IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT

DAVID GENTRY; JAMES PARKER; MARK MIDLAM; JAMES BASS; AND CALGUNS SHOOTING SPORTS ASSOCIATION, PLAINTIFFS AND APPELLANTS, V. XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA; STEPHEN LINDLEY, IN HIS OFFICIAL CAPACITY AS ACTING CHIEF OF THE CALIFORNIA DEPARTMENT OF JUSTICE; BETTY T. YEE, IN HER OFFICIAL CAPACITY AS STATE CONTROLLER; AND DOES 1-10, DEFENDANTS AND RESPONDENTS.	Case No. C089655

APPELLANTS' OPENING BRIEF

Superior Court of California, County of Sacramento
Case No. 34-2013-80001667
Honorable Richard K. Sueyoshi, Judge

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

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APPELLANT/ PETITIONER: David Gentry, et al. RESPONDENT/ REAL PARTY IN INTEREST: Xavier Becerra, et al.	
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INTRODUCTION

Appellants seek review of the lower court's ruling that The Dealer's Record of Sale Fee ("DROS Fee") that the State charges on lawful firearm acquisitions is not an *illegal* tax disguised as a regulatory fee. If the trial court's ruling is upheld, notwithstanding the contrary constitutional and California Supreme Court authority, the state will have free reign to charge law-abiding citizens a supposedly regulatory fee that is based not on the costs of regulating those purchasers' actions, but on the conduct of others.

A purportedly regulatory levy without a causal connection to the payor has been recognized as illegal in California for more than a hundred years. (*Plumas Cty. v. Wheeler* (1906) 149 Cal. 758, 763.) Californians have only strengthened that motion by amending our constitution to stop government from creating "hidden taxes" presented to the public as regulatory fees. (Cal. Const., art. XIII A § 3(a).) If the state is allowed to single out a narrow class of law-abiding citizens for a levy that has no causal connection to their individual conduct like it is doing here, it will be emboldened to create other "hidden taxes" nullifying protections of taxpayers adopted by votes. Accordingly, this Court should reverse the court below and put the state on notice that it is not allowed to solve a budgetary dilemma by creating an illegal tax.

STATEMENT OF THE ISSUES

(1) The California Constitution provides that a "change in statute which results in [a] taxpayer paying a higher tax" that does not meet an exemption 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[.]" California has amended the statute governing the charge it imposes on firearm purchasers to increase the amount of the charge and the activities for which

revenues from the charge can be used. Do these amendments constitute an unlawful tax because they were not made by the required two-thirds vote?

(2) The California Constitution exempts from its restrictions on "taxes" regulatory fees that are charged at a reasonable rate to recover costs that result directly from the fee payor's activities. The DROS Fee is charged at a rate beyond the costs directly attributable to the state's regulation of the acquisition of a firearm and is used to fund activities that DROS Fee payors do not necessarily, or are even likely to, engage in. Is the DROS Fee a tax and not a regulatory fee?

(3) California amended the statute governing the charge it imposes on firearm purchasers to increase the activities for which revenues from the charge can be used. It then allocated $24 million of revenues collected from that charge acquired prior to the amendment to fund those new activities. Can the government spend revenues from fees on a purpose for which they were not authorized to be collected originally?

STATEMENT OF APPEALABILITY

This appeal is from the final judgment of the County of Sacramento Superior Court denying Appellants' complaint for declaratory and injunctive relief and petition for writ of mandate and granting Appellee's Motion for Judgment on the Pleadings. It is expressly authorized by Code of Civil Procedure section 904.1, subdivision (a)(1).

STATEMENT OF THE FACTS AND CASE

I. Factual Background

A. The Challenged DROS Fee and Other Firearm-Purchase Fees

When individuals wish to obtain a firearm, state law generally requires them to do so through a properly licensed firearms dealer (an "FFL"). (Pen. Code, §§ 26500, 27545.) California authorizes the Department to require

would-be firearm purchasers to pay various fees upon initiating a purchase,[1] which are collected by the FFL processing the transfer. The Department deposits the revenues from each fee into a corresponding fund to be allocated for specific purposes.

To acquire a firearm, one must first obtain a Firearm Safety Certificate ("FSC") that is valid for five years, for which the Department can charge up to $15 (the amount currently charged) and the person issuing the FSC can charge an additional $10 (which is common practice), for a total of $25 to the purchaser. (Pen. Code, § 31650.) Revenues from the $15 are deposited into the Firearms Safety and Enforcement Special Fund ("FSESF") and are used "to cover the Department's cost in carrying out and enforcing" the FSC program and all manner of laws regulating "deadly weapons." (Pen. Code, §§ 28300, subd. (a), 31650.) The Department may also require firearm purchasers to pay a fee up to $5 (and currently does), revenues from which are deposited in the FSESF to be used for "maintenance and upgrading of equipment and services necessary for firearms dealers to comply with" the record keeping requirements for firearm transactions that occur at FFLs, and enforcing the same "deadly weapons" laws as the FSC does. (Pen. Code, § 28300.) Finally, the Department may also require firearm purchasers to pay a fee up to $1 (and currently does), revenues from which are deposited into the Firearm Safety Account to support Department costs related to its required "firearm safety device" program, Pen. Code, § 23635, subd. (a), including the establishment, maintenance, and upgrading of related database systems and public rosters." (Pen. Code, § 23690.) Appellants do not directly challenge any of these fees.

[1] "Purchase" or "purchaser" as used herein assumes the definitions for those terms in Penal Code section 28200 subdivision (a) and (b), which include loans and other non-sale transfers.

The fee that Appellants challenge is the Dealer's Record of Sale Fee ("DROS Fee"). (IX AA 2253:7-10.) The Department deposits revenue from the DROS Fee in the Dealers' Record of Sale Special Account of the General Fund ("DROS Fund"). (Pen. Code, § 28235.) Monies collected from other fees the Department charges unrelated to firearm purchases are also deposited into the DROS Fund. (Req. Jud. Ntc. (hereafter "RJN") Exh. 8.) However, the DROS Fee has been the primary source of money going into the DROS Fund. (IX AA 2255:17-21; XIV AA 3528:3-3529:8.) That is expected to continue for fiscal years 2019-2020 through 2022-2023. (See, e.g., RJN Exh. 8.)

At the time this litigation commenced and during its entire pendency in the trial court, the Department charged the DROS Fee at $19. (Cal. Code Regs., tit. 11, § 4001, operative Nov. 1, 2004.)

B. Change in Permissible Use of the DROS Fee that Prompted This Litigation

The amount of the DROS Fee and the costs it has been used to cover have changed dramatically over the years—including during the last legislative session—in ways relevant to this litigation. The Department's Bureau of Firearms ("Bureau") performs background checks for all applicants seeking to purchase a firearm. (IX AA 2253:11-14.) The primary purpose of this process (the "DROS Process") is to ensure that people seeking to purchase firearms are not legally prohibited from possessing them. (IX AA 2253:11-14.) The DROS Fee was created in 1982 to cover the costs of these background checks; it was initially set at $2.25. (IX AA 2253:20-22.)

In 1989, the Legislature increased the amount of the Fee to $4.25. (VIII AA 2085.) Between 1989 and December of 1991, the DROS Fee was increased to $14—an increase of greater than 300 percent in less than 2 years. (*Ibid.*) In 1995, the Legislature restricted any further increases in the DROS fee subject to a Consumer Price Index adjustment, with the additional

limitations that the fee "shall be no more than is sufficient to reimburse" expressly identified activities listed in the Penal Code, and that any revenue from the DROS Fee cannot "be used to directly fund or as a loan to fund any other program." (VI AA 1502-1510.) But in 2003, the Legislature would again amend the list of expressly identified activities to include costs associated with the Department's "firearms-related regulatory and enforcement activities related to the sale, purchase, loan, or transfer of firearms pursuant to this chapter." (RJN Exh. 3.)[2]

While statute capped the amount the Department could charge for the DROS Fee at $14, in 2004, the Department adopted an "emergency" regulation increasing the cap of the DROS Fee to $19, asserting the Consumer Price Index called for it. (Code Regs., tit., 11 §§ 4001-4006, Register 2004, No. 45 (Nov. 1, 2004).) In 2010, however, due to a multi-million-dollar surplus in the DROS Fund, the Department proposed a regulation to reduce the DROS Fee cap from $19.00 back to $14.00, "commensurate with the actual cost of processing a DROS" form. (XIV AA 3612; II AA 429.) The same regulatory proposal would have also required the Department to review, on a yearly basis, the amount being charged for the DROS Fee. (*Ibid.*) Even though a Final Statement of Reasons was published and the rulemaking process appeared to be basically complete as of late 2010, (II AA 436), the Department mysteriously abandoned the proposed regulations. The Department never made a public statement explaining why

[2] As used here, the phrase "pursuant to this chapter" referenced California's Penal Codes relating to "deadly weapons," all of which were reorganized without substantive change following the adoption of SB 1080. (Sen. Bill 1080 (2009-2010 Reg. Sess.).) As a result of this change, the phrase "pursuant to this chapter" in the statute was amended to read "any provision listed in Section 16580." (*Ibid.*)

it abandoned the proposed rules after going through nearly the entire rulemaking process. (II AA 440.)

During the course of the instant lawsuit, however, Defendants admitted that the 2010 rulemaking was abandoned, in part, because the Chief of the Bureau at the time wanted to use "excess" DROS Fee monies to fund its Armed & Prohibited Persons Program ("APPS"). (II AA 503, 506.) APPS, basically, is a Department system that cross-references state databases to identify persons who have lawfully acquired firearms and (with some exceptions[3]) paid the DROS Fee in doing so, and then subsequently may have become legally prohibited from firearm ownership. (Pen. Code, § 30000, subd. (a).) If the APPS system identifies a potential prohibited person in possession of a firearm, Department personnel investigate. If that investigation confirms that the person appears to be prohibited, agents attempt to contact the person and, if called for, remove any firearm from and possibly commence a criminal action against the person via arrest or referral to a prosecutor. (Pen. Code, §§ 30010, 30020.)

At the time the 2010 rulemaking was commenced, the Department exclusively used General Fund monies to pay for APPS. (*See* I AA 285:2-3.) But, while the rulemaking was still pending, the Governor at the time, Edmund Brown Jr., proposed a budget that called for heavy cuts of General Fund monies going to the Department. (V AA 1368.) The Department was no doubt aware of this funding reduction threat when it abandoned its regulations to lower and monitor the DROS Fee. (*Ibid.*) In August 2011, the Legislature enacted the California state budget for 2011-2012, which

[3] *See* Cal. Pen. Code, §§ 27875, 27920, 27925, and 27966 [exempting from the FFL-processing requirement, and thus the DROS Fee, transfers between immediate family members, transfers by operation of law, and transfers of "curios and relics."]

included a 71.5 million-dollar reduction in the Department's Division of Law Enforcement's ("DLE") budget over two years. (XIV AA 3542.) The intent behind the cut to the DLE's budget was to "[e]liminate General Fund from the Division of Law Enforcement." (*Ibid.*) While the Legislature expressly allowed the Department to continue its use of General Fund money on APPS, this budget cut severely restricted the amount of money that would be available for APPS. (*Ibid.*)

In response, the Department—well aware that it had for years overcharged firearm purchasers for background checks resulting in a surplus in excess of $14 million—sought legislative assistance to siphon off the improperly accumulated funds to partially mitigate the Department's expected budget shortfall from losing General Fund monies for APPS. (VI AA 1616-1618.) Newly elected Attorney General Kamala Harris convinced Senator Mark Leno to introduce Senate Bill 819 ("SB 819"). (*Ibid.*)

SB 819 was ultimately adopted but without a two-thirds majority of both houses. (*Ibid.* (passing the Senate with only 22/40 "Ayes" and the Assembly with only 50/80 "Ayes").) Section 1(g) of SB 819 explains its purpose: "it is the intent of the Legislature in enacting this measure to allow the DOJ to utilize the Dealer Record of Sale Account for the additional, limited purpose of funding enforcement of the Armed Prohibited Persons System." (*Id.* at § 1, subd. (g).) The goal with SB 819 was to shift APPS-related costs from the General Fund to lawful firearm purchasers "[r]ather than placing an additional burden on the taxpayers of California . . .." (VI AA 1599-1614.) SB 819 purportedly achieved this effect by merely adding the word "possession" to the litany of "firearms-related regulatory and enforcement activities" it had already been authorized to recoup costs for. (*See* Pen. Code, § 28225, subd. (b)(11).)

Just two years later, on May 1, 2013, the Legislature enacted Senate Bill 140 ("SB 140"), (VI AA 1620-1621), "urgency" appropriation legislation providing the Department access to $24,000,000 of DROS Fund money to address "the backlog in [APPS] and the illegal possession of firearms by those prohibited persons." (Pen. Code, § 30015(a).)

It was SB 819's expanded use of the DROS Fee to cover the Department's costs associated with regulating the mere "possession" of firearms, and SB 140's appropriation of $24,000,000 from the DROS Fund for that express purpose that gave rise to this litigation. The Department's publicly available budgetary records do not include a program-by-program breakdown of how DROS Fund money is spent. But in responding to discovery requests made in this action, the Department disclosed documents that confirm that prior to SB 819, an average of approximately 82% of the Department's DROS Fund spending went to pay for costs purportedly related to the work done by the Department's DROS Unit, and 0% went to fund APPS-related activities. (XIV AA 3554-3580.) After SB 819, however, the percentages changed radically, with an average of about 41% of the Department's annual DROS Fund expenditures going to APPS-related activities, and approximately 49% to the DROS Unit. (*Ibid.*) And, in fiscal year 2015-2016, the Department spent *more* DROS Fund money on APPS-related activities than it spent on the DROS Process itself. (XIV AA 3566.) The DROS Fund went from being so over-inflated with DROS Fee funds in 2011 that the Governor was able to borrow $11,500,000 from it without affecting the Department's operations, to the Department claiming the DROS Account had operational shortfalls beginning the very next year in 2012-2013 and continuing to the present. (RJN Exh. 6, p. 7; II AA 364.)

C. The Updated DROS Fee

After the trial court had disposed of this matter, the Legislature adopted and the Governor signed into law Assembly Bill 1669. (RJN Exh. 4.) As relevant here, AB 1669 lowers the existing DROS Fee to $1 and significantly limits what its funds can be used for. (RJN Exh. 6, p.7 (citing Pen. Code, § 28225, subds. (b)(1)-(11)).[4]) It is no longer used for "the costs associated with funding Department of Justice firearms-related regulatory and enforcement activities related to the sale, purchase, possession, loan, or transfer of firearms pursuant to any provision listed in Section 16580." (RJN Exh. 4, § 13 (amending Pen. Code, § 28225).)

However, AB 1669 also created a new statute that authorizes the Department to charge a fee to firearm purchasers that is effectively an extension and expansion of the DROS Fee—the legislature itself described it as such. (RJN Exh. 6, p. 6 [noting that AB 1669 "both increases the DROS fee and expands the activities for which that fee can be used," and noting that "Because this bill both increases the DROS fee and expands the activities for which that fee can be used, it is likely to subject the fee to renewed legal challenges]).) The Department's regulations implementing AB 1669 also refer to the new fee as "the Dealer's Record of Sale (DROS) fee." (Code Regs., tit. 11, § 4001.) AB 1669 raises this new DROS Fee to $31.19 (the "Updated DROS Fee"), which can be increased according to the Consumer Price Index. (Pen. Code, § 28233(a),(c).) This translates into "a net increase of $13.19 per transaction—that would be imposed by this bill." (RJN Exh. 6, p. 8.) "According to DOJ, this change is necessary because over the last several

[4] The current $1 fee also covers the Departments education and notification programs regarding the importation of firearms into California. (Pen. Code, § 28225, subd. (b)(10).) But the fee authorized by section 28225 can no longer be used for the Department's firearms-related regulatory and enforcement activities. (*See* RJN Exh. 4.)

years, program activities have been initiated and funded from the DROS Special Account (DROS Fund) that were unrelated to previous DROS responsibilities without a corresponding increase to the DROS Fund" and "the $32.19[5] fee is calculated to create sufficient revenues to avert the need for additional General Fund [sic] or significant programmatic service reductions." (RJN Exh. 6, p. 6.)

AB 1669 also "creates a DROS Supplemental Subaccount (Supplemental Fund) within the DROS Special Account of the General Fund." (*Ibid.*; *see also* Pen. Code, § 28235.) "The revenue generated from the $31.19 fee [will] be deposited into the DROS Subaccount to offset costs related to specified DOJ firearm-related regulatory and enforcement activities . . ." to be available "upon appropriation by the Legislature . . .." (RJN Exh. 6, p. 6; *see also* Pen. Code, § 28235; RJN Exh. 6, p. 7 ["The new Supplemental Fund, which imposes a $31.19 fee, would be used by DOJ for firearms enforcement purposes and background checks."].) Specifically, the revenues collected from the updated DROS fee are "for expenditure by the department to offset the reasonable costs of firearms-related regulatory and enforcement activities related to the sale, purchase, manufacturing, lawful or unlawful possession, loan, or transfer of firearms pursuant to any provision listed in Section 16580." (Pen. Code, § 28233(b).) This "[e]xpand[s] the list of regulatory and enforcement activities on which the DOJ can spend its DROS Supplemental Subaccount funds to include manufacturing and unlawful or lawful possession of firearms." (RJN Exh. 7, p.1.)

This expansion appears virtually unlimited. According to the Attorney General, who sponsored AB 1669, the Legislature has shifted the costs of

[5] This amount includes the additional $1 authorized by Penal Code section 28225.

APPS to the general fund for the current year. (RJN Exh. 6 pp. 7, 9.) But that is not to say that AB 1669 precludes the Department from using the New DROS Fee to fund APPS in the future, but only that the Department is not doing so currently. Indeed, "[u]nder the provisions of this bill [AB 1669], DOJ will be authorized to adjust the DROS fee in order to fund ***any*** firearms activity that is required of DOJ for which there is no sustainable source of funding." (*Ibid*. (emphasis added.))

In sum, since the trial court's disposition of this case, the Legislature has via AB 1669 increased the cap of the DROS Fee and expanded what its revenues can be spent on beyond what Appellants originally complained about in bringing this action, or what the trial court found acceptable. Because AB 1669, like SB 819, was not passed by a two-thirds majority of the Legislature, (RJN Exh. 4 (passing the Senate with 27/40 "Ayes" but only 49/79 "Ayes" in the Assembly)), its adoption not only raises the same issues for why Appellants brought this lawsuit but makes them more stark.

D. Department Regulations for the Updated DROS Fee

The Department's recently adopted regulations shows its intentions to use updated DROS Fee revenue for additional purposes. (RJN Exh. 8.) Specifically, it includes "a supplemental pension loan repayment of $666,000; a Pro Rata cost of $819,000 (which increases to $1,226,000 in 2020-21), and the anticipated cost to refresh and rebuild legacy firearms IT systems." (*Id*. at p. 3.) The anticipated costs to update the IT systems exceed $40,000,000 over the next five years. (*Id*. at p. 4.)

II. CASE BACKGROUND

A. Procedural History

1. The Department's Motion for Judgment on the Pleadings

This action was filed on October 16, 2013. (I AA 26.) The Department brought a motion for judgment on the pleadings as to two claims in Appellants' original complaint: First Cause of Action and one of two alternative theories pleaded in the Second Cause of Action. (I AA 279-289.) Appellants alleged that by changing what the DROS Fee could be used for to include covering regulatory and enforcement costs associated with mere firearm "possession," SB 819 violated Article XIIIA, Section 3, of the California Constitution ("Proposition 26"). Specifically, they argued that it constituted a "change in statute which results in [a] taxpayer paying a higher tax" that did not meet Proposition 26's requirement that such tax increase "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[.]" (I AA 287:20-288:6 [citing Cal. Const., art XIII A, § 3].)

On July 20, 2015, the trial court granted DOJ's motion without leave to amend the two dismissed causes of action. (II AA 528-529; XIV AA 3593-3594.) In so doing, the trial court held that because the total amount of the DROS Fee being charged did not change as a result of SB 819—i.e., the DROS Fee was capped and charged at $19.00 before and after SB 819 became law—"SB 819 did not result in anyone paying a *higher* tax," and thus Proposition 26 was inapplicable (XIV AA 3593-3594.) The court reasoned that "[t]he language of Article XIII A, section 3, subdivision (a) was only concerned with the taxpayer paying a higher tax, and not with how the tax was being used, consequently the failure of SB 819 to raise the DROS fee amount was fatal to [Appellants'] claims." (II AA 528-529; XIV AA 3593-3594.)

2. Appellants' Amended Complaint

On December 11, 2015, the trial court granted Appellants leave to amend their complaint to add several new causes of action alleging that SB

819 converts the DROS Fee, at least partially, into an unconstitutional tax under other legal theories not dependent on Proposition 26. (XIV AA 3593-3596.) Upon the trial court's suggestion, the parties agreed to bifurcate the action such that the Fifth and Ninth Causes of Action of Appellants' First Amended Complaint ("FAC") would be tried first, with the remaining causes of action to be tried in a separate trial. (XIV AA 3603-3605.)

a. Phase One of Trial Before Judge Michael P. Kenny

On June 13, 2017, Appellants and the Department filed cross motions for adjudication as to those two causes of action. (V AA 1363-1387; VI AA 1418-1441.) The trial court issued an Order on those motions on August 9, 2017. (X AA 2516-2526.)

The Fifth Cause of Action of the FAC alleges that the Department has a ministerial duty to periodically review whether the amount being charged for the DROS Fee is excessive. (II AA 568:11-570:2.) The trial court found that the Department had not performed that review since 2004, and that such a review "every thirteen years is insufficient to comply with the ministerial Duty [Penal Code] section 28225 imposes." (X AA 2523:1-12.) Accordingly, it granted Appellants' motion as to the Fifth Cause of Action and denied the Department's. (*Ibid.*)

The Ninth Cause of Action to the FAC alleges that the Department uses DROS Fee monies to fund activities beyond what is statutorily authorized. (II AA 574:1-575:7.) As explained above, as a result of SB 819, Section 28225 was amended to authorize the Department to use DROS Fee monies for the additional purpose of recouping costs of "firearms-related . . . enforcement . . . activities related to the . . . *possession* . . . of firearms[.]" (*Ibid.* (emphasis added).) The trial court held that: "[b]ased on the uncodified declaration of legislative intent [in SB 819, it] is clear that 'possession' as

used in section 28225, subdivision (b)(11) is limited to APPS-based activities." (X AA 2525:17-21.) Accordingly, the trial court also granted Appellants' motion as to the Ninth Cause of Action and denied the Department's. (*Ibid.*)

The trial court's August 9, 2017 order was intended to be a final ruling on the substance of the two bifurcated causes of action, but it did not address the issues of what injunctive relief should be granted based on that ruling or whether a writ should issue. (X AA 2516-2526.)

b. Phase Two of Trial Before Judge Richard K. Sueyoshi

On January 18, 2019, a trial was held on the remaining causes of action in the FAC. (XV AA 3981.[6]) The **First Cause of Action** of the FAC seeks a declaration that the Department lacked authority to use DROS Fee revenues on regulating "possession" of firearms before SB 819 went into effect, and thus lacked authority to use any revenues collected from the DROS Fee before 2012 for that purpose and should be enjoined from doing so. (II AA 566:6-25.[7]) The **Second Cause of Action** of the FAC seeks a writ to issue compelling the State Controller to refrain from appropriating monies to the DOJ from SB 140 and an injunction precluding it from doing so. (II AA 567:1-18.) The **Third Cause of Action** of the FAC seeks a writ to issue compelling the State Controller to recoup all monies appropriated to DOJ via SB 140 because they were used for an illegal purpose; i.e., funding APPS. (II AA 567:19-26.) The **Fourth Cause of Action** of the FAC seeks a writ to issue compelling the DOJ to return all monies appropriated to it via SB 140 because they are being used for that illegal purpose. (II AA 568:1-10.) The **Sixth, Seventh, and Eighth Causes of Action** of the FAC seek a

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[7] This cause of action is the same as the alternative theory pled in Appellants' Second Cause of Action in their original complaint that was not dismissed in the MJOP. (I AA 42:12-43:8.)

declaration that SB 819 created an unlawful property tax per California Constitution, article XIII, sections 1(b), 2, and 3(m) respectively. Finally, based on the trial court's previous rulings granting their Fifth and Ninth causes of action of the FAC, Appellants also sought a declaration confirming that: (1) the Department has an ongoing ministerial duty to make sure the amount being charged for the DROS Fee is "no more than necessary" for recouping its legitimate costs per Section 28225; (2) the Department has failed to meet that duty; and (3) SB 819's addition of the word "possession" to Section 28225 only contemplates the costs of APPS-based law enforcement activities. (II AA 570:3-573:27.) Appellants also sought a peremptory writ of mandate: (1) requiring the Department to review the DROS Fee to determine whether the amount it is changed at is "no more than is necessary" to cover legitimate regulatory costs identified in Section 28225 and to return to the trial court to explain its findings, along with supporting calculations and (2) forbidding the Department from imposing the DROS Fee at an amount greater than $14.00, at least until the Department had conducted the required review and established the appropriate amount for the DROS Fee. (II AA 575:22-576:10.)

The trial court denied Appellants' First Cause of Action to their FAC because it found that they had "failed to demonstrate sufficiently that the Department used SB 140 funds that were collected prior to SB 819 and that the use of such funds (if any) was improper." (XV AA 3994).

The trial court granted Appellants' request for declaratory relief on their Ninth Cause of Action but did not expressly enjoin the Department from using DROS Fee monies beyond APPS enforcement. (XV AA 3995.) The trial court also granted Appellants' Fifth Cause of Action per its previous ruling that the Department has a duty to analyze the DROS Fee to confirm it is

being charged as "a reasonable approximation of the costs" it is statutorily authorized to recover. (*Ibid*.) The trial court refused, however, to issue a writ of mandate compelling DOJ to undertake such an analysis, reasoning that the Department had "sufficiently established that the funds generated by the DROS Fee are a reasonable approximation of the section 28225 costs" via the Department's briefing. (*Ibid*.)

Because each of Appellants' additional causes of action in their FAC (Second, Third, Fourth, Sixth, Seventh, and Eighth) depend on the DROS Fee being a tax, the trial court denied all of them upon holding it is not a tax. (XV AA 3992.) In holding so, the trial court engaged in a two-part analysis, asking: "(1) What are the estimated costs of the service or regulatory activity and does the amount being charged approximate the estimated cost; and (2) Does the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits received from, the governmental activity?" (*Ibid*.), [citing, *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th 866 (1997), *Cal. Farm Bureau Fed'n v. State Water Res. Control Bd*., 51 Cal. 4th 421 (2011), and *City of San Buenaventura v. United Water Conservation Dist*., 3 Cal. 5th 1191 (2017)].) The court reasoned that the DROS Fee is not a tax because (1) "the [Department has] adequately demonstrated that the funds generated by the DROS Fee are a reasonable approximation of the costs of government-provided regulatory service/activity;" and that (2) "DROS Fee payors create a unique burden by way of their firearm ownership. The need for APPS only arises by way of the existence of lawful firearm purchasers and owners." (XV AA 3993-3994.)

Judgment was entered to this effect on April 10, 2019. (XVI AA 4042-4043.) Appellants filed their notice of appeal on June 4, 2019. (XVI AA 4048.)

The Department has not filed any cross-appeal to the trial court's granting of Appellants' Fifth and Ninth causes of action.

B. The Orders on Appeal

At issue on appeal are the trial court's order granting the Department's motion for judgment on the pleadings and its final order on Ruling on Submitted Matter re: Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief - Remaining Causes of Action. (II AA 547; XV AA 3981.)

ARGUMENT

I. The Trial Court Erred in Granting the Department's Motion for Judgment on the Pleadings to Dismiss Appellants' Proposition 26 Claims

The trial court granted the Department's motion dismissing Appellants' original complaint as to their First Cause of Action entirely and one of two alternative claims in their Second Cause of Action. (II AA 528-529.) The first alleged that SB 819 converted the DROS Fee into an unlawful tax under Proposition 26 by expanding what DROS Fee monies can be used for to include regulating the mere "possession" of firearms. (I AA 41:74-75.) The second alleged that because SB 819 created an unlawful tax, SB 140's allocation of $24 million from the DROS Fund to finance SB 819-authorized activities was unlawful and should be enjoined and undone. (I AA 42:86-87.) The trial court dismissed both of those claims on the ground that "SB 819 did not result in anyone 'paying a higher tax' . . . because prior to the enactment of SB 819, firearms purchasers paid a DROS Fee of $19.00, which fee remained the same after the passage of SB 819" and thus Proposition 26 was not implicated because it "was only concerned with the taxpayer paying a higher tax, and not with how the tax was being used . . .." (II AA 547.) Even if the trial court's reasoning was sound at the time—and it was not—AB 1669 renders that reasoning moot because AB 1669 plainly makes "change in state

statute which results in any taxpayer paying a higher tax[.]" (Cal. Const., art. XIII A, § 3(a)), (hereafter "Section 3".) This Court should, in addition to evaluating Appellants' original Proposition 26 claims, also analyze those claims in light of the changes AB 1669 wrought, which clearly show a violation of Proposition 26's two-thirds vote requirement.

A. Applicable Legal Standard

Appellate courts review lower court orders following a motion for judgment on the pleadings de novo. (*Gill v. Curtis Pub. Co.* (1952) 38 Cal.2d 273, 275.) Section 3 was originally made law by voter approval of Proposition 13 in 1978. (Cal. Const., art. XIIIA, § 3, added by initiative, Gen. Elec. (June 6, 1978), commonly known as Prop. 13.) It placed limits on enacting new taxes and defined what would constitute a "tax" for its purposes. (*Ibid.*) In 2010, voters approved Proposition 26, which amended Section 3 to clarify that, with certain specifically described exceptions, a "'tax' means any levy, charge, or exaction of any kind imposed by the State." (Cal. Const., art. XIIIA, § 3, subd. (b), amended by initiative, Gen. Elec. (Nov. 2, 2010), commonly known as Prop. 26.) It also codified the rule that "[t]he State bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax . . .." (*Id.* at § 3, subd. (d).) Finally, Proposition 26 declared that: "Any change in state statute which results in any taxpayer paying a higher tax 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." (*Id.* at § 3, subd. (a).)

The express purpose of Proposition 26 was to "broaden[] the definition of a state or local tax to include many payments [that previously were] considered to be fees or charges." (II AA 499.) It sought to address "the problem of state and local governments disguising taxes as fees, with the

burden on the government to prove that the so-called fee is not in fact a tax." (*Johnson v. County of Mendocino* (2018) 25 Cal.App.5th 1017, 1033.) The legislative analysis of Proposition 26 explained that "[g]enerally, the types of fees and charges that would become taxes under [Proposition 26] are ones that government imposes to address health, environmental, or other societal or economic concerns." (II AA 499.)

B. The DROS Fee Is an Unlawful Tax Under Proposition 26

The DROS Fee is undeniably a "charge" that is "imposed by the State." (*See* Pen. Code, §§ 28225(a), 28233(a) [noting that "the Department of Justice" may require an FFL to charge firearm purchasers this fee]; Cal. Const., art. XIII A § 3(b).) And neither SB 819 nor AB 1669 was passed by a two-thirds majority of the Legislature in amending Penal Code section 28225's imposition of that charge. (VI AA 1616-1618; RJN Exh. 4.) As explained above, the trial court denied Appellants' original Proposition 26 claims because the Department charged the DROS Fee at $19.00 before SB 819 and continued to do so after its passage, which led the court to conclude that "SB 819 did not result in anyone 'paying a higher tax' . . .." (II AA 547. While Appellants believe the trial court's reasoning for dismissing their Proposition 26 claims is erroneous,[8] that question has now become moot with the adoption of AB 1669 because it is no longer the case that the DROS Fee is

[8] As explained, the amount of the DROS Fee must be limited to the Department's actual, legitimate costs. SB 819 amended Penal Code section 28225(b)(11), authorizing the Department to include new cost drivers that are of a different class than regulatory related costs when establishing the DROS Fee's amount. (VI AA 1616-1618.) Specifically, it allowed funding for APPS enforcement. Without those new costs, the amount of the DROS Fee could have conceivably (and Appellants contend should have) been charged at less than $19. (XIV AA 3612; II AA 429.) Thus, the trial court's reasoning that SB 819 did not result in DROS Fee payors paying a "*higher* tax" because they continued to pay $19, misses the point that SB 819 allowed the Department to sneak its non-regulatory costs into its justification for keeping the DROS Fee at an artificially higher amount when it otherwise would not have been.

still $19. As explained above, AB 1669 has significantly increased the Updated DROS Fee by $12.19, to $31.19, as of January 1, 2020. (RJN Exh. 4; Cal. Code Regs., tit. 11, § 4001.) "A tax is increased when an agency revises its methodology for calculating a tax and the revision results in increased taxes being levied on any person or parcel. (*Webb v. City of Riverside* (2018) 23 Cal.App.5th 244, 258, citing Gov. Code, § 53750, subd. (h)(1).) Whether SB 819 resulted in DROS Fee payors paying a "higher tax," AB 1669 removes any doubt that they are. Thus, the DROS Fee is an unlawful "tax" under Section 3, unless the Department can meet its evidentiary burden to show that the DROS Fee meets one of Section 3's exceptions. The Department cannot.

The only exceptions to Section 3 that are conceivably applicable to the DROS Fee are the following:

> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the State of conferring the benefit or granting the privilege to the payor.
>
> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the State of providing the service or product to the payor.

(Cal. Const., art. XIIIA, § 3, subd. (b)(1-2).) [9]

But, upon close analysis, neither exception applies. For a law-abiding DROS Fee payor does not receive any benefit or privilege nor any government service or product at all, let alone one "that is not provided to those not

[9] The DROS Fee is not charged for issuing licenses or permits, performing investigations, inspections, or audits, or enforcing agricultural marketing orders, (Cal. Const., art. XIII A, § 3, subd. (b)(3)); the use or purchase of state property, (*id*., at subd. (4)); nor as a penalty for violating a law. (*id*., at subd. (5).) The remainder of Proposition 26's exemptions are thus irrelevant here.

charged" the DROS Fee. (*Id.* at (b)(1).) Law-abiding DROS Fee payors personally gain nothing by undergoing the DROS Process. To the contrary, they are being burdened purportedly to benefit *public* safety, i.e., preventing prohibited persons from acquiring firearms. (II AA 499.)

Assuming DROS Fee payors receive a special benefit by undergoing the DROS Process, the DROS Fee is still at least a partial tax. Under Proposition 26, a regulatory fee can only extend to cover costs of providing the "*relevant* service" or benefit. (*See Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1, 17 (emphasis added).) The Department, nonetheless, seeks to charge DROS Fee payors for services that are irrelevant to them, a fact that squarely puts the DROS Fee outside either exceptions discussed herein. (Cal. Const., art. XIII A § 3(b), subds. (1)-(2).) For they are made to "pay for many services that benefit the public broadly, rather than providing services directly to the[m]." (I AA 272.) As a result of SB 819 and AB 1669, DROS Fee revenues are used to cover costs arising from all kinds of firearm-related regulatory matters unrelated to the lawful acquisition of firearms. (*See* Pen. Code, § 28233(b) [allowing for costs associated with firearm and regulatory enforcement activities listed in section 16580, which includes approximately 735 separate statutes.].) Certainly, law abiding DROS Fee payors do not personally gain anything beyond the general public by the State's enforcement of *unlawful* firearm possession, or programs regarding entertainment firearm permits, exceptions to California's Firearm Safety Certificate requirements, or firearms in custody of a court or law enforcement agency. (*See Ibid.*; *see also* Pen. Code, §§ 29500-29535, 31705-31830, 33800-34010.) The purported benefits of those regulations inure to the public benefit at large just as much as to DROS Fee payors. That is especially so when the Department has provided no evidence that DROS Fee payors engage in the

(often obscure) panoply of activities beyond the DROS Process that are funded with DROS Fee money. Accordingly, Proposition 26's exceptions at best apply only partially to the DROS Fee, making it, at least partially, an unlawful tax.

Even if one of the exceptions applies, "[t]he State bears the burden of proving by a preponderance of the evidence that . . . the amount [of the DROS Fee] is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." Cal. Const., art. XIII A, § 3(d). The Department cannot meet its burden on either of those scores.

1. The Department Has Not Met, and Cannot Meet, Its Burden to Show that the DROS Fee Is Charged at a Reasonable Amount

The Department must show "that the amount [charged for the DROS Fee] is no more than necessary to cover the reasonable costs of the governmental activity" it is being charged for. (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal. 5th 1191, 1210, as modified on denial of reh'g (Feb. 21, 2018).) At the time this litigation commenced, the Department charged the DROS Fee at $19.00. (Cal. Code Regs., tit. 11, § 4001, operative Nov. 1, 2004.) It justified doing so based on the costs it incurred in performing "firearms-related regulatory and enforcement activities related to the sale, purchase, possession, loan, or transfer of firearms." (Pen. Code, § 28225(b)(11).) A significant portion of those costs resulted from the Department's enforcement of APPS. (*Supra*, pp. 8-12.) Appellants argued below that including APPS costs in the calculus for determining the proper amount of the DROS Fee artificially inflated that amount, making it a tax under Proposition 26. (*See* V AA 1311:21-1312:1-16.)

Appellants dispute that $19 is an appropriate amount for the DROS Fee because the Department failed to show that the DROS Process, when excluding APPS and other activities unrelated to lawful firearm acquisition, costs $19. (See V AA 1370:20-26, 1372:6-22.) Specifically, the Department did not meet its burden to show that the amount of the DROS fee was "no more than necessary to cover the reasonable costs of the governmental activity" (*City of San Buenaventura*, 3 Cal. 5th at 1210), because the Department failed to take the prefatory step of identifying what governmental activities it funded with DROS Fee money. (XI AA 2987:22-2990:13.)

Despite being unable to justify a $19 DROS Fee, California adopted AB 1669, increasing it to $31.19 with the updated DROS Fee, even though the Department simultaneously ceased funding APPS with DROS Fee monies. (RJN Exh. 4.) Nothing in the legislative history of AB 1669 specifically shows that the Department's costs for performing the DROS Process is $31.19. It contains mere platitudes about needing additional funding. (RJN Exhs. 4-7.) The Department's regulation implementing AB 1669 purports to prove its need for more DROS Process funding, but it too lacks any specificity. (RJN Exh. 8 (providing a table with estimated DROS revenues and expenditures from the DROS Fund); *See also* Cal. Code Regs., tit. 11, § 4001.)

Contradicting the Department's unspecific regulation is its own recent determination that its costs associated with non-FFL involved background checks are $19. (*See*, e.g., Cal. Code Regs., tit. 11, § 4002 [stating the processing fee for various reports regarding firearms is $19, all of which involve substantially similar, if not identical, background checks as the DROS Process].) Even assuming that determination is accurate, which Appellants do not concede, that means that the DROS Fee now imposes at least $12.19 of costs in excess of what a firearm purchaser directly imposes

on the Department ($31.19 - $19). In other words, the increased fee is charged not to cover the Department's actual costs, but to raise revenue, in case it needs more funds. That is a quintessential hallmark of an unlawful tax under the California constitution. (*California Building Industry Association v. State Ware Resources Control Board* (2018) 232 Cal. Rptr. 3d 64.)

This is not a new tune California is singing here. The Department claims the DROS Fund had operational shortfalls since 2012-2013. (RJN Exh. 6, p. 7.) But just two years prior to that, the DROS Fund had such a surplus that DOJ sought to reduce the DROS Fee to $14, and only one year prior the DROS Fund made an $11,500,000 loan to the General Fund. (II AA 452.) It was not until the legislature unlawfully expanded the activities for which DROS Fee monies could be used via SB 819 in 2011 and allocated $24 million of DROS Fund monies in 2013 via SB 140 to fund those new activities that the Department's supposed "shortfalls" began to materialize. (VIII AA 2074-2076; VI AA 1620-1621.) The Department had a surplus in the DROS Fund but asked the Legislature to allow it to take on more activities funded by the DROS Fee and exhausted that surplus and then claimed poverty. And it is now seeking to double down on that game with AB 1669, taking on more activities while claiming it needs more money. With the practically limitless nature of AB 1669, Appellants fully expect the Department to not only add more unrelated costs but to resume spending DROS Fee monies on APPS when it finds itself in the familiar position of needing a funding source, as history has shown. (*Supra*, pp. 6-15.)

In sum, the Department cannot meet its burden to justify charging the DROS Fee at $19, let alone $31.19.

2. The Department Has Not Met, and Cannot Meet, Its Burden to Show that There Is a Fair or Reasonable Relationship Between the Average DROS Fee Payor and the Department's Regulatory Costs

"Proposition 26 requires by its terms an allocation method that bears a reasonable relationship to the payor's burdens on or benefits from [an agency's] activity . . .." (*Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1446 [197 Cal.Rptr.3d 429, 440].) No such relationship exists between a DROS Fee payor and the activities for which the Department utilizes DROS Fee revenues, at least many of them.

As explained above, DROS Fee payors receive no special benefit from undergoing the Department's DROS Process; to the contrary, it is a burden on them. (*Supra*, pp.24-26.) But even if they do, they certainly do not receive any special benefit beyond the general public from enforcement of the litany of general firearm laws the Department uses the DROS Fee to fund. (*See* Pen. Code, § 28233(a),(b).)

Nor does a DROS Fee payor necessarily burden the Department in its regulation of firearms; at least not to the extent they are being charged for. As explained above, DROS Fee payors are funding Department activities they do not necessarily engage in. (*Supra*, pp.24-26.) For example, per Penal Code section 16580, the Department can use DROS Fee funds to finance the regulation of certain unlawful firearms, criminal storage of firearms, lost or stolen firearms, carry concealed weapon licenses, FFLs, manufacturers, entertainment industry firearm permits, firearms in law enforcement custody, and (although the Department currently is not doing so) APPS. (*See* Pen. Code, § 28233(b) [stating that the DROS Fee can be used to fund "firearms-related regulatory and enforcement activities related to the sale,

purchase, manufacturing, lawful or unlawful possession, loan, or transfer of firearms pursuant to any provision listed *in Section 16580*," which section lists provisions concerning all of the above].) (emphasis added.) And, in some cases, the Department is funding activities that are wholly irrelevant to both DROS Fee payors and the public. (See RJN Exh. 8 [noting that state employee pension loan repayments are in part funded by the DROS Fee.].)

Because DROS Fee payors are required to fund Department activities from which they receive no benefit and on which they impose limited, if any, burden, the Department cannot show a reasonable relationship between them and its allocation of DROS Fee funds.

* * * *

Failure to make one of these showings means the DROS Fee is a tax. (*Supra*, pp.29-30.) The Department cannot make either. Furthermore, even if the Court chooses to look at Appellant's Proposition 26 claims through the more deferential lens of pre-Proposition 26 authority (e.g., *Sinclair Paint*), the Department still fails to show the DROS Fee is a proper regulatory fee, as explained below. (*See* infra Section II.) The DROS Fee is thus a tax and because it was adopted in its current form by less than two-thirds of the Legislature, it is an unlawful one. As such, this Court should reverse the trial court's granting of the Department's motion for judgment on the pleadings.

II. The "DROS Fee" Is Not a Regulatory Fee but a Tax under *Sinclair Paint*

"[W]hether impositions are 'taxes' or 'fees' is a question of law for the . . . courts to decide on . . . *review of the facts*[.]" (*Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th 866, 874 (1997) (emphasis added).) The predicate question here—whether the DROS Fee is a tax—is itself a mixed question of law and fact. (*Cf. Oliver & Williams Elevator Corp. v. State Bd. of Equalization*, 48 Cal. App. 3d 890, 894 (1975) ["Since the issues here involve

the applicability of taxing statutes to *uncontradicted* facts, we are confronted purely with a question of law"] (emphasis added).) Once a plaintiff has made a prima facie case, the burden of showing that a particular levy is a regulatory fee, and not a tax, is on the government. (*Sinclair Paint*, 15 Cal. 4th at 878; *Cal. Farm Bureau Fed'n v. State Water Res. Control Bd.*, 51 Cal. 4th 421, 436 (2011), *as modified* (Apr. 20, 2011) ["once plaintiffs have made their prima facie case, the state bears the burden of production and must" meet the *Sinclair Paint* standard].)

"[G]enerally speaking, a tax has two hallmarks: (1) it is compulsory, and (2) it does not grant any special benefit to the payor." (*Cal. Chamber of Commerce v. State Air Res. Bd.*, 10 Cal. App. 5th 604, 641 (2017), *review denied* (June 28, 2017).) A regulatory fee is one that "constitutes an amount necessary to 'legitimately assist in regulation and . . . not exceed the necessary or probable expense of . . . regulating the subject matter it covers.'" (*United Bus. Comm'n v. City of San Diego*, 91 Cal. App. 3d 156, 165 (1979).)

> The California Supreme Court set out the standard as follows:
>
> to show a fee is a regulatory fee and not a . . . tax, the government should prove (1) the estimated cost of the service or regulatory activity, and (2) the basis for 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.

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

Sinclair Paint's analysis relies heavily on *United Business*. (*Sinclair Paint*, *supra*, 15 Cal. 4th at 879-80.) *United Business* holds that "[t]he general rule is that a regulatory . . . fee levied cannot exceed the sum reasonably

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

Regarding the "reasonable cost" prong, it is true that "[a] regulatory fee does not become a tax simply because the fee [is] disproportionate to the service rendered to individual payors[;]" but "a fee cannot exceed the reasonable cost of regulation with the generated surplus used for general revenue collection. An excessive fee that is used to generate general revenue becomes a tax." (*Cal. Farm*, *supra*, 51 Cal. 4th at 438.) That dovetails with the "allocation prong," which precludes characterizing a levy as a regulatory fee when there is "no reasonable relationship" between the payor challenging the levy and the supposedly regulatory activity the payor is funding. (*Sinclair Paint*, *supra*, 15 Cal. 4th 881.)

While *Sinclair Paint* and its related authority do not necessarily control Appellants' Proposition 26 claims, as explained above, they do control the analysis for Appellant's Third, Fourth, Sixth, Seventh, and Eighth Causes of Action because the constitutional provisions on which they rely existed prior to Proposition 26's adoption. (II AA 557:2-22; Cal. Const. art.

XIII, §§ 1(b), 2 & 3(m).) The trial court thus applied the correct standard to these claims, noting that it was required to determine:

> "(1) What are the estimated costs of the service or regulatory activity and does the amount being charged approximate this estimated cost; and (2) Does the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits received from, the governmental activity.

(XV AA 3992.)

However, the trial court erred in its conclusions applying both prongs of that analysis. It first summarily concluded that the Department "adequately demonstrated that the funds generated by the DROS Fee are a reasonable approximation of the costs of the government-provided regulatory activity/service." (XV AA 3993.) In so finding, the trial court provided no analysis. It merely suggested that it found convincing the Department's records that costs associated with funding the activities for which the DROS Fee can be used exceeded the amount of DROS Fee revenue during the five-year period following passage of SB 819. (*Ibid*.) Those records do not reflect the Department's legitimate costs from the DROS Process, but rather include ultra vires costs that DROS Fee payors should not be burdened with. Thus, they do not support the trial court's finding.

The trial court secondly concluded that "DROS Fee payors create a unique burden [on the government] by way of their firearm ownership," one that is not "created by society as a whole, but instead is a burden unique to those engaging in the firearm purchase activity." (XV AA 3994.) In so finding, the trial court focused exclusively on APPS. (*Ibid*.) While Appellants believe that the trial court was wrong, its analysis is moot with the passage of AB 1669, as the Department is no longer is spending money on APPS, but

instead various other activities to which most DROS Fee payors have a tenuous, if any, connection.

A. The Department cannot meet the reasonable cost prong.

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

After holding that the law in effect at the time compelled the Department to analyze the DROS Fee to determine whether it is charged at a proper amount, the trial court further held that the Department had acted unlawfully by failing to conduct such analysis since 2004. (X AA 2516-2527.) Subsequently, however, a different trial court judge held that the Department sufficiently satisfied that obligation via a single page in its briefing, citing records that the $19 DROS Fee did not cover the Department's regulatory costs from 2012 to 2016. (XV AA 3393.) But that holding is wrong for the reasons explained above. (*Supra*, p. 27.) It ignores Appellants' main complaint, which is that the Department was including

costs that it should not have been; particularly for APPS. (*Supra*, pp. 15-20.) Significantly, all of the years considered were post SB 819. (*See* VIII AA 2074-2076.) The trial court also ignored the fact that just prior to SB 819 being introduced the DROS Fund had such a surplus that the Department at the time sought to reduce the DROS Fee by $5 and that the Department was able to make an $11 million loan to the General Fund. (Supra__) What's more, the trial court ignored the millions of DROS Fee dollars that were spent on things that are not "regulatory activities" identified in Section 28225, such as the Department's litigation. (See X AA 2711-2712; XII AA 3270-3273; *see also* V AA 1376-1377.) The trial court's conclusion thus runs headlong into the well-established rule that the proportionality inquiry concerns whether a *particular* program's costs are reasonably related to the levy being charged. (*See, e.g., 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).) Those programs simply have no reasonable nexus to DROS Fee payors. Thus, the trial court's original, correct determination established, prima facie, that the Department could not establish that its legitimate costs justify even a $19 DROS Fee and the trial court erred in holding otherwise. (*Cal. Farm*, 51 Cal. 4th at 436.)

Yet, under AB 1669, the Department now charges $31.19 for the Updated DROS Fee, even without funding APPS. (Cal. Code Regs., tit. 11, § 4001.) And it can use it to fund all sorts of new regulatory activities. (Pen. Code, § 28233; *See also* Pen. Code, § 16580.) But as explained above, AB 1669 provides no basis justifying that higher rate. (*Supra*, pp. 12-15.)

The Department thus cannot meet its burden under the reasonable cost prong. Plaintiffs should prevail for this reason alone.

B. The Department cannot meet the allocation prong.

The allocation prong requires "that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity." (*Sinclair Paint*, *supra*, 15 Cal. 4th at 878.) It asks whether there is a "close nexus" between a *particular* fee payer and the activity the fee funds. (*Id.* at 881; *City of San Buenaventura*, *supra*, 3 Cal. 5th at 1212-13.) [Importantly, the costs allocation prong does not concern "the question of proportionality [, which is] measured collectively"—that inquiry is exclusively part of the reasonable cost prong discussed above. (*City of San Buenaventura*, 3 Cal. 5th at 1213.)]

1. DROS Fee payors impose no burden on government via the act of lawfully acquiring a firearm

The trial court erred when it held that law-abiding DROS Fee payors create a burden by lawfully obtaining a firearm. (XV AA 3394.) It wrongly connected law-abiding DROS Fee payers to APPS-related costs, stating: "The need for APPS only arises by way of the existence of lawful firearm purchasers and owners[;] "'only those who have completed the DROS Process can end up on the APPS List." (*Ibid.*) This is a quintessential example of a *post hoc ergo propter* logical fallacy. That is, the trial court found a causal connection between paying the DROS Fee and getting on the APPS List, ignoring that such relationship *does not* exist for DROS Fee payers who never end up on the APPS List. To say *all* DROS Fee payers cause the burden APPS seeks to remedy is to thus ignore the binding case law that requires the opposite conclusion. (*Sinclair Paint*, 15 Cal. 4th at 878). *Sinclair Paint* makes clear that even if the regulated entity is in a group that is known to cause harm (e.g., paint manufacturers), regulatory fees charged to that group must still be limited to address harms that are actually the result of conduct of *each* fee payer. (*Id.* at 881). Tellingly, the trial court does not cite to a single

case to support its conclusion that lawful firearm purchasers create an APPS-related burden. (XV AA 3394.)

Because the Department offered no evidence of a nexus, let alone a "clear nexus[,]" between law-abiding DROS Fee payors like Appellants *legally acquiring* firearms and APPS-related costs resulting from *illegal* firearm *possession*, the trial court erred in finding the Department met its burden under the allocation prong. (*Sinclair Paint*, *supra*, 15 Cal. 4th at 878; *City of San Buenaventura*, *supra*, 3 Cal. 5th at 1212-13.) And, while the trial court did not consider AB 1669 because it was adopted after the court ruled in this matter, the Department could not possibly show a sufficient nexus between its extensive litany of activities the Updated DROS Fee funds and the payors of that charge. (*Supra*, pp. 15-20.)

2. DROS Fee payors receive no special government benefit beyond the general public

As explained above, if anything, DROS Fee payor receive a burden, not a benefit. (*Supra*, pp. 24-26.) *Sinclair Paint* proves this point. It concerns a challenge by a paint manufacturer regarding a fee it was assessed under the Childhood Lead Poisoning Prevention Act ("CLPPA"). (*Sinclair Paint*, *supra*, 15 Cal. 4th at 870.) The CLPPA imposes "fees on manufacturers and other persons . . . responsible for identifiable sources of lead, which have significantly contributed and/or currently contribute to environmental lead contamination." (*Id.* at 872.) *Sinclair Paint* confirms that fees under the CLPPA did "not constitute payment for a government benefit or service" to "Sinclair or other manufacturers in the stream of commerce for products containing lead[,]" but were "used to benefit children exposed to lead[.]" (*Id.* at 875.)

Here, the purpose of the DROS Fee was plainly to benefit the *public* (like in *Sinclair Paint*) via a reduction in illegal firearm possession. (*Supra*,

pp. 24-26.) Indeed, SB 819 does not refer to protecting DROS Fee payers, it concerns the "substantial danger to public safety" presented by prohibited persons possessing firearms. (VI AA 1616-1618.)

To the extent DROS Fee payers receive any benefit from the Department enforcing firearm regulations, it is the same increased effectiveness of law enforcement all Californians receive. "[A]s Witkin succinctly puts it, 'no compensation is given to the taxpayer except by way of governmental protection and other general benefits.' Taxation 'promises nothing to the person taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good.'" (*Cal. Chamber*, *supra*, 10 Cal. App. 5th at 641 (citations omitted).) 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 tax." (*Cal. Farm*, *supra*, 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. Accordingly, because the "benefit" alleged is really the "burden" already shown to be insufficient to meet the allocation prong, the Department's "benefit"-based defense similarly fails.

* * * *

In summary, *Sinclair Paint* provides a two-prong test to determine if a levy is a regulatory fee permissible under a government entity's police power. (*Sinclair Paint*, *supra*, 15 Cal. 4th at 878.) Both of those prongs point decisively toward the conclusion that neither the DROS Fee nor the Updated DROS Fee are regulatory fees, but instead are taxed. Accordingly, the DROS Fee is invalid to the extent it does not comply with California's constitutional

taxation limits. As shown below, the DROS Fee violates three separate constitutional provisions.

C. Because the DROS Fee is a tax, it violates various provisions of the California Constitution

The DROS Fee violates the following three constitutional tax provisions:

> All property is taxable and shall be assessed at the same percentage of fair market value. . .. All property so assessed shall be taxed in proportion to its full value.
>
> The Legislature may provide for property taxation of all forms of tangible personal property. . .. The Legislature, two-thirds of the membership of each house concurring, may classify such personal property for differential taxation or for exemption.
>
> The following are exempt from property taxation: . . . Household furnishings and personal effects not held or used in connection with a trade, profession, or business.

(Cal. Const., art. XIII, §§ 1(a), (b), 2 & 3(m).)

These provisions cannot be amended without a two-thirds vote of the legislature (Cal. Const., art. 18, § 1)—which necessarily means they were unaffected by SB 819 or AB 1669, which were enacted on a simple majority vote. (VI AA 1616-1618; RJN Exh. 4.)

1. The DROS Fee Violates Article XIII, Section 1(b) of the California Constitution

Section 1(b) applies to personal property. (*Gen. Dynamics Corp. v. Los Angeles Cty.*, 51 Cal. 2d 59, 64 (1958) (citing sections 1 and 14).) Firearms are personal property. (*See, e.g.*, *People v. Beck*, 25 Cal. App. 4th 1095, 1097 (1994), *as modified* (June 17, 1994); *see also* Rev. & T. Code § 106 ("'Personal property' includes all property except real estate").) Because the DROS Fee is a tax that must be paid to legally obtain a firearm in California, it is a property tax that must be proportionally related to the value of the firearm

being obtained. (Cal. Const., art. XIII, § 1(b).) Because the DROS Fee is charged per transaction at a flat rate that is in no way tied to the value of the firearm(s) being transferred, the DROS Fee violates article XIII, section 1(b). (Cal. Code Regs., tit. 11, § 4001.)

2. The DROS Fee Violates Article XIII, Section 2 of the California Constitution

Section 2 allows for differential taxation, including an exemption from taxation for certain forms of tangible property, if enacted by a two-thirds vote of the legislature. CITE. Plaintiff is unaware of any form of tangible property, other than firearms, that is taxed in a manner akin to how the DROS Fee has been charged after the enactment of SB 819. That differential taxation has occurred is inescapable: before SB 819, DROS Fee payers did not pay a property tax upon purchasing a firearm, but after SB 819, they do. In light of that fact, and that SB 819 was not enacted by a two-thirds vote (VI AA 1616-1618 (passing the Senate with only 22/40 "Ayes" and the Assembly with only 50/80 "Ayes"), SB 819 created a differential taxation scheme that violates article XIII, section 2, and is thus invalid.

3. The DROS Fee Violates Article XIII, Section 3(m) of the California Constitution

Section 3(m) exempts from taxation "[h]ousehold furnishings and personal effects not held or used in connection with a trade, profession, or business." Because firearms are commonly purchased for, inter alia, home defense and recreational use, they are within the concepts of "household furnishings and personal effects[,]" meaning they are exempt from taxation under section 3(m) without substantial analysis. (*Morgan v. Imperial Irrigation Dist.*, 223 Cal. App. 4th 892, 905–06 (2014) ("[r]ules of construction and interpretation that are applicable when considering statutes are equally applicable in interpreting constitutional provisions. . . . When statutory

language is clear and unambiguous, there is no need for construction and courts should not indulge in it.'").)

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

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

Given that firearms clearly fit in the subsets described above, California's regulatory and statutory law strongly supports the conclusion that firearms are exempt from taxation under article XIII, section 3(m). Because the passage of a statute by a simple majority cannot change that fact, SB 819 and AB 1669 violate article XIII, section 3(m), and this Court should rule that the DROS Fee, as amended by SB 819 those bills, is unconstitutional. (Cal. Const., art. 18, § 1.)

III. Should this Court hold that AB 1669 does not concern the DROS Fee, but a separate fee, All but one of Appellants' Challenges Are Moot

Appellants filed this lawsuit in 2013, complaining that the Department's expanded use of monies collected via the DROS Fee under Penal Code section 28225 following adoption of SB 819 to fund costs incurred by regulating the "possession" of firearms converted the DROS Fee into an unlawful tax. (I AA 26-47.) As a result of AB 1669's passage, the fee charged under Penal Code section 28225 is now capped at $1, none of which can be spent on the Department's regulation of the "possession" of firearms. (Pen. Code, § 28225; see also RJN Exh. 4.) In other words, the uses of the DROS Fee in the pre-AB 1669 version of 28225 that Appellants challenged are no longer provided for by that statute. (*Ibid*.)

If this Court believes it should analyze the DROS Fee in a vacuum as concerning the fee provided by Penal Code section 28225 only, disregarding the practical impact of AB 1669 and the Updated DROS Fee, then Appellants have effectively obtained the relief they sought in their complaint as to that statute and this case is mostly moot. (*See, e.g.*, *Schoshinski v. City of Los Angeles* (2017) 9 Cal.App.5th 780, 784.) The only exception is Appellants' First Cause of Action of the FAC, discussed below, because it does not depend on whether the DROS Fee is a tax. (*Infra*, pp. 44-46.)

IV. AB 1669 Moots At Least Two of Appellants' Challenges

If the Court agrees with Appellants that the Updated DROS Fee should be considered subject to Appellants' existing challenge on appeal, two of Appellants' cause of action are nevertheless mooted by AB 1669.

A. AB 1669 Mooted Appellants' Fifth Cause of Action

Appellants' Fifth Cause of Action sought a declaration that the Department has a ministerial duty to periodically review whether the amount being charged for the DROS Fee is excessive, and a writ to issue compelling the Department to undertake that analysis. (I AA 44.) The district court granted this cause of action as to the declaratory relief Appellants sought, i.e., that the Department does indeed have a duty to analyze the DROS Fee to determine whether it is being charged at an appropriate amount per the statutory limitations. (X AA 2520-2523.) However, it subsequently refused to issue a writ of mandate compelling the Department to undertake such analysis, finding that the Department had adequately done so via its briefing of this matter. (XV AA 3995.)

The Department has not contested the trial court's ruling that the Department has a ministerial duty to periodically review whether the amount being charged for the DROS Fee is excessive by appealing it. That aspect of this cause of action is thus resolved in Appellants' favor. And, while Appellants believe the trial court erred in holding that the Department met its statutory obligations to show that the DROS Fee was properly charged at $19, the adoption of AB 1669 Fee moots that question because AB 1669 relieves the Department of the requirement to conduct that analysis.

B. AB 1669 Mooted Appellants' Ninth Cause of Action

Appellants' Ninth Cause of Action sought a declaration that SB 819 did not authorize the Department to use DROS Fee monies to fund any activities

beyond APPS enforcement and injunctive relief precluding it from doing so. (II AA 574-575.) The district court granted the declaratory relief Appellants sought with respect to the limitations on what SB 819 allows DROS Fee monies to be used for. (X AA 2523-2525.) The Department has not appealed that ruling and thus does not contest it.

The trial court did not expressly grant Appellants the injunctive relief they sought to preclude the Department from using DROS Fee monies for regulation of firearm "possession" beyond APPS enforcement. (See X AA 2526; XV AA 3995.) AB 1669 mooted the law that Appellants complained about by expanding the permissible use of DROS Fee monies to include costs beyond APPS enforcement and thus mooting the relief sought. (RJN Ehx. 4 [authorizing use of DROS Fee monies on regulation of the "lawful or unlawful possession" and "manufacturing" of firearms]; *see also* RJN Exhs. 5-7 [purporting a desire to override SB 819's restriction to covering only APPS enforcement costs].)

V. Use of DROS Fee Funds Collected Prior to SB 819 to Regulate Firearm "Possession" Is Unlawful and the Department Must Return Any Funds So Used to the DROS Fund

Appellants' First Cause of Action in the FAC seeks declaratory relief that adoption of SB 819 did not, and legally could not, authorize the use of DROS Fee monies collected prior to its adoption for purposes not authorized until its adoption. It also seeks injunctive relief forbidding the Department from receiving or using any monies that had been collected from the DROS Fee before Senate Bill 819 went into effect that were appropriated via SB 140 for purposes of regulating the "possession" of firearms pursuant to section 28225(b)(11). Concomitantly, Appellants' Fifth Cause of Action seeks a writ of mandate compelling the return of any such monies that have been used for those purposes.

The premise of these claims is axiomatic: There is no authority to retroactively convert funds collected under a fee authorized for a particular use to use for a whole other purpose later justified. That would make it a tax no different than had the levy been expressly intended as a tax ab initio. The California Department of Finance has clarified that the funds at issue, "when transferred, may become proceeds of taxes." (I AA 149.) That is what will happen here if the Department is allowed to convert funds collected under the guise of a regulatory fee into nothing more than a general fund subsidy. As explained above, DROS Fee monies collected prior to adoption of SB 819 were collected under a fee that, at the time, did not contemplate or authorize such use.

The trial court held that Appellants failed to show that SB 140 used funds "illegally that had been collected for a pre-SB 819 purpose and use them for SB 819." (XV AA 3994.) But, the facts as the trial court articulates them show that funds collected prior to SB 819 were necessarily included in SB 140's $24 million appropriation, as a matter of simple mathematics. SB 140 appropriated $24 million from the DROS Fund to pay for APPS, and there was not $24 million in surplus of DROS Funds collected in the two years between the time SB 819 was adopted and when SB 140 was adopted. (XV AA 3984.) The trial court's reasoning for denying this claim is thus belied by the undisputed record.

Accordingly, this Court should reverse the trial court, declare that DROS Fee monies collected prior to SB 819 taking effect could not be used for APPS, and instruct the trial court to issue a writ of mandate compelling the Department to return any such monies so used to the new DROS Subaccount.

CONCLUSION

Based on the foregoing, Appellants ask this Court to reverse the trial court's order granting the Department's motion for judgment on the pleadings and its denial of Appellants' First Amended Petition for Writ of Mandate and Complaint.

Dated: February 7, 2020

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s/ Sean A. Brady
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CERTIFICATE OF WORD COUNT

Under Rule 8.204, subdivision (c)(1), of the California Rules of Court, I certify that the attached Appellants' Opening Brief is 1½-spaced, typed in a proportionally spaced, 13-point font, and the brief contains 12,891 words of text, including footnotes, as counted by the word-count feature of the word-processing program used to prepare the brief.

Dated: February 7, 2020

MICHEL & ASSOCIATES, P.C.

s/ Sean A. Brady
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PROOF OF ELECTRONIC SERVICE

Case Name: *Gentry, et al. v. Becerra, et al.*
Court of Appeal Case No.: C089655
Superior Court Case No.: 34-2013-80001667

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

On February 7, 2020, I served a copy of the foregoing document(s) described as: **APPELLANTS' OPENING BRIEF**, by electronic transmission as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on February 7, 2020, at Long Beach, California.

s/ Sean A. Brady
Sean A. Brady
Declarant