the initial, amended, and second amended complaints in the  
19 federal case and the initial and first amended complaint here. Plaintiffs have had plenty of  
20 opportunities over the years to present their claims with respect to the DROS fee and the APPS  
21 program. Defendants should not suffer now simply because plaintiffs have realized at this late  
22 date that their most recent complaint could have been better.

23 Additionally, due to extensive law and motion practice, and the bifurcation of this matter,  
24 the current complaint has been whittled down to a relatively few causes of action against the DOJ  
25 defendants. Yet the proposed amended complaint includes two additional claims – both against  
26 the DOJ defendants only. In practical terms, this is a substantial expansion of the issues as to the  
27 DOJ defendants. And at this final stage of the litigation, such an expansion is unwarranted.  
28 Defendants are entitled to the timely resolution of the claims brought against them. The Court

1 should deny the motion and put an end to plaintiffs' periodic efforts to add new claims as they  
2 occur to them.<sup>2</sup>

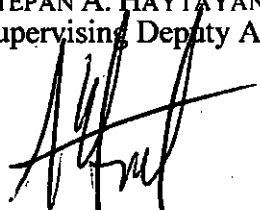
3 **CONCLUSION**

4 For the reasons set forth above, the Court should deny plaintiffs' motion.

5 Dated: June 11, 2018

Respectfully Submitted,

6 XAVIER BECERRA  
7 Attorney General of California  
8 STEPAN A. HAYTAYAN  
9 Supervising Deputy Attorney General



10 ANTHONY R. HAKL  
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27 <sup>2</sup> Not without temerity, plaintiffs' argue a lack of prejudice based on defendants'  
28 agreement to a schedule for the remainder of this case in advance of any ruling on the motion to  
amend. (Pls.' Mot. at p. 8.) But the undersigned's agreement to that schedule reveals only an  
intention to be professional and cooperative, nothing more.

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

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

I declare:

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

On June 11, 2018, I served the attached **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT** 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 June 11, 2018, at Sacramento, California.

\_\_\_\_\_  
Tracie L. Campbell  
Declarant

\_\_\_\_\_  
*Tracie Campbell*  
Signature