BY FAX

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

Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

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

Plaintiffs and Petitioners,

v.

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

Defendants and Respondents.

Case No. 34-2013-80001667

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITES IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

(Filed concurrently with Notice of Motion & Motion, Request for Judicial Notice, Proposed Order, Declaration of Anna M. Barvir, Declaration of Sean A. Brady, Declaration of Alexander A. Frank, Declaration of Scott M. Franklin, Declaration of C.D. Michel, Declaration of Albert E. Peacock, III, and Haydee Villegas, Exhibits A-I)

Hearing Date: January 14, 2022
Hearing Time: 10:00 a.m.
Department: 21
Judge: Hon. Shelleyanne W.L. Chang

Trial Date: August 24, 2018
Action Filed: October 16, 2013

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INTRODUCTION

California's "private attorney general" statute, Code of Civil Procedure section 1021.5, empowers courts to award reasonable attorneys' fees to a "prevailing party" in and action that confers a "significant benefit" on the public, shifting the burden of the costs of enforcing important public rights to the losing party when litigation was both necessary and imposed a financial burden on the plaintiffs exceeding their pecuniary interest in the outcome. Plaintiffs launched this case nearly eight years ago to end the Department of Justice's unlawful and unconstitutional practice of misusing funds from fees imposed on firearm purchasers on law enforcement activity related to the Armed Prohibited Persons System ("APPS"). And they prevailed in two senses. First, they strictly prevailed on their Fifth and Ninth Causes of Action on summary adjudication. Second, their lawsuit put pressure on the DOJ, and ultimately the legislature, to change the laws at issue and bring the DOJ into compliance with state law on the levying of fees on firearm purchasers and the expenditure of the proceeds from those fees. As a result, Plaintiffs are prevailing parties in both senses. And because Plaintiffs' efforts here led to the adoption of legislation stripping the DOJ of its power to set the fee on a whim and barring the DOJ from unlawfully using the fees on APPS, benefitting the public, an award of private attorney general fees is appropriate.

STATEMENT OF FACTS AND PROCEEDINGS

In October 2013, Plaintiffs sued the Attorney General, the Chief of the California Department of Justice, and the State Controller ("the State"), challenging (among other things) Senate Bill 819 ("SB 819") as an unlawful tax under the California Constitution and Senate Bill 140 ("SB 140") as an unlawful appropriation. (Compl., p. 19; Brady Decl., ¶¶ 51-56.) SB 819 authorized the DOJ to use funds from the Dealers Record of Sale Fee ("DROS Fees"), a fee charged to firearm purchasers mainly to cover the cost of background checks, on possession-related law enforcement activities. (Compl., ¶¶ 1-2, 4-5; Brady Decl., ¶¶ 51-52.) And SB 140, relying on SB 819, appropriated the then-existing $24-million surplus in the DROS Account to pay for DOJ's ongoing enforcement of the APPS program. (Compl., ¶ 6; Brady Decl., ¶ 53.)

On July 20, 2015, the Court granted the State's motion for judgment on the pleadings on Plaintiffs' Proposition 26 argument. (Brady Decl., ¶ 57.) But it would later grant Plaintiffs leave to

amend to add new claims alleging that SB 819 converts the DROS Fee, at least partially, into an unconstitutional tax under other legal theories—specifically, under Article XIII, sections 1(b), 2, and 3(m) of the California Constitution. (*Id.*, ¶ 58.) On the Court's suggestion, the parties agreed to bifurcate into two phases: (1) the Fifth and Ninth claims about whether section 28225 imposes a duty on the DOJ to periodically review its costs to properly fix the DROS Fee and whether the DOJ was using DROS Fees to fund unauthorized activities; and (2) the remaining unconstitutional tax claims. (*Id.*, ¶ 59.) After receiving briefing and hearing argument on the first phase, the Court granted Plaintiffs' motion for summary adjudication. (*Id.*, ¶ 60.)

In January 2019, the Court heard argument on Plaintiffs' First Amended Petition for Writ and Complaint. (Order on Pls.' First Amend. Petit. Writ & Compl., p. 1.) Just weeks later, before the Court had ruled, the legislature introduced Assembly Bill 1669 ("AB 1669")—a bill drafted and sponsored by the DOJ itself. (Pls.' Req. Jud. Ntc. Supp. Mot. Attys.' Fees ("RJN"), Ex. G; Brady Decl., ¶ 62.) Effectively, AB 1669 revoked the DOJ's authority to set fees for background checks and processing, opting instead to set the fee by statute. (RJN, Ex. G.) The law also stripped the DOJ of its power to use background check fees for APPS-related law enforcement activities. (*Ibid.*; Brady Decl., ¶ 63.) In short, AB 1669 fixed all aspects of this lawsuit that the DOJ tried to defend with limited success in the trial court and was facing appeal over. (Brady Decl., ¶ 62.) The Court of Appeal would later rule that AB 1669 mooted the case. (*Id.*, ¶ 64; Op. p. 8, *Gentry v. Becerra*, No. C089655 (3d App. Dist. Mar. 26, 2021) ("Gentry Op.") [unpublished].)

To bring this case to its successful conclusion, Plaintiffs' counsel performed the reasonably necessary work set forth below:

Complaint: Plaintiffs seek recovery for 166.2 hours billed during the complaint and case preparation phase of this matter. (Brady Decl. ¶ 31 & Ex. C.) This phase includes time spent building this case through legal research to determine viable claims, gathering relevant evidence, and preparing the complaint. (Villegas Decl., Ex. A; Brady Decl., ¶¶ 31-34 & Ex. C; Franklin Decl., ¶ 12; Michel Decl., ¶ 24.)

Discovery: Plaintiffs seek recovery for 758.5 hours billed during the discovery phase of this matter. (Brady Decl. ¶ 35 & Ex. C.) This phase includes time spent drafting and propounding

discovery requests, preparing, taking, and summarizing depositions, analyzing discovery responses and documents, engaging in meet-and-confer efforts with the State over insufficient responses, and substantial discovery-related motions practice. (Villegas Decl., Ex. A; Brady Decl., ¶¶ 35-37 & Ex. C; Franklin Decl., ¶¶ 17-23; Michel Decl., ¶ 25.) As the record shows, discovery was extensive and dealt with, among other things, rather technical and detailed accounting information from the State related to the DROS Fee. (Franklin Decl., ¶ 17.)

Discovery was also fraught with disputes that required Plaintiffs to prosecute an extraordinary number of motions to compel. (Franklin Decl., ¶ 20.) Indeed, Plaintiffs filed a half dozen such motions, and then renewed two of them. (*Ibid.*) And Plaintiffs' efforts were fruitful. Indeed, the Court granted or partially granted five of Plaintiffs' discovery motions. (*Ibid.*) And the State provided amended responses on *at least 18 occasions*. (*Ibid.*) Surely, the discovery challenges Plaintiffs faced were unusually severe, causing counsel to expend extraordinary efforts. (*Ibid.*)

Motions: Plaintiffs seek recovery for 229.0 hours spent researching, drafting, and preparing Plaintiffs' motion for leave to amend (and the related reply papers), Plaintiffs' opposition to the State's motion for judgment on the pleadings, and various stipulations, as well as preparing for, attending, and participating in hearings on those various motions. (Villegas Decl., Ex. A; Brady Decl., ¶¶ 38-41 & Ex. C; Franklin Decl., ¶ 13; Michel Decl., ¶ 26.)

Motion for Summary Adjudication on Claims 5 & 9: Plaintiffs seek recovery for 128.0 hours billed during the motion for summary adjudication phase of this matter. (Brady Decl. ¶ 42 & Ex. C.) This phase includes time spent researching, drafting, and preparing Plaintiffs' motion for summary adjudication and all supporting documents, as well preparing for, attending, and participating in the hearing on that motion. (Villegas Decl., Ex. A; Brady Decl., ¶¶ 42-44 & Ex. C; Franklin Decl., ¶ 14; Michel Decl., ¶ 27.)

Bench Trial on Remaining Claims: Plaintiffs seek recovery 171.2 hours billed preparing for and participating in the bench trial. (Brady Decl. ¶ 45 & Ex. C.) This phase includes time spent researching, drafting, and preparing Plaintiffs' trial brief and supporting material, as well as time spent preparing for and participating in trial. (Villegas Decl., Ex. A; Brady Decl., ¶¶ 45-47 & Ex. C; Franklin Decl., ¶ 15; Michel Decl., ¶ 28.) It also included significant time spent by Mr. Franklin

early in the case, before the matter was bifurcated, when Plaintiffs expected to bring a motion for summary judgment as to all claims—that work served as a significant foundation for Plaintiffs' motion for summary adjudication and, later, Plaintiffs' trial briefing. (Franklin Decl., ¶ 15.)

Post-Judgment Work: As of October 12, 2021, Plaintiffs' attorneys had spent 125.0 hours on post-judgment activities—including, most notably, work necessary to bring this fee motion. (Brady Decl. ¶ 48 & Ex. C.) This includes time spent preparing post-judgment documents including proposed judgments and stipulations; engaging in settlement negotiations in hopes of preventing the need for a fee motion; conducting legal research on the recovery of fees; drafting and revising Plaintiffs' motion and supporting papers; and meeting to discuss arguments, strategy, and division of tasks. (Villegas Decl., Ex. A; Brady Decl., ¶ 48-50; Barvir Decl., ¶ 17; Frank Decl., ¶ 11; Franklin Decl., ¶ 16.) Significant time was also necessarily expended analyzing counsel's billing records to properly account for all fees requested. (Barvir Decl., ¶ 17.) The fee request does *not* include time likely to be spent on reply and oral argument. (*Id.*, ¶ 18.)

Case Management: Finally, Plaintiffs' counsel seek recovery for about 105.6 hours spent performing myriad other tasks necessary to the successful management of any case at trial. (Brady Decl. ¶ 28 & Ex. C.) During this phase, counsel corresponded regularly via phone, email, and inter-office meetings to discuss strategy and arguments, as well as deadlines and division of tasks. (Villegas Decl., Ex. A; Brady Decl., ¶¶ 28-30 & Ex. C; Franklin Decl., ¶ 11; Michel Decl., ¶ 23.) They also reviewed and analyzed various related lawsuits or investigations about government levying and use of fees to determine whether those matters were relevant or useful here. Villegas Decl., Ex. A; Brady Decl., ¶¶ 28-30 & Ex. C; Franklin Decl., ¶ 11; Michel Decl., ¶ 23.)

A table of all the hours for which Plaintiffs seek compensation is attached to the Declaration of Sean A. Brady. (Brady Decl., Ex. C.) The declaration of each attorney working on this appeal provides detailed descriptions of their qualifications, hourly rates, and the activities performed. (Barvir Decl., ¶¶ 2-13, 17; Brady Decl., Decl., ¶¶ 2-8, 28-50; Frank Decl., ¶¶ 2-7, 11; Franklin Decl., ¶¶ 2-7, 11-23; Michel Decl., ¶¶ 22-28.) And all hours for which Plaintiffs seek recovery are supported by the detailed billing entries found at Exhibit A to the Declaration of Haydee Villegas.

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ARGUMENT

A party is "ordinarily entitled" to fees under California's "private attorney general doctrine," codified at section 1021.5, if four conditions are met: (1) the requesting party is the "prevailing party"; (2) the action enforced an important public interest; (3) the action conferred a significant benefit on the public; and (4) the necessity and financial burden of private enforcement make an award "appropriate." (Code Civ. Proc., §1021.5.) While the court has discretion to award fees under section 1021.5, when these elements are met, a court should deny fees only "[i]f special circumstances render an award unjust." (*Serrano v. Unruh* (1982) 32 Cal. 3d 621, 639 [holding that "absent circumstances rendering the award unjust, fees recoverable under section 1021.5 ordinarily include compensation for all hours reasonably spent"].) This is *not* such a case. Though Plaintiffs' success was not absolute, they readily satisfy these requirements, and a fee award is proper.

I. PLAINTIFFS ARE ENTITLED TO REASONABLE ATTORNEYS' FEES IN TRIAL COURT

A. Plaintiffs Are the Prevailing Party

To serve the purpose of section 1021.5, courts have taken a "broad, pragmatic view of what constitutes a 'successful party.'" (*Hogar Dulce Hogar v. Cmty. Devel. Commn. of Escondido* (2007) 157 Cal.App.4th 1358, 1365.) Indeed, "a plaintiff need not obtain a judgment in its favor to be a 'successful party.'" (*Ibid.*) Rather, a plaintiff prevails when it obtains relief from the harm at issue, "regardless of whether [it] is obtained through a voluntary change in the defendant's conduct, through a settlement or otherwise." (*Ibid.*) Here, even though Plaintiffs did not secure a final judgment in their favor, they are the prevailing party on two fronts. First, they prevailed on two of their causes of action, entitling them to reasonable recovery of all fees related to their work on those claims. Second, under the catalyst theory, Plaintiffs are the "prevailing party" as to the remaining claims because this lawsuit motivated the DOJ to sponsor AB 1669, which ended the DOJ's unlawful use DROS Fees. Plaintiffs are thus entitled to full recovery for all attorneys' fees incurred.

1. Plaintiffs Prevailed on the Fifth and Ninth Causes of Action

Through the Fifth Cause of Action, Plaintiffs successfully challenged the DOJ's refusal to periodically evaluate the actual cost of processing a DROS application to ensure, as was then required by statute, that the DROS Fee did not exceed the DOJ's actual processing costs. Indeed,

the Court held, as Plaintiffs argued, that "[t]he phrase 'no more than necessary,' as used in [Penal Code] section 28225 imposes a ministerial duty to perform a reassessment of the DROS Fee more frequently than every thirteen years." (Ruling on Mots. Adjud. Pls.' Fifth & Ninth Causes of Action (Aug. 9, 2017), p. 11 ("2017 Order").) The court thus held that "Plaintiffs' motion for adjudication is GRANTED as to the fifth cause of action, while Defendants' is DENIED." (*Ibid*.)

Through the Ninth Cause of Action, Plaintiffs successfully challenged the DOJ's unlawful use of DROS Special Account Funds for activities not statutorily authorized. Plaintiffs challenged the DOJ's use of DROS funds for "some use other than APPS-based law enforcement activities." (2017 Order, p. 9.) The DOJ claimed that Senate Bill 819 ("SB 819"), which authorized the DOJ to use DROS funds on enforcement activities related to the possession of firearms, authorized the DOJ to use the funds on all law enforcement activities related to the illegal possession of firearms. (*Ibid*.; see also Mem. Supp. Defs.' Mot. Adjud. Fifth & Ninth Causes of Action, pp. 21-24; Mem. Opp. Pls.' Mot. Adjud. Fifth & Ninth Causes of Action, pp. 9-10.) The Court disagreed and granted Plaintiffs' motion for adjudication as the Ninth Cause of Action, reasoning that SB 819 "makes clear that 'possession' is limited to APPS-based enforcement." (2017 Order, p. 11.)

In 2019, two years after Plaintiffs prevailed on these claims, the legislature adopted AB 1669, revoking the DOJ's authority to set the DROS Fee and opting instead to set the fee by statute. (Pls.' Req. Jud. Ntc. Supp. Mot. Attys.' Fees ("RJN"), Ex. G.) AB 1669 also expanded the possession-related law enforcement activities for which the fee could be used. (*Id.*, Ex. G.) This technically means that Plaintiffs' victory was short-lived. But that does not make it any less complete. Regardless of post-victory legislative changes, Plaintiffs are entitled to compensation for their efforts, litigating the issue and bringing the DOJ's unlawful conduct to light so that it could be legislatively corrected.

What's more, even though AB 1669 expanded the DOJ's authority to use DROS funds for possession-related activities, it addressed Plaintiffs' concerns with the DOJ's failure to regularly assess the DROS Fee rate and its illegal use of DROS monies. In that sense, AB 1669 cemented Plaintiffs' victory. Indeed, the DOJ can no longer set the fee according to its own whims, creating a massive surplus. Nor is it illegally using DROS Fee funds for unauthorized law enforcement

activities. Plaintiffs have a right to full compensation for obtaining this significant public benefit.

2. Under the Catalyst Theory, Plaintiffs Are the Prevailing Party on the Remaining Claims Because This Lawsuit Motivated the DOJ to Sponsor AB 1669, Ending the Unlawful Use of DROS Fees on APPS

Under the catalyst theory, the defining characteristic of a "successful party" "is the impact of the [party's] action, not the manner of its resolution." (*Graham v. DaimlerChrysler Corp*. (2004) 34 Cal.4th 553, 566 ("*Graham*").) When a litigant has successfully changed the condition it sought to correct through litigation, it is the prevailing party under catalyst if: (1) the lawsuit substantially contributed to the defendant providing the relief sought; (2) the lawsuit was necessary and meritorious; and (3) the plaintiff reasonably tried to settle the matter short of litigation. (*Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 608; see also *Graham, supra,* 34 Cal.4th at pp. 567-577.) Plaintiffs satisfy all three prongs of the test.

a. Plaintiffs' Lawsuit Was a Substantial Contributing Factor to the DOJ Ending Its Unconstitutional Use of DROS Fees on APPS

As recognized by the Court of Appeal, the central aim of Plaintiffs' remaining claims was to halt the DOJ's allegedly unconstitutional use of DROS Fees on APPS-related law enforcement activities. (See Gentry Op., *supra*, p. 8 [holding that because enforcement activities related to "possession" were statutorily limited to APPS enforcement under section 28225, the "material part" of Plaintiffs' constitutional challenge was the use of DROS monies on APPS, not other possession-related law enforcement activities].) AB 1669, which gutted section 28225, did away with the DROS Fee as it existed when Plaintiffs brought suit, and it diverted the newly created firearm-sales fee away from APPS to other possession-related enforcement activities. (See Brady Decl., ¶ 63; see also RJN, Ex. G.) Because AB 1669 did not fund APPS (or any possession-related law enforcement activity) (Gentry Op., p. 8), Plaintiffs obtained the relief they sought—an end to the DOJ's unlawful use of DROS on APPS enforcement (Brady Decl., ¶ 63). And, together with AB 1669's revocation of the DOJ's discretionary authority to set the DROS Fee at any rate it deems appropriate, Plaintiffs successfully achieved *all* the changes they sued to effect. (*Ibid.*)

To succeed on their catalyst-based fee claim, Plaintiffs need not have been the sole cause of the DOJ's change of heart. Instead, Plaintiffs must show that this litigation was a substantial

contributing factor. (*Hogar, supra*, 157 Cal.App.4th at p. 1365.) "Put another way, courts check to see whether the lawsuit initiated by the plaintiff was 'demonstrably influential' in overturning, remedying, or prompting a change in the state of affairs challenged by the lawsuit." (*Karuk Tribe of N. Cal. v. Cal. Reg. Water Quality Control Bd*. (2010) 183 Cal.App.4th 330, 363.) In weighing whether a plaintiff's actions were "demonstrably influential," the chronology "raise[s] an inference that the litigation was the catalyst for the relief." (*Hogar, supra*, 157 Cal.App.4th at p. 1366.)

Here, the chronology of events is more than telling. On January 18, 2019, the Court heard oral argument on Plaintiffs' First Amended Petition for Writ and Complaint. (Order on Pls.' First Amend. Petit. Writ & Compl., p. 1.) Just weeks later, on February 22, 2019, the legislature introduced AB 1669—a bill drafted and sponsored by the DOJ itself. (RJN, Ex. H, Ex. I, p. 1.) AB 1669 addressed and fixed all aspects of the lawsuit that the DOJ tried to fight with limited success in court. And, in doing so, gave Plaintiffs all the relief they sought related to section 28225. What's more, the legislative history itself referenced this very lawsuit and Plaintiffs' substantive arguments. (RJN. Ex. I, p. 7) Viewed as a whole, the legislative history is clear. Plaintiffs' lawsuit was, at least, a substantial factor motivating the DOJ to draft and introduce AB 1669, ultimately ending its unconstitutional use of DROS Fees on APPS enforcement activities—giving Plaintiffs materially all they sought to achieve via their constitutional claim.

b. Plaintiffs' Lawsuit Was Necessary and Meritorious

Under catalyst theory, the lawsuit must have also achieved its desired result "'by threat of victory,' not 'by dint of nuisance and threat of expense.'" (*Graham, supra*, 34 Cal.4th at p. 575.) In making that determination, "the court is to inquire not into a defendant's subjective belief about the suit but rather to gauge, objectively speaking, whether the lawsuit had merit." (*Ibid*.) A lawsuit has "merit" if it is not "frivolous, unreasonable or groundless." (*Ibid*.) This is not a high bar.

Plaintiffs' lawsuit was anything but frivolous. Indeed, after nearly six years of hard-fought litigation and an order granting Plaintiffs' motion for summary adjudication on two claims, it can hardly be said that Plaintiffs' claims lacked merit. If they had, it is hard to see why the DOJ would have litigated this case so fiercely for so long. It is even harder to see why the DOJ would take the drastic step of encouraging the legislature to change the law to give the DOJ the authority it

claimed it already had throughout this litigation. In short, the DOJ did not treat this case as though they believed Plaintiffs' claims to be "frivolous."

c. Plaintiffs Could Not Have Settled the Matter Short of Litigation

A catalyst fee applicant generally must show proof of efforts to settle their grievance before to beginning litigation. (*Graham, supra,* 34 Cal.4th at p. 577.) The purpose of the requirement that a litigant engage in some prelitigation negotiation effort is to discourage "lawsuits that are more opportunistic than authentically for the public good. (*Ibid.*) The theory is that the fee statute exists to reward the private prosecution of important issues—when lawsuits are *absolutely necessary*. (*Ibid*.) "Because it is a judicially created rule to promote the purposes of section 1021.5 and deter attorneys from filing meritless suits just to obtain fees, it should not be applied to bar an attorney fees recovery where to do so would defeat the core purpose of the statute." (*Cates v. Chiang* (2013) 213 Cal.App.4th 791, 816 ("*Cates*").) For that reason, pre-litigation settlement efforts are not required when they would have been futile. (*Id.* at pp. 814-817.) This exception applies here.

Here, there is simply no room to credibly argue that the DOJ would have delivered the sought relief short of litigation. A lawsuit was necessary to get the result obtained because there is no evidence that the DOJ would have agreed to change its practices in response to a prelitigation settlement letter, or that negotiating would have been a genuine alternative to litigation. (*Cates, supra,* 213 Cal.App.4th at p. 816.) To the contrary, the record shows that the DOJ fought this litigation tooth and nail for over six years—illustrating the necessity of private enforcement to achieve Plaintiffs' aim. The DOJ steadfastly held the position that it was not in error, and it even prompted the legislature to adopt AB 1669—a bill the DOJ itself drafted and sponsored—ending the DOJ's unlawful use of DROS funds, mooting the controversy, and prompting this fee request.

B. Plaintiffs' Lawsuit Enforced Important Rights Affecting the Public Interest

To obtain an award of fees under section 1021.5, Plaintiffs' lawsuit must have enforced important rights affecting the public interest. To determine the "importance" of the rights vindicated, the court must "realistically assess the significance of that right in terms of its relationship to the achievement of fundamental legislative goals." (*Woodland Hills Residents Assn., Inc. v. City Council* (*Woodland Hills*) (1979) 23 Cal.3d 917, 936; see *Graham, supra* 34 Cal.4th at

p. 577.) The public at large shares an important interest in seeing that our government agencies charged with enforcing our laws are not themselves flouting the law or abusing the authority entrusted to them by our legislature. In that sense, the public benefitted from the adoption of AB 1669, which ensures that fees charged to firearm purchasers meet the state constitutional requirement that fees not exceed their actual costs—something that could not have happened before Plaintiffs' sued considering the multi-million-dollar surplus the DROS Account had amassed over the years. The public interest was also served because Plaintiffs' efforts brought to light—and put an end to—the DOJ's unlawful use of DROS Fees on APPS-related law enforcement activities and its failure to periodically review the DROS Fee to ensure the fee was no higher than necessary to recover the costs of the program.

C. Plaintiffs' Lawsuit Conferred a Significant Benefit on the Public

The lawsuit must also confer a "significant benefit" on the public or a large class of persons. (*Woodland Hills, supra*, 23 Cal.3d at p. 939.) "[T]he 'significant benefit' that will justify an attorney fee award need not represent a 'tangible' asset or a 'concrete' gain but . . . may be recognized simply from the effectuation of a fundamental constitutional or statutory policy." (*Ibid*.; see also *Schwartz v. Rosemead* (1984) 155 Cal.App.3d 547, 558 [finding a significant benefit in action to enforce the California Environmental Quality Act "secured the opportunity for a large number of fellow residents and affected property owners to voice their concerns and objections," and "permitted a large class of persons to contribute their input towards the City's ultimate decision."].) So when an action vindicates constitutional principles of great magnitude, the court *presumes* that the public benefits. (See *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 318-319.) That presumption is appropriate here. For this lawsuit served a fundamental interest shared by *all* Californians in seeing that the principles of our state's constitution are not disregarded by the very government bodies responsible for upholding it. Specifically, this lawsuit helped hold the DOJ to its statutory duty and constitutional requirements for the levying of fees and taxes in California, as well as the lawful expenditure of the proceeds of those fees.

In any event, a "large class of persons" did benefit from Plaintiffs' success. At issue were the rights of *every* firearm purchaser in California who has had to pay the inflated DROS Fee, and

whose fees were alleged to have been used improperly. This accounts for somewhere between *half a million and one million* individual DROS transactions annually.[1] With the adoption of AB 1669, passed in response to this very lawsuit, Plaintiffs' efforts resulted in assurances to every firearm purchaser and fee payor that their fees would not be unlawfully inflated and used to fund law enforcement activities wholly unrelated to their personal burden on the system.

D. The Necessity and Financial Burden of Private Enforcement Make a Fee Award Appropriate

The Court should finally examine "'whether private enforcement was necessary and whether the financial burden of private enforcement warrants subsidizing the successful party's attorneys.'" (*In re Conservatorship of Whitley* (2010) 50 Cal. 4th 1206, 1214.) This factor requires the Court to examine two issues: (1) " 'whether private enforcement was necessary' "; and (2) " 'whether the financial burden of private enforcement warrants subsidizing the successful party's attorneys.' " (*Ibid.*, quoting *Lyons v. Chinese Hosp. Assn.* (2006) 136 Cal.App.4th 1331, 1348.) Because this action was brought against a government entity to enjoin the enforcement of an unconstitutional public law, and because Plaintiffs had zero pecuniary interest in this litigation, an award of section 1021.5 fees is proper.

1. Private Enforcement Was Necessary to Compel Defendants to Comply

When analyzing whether private enforcement is necessary, courts "'look[] to the adequacy of public enforcement and seek[] economic equalization of representation in cases where private enforcement is necessary.'" (*Whitley, supra*, 50 Cal.4th at p. 1215.) In other words, necessity is established when "public enforcement is not available, or not sufficiently available." (*Id.* at p. 1217.) When proceeding against the only government agency bearing responsibility for public enforcement the need for private enforcement is "clear." (*Woodland Hills, supra*, 23 Cal.3d at p. 941.) When Plaintiffs sued, the DOJ was the only state agency responsible for setting the amount of the DROS Fee, including conducting periodic assessments of the Fee to ensure it is "no more than

[1] See Cal. Dept. of Justice, *Dealer Record of Sale Transactions* (Feb. 1, 2019), *available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/dros-chart-2018.pdf [showing the number of DROS transaction annually between 1972 and 2018].

necessary to fund" statutorily authorized activities. (Pen. Code, § 28225.) And it was the sole agency authorized to use those monies on "firearms-related regulatory and enforcement activities." (Pen. Code, § 28225, subd. (b)(11).) As a result, the need for private enforcement is "clear." (See *Woodland Hills, supra*, 23 Cal.3d at p. 941.)

2. The Burden of Private Enforcement Warrants Subsidizing Fees

Fees are recoverable "when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff out of proportion to his individual stake in the matter.' " (See *Woodland Hills, supra*, 23 Cal.3d at p. 941.) In other words, a fee award is proper unless "the expected value of the litigant's own monetary award exceeds by a substantial margin the actual litigation costs." (*L.A. Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 10, italics added; see also *Flannery v. Cal. Hwy. Patrol* (1998) 61 Cal.App.4th 629, 635 ["When the record indicates that the *primary effect* of a lawsuit was to advance or vindicate a plaintiff's personal economic interests, an award of fees under section 1021.5 is improper."], italics added.)

Nothing on the record suggests that Plaintiffs were motivated by a substantial financial interest in the outcome, let alone that they were motivated primarily by those interests. The record instead establishes only that Plaintiffs, a collection of DROS Fee payors (and a nonprofit organization that represents their interests), have an actual interest in seeing that the DOJ's use of DROS funds is lawful. Plaintiffs made no claim for and realized no monetary recovery for the DOJ's misuse of their previously paid DROS Fees.

What's more, the cost of over seven years of litigation in the trial and appellate courts far exceeds the amount any individual Plaintiff has spent—or ever could spend—in DROS Fees over a lifetime. Simply put, relative to the total fees incurred here, the DROS Fee is nominal. So even if Plaintiffs had invalidated the fees altogether or had recovered the excess monies they spent on DROS Fees over the years, neither would be sufficient reason for any fee payor to take on the extraordinary expense of suing the government to challenge its unlawful behavior without the prospect of a fee award. Indeed, at $19 per DROS, an individual would have to make well over 30,000 gun purchases to come anywhere close to the cost of litigation.

II. PLAINTIFFS' ATTORNEYS' FEES CLAIM REPRESENTS A REASONABLE VALUATION OF THE TIME SPENT BY PLAINTIFFS' COUNSEL

When a party is entitled to attorneys' fees under section 1021.5, the amount of the award is calculated per the "lodestar/multiplier" method, by which the base fee or "lodestar" is determined by multiplying a reasonable hourly rate by the number of hours reasonably expended. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 48 (*Serrano III*); *Serrano v. Unruh* (1982) 32 Cal.3d 621, 626 fn. 6.) To fix the fee at the fair market value of the specific legal services provided, the lodestar may then be enhanced by a multiplier. (*Press, supra,* 34 Cal.3d at p. 322 fn. 12.)

Plaintiffs seek compensation for 1683.5 hours of work on the merits by four attorneys of varying experience levels, as well as three paralegals working at different points during this six-year case. Plaintiffs also seek $48,051.50 for work on this fee motion and no lodestar multiplier, for an award totaling $604,851.50. Considering the experience of Plaintiffs' attorneys, the intensive discovery necessary to litigate this case fully, and the fact this case was bifurcated and went on for nearly six years, these numbers represent a more-than-reasonable award.

A. Plaintiffs' Counsel's Hours Are Reasonable

The prevailing party is entitled to compensation for "all the hours reasonably spent." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133, italics omitted.) "Counsel's "sworn testimony that, in fact, it took the time claimed is evidence of considerable weight on the issue of the time required." (*Perkins v. Mobile Housing Bd.* (11th Cir. 1988) 847 F.2d 735, 738; see also *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254-55 [attorney declarations evidencing their rates and the hours spent establish a fee claim].) Indeed, "the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker." (*Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d 1106, 1112.)

Plaintiffs have established that they have a right to full compensation for the hours spent on this appeal—for Plaintiffs' sworn testimony establishes that each hour was reasonably spent. This fee claim is documented by counsel's detailed billing records prepared at or around the time all work was performed. (Villegas Decl., Ex. A; see also Barvir Decl., ¶¶ 14-16; Brady Decl., ¶¶ 9-27;

Frank Decl., ¶¶ 8-10; Franklin Decl. ¶¶ 8-10 ; Michel Decl. ¶¶ 19-21) And the declarations of Ms. Barvir and Messrs. Brady, Frank, Franklin, and Michel provide a step-by-step summary of the various tasks that required counsel's time, illustrating the time and effort required of each of them to bring this case to its successful conclusion. (Barvir Decl., ¶¶ 17-18; Frank Decl., ¶¶ 11-12; Franklin Decl. ¶¶ 11-23; Michel Decl. ¶¶ 23-28.) Further, Plaintiffs' counsel has exercised considerable "billing judgment," excluding from its claim time for entries that might be considered vague, excessive, or redundant, as well as *all* time billed by post-Bar law clerks to account for any duplication that might have occurred. (Brady Decl., ¶¶ 16, 25 & Ex. C; Barvir Decl., ¶ 17.) In total, Plaintiffs do not seek to recover 1011.5 hours—or about 37% of the total hours Plaintiffs' counsel billed in this matter. Plaintiffs have thus presented a fully documented fee claim, establishing the reasonableness of their request. (*Hadley v. Krepel* (1985) 167 Cal.App.3d 677, 682.)

B. Plaintiffs' Counsels' Schedule of Hourly Rates Is Reasonable

Plaintiffs' attorneys are entitled to compensation at rates that reflect the current "prevailing hourly rate in the community," (*PLCM Grp. v. Drexler* (2000) 22 Cal.4th 1084, 1094), weighing the rates of attorneys of similar skill, reputation, and experience for comparable legal services, (*Crommie v. PUC* (N.D. Cal. 1994) 840 F.Supp. 719, 724-725). Generally, the rate of attorneys from the community where the court sits controls. (*MBNA Am. Bank v. Gorman* (2006) 147 Cal.App.4th Supp. 1, 13.) But when a plaintiff retains out-of-town counsel, the attorney's "home" market rate prevails if obtaining local counsel would have been impracticable. (*Horsford v. Bd. of Trustees of Cal. State U.* (2005) 132 Cal.App.4th 359, 399.) This exception exists because "the public interest in the prosecution of meritorious civil rights cases requires that the financial incentives be adjusted to attract attorneys who are sufficient to the cause." (*Ibid.*)

Plaintiffs retained Michel & Associates, P.C., a firm from Long Beach, because it is the largest firearms practice in the nation, having represented gun-rights organizations, firearm retailers, and individual gun owners for decades. (Michel Decl., ¶ 16.) And it is among only a handful of California firms with practices concentrated in this field. (*Ibid.*) Their clients include the largest firearms civil rights organizations in the state, including the CRPA, which has relied on Michel & Associates, to represent it in all its firearm-related legal matters for years. (*Ibid.*) This

lawsuit required attorneys with specialized knowledge of California firearms law and the operations of the DOJ Bureau of Firearms, as well as the experience and access to the resources necessary to bring this case to a successful resolution—all characteristics the firearms team at Michel & Associates possesses. (*Id.*, ¶¶ 16-18.) Plaintiffs are unaware of any attorney in the Sacramento legal community with comparable experience, expertise, and resources. It was thus necessary to seek out-of-town counsel, and Plaintiffs' attorneys' "home" market rate controls.

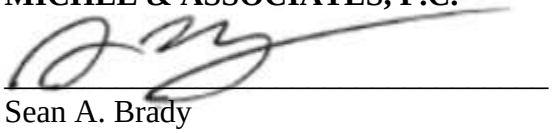
As described in the declarations of Plaintiffs' counsel, the skill, expertise, and reputation of Plaintiffs' counsel justifies the rates sought. And, as further attested to, the rates of the attorneys performing the work on this matter are well within the range of rates charged by comparable professionals in the relevant legal community. (Peacock Decl., ¶¶ 13-19; Barvir Decl., ¶¶ 2-13; Brady Decl., ¶¶ 2-8; Frank Decl., ¶¶ 2-7; Franklin Decl., ¶¶ 2-7; Michel Decl., ¶¶ 2-18.)

CONCLUSION

For these reasons, Plaintiffs request that their motion for reasonable attorneys' fees in the amount of $604,851.50 be granted.

Dated: October 12, 2021

MICHEL & ASSOCIATES, P.C.



Sean A. Brady
Attorney for Plaintiffs and Petitioners

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

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

On October 12, 2021, the foregoing document described as

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITES IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

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

Ryan A. Hanley
Deputy Attorney General
California Department of Justice
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Ryan.Hanley@doj.ca.gov

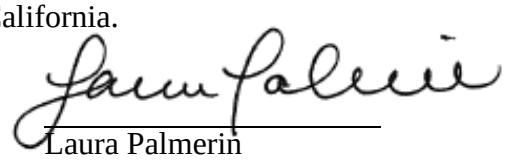
Attorney for Defendants

☒ (BY OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance with ordinary business practices.

☐ (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.

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

Executed on October 12, 2021, at Long Beach, California.



Laura Palmerin