C.D. Michel – S.B.N. 144258
Scott M. Franklin – S.B.N. 240254
Sean A. Brady – S.B.N. 262007
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444
Facsimile: (562) 216-4445
Email: cmichel@michellawyers.com

Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

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

Plaintiffs and Petitioners,

v.

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

Defendants and Respondents.

Case No. 34-2013-80001667

REPLY IN SUPPORT OF PLAINTIFFS' OPENING TRIAL BRIEF

Hearing 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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I. INTRODUCTION

Defendants'[1] Opposition consists primarily of two meritless arguments that fill the space left bare as a result of Defendants' refusal to address the clear evidence of unauthorized governmental spending presented by Plaintiffs in this case. Accordingly, the Court should grant the relief Plaintiffs seek for the reasons stated in their Opening Brief and this Reply.

II. ARGUMENT

A. Defendants Cannot Meet Two of the Three Elements of Claim Preclusion

1. The Primary Right Theory Only Potentially Creates a Res Judicata Bar as to Claims Arising from "a Particular Injury[,]" Not, as Defendants Argue, a Particular *Type* of Injury

Defendants correctly state the claim preclusion standard (Opp'n at 19:2-9),[2] but they cannot meet their burden as to two of its three elements.[3] Regarding the first element—that there is a second suit involving "the same cause of action" as was brought in a prior action (*DKN Holdings*, 61 Cal. 4th at 824)—"California law approaches the issue by focusing on the 'primary right' at stake." (Opp'n at 19:2-9 (citing *Cal Sierra Dev., Inc. v. George Reed, Inc.*, 14 Cal. App. 5th 663, 675 (2017)). "If two actions involve the *same injury to the plaintiff* and the same wrong by the defendant then the same primary right is at stake[.]" (*Id.* (italics added).) So when a primary right raised in an action litigated to final judgment is raised in another action, the application of the doctrine of res judicata results in the later-raised "cause [being] merged into the judgment and . . . serves as a bar to further litigation of the same cause of action." (Opp'nat 18:13-17, citing *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 896-97 (2002).)

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[1] Plaintiffs are in accord with Defendants' request that this Court substitute Director Horan as a defendant herein, replacing his predecessor, Stephen P. Lindley. (Opp'n, 8:25-26, n.1).

[2] "Claim preclusion arises if a second suit involves: (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit." *DKN Holdings LLC v. Faerber*, 61 Cal. 4th 813, 824 (2015).

[3] "The burden of proving that the requirements for application of res judicata have been met is upon the party seeking to assert it as a bar or estoppel." *Vella v. Hudgins*, 20 Cal. 3d 251, 257 (1977). Relatedly, Plaintiffs do not dispute that, as to the third claim preclusion element, the judgment in *Bauer* was a final judgment on the merits (Opp'n at 24:5-20, citing *Bauer v. Becerra*, 858 F.3d 1216, 1226 (9th Cir. 2017), *cert. denied*, (U.S. Feb. 20, 2018)). Nonetheless, Plaintiffs do not concede Defendants' characterization of the substance of that judgment is accurate. (*Id.*).

Though Defendants repeatedly raise variations of the claim *Bauer* and this action "concern the same legal wrong and injury" (Opp'n at 20:22-21:1, see also 21:7-8, 8:10-13), Defendants never actually identify and compare the injuries at issue in *Bauer* and this action. Doing so would have shown that *Bauer* and this case do not concern "the same . . . injury" at all—they instead only concern the same *type* of injury, which is not enough to meet the first claim preclusion element. *Planning & Conservation League v. Castaic Lake Water Agency*, 180 Cal. App. 4th 210, 227–28 (2009), *as modified on denial of reh'g* (Jan. 14, 2010); *Frommhagen v. Bd. of Supervisors*, 197 Cal. App. 3d 1292, 1299–300 (1987); *Roam v. Koop*, 41 Cal. App. 3d 1035, 1041, (1974); *Yates v. Kuhl*, 130 Cal.App.2d 536, 540 (1955).

"The scope of the primary right . . . depends on how the injury is defined. A cause of action comprises the plaintiff's primary right, the defendant's corresponding primary duty, and the defendant's wrongful act in breach of that duty." *Fed'n of Hillside & Canyon Ass'ns v. City of Los Angeles*, 126 Cal. App. 4th 1180, 1203 (2004). "An injury is defined in part by reference to the set of facts, or transaction, from which the injury arose." *Id.* The "set of facts, or transaction, from which the injury [in *Bauer*] arose" is completely separate from the "set of facts, or transaction, from which the injury [in this case] arose[.]" *Id.* As stated in the relevant complaints, the individual Plaintiffs in *Bauer* and in this action alleged injury occurring when they *each* purchased a firearm and were forced to pay the challenged levy. (Decl. of Anthony Hakl in Supp. of Defs.' Opp'n Brief ["Hakl Decl."] at Ex. A, ¶¶ 14, 17, 19, 20; Am. Compl., ¶¶ 21-24.) The fact that *each* plaintiff has a unique injury in and of itself proves there was not a single invasion of a primary right upon which the "same action" requirement could be met.

Further, the timing of the injuries pleaded in this action is dispositive as to the whether this case concerns the same invasion of a primary right that was addressed in *Bauer*. That is, each individual Plaintiff herein alleged that, between October 31, 2012, and October 31, 2013, they had purchased a firearm, and in the course thereof were injured because they had to pay the inflated Dealers Record of Sale ("DROS") fee ("DROS Fee"). (Am. Compl., ¶¶ 21-24, 111.). *Bauer* was filed on August 25, 2011 (Hakl Decl. at Ex. A), well before any of the occurrence of any of the injuries at issue herein. (Am. Compl., ¶¶ 21-24.) Because "a cause of action is framed

by the facts in existence when the underlying complaint is filed, res judicata 'is not a bar to claims that arise after the initial complaint is filed.'" *Planning & Conservation League*, 180 Cal. App. 4th at 227. Indeed, where post-filing injuries violate a plaintiff's rights, "[t]hese rights may be asserted in a supplemental pleading, but if such a pleading is not filed a plaintiff is not foreclosed from asserting the rights in a subsequent action." *Id.* at 228. There is simply no merger where "the second action is on a different cause of action, where there are successive breaches of an obligation, or . . . new rights accrued since the rendition of the former judgment." 7 Witkin, Cal. Proc. 5th Judgm. § 404 (2017) (identifying more than a dozen relevant cases).

Frommhagen is particularly instructive. There, the plaintiff brought and litigated a lawsuit regarding a "county service area charge" (the "Charge") levied on him for fiscal year 1984-1985 that was dismissed by the trial court, a decision upheld on appeal. *Frommhagen*, 197 Cal. App. 3d 1292, 1297-98. Soon after his first case was over, Frommhagen filed a new action regarding the assessment of the Charge for fiscal year 1985-1986, and the defendant county raised a res judicata argument based on the first action. *Id.* at 1298-99.

The *Frommhagen* court had little trouble in finding that the "suit attacking the 1985–1986 charges is not based on the same cause of action as the suit attacking the 1984–1985 charges." *Id.* at 1300. It held that "each year is the origin of a new charge fixing procedure, new charge liability, and, we believe, a new cause of action. In the parlance of the 'primary right theory,' those paying charges have a primary right to have the charges properly calculated and imposed each year." *Id.* The rejected res judicata allegations in *Frommhagen* and those made in this action are patently parallel. Just like each yearly levy of the Charge created a new cause of action (*id.*),[4] each firearm purchase burdened with the payment of the illegally inflated DROS Fee created a new cause of action. Accordingly, because none of the Plaintiffs herein base their claims on the

[4] *See also Yates*, 130 Cal.App.2d at 540 (noting that "it is . . . well established that the doctrine [of res judicata] is limited by the rule that it does not apply to new rights" and holding the doctrine was inapplicable in a case concerning "successive causes of action arising out of the same general subject matter"); *Roam*, 41 Cal. App. 3d at 1041 (holding that, pursuant to "ten separate contracts entered into over a period of approximately two years . . . each may be viewed as involving a separate primary right and thus giving rise to a separate and independent cause of action [even "though they all concerned the same general subject matter"); *Citizens for Open Access to Sand & Tide, Inc. v. Seadrift Ass'n*, 60 Cal. App. 4th 1053, 1069 (1998) ("the application of the doctrine of res judicata 'depends on whether the issue in both actions is the same, not whether the issue arises in the same context.'").

fee payments at issue in *Bauer*, Defendants cannot meet the first element and their res judicata claim fails for that reason alone.

2. Defendants Cannot Show the Required Privity.

Defendants claim that Plaintiffs have a sufficient relationship with the *Bauer* plaintiffs to meet the res judicata privity requirement. (Opp'n at 22:6-24:4.) This assertion is based on three factual allegations: (1) the same law firm (and to some extent, the same specific lawyers) that represents Plaintiffs also represented the plaintiffs in *Bauer*; (2) Plaintiffs "worked in cooperation with the plaintiffs in *Bauer*[;]" and (3) that the entity plaintiffs in this case and *Bauer* "maintain a relationship of privity as a practical matter[.]"(*Id.*). Even if all of those factual assertions are true, Defendants have nonetheless failed to show the existence of privity upon which a claim preclusion bar could be applied to Plaintiffs.

Defendants' own case law dooms their attempt to show privity. In the res judicata context, "[a] privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase." (Opp'n at 21:11-20.; citing *Cal Sierra*, 14 Cal. App. 5th at 672.) Under this definition, Plaintiffs are only privies of the *Bauer* plaintiffs if Plaintiffs "acquired an interest in the subject matter affected by the judgment through or under one of the [*Bauer* plaintiffs] as by inheritance, succession, or purchase." (*Id.*) Defendants, however, fail to allege (1) an interest in the "subject matter" obtained by a Plaintiff from a *Bauer* Plaintiff, let alone one that was obtained (2) "as by inheritance, succession, or purchase." (*Id.*).

"A party is adequately represented for purposes of the privity rule 'if his or her interests are so similar to a party's interest that the latter was the former's virtual representative in the earlier action.'" *Citizens for Open Access*, 60 Cal. App. 4th at 1070. "This requires more than a showing of parallel interests—it is not enough that the non-party may be interested in the same questions or proving the same facts." *In re Yellow Cab Co.*, 212 B.R. 154, 158 (Bankr. S.D. Cal. 1997). "The cases uniformly state that, in addition to an identity or community of interest between the party to be estopped and the losing party in the first action, and adequate representation by the latter, 'the circumstances must have been such that the party to be estopped

should reasonably have expected to be bound by the prior adjudication.'" *Rodgers v. Sargent Controls & Aerospace*, 136 Cal. App. 4th 82, 93 (2006), as modified (Feb. 7, 2006). As the *Rodgers* court noted, in *Vega v. Jones, Day, Reavis & Pogue*, 121 Cal. App. 4th 282, 298–299 (2004), the court there "discern[ed] no basis for concluding Vega 'should reasonably have expected to be bound by' the adjudication of lawsuits *in which he did not participate in any way, in which he had no proprietary or financial interest, and over which he had no control of any sort.*" *Id.* (italics added).

"'This requirement of identity of parties or privity is a requirement of due process of law.' [Citation.] 'Due process requires that the nonparty have had an identity or community of interest with, and adequate representation by, the losing party in the first action." *Cal Sierra*, 14 Cal. App. 5th at 673. *Richards v. Jefferson County, Ala.* 517 U.S. 793, 801-02 (1996), decisively directs that Defendants have not made a sufficient privity showing. In that ruling, the Supreme Court held that the final ruling in a prior taxpayer lawsuit brought by three taxpayers, who acted for their own benefit and not for a class or the public at large, was not res judicata as to a later, substantially similar lawsuit brought by different parties. *Id.* at 798, 801-02. As the Supreme Court stated, "to contend that the plaintiffs in [the first action] somehow represented [plaintiffs in the second action], let alone represented them in a constitutionally adequate manner, would be 'to attribute to them a power that it cannot be said that they had assumed to exercise.'" *Id.* at 1768. "Accordingly, [*Richards* holds that] due process prevents the [plaintiffs in the second action] from being bound by the [plaintiffs in the first actions'] judgment" (*id.*), just as this Court should.

i. Use of the Same Attorney Is Not Per Se Relevant as to Privity

Defendants claim that "the same counsel's representation of different plaintiffs in successive actions is a factor this Court should consider in determining privity[,]" citing *Alvarez v. May Dept. Stores Co.*, 143 Cal. App. 4th 1223, 1238 (2008). (Opp'n at 21:16-19.) Defendants do not, however explain why this "factor" weighs in favor of a privity finding in *this* action. As Defendants admit: "[w]hether someone is in privity with the actual parties requires a close examination of the circumstances of each case." (Opp'n at 21:1-5, citing *Citizens for Open Access*, 60 Cal. App. 4th at 1070.) And yet, Defendants provide no argument supporting their

position. Indeed, the idea that an attorney's representation of two similarly situated clients in two similar cases should be the basis for penalizing the second such client is contrary to public policy.

> That appellant is represented by the same counsel as were the plaintiffs in the prior actions does not, we conclude, suffice to extend the doctrine of privity to his case. . . . [T]he representation of different plaintiffs in different cases by the same attorneys is not a factor that justifies imposition of collateral estoppel to preclude litigation of an issue by appellant as a non-party to the prior actions, *at least without evidence that through his attorney he participated in or controlled the adjudication of the issue sought to be relitigated*. [citation] To find that an identity of attorneys presenting the same issue on behalf of different parties results in issue preclusion would promote attorney shopping, and tend to prevent parties from obtaining representation by chosen counsel familiar with an issue or matter in litigation.

Rodgers, 136 Cal. App. 4th at 93–94 (discussing privity vis-à-vis issue preclusion) (italics added).

Thus, if this "factor" is relevant at all, it is only relevant to the extent that one of the Plaintiffs used their counsel to "participate[] in or control[] the adjudication" in *Bauer*. *Id.* Defendants have not produced even a scintilla of argument of that having occurred. That Plaintiffs chose a law firm with firearms law experience to bring a case concerning firearms law—just as the *Bauer* plaintiffs did—is of no import to the privity analysis. Indeed, to hold otherwise would cut against the well-established "interest of clients in having the attorney of [their] choice[.]" *Howard v. Babcock*, 6 Cal. 4th 409, 425 (1993).

ii. Cooperation Does Not Evince Privity

Defendants' attempt to show privity based on the supposition that Plaintiffs "worked in cooperation with the plaintiffs in *Bauer*" also fails for the same reason. (Opp'n at 22:20-21.) That is, two sets of plaintiffs "working in cooperation" is not a salient consideration vis-à-vis proving privity *unless* it shows a plaintiff in one lawsuit participated in, had a proprietary interest in, or had control over another lawsuit. *Rodgers*, 136 Cal. App. 4th at 93. Defendants claim that Plaintiffs "had access to all of the discovery [responses] in the possession of the *Bauer* plaintiffs[,]" but such access would not further the assertion of privity—obtaining "presumptively public"[5] discovery responses from *Bauer* does nothing to show a Plaintiff "had a right to make a defense [in], control . . . , [or] appeal" that case. (Opp'n at 21:13-20), citing *Cal Sierra*, 14 Cal.

[5] "It is well-established that . . . the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public." *San Jose Mercury News, Inc. v. United States Dist. Court-N. Dist.*, 187 F.3d 1096, 1103 (9th Cir.1999).

App. 5th at 672.)

iii. Defendants Show No Privity between the Entity Plaintiffs

Defendants claim their privity assertion is assisted because the "lead organizational plaintiff in *Bauer*" and the "lead organizational plaintiff in" this case "maintain a relationship of privity as a practical matter, when it comes to lobbying, litigating, and generally advocating to promote firearm rights." (Opp'n at 23:10-24:4). First, the claim about "a relationship of privity . . . when it comes to . . . litigating" is speculation: Defendants do not identify a single evidentiary basis for this contention. Second, even assuming Defendants' citation to internet sources did suggest these two entities had a relationship that generally included some aspect concerning litigation, that fact would do nothing to show the Plaintiffs had "adequate representation" of their interests in a particular prior lawsuit, i.e., *Bauer. Consumer Advocacy Grp., Inc. v. ExxonMobil Corp.*, 168 Cal. App. 4th 675, 690 (2008) (citing *Richards*, 517 U.S. 793, *passim*).

In sum, Defendants offer three arguments to support a finding of privity and each fails. Accordingly, Defendants have not met their burden to show privity, in addition to having failed to show that this action and *Bauer* concern the same primary right. Therefore, there are two independent, elemental reasons why claim preclusion is inapplicable here.

3. The Public Policy/Injustice Exception

When the *Bauer* court determined that the Armed Prohibited Person System ("APPS") "can fairly be considered an 'expense[ ] of policing the activities in question,'" relying upon certain First Amendment fee jurisprudence (*Bauer*, 858 F.3d at 1225), it was ruling on a question of law. *Bd. of Educ. v. Jack M.*, 19 Cal. 3d 691, 698 (1977) ("a determination is one of law if it can be reached only by the application of legal principles"). If the Court finds a prima facie issue preclusion claim exists, "public policy considerations . . . warrant an exception to the claim preclusion aspect of res judicata." *People v. Barragan*, 32 Cal. 4th 236, 256, 83 P.3d 480, 495 (2004); *see also Kopp v. Fair Pol. Practices Com.*, 11 Cal. 4th 607, 622 (1995) ("when the issue is a question of law . . . , the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed.") The conclusion reached in *Bauer* is completely at odds with the import of *Sinclair Paint Co. v. State Bd. of Equalization* 15

Cal. 4th 866, 874 (1997) (see *infra* Section II.B.1.), and it would be unjust to allow a legal determination in a federal action, concerning a claim brought under the United States Constitution, to run roughshod over the clear instruction of the California Supreme Court. Thus, the public policy/injustice exception should prevent claim preclusion based on *Bauer*.

B. The DROS Fee Operates as an Unconstitutional Tax

Before dismantling Defendants' arguments attempting to characterize the DROS Fee as a regulatory fee, it is worth noting that Defendants make no real argument that if the DROS Fee is held to be a tax, it would necessarily be an unconstitutional tax. Defendants' only comment on this point is an unsupported claim, raised in a footnote, that "even if article XIII were somehow implicated, plaintiffs have not cited a single case holding that section 1 (b), 2, or 3(m) applies to firearms." (Opp'n at 28:27-28, n.22). The non-existence of such a case is patently irrelevant. Just because a court has not had the opportunity to apply the relevant law to a certain factual scenario imparts no indication as to applicability of such law to that scenario. Factual distinctions, e.g., whether a case concerns firearms or some other form of property, mean nothing unless the distinction is legally relevant. *See People v. Johnson*, 6 Cal. 4th 1, 40-41 (1993); *People v. Byoune*, 65 Cal. 2d 345, 348 (1966). Because Defendants fail to identify a legally relevant distinction between the facts here and the facts in the case law cited by Plaintiffs (Open. Br. at 24:8-9, 25:8-13.) the sole disputed issue is whether the DROS Fee is a completely valid regulatory fee—which is Defendants' position (Opp'n at 26:19-31:13)—or if it is operating, at least in part, as an unconstitutional tax. The Opposition fails to overcome the reality that the Department is using the DROS Fee to collect an unconstitutional tax.

1. Defendants Avoid Admitting that the DROS Fee Is a Tax by Wrongly Claiming the *Sinclair Paint* Standard Does Not Apply

Even though the proper framework for "distinguishing taxes from regulatory fees" is of central importance in this case, Defendants use a footnote to argue that the two-prong approach identified by Plaintiffs "misses the mark." (Opp'n at 26:24-28, n. 20.) Defendants claim that: *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* 203 Cal. App. 3d 1132, 1146 (1988) is "the case outlining that approach that plaintiffs urge this court to follow[,]"

that *San Diego Gas* "expressly indicates that it [the two-prong analysis] applies to determining whether a fee is a 'special tax under Proposition 13 (i.e., article XIIIA [of the California Constitution]), and that "the issue in this case is not whether the DROS Fee is a special tax under Proposition 13."[6] (Opp'n at 26:24-28, n. 20.) What Defendants cobble together here is a textbook strawman argument.

San Diego Gas is *not* "the," i.e., the *only*, case identified by Plaintiffs that outlines the approach that plaintiffs urge this Court to follow." (*Id.; see* Open. Br. at § IV.A (discussing a series of cases going back to 1906, including the pre-Proposition 13 case *Un. Busi. Com. v. City of San Diego*, 91 Cal. App. 3d 156 (1979) and the seminal case *Sinclair Paint*). In contrast, the Opposition repeatedly cites a single case (*Cal. Farm Bureau Federation v. State Water Resources Control Bd.*, 51 Cal. 4th 421 (2011), *as modified* (Apr. 20, 2011), and never identifies an analytical framework in *Cal. Farm* that could be utilized in this case. (Opp'n at 25:8-26:18.)

The reason for this omission is clear: *Cal. Farm* adopts the standard Defendants now urge this Court not to follow, hereinafter referred to as the *Sinclair Paint* standard. *Cal. Farm,* 51 Cal. 4th at 441 (noting that, "in *Sinclair Paint,* to determine the tax or fee issue, we directed courts to examine [(1)] the costs of the regulatory activity and [(2)] determine if there was a reasonable relationship between the fees assessed and the costs of the regulatory activity"), 436-37. The *Cal. Farm* court expressly recognized the two-prong *Sinclair Paint* standard was valid, concluding that "the question [at issue in *Cal. Farm*] revolve[d] around [(1)] the scope and the cost of the Division's regulatory activity and [(2)] the relationship between those costs and the fees imposed." *Id.* Accordingly, *Cal. Farm*, just like *Sinclair Paint*, is a Proposition 13 case that nonetheless relies on a "tax v. fee" analytical framework predating Proposition 13 (i.e., the *Sinclair Paint* Standard)—meaning that framework is necessarily not limited to Proposition 13

[6] As enacted, Proposition 13 created two new constitutional provisions that are worth identifying to understand why Defendants' argument on this point does not hold water. Those two provisions can be summarized as follows: (1) "any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto . . . must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature" and (2) "Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district[.]" Ballot Pamp., Prim. Elec., text of Prop. 13, p. 57 (June 6, 1978), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1849&context=ca_ballot_props).

cases.[7] For example, in *Northwest Energetic*, which does not concern Proposition 13, the court stated that "the distinction between a tax and a fee has been well-discussed in Proposition 13 cases" and then went on to cite and rely on, e.g., *Sinclair Paint. Nw. Energetic Servs., LLC v. California Franchise Tax Bd.*, 159 Cal. App. 4th 841, 857 (2008), *as modified on denial of reh'g* (Mar. 3, 2008). Therefore, Defendants are wrong as a matter of law in trying to distinguish the *San Diego Gas/Sinclair Paint* line of cases and the analytical framework it provides.

Considering the foregoing, Defendants' well-camouflaged strawman comes into view. Defendants set up this distraction by erroneously implying that *Plaintiffs* contend "the DROS Fee is a special tax under Proposition 13." (Opp'n at 26:27-28, n.20.) Because the relevant aspect of Proposition 13 (article XIIIA, section 4) only applies to "Cities, Counties and special districts" (*id.*), and the California Department of Justice ("Department") is clearly none of those, Plaintiffs are obviously not making such a claim. What Plaintiffs do assert is that, under generally applicable law, the DROS Fee is a tax. That such generally applicable law has been relied upon in Proposition 13 cases in no way operates to limit the use of such law in non-proposition 13 cases. Because the *Sinclair Paint* standard is applicable here, Defendants' claim that the DROS Fee is a reasonable regulatory fee must be analyzed under that standard. As shown below, that analysis clearly identifies the DROS Fee as a tax.

2. *Cal. Farm* Is Distinguishable, and Even Assuming It Is Not, It Would Support Plaintiffs' Position, Not Defendants'

Defendants' attempt to compare this action to *Cal. Farm* is confounding. First, they assert that in *Cal. Farm* "the California Supreme Court upheld the state's water right statutes . . . imposing annual fees on those who hold permits and licenses to appropriate water." (Opp'n at 26:20-23; citing *Cal. Farm*, 51 Cal. 4th at 446.) That is not an accurate representation of the *Cal. Farm* holding. The *Cal. Farm* court did "affirm the Court of Appeal's judgment holding that the fee statutes at issue [we]re facially constitutional." *Cal. Farm*, 51 Cal. 4th at 446. But *literally* the

[7] *Cal. Farm*, 51 Cal. 4th at 436-37 (citing *Sinclair Paint*, 15 Cal. 4th at 874, 876, 878); *Sinclair Paint*, 15 Cal. 4th at 878 (citing *United Business*, 91 Cal. App. 3d at 165, 166-68); *United Business*, 91 Cal. App. 3d at 165 (noting a municipality could impose a regulatory fee under the police power if "the fee constitutes [(1)] an amount necessary to 'legitimately assist in regulation and [(2)]. . . not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the . . . subject that it covers.'")

next sentence of that opinion—unmentioned by Defendants—states: "the Court of Appeal's judgment is reversed as to its determination that the statutes and their implementing regulations are unconstitutional as applied." (*Id.* at 446-47.) That omission is strange; the Opposition later quotes the *Cal. Farm* court's explanation of why it reversed and remanded. (Opp'n at 28:12-17).

Second, and stranger still, is that Defendants approvingly quote the portion of *Cal. Farm* that reiterates the *Sinclair Paint* standard applies in cases like *Cal. Farm*: "the [tax or fee] question revolves around [(1)] the scope and the cost of the Division's regulatory activity and [(2)] the relationship between those costs and the fees imposed." (Opp'n at 27:12-17, citing *Cal. Farm*, 51 Cal. 4th at 441.)[8]

Third, *Cal. Farm* shines little light on this case because there "the record before [the Court wa]s insufficient to resolve the 'tax or fee' question." *Cal. Farm*, 51 Cal. 4th at 441. Without an application of law to facts, *Cal. Farm* is little more than a recapitulation of the judicial landscape vis-à-vis the 'tax or fee' question, a landscape that *Cal. Farm* recognized was (and still is) dominated by *Sinclair Paint*. *Cal. Farm*, 51 Cal. 4th at 441. Because *Cal. Farm* does not include a determination based on a factual analysis intended to resolve the 'tax or fee' question, it has no materiality to this case, and the Court should ignore Defendants' conclusions based on *Cal. Farm*.

3. Section 28225 and the Statute at Issue in *Cal. Farm* Are Not Analogous

For reasons not totally clear, Defendants cite *Cal. Farm*'s statement that the statute at issue there "'revealed a specific intention to' impose a regulatory fee[,]' [and that] Penal Code section 28225 ("Section 28225"), also reveals a specific legislative intention to impose a regulatory fee." (Opp'n at 26:21-27:4). If Defendants are attempting to claim the legislature can make a tax into a regulatory fee by naming it as such, that assertion is plainly wrong. "Whatever it is and by whatever name it may be called, the character of the tax 'must be ascertained by its incidents and from the natural and legal effect of the language employed in the (legislative enactment).'" *Ainsworth v. Bryant*, 34 Cal. 2d 465, 473 (1949). Further, Senate Bill 819 (Leno,

[8] The material quoted by Defendants is directly preceded in the *Cal. Farm* opinion by this sentence: "Thus, in *Sinclair Paint*, to determine the tax or fee issue, we directed courts to examine the costs of the regulatory activity and determine if there was a reasonable relationship between the fees assessed and the costs of the regulatory activity." *Cal. Farm*, 51 Cal. 4th 441 (citation and footnote omitted).

2011) ("SB 819") plainly shows an intent to create a (special) tax. It states that: "[r]ather than placing an additional burden on the taxpayers of California to fund enhanced enforcement of [APPS], it is the intent of the Legislature in enacting this measure to allow the [Department] to utilize the [DROS] Account for the additional, limited purpose of funding enforcement of [APPS]." *Compare* 2011 Cal. Stat., ch. 743 § 1(g); *with Nw. Energetic*, 159 Cal. App. 4th at 857 (2008), ("the Legislature's plain intent to impose the Levy in order to make up for lost income tax revenues . . . indicat[e]s that the Levy constitutes a tax rather than a fee.") [9]

More likely, Defendants' strategy is to gloss over critical distinctions between Section 28225 and Water Code 1525 (the primary statute at issue in *Cal. Farm*) so they can (wrongly) conclude that Section 28225 is a facially valid fee like Water Code section 1525 was determined to be. *Cal. Farm*, 51 Cal. 4th at 438-39.

Defendants claim "Section 28225 'carefully sets out that the fee[] imposed shall relate to costs linked to' the eleven categories set forth in subdivision (b)(1) through (11), and it 'lists the recoverable costs in some detail[,]'" relying on *Cal. Farm*'s discussion of Water Code section 1525. (Opp'n at 27:8-10.) That claim may be correct as to *some* of the categories stated in section 28225(b) (which are minimally relevant here),[10] but *not* as to the subsection at the heart of this case, Section 28225(b)(11). Subsection (b)(11) refers to "costs associated with funding Department of Justice firearms-related regulatory and enforcement activities related to the sale, purchase, possession, loan, or transfer of firearms pursuant to any provision listed in Section 16580." Defendants admit they view this provision as being broadly applicable to firearm-related activities. (Opp'n Pls.' Mot Adj. re: 5th & 9th Causes of Action, 9:9-12, 10:2-7; *accord* Memo Supp. Defs.' Mot. Summ. Adj. at 21:26-22:15("section 28225 . . . broadly speaks in terms of 'costs associated with . . . the sale, purchase, possession, loan, or transfer of firearms.").)

Water Code section 1525 provides a helpful contrast, as it, unlike Section 28225(b)(11), is actually drafted "in some detail[.]"(Opp'n at 27:8-10.)

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[9] Like the levy at issue in *Nw. Energetic*, SB 819 was intended to make up for a reduction in available general fund money. (Open. Br., § II.C.).

[10] E.g, Section 28225(b)(8) is a category described "in some detail[:]" "actual costs associated with the electronic or telephonic transfer of information pursuant to Section 28215."

> The board shall set the fee schedule authorized by this section so that the total amount of fees collected pursuant to this section equals that amount necessary to recover costs incurred in connection with the issuance, administration, review, monitoring, and enforcement of permits, licenses, certificates, and registrations to appropriate water, water leases, statements of water diversion and use for cannabis cultivation, and orders approving changes in point of discharge, place of use, or purpose of use of treated wastewater. . . .

Water Code § 1525(c). Thus, Water Code section 1525 is limited to recovery of a narrowly defined class of costs related to processing and enforcing documentary proof of rights related to water (e.g., permits, wastewater-related orders). *Id.* Further, Water Code section 1525 has a provision—with no analog in Section 28225—requiring "that [the state water board] 'set the amount of total revenue collected each year through the fees authorized by this section at an amount equal to the revenue levels set forth in the annual Budget Act *for this activity.*" *Cal. Farm*, 51 Cal. 4th at 439-40. Also, "There is a safeguard in subdivision (d)(3) authorizing the [state water board] to "further adjust the annual fees" if it "determines that the revenue collected during the preceding year was greater than, or less than, the revenue levels set forth in the annual Budget Act...." *Id.* at 440. Section 28225 does not include these kinds of limitations.

Defendants assert that, [l]ike the situation in" *Cal. Farm*, the "language [in Section 28225] also allows the [Department] to adjust the amount of the DROS fee as needed." (Opp'n at 28:1-2.) This is a false comparison, as Section 28225 does not have the type of "safeguard" language found in Water Code section 1525 that *requires* a yearly review. If it did, the Department might not have failed to review the amount being charged for the DROS Fee for more than thirteen years. (Ruling of Aug. 9, 2017, at 11:2-5.) And in any event, Defendants do not explain how a regulatory agency's statutory ability to adjust a levy "reveals a specific legislative intention to impose a regulatory fee[.]" (Opp'n at 26:22-27:4.) That ability could just as easily support Plaintiffs' observation that Section 28225 violates the Separation of Powers doctrine specifically because the Department can adjust the DROS Fee, which is a tax. (Open. Br. § IV.D.1.).

To conclude Defendants' *Cal. Farm*-centric analysis in Section II.A. of their Opposition, they claim the DROS Fee "is hardly a tax" because "like the fees upheld in *California Farm Bureau*, the DROS Fee authorized by section 28225 is "linked to the activities that [the Department] and other specified agencies perform." (Opp'n at 28:4-6; citing *Cal. Farm*, 51 Cal.

4th at 440.) But Defendants' claim fails to recognize the context in which the quoted material arose. That is, the final paragraph in *Cal. Farm*'s facial challenge analysis concludes that: "the fees charged under section 1525 are linked to the activities the [state water board] performs." *Cal. Farm*, 51 Cal. 4th at 440. Defendants use this summary statement to argue that, under *Cal. Farm*, a challenge to a purported tax can be defeated upon nothing more than a showing that the charge "is linked to" activities performed by the relevant agency. (Opp'n at 28:4-6; citing *Cal. Farm*, 51 Cal. 4th at 440.) But as the paragraph at issue makes clear, *Cal. Farm* specifically rejected the idea that "the 'activity' subject to fees under [water code section 1525] could represent all of the [state water board]'s activities[.]" *Cal. Farm*, 51 Cal. 4th at 439-440. Rather, *Cal. Farm's* reference to "the activities the [state water board] performs" was limited to the plainly regulatory activities actually identified in Water Code section 1525(a)-(c). *Id.* Thus, even if *Cal. Farm*'s facial challenge analysis is relevant, Defendants cannot cherry-pick it and ignore the critically important limitation identified above. A fair reading of *Cal. Farm* shows that it does not support Defendants' interest in using DROS Fee money for activities not listed in Section 28225.[11]

Because of the material distinctions—ignored by Defendants—that negate Defendants' attempt to construct an argument based on Water Code section 1525, the Court should ignore it.

4. Defendants' Confused "Reasonable Relationship" Argument Fails; the Framework that Must Be Applied is the *Sinclair Paint* Standard, Under Which the DROS Fee Is a Tax

Section II.B. of the Opposition is the core of Defendants' argument on the "tax or fee" issue. But that section is muddled as to what analytical framework is being applied—assuming one is. The section does quote the *Cal. Farm* court's restatement of the *Sinclair Paint* standard (Opp'n at 28:12-14), but the remainder of the section does not refer to the *Sinclair Paint* standard. The latter is consistent with footnote 20 of the Opposition, which (incorrectly) argues the *Sinclair Paint* standard is inapplicable because it is a Proposition 13 case. (Opp'n. at 26:23-28, n.20.)

Rather, it seems Defendants have manufactured a standard that is based on their faulty "linked to" argument described in the prior subsection. Though Defendants do not cite any

[11] Defendants still seem to advocate for a broad interpretation of Section 28225(b)(11), but Plaintiffs contend that issue was largely, if not completely, resolved when Judge Kenney ordered that the reference to "possession"-related enforcement activates in Section 28225 were limited to "APPS-Based Law Enforcement Activities." (Ruling of Aug. 9, 2017, at 11:2-5.)

authority, they are apparently arguing that the Court should utilize the following standard: a levy [e.g., "the $19 DROS fee"] is not a tax if it "is reasonably related to all of the costs related to the regulation of the fee *payors*." (Opp'n at 31:12-13; *accord* Opp'n at 28:7-8 & 28:22-23 (italics added.) That "standard" is much broader than the *Sinclair Paint* standard in at least two ways. First, it changes the scope of costs under consideration from "the reasonable cost of providing services *necessary to the activity for which the fee is charged* (*Sinclair Paint*, 15 Cal. 4th at 876 (italics added)) "to *all* of the costs related to the regulation of the fee payors" (Opp'n at 31:12-13 (italics added)), i.e., costs beyond those for a specific program. Second, the phrase "fee payors" (*id.*) includes *all* fee payers, even those that get no benefit from, nor create a burden on, a relevant program. On the other hand, the phrase "fee payor's" (*Sinclair Paint*, 15 Cal. 4th at 876) is much narrower and looks at what costs are actually attributable to a particular person.

Presumably, Defendants ask the Court to adopt a "novel" standard because they recognize the DROS Fee is a tax under *Sinclair Paint*. Indeed, it is noteworthy that Defendants never even attempt to mount a defense of the DROS Fee in the context of the *Sinclair Paint* standard. Nonetheless, Plaintiffs now explain why Defendants' factual and legal assertions cannot prevent the DROS Fee from being recognized as a tax.

i. Irrelevant Data Cannot Trump Relevant, Undisputed Data

Defendants claim financial data going back five years shows that "all of the costs associated with funding the relevant firearms-related regulatory and enforcement activities actually exceeded the amount of DROS fee revenue[; t]his demonstrates that the $19.00 DROS fee is proportional to the costs of the regulated activities." (Opp'n at 28:18-29:9.) That assertion is pure obfuscation: Defendants provide an answer to a question that no one has asked.

The expenditure data Defendants cite (*Id.* at 28:25-29:17) is not limited to only expenditures authorized by section 28225, but includes other expenses that, as Plaintiff have already explained (Open. Br. § IV.D.2.; *see also* Mot. Adj. Pls.' 5th & 9th Causes of Action, § II.F.), are not authorized to be funded via the DROS Fee. (*Id.*) So when Defendants claim "that the $19.00 DROS fee is proportional to the costs of the *regulated activities*[,]" Defendants are obfuscating a key issue: both prongs of the *Sinclair Paint* standard only consider the costs of the

regulatory program giving rise to the relevant levy, not some undefined list of regulatory activities performed by the levy-imposing agency. *See Sinclair Paint*, 15 Cal. 4th at 8767; *see also Cal. Bldg. Indus. Ass'n v. San Joaquin Valley Air Pollution Control Dist.*, 178 Cal. App. 4th 120, 131, (2009) ("a regulatory fee is charged to cover the reasonable cost of *a service or program* connected to a particular activity.") In contrast to Defendants' disinformation, Plaintiffs provided the Court undisputed evidence that the Department is spending numerous millions of dollars on activities that are not "regulatory activities" identified in Section 28225. (Open. Br. § IV.D.2.; *see also* Mot. Adj. Pls.' 5th & 9th Causes of Action § II.F.)

ii. **The Compulsory Versus Voluntary Dichotomy**

To further the claim that the DROS Fee is nothing but a legitimate regulatory fee, Defendants state that "[t]he DROS fee is not compulsory, whereas, one of the hallmarks of a tax is that it is compulsory." (Opp'n at 30:12-21.) Plaintiffs do no dispute that "one of the hallmarks of a tax is that it is compulsory," but that is not an absolute requirement. (*See* Opp'n at 25:8-17, quoting *Sinclair Paint*, 15 Cal. App. At 874 ("[T]he word 'tax' has no fixed meaning . . . . *Most* taxes are compulsory . . . .") (italics added).) More to the point, the issue of "compulsory" payment needs to be understood in context. It is used in contrast to a situation where a levy is charged "in response to a voluntary decision to develop or to seek other government benefits or privileges" and paid "in return for a specific benefit conferred or privilege granted." (*Id.* at 25:12-14, citing language originally found in *Sinclair Paint*.)

Firearm ownership is an individual right, not a "government benefit or privilege[.]" *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). Thus, *if* there is a "government privilege" here, it is only the "privilege" of having the Department conduct a background check. Accordingly, if the costs to be considered in setting a regulatory fee are the costs of performing background checks, Plaintiffs have produced undisputed evidence that a $19.00 DROS Fee is so grossly disproportionate to the relevant costs[12] and that it therefore violates the first prong of the *Sinclair Paint* standard. *Sinclair Paint*, 15 Cal. 4th at 878.

[12] (Decl. Scott Franklin Supp. Open. Br. ["Franklin Decl"], Exs. 11 & 12; Open. Br., 10:11-28.)

If the Court recognizes that there is no "government benefit or privilege" at issue here—a point Defendants implicitly concede[13]—and identifies the levy at issue is burden-based like in *Sinclair Paint* (*id.*), only two options will remain as to the compulsory versus voluntary dichotomy issue. The Court could disregard the dichotomy as irrelevant to determining if a *burden*-based levy is a tax. Or, the Court could recognize that the dichotomy presents two mutually exclusive scenarios—which would necessarily lead to the conclusion the non-existence of a voluntarily obtained "benefit or privilege" determines the fee is compulsory, and thus a tax. Either way, the compulsory versus voluntary dichotomy, like all of Defendants' arguments, fail to meet Defendants' "Reasonable Relationship" "standard," let alone the *Sinclair Paint* standard. In light thereof, the Court should find the DROS Fee is a tax, and that it is unconstitutional.

5. *Bauer* Cannot Be Used to Avoid the Requirements of *Sinclair Paint*

Once again, context matters. The Court should not be persuaded to disregard California law due to a passage in *Bauer* that was intended to address a Second Amendment claim, inasmuch as this case presents no substantive analog to that claim. Defendants ask the Court to deny Plaintiffs' claims based on *Bauer*'s conclusion that "[t]he APPS program is, in essence, a temporal extension of the background check program." (Opp'n at 31:71-11.) But the *Bauer* court was not making a broad pronouncement that, for all purposes, there is a relevant connection between the background check process (wherein the DROS Fee is charged) and APPS. Rather, it made a judgment only that "the enforcement activities carried out through the APPS program are sufficiently related to the DROS fee *under this line of jurisprudence*, [i.e.] First Amendment fee jurisprudence[.]" *Bauer v. Becerra*, 858 F.3d at 1226.[14] Whether "targeting illegal possession under APPS is closely related to the DROS fee" under First Amendment fee jurisprudence (*id.* at 1225) does not illuminate the issue here—i.e., whether Defendants can prove the DROS Fee is a regulatory fee under *Sinclair Paint*. Because this Court is not bound to accept the Ninth Circuit's analysis or conclusions (*Governor Gray Davis Com. v. Am. Taxpayers All.*, 102 Cal. App. 4th

[13] "[D]efendants submit . . . evidence that the fee imposed on firearms purchasers bears a reasonable relationship to the burdens of firearms regulation." (Opp'n at 30:26-28, n 24.)

[14] Plaintiffs contend *Bauer* was wrongly decided, but unless this Court determines it is relevant to analyze the propriety of that ruling, Plaintiffs will not delve into that issue any further.

449, 468 (2002)) and there is no persuasive reason to do so, *Bauer* should be disregarded. *See Busch v. CitiMortgage, Inc.*, No. 11-CV-03192-EJD, 2011 WL 3627042, at *2 (N.D. Cal. Aug. 17, 2011) ("every case arises on different facts; the persuasive value of precedent exists when the legal principles that apply to the facts of one case can be analogized to the facts of another").

A comparison of the legal standards at issue here and *Bauer* illuminates Plaintiffs' point. In *Bauer*, the court's salient inquiry, under intermediate scrutiny, was whether there was a "'reasonable fit' between the government's stated objective and its means of achieving that goal[; this standard] does not require the least restrictive means of furthering a given end.'" *Id.* at 1223. *Bauer*'s "reasonable fit" analysis is expressly based on evaluating DROS Fee payers' "burdens" as a whole. *Id.* at 1224 ("the unlawful firearm possession targeted by APPS is the direct result of *certain* individuals' prior acquisition of a firearm through a DROS-governed transaction") (italics added). Conversely, in this case, the relevant analysis is much more prescribed than it is under the intermediate scrutiny standard. *Sinclair Paint* requires the reviewing court must look at an *individual* fee payer's burden vis-à-vis "the activity for which the fee is charged" (*Sinclair Paint*, 15 Cal. 4th at 876, 881)—here, participation in the background check process. Because the conclusion stated in *Bauer* is based on a materially distinguishable analysis, this Court should not give any weight to the Ninth Circuit's conclusion, as doing so would run afoul of binding California Supreme Court precedent.

Coincidentally, the reason the Court should not follow *Bauer* is disclosed in Defendants' attempt to support the supposed relevance of *Bauer* with a citation to *Sinclair Paint*. Defendants quote *Sinclair Paint*'s statement that: "case law 'clearly indicates that the police power is broad enough to include mandatory remedial measures to mitigate the past, present, or future adverse impact of the fee payer*'s* operations[.]" (Opp'n at 31:8-11, citing *Sinclair Paint*, 15 Cal. 4th at 877-878 [emphasis added].) As discussed above, the second prong of the analysis must be performed based on the specific "payor's" conduct, *not* the conduct of all fee payors. (*Id.*); *see Sinclair Paint*, 15 Cal. 4th at 881 ("Sinclair will have the opportunity to try to show [at trial] that no clear nexus exists between ***its*** products and childhood lead poisoning, or that the amount of the

fees bore no reasonable relationship to the social or economic "burdens" ***its*** operations generated.") (emphasis added).

Defendants' claim that "[t]his Court should reject [Plaintiffs'] argument just like the Ninth Circuit did" in *Bauer v. Beccera*, 858 F.3d 1216 (Opp'n at 30:1-11) is basically an issue preclusion argument that—if it had been fully briefed—would have shown an elementary deficit. "[The] issue preclusion . . . bar is asserted against a party who had a full and fair opportunity to litigate the issue in the first case but lost." *DKN Holdings*, 61 Cal. 4th at 826. "[I]ssue preclusion applies: (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." *Id.* at 825. Elements 1, 2, and 4 are also found in the claim preclusion standard. *Zevnik v. Super. Ct.*, 159 Cal. App. 4th 76, 82–83 (2008). As shown above in Section II.A., Defendants cannot meet two of the "common elements" shared by claim and issue preclusion: (1) that both actions concerned "identical" claims, and (2) that "the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding." *Zevnik*, 159 Cal. App. 4th at 82–83.

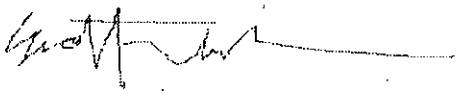
Defendants' *Bauer* and *Cal. Farm*-based arguments work only as distractions, pulling attention away from all the evidence cited and arguments raised in the Opening Brief. Because *Sinclair Paint* is controlling and the DROS Fee is an unconstitutional tax thrice over, the Court should grant Plaintiffs' Sixth, Seventh, and Eighth Causes of Action.

III. CONCLUSION

Plaintiffs should be granted relief for the reasons stated herein and in the Opening Brief.

Dated: January 3, 2019

MICHEL & ASSOCIATES, P.C.



Scott M. Franklin
Attorney for Plaintiffs and Petitioners

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

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

On January 3, 2019, the foregoing document described as

REPLY IN SUPPORT OF PLAINTIFFS' OPENING TRIAL BRIEF

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

Attorney for Defendants

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Laura Palmerin