IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

DAVID GENTRY, et al., Plaintiff and Appellant, **v.** **XAVIER BECERRA, et al.,** Defendant and Respondent.	Case No. C089655

Sacramento County Superior Court Case No. 34-201380001667
The Honorable Richard K. Sueyoshi, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

Plaintiffs David Gentry, et al., filed this action to challenge the constitutionality of a fee imposed by the Department of Justice on those seeking to acquire firearms. The fee originally supported the Dealers Record of Sale or "DROS" system, which is the Department's system for performing background checks on those seeking to purchase firearms. Beginning in 2012, the fee also supported the Armed Prohibited Persons System or "APPS," which is the Department's system for identifying people who lawfully acquired firearms but then lost their eligibility to keep them. Gentry alleges that using the fee to support APPS created an unconstitutional tax.

After the trial court entered judgment upholding the fee, the Legislature repealed the fee and imposed two significantly different ones, neither one of which is presently being used to support APPS. Gentry's challenge to the former fee is therefore moot.

On appeal, Gentry challenges the two new fees as if they merely perpetuated the former fee, which is not the case. Since Gentry did not challenge the new fees in the trial court, he cannot do so on appeal.

Gentry's claims also fail on their merits. Gentry relies on constitutional provisions that do not even apply to the former fee, so he establishes no need for the court determine whether the fee was an unconstitutional tax. And if that determination were somehow required, the trial court correctly determined that the fee was a valid regulatory fee and not a tax. Also meritless is Gentry's one claim that arguably is not moot, in which Gentry asks for some of the fee revenue that the Legislature appropriated for APPS to be returned to the State Controller.

The trial court's judgment should therefore be affirmed. Alternatively, Gentry's appeal should be dismissed as moot.

STATEMENT OF THE CASE

I. THE FORMER DROS FEE HELPED SUPPORT THE REGULATION OF FIREARMS IN CALIFORNIA

A. The Department of Justice Bears Responsibility for Regulating Firearms

The Department of Justice is charged by the Legislature with broad responsibilities for regulating firearms in California. Among those responsibilities is DROS, which requires those who wish to purchase firearms from a dealer in California to report relevant personal information to the dealer for submission to the Department. (Penal Code, §§ 28100, 28155, 28160 & 28205 [all further statutory references are to the Penal Code unless otherwise stated]; see *Bauer v. Becerra* (9th Cir. 2017) 858 F.3d 1216, 1218-1220 [explaining DROS].) The dealer must then wait ten days before delivering the firearms. (§ 26815.) During the waiting period the Department must perform a background check to ensure the purchaser is not legally prohibited from possessing firearms. (§ 28220.) The Department also must maintain a registry to preserve all of the information obtained through the DROS process. (See, e.g., § 11106, subds. (a)(1)(D), (b)(1)(F), & (b)(2)(A).)

Another component of the Department's regulation of firearms is APPS, which helps the Department identify individuals who lost their eligibility to possess firearms after lawfully acquiring them. (§ 30000.) APPS operates by cross-referencing the Department's data regarding registered firearms with current data regarding criminal histories, domestic violence restraining orders, wanted persons, and the On-Line Mental Health Firearms Prohibition Reporting System. (See § 30000, subd. (a), & § 11106.) The Department relies on APPS to assist with investigating, disarming, apprehending, and prosecuting people who continue to possess

firearms after they are prohibited from doing so. (See *Bauer v. Becerra*, *supra*, 858 F.3d at pp. 1219-1220.)

B. The Legislature Authorized the Department to Impose the Former DROS Fee to Support the Regulation of Firearms

1. The fee was originally imposed for the limited purpose of supporting background checks

Beginning in 1982, the Legislature authorized the Department to require firearms dealers to pay a fee in whatever amount the Department needed to support background checks. (Former § 12076, subd. (e), added by Stats. 1982, ch. 327, § 129, p. 1473 [6 AA 1461].) The Legislature directed that all revenue from the fee "shall be deposited in the Dealers' Record of Sale Special Account of the General Fund." (*Ibid*.) The Legislature later shifted the responsibility for paying the fee from firearms dealers to firearms purchasers. (Former § 12076, subd. (e), as amended by Stats. 1998, ch. 922, § 1 (SB 591).)

The Legislature gradually authorized the Department to use the fee to support a variety of additional activities related to background checks, such as reporting by the State Department of Mental Health and local mental health facilities, mental hospitals, sanitariums, and institutions; notification requirements imposed on local law enforcement agencies and the Department of Food and Agriculture; the electronic or telephonic transfer of information from firearms dealers; and the Department's funding of "regulatory and enforcement activities related to the sale, purchase, loan, or transfer of firearms…." (Former § 12076, subd. (d)(1) through (4), added by Stats. 1990, ch. 1090 [6 AA 1498]; former § 12076, subd. (e)(4) through (7), added by Stats. 1996, ch. 128, § 7 (SB 671); former § 12076, subd. (e)(8) & (9), added by Stats. 1998, ch. 922, § 1 (SB 591); former § 12076, subd. (e)(10), added by Stats. 2003, ch. 754 (AB 161).)

The amount of the fee was gradually increased to keep pace with the scope of fee-supported activities. The Department originally set the fee at $2.25 per firearms transaction in 1982, and in 1991 the fee was raised for the eighth time and became $14 per transaction. (6 AA 1464.) The Legislature later capped the fee at that amount, subject to increases for inflation. (Former § 12076, subd. (d), as amended by Stats. 1995, ch. 901, § 1 (SB 670) [6 AA 1504].)

In 2004 the Department used its existing statutory authority to increase the fee to $19. (Cal. Code Regs., tit. 11, § 4001, operative Nov. 1, 2004, Register 2004, No. 45 (Nov. 1, 2004).) Without the 2004 fee adjustment, the DROS Special Account was projected to run out of cash in 2005. (6 AA 1594.)

2. In 2011, the Legislature enacted SB 819 to authorize the Department to use the fee to support APPS

Firearms sales from 2007 to 2010 were much higher than anticipated, so the fee was producing more revenue than the Department projected. (14 AA 3612.) At the same time, economies of scale and other factors caused some of the Department's costs of operating the DROS system to decline. (14 AA 3612-3613.) The Department therefore considered adopting a regulation to lower the fee from $19 to $14. (2 AA 429, 14 AA 3612.)

In 2011, however, the Legislature enacted Senate Bill 819, which did not change the amount of the DROS fee but authorized the Department for the first time to use the fee to help support APPS. (§ 28225, former subd. (b)(11), added by Stats. 2011, ch. 743, § 1 [6 AA 1616-1617, 1628-1629].) An uncodified part of SB 819 stated that the Legislature intended this change to avoid "placing an additional burden on the taxpayers of

California to fund enhanced enforcement of [APPS]." (Stats. 2011, ch. 743, § 1, subd. (g) [6 AA 1617].)

3. In 2013, the Legislature enacted SB 140 to use fee revenue to address a backlog in APPS

In 2013, the Legislature passed Senate Bill 140, making a one-time appropriation of $24 million from the DROS Special Account to the Department to "address the backlog in [APPS] and the illegal possession of firearms" by those targeted by APPS. (§ 30015, subd. (a), added by Stats. 2013, ch. 2, § 1 (SB 140) [6 AA 1620-1621].) SB 140 provided for the Department to report annually through 2019 regarding its efforts to reduce the APPS backlog. (§ 30015, subds. (b) & (c) [6 AA 1621].)

4. After the trial court entered judgment, the DROS fee was repealed and replaced with other sources of revenue

Six months after the trial court entered judgment in this case, the Governor signed AB 1669 into law, repealing the former DROS fee and creating two other fees. (Stats. 2019, ch. 736, §§ 13-16 [Gentry's request for judicial notice, pp. 50-52].)

AB 1669 authorized the Department to impose a new fee of $1 per transaction to support many of the same activities that had been supported by the former DROS fee. Those activities include the exchange of information between the Department and local hospitals, local law enforcement, and other agencies to support the DROS process. (§ 28225, subd. (b).)

The other new fee authorized by AB 1669 is in the amount of $31.19 and supports other activities that had been supported by the former DROS fee. (§ 23233, subd. (b) [authorizing the use of the fee to support "firearms-related regulatory and enforcement activities related to the sale, purchase,

manufacturing, lawful or unlawful possession, loan, or transfer of firearms….”].)

The 2019-2020 state budget act provides for APPS to be supported by general fund revenues, rather than by either one of the new fees. (Gentry’s request for judicial notice, pp. 74, 76; AOB pp. 19-20.)

II. PROCEDURAL HISTORY

A. Gentry’s Original Complaint Asserted that SB 819 Violated Proposition 26 by Using the Former DROS Fee to Support APPS

Gentry’s original complaint for declaratory relief and petition for writ of mandamus was based primarily on Proposition 26, which the voters enacted in 2010 to amend the state tax limitations originally imposed by Proposition 13. (Cal. Const., art. XIII A, § 3, added by initiative, Primary Elec. (June 6, 1978), commonly known as Prop. 13; amended by initiative, Gen. Elec. (Nov. 2, 2010), commonly known as Prop. 26.) The complaint challenged SB 819 on the grounds that by providing for APPS to be supported by the former DROS fee, SB 819 “increase[ed] the activities the DROS Fee payer [was] responsible to finance,” resulting in a “tax” as defined in Proposition 26 and therefore requiring approval by a two-thirds vote of the Legislature. (1 AA 28-29, 41-42.)

The complaint also challenged SB 140 on the ground that its one-time appropriation of $24 million from the DROS Special Account for APPS was “an ongoing illegal expenditure of state funds,” because the appropriation “was based solely on the invalid adoption of SB 819.” (1 AA 28-29, 42-43.)

B. The Trial Court Dismissed Gentry's Proposition 26 Claims

The Department successfully moved for judgment on the pleadings regarding Gentry's claim that SB 819 violated Proposition 26. (2 AA 529.) The trial court concluded that since SB 819 did not result in anyone paying a higher tax, the statute was not governed by Proposition 26:

> SB 819 did not result in anyone paying a higher tax. This was because, prior to the enactment of SB 819, firearms purchasers paid a DROS fee of $19.00, which remained the same after the passage of SB 819. The language of article XIIIA, section 3, subdivision (a) was only concerned with the taxpayer paying a *higher* tax, and not with how the tax was being used[.] [C]onsequently[,] the failure of SB 819 to raise the DROS fee amount was fatal to [Gentry's] claims.

(14 AA 3594.)

C. After Gentry Filed His Amended Complaint, the Trial Court Received Evidence and Rejected Essentially All of Gentry's Claims

Gentry filed an amended complaint asserting nine causes of action, and the trial court held a hearing on the fifth and ninth causes of action before hearing the others.

In his fifth cause of action, Gentry relied on Proposition 13 cases such as *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866 (*Sinclair Paint*) to allege that the Department had a duty to review whether the fee was higher than necessary to support the relevant governmental activities. (2 AA 568-569.) Gentry asked the court to compel the Department to undertake that review. (2 AA 568-570.)

The court initially found that the Department had breached a ministerial duty to determine how much revenue was needed from the fee. (10 AA 2523.) However, the Department later submitted evidence that for the first five years after the Legislature enacted SB 819, the Department's

estimated expenditures from the DROS Special Account consistently exceeded the estimated annual revenue from the fee. (14 AA 3692-3693.) Based on that evidence, the court found that there was no need to grant Gentry relief, because the Department had "sufficiently established that the funds generated by the DROS Fee [were] a reasonable approximation of the [relevant] costs." (15 AA 3993, 3995.)

Gentry's ninth cause of action sought declaratory relief that SB 819 authorized the former DROS fee to be used for only a limited range of APPS-related activities. (2 AA 574-575.) The trial court granted Gentry the requested declaratory relief, and the Department does not appeal from that ruling. (10 AA 2523-2525; 15 AA 3995.) The ruling does not affect the issues presented on appeal.

The trial court then received extensive evidence and briefing on Gentry's remaining seven causes of action. (13 AA 3422-15 AA 3980.)

Three of those causes of action—Gentry's sixth, seventh, and eighth—alleged that by providing for the fee to support APPS, SB 819 caused the fee to become an unconstitutional tax. (2 AA 570-573.) Gentry did not base those allegations on Proposition 26, which appears within article XIII A of the Constitution, but instead relied on rules that appear within article XIII of the California Constitution and relate to property taxes. (2 AA 570-573.) Gentry's briefs again relied on cases such as *Sinclair Paint, supra*, 15 Cal.4th 866, which do not concern either article XIII or property taxes. (13 AA 3435-3444, 15 AA 3968-3979.)

Based on *Sinclair Paint* and related cases, the trial court determined that SB 819 did not cause the former DROS fee to become a tax and that the fee therefore did not require approval by a two-thirds majority of the Legislature. The court made the following findings:

- The funds generated by the fee reasonably approximated the costs of the relevant regulatory activity, including both DROS

and APPS. (15 AA 3993.) The court based that finding on evidence that annual fee revenue did not exceed expenditures from the DROS Special Account during the five years after SB 819 was enacted, as discussed above. (15 AA 3993.)

- The fee payers were responsible for creating the regulatory burdens addressed by both DROS and APPS. (15 AA 3993-3994.) The court noted that "DROS Fee payors create a unique burden by way of their firearm ownership," and "[t]he need for APPS only arises by way of the existence of lawful firearm purchasers and owners." (15 AA 3994.)

The court did not address whether, assuming the fee was somehow a tax, it could ever be classified as a property tax governed by article XIII.

Gentry's other four causes of action asserted that SB 819 and SB 140 improperly provided for the Department to support APPS with DROS fees that had already been collected before SB 819 and SB 140 were enacted. (2 AA 566-567.) In his first and second causes of action, Gentry alleged that any DROS fees collected before SB 819 could not be used to fund APPS, because SB 819 provided the earliest statutory authority for the fee to be used for APPS. (2 AA 566-567.) In his third and fourth causes of action, Gentry sought to recoup any DROS fees that DOJ collected before SB 819 but that were later used to support APPS. (2 AA 567.) The court rejected each of those claims, because Gentry failed to demonstrate sufficiently that the Department used DROS fees as Gentry alleged or that any such use would be prohibited. (15 AA 3994.)

Nowhere in the amended complaint did Gentry assert that the fee violated any provisions of the California Constitution other than provisions in article XIII regarding property taxes. The amended complaint mentions Proposition 13 only in passing, and the trial court never addressed the applicability of Proposition 13. (2 AA 557.) Gentry had earlier disclaimed

any intent to rely on Proposition 13, stating that he relied on "generally applicable law" applicable even in "non-proposition 13 cases." (15 AA 3970.)

Gentry filed a timely appeal of the trial court's judgment. (16 AA 4048.) The Department did not file a cross-appeal.

STANDARD OF REVIEW

Whether a charge imposed by the government is a tax or a fee is a question of law to be decided upon an independent review of the record. (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 436 (*Farm Bureau*).) The trial court's foundational findings of fact are reviewed using the substantial evidence standard. (*Northern California Water Assn. v. State Water Resources Control Bd.* (2018) 20 Cal.App.5th 1204, 1219.)

"The lower court's judgment is presumed correct and plaintiff, as the party challenging the lower court's judgment, must demonstrate as a matter of law" that a challenged fee is an invalid tax. (*California Building Industry Association v. State Water Resources Control Board* (2018) 4 Cal.5th 1032, 1050 (*California Building Industry Association*).)

The other issues presented in this appeal are also primarily issues of law and are therefore governed by the same standards. (*County of Yolo v. American Surety Co.* (2019) 43 Cal.App.5th 520, 524.)

BURDEN OF PROOF

As the plaintiff and petitioner, Gentry bore the burden of proving all elements of his case. (*American Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 460.)

Contrary to Gentry's assertions, the burden of proof would not shift to the Department on the constitutional issues even if Gentry could establish a prima facie case that the former DROS fee violated the requirements of *Sinclair Paint, supra,* 15 Cal.4th 866. (AOB p. 36.) If Gentry established a prima facie case on that issue, the Department would bear only the burden of producing evidence establishing that the fee satisfied the relevant constitutional requirements. (*Farm Bureau*, *supra*, 51 Cal.4th at pp. 436-437.) The burden of proof would not shift—it would remain with Gentry as the party challenging the fee. (*Id*. at p. 436.)

Proposition 26, if applicable, would require the Department to bear the burden of proving by a preponderance of the evidence that the former DROS fee "is not a tax, that the amount is no more than necessary to cover the reasonable costs of the [fee-supported] 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, subd. (d).)

ARGUMENT

I. GENTRY'S CHALLENGE TO THE CONSTITUTIONALITY OF THE FORMER DROS FEE IS MOOT

Gentry's complaint challenges the constitutionality of the former DROS fee on the grounds that the fee was excessive and should not have been used to support APPS. (2 AA 552-554.) Any such claims are moot, because the former DROS fee was repealed and replaced with two new fees by AB 1669 in 2019. (2 AA 558-560, 568-575; Gentry's request for judicial notice, pp. 50-52.)

As a general rule, a court's duty "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions…." (*Paul v. Milk Depots, Inc.*

(1964) 62 Cal.2d 129, 132.) The repeal or modification of a statute may therefore render moot a challenge to the original statute. (*Association of Irritated Residents v. Department of Conservation* (2017) 11 Cal.App.5th 1202, 1222; *Bell v. Board of Supervisors* (1976) 55 Cal.App.3d 629, 635-637.)

Gentry observes that much of the statutory language governing the former DROS fee continues to apply to one or the other of the two new fees. (AOB p. 47; compare § 28225, subd. (b); § 28225, former subd. (b), as amended by Stats. 2011, ch. 743, § 2; and § 23223.) But the new fees are in different amounts and support different activities than the former fee, so to determine whether the former fee was constitutional would not determine the constitutionality of either one of the new fees.

Gentry's challenge to the former DROS fee is also moot because neither one of the new fees supports APPS. As Gentry acknowledges, the state budget act of 2019-2020 provides that APPS will be supported instead with general fund revenues. (AOB pp. 19-20, citing Gentry's request for judicial notice, p. 74 [noting that the Department's enforcement of the APPS had been "moved to a general fund allocation in the budget"].) Gentry's speculation that some future budget act might provide for APPS to be fee-supported is not ripe for judicial review. (AOB pp. 19-20; see *Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 541-542 [request for declaratory relief was not ripe where court was asked to speculate as to what future legislation, if any, might be adopted].)

The court should therefore disregard as moot the parts of Gentry's appeal that concern his constitutional challenge to the former fee. Those claims include, at a minimum, those related to the sixth through eighth causes of action of the amended complaint, which are based on article XIII of the Constitution, and the Proposition 26 claim that was dismissed from the original complaint. (1 AA 41-42; 2 AA 570-573.)

Also moot is the fifth cause of action, which concerns the Department's efforts to determine whether the former DROS fee was higher than necessary to support the relevant governmental activities (2 AA 568-570), and the ninth cause of action, which concerned the scope of APPS-related activities that SB 819 authorized to be supported by the former DROS fee (2 AA 574-575). Those claims were related only to the former DROS fee and present no continuing controversy.

Also moot are Gentry's first through fourth causes of action, which concern expenditures resulting from SB 819 and SB 140, except to the extent that they may seek particular expenditures of fee revenue to be returned to the State Controller. (See part V below.)

II. THE CONSTITUTIONALITY OF AB 1669 WAS NOT CONSIDERED BELOW AND IS NOT PROPERLY BEFORE THIS COURT

Gentry further responds to the mootness issue by asking the court to determine the constitutionality of AB 1669. (AOB pp. 26-27.) But AB 1669 was enacted after the trial court entered judgment, so no challenge to AB 1669 was ever presented to or considered by that court. (15 AA 3981-3995.)

"It is an elementary rule of appellate procedure that, when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered. [Citation.]" (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813.) " ' "Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider…." ' " (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997, quoting *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1519, in turn quoting

JRS Products, Inc. v. Matsushita Electric Corp. of America (2004) 115 Cal.App.4th 168, 178.)

Here the court is being asked to consider not just new facts or new issues, but an entirely new cause of action challenging a different statute than Gentry challenged in the trial court. Doing so would be an inefficient and improper use of appellate resources.

III. GENTRY ESTABLISHES NO NEED TO DETERMINE WHETHER THE FORMER DROS FEE WAS A "FEE" RATHER THAN A "TAX"

A. Proposition 26 Does Not Apply to the Former DROS Fee, Because the Fee Was Not Increased After Proposition 26 Took Effect

Proposition 26 amended Proposition 13 in 2010 to impose new requirements affecting "[a]ny change in state statute which results in any taxpayer paying a higher tax...." (Cal. Const., art. XIII A, § 3, subd. (a).) Any such statute must be approved by a two-thirds majority of each house of the Legislature. (*Ibid.*) But in the absence of a change in statute that "results in any taxpayer paying a higher tax" and takes effect after January 1, 2010, Proposition 26 is not relevant. (*California Chamber of Commerce v. State Air Resources Bd.* (2017) 10 Cal.App.5th 604, 633; *Brooktrails Township Community Services Dist. v. Board of Supervisors of Mendocino County* (2013) 218 Cal.App.4th 195, 205-207.)

Gentry's complaint did not challenge any such change in state statute, because the former DROS fee was $19 before 2010 and remained $19 when the trial court entered judgment. (Cal. Code Regs., tit. 11, § 4001, operative Nov. 1, 2004, Register 2004, No. 45 (Nov. 1, 2004); 15 AA 3982.) The fee was also imposed on the same class of fee payers throughout that time. (Former § 12076, subd. (e), as amended by Stats. 1998, ch. 922, § 1 (SB 591); § 28225, former subd. (a), as amended by Stats. 2011, ch. 743,

§ 2.) Accordingly, the trial court correctly dismissed Gentry's Proposition 26 claims. (2 AA 529; 14 AA 3594.)

Gentry asserts that when SB 819 authorized the former fee to be used for APPS, the practical effect was to increase the fee, because "without those new costs," the amount of the fee "could have conceivably … been charged at less than $19." (AOB p. 28, fn. 8.) But Proposition 26 does not call for the court to speculate about what might conceivably have happened in the absence of a new statute—the language of the new statute either requires a higher payment or it does not. Like any other part of the Constitution, Proposition 26 should be interpreted whenever possible based on the ordinary meaning of its words. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037.)

A similar effort to expand the effect of Proposition 26 was rejected in *California Chamber of Commerce v. State Air Resources Bd.*, *supra*, 10 Cal.App.5th 604. The plaintiffs in *California Chamber* disputed an agency's statutory authority to create California's cap and trade program, and they asserted that even if the Legislature had authorized the creation of the program, the program resulted in an unconstitutional tax. (*Id.* at pp. 613.) The plaintiffs further asserted that if the creation of the program was ratified by a 2012 statute restricting the use of cap and trade revenue, then the court would have to apply Proposition 26 to determine whether the program resulted in an unconstitutional tax. (*Id.* at p. 633.) The court held that Proposition 26 did not apply, because a statute specifying "how the proceeds of [a charge] would be handled" is not the sort of change in state statute governed by Proposition 26. (*Ibid.*) Since the 2012 statute "did not change the *cost*" borne by participants in the program, there was no change in state statute that resulted in "any taxpayer paying a higher tax." (*Ibid.*)

SB 819 only affected how the proceeds of the former DROS fee would be handled; it did not result in anyone paying a higher amount. For

that reason, the trial court correctly dismissed Gentry's Proposition 26 claims. (2 AA 529 [granting judgment on the pleadings as to Gentry's first cause of action]; 1 AA 287-289 [stating the grounds for the motion].)

B. Article XIII Does Not Apply to the Former DROS Fee, Because Even If the Fee Could Somehow Be Classified as a Tax, It Could Not Be Classified as a Property Tax

Gentry's amended complaint challenges the constitutionality of the former DROS fee based on various provisions of article XIII of the California Constitution. (AOB pp. 44-47; 2 AA 570-573.) But as Gentry appears to acknowledge, those provisions only govern property taxes. (Cal. Const., art. XIII, § 1, subd. (b) [taxes on personal property], § 2 [same], § 3, subd. (m) [exemptions from property tax]; AOB pp. 44-46.) Even if the former DROS fee was not a valid regulatory fee, it could never be classified as a property tax, because it was imposed solely on the *acquisition* of a firearm, rather than on possession or ownership. (§ 28225, former subd. (a).) Article XIII is therefore not relevant.

The character of a tax " 'must be ascertained from its incidents and from the natural and legal effect of the language employed' " in the statute. (*Ainsworth v. Bryant* (1949) 34 Cal.2d 465, 473, quoting *Ingels v. Riley* (1936) 5 Cal.2d 154, 159.) A property tax generally "taxes ownership per se without conditions." (*City of Oakland v. Digre* (1988) 205 Cal.App.3d 99, 106.) In contrast, a charge "[l]evied upon the freedom or privilege of purchase … is properly denominated … as an 'excise tax' as distinguished from a personal property tax." (*Ainsworth*, at p. 475.)

The former DROS fee could never be classified as a property tax, because it was imposed only on the purchase or other acquisition of firearms; it was not a tax on ownership. (§ 28225, former subd. (a).) Gentry never provides any reasoning to support a contrary conclusion. Article XIII

therefore cannot support a determination that the former DROS fee was unconstitutional.

C. Gentry Does Not Rely on Proposition 13, Which Was the Basis for *Sinclair Paint* and Related Cases

Gentry asserts that his constitutional claims are governed by *Sinclair Paint*, *supra*, 15 Cal.4th 866, and related cases. (AOB pp. 37-38.) But the requirements of *Sinclair Paint* apply only when necessary to determine whether a governmental charge is a "tax" or a "fee" for purposes of Proposition 13 or some other law. Gentry relies on no such law other than Proposition 26 and article XIII of the Constitution, which for reasons discussed above do not apply. He does not rely on Proposition 13, the relevant parts of which were replaced almost a decade ago by Proposition 26. (2 AA 551-557.) In the absence of any law that makes *Sinclair Paint* relevant here, the court has no reason to examine whether the former DROS fee was a "tax" rather than a "fee."

Proposition 13 provided that "any changes in State taxes enacted for the purpose of increasing revenues" must be approved by a two-thirds majority in each house of the Legislature. (Cal. Const., art. XIII A, former § 3.) *Sinclair Paint* established that although Proposition 13 required taxes to be approved by a two-thirds majority of the Legislature, regulatory fees were not "taxes" for purposes of Proposition 13 and therefore did not require a two-thirds majority. (*Sinclair Paint*, *supra*, 15 Cal.4th at p. 876.) Proposition 26 amended Proposition 13 to " 'close perceived loopholes' " in its provisions, but does not apply to statutes enacted before 2010. (*California Building Industry Association*, *supra*, 4 Cal.5th at p. 1047, quoting *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1322; see part III.A above.)

Gentry appears to assume that the principles followed in *Sinclair Paint* apply even in the absence of any constitutional or statutory rule,

because *Sinclair Paint* was based in part on cases that preceded Proposition 13. (AOB at pp. 10, 36-37.) However, each of those cases was concerned with some other constitutional or statutory limitation on the power to tax. (See, e.g., *Plumas County v. Wheeler* (1906) 149 Cal. 758, 761 [statute allowed counties to impose fees "for the purpose of regulation" but not to raise revenue]; *United Business Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 164-165 [constitutional limitation on charter cities' power to enact measures for the purpose of raising revenue]; *Ventura County v. Southern Cal. Edison Co.* (1948) 85 Cal.App.2d 529, 533 [constitutional prohibition on state taxation of municipal corporations].) In the absence of any applicable limit on the taxing power, it is unnecessary to apply the kind of distinction between "fees" and "taxes" that *Sinclair Paint* helped define. (See *The Gillette Co. v. Franchise Tax Bd.* (2015) 62 Cal.4th 468, 477 ["Legislative power over taxation is supreme, and 'the provisions on taxation in the state Constitution are a limitation on the power of the Legislature rather than a grant to it' "]; *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 254 ["Only where the state Constitution withdraws legislative power will we conclude an enactment is invalid for want of authority"].)

Proposition 13 arguably remains relevant to some fees not governed by Proposition 26. (See *California Building Industry Association*, *supra*, 4 Cal.5th at pp. 1048-1050 [discussing the possibility that although plaintiff had forfeited any reliance on Proposition 26, the challenged fee might be governed by Proposition 13].) At no point in this action, however, has Gentry relied on Proposition 13, so the court need not consider Proposition 13 here. (2 AA 551-557.)

Gentry has identified no other constitutional or statutory limit on taxation that causes the requirements of *Sinclair Paint* to apply to the

former DROS fee. Gentry's constitutional challenge to the former DROS fee is therefore without basis.

IV. THE FORMER DROS FEE SATISFIES THE CONSTITUTIONAL REQUIREMENTS FOR A REGULATORY FEE

A. A Regulatory Fee Is Not a "Tax" If It Reasonably Shifts the Costs of a Governmental Activity from the Taxpayers to Those Responsible for Making that Activity Necessary

Gentry's claims regarding the constitutionality of the former DROS fee would be without merit even if they were not moot and even if Gentry established some reason to determine whether the fee was a "tax" that violated the requirements of *Sinclair Paint*.

Sinclair Paint established that although Proposition 13 required any "changes in State taxes enacted for the purpose of increasing revenues" to be approved by a two-thirds vote of the Legislature, a two-thirds vote was not necessary to enact regulatory fees. (Cal. Const., art. XIII A, former § 3.) To qualify as a valid regulatory fee, the state was required to show "(1) the estimated costs 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 p. 878, quoting *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist*. (1988) 203 Cal.App.3d 1132, 1146.)

The first of those two requirements has been described as the "aggregate cost" or "reasonable cost" inquiry. (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210-1212.) The inquiry is concerned with "the size of the revenue pie"; it examines whether the challenged fee generates more revenue than necessary to support the relevant regulatory activity. (*California Building Industry Association,*

supra, 4 Cal.5th at p. 1050-1052.) The inquiry includes two closely related parts: (1) whether the fee "exceed[s] the reasonable, estimated costs of administering" the regulatory program, and (2) "whether the fee is used to generate *excess revenue*, that is, to generate more revenue than necessary to pay for the regulatory program" and thereby is used to support unrelated activities. (*Id.* at pp. 1050-1051; see *Farm Bureau*, *supra*, 51 Cal.4th at p. 438 ["What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used for general revenue collection"].)

The second requirement of *Sinclair Paint* has been described as the "allocation inquiry" and addresses "how the pie is sliced." (*California Building Industry Association*, *supra*, 4 Cal.5th at p. 1052; *City of San Buenaventura v. United Water Conservation Dist.*, *supra*, 3 Cal.5th at p. 1212.) The allocation inquiry concerns "whether any class of feepayers is shouldering too large a portion of the associated regulatory costs." (*California Building Industry Association*, at p. 1052.)

Proposition 13 "must … be construed in light of its underlying rationale: to shift costs away from the taxpaying public towards the class of individuals that benefits from or necessitates those costs." (*Collier v. City and County of San Francisco* (2007) 151 Cal.App.4th 1326, 1338; accord, *Sinclair Paint*, *supra*, 15 Cal.4th at p. 879.) As long as the former DROS fee operated in a reasonable way to relieve the taxpaying public of costs reasonably deemed attributable to the DROS fee payers, it was not a tax.

B. The Former DROS Fee Satisfied the Aggregate Cost Inquiry

1. Revenue from the fee did not exceed the cost of the relevant regulatory activity

The aggregate cost inquiry requires agencies only to apply "sound judgment and probabilities according to the best honest viewpoint of informed officials." (*Farm Bureau*, *supra*, 51 Cal.4th at p. 438, quoting

California Assn. of Professional Scientists v. Department of Fish & Game (2000) 79 Cal.App.4th 935, 955 (*Professional Scientists*), in turn quoting *United Business Com. v. City of San Diego, supra*, 91 Cal.App.3d 156, 166, in turn quoting *Watson v. Merced County* (1969) 274 Cal.App.2d 263, 268.) Agencies may therefore rely reasonably on projections of future revenues and expenditures. (*California Building Industry Association*, *supra*, 4 Cal.5th at pp. 1052-1053 [noting "the imprecise nature of projecting future permit fee revenues and expenditures"].) Anticipated fee revenue may reasonably be " 'large enough to cover any reasonable anticipated expenses.' " (*Plumas County v. Wheeler*, *supra*, 149 Cal. at p. 765, quoting *Atlantic & Pacific Telegraph Co. v. City of Philadelphia* (1903) 190 U.S. 160, 164-165.) The court "need not perform an appellate audit of [the agency's] accounting systems." (*Professional Scientists*, at p. 954.)

Gentry's core contention is that the former DROS fee should not have been used to support APPS, so he focuses on the period after 2011, when SB 819 provided for the fee to support APPS. (2 AA 570-572; AOB pp. 17, 30-35.) From 2012 through 2016, the Department's estimated expenditures from the DROS Special Account consistently exceeded the estimated annual revenue from the fee. (14 AA 3692-3693.) The record contains no evidence of any change in that trend between 2016 and the repeal of the fee in 2019. The fee therefore satisfied the requirements of the first part of the aggregate cost inquiry. (See *California Building Industry Association*, *supra*, 4 Cal.5th at p. 1051 [aggregate cost inquiry was satisfied based on the state's projections and estimates that "fee revenues did not and would not exceed the reasonable costs of administering" the relevant regulatory activity].)

Gentry also attempts to show that the former DROS fee was excessive by comparing it to a different $19 fee that supported different regulatory activities relating to firearms. (AOB p. 32.) Gentry cites no evidence and

offers no analysis demonstrating that the costs of the regulatory activities supported by the two fees were similar.

2. Revenue from the fee was not used for unrelated revenue purposes

The former DROS fee also satisfied the second part of the aggregate cost inquiry, because revenues were not used for unrelated revenue purposes. Gentry asserts that APPS and DROS were unrelated activities and that it was therefore improper to use the former DROS fee to support APPS. (E.g., AOB pp. 30-32, 40.) He disregards that DROS and APPS share the common purpose of keeping firearms away from those not legally entitled to possess them, and it was reasonable for the same fee to support multiple activities related to that common purpose.

The point of the aggregate cost inquiry is to prevent fees from being used as general revenue, and not to make unnecessary distinctions between activities that serve a common purpose. For example, in *California Building Industry Association*, *supra*, 4 Cal.5th 1032, the challenged fee supported eight "program areas" through which the State Water Resources Control Board carried out its broad duty to regulate parties who discharged waste into California's waters. (*Id.* at p. 1051.) Each program area was created by the Board to regulate a different category of discharges, such as discharges affecting stormwater or irrigated lands. (*Id.* at pp. 1043-1044, fn. 7.) But since all eight program areas were "components of the Board's broad duty to regulate parties who discharged waste," they could reasonably be supported by the same fee. (*Id.* at p. 1051.)

Another fee that supported multiple components of a common regulatory activity was upheld in *Collier v. City and County of San Francisco*, *supra*, 151 Cal.App.4th 1326. The court found it constitutionally permissible for revenue from a local building permit fee to be shared among the local building department, fire department, and planning

department, each of which played a role in regulating the construction industry. (*Id*. at pp. 1340-1344.) The court explained that to define the fee-supported regulatory activity too narrowly "would risk depriving municipalities of a reasonable degree of flexibility" when considering how to regulate. (*Id.* at p. 1340.)

In this case, Gentry narrowly characterizes the purpose of DROS as relating only to firearms *acquisition*, disregarding that both DROS and APPS serve the common purpose of regulating firearms *possession*. (AOB pp. 31-32.) As the trial court explained, DROS helps determine whether a person can lawfully purchase firearms, while "APPS provides a tool for [the Department] to continue to determine whether firearm purchasers are lawfully entitled to possess the firearms they have purchased." (15 AA 3994.) Since DROS and APPS advance a common regulatory purpose, the former DROS fee could reasonably support both programs.

Gentry errs by asserting that the aggregate cost inquiry must focus on the costs of "a *particular* program[]." (AOB p. 40.) The rule is that the costs of the fee-supported *regulatory activity* must be reasonably related to the amount of the fee. (*Sinclair Paint, supra*, 15 Cal.4th at p. 878 [referring to "the estimated costs of the service or regulatory activity" and "the payor's burdens on or benefits from the regulatory activity"].) Counting the number of "programs" supported by a fee is not necessarily useful or relevant. (See *California Building Industry Association, supra*, 4 Cal.5th at p. 1051 [multiple program areas supported by the same fee]; *Collier v. City and County of San Francisco, supra*, 151 Cal.App.4th at p. 1340-1344 [activities of multiple departments supported by the same fee].)

Gentry also asserts that some expenditures from the DROS Special Account, such as payments to the Department's lawyers to defend lawsuits challenging the fee, were not for "legitimate costs from the DROS process." (AOB pp. 38, 40.) But when enacting a fee, "it is proper and

reasonable to take into account not the expense merely of direct regulation, but all the incidental consequences that may be likely to subject the public to cost…." (*Plumas County v. Wheeler*, *supra*, 149 Cal. at p. 764; accord, *Professional Scientists*, *supra*, 79 Cal.App.4th at p. 945.) Defending either the former DROS fee or the fee-supported regulatory system from legal challenge would have been a proper use of the fee.

Gentry also questions why the DROS Special Account should be used to support "pension loan repayment," but he offers no supporting analysis, and he relies on matters outside the record. (AOB pp. 20, 34-35; order entered Feb. 28, 2020, denying in part Gentry's request for judicial notice.) He appears to be referring to laws that are broadly applicable to state funds and have no special relevance to the former DROS fee. (See, e.g., Stats. 2017, ch. 50 (SB 84) [amending Gov. Code, §§ 16475, 16480.6, & 20825].)

Even if the court could somehow assume that the DROS Special Account supported some expenditures unrelated to DROS and APPS, the account had substantial revenue from sources other than the former DROS fee. (14 AA 3528-3529.) For the account to support purposes unrelated to DROS and APPS would therefore not necessarily affect the constitutional analysis. (*Northern California Water Assn. v. State Water Resources Control Bd.*, *supra*, 20 Cal.App.5th at p. 1221 [upholding a fee where expenses attributable to groups who did not pay the fee had other sources of funding]; see *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1, 15 [city did not impose an unlawful tax on ratepayers when municipal utility had sufficient non-rate revenue to cover the city's charges, so that the utility's payments were "not necessarily passed through to and imposed on ratepayers"].)

The Legislature specified that the former DROS fee must "be no more than necessary to fund" the fee-supported activities. (§ 28225, subd. (b), as amended by Stats. 2011, ch. 714.) While that kind of statute does not by

itself establish that the fee is constitutional, it "reveals a specific intention to avoid the imposition of a tax." (*Farm Bureau, supra*, 51 Cal.4th at pp. 438-439; accord, *California Building Industry Association, supra*, 4 Cal.5th at p. 1051 [statute "explicitly limited fees to the amount necessary" to recover program costs].) The record supports the trial court's determination that the former DROS fee was consistent with that legislative intent.

C. The Former DROS Fee Satisfied the Allocation Inquiry

1. All DROS applicants helped make APPS necessary and could therefore reasonably be required to support APPS

A relatively low, flat fee charged to all those who sought to acquire firearms was a reasonable method of allocating the regulatory costs associated with both DROS and APPS. Gentry seems to contend that the Department should have charged a separate fee or a higher amount to DROS applicants who were later identified through APPS as having lost the right to possess firearms. Gentry disregards that everyone who legally acquires firearms could potentially lose the right to possess them, and the Department cannot know in advance which DROS applicants those will be. The court's responsibility is not to second-guess the legislature's choice of allocation methods, but only to determine whether the choice was reasonable.

Fees "need not be finely calibrated" to each particular fee payer. (*Farm Bureau, supra*, 51 Cal.4th at p. 438.) The cost of regulating a particular fee payer may be difficult or impossible to predict, because those costs may depend on the individual's future behavior, among other reasons. "[I]n the context of a regulatory fee applicable to numerous payors … it would be impossible to assess such fees based on the individual payor's precise burden on the regulatory program." (*Newhall County Water Dist. v.*

Castaic Lake Water Agency (2016) 243 Cal.App.4th 1430, 1443.) The relevant question is only "whether any *class* of feepayers is shouldering too large a portion of the associated regulatory costs." (*California Building Industry Association*, *supra*, 4 Cal.5th at p. 1052, italics added.)

Gentry contends that a focus on individual fee payers is required by *City of San Buenaventura v. United Water Conservation Dist.*, *supra*, 3 Cal.5th 1191. (AOB p. 41.) He is mistaken. *City of San Buenaventura* merely attempted to clarify the rule that "the question of proportionality is not measured on an individual basis," but "is measured collectively, considering all rate payors." (*City of San Buenaventura*, at p. 1211, quoting *Farm Bureau*, *supra*, 51 Cal.4th at p. 438) The court's point was that to consider the fee payers "collectively" does not mean all fee payers must be considered as a unitary group, or else the allocation inquiry would add nothing to the aggregate cost inquiry. (*City of San Buenaventura*, at pp. 1211-1213 [explaining that "the aggregate cost inquiry and the allocation inquiry are two separate steps in the analysis" required by *Sinclair Paint*, *supra*, 15 Cal.4th 877].) But the allocation inquiry is not concerned with particular fee payers; as noted above, the inquiry only examines whether a fee treats different *classes* of fee payers reasonably. (*California Building Industry Association*, *supra*, 4 Cal.5th at p. 1052.)

The courts have repeatedly upheld fees like the former DROS fee that are charged in a flat amount, even though by definition those fees are unrelated to the costs attributable to particular fee payers. For example, in *Professional Scientists*, *supra*, 79 Cal.App.4th 935, a flat fee was imposed on developers to cover the costs of environmental review. (*Id.* at p. 943.) The plaintiff argued that the fee should be treated as a tax because there was "no individual correlation between the amount of the fee and the cost of the benefit or burden." (*Id*. at p. 946.) The court acknowledged that "[t]here is no question that a flat fee will seldom represent the exact cost"

attributable to individual fee payers. (*Id.* at p. 951.) But there were "several reasonable justifications" for imposing a flat fee, including administrative economy, and it was "not [the court's] role to assess the wisdom of legislation from either a public policy or public relations perspective." (*Id.* at p. 953.) Flat fees have been upheld in a variety of other contexts, as well. (See *Rincon Del Diablo Municipal Water Dist. v. San Diego County Water Authority* (2004) 121 Cal.App.4th 813, 824 [collecting cases]; cf. *Newhall County Water Dist. v. Castaic Lake Water Agency*, *supra*, 243 Cal.App.4th at pp. 1443-1444 [where water service fee was imposed on only four fee payers, "the only rational method of evaluating their burdens on, or benefits received from, the governmental activity, is individually, payor by payor"].)

Any rule that fees must be based on costs attributable to particular fee payers would also be inconsistent with *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, where the court upheld fees imposed under a rent control ordinance to support the costs of a hearing process for resolving disputes between lessors and lessees. (*Id.* at pp. 374-375.) Lessors were required to pay a flat fee per rental unit even if they never used the hearing process or believed the process benefitted them, yet the court held that it was a valid regulatory fee. (*Id.* at p. 375, fn. 11.)

When Gentry asserts that APPS is unrelated to lawful firearms owners, he disregards that everyone who acquires firearms contributes to the need for APPS to exist. Those who paid the former DROS fee were reasonably required to support both DROS and APPS.

2. Gentry repeatedly mischaracterizes the requirements of the allocation inquiry

The court should also disregard several other ways in which Gentry mischaracterizes the requirements of the allocation inquiry.

For example, Gentry erroneously asserts that the allocation inquiry requires costs supported by regulatory fees to "result directly" from activities of the fee payers. (AOB p. 11.) Regulatory costs need only bear a "fair or reasonable relationship" to the fee payers' activities. (*Sinclair Paint*, *supra*, 15 Cal.4th at p. 878.) Even Proposition 26 (which for reasons explained in part III.A above does not apply) does not require regulatory costs to result "directly" from the fee payers' activities. (Compare Cal. Const., art. XIII A, § 3, subd. (b)(1) & (2) [governing fees imposed to support benefits and services provided "directly to the payor"], and subd. (b)(3) [governing fees imposed to cover "reasonable regulatory costs"].)

Gentry also misquotes *Sinclair Paint* when he asserts that a "close nexus" must exist between the fee payers and the fee-supported activity. (AOB p. 41; 13 AA 3439.) The law requires only a "clear" nexus, not a "close" one. (*Sinclair Paint*, *supra*, 15 Cal.4th at p. 881.) In *Equilon Enterprises LLC v. Board of Equalization* (2010) 189 Cal.App.4th 865, for example, a fee that supported California's childhood lead poisoning prevention program was imposed on companies whose historical manufacture of products containing lead caused lead contamination that persisted in the environment, which in turn caused ongoing lead exposure to children and potential lead poisoning. (*Id.* at pp. 885-886.) The fee was allocated among the fee payers based on the relative amounts of lead contained in their products. (*Id.* at pp. 876-877.) The relationship between the fee payers and the risk of childhood lead poisoning was clear, but the court never suggested that the relationship had to be "close." The court held that there was a "reasonable basis in the record" for the method of allocating the fee, and nothing more was required. (*Id.* at p. 886.)

Gentry also asserts that the former DROS fee failed the allocation inquiry because fee payers did not receive any special benefit from APPS

that the general public did not also receive. (AOB pp. 30-31, 34, 42-43.) But "regulatory fees in amounts necessary to carry out the regulation's purpose are valid despite the absence of any perceived 'benefit' accruing to the fee payers." (*Sinclair Paint*, *supra*, 15 Cal.4th at p. 876; accord, *Farm Bureau*, *supra*, 51 Cal.4th at p. 438; *Pennell v. City of San Jose*, *supra*, 42 Cal.3d 365, 375, fn. 11.) It is equally irrelevant that APPS benefits the general public, because "all governmental activities by definition serve a public purpose." (*Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 661 [upholding a processing fee on land use applications even though regulating land use benefits the general public]; see *Southern California Edison Co. v. Public Utilities Com.* (2014) 227 Cal.App.4th 172, 200-201 [upholding a fee against Prop. 26 challenge despite a stated purpose of supporting broad statewide energy policy and social objectives].)

The ultimate issue under the allocation inquiry is whether there was a "reasonable basis in the record" to support the method of allocating the fee. (*California Building Industry Association*, *supra*, 4 Cal.5th at p. 1052.) The former DROS fee easily met that standard.

V. GENTRY'S CHALLENGE TO THE USE OF FEE REVENUE COLLECTED BEFORE 2012 IS GENERALLY MOOT AND IS WITHOUT MERIT

Gentry claims that SB 819 and SB 140 improperly allowed fee revenues to be used for purposes that the Legislature authorized "retroactively," after the fees were collected. (AOB pp. 49-50.) But like taxpayers, those who pay a regulatory fee have no right to have their payments used as they originally anticipated. Assuming the requirements of *Sinclair Paint* are even relevant, the only issue is whether the former DROS fee continued to satisfy those requirements after SB 819 and SB 140 were enacted, as it did. (See part IV above.)

Gentry attempts to support his argument by citing the Department of Finance's Manual of State Funds, which refers to the state appropriations limit imposed by article XIII B of the Constitution. The state appropriations limit is not related to the requirements of *Sinclair Paint* and is not concerned with individual appropriations, but instead places an overall cap on the state's authority to spend general fund revenues. (Cal. Const., art. XIII B, § 1.) Gentry does not assert that state spending ever exceeded that cap after SB 819 and SB 140 were enacted, so the state appropriations limit is not relevant.

Gentry's quotation from the Manual of State Funds is also not relevant. The manual states that revenues from the former DROS fee are not "proceeds of taxes" for purposes of the state appropriations limit, but "when transferred, may become proceeds of taxes." (AOB p. 50, quoting 1 AA 211.) Gentry appears to assert that any appropriations resulting from SB 819 and SB 140 transferred fee revenues to a different use and therefore caused the revenues to become proceeds of taxes. (AOB p. 50.) But "proceeds of taxes" is a term of art that is specially defined in article XIII B to identify the revenues subject to that article. (Cal. Const., art. XIII B, § 8, subds. (a) & (c); see *City Council v. South* (1983) 146 Cal.App.3d 320, 333-334 [discussing the operation of art. XIII B].) Whether revenues are "proceeds of taxes" subject to the state appropriations limit is not relevant to the distinction between taxes and fees under *Sinclair Paint.* (See generally, *Sinclair Paint*, *supra*, 15 Cal.4th at p. 874 [" 'tax' has no fixed meaning, and … the distinction between taxes and fees is frequently 'blurred,' taking on different meanings contexts"]; accord, *Wilde v. City of Dunsmuir* (Aug. 3, 2020, S252915) __ Cal.4th __ [pp. 10-11] (2020 WL 4432754); *California Chamber of Commerce v. State Air Resources Bd.*, *supra*, 10 Cal.App.5th at p. 661.)

To the extent Gentry seeks a judgment requiring revenues collected before SB 819 and SB 140 and then appropriated for APPS to be returned to the State Controller, his claims are therefore unsupported and meritless. And to the extent Gentry seeks to enjoin further appropriation or use of revenues collected before SB 819 and SB 140, the claims are moot, because there is no evidence or allegation that any revenues collected before those statutes were enacted remain in the DROS Special Account to be appropriated.

CONCLUSION

The trial court's judgment should be affirmed, or the appeal should be dismissed as moot.

Dated: August 11, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13 point Times New Roman font and contains 9,268 words.

Dated: August 11, 2019

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Attorneys for Defendant and Respondent Xavier Becerra, et al.

CERTIFICATE OF SERVICE

Case Name: **Gentry et al. v. Becerra, et al.** No. **C089655**

I hereby certify that on August 11, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

RESPONDENT'S BRIEF

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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

I further certify that some of the participants in the case are not registered CM/ECF users. On August 11, 2020, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

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~ Attorneys for Plaintiff and Appellant~

Hon. Richard K. Sueyoshi
Sacramento County Superior Court
720 Ninth Street
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 11, 2020, at Sacramento, California.

M.E. Conde	*/s/ M.E. Conde*
Declarant	Signature

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