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' REPLY BRIEF

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

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INTRODUCTION

The State's claim that Gentry's appeal is moot is erroneous on multiple levels. First, the main aspect of the DROS Fee that Gentry originally complained about remain in effect. Providing Gentry the injunctive relief he originally sought would give him much of the relief he requested. But, this Court can and should evaluate the State's change in the DROS Fee on this appeal, which only strengthens Gentry's claims. Finally, this is a question of law that involves a matter of great public importance; thus, even if technically moot, this Court should consider Gentry's claims.

The State's defenses against Gentry's Proposition 26 claims likewise fail. The State only argues that Gentry's Proposition 26 claim fails because it SB 819 did not result in DROS Fee payers to pay more, a prerequisite to qualify as a tax under Proposition 26, and that this Court cannot consider AB 1669's amendments. But the State does not rebut that the DROS Fee fails to qualify for any of the exemptions from Proposition 26 analysis, if it does cause DROS Fee payers paying a higher amount. Because SB 819 did lead to DROS Fee payers paying more and this Court can and should consider AB 1669's amendments in determining whether the DROS Fee runs afoul of Proposition 26, which they do by almost doubling the amount of the DROS Fee, this Court should reverse the trial court's dismissal of Gentry's Proposition 26 claim.

Because the DROS Fee fails scrutiny under Proposition 26, there is no need for this Court to evaluate Gentry's other claims under Article XIIIA, Sections 1(b), 2, and 3(m) of the California Constitution. If it does, however, contrary to the State's argument, the Court should evaluate those claims under *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 873-879, which shows that the DROS Fee is an unlawful property tax. This Court should thus reverse the trial court's dismissal of Gentry's claims under Article XIIIA, Sections 1(b), 2, and 3(m) of the California Constitution.

Finally, the State's argument that Gentry cannot challenge the State's use of monies collected before SB 819's adoption to fund purposes only authorized by SB 819 is baseless. The State cites no authority allowing it to convert funds collected under a fee for different purposes and doing so would clearly be against public policy.

For these reasons, this Court should reverse the trial court in its entirety as to those matters that are not moot and remand for Gentry to assert prevailing party status as to those claims that have been mooted.

ARGUMENT

I. GENTRY'S CHALLENGE TO THE DROS FEE IS NOT ENTIRELY MOOT

The State argues that this case is moot because the "former DROS Fee" that Gentry challenged was "repealed and replaced with two new fees by AB 1669" after the lower court disposed of this case. (Respt.'s Br. ("R.B.") p. 20.) But the State's description of AB 1669 and its effect is both incomplete and misleading. To be sure, the precise version of the fee that Gentry originally challenged no longer exists in a single statute. (See I AA 33-35.) But nearly every aspect of the "former DROS fee" remains in the Penal Code despite the adoption of AB 1669.

Penal Code section 28225, the statute Gentry originally challenged, still imposes a fee—although a lower one—on firearm purchases, and that fee is still used to recover many costs the prior version of the statute listed. (Pen. Code, § 28225, subds. (a)-(b).)[1] At the same time, section 28233, a new statute created by AB 1669, imposes an "additional" fee, but it is essentially the "former DROS Fee" charged at a higher rate.[2] (Compare former § 28225, as amended by Stats. 2013, ch. 737, § 8.1, with current § 28233, added by Stats. 2019, ch. 736, § 14.) It authorizes recovery of *all* the costs previously found in section 28225 verbatim—and adds a few that have only exacerbated the injuries that Gentry originally complained about. (§ 28233, subd. (b) [allowing the Department of Justice ("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," adding "manufacturing" and "lawful or unlawful" as a qualifier to "possession," thus expanding the scope from mere "possession"].)

[1] All subsequent statutory references are to the Penal Code, unless otherwise indicated.

[2] The new statutory fee is $31.19, rather than being capped at $19.

In sum, between the two "new" fees, almost all aspects of "the former DROS Fee" remain in place. The only differences are that: (1) the Department no longer determines the appropriate DROS Fee amount based on its actual costs because the amount is now statutorily fixed; and (2) use of DROS Fee funds for regulating firearm "possession" is no longer limited to APPS[3] expenditures, but can be used on virtually anything concerning the "lawful or unlawful possession" of firearms. (Compare former § 28225, with current § 28233, subds. (a)-(b).)[4]

California cannot moot Gentry's case by merely moving injury-causing elements to a new statute or adding some new elements to that statute. Indeed, the Court of Appeal long ago recognized that

> When a statute, although new in form, re-enacts an older statute without substantial change, even though it repeals the older statute, the new statute is but a continuation of the old. There is no break in the continuous operation of the old statute, and no abatement of any of the legal consequences of acts done under the old statute.

(*Sobey v. Molony* (1940) 40 Cal.App.2d 381, 385.) While the State is correct that amendment of a statute *may* render a challenge to it moot, (R.B. p. 21), an "appeal may not be moot if the amendment includes, continues, or reenacts a material part of the enactment which was considered by the lower court." (*Alts. for Cal. Women v. County of Contra Costa* (1983) 145 Cal.App.3d 436, 445 ("*Alts. for Cal. Women*"). See also *Montalvo v. Madera Unified Sch. Dist. Bd. of Educ.* (1971) 21 Cal.App.3d 323.) If a "material part" of a law remains "for purposes of testing its constitutionality," then it is not moot. (*Alts. for Cal. Women*, *supra*, 145 Cal.App.3d at p. 445.) That is no doubt the case here.

The "material part" of the law at issue in Gentry's challenge is the authorization for the Department to use DROS Fee revenues to recover the costs of regulating the mere

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[3] Recall that APPS, basically, is a Department system that cross-references state databases to identify persons who have lawfully acquired firearms and (with exceptions) paid the DROS Fee, and later may have become legally prohibited from firearm ownership, so the Department may contact those persons to remove any firearms they may possess. (See Appellants' Opening Br. ("A.O.B.") p. 15.)

[4] As explained below in Section II, these differences only impact the claims that Gentry prevailed on and that the State does not appeal.

"possession" of firearms and to pin the amount of the DROS Fee to those costs. In his original complaint, Gentry sought a declaration that, because it created such authorization, SB 819 "is an unlawful tax under Article XIIIA, Section 3 of the California Constitution and thus void." (I AA 45-47.) Gentry thus sought an injunction forbidding the State from using DROS Fee revenues "for purposes regulating the 'possession' of firearms pursuant to SB 819." (*Ibid.*) In his amended complaint, Gentry sought a declaration that, because it authorized the Department to recover costs regulating "possession" of firearms, SB 819 created an unlawful tax, and an injunction on the enforcement of the DROS Fee. (II AA 575-77.) Penal Code section 28233 (the new section created by AB 1669) continues to authorize the Department to use DROS Fee revenues to cover its costs regulating the "possession" of firearms. (§ 28233, subd. (b).) In fact, as explained above, it expands the Department's authorization to do so by adding "lawful or unlawful" as a qualifier to "possession" and removing the limitation on expenditures for APPS-enforcement activities only. (*Ibid.*)

AB 1669 thus continues the "material part" of the law at issue in Gentry's challenge, and the Court may consider it. (See *Alts. for Cal. Women*, *supra*, 145 Cal.App.3d at p. 445.) That AB 1669 exacerbates the identical injury that Gentry originally complained about, or that it does so from a newly numbered statute, does not alter that conclusion. If anything, it just makes Gentry's purported injury starker. Thus, AB 1669's adoption cannot moot Gentry's challenge. But even if this Court found that it could not consider AB 1669 in evaluating Gentry's claims, his challenge would still not be moot. Were this Court to reverse the trial court on any of Gentry's theories for why using DROS Fee monies to regulate mere "possession" of firearms constitutes a tax, thereby imposing an injunction on such use, Gentry would be receiving much of the relief he originally sought. For such a holding would, at minimum, prevent the Department from using DROS Fee monies to fund improper purposes, which would in turn require a reevaluation of the State's current charge of $31.19 for the DROS Fee under AB 1669. Or, at least, the surplus monies the Department would receive would be limited to bettering the systems that DROS Fee payers like Gentry use, like background checks. Gentry's challenge is thus far from moot.

The State's other argument for why Gentry's challenge is moot—that "neither one of the new fees supports APPS," (R.B. p. 21)—does not change this. First, that assertion is simply not true. When Gentry brought his challenge, the Department's authority to fund APPS derived from the language in section 28225, allowing for the expenditure of DROS Fee funds on regulating the "possession" of firearms. (Former § 28225, as amended by Stats. 2013, ch. 737, § 8.1.) As explained above, the State maintains that authority. (§ 28233, subd. (a),(b).) That the State is not currently using the DROS Fee to fund APPS does not mean it is not still statutorily authorized to do so. Indeed, AB 1669's legislative history itself states that "[u]nder the provisions of this bill, the Department will be authorized to adjust the DROS fee in order to fund ***any*** firearms activity that is required of the Department for which there is no sustainable source of funding." (A.O.B. p. 20, emphasis added.) In any event, Gentry's complaint was not exclusively limited to the Department's use of DROS Fee funds on APPS. That was merely a prime example of the State's abuses. Gentry complained about the use of DROS Fee funds on regulating "possession" of firearms generally. (I AA 41-47.)

Even if this Court believes Gentry's claims are moot, that does not end the inquiry. Courts may hear a moot appeal if (1) the case poses a broad public interest issue that will likely recur; (2) the same controversy between the parties likely will recur; or (3) the court faces material questions for determination. (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 472. See also *Sierra Club v. Bd. of Supers.* (1981) 126 Cal.App.3d 698, 708.) This appeal easily meets that test.

The constitutionality of a fee imposed on hundreds of thousands of Californians to exercise a fundamental right—here, the right to acquire firearms necessary to exercise the Second Amendment right to "keep and bear arms"—could hardly be characterized as anything but a matter of broad public interest. (See *Steiner v. Superior Court* (2013) 220 Cal.App.4th 1479, 1486 [First Amendment challenge to order that attorney remove content from her website during pendency of a lawsuit found to be a matter of broad public interest]; *Terminal Plaza Corp. v. City* (1986) 177 Cal.App.3d 892, 914, fn. 4 [regulating housing availability that impacts low-income and elderly found to be a matter of broad public

interest]; *In re Taya C.* (1991) 2 Cal.App.4th 1, 5 [manner and review of orders affecting parental rights is a broad public interest issue].)

And not only is the dispute Gentry raised "likely" to recur, it has *already* recurred. AB 1669 created a new statute that imposes an even higher fee on firearm purchases than the one Gentry originally complained about, the revenues from which are used to fund even more activities that are wholly unrelated to the fee payer. That the original statute under which it is doing so has limited the fee to $1 and limits what that money can be spent on makes no difference where there is now another statute that allows the State to do the very thing they were doing before the statute's adoption but even more extensively. So even if moot, this Court should evaluate Gentry's claims.

II. THE ONLY CLAIMS THAT AB 1669 MOOTED ARE THE TWO GENTRY PREVAILED ON AND THAT THE STATE DOES NOT APPEAL

The State agrees with Gentry that AB 1669 moots the Fifth and Ninth Cause of Actions to his FAC. (R.B. p. 22; A.O.B. pp. 48-49.) And the State does not dispute the trial court's ruling that Gentry prevailed on both those claims, as the State has not appealed either. The State has thus waived any dispute to both. (*Johnston v. Board of Supers.* (1947) 31 Cal.2d 66, 70.) Gentry is therefore entitled to a remand of this matter for the trial court to evaluate his claim for attorneys' fees as the prevailing party on those causes of action under a catalyst theory. (See *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 561, 565-566.)

III. IF THE COURT FINDS HIS REMAINING CLAIMS ARE NOT MOOT, GENTRY PREVAILS ON EACH OF THEM

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

Under Proposition 26, 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).) The State does not dispute Appellants' view that the DROS Fee does not meet any of the specific exemptions that would remove a charge from Proposition 26's "tax" designation. (A.O.B. at pp. 28-31.) For the State does not identify any special benefit or privilege or any specific government service or product that DROS Fee payers receive beyond what the public also receives. Nor does the State attempt to justify the DROS Fee under the appropriate Proposition 26 analysis.

The State does argue that the DROS Fee is a regulatory fee (and thus not a tax), but only under the test from *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 873-879. (R.B. at pp. 28-38.) As Gentry has explained, however, while similar, that is a significantly less-demanding standard than what Proposition 26 claims require and thus not relevant to this claim. (A.O.B. at pp. 31-35.) In any event, as explained in Section III.B., the DROS Fee is a tax even under the *Sinclair Paint* test when applied to Gentry's alternative claims. And if it is an unlawful tax under that standard, it necessarily is one under Proposition 26's more-demanding standard.

The State argues only that: (1) the trial court correctly held that "SB 819 did not result in anyone paying a higher tax" because the DROS Fee was $19.00 before SB 819 became law, and it remained $19 after its passage, (R.B. p. 16, quoting XIV AA 3594); and (2) this Court cannot consider AB 1669's amendments to the DROS Fee ("the Updated DROS Fee") because it was adopted after the trial court disposed of this matter and was thus not considered below, (*id.* at pp. 22-23). Because "[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 . . .," (Cal. Const., art. XIIIA, § 3, subd. (d)), the State must succeed on both arguments—the only two arguments it makes—to survive scrutiny under Proposition 26. Yet, the State fails on both scores.

1. SB 819 Resulted in DROS Fee Payers Paying a Higher Amount

Gentry's original Proposition 26 claim was that SB 819 converted the DROS Fee into an unlawful tax under Proposition 26 by expanding what the Department could use DROS Fee monies for to include regulating the mere "possession" of firearms. (I AA 41.) Before SB 819's adoption, the Department had discretion to charge the DROS Fee at an amount sufficient to cover its statutorily authorized costs, up to $19. As it was supposed to work, as the trial court recognized, the Department would have reviewed from time to time the actual cost of administering the DROS Process and set the fee at an amount no greater than necessary to recover its actual costs. (See X AA 2523.) If its costs were $5, the Department was to set the DROS Fee at $5. If its costs increased to $10, then it could raise the amount to $10, and so on. In practice, rather than evaluate its costs to determine the proper DROS

Fee amount, the Department simply (and wrongly) charged the statutory maximum of $19, creating a multi-million-dollar surplus in the DROS Fund before the adoption of SB 819. (II AA 426-427. See also R.B. p. 13.) Rather than lower the DROS Fee to reflect the Department's actual costs for the DROS Process, the legislature adopted SB 819, giving the Department the authority to include additional costs (i.e., regulating firearm "possession") in setting the DROS Fee's amount. (R.B. p. 13.)

The trial court held that because the amount of the DROS Fee being charged did not change as a result of SB 819—that is, the State capped and charged the DROS Fee 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 XIIIA, 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 [Gentry's] claims." (*Ibid.*) The State reiterates the trial court's reasoning in arguing that Proposition 26 is inapplicable. (R.B. p. 16, quoting XIV AA 3584; *id.* pp. 23-24.) As Gentry has explained, the State and the trial court misunderstand both the applicable law and the effect of SB 819. (A.O.B. p. 28, fn. 8.)

Simply put, "[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).) SB 819 no doubt revised the methodology for calculating the DROS Fee by adding the costs of regulating the "possession" of firearms. (VI AA 1616-1617.) Before SB 819, the DROS Fee was supposed to fluctuate based on the Department's *actual* costs. Those costs, before SB 819, were undisputedly less than the $19 the Department was charging, as evidenced by the DROS Fund's over $14 million dollar surplus just before SB 819's passage, (II AA 426-427), and the Department's proposed regulation then to lower the DROS Fee to $14, "commensurate with the actual cost of processing a DROS" form, (II AA 360; XIV AA 3612). By tacking on the significant added costs of regulating firearm "possession" rather than lowering the DROS Fee, SB 819 increased the DROS Fee.

The State argues that Gentry is speculating that the State would have charged less than $19 for the DROS Fee had SB 819 not been passed. (R.B. p. 24.) But that is not accurate. Gentry argues instead that the DROS Fee should not have been set at $19 to begin with. He argues the Department "*should have*" charged less because the law required it to tailor the fee amount to its actual costs—something the Department was not doing. (A.O.B. p. 28, fn. 8.) Gentry bases his argument on the undisputed evidence that the DROS Account had a multi-million-dollar surplus just before SB 819's passage, (II AA 426-427), and that the Department had proposed a regulation to lower it, (II AA 429-431; XIV AA 3612-3613). The State does not dispute that there was a surplus in the DROS Fund or that SB 819's purpose was to allow the Department to use that surplus on APPS, rather than lowering the DROS Fee. (A.O.B. pp. 15-16, 33; R.B. pp. 13-15.) Nor does the State dispute that it spent zero DROS Fund dollars on APPS before adopting SB 819, (XIV AA 3554-3580), or that after adopting SB 819 and SB 140, the State spent *millions* on it, eventually spending more money on APPS—using mostly DROS Fee revenues—than it did on the DROS Process, (XIV AA 3566). (Compare A.O.B. p. 15, with R.B. pp. 13-14.) The State also ignores all the "possession" related activities the DROS Fee funds beyond APPS. (See X AA 2711-2712; XII AA 3270-3273; see also V AA 1376-1377.) Those are all undeniably costs that would not have been imposed on Gentry but for passage of SB 819. Without those costs, according to the State itself, the DROS Fee would have been lowered. (*Id.* at p. 13.)

Rather than dispute SB 819's effect, because it cannot, the State relies almost entirely on *California Chamber of Commerce v. State Air Resources Board* (2017) 10 Cal.App.5th 604 ("*Commerce*") to support its argument that Proposition 26 does not apply to "the former DROS Fee." (R.B. pp. 23-25.) But that case is inapt. At issue in *Commerce* was California's "Global Warming Solutions Act of 2006," which established an auction and sale system for allocating companies' greenhouse gas emission allowances under a "cap-and-trade" system. (10 Cal.App.5th at p. 613.) The specific question before this Court was whether amendments to that act made in 2012 violated Proposition 26. (*Id.* at p. 632-634.) This Court found they did not because they merely "specified how the proceeds of auctions sales would be handled" and thus "did not change the cost" to those participating in the program. (*Id.* at p.

633. See also R.B. p. 24.) The State relies on that language to liken the amendments in *Commerce* to SB 819's effect on the DROS Fee, arguing that SB 819 did not lead to a change to the cost of the DROS Fee either. (R.B. p. 24-25.) But the two laws are nothing alike. The "cap-and-trade" system in *Commerce* functions so that "[w]hen the allowances are auctioned, the government collects a portion of the value of the allowances in the amounts paid in the auction. [Citation]." (10 Cal.App.5th at p. 624.) The cost of pollution allowances to companies under the "cap-and-trade" system in *Commerce*, therefore, did not fluctuate based on the regulating body's costs, like the "former DROS Fee" did. SB 819 added costs for the Department's regulating "possession" of firearms that it passed on to the DROS Fee payer. These two fee structures are thus not comparable, and *Commerce* does not say what the State claims it does.

To the contrary, *Commerce* supports Gentry's view that the DROS Fee is a tax under Proposition 26. It explains that "the hallmarks of a tax are: (1) that it is compulsory and (2) that the payer receives nothing of particular value for payment . . .." (*Id.* at p. 614.) In applying this test, *Commerce* noted that the purchase of the pollution allowances at issue was an entirely "voluntary decision driven by business judgments as to whether it is more beneficial to the company to make the purchase than to reduce emissions." (*Ibid.*) What's more, once allowances are bought, they "are valuable, tradable commodities, conferring on the holder the privilege to pollute." (*Ibid.*) As a result, these "twin aspects of the auction system, voluntary participation and purchase of a specific thing of value, preclude a finding that the auction system has the hallmarks of a tax." (*Ibid.*)

Here, in contrast, Gentry is *required* to pay the DROS Fee to lawfully purchase a firearm in California. (§ 28233, subd. (a); Cal. Code Regs., tit. 11, § 4001.) It is, therefore, not a "voluntary" fee. Nor can it be said that the DROS Fee confers upon the purchaser something of specific value, as it is not something that once purchased can be traded or sold, like the allowances at issue in *Commerce*. In fact, the background check begun upon payment of the DROS Fee can be used only for the specific firearm(s) associated with the transaction and automatically expires after 30 days. (§ 26835; 27 C.F.R., § 478.124, subd. (c).) What's more, DROS Fee payers receive no benefit unique to the payers themselves; rather, they

alone shoulder the burden of funding government actions that benefit the public, at large. (See A.O.B. pp. 30-31.)

As a result, the DROS Fee is nothing like the pollution allowances that the *Commerce* Court determined were not a tax subject to Proposition 26's requirements. And the requirements of Proposition 26 clearly *do* apply to Gentry's claim. Because, as explained above, the State does not defend the DROS Fee under a Proposition 26 analysis, if this Court finds that it must evaluate Gentry's Proposition 26 claim based on the law as it was when the trial court ruled, Gentry still prevails.

The wrinkle in the analysis is that since the trial court ruled on this case, California amended the law by AB 1669 so that the amount of the DROS Fee no longer fluctuates based on the Department's actual costs but is instead a (higher) flat fee. (Assem. Bill 1669 (2019-2020 Reg. Sess.) [attached to Appellants' Req. Jud. Ntc. as Exh. 4].) While that amendment moots the trials court's reasoning for why Gentry's original Proposition 26 claim fails, it does not moot that claim. For, if this Court finds that the trial court erred in holding that the "former DROS Fee" was not an unlawful tax under Proposition 26 because using DROS Fee revenues on regulating firearm "possession" makes it an unlawful tax, that would mean the Department is precluded from using the Updated DROS Fee for those same purposes, as it currently does. Thus, even if this Court could not evaluate AB 1669's impact, Gentry would receive much of the relief sought from this Court declaring use of DROS Fee revenues on regulating "possession" to be a tax because the State would, at minimum, have to cease such expenditures, but would also likely be forced to reassess (and lower) the proper amount of the Updated DROS Fee. In any event, this Court need not struggle with this question because, as explained above, it can and should evaluate Gentry's Proposition 26 claim in light of AB 1669's amendments.

2. This Court Can and Should Consider AB 1669's Amendments to the DROS Fee

The trial court's reasoning for dismissing Gentry's original Proposition 26 claim—that SB 819 did not raise the dollar amount of the DROS Fee, (XIV AA 3593-3594)—no longer holds because AB 1669 raised the DROS Fee from a cap of $19 to a flat fee of $31.19. (§ 28225 as amended by Stats. 2019, ch. 736, § 13.) The State argues that Gentry

cannot raise AB 1669's impact on appeal because doing so would ask the Court to consider "an entirely new cause of action challenging a different statute than Gentry challenged in the trial court." (R.B. p. 23.) Not so. This Court can and should evaluate Gentry's Proposition 26 claim in light of AB 1669's changes to the law.

In support of its argument that this Court should not consider AB 1669's effects, the State relies on the statement in *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813, that "[i]t 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." (R.B. p. 23.) But in the very same paragraph, the Court explained that "the rule is somewhat flexible; courts have not hesitated to consider postjudgment events when legislative changes have occurred subsequent to a judgment." (30 Cal.3d at p. 813.) In fact, the *Pisciotta* Court itself considered postjudgment events. (*Ibid.*)

Another case the State cites, *Nellie Gail Ranch Owners Association v. McMullin* (2016) 4 Cal.App.5th 982, 997, merely says that "[a]ppellate 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 . . .." While true, it does not change the fact that, under some circumstances, it is appropriate for appellate courts to do just that. Indeed, the very case that *McMullin* quotes for this proposition goes on to say that an "appellate court may consider new contentions on appeal in its discretion" and, in fact, did so despite the court calling the appellant's choice to raise the new issue on appeal a " 'bait and switch' tactic."[5] (*Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1519.) Likewise, the final case the State relies on also considered new argument on appeal, noting that "a Court of Appeal is at liberty to reject a waiver claim and consider the issue on the merits." (R.B. p. 22-23, citing *JRS Products, Inc. v. Matsushita Elec. Corp. of Am.* (2004) 115 Cal.App.4th 168, 178-179.) In sum, the State has provided no authority for why this Court is precluded from considering AB 1669's effects. Instead, the State's own authorities confirm that the Court may do so.

[5] To be clear, Gentry has not changed anything. Rather, the State has changed the relevant law.

And, here, the circumstances more than warrant the exercise of that discretion to consider the effects of AB 1669.

This is especially so because "[o]n an appeal from a judgment granting or denying an injunction, the reviewing court applies the law which is current at the time of review." (*Alts. for Cal. Women*, *supra* 145 Cal.App.3d at pp. 444-446, citing *Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 306, fn. 6; *White v. Davis* (1975) 13 Cal.3d 757, 773, fn. 8; *M Restaurants, Inc. v. S.F. Local Joint Exec. Bd. Culinary Workers* (1981) 124 Cal.App.3d 666, 673-674.) In *Alternatives for California Women*, as here, the court faced the issue of whether to consider a post-judgment amendment to the law at issue. (145 Cal.App.3d at p. 444.) The court first had to decide whether the change in law mooted the case. As explained above, the court found that the case was not moot because there had been no showing that the "change significantly affect[ed] the 'material part' of the ordinance for purposes of testing its constitutionality." (*Id.* at p. 445.) Based on that finding, the court "conclude[d] that the appeal should not be dismissed as moot and that the question before us is whether the ordinance *as amended* is constitutional." (*Id.* at p. 446, italics added.)

Here, AB 1669 continues the "material part" of the law that Gentry originally sought to enjoin—using DROS Fee revenue to fund regulating firearm "possession." (See *supra* Section I.) As explained in Section I and in Appellants' Opening Brief, while AB 1669 created a new statute imposing a fee on firearm purchasers, it is no more than an extension of the DROS Fee. Indeed, the new statute contains nearly verbatim language from the statute that authorized the DROS Fee before AB 1669. (Compare former § 28225, as amended by Stats. 2013, ch. 737, § 8.1, with current § 28233, added by Stats. 2019, ch. 736, § 14.) The State thus cannot credibly argue that the fee that AB 1669 increased is not the DROS Fee. Because AB 1669 continues the "material part" of the law that Gentry originally sought to enjoin, the State's contention that this Court cannot consider AB 1669 because it was adopted after the trial court ruled on Gentry's case is erroneous.

Further, as the California Supreme Court has held "parties may advance new theories on appeal when the issue posed is purely a question of law based on undisputed facts, and involves important questions of public policy.' " (*Fisher v. City of Berkeley* (1984) 37 Cal.3d

644, 654, fn. 3.) AB 1669 raises pure legal questions, not factual disputes, directly relevant to Gentry's claims. And those questions, which concern the broad imposition of a "fee" just to exercise a constitutional right, are no doubt important questions of public policy.

For all these reasons, the Court should exercise its discretion to evaluate Gentry's Proposition 26 claim in light of AB 1669's changes. If this Court does so, Gentry necessarily prevails. The State does not even attempt to defend the Updated DROS Fee under a Proposition 26 analysis. Indeed, the State does not even dispute Gentry's arguments for why AB 1669 converts the DROS Fee into a tax. (R.B. pp. 14-15.) [6]

* * * *

Whether this Court evaluates the "former DROS Fee" or the "Updated DROS Fee," the result is the same, Gentry prevails. Both are charges imposed by the State that do not meet any of the exceptions to being designated a tax. And both were increased without having been passed by the requisite 2/3 vote of the legislature. Thus, they are illegal taxes under Proposition 26.

B. SB 819 Created an Unlawful Tax Under Article XIIIA, Sections 1(b), 2, and 3(m) of the California Constitution

As an initial matter, this Court need not decide these alternative claims if it resolves Gentry's Proposition 26 claim in his favor. Assuming this Court does not find Gentry's challenge moot, as it should not for the reasons discussed in Section I, it need only consider these claims if it finds both that the trial court properly disposed of Gentry's Proposition 26 claim and that AB 1669's amendments are either not properly before the Court or do not violate Proposition 26, despite the State making no argument that they do not. If this Court reaches the merits of these claims, however, Gentry easily prevails.

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[6] At this point, the State has waived these arguments and, should the State attempt to raised them for the first time at oral argument, the Court may rightly refuse to consider them. (*Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 226 ["Absent a sufficient showing of justification for the failure to raise an issue in a timely fashion, we need not consider any issue which, although raised at oral argument, was not adequately raised in the briefs."].)

1. The DROS Fee Is a Property Tax

The State argues, for the first time on appeal, that the DROS fee "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" and is thus properly classified an *excise tax*. (R.B. p. 25.) This argument is unavailing.

A "property tax is a tax whose imposition is triggered merely by the ownership of property." (*Thomas v. City of E. Palo Alto* (1997) 53 Cal.App.4th 1084, 1088.) "An excise tax, by contrast, is a tax whose imposition is triggered not by ownership but instead by some particular use of the property or privilege associated with ownership, such as transfer of the parcel to a new owner." (*Ibid.*) The "determination of whether a particular tax is a property tax or excise tax is not always an easy matter." (*Douglas Aircraft Co., Inc. v. Johnson* (1939) 13 Cal.2d 545, 550.) The "character of a tax must be determined by its incidents, and from the natural and legal effect of the language employed in the act." (*Flynn v. San Francisco* (1941) 18 Cal.2d 210, 215 ("*Flynn*").) This analysis requires assessing the "real object, purpose and result of the enactment." (*Id.* at pp. 214-215.)

The California Supreme Court's decision in *Flynn* is instructive here. There, the plaintiffs challenged a "license tax" imposed on various types of trucks and taxi cabs. (18 Cal.2d at pp. 211-212.) The Court characterized that levy as a property tax because the "express wording" of the law "[depended] entirely on the factor of ownership," and did not involve use or operation of the vehicles. (*Id.* at pp. 212, 214.) Further emphasizing "ownership as the single determinant of these assessments," and reasoning that "a tax levied by reason of ownership of property is a tax," the Court held the license fee to be a tax on property. (*Id.* at p. 214.)

Similarly, the express wording of the statute creating the DROS Fee says it is charged for (at least as to the part that makes it a tax) mere "possession" of the firearm. Like the vehicle tax ruled a property tax in *Flynn*, individuals must pay the DROS Fee "without regard to use or operation" of the firearm(s) they purchase. (18 Cal.2d at p. 214.) The DROS is not simply a sales tax imposed on all products to generate general revenue. Its real object, purpose, and result is for the State to determine whether the recipient of a firearm is lawfully

entitled to ownership at the time of acquisition and then to continuously monitor the recipient indefinitely so it can take action in the event the recipient becomes prohibited from firearm ownership in the future.

That it is not imposed on an ad valorem basis or levied annually does not change this fact. Indeed, "a non-ad valorem tax could just as easily be an excise tax or an unconstitutional general tax on property." (*City of Oakland v. Digre* (1988) 205 Cal.App.3d 99, 107.) Rather than impose a charge annually, the DROS Fee charges a lump sum upfront that builds in a charge for ownership, i.e., that has nothing to do with use. In sum, the DROS Fee is "not a tax on the privilege of using" property, it is, at least in part, a levy imposed on mere ownership. (*Tesoro Logistic Ops., LLC v. City of Rialto* (2019) 40 Cal.App.5th 798, 811 [finding that a measure imposing a fee on fuel storage tanks failed to touch upon any use/incident of them and so was properly classified a property tax].) For those reasons, the Court should evaluate Gentry's property tax claims.

2. *Sinclair Paint* and Its Progeny Govern Gentry's Claims under Article XIIIA, Sections 1(b), 2, and 3(m) of the California Constitution

The State argues that *Sinclair Paint* only applies "to determine whether a governmental charge is a 'tax' or a 'fee' for purposes of Proposition 13 or some other law" but not for purposes of Article XIIIA. (R.B. p. 26.) Yet it cites no authority supporting this argument; likely because there is none. Indeed, the cases discussing the principles of whether a given charge is a tax or fee long predate the adoption of Proposition 13 in 1978.

In a pre-Proposition 13 case, the Fourth District Court of Appeal, relying on precedent dating back to 1906, wrote that "[t]he general rule is that a regulatory license or permit fee levied cannot exceed the sum reasonably necessary to cover the costs of the regulatory purpose sought." (*United Business Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 165.) Similarly, in a 1915 case discussing special assessments on real property and why they were not taxes, the Supreme Court of California wrote that:

> [I]t must be held, as it has so often been held, *that a special assessment is not, in the constitutional sense, a tax at all.* It is "a compulsory charge placed by the state upon real property within a pre-determined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein, enhancing the present value of such

> real estate, and laid by some reasonable rule of uniformity based upon, in the ratio of, and limited by, such enhanced value." (Hamilton on Law of Special Assessments, sec. 56.)

(*Spring Street Co. v. Los Angeles* (1915) 170 Cal. 24, 29-30, italics added.) Even then, the distinction between taxes and fees was clear. Fees, such as the special assessment at issue in *Spring Street Co.*, had to have some connection to the actual cost borne by the government, or at least to the benefit conferred to the person paying the assessment.

In short, *Sinclair Paint Co.* and its immediate predecessors were not dealing with this question for the first time in the wake of the passage of Proposition 13. Those cases stood on the shoulders of precedent that had dealt with similar issues long ago. For example, *Spring Street Co.* was cited as supporting authority by *County of Fresno v. Malmstrom* (1979) 94 Cal.App.3d 974, 984, a case decided right after the passage of Proposition 13. And another case the *Malmstrom* court cited as persuasive authority dated back to 1886. (94 Cal.App.3d at p. 984, citing *Sterling v. Galt* (1886) 117 Ill. 11, 17 [7 N.E. 471] ["Or the ordinance might provide that one-half of the expenses should be raised by general and the other by special taxation. Or, again, it might provide that the contiguous property should pay an amount equal to the special benefits it would derive from the improvement, to be ascertained by the commissioners, and that the balance should be raised by general taxation."].)

Even in the modern era, the distinction between taxes and fees carries over to cases that are not about Proposition 13 as well. For example, in *Northwest Energetic*, which does not concern Proposition 13, the court recognized that "the distinction between a tax and a fee has been well-discussed in Proposition 13 cases" and then went on to cite and rely on those cases, including *Sinclair Paint.* (*Nw. Energetic Servs., LLC v. Cal. Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 854, *as modified on denial of reh'g* (Mar. 3, 2008) ("*Nw. Energetic*"), quoting *Sinclair Paint, supra*, 15 Cal.4th at p. 874 and *Cal. Assn. of Prof. Scientists v. Dept. of Fish & Game* (2000) 79 Cal.App.4th 935, 944.)[7]

[7] As the *Northwest Energetic* court recognized: "[t]he essence of a tax is that it raises revenue for general governmental purposes and is 'compulsory rather than imposed in response to a voluntary decision . . . to seek . . . benefits.' (*Sinclair Paint, supra*, 15 Cal.4th at p. 874; see *Professional Scientists, supra*, 79 Cal.App.4th at p. 944 ["Ordinarily, 'taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege

The State's position that *Sinclair Paint*'s tax versus fee analysis is somehow limited to Proposition 13 or "some other law" but not for purposes of Article XIIIA is entirely without merit. Indeed, the State cites no alternative body of law that should govern. That such generally applicable law has been relied upon in Proposition 13 cases in no way operates to limit the use of such law in non-Proposition 13 cases. Because the *Sinclair Paint* standard is applicable here, the State's claim that the DROS Fee is a reasonable regulatory fee must be analyzed under that standard.[8]

3. The DROS Fee Is Not a Regulatory Fee but a Tax

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*, *supra*, 15 Cal.4th at p. 878; *Cal. Farm Bureau Fedn. v. State Water Res. Control Bd.* (2011) 51 Cal.4th 421, 436, *as modified* (Apr. 20, 2011) [holding that "once plaintiffs have made their prima facie case, the state bears the burden of production and must" meet the *Sinclair Paint* standard].) The State has failed to meet its burden to show both that: "(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 payer bear a fair or reasonable relationship to the payer's burdens on or benefits from the regulatory activity." (*Sinclair Paint*, *supra*, 15 Cal.4th at p. 878.)

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granted' and '[m]ost taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges.' "].) A fee, on the other hand, funds a regulatory program or compensates for services or benefits provided by the government. (*Sinclair Paint, supra*, at pp. 874-875.)" (*Nw. Energetic* 159 Cal.App.4th at p. 854.)

[8] If this Court holds that the DROS Fee must be considered under a Proposition 13 analysis, Gentry should be allowed to make that argument now, even though it was not previously raised because the State raises its contrary argument for the first time on appeal. It has long been established that "a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) This is most often applied when important questions of public policy or public interest are involved. (*Fisher*, *supra*, 37 Cal.3d at p. 654, fn. 3.)

a. The DROS Fee Does Not Meet the "Reasonable Cost Prong"

i. Revenue from the DROS Fee exceeded the Department's regulatory costs.

This prong of the analysis asks (1) whether the charge "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 thus used to fund unrelated activities. (*Cal. Bldg. Indus. Assn. v. State Water Res. Control Bd.* (2018) 4 Cal.5th 1032, 1050-1052 ("*Cal. Bldg. Indus.*").) The answers to both inquiries show the DROS Fee is not a regulatory fee but a tax.

First, the State commits the same error the trial court did in conducting this analysis by examining costs that were not authorized until after passage of SB 819. (R.B. p. 30.) Gentry's entire point is that inclusion of those costs converted the DROS Fee into a tax and should be excluded when determining what the State's actual, reasonable costs are. In other words, the proper analysis is whether the (pre-SB 819) DROS Process reasonably cost the Department $19 per transaction. It did not.

The State hides from the fact that, just before SB 819 was introduced, the DROS Fund had such a surplus that the Department then sought to reduce the DROS Fee by $5 and that the Department was able to make an $11 million loan to the General Fund. (A.O.B. p. 17.) What's more, the State ignores the millions of DROS Fee dollars that it spent on things that are not "regulatory activities" identified in section 28225, including litigation involving the Department. (See X AA 2711-2712; XII AA 3270-3273; see also V AA 1376-1377.) Nor does the State dispute that before SB 819, an average of around 82% of the Department's DROS Fund spending went to 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), while, after SB 819, 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.)

ii. DROS Fee payers receive no special benefit by paying the DROS fee, nor do their activities burden the state.

The State asserts that Gentry errs by narrowly characterizing the purpose of the DROS Process as only regulating firearm acquisition because its purpose is to prevent unlawful possession, and APPS is just an extension of that. (R.B. p. 32.) But Gentry's objection is that regulating *illegal* firearm possession is not reasonably related to individuals who seek to *lawfully* acquire firearms. (A.O.B. pp. 29-30. See also XI AA 2747, 2907, 2911 [establishing that the percentage of DROS Fee payers that end up in APPS is indisputably small].) The State has presented no evidence that illegal firearm possession is even a remotely common component of lawful firearm acquisition, let alone a necessary one. To the contrary, the percentage of DROS Fee payers that end up in APPS is indisputably minute. (XI AA 2747, 2907, 2911.) Few DROS Fee payers ever become legally prohibited from possessing firearms. (*Ibid.*) That necessarily means that regulation of illegal firearm possession, e.g., APPS, is wholly unrelated to the vast majority of DROS Fee payers.

The State complains that the analysis does not require that we look at the costs of a particular program, but that the "regulated activity" need only be reasonably related to the amount of the fee. (R.B. p. 32.) But Gentry is not just "counting the number of programs." (*Ibid.*) He is complaining that a major portion (perhaps a clear majority) of the costs the State seeks recovery for from the DROS Fee supports a program that is wholly unrelated to firearm purchasers. The State cannot just lump in a program regulating illegal firearm possession as reasonably related to the DROS Process when there is no evidence it has any connection whatsoever. (See *Cal. Bldg. Indus.*, *supra*, 178 Cal.App.4th at p. 131 ["[A] regulatory fee is charged to cover the reasonable cost of *a service or program* connected to a particular activity."].) The State fails to meet its burden under this prong, which is all that is necessary to reverse the lower court.

b. The DROS Fee Does Not Meet the Allocation Prong

The allocation prong requires "that charges allocated to a payer bear a fair or reasonable relationship to the payer's *burdens on or benefits from the regulatory activity*." (*Sinclair Paint*, *supra*, 15 Cal. 4th at 878, italics added.) Thus, this prong concerns whether there is a

"clear nexus" between a *particular* fee payer and the activity he or she is funding. (*Id.* at p. 881; *City of San Buenaventura v. United Water Conserv. Dist.* (2017) 3 Cal.5th 1191, 1212-1213 ("*City of San Buenaventura*").) 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. (*City of San Buenaventura*, *supra*, 3 Cal.5th at p. 1213.)

When the State cannot show there is a "clear nexus" between a class of fee payer's *own* activity (for example, legally obtaining a firearm) and the harm the relevant regulation is intended to address (e.g., illegal firearm possession), that levy cannot be considered a regulatory fee. (*Sinclair*, *supra*, 15 Cal.4th at p. 881.) Similarly, a levy is a tax when "the amount of the fee [bears] no reasonable relationship to the social or economic 'burdens' . . ." generated by the fee payer's "operations[.]" (*Ibid.*) Here, the State does not identify any benefit that DROS Fee payers receive. While the State may be correct that a fee payer need not receive any benefit from paying the fee, in the absence of a benefit, the fee payer must impose some burden on the State to justify the charge. (*California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 948, *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist*. (1988) 203 Cal.App.3d 1132, 1146.) DROS Fee payers impose no such burden. The DROS Fee payer's "operations" are not manufacturing paint that necessarily pollutes and causes harm like the plaintiff in *Sinclair Paint*, but are legally purchasing and possessing a firearm.

The State incredibly argues that it is proper to charge Gentry with the costs of regulating illegal firearm possession because "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." (R.B. p. 34, italics added.) But such reasoning would justify categorizing just about any charge as a fee and would result in a disastrous deterioration of the taxpayer protections that Californians voted for. Moreover, as explained above, the chances of Gentry, or any lawful firearm purchaser, becoming prohibited and subject to regulation for illegal firearm possession is extremely remote. Because legally purchasing and possessing a firearm has "no reasonable relationship to the social or economic 'burdens' " of *illegal* firearm possession, *Sinclair Paint*, again, shows why the DROS Fee is a tax.

None of the other cases cited by the State changes this. While it is true that the allocation inquiry only examines whether a fee treats different classes of fee payers reasonably, (R.B. p. 35, citing *Cal. Bldg. Indus.*, *supra*, 4 Cal.5th 1032), "reasonably" is not an endlessly elastic definition. There must be a "reasonable basis in the record for the manner in which the fee is allocated among those responsible for paying it." (*Equilon Enterps. LLC v. Bd. of Equalizatio*n (2010) 189 Cal.App.4th 865, 870 ("*Equilon Enterps.*").) For example, in *California Building Industry Association*, the difference between the percentage of costs attributable to those paying the fee and the expenses that fee existed to pay was a mere 3%. (*Cal. Bldg. Indus.*, *supra*, 4 Cal.5th at p. 1052.) That is wildly different than the disparity at issue with the DROS Fee. But more fundamentally, that was a case where the fee payers were undeniably either receiving a benefit from or imposing a burden on government, which is not the case with DROS Fee payers with respect to firearm possession regulation.

The same principle was cited in *California Association of Professional Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935. There, the court agreed that shifting the costs of environmental protection to those "who seek to impact our natural resources does not subvert the objectives embodied in Proposition 13." (*Id.* at p. 950.) That is a considerable distinction from the lawful firearm purchasers who pay the DROS Fee, who must pay that fee even though they do not have any intention to commit crime and likely never will and do so for personal reasons unrelated to commercial activity.

Finally, the State cites *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, noting that the court in that case upheld a flat fee imposed on all lessors under a rent control ordinance to support the costs of a hearing process for resolving disputes between lessors and lessees. " (R.B. p. 36.) However, the cost in that case was $3.75 per year, a "relatively minor unit fee" that "does not exceed the sum reasonably necessary to cover the costs of the regulatory purpose sought." (*Id.* at p. 375.) This differs greatly from the DROS Fee, which is levied on each firearm lawfully purchased and collects much more than the DROS process actually costs the State to administer.

In sum, the cases that the State relies on all involve *commercial* enterprises whose activities undeniably result in the costs the government seeks reimbursement for. They are

nothing like the DROS Fee that demands the payer fund activities that very few DROS Fee payers will ever engage in (criminal activity) and that is imposed on private individuals, not industry. To be clear, Gentry does not argue that all flat fees are improper nor that fees need to reflect an individual fee payer's specific circumstances down to the cent, as the State suggests. (R.B. p. 34-36.) He simply argues, as the case law supports, that the fee must relate to activity that the fee payer necessarily (or at least will likely) engage in. That is not the case here.

The State additionally claims that Gentry "repeatedly mischaracterizes the requirements of the allocation inquiry." (R.B. p. 36.) But the State's complaints are mostly about trivial semantics. The State first takes issue with Gentry's description that costs must "result directly" from a fee payer's activities when the language from case law says there must be a "fair or reasonable relationship" to the fee payer's activities. (*Ibid.*) But it is unclear how something could meet that standard without being directly related to the fee payer. Next, the State takes issue with Gentry's description of the standard as a "close nexus" as opposed to a "clear nexus." (R.B. p. 37.) The latter is the correct quote. (But see *City of San Buenaventura*, *supra*, 3 Cal.5th at pp. 1206-1207.) The practical distinction between the two types of nexuses, however, is not readily apparent. What is apparent, however, is that the very case the State cites explaining the "clear nexus" standard, shows why the DROS Fee fails that requirement. The fee at issue in that case "was imposed on companies whose historical manufacture of products containing lead caused lead contamination that persisted in the environment" and harmed children. (R.B. p. 37, citing *Equilon Enterps.*, *supra*, 189 Cal.App.4th at pp. 885-886.) First, the companies charged the fee in *Equilon* actually caused the harm to be addressed. No companies that were not responsible for the lead pollution had to pay. All DROS Fee payers, on the other hand, are being made to pay for the illegal action of a small percentage of them. Moreover, *Equilon* contradicts the State's view of this analysis, saying the charge was not a tax because the costs allocated among the fee payers was based o*n the relative amounts of lead contained in their products*. (*Id.* at pp. 876-877.) The State contends no such allocation should be afforded DROS Fee payers, and none is under the DROS Fee.

C. The State Has Failed to Justify Its Use of DROS Fee Revenues Collected Prior to 2012

Regardless of whether this Court finds that the DROS Fee is an unlawful tax, Gentry nevertheless prevails on his claim that the State unlawfully used DROS Fee revenues collected before passage of SB 819. The State does not dispute that it used DROS Fee revenues from the multi-million-dollar surplus in the DROS Fund collected before 2012 on SB 819-related activities. Instead, the State argues that Gentry's challenge to the Department's use of such funds fails because "those who pay a regulatory fee have no right to have their payments used as they originally anticipated." (R.B. at p. 38.) Yet the State cites no authority for that astonishingly brazen premise. Indeed, it cites nothing to suggest that funds in its possession that were collected under one fee can be later converted for another use that those fees were never meant to cover. The likely reason there is no such authority is because regulatory fees are not supposed to generate the sort of multi-million-dollar surpluses the DROS Fee did. To allow the State to retroactively convert surplus funds from fees collected for other purposes—surpluses that should have never been created in the first place—would be to give the State license to circumvent all taxpayer protections by simply repurposing surplus fee revenues.

The State then argues that Gentry's Ninth Cause of Action requesting injunctive relief to prevent the Department from using DROS Fee funds collected before SB 819 and SB 140 is moot "because there is no evidence or allegation that any revenues collected before [SB 819 and SB 140] were enacted remain in the DROS Special Account to be appropriated." (R.B. p. 40.) The allegation that such funds exist is naturally implicit in Gentry's claim. It is worth pointing out that Gentry originally made this claim in October 2013, around the time that those funds were undeniably in the DROS Fund, according to the State itself. (*Id.* at p. 14.) As for evidence, it is the State that would have the information on what funds remain in the DROS Fund. Yet the State only tracks the sources of funds deposited into the DROS account, not where or how those funds are ultimately spent. (See XIV AA 3528-3529.) More importantly, the State does not dispute that such funds do remain in the DROS Fund. Gentry has sufficiently alleged and supported with evidence provided by the State itself that when he brought this action there were funds in the DROS

Account collected before 2012 that the Department used for SB 819 purposes. (A.O.B. p. 50.) The State provides no contradictory evidence. Gentry's claim is thus not moot.

In any event, the State does not argue, nor could it, that Gentry's Third and Fourth Causes of Action seeking a writ of mandate compelling the return of such monies are moot. So even if Gentry's request to enjoin the State from continuing to use DROS Fee funds collected before 2012 to regulate firearms "possession" is moot, his claims that such funds should be returned to the DROS Account remain viable. And because the State has no legal justification for its use of those fees for the reasons explained above, this Court should reverse the trial court and order the State to return those monies to the DROS Fund.

CONCLUSION

For these reasons and those discussed in Appellants' Opening Brief, the Court should reverse the trial court in its entirety as to those matters that are not moot and remand for Gentry to assert prevailing party status as to those claims that have been mooted.

Dated: November 2, 2020

MICHEL & ASSOCIATES, P.C.

s/Sean A. Brady
Sean A. Brady
Attorneys for Plaintiffs-Appellants

CERTIFICATION OF WORD COUNT

Under Rule 8.204, subdivision (c)(1), of the California Rules of Court, I certify that the attached Appellants' Reply Brief is 1½-spaced, typed in a proportionally spaced, 13-point font, and the brief contains 10,161 words of text, including footnotes, as counted by the word-count feature of the word-processing program used to prepare the brief.

Dated: November 2, 2020

MICHEL & ASSOCIATES, P.C.

s/Sean A. Brady
Sean A. Brady
Attorneys for Plaintiffs-Appellants

PROOF OF 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, Long Beach, California 90802.

On November 2, 2020, I served a copy of the foregoing document(s) described as: **APPELLANTS' REPLY BRIEF**, on the following party, by electronic transmission through TrueFiling. Said transmission was reported and completed without error.

Robert E. Asperger
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1300 I Street
Sacramento, CA 95814
Attorneys for Defendants and Respondents Xavier Becerra, et al.

On November 2, 2020, I served a copy of the foregoing document(s) described as: **APPELLANTS' REPLY BRIEF**, on the following party, by mail as follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.

Superior Court of California
County of Sacramento
720 Ninth Street, Appeals Unit Room 101
Sacramento, CA 95814-1380

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

Executed on November 2, 2020, at Long Beach, California.

s/Sean A. Brady
Sean A. Brady
Declarant