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12 FOR THE COUNTY OF SACRAMENTO

13 DAVID GENTRY, JAMES PARKER,  
14 MARK MIDLAM, JAMES BASS, and  
15 CALGUNS SHOOTING SPORTS  
16 ASSOCIATION,

17 Plaintiffs and Petitioners,

18 v.

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

26 Defendants and Respondents.

Case No. 34-2013-80001667

**PLAINTIFFS' OPENING TRIAL BRIEF**

Hearing/Trial Date: January 18, 2019

Hearing Time: 11:00 a.m.

Judge: Honorable Richard K. Sueyoshi

Dept.: 28

Action Filed: October 16, 2013

BY FAX

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

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

16 **II. STATEMENT OF FACTS**

17 **A. The DROS Fee**

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

27 \_\_\_\_\_  
28 <sup>1</sup> References to “purchase” or “purchaser” refer to both purchase-based transfers and transfers not resulting from a purchase. Cal. Penal Code § 28200(a)-(b).

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

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

12 The Department deposits the revenue from the DROS Fee in the Dealers’ Record of Sale  
13 Special Account of the General Fund (“DROS Fund”). Cal. Penal Code § 28235. The Department  
14 claims that it is “unable to admit or deny” whether DROS Fee money constitutes a certain  
15 percentage of the money in the DROS Fund (Franklin Decl. Ex. 5, at 9:12-16), but documents  
16 produced in this case show that the Department recognizes the DROS Fee is the primary source  
17 of money going into the DROS Fund. (*Id.* Ex. 1, at 4:17-21.) For example, DROS Fee revenue  
18 constituted approximately 88% of the money deposited in the DROS Fund in fiscal year 2014-  
19 2015. (*Id.* Ex. 6, at 3:3-4:8.)

#### 20 **B. The Armed Prohibited Person System (“APPS”)**

21 Put simply, APPS is a system that cross-references two things, (1) firearm purchaser  
22 background check records and (2) criminal or other records that indicate if an individual is  
23 prohibited from possessing firearms. (Franklin Decl. Ex. 1, at 16:9-13.) If the system produces a  
24 “hit” that is later verified by human analysis, it provides a basis for law enforcement to contact  
25 the person identified to determine whether that person is illegally possessing a firearm. (*Id.* Ex. 1,  
26 at 16:24-17.) As is relevant here, there are only two kinds of APPS-related activities: (1) APPS  
27 itself, i.e., the maintenance of the “APPS List[.]”<sup>2</sup> which is created via the abovementioned cross-

28 <sup>2</sup> The APPS List is also known as the “Prohibited Armed Persons File[.]” Cal. Penal Code



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

10  
11 **C. The Department Pushes for the Enactment of SB 819 to Mitigate a Large Budget Cut**

12 In August 2011, the Legislature enacted the California state budget for 2011-2012, which  
13 included a 71.5 million-dollar reduction in the (Department's) Division of Law Enforcement's  
14 ("DLE") budget over two years. (Franklin Decl. Ex. 7, at 16.) The intent behind the cut to the  
15 DLE's budget was to "[e]liminate General Fund from the Division of Law Enforcement[.]"  
16 though the Legislature expressly allowed the Department to continue its use of General Fund  
17 money on APPS itself. (Franklin Decl. Ex. 7, at 16.) To help mitigate that shortfall, the  
18 Department quickly brought proposed legislation to Senator Mark Leno that ultimately became  
19 SB 819. (*Id.* at Ex. 8.) Senator Leno's "Q&A" packet for SB 819 expressly stated that the  
20 proponents of the bill had "added declarations and findings to make it clear that [SB 819 wa]s  
21 intended to address the APPS enforcement issue." (*Id.* at Ex. 9, at A – 43.) There is no denying

22 § 30000(a).

23 <sup>3</sup> As previously held in this action, Senate Bill ("SB") 819 did not provide a funding  
24 source for activities other than APPS-related law enforcement activities. (Franklin Decl. Ex. 2, at  
25 10:12-18.) The Department has admitted that under the guise of SB 819, it sought to, and did,  
26 remove firearms from the possession of people who were not on the APPS List. (*Id.* Ex. 4, at  
27 17:15-18:5.) The Department did not track costs related to non-APPS-based law enforcement  
28 activities separately from the costs incurred for the Department's APPS-based law enforcement  
activities. (*Id.* Ex. 4, at 46:3-15.) Accordingly, all the data the Department has produced as to  
APPS-based law enforcement activities are improperly inflated. Regardless, Plaintiffs use that  
improperly inflated data here because the Department has no better data on the relevant issue, and  
Plaintiffs expressly note that their use of such data is not an admission that non-APPS-based law  
enforcement activities can legally be paid for with DROS Fund money.

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

5 On May 1, 2013, the Legislature enacted SB 140, appropriation legislation providing the  
6 Department with access to \$24,000,000 of DROS Fund money to address “the backlog in the  
7 Armed Prohibited Persons System (APPS) and the illegal possession of firearms by those  
8 prohibited persons.” Cal. Penal Code § 30015(a). The “backlog” at issue was the approximately  
9 20,000 people on the APPS List at that time. 2013 Cal. Stat., ch. 2 § 1(c), (3). Plaintiff assumes  
10 all \$24,000,000 has already been spent by the Department. (Franklin Decl. ¶ 11; Ex. 10.)

11 The Department’s publicly available budgetary records do not include a program-by-  
12 program breakdown of how DROS Fund money is spent. But in response to discovery requests  
13 made in this action, the Department disclosed documents that confirm the following. Prior to SB  
14 819, an average of approximately 82% the Department’s DROS Fund spending went to pay for  
15 costs purportedly related to the work done by the Department’s DROS Unit,<sup>4</sup> and 0% went to  
16 fund APPS-related activities. (*Id.* at Exs. 11 & 12.) After SB 819, however, the percentages  
17 changed radically. Post-SB 819, an average of about 41%<sup>5</sup> of the Department’s annual DROS  
18 Fund expenditures were on APPS-related activities, and approximately 49% was attributed to the  
19 DROS Unit. (*Id.*) In fact, in fiscal year 2015-2016, the Department spent *more* DROS Fund  
20 money on APPS-related activities than it spent on the DROS Process itself. (*Id.* Ex. 11, at  
21 AGRFP001240.)

22 ///

23 <sup>4</sup> The amount spent on the DROS Unit is greater than the amount spent on the DROS  
24 Process. For example, the DROS unit processes both DROS Applications and non-DROS  
25 Applications. (Franklin Decl. Ex. 13, at 21.) Nonetheless, even assuming that DROS and non-  
26 DROS applications take the same amount of time to process, it seems the vast majority (i.e., over  
27 96%) of the DROS Unit’s time is spent performing the DROS Process. (*Id.*)

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

1 **III. PROCEDURAL HISTORY**

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

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

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

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

26 <sup>6</sup> The Department itself instituted a rulemaking to reduce the amount of the DROS Fee in  
27 2010, but it abandoned that rulemaking in favor of SB 819, which purports to allow the  
28 Department to siphon off the surplus created by the unnecessarily high amount being charged for  
the DROS Fee and use the surplus for non-regulatory activities. (Franklin Decl. at Exs. 4, 108:5-  
12; 20, p.1; 21, 4:21-22.)

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

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

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

15 The Fifth Cause of Action alleges that the Department has a ministerial duty to  
16 periodically review whether the amount charged for the DROS Fee is excessive. (*Id.* Ex. 19, at ¶¶  
17 90, 96.) The Department claimed it "regularly monitors" the amount being charged for the DROS  
18 Fee, but Judge Kenny held such assertion to be "vague and provide[d] no indication as to the  
19 level of review [or] steps completed[.]" (*Id.* Ex. 22, at 8:1-12.) In contrast, he found that the  
20 Department had not performed the relevant review since 2004, and that a review "every thirteen  
21 years is insufficient to comply with the ministerial Duty [Penal Code] section 28225 imposes."  
22 (*Id.*) Accordingly, Judge Kenny granted Plaintiffs' Motion for Adjudication as to the Fifth Cause  
23 of Action. (*Id.*)

24 The Ninth Cause of Action alleges that the Department is using a specific funding source  
25 to pay for activities outside the statutorily defined scope of the funding source. (*Id.* Ex. 22, at ¶¶  
26 138, 139.) As a result of SB 819, Section 28225 was amended to allow the Department to use  
27 DROS Fee money to recoup costs of "firearms-related . . . enforcement . . . activities related to  
28 the . . . possession . . . of firearms[.]" (*Id.*) Section 1(g) of SB 819 definitively explains its

1 purpose: “it is the intent of the Legislature in enacting this measure to allow the DOJ to utilize the  
2 Dealer Record of Sale Account for the additional, *limited* purpose of funding enforcement of the  
3 Armed Prohibited Persons System.” 2011 Cal. Stat., ch. 743 § 1(g) (emphasis added). The  
4 Department asked Judge Kenny to ignore this plain statement of legislative intent (a statement the  
5 Department itself likely drafted or reviewed) and instead adopt a different interpretation, which  
6 the Department labeled a “common sense interpretation[.]” (Franklin Decl. Ex. 23, at 9:8-14.)  
7 The Court rejected the Department’s claim, holding that: “[b]ased on the uncodified declaration  
8 of legislative intent [in SB 819, it] is clear that ‘possession’ as used in section 28225, subdivision  
9 (b)(11) is limited to APPS-based activities.” (*Id.* Ex. 23, at 10:12-20.) Accordingly, Judge Kenny  
10 also granted Plaintiffs’ Motion for Adjudication as to the Ninth Cause of Action. (*Id.*)

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

16 **C. Summary of Causes of Action (“COAs”) Currently Before the Court<sup>7</sup>**

- 17 1<sup>st</sup> COA: seeks declaratory and injunctive relief as to the Department’s use of funds  
18 collected prior to the enactment of SB 819, a non-retroactive bill seeking to fund  
19 activities related to the post-SB 819 “possession” of firearms by people not legally  
20 allowed to possess firearms.
- 21 2<sup>nd</sup> COA: seeks injunctive relief in the form of an order, and/or issuance of a writ of mandate,  
22 compelling the state controller stop appropriating funds pursuant to SB 140.<sup>8</sup>
- 23 3<sup>rd</sup> COA: seeks injunctive relief in the form of an order, and/or issuance of a writ of mandate,  
24 compelling the state controller to recover all money it disbursed pursuant to SB  
25 140.

26 \_\_\_\_\_  
27 <sup>7</sup> Am. Compl., *passim*.

28 <sup>8</sup> The Department has yet to expressly confirm whether all \$24,000,000 of the SB 140  
appropriation has been spent.

1 4<sup>th</sup> COA: seeks injunctive relief in the form of an order, and/or issuance of a writ of mandate,  
2 compelling the Department to return to the state controller any funds it obtained  
3 pursuant to SB 140.

4 6<sup>th</sup> COA: seeks declaratory and injunctive relief because SB 819 created a tax that violates  
5 article XIII, section 1(b) of the California Constitution,<sup>9</sup> which requires property  
6 taxes be assessed in proportion to the value of the property being taxed.

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

11 8<sup>th</sup> COA: seeks declaratory and injunctive relief because SB 819 created a tax that violates  
12 article XIII, section 3(m), which exempts “[h]ousehold furnishings and personal  
13 effects not held or used in connection with a trade, profession, or business”—e.g.,  
14 firearms purchased by members of the general public—from taxation.

#### 15 IV. ARGUMENT

##### 16 A. Distinguishing Taxes from Regulatory Fees

17 “[W]hether impositions are ‘taxes’ or ‘fees’ is a question of law for the . . . courts to  
18 decide on . . . *review of the facts*[.]” *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th  
19 866, 874 (1997) (emphasis added). So even assuming the constitutionality of a particular tax is a  
20 question that can be answered as a matter of law, the predicate question here—whether SB 819 or  
21 140 (or both) created or increased a tax—is itself a mixed question of law and fact. *Cf. Oliver &*  
22 *Williams Elevator Corp. v. State Bd. of Equalization*, 48 Cal. App. 3d 890, 894 (1975) (“Since the  
23 issues here involve the applicability of taxing statutes to *uncontradicted facts*, we are confronted  
24 purely with a question of law”) (emphasis added); *accord Neecke v. City of Mill Valley*, 39 Cal.  
25 App. 4th 946, 953 (1995). Once a plaintiff has made a prima facie case, the burden of showing  
26 that a particular levy is a regulatory fee, and not a tax, is on the government. *Sinclair Paint*, 15

27 \_\_\_\_\_  
28 <sup>9</sup> All further references to an “article” of law refer to the California Constitution, except as  
noted otherwise.

1 Cal. 4th at 878; *Cal. Farm Bureau Fed'n v. State Water Res. Control Bd.*, 51 Cal. 4th 421, 436  
2 (2011), *as modified* (Apr. 20, 2011) (“once plaintiffs have made their prima facie case, the state  
3 bears the burden of production and must” meet the *Sinclair Paint* standard).

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

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

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

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

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

23 15 Cal. 4th at 878. The two prongs identified above are referred to here as the “reasonable cost”  
24 and “allocation” prongs, respectively. *City of San Buenaventura v. United Water Conservation*  
25 *Dist.*, 3 Cal. 5th 1191, 1212 (2017).

26 *Sinclair Paint*’s police power analysis relies heavily on *United Business*. *Sinclair Paint*,  
27 15 Cal. 4th at 879-80. *United Business* holds that “[t]he general rule is that a regulatory . . . fee  
28 levied cannot exceed the sum reasonably necessary to cover the costs of the regulatory purpose

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

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

17       **B.     The DROS Fee Is a Tax**

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



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

5  
6 **1. The ruling of August 9, 2017, shows that the Department cannot meet  
the reasonable cost prong.**

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

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

27 <sup>10</sup> I.e., that the Department can knowingly overcharge an existing regulatory fee and use  
28 the surplus to pay for general law enforcement costs without violating Proposition 26 so long as  
the total amount being charged to “fee” payers does not increase.

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

6  
7 **2. The DROS Fee Is a Tax because there Is No Reasonable Relationship  
Between the Average Fee Payer and Money Spent on APPS.**

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

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

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

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

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

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

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

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

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

1 Department's response was utterly evasive.

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

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

12 (*Id.* Ex. 22, at 10:12-20.)

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

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

26 ///

27 ///

28 <sup>12</sup> They also receive no special benefit from legal firearm ownership or APPS.

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

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

12           When Plaintiffs recently propounded discovery that required the Department to identify  
13 any benefits of APPS-Related Law Enforcement Activities obtained by DROS Fee payers, the  
14 Department provided the following sworn response. “[T]he APPS program helps ensure that  
15 DROS Fee payers do not cause firearm-related injuries to themselves, others, or property with a  
16 firearm despite being prohibited from owning one. It helps reduce the chance of a DROS fee  
17 payer being involved in firearms violence and firearms-related criminal activity.” (*Id.* Ex. 28, at  
18 2:6-3:13.)

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

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

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

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

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

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

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

3 An avid shooting sports enthusiast could pay the DROS Fee five times over the course of  
4 a single year (\$95) as a result of “trading up” to find just the right firearm, and yet that fee payer  
5 would receive no greater benefit (nor create any larger burden) than a DROS Fee payer that buys  
6 a single firearm for hunting and self-defense who puts only \$19 in the DROS Fund.<sup>13</sup> In contrast,  
7 if these same two individuals wanted to hunt, they would both get the same right to hunt upon  
8 obtaining a hunting license, and they would pay the same fee to do so. Cal. Fish & Game Code §  
9 3031(a)(1). When two fee payers get the exact same benefit (or cause the same burden), but are  
10 charged different amounts, that disparity—likely a difference of 100% or more because of how  
11 the DROS Fee is collected—is proof that the fee is not being properly allocated to at least some  
12 DROS Fee payers. *Sinclair Paint*, 15 Cal. 4th at 878.

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

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

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

20 **SEC. 1.** . . . (a) All property is taxable and shall be assessed at the same percentage  
21 of fair market value. . . . (b) All property so assessed shall be taxed in proportion to  
its full value.

22 **SEC. 2.** . . . The Legislature may provide for property taxation of all forms of  
23 tangible personal property. . . . The Legislature, two-thirds of the membership of  
each house concurring, may classify such personal property for differential  
24 taxation or for exemption.

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

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

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

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

7                           **1.       Article XIII, Section 1(b)**

8           Section 1(b) applies to personal property. *Gen. Dynamics Corp. v. Los Angeles Cty.*, 51  
9           Cal. 2d 59, 64 (1958) (citing sections 1 and 14). Firearms are personal property. *See, e.g., People*  
10          *v. Beck*, 25 Cal. App. 4th 1095, 1097 (1994), *as modified* (June 17, 1994); *see also* Cal. Rev. & T.  
11          Code § 106 (“Personal property” includes all property except real estate”). Because the DROS  
12          Fee is a tax that must be paid to legally obtain a firearm in California, it is a property tax that  
13          must be proportionally related to the value of the firearm being obtained. Cal. Const. art. XIII, §  
14          1(b). Because the DROS Fee is a per transaction flat fee (Cal. Code Regs. tit. 11, § 4001) that is  
15          in no way tied to the value of the firearm(s) being transferred, the DROS Fee violates article XIII,  
16          section 1(b).

17                           **2.       Article XIII, Section 2**

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

26                           **3.       Article XIII, Section 3(m)**

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



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

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

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

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

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

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

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

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

17 **E. The Relief Sought by Plaintiff Is Appropriate**

18 Based on the Order of August 9, 2017, which concerns the Fifth and Ninth Causes of  
19 Action in the Amended Complaint, Plaintiffs seek a declaratory judgment confirming that: (1) the  
20 Department has an ongoing ministerial duty to make sure the amount being charged for the  
21 DROS Fee is “no more than necessary” per Section 28225; (2) the Department has failed to meet  
22 that duty; and (3) SB 819, and the addition of the word “possession” to Section 28225, only  
23 address the costs of APPS-related law enforcement activities, i.e., investigating whether people  
24 on the APPS List are illegally possessing firearms—and not the costs of running APPS itself or  
25 investigating potentially armed and prohibited individuals *not* on the APPS List. Code Civ. Proc.  
26 § 1060; *see Kirkwood v. Cal. State Auto. Ass’n Inter-Ins. Bureau*, 193 Cal. App. 4th 49, 59 (2011)  
27 (“The correct interpretation of a statute is a particularly suitable subject for a judicial  
28 declaration.”).

///

1 Further, based on the ruling of August 9, 2017, Plaintiffs seek a peremptory writ of  
2 mandate: (1) requiring, within 60 days of this order, the Department to review the DROS Fee as  
3 currently imposed to determine whether the amount is “no more than is necessary” to cover  
4 regulatory costs identified in Section 28225 and to return to this Court to explain what DROS Fee  
5 amount the Department identified as “no more than necessary” to fund the relevant regulatory  
6 costs, along with the calculations supporting that amount; and (2) forbidding the Department and  
7 its agents, employees, officers, and representatives, from imposing the DROS Fee at an amount  
8 greater than \$14.00, at least until the required review is conducted by the Department and the  
9 appropriate amount for the DROS Fee is established. “There are two basic requirements for  
10 issuance of [a] writ: (1) A clear, present, ministerial duty owed by the agency or official, and (2) a  
11 clear, present beneficial right in the petitioner to performance of that duty.” 9 Witkin, Cal. Proc.  
12 5th Admin Proc § 140 (2008); *see also* Cal. Civ. Proc. Code § 1085. Because the Court has  
13 already identified the relevant ministerial duty (i.e., the ongoing duty to only charge a DROS Fee  
14 necessary to cover statutorily identified regulatory costs, which necessarily means the Department  
15 cannot continue using DROS Fee funds for unauthorized non-APPS law enforcement activities),  
16 and because Plaintiffs are, or represent, law-abiding DROS Fee payers who have a clear, present,  
17 and beneficial right in the relevant duty being properly performed, the issuance of the requested  
18 writ is proper. *Id.*

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

23 Furthermore, based on the argument herein and the Sixth, Seventh, and Eighth Causes of  
24 Action in the Amended Complaint, Plaintiffs seek a declaratory judgment that the DROS Fee, as  
25 currently imposed and funds therefrom used, violates article XIII, section 3, and article XIII,  
26 sections 1(b), 2, and 3(m), of the California Constitution. Plaintiffs further seek a peremptory writ  
27 of mandate and/or injunctive relief forbidding the Department (1) from considering non-  
28 regulatory activities when setting the amount of the DROS Fee, and (2) from using DROS Fee

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

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

13 **V. CONCLUSION**

14 When deposed, Defendant Stephen Lindley stated the Department's viewpoint repeatedly  
15 as to why the Department wants all DROS Fee payers to shoulder the burden of APPS-based law  
16 enforcement activities: "the problem is caused by people who purchase, possess, [and] use  
17 firearms. If you don't have a firearm, you're not going to show on the APPS system." (Franklin  
18 Decl. Ex. 4, at 67:4-19; 81:11-82:12). A person familiar with elementary logic will immediately  
19 identify this as a "'fallacy of composition[, 'which] is committed when one reasons from the  
20 properties of a 'part' to the properties of the 'whole.'" *Rosen v. Unilever U.S., Inc.*, Case No. C  
21 09-02563 JW, 2010 WL 4807100, at \*5 (N.D. Cal. May 3, 2010). "The reasoning is fallacious  
22 because things joined together may have different properties as a whole than they do separately."

23 *Id.*

24 *///*

25 *///*

26 *///*

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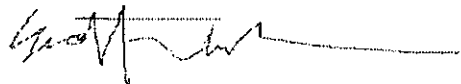
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Even if the Legislature chose to adopt the Department's logically unsound position and concluded law-abiding firearm owners should be singled out for paying additional taxes to be used in illegal firearm ownership reduction activities, the Legislature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

Dated: December 4, 2018

**MICHEL & ASSOCIATES, P.C.**



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**Scott M. Franklin**  
**Attorney for Plaintiffs and Petitioners**

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA

3 COUNTY OF SACRAMENTO

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

7 On December 4, 2018, the foregoing document described as

8 **PLAINTIFFS' OPENING TRIAL BRIEF**

9 on the interested parties in this action by placing

10  the original

11  a true and correct copy

12 thereof enclosed in sealed envelope(s) addressed as follows:

13 Anthony R. Hakl  
14 anthony.hakl@doj.ca.gov  
15 Deputy Attorney General  
16 1300 I Street, Suite 125  
17 P.O. Box 944255  
18 Sacramento, CA 94244-2550

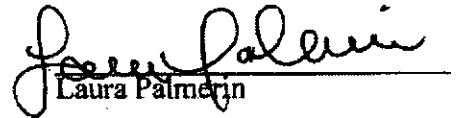
19 *Attorney for Defendants*

20  (BY ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic  
21 transmission. Said transmission was reported and completed without error.

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

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

Executed on December 4, 2018, at Long Beach, California.

  
Laura Palmerin