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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 COUNTY OF SAN DIEGO

12
13
14 **DANIELLE JAYMES, JOSHUAH GERKEN,**
15 **SECOND AMENDMENT FOUNDATION,**
16 **FIREARMS POLICY COALITION,**
17 **CALIFORNIA RIFLE & PISTOL**
ASSOCIATION, and NATIONAL RIFLE
ASSOCIATION OF AMERICA, INC.,

18 **Plaintiffs,**

19 **v.**

20
21 **NICOLAS MADUROS, in his official capacity**
as Director of the California Department of
22 **Tax and Fee Administration,**

23 **Defendant.**

Exempt from Filing Fees --
Gov't Code § 6103

Case No. 37-2024-00031147-CU-MC-CTL

DEFENDANT NICOLAS MADUROS'
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEMURRER TO FIRST AMENDED
COMPLAINT

Date: September 5, 2025
Time: 10:30 a.m.
Dept: C-70
Judge: The Honorable Carolyn Caietti
Trial Date: None Set
Action Filed: July 2, 2024

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INTRODUCTION

Plaintiffs are gun retailers, gun purchasers, and gun rights organizations who seek to enjoin a law imposing an excise tax on retailers of firearms and ammunition to fund a Gun Violence Prevention and School Safety Special Fund. The law requires qualifying firearms and ammunition retailers to remit an 11 percent excise tax on sales of firearms, certain firearm precursor parts, and ammunition to the California Department of Tax and Fee Administration (Department) and mandates those tax revenues be directed to fund specified programs aimed at addressing the costs of gun violence. Plaintiffs contend that the tax on the retailer's gross receipts violates the Second Amendment of the United States Constitution. The Department's director, Nicolas Maduros, demurs to Plaintiffs' first amended complaint on the basis that the Court lacks jurisdiction over this action and Plaintiffs failed to allege facts adequate to state a violation of the Second Amendment.

The Court need not and cannot reach Plaintiffs' claims because they are barred by Article XIII, section 32 of the California Constitution, which explicitly bars "any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax." That provision limits taxpayers to post-payment refund claims, and vests power to create procedures governing the processing and adjudication of those claims in the Legislature. In California, payment of sales taxes as well as some excise taxes, including the excise tax at issue here, is the responsibility of retailers. And the Legislature has created a series of dispute resolution procedures that require retailers to first pay the assessed excise taxes and exhaust their administrative remedies with the Department before filing a suit for a refund challenging the legality of the tax in court. Plaintiffs may not evade compliance with the tax refund procedures by seeking a declaratory judgment. Nor can Plaintiffs properly bring a claim against the Director in this action.

As for the gun purchasers and gun rights organizations, the California Constitution, state statutes, and California Supreme Court precedent bar claims for tax refunds asserted by consumers except under narrow circumstances not present here. For the retailer taxpayers, state law requires that they pay the tax, file a claim for refund, and await the resolution of that

1 administrative process *before* bringing suit in state court against the tax agency. Because the
2 retailer taxpayers did not exhaust their administrative remedies before the action was filed, the
3 Court lacks jurisdiction over their claims.

4 Even if Plaintiffs had complied with the requisite pre-lawsuit procedures, they have not
5 alleged facts adequate to state a violation of the Second Amendment. The state excise tax mirrors
6 the federal excise tax on firearms and ammunition, which the federal government has imposed on
7 firearm and ammunition industry participants for over a hundred years. Those laws have
8 withstood challenges identical to the one asserted here, and thus, the merits of Plaintiffs' case are
9 barred by principles of *stare decisis*.

10 For these reasons, the Director respectfully requests that the Court sustain his demurrer in
11 its entirety and dismiss the first amended complaint with prejudice.

12 **BACKGROUND**

13 **I. TAXES ON SALES OF FIREARMS AND AMMUNITION IN CALIFORNIA**

14 With limited exceptions, sales of firearms and ammunition in California are subject to
15 federal and state tax. The federal excise tax on firearms and ammunition was first enacted in 1919
16 and imposes “upon the sale by the manufacturer, producer, or importer” of firearms and
17 ammunition an excise tax of either 10 or 11 percent of the sales price, depending on the item. (26
18 U.S.C. § 4181; see *id.*, § 4182 [noting exemptions]; see also 26 U.S.C. §§ 5801, 5811, 5821
19 [noting \$200 tax for each firearm made].)

20 California also broadly imposes sales tax upon retailers' gross receipts from sales of
21 tangible personal property in the state, including firearms, firearm precursor parts, and
22 ammunition. (Rev. & Tax. Code, §§ 6051, 6007, 6012;¹ see Pen. Code, § 26705, subd. (b)(2).) In
23 addition to the general sales tax, the Legislature imposes special excise taxes on transactions
24 involving certain tangible goods, such as fuel (§§ 7360, 60050), alcohol (§§ 32151, 32201,
25 32220), and cigarettes (§§ 30101, 30123, 30130.51).

26 In 2023, the Legislature passed and the Governor approved Assembly Bill No. 28, the Gun
27 Violence Prevention and School Safety Act (AB 28). (Assem. Bill No. 28 (2023-2024 Reg.

28 ¹ Unless stated otherwise, all statutory citations are to the Revenue & Taxation Code.
8

Sess.); see Pen. Code, §§ 26700, 26705, 30395, 34400; Rev. & Tax. Code, §§ 36001-36043.) Effective July 1, 2024, AB 28 imposes “an excise tax upon licensed firearms dealers, firearms manufacturers, and ammunition vendors, at the rate of 11 percent of the gross receipts from the retail sale in this state of any firearm, firearm precursor part, or ammunition.” (§ 36011.) The excise tax imposed by AB 28 is distinct from and applied in addition to the general sales tax. Both taxes apply to sellers, not purchasers, of firearms and ammunition. (§§ 6051, 36011.)

Like other California excise taxes, the tax established by AB 28 is administered by the Department. (§§ 36001, 36021, 36031².) Excise-tax dollars are placed in the Gun Violence Prevention and School Safety Fund and allocated to fund specified programs aimed at reducing gun violence and addressing its impact in the community. (§ 36005.)

The legal incidence of the excise tax falls on retailers and must be paid by them to the state. (§ 36011.) In turn, retailers are permitted—but not required—to obtain reimbursement for their tax liability from the consumer at the time of sale. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1108 (*Loeffler*)). The tax relationship at all times remains “ ‘between the retailer only and the state; and is a direct obligation of the former.’ ” (*Id.* at p. 1104, quoting *Livingston Rock & Gravel Co. v. De Salvo* (1955) 136 Cal.App.2d 156, 160.)

II. SUMMARY OF PLAINTIFFS’ ALLEGATIONS

Plaintiffs Danielle Jaymes and Joshua Gerken (Individual Plaintiffs) are individuals who possess active California Carry Concealed Weapons Licenses. (First Amended Complaint (FAC), ¶¶ 10, 14.) Both allege that they have purchased firearms and/or ammunition and paid tax reimbursement for the 11 percent excise tax on those purchases. (FAC, ¶ 12, Ex. 1; ¶ 16, Ex. 2.) The Individual Plaintiffs allege that they will continue to purchase ammunition despite the tax. (FAC, ¶¶ 13, 17.) Ms. Jaymes alleges that she postponed the purchase of a new handgun due to the “increased cost from the tax.” (FAC, ¶ 13.) Mr. Gerken alleges that he will purchase ammunition “less frequently due to the 11% tax.” (FAC, ¶ 17.)

² Section 36031 provides that the Department shall administer and collect the taxes imposed by this part pursuant to the Fee Collection Procedures Law (Part 30 (commencing with section 55001), which is analogous to the Sales and Use Tax Law (section 6901 et al.).

1 Four organizations are plaintiffs: the Second Amendment Foundation, the Firearms Policy
2 Coalition, Inc., the California Rifle & Pistol Association, Inc., and the National Rifle Association,
3 Inc. (collectively, the Organizational Plaintiffs). The Organizational Plaintiffs allege that they
4 bring this action “on behalf of [their] members residing in California” who are “subject to the tax
5 every time they purchase firearms and ammunition in California,” but “plan to continue to
6 purchase these goods despite the tax.” (FAC, ¶¶ 25, 27, 29, 31.)

7 Plaintiffs Poway Weapons & Gear (PWG) and North County Shooting Center, Inc. (North
8 County) (collectively, the Retailer Plaintiffs) are licensed dealers of firearms and ammunition,
9 which they sell at their shooting ranges and retail locations. (FAC, ¶¶ 18, 21.) As of July 1, 2024,
10 both dealers began collecting the tax from customers, adding it as a line item on the customers’
11 receipts. (FAC, ¶¶ 19, 22.) Both allege that they submitted payment for the excise tax with their
12 excise tax returns for the third quarter of 2024 and then submitted claims for refund of the tax
13 from the Department. (FAC, ¶¶ 20, 23.) Only PWG alleges that its claim was denied by the
14 Department. (FAC, ¶ 20.)

15 Plaintiffs allege that AB 28 violates the United States Constitution in two respects. They
16 allege that AB 28 violates the Second Amendment because it “implicates conduct protected by
17 the Second Amendment’s plain text—acquiring firearms and ammunition—and is not part of this
18 Nation’s history of gun or arms regulation” and there is no “widespread, relevantly-similar
19 analogues from the Founding era to support the tax.” (FAC, ¶ 48, citing *New York State Rifle*
20 *Association, Inc. v. Bruen* (2022) 597 U.S. 1 (*Bruen*).) Plaintiffs further allege that that the tax
21 “impermissibly singles out the exercise of a constitutional right for special taxation.” (FAC, ¶ 49.)

22 Plaintiffs seek a declaratory judgment that the tax violates the Second Amendment and a
23 permanent injunction against enforcement of the tax. (FAC, Count 1, Prayer, 1, 2.) They also seek
24 a determination pursuant to 42 U.S.C. § 1983 that their constitutional rights were violated by the
25 tax. (FAC, Count 2, Prayer, 1.) In addition, the Retailer Plaintiffs seek a refund of all the excise
26 taxes they have paid pursuant to the tax, “whether paid before or after the filing of this
27 complaint.” (FAC, Count 3, Prayer 3.)
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1 with these constitutional and statutory provisions are barred. (*Woosley, supra*, at p. 789
2 [Legislature has provided different statutory methods for seeking refunds of taxes that fall “within
3 the ambit of” section 32]; *Loeffler, supra*, at pp. 1123-1124, 1133.) Plaintiffs’ claims fail because
4 they are not consistent with the constitutional and statutory procedures for challenging the 11
5 percent excise tax. The Individual and Organizational Plaintiffs lack standing to file this action
6 because they are not the taxpayers. The Retailer Plaintiffs’ failure to exhaust administrative
7 remedies before bringing this action deprives the Court of jurisdiction over their claims.

8 **A. The Individual Plaintiffs Lack Standing to Enjoin the Tax or Seek a Tax**
9 **Refund**

10 The Individual Plaintiffs are not the taxpayers and lack standing to bring this action. Under
11 the procedures adopted by the Legislature to challenge a tax under Section 32, only retailers as
12 the taxpayers are authorized to file and prosecute a tax refund action against the Department. (See
13 §§ 36011, 55242 & 55243; *Loeffler, supra*, 58 Cal.4th at p. 1103.) The Individual Plaintiffs are
14 consumers that allege they have paid tax *reimbursement* for the excise tax to the retailers. (FAC,
15 ¶¶ 12, 16.) As consumers, the Individual Plaintiffs are not legally liable for the tax and are not
16 authorized to file and prosecute a refund action against the Department. (§§ 36011, 55222, 55248;
17 see also *Loeffler, supra*, at p. 1103.) Because the Legislature has barred consumers who pay tax
18 reimbursement from bringing an action “to prevent or enjoin the collection of any tax,” and the
19 Individual Plaintiffs have only paid tax reimbursement, they lack standing to challenge AB 28
20 under Section 32. (§ 55248; *Loeffler, supra*, at p. 1128.)

21 **B. The Organizational Plaintiffs Lack Standing to Enjoin the Tax or Seek a**
22 **Tax Refund**

23 The Organizational Plaintiffs are also not taxpayers and lack standing for the same reasons
24 as the Individual Plaintiffs. The Organizational Plaintiffs are associations that allege that their
25 membership includes individuals residing in California who have or will make purchases of
26 firearms or ammunition that will be subject to the tax. (FAC, ¶¶ 25, 27, 29 & 31.) The
27 Organizational Plaintiffs assert a claim on behalf of their consumer members who as part of their
28 purchases have paid or will pay tax reimbursement to the retailer for the excise tax. (*Ibid.*) The
Organizational Plaintiffs, at best, have the characteristics of their individual consumer members

1 who have only paid tax reimbursement and lack standing to bring an action seeking a refund of
2 tax reimbursement under the applicable procedures enacted by the Legislature. (*Loeffler, supra*,
3 58 Cal.4th at pp. 1132-1134.) As a result, the Organizational Plaintiffs lack standing to bring this
4 action under Section 32.

5 **C. Retailer Plaintiffs’ Claims are Barred Because They Have Not Exhausted**
6 **Their Administrative Remedies**

7 Under Section 32 and enabling statutes, a taxpayer must pay the disputed tax, challenge the
8 tax with an administrative refund claim, and exhaust administrative remedies before filing a suit
9 for refund. But the Retailer Plaintiffs did not exhaust administrative remedies prior to bringing
10 this action.

11 The procedures established by the Legislature require that, among other things, a taxpayer
12 may not bring a judicial action for a tax refund until the taxpayer has exhausted all administrative
13 remedies. (*Woosley, supra*, 3 Cal.4th at p. 790; *Loeffler, supra*, 58 Cal.4th at p. 1102; see § 55242
14 [claim for refund must be filed with agency]; § 55243 [after agency has rendered its decision on
15 claim for refund, taxpayer may file suit in court]; *O’Hara, supra*, 39 Cal.3d at p. 637, fn. 6,
16 [citing § 6932, the sales tax analog to § 55242 under the Fee Collection Procedures Law].)

17 This is a jurisdictional bar: “It is well settled that pending completion of those
18 administrative proceedings, respondent court lacks jurisdiction.” (*State Bd. of Equalization v.*
19 *Superior Ct.* (1980) 111 Cal.App.3d 568, 571.) Section 32 requires that the Retailer Plaintiffs
20 exhaust their administrative remedies before bringing a refund action, which includes, among
21 other things, that the Department deny the Retailer Plaintiffs’ claims for refund. (§§ 55242,
22 55243.)

23 While the Retailer Plaintiffs allege that they have paid the tax and made claims for refund
24 with the Department (FAC, ¶¶ 20, 23), neither alleges that they completed the administrative
25 refund process prior to bringing this action. Plaintiff North County alleges that it filed a claim for
26 refund just prior to filing the first amended complaint but does not allege that its claim has been
27 denied. (FAC, ¶ 23 [claim for refund requested Dec. 3, 2024, FAC filed Dec. 6, 2024].) Plaintiff
28 PWG alleges that its claim for “refund was denied,” and references Exhibit 6 in support. (FAC, ¶

20.) But Exhibit 6 is not an official denial of claim; rather, it is the Department’s notice of its “recommendation to deny” the claim and instructions on how the taxpayer can “request an appeals conference.” (FAC, Ex. 6, Nov. 19, 2024 Letter [“We have reviewed your claim and made a *recommendation* to deny your claim in full.” (italics added)].) Thus, neither of the Retailer Plaintiffs completed the administrative refund process prior to bringing this action.

Neither the Plaintiffs’ section 1983 claim nor the nullity and futility exceptions excuse Retailer Plaintiffs from complying with the rule of administrative exhaustion. As to the section 1983 claim, in *Writers Guild of America, West, Inc. v. City of Los Angeles* (2000) 77 Cal.App.4th 475 (*Writers Guild*), the plaintiffs asserted a section 1983 challenge to the validity of a business tax. The trial court sustained the defendant’s demurrer without leave to amend, and the Court of Appeal affirmed. (*Writers Guild, supra*, at pp. 477-478, 483.) The court explained, “ ‘[w]hen a litigant seeks declaratory or injunctive relief against a state tax pursuant to § 1983, [] state courts, like their federal counterparts, must refrain from granting federal relief under § 1983 when there is an adequate legal remedy.’ ” (*Id.* at p. 479, quoting *National Private Truck Council, Inc. v. Oklahoma Tax Com’n* (1995) 515 U.S. 582, 592.) Because there was “an adequate legal remedy for plaintiffs in the form of a suit for a refund in superior court, in which constitutional objections to the tax could be raised,” the court held that the plaintiff’s prepayment judicial challenge to the tax was barred. (*Writers Guild, supra*, at p. 479.) Like the plaintiffs in *Writers Guild*, Retailer Plaintiffs have an adequate remedy to challenge the validity of the tax assessed against them *after* they exhaust “all available, nonduplicative administrative review procedures.” (*Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, 1267.) They cannot simply invoke section 1983 to circumvent the conditions imposed by the California Constitution and Legislature prior to seeking such relief.

Further, as a tax refund action against the state, this action is governed by Section 32 and neither the nullity nor futility exceptions proffered by Plaintiffs apply to the requirement of administrative exhaustion. (*Shiseido Cosmetics (America) Ltd. v. Franchise Tax Board* (1991) 235 Cal.App.3d 478, 489; *Patane v. Kiddo* (1985) 167 Cal.App.3d 1207, 1214 [“We are not at

1 liberty to alter the constitutionally authorized process by engrafting onto it exceptions borrowed
2 from the judicially fashioned doctrine of exhaustion of administrative remedies.”].)

3 The Legislature’s procedures require that any individual bringing a suit to challenge a tax or
4 seek a tax refund first exhaust their administrative remedies. The requirement to exhaust
5 administrative remedies *before* bringing an action in court “is a jurisdictional prerequisite to
6 judicial review, not a matter of judicial discretion.” (*Stettner, supra*, 98 Cal.App.5th at pp. 53-54;
7 *Shiseido Cosmetics, supra*, 235 Cal.App.3d at p. 489.) Because the Retailer Plaintiffs did not do
8 so before filing this action, the Court lacks jurisdiction over their claims.

9 **II. PLAINTIFFS DO NOT HAVE STANDING TO SEEK DECLARATORY RELIEF UNDER**
10 **CODE OF CIVIL PROCEDURE SECTION 1060**

11 Plaintiffs have not alleged facts sufficient to satisfy the broader statutory standing principles
12 applicable to non-tax suits. Plaintiffs request a declaratory judgment under Code of Civil
13 Procedure section 1060 “stating that California’s 11% excise tax on firearms and ammunition,
14 Cal. Rev. [& Tax] Code § 36011 et seq., violates the right to keep and bear arms secured by the
15 Second Amendment to the United States Constitution.” (FAC, Count 1, Prayer, p. 1.) To establish
16 standing under section 1060, Plaintiffs must show that they are “interested person[s]” with an
17 “actual controversy relating to the legal rights and duties of the respective parties.” (Code Civ.
18 Proc., § 1060.) To be interested persons, Plaintiffs “must be beneficially interested in the
19 controversy” by having “some special interest to be served or some particular right to be
20 preserved or protected over and above the interest held in common with the public at large.”
21 (*Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 480-481 [citation
22 omitted].) Plaintiffs fail to show they are “beneficially interested” in an “actual controversy”
23 regarding AB 28.

24 First, the Individual Plaintiffs and Organizational Plaintiffs are not “interested person[s]”
25 because the AB 28 excise tax relationship is exclusively between the Retailer Plaintiffs and the
26 state. (§ 36011; see *Loeffler, supra*, 58 Cal.4th at p. 1108.) As noted in *Loeffler*, “[i]t would be
27 anomalous if persons not subject to the tax were in a better position than taxpayers to secure
28 judicial review of the question whether a certain transaction is subject to the sales tax or is

1 exempt.” (*Loeffler*, at pp. 1127-28, citing *Chiatello*, *supra*, Cal.App.4th at pp. 476, 496–497.) As
2 such, the Individual and Organizational Plaintiffs lack standing to bring a declaratory relief claim.

3 Second, the Retailer Plaintiffs, who are the taxpayers, are permitted to obtain
4 reimbursement for their tax liability from the consumer at the time of sale and did so here by
5 adding “the 11% excise tax as a line item on its customers’ receipts.” (FAC, ¶¶ 19, 22.) To
6 challenge the tax, the California Constitution requires that the Retailer Plaintiffs must comply
7 with the comprehensive procedure established by the Legislature. (*Stettner*, *supra*, 98
8 Cal.App.5th at p. 53; *California Department of Tax and Fee Administration v. Superior Court*
9 (2020) 48 Cal.App.5th 922, 931; see *Mojave Pistachios, LLC v. Superior Court* (2024) 99
10 Cal.App.5th 605, 627–628, review denied May 15, 2024.) Taxpayers may not make an end-run
11 around the constitutional and statutory tax refund procedures by pleading a cause of action for
12 declaratory relief under section 1060 instead. (*O’Hara*, *supra*, 39 Cal.3d 633, 638-639 [“the sole
13 legal avenue for resolving tax disputes is a postpayment refund action.”]; *Chiatello*, *supra*,
14 Cal.App.4th at pp. 476, 496–497.)

15 Further, courts generally will not consider issues based on “speculative future harm,”
16 particularly “where the complaining party will have the opportunity to pursue appropriate legal
17 remedies should the anticipated harm ever materialize.” (*Metropolitan Water Dist. of Southern*
18 *California v. Winograd* (2018) 24 Cal.App.5th 881, 892–893.) Even if the Retailer Plaintiffs had
19 exhausted their legal remedies under the Revenue and Taxation Code, they still lack an “actual
20 controversy” because the plain text of the Second Amendment does not convey a right to tax-free
21 firearms transactions. (See, *infra*, pp. 14-15.) Thus, they cannot show that, absent judicial
22 intervention in the form of a declaration under section 1060, they face “imminent and significant
23 hardship.” (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170,
24 172–173.) Plaintiffs therefore fail to allege adequate facts establishing standing to obtain
25 declaratory relief. (Code of Civ. Proc., § 1060.)

26 ///

27 ///

1 **III. DIRECTOR MADUROS IS NOT THE PROPER DEFENDANT AND SECTION 1983 RELIEF**
2 **IS BARRED AGAINST A STATE OFFICIAL**

3 Director Maduros is not the proper defendant in this action. First, section 55243 requires
4 that an action for refund of excise tax must be brought against the Department. (§ 55243;
5 *McClain, supra*, 6 Cal.5th at p. 957.) Second, Plaintiffs could not prevail on a section 1983 action
6 against Director Maduros because state agencies and officials operating in their official capacities
7 are not “persons” amenable to suit under section 1983 and section 1983 does not authorize
8 monetary claims against states—especially in state tax cases. (*General Motors Corp. v. City &*
9 *County of San Francisco* (1999) 69 Cal.App.4th 448, 457-458.)

10 **IV. PLAINTIFFS DO NOT ADEQUATELY ALLEGE A CONSTITUTIONAL VIOLATION**
11 **UNDER SECTION 1983**

12 Even if Plaintiffs’ action were not constitutionally and statutorily barred, it fails to state a
13 claim under 42 U.S.C. section 1983 for at least two reasons. First, as discussed above, Plaintiffs
14 cannot allege a Section 1983 claim against Director Maduros. Second, the California excise tax at
15 issue, which “mirrors” the “federal excise tax on firearm and ammunition industry participants” is
16 not barred by the plain text of the Second Amendment. (Assem. Bill No. 28 (2023-2024 Reg.
17 Sess.) § 2, subd. (p).)

18 **A. The Second Amendment Protects the Right to Keep and Bear Arms for**
19 **Self-Defense—Within Limits**

20 The Second Amendment provides that “[a] well regulated Militia, being necessary to the
21 security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”
22 (U.S. Const. amend. II.) The amendment “protect[s] an individual right to keep and bear arms for
23 self-defense.” (*Bruen, supra*, 597 U.S. at p. 17.) The U.S. Supreme Court has thus struck down
24 laws that effectively bar “ordinary, law-abiding, adult citizens” from possessing and carrying
25 “commonly use[d]” firearms. (*Id.* at pp. 11, 21 [licensing regime requiring showing of special
26 need for self-defense]; *D.C. v. Heller* (2008) 554 U.S. 570, 627, 635 (*Heller*) [ban on handgun
27 possession in the home]; *McDonald v. City of Chicago, Ill.* (2010) 561 U.S. 742, 791 [municipal
28 ban on handgun possession in the home].)

1 The Court has emphasized, however, that the constitutional right to bear arms is “not
2 unlimited.” (*Bruen, supra*, 597 U.S. at p. 21, quoting *Heller, supra*, 554 U.S. at p. 626.) Rather,
3 “[p]roperly interpreted, the Second Amendment allows a ‘variety’ of gun regulations.” (*Bruen*,
4 *supra*, 597 U.S. at p. 80 [Kavanaugh, J., concurring], quoting *Heller, supra*, 554 U.S. at p. 636.)
5 These include “longstanding prohibitions on the possession of firearms by felons and the mentally
6 ill” (*Heller, supra*, 554 U.S. at p. 626), laws forbidding firearms in schools and government
7 buildings (*ibid.*), “shall-issue” licensing regimes and their concomitant costs (*Bruen, supra*, 597
8 U.S. at p. 636, fn. 9), and “conditions and qualifications on the commercial sale of arms” (*Heller*,
9 *supra*, 554 U.S. at p. 627)—among them, taxes and fees.

10 In considering a Second Amendment challenge to a regulation, a court must first determine
11 whether the Second Amendment’s plain text reaches an individual’s proposed course of conduct.
12 (*Bruen, supra*, 597 U.S. at p. 17.) In doing so, the court analyzes whether a plaintiff challenging a
13 regulation is among “the people” the Second Amendment protects; whether any weapon at issue
14 is in common use today for self-defense; and whether the plaintiff’s proposed course of conduct
15 falls within the Second Amendment. (*United States v. Alaniz* (9th Cir. 2023) 69 F.4th 1124, 1128,
16 citing *Bruen, supra*, 597 U.S. at pp. 31-32; *Heller*, 554 U.S. at pp. 580, 627; see also *Bevis v. City*
17 *of Naperville, Illinois* (7th Cir. 2023) 85 F.4th 1175, 1189 [noting questions relevant to inquiry].)
18 If the plain text does not reach the proposed course of conduct, the court’s analysis is at an end,
19 and the regulation stands. (*Alaniz, supra*, 69 F.4th at p. 1128 [“*Bruen* step one involves a
20 threshold inquiry.”]) If, however, the individual’s proposed conduct is encompassed by the
21 “‘normal and ordinary’ meaning of the Second Amendment’s language,” that conduct is
22 presumptively protected; and the government must demonstrate that its regulation of that conduct
23 “is consistent with this Nation’s historical tradition of firearm regulation.” (*Bruen, supra*, 597
24 U.S. at p. 17; *id.* at p. 20, quoting *Heller*, 554 U.S. at pp. 576–78.)

25 For the reasons set forth below, Plaintiffs have failed to satisfy their burden under *Bruen* to
26 allege AB 28 reaches conduct that is protected by the Second Amendment. (*Bevis, supra*, 85 F.4th
27 at p. 1184 [burden is plaintiff’s].) Thus, the Court should uphold the validity of the tax and need
28 not address whether the regulation is consistent with the nation’s history of firearm regulation.

1 **B. The Second Amendment Protects Only Consumers, not Retailers**

2 Only the Individual Plaintiffs allege facts showing that they are arguably among “the
3 people” the Second Amendment protects—namely, a consumer of firearms for their own use. The
4 central safeguard of the amendment is the “individual right to possess and carry weapons in case
5 of confrontation.” (*Heller*, 554 U.S. at p. 592.) By its plain text, the amendment protects only
6 “ordinary, law-abiding, adult citizens” purchasing firearms for self-defense—entities such as the
7 Retailer Plaintiffs or the Organizational Plaintiffs do not have an independent constitutional right
8 to possess weapons. (*Bruen*, *supra*, 597 U.S. at p. 31; see *Teixeira v. County of Alameda* (9th Cir.
9 2017) 873 F.3d 670, 687 [“[T]he Second Amendment does not confer a freestanding right to sell
10 firearms[.]”], citing *Heller*, *supra*, 554 U.S. at p. 635.) Thus, only the Individual Plaintiffs have
11 rights protected by the Second Amendment. But the legal incidence of the tax will fall upon
12 qualifying retailers, not the Individual Plaintiffs. (§ 36011; see *Wagon v. Prairie Band*
13 *Potawatomi Nation* (2005) 546 U.S. 95, 102.) Thus, AB 28’s modest excise tax does not impose
14 restrictions on the Individual Plaintiffs’ Second Amendment rights.

15 **1. AB 28 does not target arms commonly used for self-defense**

16 Second, AB 28 treats all firearms the same and imposes an 11 percent tax on the gross
17 receipts from retail sales of any item that fits the definition of “firearm,” “firearm precursor part,”
18 or “ammunition” in the Penal Code. (§ 36011; see *id.*, § 36001, subds. (a), (c); Pen. Code, §
19 16520; *id.*, §§ 16100-17360.) Plaintiffs do not allege facts showing that AB 28 will bar a
20 protected person from bearing arms commonly used for self-defense. They allege the opposite.
21 On July 1, 2024—the date the excise tax became effective—Individual Plaintiff Jaymes
22 “purchased a handgun and ammunition from PWG” and Individual Plaintiff Gerken “purchased
23 ammunition from the Big 5 Sporting Goods store” for their “self-defense and training purposes.”
24 (FAC, ¶¶ 12, 16; Exhs. 1, 2 [receipts].) And they “plan to continue purchasing ammunition in the
25 coming months that will be subject to the tax.” (FAC, ¶¶ 5, 13, 17.) Accordingly, unlike the
26 regulations at issue in *Bruen*, *Heller*, and *McDonald*, AB 28 does not bar nor limit the purchase or
27 carry of a weapon commonly used for self-defense, nor does it impose any requirement upon
28 those seeking to acquire a firearm. (See *Bruen*, *supra*, 597 U.S. at p. 11 [public-carry license

1 conditioned on showing of special need for self-defense]; *Heller, supra*, 554 U.S. at p. 635 [ban
2 on handgun possession in the home]; *McDonald, supra*, 561 U.S. at p. 791 [same].)

3 **2. The Second Amendment does not convey a right to tax-free firearms**
4 **transactions**

5 Third, Plaintiffs do not allege facts showing that the 11 percent excise tax paid by *retailers*
6 infringes the constitutional right of firearms *consumers* to carry arms for self-defense. (See
7 *Teixeira, supra*, 873 F.3d at p. 687, collecting cases; *Firearms Association v. Nigrelli* (W.D.N.Y.,
8 Sept. 21, 2023, No. 23-6524) 2023 WL 8495198, at *4 [rejecting challenge to fee paid by dealer,
9 not purchaser].) Rather, the Individual Plaintiffs and the Organizational Plaintiffs’ members, who
10 “regularly buy firearms and ammunition” in California, “plan to continue to purchase these goods
11 despite the tax.” (FAC, ¶¶ 25, 27, 29, 31; see also ¶¶ 12-16.) Therefore, Plaintiffs cannot allege
12 that the modest excise tax on retailers impairs the Second Amendment rights of the Individual
13 Plaintiffs and the Organizational Plaintiffs’ members. (*Ibid.*)

14 The U.S. Supreme Court has characterized “laws imposing conditions and qualifications on
15 the commercial sale of arms” as “presumptively lawful.” (*Heller, supra*, 554 U.S. at pp. 626-627
16 & fn. 26; see also *Sonzinsky v. United States* (1937) 300 U.S. 506, 513 [Supreme Court holding
17 that \$200 federal annual license tax on firearms dealers under the National Firearms Act was a
18 constitutional exercise of Congressional power].) And the Court expressly did not disturb “shall-
19 issue” licensing laws (*Bruen, supra*, 597 U.S. at p. 39, fn. 9)—which are imposed directly on
20 consumers and can constitutionally mandate “fingerprinting, a background check, a mental health
21 records check, and training in firearms handling and in laws regarding the use of force, among
22 other possible requirements” (*id.* at p. 80). Thus, in the wake of *Bruen*, courts have upheld
23 “administrative condition[s] to lawful gun-ownership,” including costs associated with purchases
24 and registration—even when imposed directly on a gun purchaser. (*United States of America v.*
25 *Beaty* (M.D. Fla., Jan. 20, 2023, No. 2295) 2023 WL 9853255, at *8 [“One must pay for the
26 firearm, including a state sales tax, and registering a weapon . . . imposes no greater burden.”].)

27 Here, the tax at issue is no more burdensome than similar requirements the Supreme Court
28 has presumptively deemed constitutional. (*Bruen, supra*, 597 U.S. at p. 39, fn. 9; *Heller, supra*,
554 U.S. at pp. 626-627 & fn. 26.) Indeed, in 1934, Congress enacted the National Firearms Act

1 which imposes an additional federal tax on the manufacture, sale and transfer of certain firearms,
2 in addition to the 10 to 11 percent excise tax placed on firearm and ammunition manufacturers
3 and importers since 1919. (26 U.S.C. § 5801 et seq.; § 5845.) Shortly after, a firearms dealer who
4 was convicted under the National Firearms Act for failing to pay the annual \$200 license tax
5 challenged the tax as unconstitutional. (*Sonzinsky v. United States* (1937) 300 U.S. 506, 511.) The
6 Supreme Court rejected the dealer’s constitutional challenge and upheld the \$200 tax as a valid
7 exercise of Congress’s taxing power. (*Id.* at p. 513 [citations omitted]; see also *United States v.*
8 *Morgan* (W.D. Wis., June 5, 2024) 2024 WL 3327866, at *7 [concluding *Sonzinsky* remains good
9 law].)

10 The impending excise tax will not “deny [purchasers] their right to public carry” or “bear
11 Arms” at all. (*Bruen, supra*, 597 U.S. at p. 39, fn. 9.) The consumers are only impacted if the
12 Retailer Plaintiffs choose to collect tax reimbursement from their customers. And their customers
13 have stated that they will continue to buy firearms and ammunition “despite the tax.” (*Id.*, ¶¶ 22,
14 25, 27, 29, 31; *cf.* ¶ 13 [individual’s firearm purchase postponed].) Plaintiffs, therefore, do not
15 allege that AB 28 regulates conduct protected by the Second Amendment and Plaintiffs’ second
16 cause of action fails to state a Section 1983 claim against defendant based on an alleged violation
17 of the U.S. Constitution. (See also, *Sonzinsky, supra*, 300 U.S. at p. 514.)

18 **V. THE DEMURRER SHOULD BE SUSTAINED WITHOUT LEAVE TO AMEND**

19 Amendment cannot make the Individual and Organizational Plaintiffs the taxpayers or
20 resolve the lack of violation of constitutional rights. Amendment cannot retroactively cure the
21 Retailer Plaintiffs’ failure to exhaust administrative remedies before bringing this action.
22 (*Stettner, supra*, 98 Cal.App.5th at pp. 53-54; *Shiseido Cosmetics, supra*, 235 Cal.App.3d at
23 p. 489.) Because Plaintiffs cannot cure the complaint’s defects by amendment, the demurrer
24 should therefore be sustained without leave to amend. (*Stettner, supra*, at pp. 53-54; *Goodman v.*
25 *Kennedy* (1976) 18 Cal.3d 335, 349.)

26 **CONCLUSION**

27 For the foregoing reasons, the Director respectfully requests that the Court sustain this
28 demurrer and order that this action be dismissed without leave to amend.

1 Dated: February 18, 2025

Respectfully submitted,

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