No. _____

In the
Supreme Court of the United States

BARRY BAUER; NICOLE FERRY; JEFFREY HACKER; NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; HERB BAUER SPORTING GOODS, INC.,

Petitioners,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California; STEPHEN LINDLEY, in his official capacity as Acting Chief of the California Department of Justice; DOES 1-10,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

C.D. MICHEL
SEAN A. BRADY
ANNA M. BARVIR
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
(562) 216-4444
cmichel@michellawyers.com

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
EDMUND G. LACOUR JR.
MATTHEW S. BROOKER
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioners

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QUESTION PRESENTED

This Court has long held that "[a] state may not impose a charge for the enjoyment of a right granted by the federal constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). Accordingly, while constitutionally protected conduct may be subjected to generally applicable taxes or fees, it may be singled out for special fees only as necessary to "meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941). As originally crafted, California's firearms transaction fee abided by that constraint, as it was statutorily confined to recovering the costs of a firearms transaction—*e.g.*, running a background check and registering the transaction. But when the state discovered that the fee was set too high and was generating a multi-million dollar surplus, instead of lowering the fee, the state decided to amend its law to allow the fee to be used to fund a special law enforcement program dedicated to tracking down individuals who unlawfully possess firearms. The Ninth Circuit held that amended fee constitutional, parting company with cases that confine fees on constitutionally protected conduct to recovery of costs reasonably attributed *to the fee-payer*, and instead following a line of cases allowing such fees to be used to police the conduct of wholly unrelated third parties.

The question presented is:

Whether the exercise of a constitutional right may be conditioned on the payment of a special fee used to fund general law enforcement activities bearing no relation to the fee-payer's own conduct.

PARTIES TO THE PROCEEDING

Petitioners are Barry Bauer, Nicole Ferry, Jeffrey Hacker, the National Rifle Association of America, Inc., the California Rifle and Pistol Association Foundation, and Herb Bauer Sporting Goods, Inc. They were plaintiffs in the district court and plaintiffs-appellants in the court of appeals.

Respondents are Xavier Becerra, who was sued in his official capacity as Attorney General of the State of California; Stephen Lindley, who was sued in his official capacity as the Acting Chief of the California Department of Justice; and Does 1-10. They were defendants in the district court and defendants-appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state as follows:

Petitioner National Rifle Association of America, Inc., has no parent corporation. It has no stock, so no publicly held company owns 10 percent or more of its stock.

Petitioner California Rifle and Pistol Association Foundation is a California nonprofit organization. It has no parent corporation and no stock, so no publicly held corporation owns 10 percent or more of its stock.

Petitioner Herb Bauer Sporting Goods, Inc. has no parent corporation and no publicly held corporation holds 10 percent or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

This case squarely presents an important constitutional question that cuts across several enumerated rights and has divided the lower courts. While constitutionally protected conduct may be subject to generally applicable fees and taxes, this Court has long held that it may be singled out for special monetary exactions only to the extent necessary to offset costs attributable to regulating the fee-payer's exercise of that constitutional right. Accordingly, the government may charge a fee for a parade permit, or impose a fee on firearms transactions, but it must confine such fees to offsetting the costs of closing the streets for a parade, or of processing and recording a firearms transaction. The government may not charge more than necessary to offset the fee-payer-specific costs and divert the excess to tracking down parade-permit violators or individuals who illegally possess firearms. That cost-recovery principle ensures that the government may not leverage constitutionally protected conduct as a general revenue-raising measure.

About three decades ago, California enacted a statute allowing the California Department of Justice ("Department") to impose a fee on firearms transactions. Consistent with the principles this Court has articulated, that fee was statutorily confined to offsetting costs attributable to processing a firearms transaction, such as the cost of running a background check and of recording the transaction in applicable databases. And the statute not only capped the fee, but for good measure expressly stated that it "shall be no more than is necessary to fund" those

statutorily enumerated transaction costs. Nonetheless, the Department ultimately increased the fee to the statutory maximum of $19—only to discover that it was generating far more money than necessary to pay for the transaction costs; indeed, the fee was producing a multi-million dollar surplus.

At that point, the attorney general recommended that the Department do what the state statute and the Constitution required: lower the fee to an amount commensurate with the costs of processing a firearms transaction. But a cash-strapped legislature with more money in its coffers from the fee than the Constitution permits was unwilling to follow that sound advice. Instead of lowering the fee, the legislature amended the governing state statute to allow the funds generated by the fee to be put to uses *other than* offsetting the costs of processing a firearm transaction. Specifically, it amended the statute to allow the fee to be used to fund a special law enforcement program focused on tracking down people who possess firearms illegally. The legislature did not suggest that those criminal law enforcement costs were in any way attributable to the law-abiding citizens who pay the firearms transaction fee; nor could it, as only an infinitesimally small number of people who lawfully purchase a firearm through a duly recorded transaction ever become prohibited from possessing firearms. Instead, the legislature admitted that the point of this amendment was simply to save other taxpayers the cost of funding those general law enforcement activities.

The Ninth Circuit has now held that there is no constitutional problem with conditioning the exercise

of a fundamental enumerated right on the payment of a special fee diverted to fund general law enforcement activities. In doing so, the court has broken with decisions from several other circuits recognizing that special fees on constitutionally protected conduct—including conduct protected by the Second Amendment—must be confined to offsetting costs reasonably attributable to regulating the specific conduct to which they attach, like shutting down the streets for a parade, or processing a transaction. Instead, the Ninth Circuit has aligned itself with a minority of circuits that have allowed constitutional rights to be conditioned on the payment of fees imposed to fund policing the unrelated conduct of third parties over which the fee-payer has no control.

Those decisions are wrong, and they set a dangerous precedent that states may use special fees to profit from, or even discourage, the exercise of constitutional rights. That danger is nowhere more acute than in the Second Amendment context, where jurisdictions that are hostile to the Second Amendment have shown an increasing willingness to impose special taxes or fees for *the express purpose* of discouraging the exercise of the right. Indeed, it is telling that the most constitutionally problematic monetary exactions have often arisen in the context of disfavored or controversial constitutional rights, such as door-to-door or airport solicitation, running adult businesses, or holding parades to promote an unpopular message. Unfortunately, the Second Amendment has proven no exception to that troubling trend.

This case presents an ideal vehicle to resolve this important constitutional question that has divided the lower courts. There can be no serious dispute that the transactions to which California's fee attaches are constitutionally protected, as the right to *possess* a firearm for self-defense necessarily includes the right to acquire one. And unlike in many fees cases, there is no dispute here over whether the state's transaction fee is higher than necessary to offset the costs reasonably attributable to processing a firearms transaction; to the contrary, the legislature expanded the uses to which the fee could be put *precisely because* the fee was set too high and generated a massive surplus. Accordingly, this Court need not trouble itself with deciding exactly how high of a fee the state may charge, or how much leeway a state should get when approximating the costs reasonably attributable to processing a transaction. The state has *admitted* that it is using its firearms transaction fee to pay for costs not attributable to the people who pay that fee, so the only question is whether it is permissible for the state to do so.

It is not. Just as the government may not offset the cost of pursuing permit-violators or law-breakers by assessing excess fees on parade permits or court filings, it may not offset the cost of policing illegal firearms possession by assessing excess fees on lawful firearms transactions. This Court should grant the petition and make clear that the government may not impose excessive monetary exactions on constitutionally protected activity and divert that money to fund other government operations.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 858 F.3d 1216 and reproduced at App.1-20. The order denying rehearing en banc is reprinted at App.21-22. The district court's opinion is reported at 94 F. Supp. 3d 1149 and reproduced at App.23-36.

JURISDICTION

The Ninth Circuit issued its opinion on June 1, 2017. App.2. Petitioners filed a timely petition for rehearing en banc, which the court denied on July 12, 2017. App.21. On September 22, 2017, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including November 9, 2017. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment, the Fourteenth Amendment, the relevant portions of the California Penal Code, and California Senate Bill 819 are reproduced at App.37-72.

STATEMENT OF THE CASE

A. Statutory Background

To obtain a firearm in California, an individual generally must register the transfer of the firearm into his or her possession through the state's Dealer's Record of Sale ("DROS") process. *See* Cal. Penal Code §§28100, 28160, 28180. The DROS process requires, among other things, a would-be firearm purchaser or transferee to conduct that transaction through a federally licensed California firearms dealer, even if the transaction does not involve a sale. *Id.* §§27545, 28050(a). Once a licensed dealer has reviewed and

processed the application, the application is evaluated by the Department, which runs an extensive background check to ensure that the applicant is not legally prohibited from possessing a firearm. *Id.* §28220(a). If the applicant satisfies the necessary criteria, the Department will approve the transaction, and the firearm will be registered to the applicant in the Department's Consolidated Firearms Information System ("CFIS") database. *See id.* §30000. At no point does the applicant obtain a license for the possession or use of a firearm as a result of the DROS process. The process merely involves approval and registration of the transaction.

Since roughly 1990, a state statute has given the Department discretion to levy a fee on applicants as part of the DROS process. Cal. Penal Code §28225(a). This fee is imposed on every DROS applicant and must be paid as a prerequisite to completing the transaction. E.R.II.016-17; E.R.III.451-52; Cal. Penal Code §28225(a).[1] Because almost every firearm transfer requires a DROS application, almost everyone who wants to lawfully obtain a firearm in California must pay the DROS fee.[2] In its original form, the statute authorizing the Department to charge the DROS fee confined use of any funds

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[1] "E.R." refers to the Excerpts of Record petitioners filed with the Court of Appeals.

[2] A very small number of transactions—intra-familial transfers and "personal importation" (*i.e.*, when a person who moves to California brings a firearm that was lawfully acquired elsewhere)—do not have to go through the DROS process, but those transactions still must be recorded in the CFIS database even though the people registering the firearms did not pay DROS fees. E.R.II.024; E.R.III.461.

collected by the fee to certain enumerated activities, each of which had to do with processing the DROS application and registering the resulting transaction. *See* Cal. Penal Code §12076(e)-(g) (2011) (confining use of fees to, *inter alia*, "the cost of furnishing this information," "the actual costs associated with the electronic or telephonic transfer of information" during the DROS process, and costs attributable to various "reporting" and "notification" requirements). The law also expressly mandated that the fee "shall be no more than is necessary to fund" those enumerated activities. *Id.* §28225(b); *see also id.* §28255(c) ("[t]he fee … shall not exceed the sum of … the estimated reasonable cost of" such activities); E.R.II.018; E.R.III.453.

In 1995, the legislature capped the DROS fee at $14 subject to inflation, a cap that it later raised to $19. And for more than a decade, the Department proceeded to charge the statutory maximum. Over time, however, the Department discovered that the $19 fee was generating far more money than necessary to fund the DROS process. According to a 2010 report prepared by then-Attorney General, now-Governor Edmund Brown, this was owing principally to the fact that, "although the volume of DROS transactions has increased, the average time spent on each DROS, and thus the processing cost, has decreased." E.R.II.81-82. Accordingly, Brown recommended doing what the state statute (and the Constitution) required: lowering the fee to ensure that it would be "commensurate with the actual costs of processing a DROS" application. E.R.II.019; 081-82; E.R.III.441, 454. The Department took no action,

however, and by 2013, the DROS account had a surplus of nearly $13 million. E.R.III.453.

At that point, California's new Attorney General, Kamala Harris, proposed a different course of action. Instead of lowering the fee to comply with state law, she encouraged the legislature to revise state law to allow the Department to use DROS fees to pay for costs *beyond* those attendant to processing the firearms transactions to which they attached—specifically, to fund a law enforcement program relating to the Armed Prohibited Persons System ("APPS"). E.R.II.073. Unlike the uses to which DROS fees traditionally could be put, the APPS program has nothing to do with processing a DROS application or registering a firearms transaction. It is a "crime-fighting tool" used to enforce laws prohibiting certain persons from possessing firearms. E.R.II.026; E.R.III.375-76, 439, 463; Cal. Penal Code §30000(b).

APPS itself is "an online database" used "to identify criminals who are prohibited from possessing firearms subsequent to the legal acquisition of firearms or registration of assault weapons." E.R.II.020-21, 143; E.R.III.442; Cal. Penal Code §30000(a). To do so, APPS cross-references two lists: (1) the CFIS database, which lists persons who have registered firearms (whether through the DROS process or otherwise); and (2) a list of individuals prohibited by law from possessing firearms. Cal. Penal Code §30005. By cross-referencing these two lists, APPS seeks to identify individuals who legally acquired or registered a firearm but subsequently lost the right to possess one. The Department has a special 12-person APPS Unit tasked with reviewing

each cross-reference "hit" to determine whether the individual actually belongs on the APPS list or is a false positive. E.R.II.022; E.R.III.255-58, 278, 323-24, 439, 458. The Department also has approximately 45 sworn peace officers who work full time on APPS-based law enforcement activities, "investigating, disarming, apprehending, and ensuring the prosecution of persons who are prohibited or become prohibited from purchasing or possessing a firearm." E.R.II.025, 143; E.R.III.268, 439, 442, 462. While most individuals who make it onto the APPS list will have paid a DROS fee when they obtained their firearm, at most, only 3 out of every 1,000 DROS applications—or 0.3%—ever leads to an APPS investigation, much less an actual firearm seizure. E.R.II.017, 035; E.R.III.355, 371-72, 379, 439, 441, 452.

Before 2013, the costly general law enforcement activities conducted pursuant to the APPS program were funded almost exclusively by general revenues. On May 1, 2013, however, the legislature passed Senate Bill 819 ("SB819"), which amended the DROS fee statute to allow the fee to fund "Department of Justice firearms-related regulatory and enforcement activities related to the sale, purchase, *possession*, loan, or transfer of firearms pursuant to any provision listed in Section 16580." Cal. Penal Code §28225(b)(11) (emphasis added). By adding the term "possession" to that list of activities otherwise directly related to a firearms *transaction*, SB819 enabled the Department to use the surplus the DROS fee was generating "for the additional, limited purpose of funding enforcement of the Armed Prohibited Persons System." 2011 Cal. Stat. 5736, §1(g); *see also*

E.R.II.073 ("add[ing] the word 'possession'" will "allow the Department … to use the money from" DROS fees "for the APPS Program").

The legislature did not claim that the APPS program is a cost attributable to the lawful firearms transactions to which the DROS fee attaches. To the contrary, the legislature readily admitted that SB819 was animated by a simple desire to avoid "placing an additional burden on the taxpayers of California to fund enhanced enforcement of the existing armed prohibited persons program"—in other words, to avoid having to raise general revenue to pay for the general law enforcement activities that the APPS program entails. E.R.II.102; E.R.III.441. And indeed, SB819 has had that result: In 2013 alone, the Department siphoned *$24 million* in DROS fees to fund the APPS program. App.5 n.2. According to the legislature, conditioning the exercise of Second Amendment rights on funding those general law enforcement activities is actually *beneficial* to "law-abiding firearms owners" because enforcing criminal possession laws "help[s] avoid gun ownership from becoming strongly associated with the random acts of deranged individuals." E.R.II.124; E.R.III.442.

B. Proceedings Below

Petitioners are three individuals who paid DROS fees before engaging in lawful firearm transactions, and who anticipate lawfully purchasing firearms in the future; two organizations whose members and supporters are routinely required to pay DROS fees; and a licensed firearms vendor that regularly collects DROS fees. No petitioner is prohibited under federal or state law from possessing a firearm.

Petitioners filed this lawsuit challenging the constitutionality of California's use of DROS fees to fund the APPS program. As petitioners explained, while they have no objection to paying a DROS fee to cover the costs reasonably associated with processing and registering lawful firearm transactions, they do object to being forced to fund general law enforcement activities as a condition of exercising their Second Amendment rights. Because enforcing the APPS program is decidedly not a cost attributable to lawful firearms transactions, petitioners maintain that the Constitution prohibits California from using DROS fees to fund APPS enforcement activities.

The district court rejected petitioners' challenge on the startling theory that the Second Amendment places no limits whatsoever on the fees that may be imposed on firearms transactions, reasoning that such fees are constitutional per se under *District of Columbia v. Heller*, 554 U.S. 570 (2008), because they are "conditions [or] qualifications on the commercial sale of arms." App.31 (quoting *Heller*, 554 U.S. at 627). In the alternative, the court held that even if firearms transaction fees are subject to Second Amendment scrutiny, the DROS fee may be put to any use the state chooses because a $19 fee is "only a marginal burden." App.35.

Petitioners appealed, and the Ninth Circuit affirmed. While the court was unwilling to hold that acquiring a firearm is conduct protected by the Second Amendment, it assumed arguendo that it is. App.8. Applying intermediate scrutiny, the court then concluded that the DROS fee in its present form passes constitutional muster, reasoning that there is

a "reasonable fit" between California's interest in funding the APPS program and its chosen means of making law-abiding firearms purchasers provide the funding because "the unlawful firearm possession targeted by APPS is the direct result of certain individuals' prior acquisition of a firearm through a DROS-governed transaction." App.13-14.

The court also determined that it would reach the same result even assuming this Court's fees jurisprudence applies in the Second Amendment context (another proposition that the court was unwilling to embrace without qualification). App.16-17. The court acknowledged that a fee on a constitutional right "may not be used to raise general revenue" and must be limited to recovering the "expense incident" to the conduct to which the fee attaches. App.17. The court further acknowledged that "only a small subset of DROS fee payers will later become illegal possessors targeted by APPS." App.17. Yet the court nonetheless deemed the APPS program an expense attributable to the lawful acquisition of a firearm because "essentially everyone targeted by the APPS program was a DROS fee payer at the time he or she acquired a firearm." App.17. In reaching that conclusion, the court invoked First Amendment decisions from the Second and Sixth Circuits indicating that fees may be imposed on constitutional rights not only to offset costs attributable to the conduct to which they attach, but also to "enforce[]" laws "policing" the "ongoing impacts" of that constitutionally protected activity. App.18 (citing *Nat'l Awareness Found. v. Abrams*, 50 F.3d 1159 (2d Cir. 1995), and *Deja Vu of Nashville, Inc. v. Metro.*

Gov't of Nashville & Davidson Cty., 274 F.3d 377 (6th Cir. 2001)).

REASONS FOR GRANTING THE PETITION

More than 70 years ago, this Court made clear that "[a] state may not impose a charge for the enjoyment of a right granted by the federal constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). Accordingly, while constitutionally protected conduct may be subject to generally applicable taxes and fees, it may not be singled out for special monetary exactions designed to profit from or, worse still, discourage the exercise of a constitutional right. Instead, special fees may be imposed on constitutionally protected conduct only when necessary "to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941).

Many courts have abided by that cost-recovery command and have required governments that seek to impose fees on constitutionally protected conduct to ensure that the fees are commensurate with costs reasonably attributable to the conduct on which they are imposed—*i.e.*, the cost of closing the streets for a parade, or of processing a license application, or of regulating a lawful transaction. In the decision below, however, the Ninth Circuit aligned itself with a line of authority allowing such fees to be used not just to recover costs reasonably attributable to the fee-payer's *exercise* of a constitutional right, but also to pay for general law enforcement activities designed to ferret out and punish unrelated third parties who *abuse* the rights that the Constitution protects.

That conclusion has far-reaching consequences—not just for Second Amendment rights, but for other constitutionally protected conduct as well. As *Murdock* and a long line of cases in its wake confirm, the temptation to convert the exercise of constitutional rights into a general revenue-raising measure is ever-present. And that temptation is stronger still where disfavored rights are at stake, for it is all too easy for the government to try to discourage the exercise of unpopular rights by making it more expensive and by associating those who *exercise* their constitutional rights with those who *abuse* them. That is precisely why this Court and others have been vigilant against efforts to impose dubious "licensing" fees on door-to-door or airport solicitation, or to charge a premium for permits for unpopular parades, or to force adult bookstore owners to fund obscenity prosecutions as a condition of obtaining a license to operate.

Yet the Ninth Circuit has now joined the Second and Sixth Circuits in embracing a concept of "policing" the exercise of constitutional rights so capacious as to allow precisely those forbidden results. Indeed, the decision below allows California to condition the exercise of Second Amendment rights on funding the enforcement of criminal firearms possession prohibitions even though it is undisputed that *less than one half of one percent* of lawful firearms transactions ever lead to a violation of those prohibitions. That conclusion conflicts with this Court's precedents on fees and deters the exercise of constitutionally protected rights by deeming fungible the use and the abuse of a constitutional right.

I. Lower Courts Are Divided Over The Extent To Which Fees May Be Imposed On The Exercise Of A Constitutional Right.

Although constitutionally protected conduct may be subject to generally applicable taxes and fees, this Court has long held that such conduct may be singled out for special monetary exactions only when necessary "to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." *Cox*, 312 U.S. at 577; *see also Murdock*, 319 U.S. at 114 (fees must be limited "to defray[ing] the expenses of policing the activities in question"). When a fee is expanded beyond those narrow cost-recovery purposes, it risks becoming nothing more than "a revenue tax," *Cox*, 312 U.S. at 577—or, worse still, an effort "to control or suppress [the] enjoyment" of a constitutional right, *Murdock*, 319 U.S. at 112.

Adhering to that rule, many lower courts have recognized that the only fees the government may impose on the exercise of a constitutional right are fees commensurate with costs that are reasonably attributable to the activity of the fee-payer himself—not costs attributable to third-party conduct over which the fee-payer has no control. For instance, in *iMatter Utah v. Njord*, 774 F.3d 1258 (10th Cir. 2014), the Tenth Circuit rejected a state's effort to require anyone who sought a parade permit "to purchase insurance against risks for which the permittee could not be held liable," including actions state officials might take during the parade. *Id.* at 1270. Because those costs were generated not by the activity *of the permittees*, but rather by the potential "conduct of a

third party," the provision "impermissibly burden[ed] the plaintiffs' First Amendment rights." *Id.*

Several courts have applied the same principle to licensing fees, requiring the government "to demonstrate that its licensing fee is reasonably related to recoupment of the costs of administering the licensing program." *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1314 (11th Cir. 2003). In *Fly Fish*, the Eleventh Circuit held unconstitutional a $1,250 licensing fee on adult businesses after the city failed to show that "its licensing fee is justified by the cost of processing the application" for a license. *Id.* at 1315. In *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), the Fifth Circuit struck down a modest $6 daily licensing fee on airport solicitors because "the governmental body did not demonstrate a link between the fee and the costs of the licensing process." *Id.* at 633. In *Sullivan v. City of Augusta*, 511 F.3d 16 (1st Cir. 2007), the First Circuit held that the city violated the First Amendment when it "charged Sullivan more than the actual administrative expenses of the license" he obtained to conduct a march on city streets. *Id.* at 38. And in *Wendling v. City of Duluth*, 495 F. Supp. 1380 (D. Minn. 1980), the district court struck down a licensing fee that required adult book stores to fund the enforcement of obscenity laws.

Courts have applied the same principles in the Second Amendment context, reiterating that any fees imposed on activity protected by the Second Amendment must be "designed to defray (and … not exceed) the administrative costs associated with" processing a firearm transaction or issuing a firearm

license. *Kwong v. Bloomberg*, 723 F.3d 160, 166 (2d Cir. 2013); *see also, e.g.*, *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 192 (D.D.C. 2010), *aff'd in part*, *rev'd in part on other grounds*, 801 F.3d 264, 278 (D.C. Cir. 2015) (upholding registration fee used to offset costs of "fingerprinting registrants, … processing applications and maintaining a database of firearms owners"); *Justice v. Town of Cicero*, 827 F. Supp. 2d 835, 842 (N.D. Ill. 2011) (upholding fee when "there [wa]s no indication that [it] was imposed for any other purpose" than to cover costs of registering firearms). As those and other decisions reflect, "a licensing fee is permissible, but a state or municipality may charge no more than the amount needed to cover administrative costs." *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189, 1205 (11th Cir. 1991). That critical limitation ensures that the government is "prohibited from raising revenue under the guise of defraying its administrative costs," *id.*, or from using special fees to try "to suppress the[] exercise" of rights guaranteed by the Constitution, *Murdock*, 319 U.S. at 114.

The decision below marks a sharp departure from that precedent. In the Ninth Circuit's view, "nothing in our case law requires" a fee on a constitutional right to be limited to the "'actual costs' of processing a license or similar direct administrative costs." App.17-18. Instead, the court held that California may constitutionally condition the *lawful* acquisition of firearms on paying for a law enforcement program designed to catch criminals who *unlawfully* possess firearms. The court attempted to justify that conclusion by reasoning that these general law enforcement activities are just part of "the expenses of policing the activities in question." *Murdock*, 319 U.S.

at 114. But that reasoning cannot be reconciled with the long line of decisions making clear that "the activities in question" mean the activities in which *the fee-payer* seeks to engage—*i.e.*, holding a parade, or running an adult bookstore, or buying a firearm—not every third-party action that might be deemed loosely attributable to the existence or exercise of the constitutional right. It could hardly be otherwise, as a contrary rule would allow the government to force newspapers to pay into libel funds, or force court-filers to fund those held in contempt or who failed to satisfy judgments. The decision below is no more reconcilable with the Second Amendment than those results would be with the First and Fifth Amendments.

Yet the Ninth Circuit is not alone in accepting the dubious proposition that policing the activities of those who *abuse* constitutional rights is a cost that may be imposed on those who seek only to exercise them. The Ninth Circuit relied on decisions from the Second and Sixth Circuits that also allowed licensing fees to be used to cover enforcement, rather than administrative, costs. *Nat'l Awareness Found. v. Abrams*, 50 F.3d 1159 (2d Cir. 1995), involved an annual registration fee imposed on professional solicitors for charities. Plaintiffs argued that the fee violated "the First Amendment … because the revenues derived therefrom [we]re not limited solely to the costs of administrative activities, such as processing and issuing fees," but were also used to pay for enforcement actions against solicitors who violated the governing regulations. *Id.* at 1166. The court rejected that argument, finding it sufficient that "[a] certain degree of enforcement power is necessary to ensure that the purposes of [the licensing regime] are

served." *Id.* Similarly, in *Deja Vu of Nashville, Inc. v. Metro. Gov. of Nashville & Davidson Cty.*, 274 F.3d 377 (6th Cir. 2001), the Sixth Circuit upheld a licensing fee imposed on adult entertainment businesses even though the fee admittedly was not confined to administrative costs, but also included costs attributable to enforcing applicable regulations. *Id.* at 395-96.

The decision below brings the division between those two lines of authority into sharp relief. While many courts have been careful to ensure that no one seeking to exercise a constitutional right is forced to pay costs that are not reasonably attributable to her own conduct, others have followed a different course, allowing states and localities to condition the exercise of constitutional rights on the payment of costs attributable to enforcing criminal or regulatory requirements against wholly unrelated third parties. This Court should grant certiorari and resolve that division by rejecting the approach that the decision below embraces.

II. The Decision Below Is Profoundly Wrong.

The decision below not only deepens a division among the lower courts, but also is incompatible with this Court's fees jurisprudence. As this Court held long ago, "[a] state may not impose a charge for the enjoyment of a right granted by the federal constitution." *Murdock*, 319 U.S. at 113. A tax on the exercise of a constitutional right is "as obnoxious" as an outright prohibition, for "'the power to tax the exercise of a privilege is the power to control or suppress its enjoyment.'" *Follett v. Town of*

McCormick, 321 U.S. 573, 577 (1944) (quoting *Murdock*, 319 U.S. at 112).

In *Murdock*, the Court struck down a municipal ordinance that conditioned the distribution of books and pamphlets on the payment of a $1.50-per-day licensing fee. *Murdock*, 319 U.S. at 106, 117. In doing so, the Court made clear that what matters is not whether a fee is particularly onerous, but whether it is a permissible "regulatory measure to defray the expenses of policing the activities in question," or an impermissible "charge for the enjoyment of a right granted by the federal constitution." *Id.* at 113-14. Because the fee at issue there was "unrelated to the scope of the activities of petitioners" or any costs those activities might impose on the state, the Court concluded that it was the latter. *Id.*

The same result should have obtained here, as there is no conceivable sense in which the law enforcement activities that DROS fees are being used to fund as a result of SB819 could be deemed "[]related to the scope of the activities of petitioners." *Id.* While it may well be true that most (although certainly not all) people in the CFIS database (*i.e.*, the database of lawful firearms transactions) that is used to help generate the APPS list (*i.e.*, the list of people who are in unlawful possession of a firearm) once paid a DROS fee, the relevant question is not whether those correctly placed *on the APPS list* may permissibly be saddled with the costs of enforcing the criminal prohibitions that they have violated; of course they could. The question is whether *everyone who pays a DROS fee* can permissibly be saddled with those general law enforcement costs. And the answer to that

question depends on whether APPS enforcement activities are a cost attributable to the activity on which the DROS fee is imposed—*i.e.*, the lawful acquisition of a firearm. Plainly, they are not. According to the state's own data, less than one half of one percent of all DROS applications ever even lead to an APPS investigation, let alone to an actual seizure of an illegally possessed firearm.

That is manifestly insufficient to establish the requisite connection between the fee-payer's activity and the uses to which the fee will be put. Indeed, this Court has refused to sanction fees that included the costs of policing third-party conduct even when that conduct actually *was* arguably attributable to the fee-payer's constitutionally protected activity. In *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), the Court struck down a fee imposed on public gatherings because one of the costs the county included was third parties' potential "reaction to the speech." *Id.* at 134. As the Court explained, such a fee cannot include "the cost of police protection from hostile crowds," for First Amendment conduct "cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Id.* at 134-35 & n.12. If a fee-payer cannot be charged with third-party costs that actually *are* connected to his own constitutionally protected conduct, then a fortiori a fee-payer cannot be charged with costs attributable to wholly unrelated third-party conduct.

Tellingly, the legislature never even tried to justify SB819 on the ground that the APPS program is a cost attributable to everyone who lawfully acquires

a firearm. Instead, the legislature readily admitted that the motivation behind SB819 was simply to avoid "placing an additional burden on the taxpayers of California" to fund that general law enforcement program—in other words, simply to raise general revenue. E.R.II.102; E.R.III.441. That alone is reason enough to invalidate SB819 as an impermissible "revenue tax." *Cox*, 312 U.S. at 577. But the legislature then offered the remarkable theory that law-abiding firearm owners *should* have to pay to enforce criminal possession prohibitions because doing so "help[s] avoid gun ownership from becoming strongly associated with the random acts of deranged individuals." E.R.II.124; E.R.III.442.

That explanation betrays an unconstitutional purpose rather than a valid justification. To the extent the legislature itself associates constitutionally protected gun ownership with the unlawful actions of individuals, that is antithetical to the Second Amendment and hopelessly conflates the exercise and abuse of a constitutional right. The idea that the government could treat constitutionally protected speech and obscenity and libel as fungible, and condition the exercise of the former on funding the prosecution of the latter, is incompatible with the First Amendment. That is no less true for the Second Amendment. "[G]uilt by association is a philosophy alien to the traditions of a free society." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982) (rejecting effort to hold NAACP liable for an illegal boycott based on illegal activity of a few members that the organization never ratified).

III. This Is An Ideal Vehicle To Address The Limits On The Imposition Of Special Fees On The Exercise Of Constitutional Rights.

This case is an ideal vehicle for addressing the extent to which the government may single out constitutionally protected conduct for special fees. First, notwithstanding the Ninth Circuit's apparent unwillingness to squarely recognize Second Amendment rights, there can be no serious dispute that the fundamental and individual right to *possess* a firearm for self-defense includes the antecedent right to *acquire* a firearm. *See, e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) ("[t]he right to possess firearms for protection implies a corresponding right to acquire" them). And there is no dispute that the DROS fee is not a generally applicable transaction fee, but is imposed solely on firearms transactions. This case thus plainly involves the imposition of a special fee on conduct protected by the Constitution.

This is also the rare fees case in which there is no dispute that the fee is higher than necessary "to defray … the administrative costs" attributable to the constitutionally protected conduct to which it attaches. *Kwong*, 723 F.3d at 166. Indeed, SB819 was enacted precisely because the legislature learned that the fee was not "commensurate with the actual cost of processing a DROS" application, E.R.II.081-82, but had been set so high that it was generating a multi-million dollar surplus. And the expressly acknowledged point of SB819 was to empower the Department to use the surplus funds that the DROS fee was generating for purposes *other than* processing

the lawful firearms transactions on which they are imposed. Thus, the only question for this Court is whether funding the APPS program qualifies as a permissible effort "to defray the expenses of policing the activities in question." *Murdock*, 319 U.S. at 114. If it does not, then the DROS fee is, by the legislature's (and the Ninth Circuit's) own admission, unconstitutionally high. *See* App.4 (acknowledging that SB819 "allows the Department to use a portion of the DROS [F]ee … [to] fund[] enforcement efforts targeting illegal firearm possession *after* the point of sale").

Resolution of the question presented is critically important, as California's approach offers a blueprint for cash-strapped or ideologically motivated governments that seek to tax—and suppress—the exercise of fundamental constitutional rights. *See Murdock*, 319 U.S. at 113 ("The power to impose a [] tax on the exercise of [constitutional] freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down."). Other jurisdictions are undoubtedly monitoring California's actions, and many have already enacted similar—or even more aggressive—monetary exaction policies.

For instance, Cook County, Illinois, has levied a $25 tax on the purchase of firearms and a smaller tax on the purchase of ammunition. *See Firearm and Firearm Ammunition Tax*, Cook County Gov't, goo.gl/SjExB6 (last visited Nov. 8, 2017). The County has abandoned any pretext that it seeks only to offset the costs of regulating firearms and ammunition purchases, and instead openly acknowledged that it imposed these taxes for the express purpose of

deterring citizens from exercising their Second Amendment rights. *See Official Proposes Bullet Tax to Curb Chicago Crime*, USA Today (Oct. 18, 2012), goo.gl/f9gzJ7. The City of Seattle has also levied a $25 tax on all firearm sales to fund gun-violence studies and anti-gun-violence initiatives. Seattle, Wash., Ordinance 124833 (Aug. 21, 2015). And candidates for City Council have pledged to seek to double that tax if elected. *See* Paige Browning, *Seattle Candidates Say Gun Tax Isn't Enough. For Gun Dealers, It's Enough To Move,* KUOW (Aug. 22, 2017), https://goo.gl/boSCQA. There is thus little doubt that, if allowed to stand, the decision below will embolden other jurisdictions to follow in California's footsteps. Accordingly, this Court should grant certiorari and put an end to this troubling trend of trying to use the power to tax "to control or suppress [the] enjoyment" of constitutional rights. *Murdock*, 319 U.S. at 112.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

C.D. MICHEL
SEAN A. BRADY
ANNA M. BARVIR
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
(562) 216-4444
cmichel@michellawyers.com

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
EDMUND G. LACOUR JR.
MATTHEW S. BROOKER
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioners

November 9, 2017

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-15428

BARRY BAUER; NICOLE FERRY; JEFFREY HACKER; NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; HERB BAUER SPORTING GOODS, INC.,

Plaintiffs-Appellants,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California; STEPHEN LINDLEY, in his official capacity as Acting Chief of the California Department of Justice; DOES, 1-10,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, Chief Judge, Presiding

Argued and Submitted April 19, 2017
San Francisco, California

Before: Sidney R. Thomas, Chief Judge, and Ferdinand F. Fernandez and Mary H. Murguia, Circuit Judges.

Filed June 1, 2017

OPINION

THOMAS, Chief Judge:

In this appeal, we consider whether California's allocation of $5 of a $19 fee on firearms transfers to fund enforcement efforts against illegal firearm purchasers violates the Second Amendment. We conclude that, even if collection and use of the fee falls within the scope of the Second Amendment, the provision survives intermediate scrutiny and is therefore constitutional. We affirm the judgment of the district court.

I.

California regulates firearm sales and transfers through the Dealer's Record of Sale ("DROS") system, which was created a century ago and has been updated throughout the intervening years. *See* 1917 Cal. Stat. 221, § 7. The DROS system today requires that "any sale, loan, or transfer of a firearm" be made through a licensed dealer, Cal. Penal Code §§ 27545, 28050(a), and it requires dealers to keep standardized records of all such transactions, *id.* at §§ 28100, 28160 *et seq*. This statutory framework also requires the California Department of Justice ("the Department") to run background checks prior to purchase, and to notify the dealer if a prospective firearm purchaser is prohibited from possessing a gun under federal law or under certain provisions of California law relating to prior

convictions and mental illness. Cal. Penal Code § 28220.

The DROS system allows the Department to charge a fee, known as the DROS fee, to cover the cost of running these background checks and other related expenses.[1] Cal. Penal Code § 28225. Although the use of the DROS fee was originally limited to background checks, 1982 Cal. Stat. 1472, § 129, this provision was later expanded to allow the fee to be used for "the costs associated with funding Department of Justice firearms-related regulatory and enforcement activities related to the sale, purchase, loan, or transfer of firearms," as well as certain costs incurred by other agencies in compliance with the record-keeping and notification requirements of the background check provisions. Cal. Penal Code 12076(e) (repealed 2010, replaced by Cal. Penal Code § 28225). In 1995 the legislature capped the DROS fee, with inflation adjustment to be set by regulation. Cal. Penal Code § 28225(a). With inflation, the fee was most recently set at $19 in 2004. Cal. Code Regs. Tit. 11, § 4001.

In 2011, the California Legislature further expanded the permissible uses of the DROS fee by enacting the law that is challenged in this case. This law, commonly referred to as Senate Bill 819, changed the language of § 28225 to allow the DROS fee to be used for "firearms-related regulatory and enforcement activities related to the sale, purchase, *possession*, loan, or transfer of firearms." Cal. Penal Code

[1] The statute permits the Department to "require the dealer to charge each firearm purchaser a fee," which is then remitted to the Department. Cal. Penal code § 28225.

§ 28225(b)(11) (emphasis added). In effect, this change allows the Department to use a portion of the DROS fee "for the additional, limited purpose" of funding enforcement efforts targeting illegal firearm possession *after* the point of sale, through California's Armed Prohibited Persons System ("APPS"). 2011 Cal. Stat. 5735, § 1(g).

The APPS program, established in 2001, enforces California's prohibitions on firearm possession by identifying "persons who have ownership or possession of a firearm" yet who, subsequent to their legal acquisition of the firearm, have later come to "fall within a class of persons who are prohibited from owning or possessing a firearm" due to a felony or violent misdemeanor conviction, domestic violence restraining order, or mental health-related prohibition. Cal. Penal Code §§ 30000, 30005. Essentially, these are people who passed a background check at the time of purchase but would no longer pass that check, yet still possess a firearm.

The system identifies such people by cross-referencing the Consolidated Firearms Information System ("CFIS") database of people who possess a firearm, which is generated primarily through DROS reporting, against criminal records, domestic violence restraining order records, and mental health records. Cal. Penal Code §§ 11106, 30005. This process generates a list of "armed prohibited persons," which the Department uses for "investigating, disarming, apprehending, and ensuring the prosecution" of persons who have become prohibited from firearm possession.

Since the enactment of Senate Bill 819 in 2011, the APPS program—including both the identification of armed prohibited persons and the Department's related enforcement efforts confiscating firearms from those people—has been partially funded by DROS fees.[2] However, only a portion of the DROS fee is used to fund APPS: the evidence in the record before us suggests that the cost of running background checks and processing DROS records is approximately $14, meaning that only the remaining $5 of each DROS fee is available for APPS funding.

Barry Bauer and five other individuals and entities (collectively, "Bauer") challenge the use of this $5 portion of the DROS fee[3] to fund APPS, arguing that it violates the Second Amendment because "the criminal misuse of firearms" targeted by the APPS is not sufficiently related to the legal acquisition of firearms on which the fee is imposed. On these grounds, Bauer filed suit against the Attorney General of California and the Chief of the California Department of Justice Bureau of Firearms (collectively, "the State") in August 2011, seeking declaratory and injunctive relief under 42 U.S.C. § 1983. Bauer subsequently filed an amended complaint adding allegations regarding the 2013 appropriation of funds from the DROS account to the APPS program.

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[2] Most notably, in 2013, the legislature appropriated $24 million from the DROS Account to the APPS program. 2013 Cal. Stat. 2, *codified at* Cal. Penal Code § 30015.

[3] Bauer challenges only the approximately $5 portion of the DROS fee that exceeds the Department's actual costs for running background checks and processing DROS records.

The district court granted summary judgment for the State, concluding that the DROS fee does not violate the Constitution because it falls outside the scope of the Second Amendment as a "condition[or] qualification[] on the commercial sale of arms." *Dist. of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). In the alternative, the district court concluded that the DROS fee would survive heightened scrutiny even if the Second Amendment were implicated, because it places only a "marginal burden" on the of the core Second Amendment right. Bauer timely appealed.

The district court had jurisdiction under 28 U.S.C. § 1331, and we have jurisdiction to hear Bauer's appeal under 28 U.S.C. § 1291. "We review a district court's grant of summary judgment de novo." *Peruta v. Cty. of San Diego*, 824 F.3d 919, 925 (9th Cir. 2016) (en banc) (citing *Sanchez v. Cty. of San Diego*, 464 F.3d 916, 920 (9th Cir. 2006)). Similarly, "[w]e review constitutional questions de novo." *Id.* (citing *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1103 (9th Cir. 2004)).

II

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In the Supreme Court's seminal decision on Second Amendment rights, *District of Columbia v. Heller*, the Court articulated an individual right to bear arms but explained that this holding should not "be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive

places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. at 626-27. The Court described these categories of regulation as "presumptively lawful" and noted that this list was not intended to be exhaustive. *Id.* at 627 n.26.

In accord with many of our sister circuits, "we have discerned from *Heller*'s approach a two-step Second Amendment inquiry." *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 960 (9th Cir. 2014) (citing *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013)); *see also, e.g.*, *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). This two-step inquiry "(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny." *Jackson*, 746 F.3d at 960 (citing *Chovan*, 735 F.3d at 1136). In determining whether a given regulation falls within the scope of the Second Amendment under the first step of this inquiry, "we ask whether the regulation is one of the 'presumptively lawful regulatory measures' identified in *Heller*, or whether the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment." *Id.* (first quoting *Heller*, 554 U.S. at 627 n.26; then citing *Chovan*, 735 F.3d at 1137).

Here, Bauer contends that the challenged portion of the DROS fee burdens conduct protected by the Second Amendment because it applies to all firearm

transfers, not just those that would be considered "commercial sale" in the ordinary sense. Cal. Penal Code §§ 27545, 28050, 28055(b). Thus, Bauer argues that the DROS fee does not belong to the category of "conditions and qualifications on the commercial sale of arms" that *Heller* held to be presumptively lawful at the first step of the inquiry. *See* 554 U.S. at 626-27 & n.26. The State counters that by regulating transactions conducted through commercial firearm dealers, the DROS fee is properly considered a condition on the commercial sale of arms and thus falls outside the scope of the Second Amendment under *Heller*'s first step.

We need not decide this question because the challenged portion of the DROS fee would survive heightened scrutiny even if it implicates Second Amendment protections. Therefore, for purposes of this analysis, we assume, without deciding, that the challenged fee burdens conduct falling within the scope of the Second Amendment. *See Silvester v. Harris*, 843 F.3d 816, 826-27 (9th Cir. 2016) (assuming without deciding that waiting period laws fall within the scope of the Second Amendment at step one); *Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015) (bypassing step one because firing-capacity regulations would survive heightened scrutiny even if they fell within the scope of the Second Amendment).

III

If a law burdens conduct protected by the Second Amendment, as we assume, but do not decide that this one does, *Heller* mandates some level of heightened scrutiny. 554 U.S. at 628 & n.27. We conclude that intermediate scrutiny is the appropriate standard for

analyzing the fee scheme challenged here, and we hold that the fee survives under this standard.

A

Because *Heller* did not specify a particular level of scrutiny for all Second Amendment challenges, courts determine the appropriate level by considering "(1) how close the challenged law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on that right." *Silvester*, 843 F.3d at 821 (citing *Jackson*, 746 F.3d at 960-61). *Heller* identified the core of the Second Amendment as "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. Guided by this understanding, our test for the appropriate level of scrutiny amounts to "a sliding scale." *Silvester*, 843 F.3d at 821. "A law that imposes such a severe restriction on the fundamental right of self defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny." *Id.* (citing *Chovan*, 735 F.3d at 1138). Further down the scale, a "law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny. Otherwise, intermediate scrutiny is appropriate." *Id.*

Here, Bauer argues that the core right to possess and use a firearm in the home includes a corresponding right to *purchase* a firearm, and that the core right is therefore burdened by the DROS fee. But even if we assume that the right to possess a firearm includes the right to purchase one, the burden on that right is exceedingly minimal here.

Bauer has neither alleged nor argued that the $19 DROS fee—let alone the smaller, $5 challenged

portion of the fee—has any impact on the plaintiffs' actual ability to obtain and possess a firearm. Although Bauer suggests that a hypothetical $1 million fee could effectively eliminate the general public's ability to acquire a firearm, that extreme comparison underscores the minimal nature of the burden here. Indeed, in considering a fee much larger than the one here, the Second Circuit suggested in *Kwong v. Bloomberg* that even a $340 licensing fee might not be a "substantial burden" on Second Amendment rights."[4] 723 F.3d 160, 167 (2d Cir. 2013). On the facts before us, the challenged portion of the DROS fee does not "severely burden[]" or even meaningfully impact the core of the Second Amendment right, and intermediate scrutiny is therefore appropriate. *See Silvester*, 843 F.3d at 821 (citing *Chovan*, 735 F.3d at 1138).

This approach is consistent with our past cases analyzing the appropriate level of scrutiny under the second step of *Heller*, as we have repeatedly applied intermediate scrutiny in cases where we have reached this step. *Silvester*, 843 F.3d at 823 (applying intermediate scrutiny to a law mandating ten-day waiting periods for the purchase of firearms); *Fyock*, 779 F.3d at 999 (applying intermediate scrutiny to a law prohibiting the possession of large-capacity magazines); *Jackson*, 746 F.3d at 965, 968 (applying intermediate scrutiny to laws mandating certain handgun storage procedures in homes and banning

[4] Although the DROS fee is not a licensing fee, it is analogous in the sense that it applies to essentially all means of acquiring a firearm, just as a licensing fee applies to all those who acquire and possess a firearm under a licensing or registration scheme.

the sale of hollow-point ammunition in San Francisco); *Chovan*, 735 F.3d at 1138 (applying intermediate scrutiny to a law prohibiting domestic violence misdemeanants from possessing firearms).

Similarly, our sister circuits have overwhelmingly applied intermediate scrutiny when analyzing Second Amendment challenges under *Heller*'s second step. *See, e.g.*, *Kwong*, 723 F.3d at 168 & n.16 (law imposing a $340 licensing fee on all handguns); *NRA v. McCraw*, 719 F.3d 338, 348 (5th Cir. 2013) (law prohibiting 18-to-20-year-olds from carrying handguns in public); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (law requiring a "good and substantial reason" for issuance of a handgun permit); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96-97 (2d Cir. 2012) (law requiring a showing of "proper cause" to obtain a concealed carry permit); *Heller v. Dist. of Columbia (Heller II)*, 670 F.3d 1244, 1256-58, 1261-62 (D.C. Cir. 2011) (laws imposing registration requirements on all firearms and banning assault weapons and large-capacity magazines); *Reese*, 627 F.3d at 802 (law prohibiting possession of all firearms while subject to a domestic protection order); *Marzzarella*, 614 F.3d at 97 (law effectively prohibiting possession of firearms with obliterated serial numbers); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (law prohibiting domestic violence misdemeanants from possessing firearms); *but see Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (applying "a more rigorous standard" than intermediate scrutiny, "if not quite 'strict scrutiny,'" to a law mandating firing-range training as a prerequisite to gun ownership but banning all firing ranges within the City of Chicago). In short, intermediate scrutiny is the appropriate

standard for the minimal burden posed by the portion of the DROS fee challenged in this case.

B

Our intermediate scrutiny test under the Second Amendment requires that "(1) the government's stated objective . . . be significant, substantial, or important; and (2) there . . . be a 'reasonable fit' between the challenged regulation and the asserted objective." *Silvester*, 843 F.3d at 821-22 (quoting *Chovan*, 735 F.3d at 1139). The challenged portion of the DROS fee survives this test.

The government's stated objective for using a portion of the DROS fee to fund APPS, as expressed in the legislative findings in Senate Bill 819, is to target "[t]he illegal possession of . . . firearms" because illegal possession "presents a substantial danger to public safety." 2011 Cal. Stat. 5735, § 1(d). Thus, the State asserts that its goal is "improving public safety by disarming individuals who are prohibited from owning or possessing firearms." The legislative findings in Senate Bill 819 estimated that there were more than 18,000 armed prohibited persons in California at the time the law was passed, and the APPS program aims to target these violations. 2011 Cal. Stat. 5735, § 1(d).

As we have previously stated, "'[i]t is self-evident' that public safety is an important government interest," and reducing "gun-related injury and death" promotes public safety. *Jackson*, 746 F.3d at 965 (quoting *Chovan*, 735 F.3d at 1139). Moreover, in light of *Heller*'s specific approval of "prohibitions on possession of firearms by felons and the mentally ill," 554 U.S. at 626-27, we have recognized that public

safety is advanced by keeping guns out of the hands of people who are most likely to misuse them for these reasons. *See e.g.*, *Chovan*, 735 F.3d at 1139-40; *accord*, *Fortson v. L.A. City Attorney's Office*, 852 F.3d 1190, 1193 (9th Cir. 2017). We therefore conclude that the State has established a "significant, substantial, or important interest" in the challenged law. *Silvester*, 843 F.3d at 821-22. The use of the DROS fee to fund APPS thus satisfies the first prong of intermediate scrutiny.

Under the second prong of the intermediate scrutiny test, we require a "reasonable fit" between the government's stated objective and its means of achieving that goal, and we "have said that 'intermediate scrutiny does not require the least restrictive means of furthering a given end.'" *Id.* at 827 (quoting *Jackson*, 746 F.3d at 969).

Given the State's important interest in promoting public safety and disarming prohibited persons under the first prong of the test, there is a "reasonable fit" between these important objectives and the challenged portion of the DROS fee. As we have noted, the statute provides that the DROS fee is intended to fund "costs associated with funding Department of Justice firearms-related regulatory and enforcement activities related to the sale, purchase, possession, loan, or transfer of firearms." Cal. Penal Code § 28225(b)(11). Because the APPS program involves the investigation of illegally armed individuals and enforcement of firearms laws, there is certainly a fit between the legislative objective and the use of the DROS fee. Indeed, the unlawful firearm possession targeted by APPS is the direct result of certain

individuals' prior acquisition of a firearm through a DROS-governed transaction.

The legislative history supports this conclusion. The California Senate Committee considering the legislation stated in its report that it "would clarify that [the Department] is permitted to use DROS funds to pay for its efforts to retrieve unlawfully possessed firearms and prosecute individuals who possess those firearms despite being prohibited by law from doing so." Sen. Comm. on Public Safety, Analysis of S.B. 819, 2011-12 Reg. Sess., at 11 (April 26, 2011). In addition, the legislative history indicates that, like the use of the DROS fee to fund a background check at the time of purchase, the use of the DROS fee to fund APPS simply allows ongoing enforcement when some of "those same individuals" later become prohibited from possessing a firearm. Assem. Comm. on Appropriations, Analysis of S.B. 819, 2011-2012 Reg. Sess., at 2 (July 6, 2011).

Moreover, we have emphasized that "'intermediate scrutiny does not require the least restrictive means of furthering a given end.'" *Silvester*, 843 F.3d at 827 (quoting *Jackson*, 746 F.3d at 969). Accordingly, the fact that not *all* DROS fee payers will later be subject to an APPS enforcement action does not signify that this use of the DROS fee is unconstitutionally broad. *Cf. Jackson*, 746 F.3d at 967 (concluding that the fit was reasonable even though the regulation could have been drawn more narrowly, because the burden was minimal and intermediate scrutiny does not require the least restrictive means). Thus, with the limited burden and the close relationship between firearm acquisition and

monitoring of illegal possession, the State has established the requisite "reasonable fit" to satisfy the second prong of the intermediate scrutiny test.

C

Bauer argues that traditional Second Amendment intermediate scrutiny should not apply because this case involves a fee. He urges us to apply the line of "fee jurisprudence" that was developed by the Supreme Court in the First Amendment context to assess the constitutionality of fees imposed on the exercise of constitutional rights. We have recognized that there are other elements of Second Amendment jurisprudence that have First Amendment analogies. *See Jackson*, 746 F.3d at 960. However, we need not—and do not—decide whether First Amendment fee jurisprudence applies here because the fee easily survives that inquiry.[5]

Under First Amendment fee jurisprudence, the two seminal cases on the constitutionality of fees are *Cox v. New Hampshire*, 312 U.S. 569 (1941), in which permit and fee requirements for parades and public rallies were upheld, and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), in which license and fee requirements for solicitors were struck down. In *Cox*, the Supreme Court explained that a fee imposed on the exercise of a constitutional right must not be a general "revenue tax," but such a fee is lawful if it is instead designed "to meet the expense incident to the

[5] The fact that the State did not contest which form of intermediate scrutiny applied before the district court, but only raised that question on appeal, also cautions against us deciding an issue not fully developed in the district court.

administration of the act and to the maintenance of public order in the matter licensed." 312 U.S. at 577. The Court reiterated this principle in *Murdock*, striking down the licensing fee in that case because it was "not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." 319 U.S. at 113-14. Following this precedent, we have similarly held that a "state may . . . impose a permit fee that is reasonably related to legitimate content-neutral considerations, such as the cost of administering the ordinance" in question, as long as the ordinance or other underlying law is itself constitutional. *S. Oregon Barter Fair v. Jackson Cty.*, 372 F.3d 1128, 1139 (9th Cir. 2004).

Attempting to apply this precedent in the Second Amendment context, Bauer argues that the APPS program is not sufficiently related to the DROS fee because targeting illegal firearm *possession* via APPS is not closely related to the legal *acquisition* of firearms governed by the DROS requirements. Because he defines the regulated activity as being limited to firearm acquisition, Bauer contends that the cost of APPS cannot be considered an "expense[] of policing the activities in question." *Murdock*, 319 U.S. at 113-14. However, this argument is undermined by Bauer's own contention, under the first step of *Heller*, that the DROS fee burdens the Second Amendment right of possession precisely because it governs essentially *all* means of acquiring a firearm in California. *See* Cal. Penal Code §§ 27545, 28050, 28055(b). In light of this reality, DROS-regulated firearm transactions are in fact a close proxy for subsequent firearm possession, and targeting illegal

possession under APPS is closely related to the DROS fee.

Moreover, despite Bauer's emphasis on the fact that only a small subset of DROS fee payers will later become illegal possessors targeted by APPS, we note that essentially everyone targeted by the APPS program was a DROS fee payer at the time he or she acquired a firearm. *Cf. Silvester*, 843 F.3d at 827 (explaining that intermediate scrutiny does not require least restrictive means). Indeed, each instance of firearm possession targeted by APPS is a direct result of a DROS-governed transaction. Along similar lines, Bauer concedes that it is appropriate for the State to use the DROS fee to fund a background check at the time of purchase. The APPS program is, in essence, a temporal extension of the background check program. The APPS program therefore, can fairly be considered an "expense[] of policing the activities in question," *Murdock*, 319 U.S. at 113-14, or an "expense incident to . . . the maintenance of public order in the matter licensed," *Cox*, 312 U.S. at 577.[6]

Because a tax on a constitutional right may not be used to raise general revenue, *Cox*, 312 U.S. at 577, Bauer contends that the DROS fee may not exceed the

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[6] The other federal courts that have considered firearm licensing or registration fees under the fee jurisprudence framework have similarly upheld those fees, each of which was larger than the challenged portion of the DROS fee here. *Heller III*, 801 F.3d at 301; *Kwong*, 723 F.3d at 166; *Second Amendment Arms v. City of Chicago*, 135 F. Supp. 3d 743, 766 (N.D. Ill. 2015); *Justice v. Town of Cicero*, 287 F. Supp. 2d 835 (N.D. Ill. 2011). Again, although the DROS fee is not a licensing fee, it is analogous in the sense that all those who possess a firearm must pay the fee at the outset.

"actual costs" of processing a license or similar direct administrative costs. But in fact, nothing in our case law requires that conclusion.[7] While we have not previously decided whether ongoing enforcement costs may be considered part of the "expense incident to . . . the maintenance of public order in the matter licensed," *Cox*, 312 U.S. at 577, several of our sister circuits have held that "it is permissible to include the costs of both administering and enforcing [the relevant licensing or permitting statute] in determining the constitutionality of [a] registration fee." *Nat'l Awareness Found. v. Abrams*, 50 F.3d 1159, 1166 (2d Cir. 1995) (upholding a registration fee on charitable organizations, fundraisers, and solicitors); *see also Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 274 F.3d 377, 395-96 (6th Cir. 2001) (accounting for ongoing enforcement costs in upholding a licensing fee on nude dancing establishments).

Moreover, where the initial fee enables an activity that has ongoing impacts, such as the purchase of firearms or the licensing of an adult entertainment establishment as in *Deja Vu*, there is an even stronger argument for including ongoing enforcement as part of the costs of "policing the activities in question." *Murdock*, 319 U.S. at 113-14. To the extent that fee jurisprudence applies in the Second Amendment

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[7] The case Bauer cites in support of this argument, *Kaplan v. Cty. of Los Angeles*, 894 F.2d 1076 (9th Cir. 1990), does not actually require that fees be limited to the direct costs of processing licenses or permits; it merely states that the statute *in that case* was clearly narrowly drawn because it allowed local agencies to "recover actual costs alone," *id.* at 1081.

context, therefore, we conclude that enforcement costs are properly considered part of the "expense[] of policing the activities in question" permitted under *Murdock* and *Cox*. *Murdock*, 319 U.S. at 113-14. Accordingly, the enforcement activities carried out through the APPS program are sufficiently related to the DROS fee under this line of jurisprudence, and the second prong of the intermediate scrutiny test is therefore satisfied even considered through the lens of First Amendment fee jurisprudence, which may or may not apply.

D

In sum, the use of the DROS fee to fund APPS survives intermediate scrutiny because the government has demonstrated an important public safety interest in this statutory scheme, and there is a reasonable fit between the government's interest and the means it has chosen to achieve those ends.[8] Accordingly, the district court did not err in concluding that the use of the DROS fee to fund APPS, through California Penal Code § 28225, does not violate the Constitution.

IV

Where a law poses a minimal burden on core Second Amendment rights in furtherance of an important government interest, the federal courts have universally upheld it. We do the same here. In

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[8] In reaching our conclusion, we need not, and do not, decide what the result would be if the DROS fee were used to enforce firearm possession laws in general through the APPS program, or otherwise, rather than firearm possession laws as they apply to those who legally acquired a firearm by paying the fee.

doing so, we need not—and do not—decide whether the fee implicates the Second Amendment, nor do we decide whether First Amendment fee jurisprudence should be applied in analyzing whether the provision passes the intermediate scrutiny test. Because, even assuming the Second Amendment applies in this context, California's use of the DROS fee to fund the APPS program survives intermediate scrutiny under either test, we affirm the district court's grant of summary judgment in favor of the State.

AFFIRMED.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-15428

BARRY BAUER; NICOLE FERRY; JEFFREY HACKER; NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; HERB BAUER SPORTING GOODS, INC.,

Plaintiffs-Appellants,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California; STEPHEN LINDLEY, in his official capacity as Acting Chief of the California Department of Justice; DOES, 1-10,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, Chief Judge, Presiding

Before: Sidney R. Thomas, Chief Judge, and Ferdinand F. Fernandez and Mary H. Murguia, Circuit Judges.

Filed July 12, 2017

ORDER

The panel has voted to deny Appellants' petition for rehearing en banc. The full Court has been advised of the petition for rehearing en banc, and no judge has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The appellant's petition for rehearing en banc is denied.

Appendix C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 1:11-cv-1440-LJO-MJS

BARRY BAUER, et al.,

Plaintiffs,

v.

KAMALA D. HARRIS, et al.,

Defendants.

Filed March 2, 2015

MEMORANDUM DECISION AND ORDER RE CROSS MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

This case presents a narrow yet novel issue under the Second Amendment to the United States Constitution. Plaintiffs[1] bring this suit under 42

[1] Plaintiffs are Barry Bauer, Stephen Warkentin, Jeffrey Hacker, Nicole Ferry, the National Rifle Association of America, Inc., ("NRA"), California Rifle and Pistol Association Foundation ("CRPA"), and Herb Bauer Sporting Goods, Inc. ("Herb Bauer") (collectively, "Plaintiffs").

U.S.C. § 1983 against Defendants[2] in which they contend the State of California's use of revenue generated by a fee imposed on every firearm sale conducted in the state, the Dealer's Record of Sale fee ("the DROS fee"), to fund a firearms-related law enforcement program administered by the California Department of Justice ("DOJ"), known as the Armed Prohibited Persons System ("the APPS"), violates the Second Amendment. Plaintiffs seek a declaration from this Court that Defendants' use of the revenue from the DROS fee to fund the APPS "impermissibly infringes on [Plaintiffs'] Second Amendment rights," Doc. 37, Second Amended Complaint ("SAC"), at 15, and an injunction "forbidding [Defendants] . . . from using DROS Fee revenues to fund the APPS program." *Id.* at 16.

Currently before the Court are the parties' cross motions for summary judgment. Docs. 51, 52. The Court finds it appropriate to rule on the motions without oral argument. *See* Local Rule 230(g). Further, the parties agree that this case can and should be resolved on the motions and that no trial is necessary. *See* Doc. 57. For the following reasons, the Court GRANTS Defendants' motion for summary judgment and DENIES Plaintiffs' motion for summary judgment.

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[2] Defendants are Kamala Harris, Stephen Lindley, and Does 1-100 (collectively, "Defendants").

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Facts.[3]

The DROS fee imposes a fee of $19.00 "for one or more firearms (handguns, rifles, shotguns) transferred at the same time to the same transferee." Cal. Code. Regs. Tit. 11, § 4001; SUF 15; § 28225(a); Doc. 54-6, Defendants' Response to Plaintiffs' Statement of Undisputed Facts ("SUF") 31. Anyone who purchases a firearm from a federally licensed California firearm vendor ("FFL") in California must pay the DROS fee as a prerequisite to receiving the firearm. SUF 1, 15.

In 2001, the California legislature established the APPS. *See* Cal. Penal Code § 30000.[4] The APPS is "an online database . . . [, the] purpose of [which] is to cross-reference persons who have ownership or possession of a firearm" and who "fall within a class of persons who are prohibited from owning or possessing a firearm." § 30000(a); SUF 46. The DOJ describes the APPS as "populated with data from a number of existing DOJ databases, to identify criminals who are prohibited from possessing firearms subsequent to the legal acquisition of firearms or registration of assault weapons." SUF 47. "Any person who is on the APPS List may be investigated for criminal firearm possession and potentially an enforcement action by

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[3] The parties agree that there are no materially factual disputes. See Doc. 57. Further, although the Court has reviewed the entire record, the Court will discuss only the facts necessary to resolve the parties' cross-motions for summary judgment.

[4] All further statutory references are to the California Penal Code unless otherwise indicated.

the [DOJ] to confiscate the firearms." SUF 52. The APPS Enforcement Section's responsibilities therefore include

> investigating, disarming, apprehending, and ensuring the prosecution of persons who are prohibited or become prohibited from purchasing or possessing a firearm as a result of their mental health status, a felony/violent misdemeanor conviction, and/or a domestic restraining order.

SUF 71. Revenue generated by the DROS fee is the "primary or exclusive funding source for the costs of employing the members of the APPS Unit and Enforcement Section." SUF 119.

B. Procedural History.

Plaintiffs Bauer, Warkentin, Hacker, and Ferry have purchased firearms from California FFLs within the past five years and, in doing so, paid the DROS fee prior to acquiring those firearms. SAC at ¶¶ 16-19. In addition, Plaintiffs Warkentin and Hacker purchased firearms from a private party, through an FFL. *Id.* at ¶ 17.

Plaintiffs NRA and CRPA are non-profit civil rights groups dedicated to the protection of Second Amendment rights, *id.* at ¶¶ 20-21, and Herb Bauer is a California FFL that sells firearms. *Id.* at ¶ 23. Each of these Plaintiffs "either has individual members or supporters, or represents individual members of a related organization . . . who have an acute interest in purchasing firearms and do not wish to pay unlawful fees, taxes, or other costs associated with that purchase." *Id.* at ¶ 25.

Plaintiffs bring one claim under 42 U.S.C. § 1983, entitled "Validity of Defendants' Use of DROS Fee Revenues, Violation of the Second Amendment Right to Keep and Bear Arms (U.S. Const., Amends. II and XIV." *Id.* at 15. According to Plaintiffs, this case presents the issue of "whether the state can mandate that all *law-abiding* individuals who seek to exercise their right to acquire firearms bear the full cost of a law enforcement scheme designed to ferret out and confiscate firearms from those who *unlawfully* possess them." Doc. 52-1 at 7 (emphasis in original). Plaintiffs "challenge the constitutionality of [Defendants'] use of the revenues generated from the DROS Fee for general law enforcement activities which have no relation to fee payers; specifically, activities associated with [the APPS]." SAC at ¶ 8. Plaintiffs assert that Defendants' "use of revenues generated from the DROS Fee to fund general law enforcement activities associated with the [APPS] is unconstitutional, because the criminal misuse of firearms is not sufficiently related to the fee payers' activities, i.e., lawful firearm transactions." *Id.* at ¶ 12. In other words, Plaintiffs maintain that "[t]he dispute in this matter is over the use of DROS Fee revenues being used to fund activities concerning the 'possession' of firearms specifically, and more specifically, their use for funding APPS activities." Doc. 52-1 at 10.

Plaintiffs seek a declaration from this Court that Defendants'

> enforcement of the APPS program is not sufficiently related to [Plaintiffs'] lawful firearm purchases so as to justify [Defendants'] using the revenues from the

> DROS Fee—which [Plaintiffs] must pay to obtain a firearm—for the purpose of funding the APPS program, and that such use of DROS Fee funds impermissibly infringes on [Plaintiffs'] Second Amendment rights because it improperly requires [Plaintiffs] to bear the burden of financing general law enforcement activities as a precondition to exercising those rights.

SAC at 15. Plaintiffs further seek "a preliminary and permanent prohibitory injunction forbidding [Defendants] . . . from using DROS Fee revenues to fund the APPS program." *Id.* at 16.

Defendants assert that the imposition of the DROS fee is constitutional because it "is designed to defray DOJ's costs associated with enforcing a variety of California's firearm laws, including but not limited to the laws related to APPS." Doc. 51-1 at 18. Analogizing to First Amendment precedent, Defendants claim "that there is nothing unconstitutional about imposing a fee on the exercise of a constitutional right when the fee is designed to defray the broad administrative costs of regulating the protected activity." *Id.* at 16. Defendants further assert "[t]here is also a common sense connection between the payment of a fee which is used, in part, to ensure that people desiring to possess firearms in California are not legally prohibited from possessing them and the use of that fee to recover firearms from persons who become prohibited from possessing them." *Id.* at 19. Simply put, Defendants contend that the DROS fee is a constitutionally permissible fee on constitutionally protected activity.

III. STANDARD OF DECISION

Summary judgment is appropriate when the pleadings, disclosure materials, discovery, and any affidavits provided establish that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A material fact is one that may affect the outcome of the case under the applicable law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable trier of fact could return a verdict in favor of the nonmoving party." *Id.*

The party seeking summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks omitted). The exact nature of this responsibility, however, varies depending on whether the issue on which summary judgment is sought is one in which the movant or the nonmoving party carries the ultimate burden of proof. *See Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); *Cecala v. Newman*, 532 F. Supp. 2d 1118, 1132 (D. Ariz. 2007). If the movant will have the burden of proof at trial, it must demonstrate, with affirmative evidence, that "no reasonable trier of fact could find other than for the moving party." *Soremekun*, 509 F.3d at 984. In contrast, if the nonmoving party will have the burden of proof at trial,

"the movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case." *Id.* (citing *Celotex*, 477 U.S. at 323).

If the movant satisfies its initial burden, the nonmoving party must go beyond the allegations in its pleadings to "show a genuine issue of material fact by presenting *affirmative evidence* from which a jury could find in [its] favor." *FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009) (emphasis in original). "[B]ald assertions or a mere scintilla of evidence" will not suffice in this regard. *Id.* at 929; *see also Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.") (citation omitted). "Where the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

In resolving a summary judgment motion, "the court does not make credibility determinations or weigh conflicting evidence." *Soremekun*, 509 F.3d at 984. That remains the province of the jury or fact finder. *See Anderson*, 477 U.S. at 255. Instead, "[t]he evidence of the [nonmoving party] is to be believed, and all justifiable inferences are to be drawn in [its] favor." *Id.* Inferences, however, are not drawn out of the air; the nonmoving party must produce a factual predicate from which the inference may reasonably be drawn. *See Richards v. Nielsen Freight Lines*, 602 F.

Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898 (9th Cir. 1987).

IV. ANALYSIS

The Second Amendment provides: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." U.S. Const. amend. II. The Supreme Court holds "that the Second Amendment codified a pre-existing, individual right to keep and bear arms and that the 'central component of the right' is self-defense," *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1149 (9th Cir. 2014) (citing *Heller v. District of Columbia*, 554 U.S. 570, 592, 599 (2008)), and that the right is fully applicable to the states. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The Supreme Court explained in *Heller* that

> [a]lthough we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

554 U.S. 626-27. Rather, the Court indicated that such regulations are "presumptively lawful." *Id.* at 627 n.26.

The Ninth Circuit outlined the applicable standards for assessing Second Amendment claims in *Jackson v. City & Cnty. of San Francisco*, 746 F.3d

953, 960 (9th Cir. 2014). The two-step inquiry the Ninth Circuit has adopted "(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny." *Id.* (quoting *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)).

In assessing the first step, the Court must ask "'whether the challenged law burdens conduct protected by the Second Amendment . . . based on a 'historical understanding of the scope of the [Second Amendment] right . . . or whether the challenged law falls within a 'well-defined and narrowly limited' category of prohibitions 'that have been historically unprotected.'" *Id.* (citations omitted). Although the Ninth Circuit has left determining the scope of the Second Amendment "for another day," *Nordyke v. King*, 681 F.3d 1041, 1044 (9th Cir. 2012) (en banc), that court holds that, "[t]o determine whether a challenged law falls outside the historical scope of the Second Amendment," the Court must ask "whether the regulation is one of the 'presumptively lawful regulatory measures' identified in *Heller*, 554 U.S. 627 n.26, or whether the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment." *Jackson*, 746 F.3d at 960 (citations omitted). If a challenged law is a "presumptively lawful regulatory measure" as identified in *Heller*, or if it falls outside the historical scope of the Second Amendment, the inquiry ends—the challenged law does not violate the Second Amendment. *See id.*; *see also Peruta*, 742 F.3d at 1151 (citing *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol,*

Tobacco, Firearms & Explosives, 700 F.3d 185, 196 (5th Cir. 2012) ("For now, we state that a longstanding presumptively lawful regulatory measure . . . would likely [burden conduct] outside the ambit of the Second Amendment.")).

Plaintiffs have operated on the assumption that regulations on firearms commerce fall within the scope of the Second Amendment. But Plaintiffs do not provide—and the Court cannot find—any binding authority that so holds. Courts within the Ninth Circuit and elsewhere are split on the issue, and also are split on the applicable standard of scrutiny to apply, if any.[5]

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[5] *See, e.g.*, *Silvester v. Harris*, __ F. Supp. 2d __, 2014 WL 4209563, at *27, 36 (E.D. Cal. Aug. 25, 2014) (finding California law imposing a 10-day waiting period on purchase of firearms "burdens [and violates] the Second Amendment right to keep and bear arms"); *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010) ("Commercial regulations on the sale of firearms do not fall outside the scope of the Second Amendment"); *Illinois Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 947 (N.D. Ill. 2014) (holding that Chicago's laws, "which ban gun sales and transfers other than inheritance, are declared unconstitutional under the Second Amendment"); *Teixeira v. Cnty. of Alameda*, No. 12-cv-3288-WHO, 2013 WL 4804756, at *7 (N.D. Cal. Sept. 9, 2013) (finding that regulation limiting areas where gun stores may be located is a presumptively lawful regulation "imposing conditions and qualifications on the commercial sale of arms" and thus "would pass any applicable level of scrutiny"); *Teixeira v. Cnty. of Alameda*, No. 12-cv-3288 SI, 2013 WL 707043, at *5 (N.D. Cal. Feb. 26, 2013) ("*Heller* envisioned a process where courts first examine whether the regulation is presumptively valid and therefore excepted from Second Amendment coverage—a presumption that may be overcome by a showing that the regulation nonetheless places a substantial burden the 'core protection of the Second

As discussed, the Ninth Circuit in *Jackson* held that, "[t]o determine whether a challenged law falls outside the historical scope of the Second Amendment, we [first] ask whether the regulation is one of the 'presumptively lawful regulatory measures' identified in *Heller*." *See* 746 F.3d at 960 (citation omitted). The court further held that if a challenged regulation constitutes one of the "presumptively lawful regulatory measures" enumerated in *Heller*, then that regulation falls outside the ambit of the Second Amendment and no further inquiry is necessary. *Id.* (citation omitted). Other courts within the Ninth Circuit have read *Jackson* to stand for that proposition. *See, e.g.*, *Pena v. Lindley*, No. 2:09-cv-1185-KJM-CKD, Doc. 26 at 22 (E.D. Cal. Feb. 26, 2015) (holding that California law placing restrictions and regulations on, among other things, the sale of

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Amendment,' which is the ability to defend 'hearth and home'") (citation omitted); *Montana Shooting Sports Ass'n v. Holder*, No. 09-cv-147-DWM-JCL, 2010 WL 3926029, at *21 (D. Mont. Aug. 31, 2010) (noting that individuals "who essentially claim they have the right to manufacture and sell firearms" had no Second Amendment claim because "the specific Second Amendment right recognized by *Heller* is simply not implicated"), *adopted by* 2010 WL 3909431 (D. Mont. Sept. 29, 2010); *United States v. Chafin*, 423 Fed. App'x 342, 344 (4th Cir. 2011) (finding no authority "that remotely suggests that, at the time of its ratification, the Second Amendment was understood to protect an individual's right to sell a firearm"); *Colorado Outfitters Ass'n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1074 (D. Colo. 2014) ("Logically, if the government can lawfully regulate the ability of persons to obtain firearms from commercial dealers, that same power to regulate should extend to non-commercial transactions . . . . Thus, the Court has grave doubt that a law regulating (as opposed to prohibiting) temporary private transfers of firearms implicates the Second Amendment's guarantee at all.").

handguns is "'one of the presumptively lawful regulatory measures identified in *Heller*' and, as such, 'falls outside the historical scope' of the Second Amendment") (quoting *Jackson*, 746 F.3d at 960) (quotation marks omitted).

As Plaintiffs strenuously argue, the DROS fee is a condition on the sale of firearms: unless and until an individual pays the DROS fee, he/she may not purchase and possess the firearm. The DROS fee, therefore, is a presumptively lawful regulatory measure. *See Jackson*, 746 F.3d at 960. Accordingly, the DROS fee is constitutional because it "falls outside the historical scope of the Second Amendment." *Id.*

In any event, the DROS fee imposes only a $19.00 fee on firearm transactions. Under any level of scrutiny, the DROS fee is constitutional because it places only a marginal burden on "the core of the Second Amendment," which is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Peruta*, 742 F.3d at 1181 (quoting *Heller*, 554 U.S. at 635).[6]

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[6] Because Plaintiffs assumed the Second Amendment protects the activities at issue here—commercial sales of firearms—and Defendants do not challenge that assumption, the parties focused on whether California may impose the DROS fee as a condition of purchasing a firearm in the state. In doing so, both parties relied primarily on analogies to First Amendment jurisprudence in support of their respective positions. Plaintiffs correctly point out that other courts have applied the principles used to "analyz[e] government fees imposed on First Amendment protected conduct" in other civil rights contexts. *See* Doc. 52-1 at 21 (collecting cases). Plaintiffs are also correct that the Ninth Circuit has been "guided by First Amendment principles" in assessing Second Amendment claims. Doc. 52-1 (citing *Chovan*,

V. CONCLUSION AND ORDER

For the foregoing reasons, the Court finds that Defendants' use of the DROS fee to fund the APPS does not violate the Second Amendment. Accordingly, the Court GRANTS Defendants' motion for summary judgment in Defendants' favor and against Plaintiffs. Plaintiffs' motion for summary judgment is DENIED. The Clerk of Court is directed to CLOSE this case.

IT IS SO ORDERED.

DATED: March 2, 2015 /s/ Lawrence J. O'Neill
United States District Judge

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735 F.3d at 1138); *see also Jackson*, 746 F.3d at 960-61 (discussing use of First Amendment principles in applying appropriate level of scrutiny to Second Amendment claims). But, because the Ninth Circuit has not indicated that First Amendment precedent concerning whether and to what extent a state may impose a fee as a precondition to exercising a constitutional right is appropriate in the Second Amendment context, the Court declines to apply that precedent here.

Appendix D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. XIV, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cal. Penal Code § 11106

(a) (1) In order to assist in the investigation of crime, the prosecution of civil actions by city attorneys pursuant to paragraph (3) of subdivision (b), the arrest and prosecution of criminals, and the recovery of lost, stolen, or found property, the Attorney General shall keep and properly file a complete record of all of the following:

(A) All copies of fingerprints.

(B) Copies of licenses to carry firearms issued pursuant to Section 26150, 26155, 26170, or 26215.

(C) Information reported to the Department of Justice pursuant to Section 26225, 27875, 27920, 29180 or 29830.

(D) Dealers' records of sales of firearms.

(E) Reports provided pursuant to Article 1 (commencing with Section 27500) of Chapter 4 of Division 6 of Title 4 of Part 6, or pursuant to any provision listed in subdivision (a) of Section 16585.

(F) Forms provided pursuant to Section 12084, as that section read prior to being repealed on January 1, 2006.

(G) Reports provided pursuant to Article 1 (commencing with Section 26700) and Article 2 (commencing with Section 26800) of Chapter 2 of Division 6 of Title 4 of Part 6, that are not dealers records of sales of firearms.

(H) Information provided pursuant to Section 28255.

(I) Reports of stolen, lost, found, pledged, or pawned property in any city or county of this state.

(2) The Attorney General shall, upon proper application therefor, furnish the information to the officers referred to in Section 11105.

(b) (1) The Attorney General shall permanently keep and properly file and maintain all information reported to the Department of Justice pursuant to the following provisions as to firearms and maintain a registry thereof:

(A) Article 1 (commencing with Section 26700) and Article 2 (commencing with Section 26800) of Chapter 2 of Division 6 of Title 4 of Part 6.

(B) Article 1 (commencing with Section 27500) of Chapter 4 of Division 6 of Title 4 of Part 6.

(C) Chapter 5 (commencing with Section 28050) of Division 6 of Title 4 of Part 6.

(D) Any provision listed in subdivision (a) of Section 16585.

(E) Former Section 12084.

(F) Section 28255.

(G) Section 29180.

(H) Any other law.

(2) The registry shall consist of all of the following:

(A) The name, address, identification of, place of birth (state or country), complete telephone number, occupation, sex, description, and all legal names and aliases ever used by the owner or person being loaned the particular firearm as listed on the information provided to the department on the Dealers' Record of Sale, the Law Enforcement Firearms Transfer (LEFT), as defined in former Section 12084, or reports made to the department pursuant to any provision listed in subdivision (a) of Section 16585, Section 28255 or 29180, or any other law.

(B) The name and address of, and other information about, any person (whether a dealer or a private party) from whom the

owner acquired or the person being loaned the particular firearm and when the firearm was acquired or loaned as listed on the information provided to the department on the Dealers Record of Sale, the LEFT, or reports made to the department pursuant to any provision listed in subdivision (a) of Section 16585 or any other law.

(C) Any waiting period exemption applicable to the transaction which resulted in the owner of or the person being loaned the particular firearm acquiring or being loaned that firearm.

(D) The manufacturer s name if stamped on the firearm, model name or number if stamped on the firearm, and, if applicable, the serial number, other number (if more than one serial number is stamped on the firearm), caliber, type of firearm, if the firearm is new or used, barrel length, and color of the firearm, or, if the firearm is not a handgun and does not have a serial number or any identification number or mark assigned to it, that shall be noted.

(3) Information in the registry referred to in this subdivision shall, upon proper application therefor, be furnished to the officers referred to in Section 11105, to a city attorney prosecuting a civil action, solely for use in prosecuting that civil action and not for any other purpose, or to the person listed in the registry as the owner or person who is listed as being loaned the particular firearm.

(4) If any person is listed in the registry as the owner of a firearm through a Dealers' Record of Sale prior to 1979, and the person listed in the registry requests by letter that the Attorney General store and keep the record electronically, as well as in the record's existing photographic, photostatic, or nonerasable optically stored form, the Attorney General shall do so within three working days of receipt of the request. The Attorney General shall, in writing, and as soon as practicable, notify the person requesting electronic storage of the record that the request has been honored as required by this paragraph.

(c) (1) If the conditions specified in paragraph (2) are met, any officer referred to in paragraphs (1) to (6), inclusive, of subdivision (b) of Section 11105 may disseminate the name of the subject of the record, the number of the firearms listed in the record, and the description of any firearm, including the make, model, and caliber, from the record relating to any firearm's sale, transfer, registration, or license record, or any information reported to the Department of Justice pursuant to any of the following:

(A) Section 26225, 27875, or 27920.

(B) Article 1 (commencing with Section 26700) and Article 2 (commencing with Section 26800) of Chapter 2 of Division 6 of Title 4 of Part 6.

(C) Article 1 (commencing with Section 27500) of Chapter 4 of Division 6 of Title 4 of Part 6.

(D) Chapter 5 (commencing with Section 28050) of Division 6 of Title 4 of Part 6.

(E) Article 2 (commencing with Section 28150) of Chapter 6 of Division 6 of Title 4 of Part 6.

(F) Article 5 (commencing with Section 30900) of Chapter 2 of Division 10 of Title 4 of Part 6.

(G) Chapter 2 (commencing with Section 33850) of Division 11 of Title 4 of Part 6.

(H) Any provision listed in subdivision (a) of Section 16585.

(2) Information may be disseminated pursuant to paragraph (1) only if all of the following conditions are satisfied:

(A) The subject of the record has been arraigned for a crime in which the victim is a person described in subdivisions (a) to (f), inclusive, of Section 6211 of the Family Code and is being prosecuted or is serving a sentence for the crime, or the subject of the record is the subject of an emergency protective order, a temporary restraining order, or an order after hearing, which is in effect and has been issued by a family court under the Domestic Violence Protection Act set forth in Division 10 (commencing with Section 6200) of the Family Code.

(B) The information is disseminated only to the victim of the crime or to the person who has obtained the emergency protective order, the temporary restraining order, or the order after hearing issued by the family court.

(C) Whenever a law enforcement officer disseminates the information authorized by this subdivision, that officer or another officer

assigned to the case shall immediately provide the victim of the crime with a Victims of Domestic Violence card, as specified in subparagraph (H) of paragraph (9) of subdivision (c) of Section 13701.

(3) The victim or person to whom information is disseminated pursuant to this subdivision may disclose it as he or she deems necessary to protect himself or herself or another person from bodily harm by the person who is the subject of the record.

Cal. Penal Code § 26815

No firearm shall be delivered:

(a) Within 10 days of the application to purchase, or, after notice by the department pursuant to Section 28220, within 10 days of the submission to the department of any correction to the application, or within 10 days of the submission to the department of any fee required pursuant to Section 28225, whichever is later.

(b) Unless unloaded and securely wrapped or unloaded and in a locked container.

(c) Unless the purchaser, transferee, or person being loaned the firearm presents clear evidence of the person's identity and age to the dealer.

(d) Whenever the dealer is notified by the Department of Justice that the person is prohibited by state or federal law from processing, owning, purchasing, or receiving a firearm. The dealer shall make available to the person in the prohibited class a prohibited notice and transfer form, provided by the department, stating that the person is prohibited from owning or

possessing a firearm, and that the person may obtain from the department the reason for the prohibition.

Cal. Penal Code § 27875

(a) Section 27545 does not apply to the transfer of a firearm by gift, bequest, intestate succession, or other means from one individual to another, if all of the following requirements are met:

(1) The transfer is infrequent, as defined in Section 16730.

(2) The transfer is between members of the same immediate family.

(3) Within 30 days of taking possession of the firearm, the person to whom it is transferred shall submit a report to the Department of Justice, in a manner prescribed by the department, that includes information concerning the individual taking possession of the firearm, how title was obtained and from whom, and a description of the firearm in question. The reports that individuals complete pursuant to this subdivision shall be made available to them in a format prescribed by the department.

(4) Until January 1, 2015, the person taking title to the firearm shall first obtain a valid handgun safety certificate if the firearm is a handgun, and commencing January 1, 2015, a valid firearm safety certificate for any firearm, except that in the case of a handgun, a valid unexpired handgun safety certificate may be used.

(5) The person receiving the firearm is 18 years of age or older.

(b) Subdivision (a) of Section 27585 does not apply to a person who imports a firearm into this state, brings a firearm into this state, or transports a firearm into this state if all of the following requirements are met:

(1) The person acquires ownership of the firearm from an immediate family member by bequest or intestate succession.

(2) The person has obtained a valid firearm safety certificate, except that in the case of a handgun, a valid unexpired handgun safety certificate may be used.

(3) The receipt of any firearm by the individual by bequest or intestate succession is infrequent, as defined in Section 16730.

(4) The person acquiring ownership of the firearm by bequest or intestate succession is 18 years of age or older.

(5) Within 30 days of that person taking possession of the firearm and importing, bringing, or transporting it into this state, the person shall submit a report to the Department of Justice, in a manner prescribed by the department, that includes information concerning the individual taking possession of the firearm, how title was obtained and from whom, and a description of the firearm in question. The reports that individuals complete pursuant to this subdivision shall be made available to them in a format prescribed by the department.

Cal. Penal Code § 28155

The Department of Justice shall prescribe the form of the register and the record of electronic transfer pursuant to Section 28105.

Cal. Penal Code § 28160

(a) For all firearms, the register or record of electronic transfer shall include all of the following information:

(1) The date and time of sale.

(2) The make of firearm.

(3) Peace officer exemption status pursuant to the provisions listed in subdivision (c) of Section 16585, and the agency name.

(4) Any applicable waiting period exemption information.

(5) California Firearms Dealer number issued pursuant to Article 1 (commencing with Section 26700) of Chapter 2.

(6) For transactions occurring on or after January 1, 2003, the purchaser's handgun safety certificate number issued pursuant to Article 2 (commencing with Section 31610) of Chapter 4 of Division 10 of this title, or pursuant to former Article 8 (commencing with Section 12800) of Chapter 6 of Title 2 of Part 4, as that article read at any time from when it became operative on January 1, 2003, to when it was repealed by the Deadly Weapons Recodification Act of 2010.

(7) Manufacturer's name if stamped on the firearm.

(8) Model name or number, if stamped on the firearm.

(9) Serial number, if applicable.

(10) Other number, if more than one serial number is stamped on the firearm.

(11) Any identification number or mark assigned to the firearm pursuant to Section 23910.

(12) If the firearm is not a handgun and does not have a serial number, identification number, or mark assigned to it, a notation as to that fact.

(13) Caliber.

(14) Type of firearm.

(15) If the firearm is new or used.

(16) Barrel length.

(17) Color of the firearm.

(18) Full name of purchaser.

(19) Purchaser's complete date of birth.

(20) Purchaser's local address.

(21) If current address is temporary, complete permanent address of purchaser.

(22) Identification of purchaser.

(23) Purchaser's place of birth (state or country).

(24) Purchaser's complete telephone number.

(25) Purchaser's occupation.

(26) Purchaser's gender.

(27) Purchaser's physical description.

(28) All legal names and aliases ever used by the purchaser.

(29) Yes or no answer to questions that prohibit purchase, including, but not limited to, conviction

of a felony as described in Chapter 2 (commencing with Section 29800) or an offense described in Chapter 3 (commencing with Section 29900) of Division 9 of this title, the purchaser's status as a person described in Section 8100 of the Welfare and Institutions Code, whether the purchaser is a person who has been adjudicated by a court to be a danger to others or found not guilty by reason of insanity, and whether the purchaser is a person who has been found incompetent to stand trial or placed under conservatorship by a court pursuant to Section 8103 of the Welfare and Institutions Code.

(30) Signature of purchaser.

(31) Signature of salesperson, as a witness to the purchaser's signature.

(32) Salesperson's certificate of eligibility number, if the salesperson has obtained a certificate of eligibility.

(33) Name and complete address of the dealer or firm selling the firearm as shown on the dealer's license.

(34) The establishment number, if assigned.

(35) The dealer's complete business telephone number.

(36) Any information required by Chapter 5 (commencing with Section 28050).

(37) Any information required to determine whether subdivision (f) of Section 27540 applies.

(38) A statement of the penalties for signing a fictitious name or address, knowingly furnishing

any incorrect information, or knowingly omitting any information required to be provided for the register.

(39) A statement informing the purchaser, after his or her ownership of a firearm, of all of the following:

(A) Upon his or her application, the Department of Justice shall furnish him or her any information reported to the department as it relates to his or her ownership of that firearm.

(B) The purchaser is entitled to file a report of his or her acquisition, disposition, or ownership of a firearm with the department pursuant to Section 28000.

(C) Instructions for accessing the department's Internet Web site for more information.

(40) For transactions on and after January 1, 2015, the purchaser's firearm safety certificate number, except that in the case of a handgun, the number from an unexpired handgun safety certificate may be used.

(b) The purchaser shall provide the purchaser's right thumbprint on the register in a manner prescribed by the department. No exception to this requirement shall be permitted except by regulations adopted by the department.

(c) The firearms dealer shall record on the register or record of electronic transfer the date that the firearm is delivered, together with the firearm dealer's signature indicating delivery of the firearm.

(d) The purchaser shall sign the register or the record of electronic transfer on the date that the firearm is delivered to him or her.

Cal. Penal Code § 28180

(a) The purchaser's name, date of birth, and driver's license or identification number shall be obtained electronically from the magnetic strip on the purchaser's driver's license or identification and shall not be supplied by any other means, except as authorized by the department.

(b) The requirement of subdivision (a) shall not apply in either of the following cases:

(1) The purchaser's identification consists of a military identification card.

(2) Due to technical limitations, the magnetic strip reader is unable to obtain the required information from the purchaser's identification. In those circumstances, the firearms dealer shall obtain a photocopy of the identification as proof of compliance.

(c) In the event that the dealer has reported to the department that the dealer's equipment has failed, information pursuant to this section shall be obtained by an alternative method to be determined by the department.

Cal. Penal Code § 28205

(a) Until January 1, 1998, the Department of Justice shall determine the method by which a dealer shall submit firearm purchaser information to the department. The information shall be in one of the following formats:

(1) Submission of the register described in Article 2 (commencing with Section 28150).

(2) Electronic or telephonic transfer of the information contained in the register described in Article 2 (commencing with Section 28150).

(b) On or after January 1, 1998, electronic or telephonic transfer, including voice or facsimile transmission, shall be the exclusive means by which purchaser information is transmitted to the department.

(c) On or after January 1, 2003, except as permitted by the department, electronic transfer shall be the exclusive means by which information is transmitted to the department. Telephonic transfer shall not be permitted for information regarding sales of any firearms.

Cal. Penal Code § 28220

(a) Upon submission of firearm purchaser information, the Department of Justice shall examine its records, as well as those records that it is authorized to request from the State Department of State Hospitals pursuant to Section 8104 of the Welfare and Institutions Code, in order to determine if the purchaser is a person described in subdivision (a) of Section 27535, or is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm.

(b) The Department of Justice shall participate in the National Instant Criminal Background Check System (NICS), as described in subsection (t) of Section 922 of Title 18 of the United States Code, and shall notify the dealer and the chief of the police department of the

city or city and county in which the sale was made, or if the sale was made in a district in which there is no municipal police department, the sheriff of the county in which the sale was made, that the purchaser is a person prohibited from acquiring a firearm under federal law.

(c) If the department determines that the purchaser is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm or is a person described in subdivision (a) of Section 27535, it shall immediately notify the dealer and the chief of the police department of the city or city and county in which the sale was made, or if the sale was made in a district in which there is no municipal police department, the sheriff of the county in which the sale was made, of that fact.

(d) If the department determines that the copies of the register submitted to it pursuant to subdivision (d) of Section 28210 contain any blank spaces or inaccurate, illegible, or incomplete information, preventing identification of the purchaser or the handgun or other firearm to be purchased, or if any fee required pursuant to Section 28225 is not submitted by the dealer in conjunction with submission of copies of the register, the department may notify the dealer of that fact. Upon notification by the department, the dealer shall submit corrected copies of the register to the department, or shall submit any fee required pursuant to Section 28225, or both, as appropriate and, if notification by the department is received by the dealer at any time prior to delivery of the firearm to be purchased, the dealer shall withhold delivery until

the conclusion of the waiting period described in Sections 26815 and 27540.

(e) If the department determines that the information transmitted to it pursuant to Section 28215 contains inaccurate or incomplete information preventing identification of the purchaser or the handgun or other firearm to be purchased, or if the fee required pursuant to Section 28225 is not transmitted by the dealer in conjunction with transmission of the electronic or telephonic record, the department may notify the dealer of that fact. Upon notification by the department, the dealer shall transmit corrections to the record of electronic or telephonic transfer to the department, or shall transmit any fee required pursuant to Section 28225, or both, as appropriate, and if notification by the department is received by the dealer at any time prior to delivery of the firearm to be purchased, the dealer shall withhold delivery until the conclusion of the waiting period described in Sections 26815 and 27540.

(f)(1)(A) The department shall immediately notify the dealer to delay the transfer of the firearm to the purchaser if the records of the department, or the records available to the department in the National Instant Criminal Background Check System, indicate one of the following:

(i) The purchaser has been taken into custody and placed in a facility for mental health treatment or evaluation and may be a person described in Section 8100 or 8103 of the Welfare and Institutions Code and the department is unable to ascertain

whether the purchaser is a person who is prohibited from possessing, receiving, owning, or purchasing a firearm, pursuant to Section 8100 or 8103 of the Welfare and Institutions Code, prior to the conclusion of the waiting period described in Sections 26815 and 27540.

(ii) The purchaser has been arrested for, or charged with, a crime that would make him or her, if convicted, a person who is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm, and the department is unable to ascertain whether the purchaser was convicted of that offense prior to the conclusion of the waiting period described in Sections 26815 and 27540.

(iii) The purchaser may be a person described in subdivision (a) of Section 27535, and the department is unable to ascertain whether the purchaser, in fact, is a person described in subdivision (a) of Section 27535, prior to the conclusion of the waiting period described in Sections 26815 and 27540.

(B) The dealer shall provide the purchaser with information about the manner in which he or she may contact the department regarding the delay described in subparagraph (A).

(2) The department shall notify the purchaser by mail regarding the delay and explain the process

by which the purchaser may obtain a copy of the criminal or mental health record the department has on file for the purchaser. Upon receipt of that criminal or mental health record, the purchaser shall report any inaccuracies or incompleteness to the department on an approved form.

(3) If the department ascertains the final disposition of the arrest or criminal charge, or the outcome of the mental health treatment or evaluation, or the purchaser's eligibility to purchase a firearm, as described in paragraph (1), after the waiting period described in Sections 26815 and 27540, but within 30 days of the dealer's original submission of the purchaser information to the department pursuant to this section, the department shall do the following:

(A) If the purchaser is not a person described in subdivision (a) of Section 27535, and is not prohibited by state or federal law, including, but not limited to, Section 8100 or 8103 of the Welfare and Institutions Code, from possessing, receiving, owning, or purchasing a firearm, the department shall immediately notify the dealer of that fact and the dealer may then immediately transfer the firearm to the purchaser, upon the dealer's recording on the register or record of electronic transfer the date that the firearm is transferred, the dealer signing the register or record of electronic transfer indicating delivery of the firearm to that purchaser, and the purchaser signing the register or record of electronic transfer acknowledging the receipt of the

firearm on the date that the firearm is delivered to him or her.

(B) If the purchaser is a person described in subdivision (a) of Section 27535, or is prohibited by state or federal law, including, but not limited to, Section 8100 or 8103 of the Welfare and Institutions Code, from possessing, receiving, owning, or purchasing a firearm, the department shall immediately notify the dealer and the chief of the police department in the city or city and county in which the sale was made, or if the sale was made in a district in which there is no municipal police department, the sheriff of the county in which the sale was made, of that fact in compliance with subdivision (c) of Section 28220.

(4) If the department is unable to ascertain the final disposition of the arrest or criminal charge, or the outcome of the mental health treatment or evaluation, or the purchaser's eligibility to purchase a firearm, as described in paragraph (1), within 30 days of the dealer's original submission of purchaser information to the department pursuant to this section, the department shall immediately notify the dealer and the dealer may then immediately transfer the firearm to the purchaser, upon the dealer's recording on the register or record of electronic transfer the date that the firearm is transferred, the dealer signing the register or record of electronic transfer indicating delivery of the firearm to that purchaser, and the purchaser signing the register

or record of electronic transfer acknowledging the receipt of the firearm on the date that the firearm is delivered to him or her.

(g) Commencing July 1, 2017, upon receipt of information demonstrating that a person is prohibited from possessing a firearm pursuant to federal or state law, the department shall submit the name, date of birth, and physical description of the person to the National Instant Criminal Background Check System Index, Denied Persons Files. The information provided shall remain privileged and confidential, and shall not be disclosed, except for the purpose of enforcing federal or state firearms laws.

Cal. Penal Code § 28225

(a) The Department of Justice may require the dealer to charge each firearm purchaser a fee not to exceed fourteen dollars ($14), except that the fee may be increased at a rate not to exceed any increase in the California Consumer Price Index as compiled and reported by the Department of Industrial Relations.

(b) The fee under subdivision (a) shall be no more than is necessary to fund the following:

(1) The department for the cost of furnishing this information.

(2) The department for the cost of meeting its obligations under paragraph (2) of subdivision (b) of Section 8100 of the Welfare and Institutions Code.

(3) Local mental health facilities for state-mandated local costs resulting from the reporting requirements imposed by Section 8103 of the Welfare and Institutions Code.

(4) The State Department of State Hospitals for the costs resulting from the requirements imposed by Section 8104 of the Welfare and Institutions Code.

(5) Local mental hospitals, sanitariums, and institutions for state-mandated local costs resulting from the reporting requirements imposed by Section 8105 of the Welfare and Institutions Code.

(6) Local law enforcement agencies for state-mandated local costs resulting from the notification requirements set forth in subdivision (a) of Section 6385 of the Family Code.

(7) Local law enforcement agencies for state-mandated local costs resulting from the notification requirements set forth in subdivision (c) of Section 8105 of the Welfare and Institutions Code.

(8) For the actual costs associated with the electronic or telephonic transfer of information pursuant to Section 28215.

(9) The Department of Food and Agriculture for the costs resulting from the notification provisions set forth in Section 5343.5 of the Food and Agricultural Code.

(10) The department for the costs associated with subdivisions (d) and (e) of Section 27560.

(11) The department for the costs associated with funding Department of Justice firearms-related regulatory and enforcement activities related to the sale, purchase, possession, loan, or transfer of

firearms pursuant to any provision listed in Section 16580.

(c) The fee established pursuant to this section shall not exceed the sum of the actual processing costs of the department, the estimated reasonable costs of the local mental health facilities for complying with the reporting requirements imposed by paragraph (3) of subdivision (b), the costs of the State Department of State Hospitals for complying with the requirements imposed by paragraph (4) of subdivision (b), the estimated reasonable costs of local mental hospitals, sanitariums, and institutions for complying with the reporting requirements imposed by paragraph (5) of subdivision (b), the estimated reasonable costs of local law enforcement agencies for complying with the notification requirements set forth in subdivision (a) of Section 6385 of the Family Code, the estimated reasonable costs of local law enforcement agencies for complying with the notification requirements set forth in subdivision (c) of Section 8105 of the Welfare and Institutions Code imposed by paragraph (7) of subdivision (b), the estimated reasonable costs of the Department of Food and Agriculture for the costs resulting from the notification provisions set forth in Section 5343.5 of the Food and Agricultural Code, the estimated reasonable costs of the department for the costs associated with subdivisions (d) and (e) of Section 27560, and the estimated reasonable costs of department firearms-related regulatory and enforcement activities related to the sale, purchase, possession, loan, or transfer of firearms pursuant to any provision listed in Section 16580.

(d) Where the electronic or telephonic transfer of applicant information is used, the department shall establish a system to be used for the submission of the fees described in this section to the department.

Cal. Penal Code § 28230

(a) The Department of Justice may charge a fee sufficient to reimburse it for each of the following but not to exceed fourteen dollars ($14), except that the fee may be increased at a rate not to exceed any increase in the California Consumer Price Index as compiled and reported by the Department of Industrial Relations:

(1) For the actual costs associated with the preparation, sale, processing, and filing of forms or reports required or utilized pursuant to any provision listed in subdivision (a) of Section 16585.

(2) For the actual processing costs associated with the submission of a Dealers' Record of Sale to the department.

(3) For the actual costs associated with the preparation, sale, processing, and filing of reports utilized pursuant to Section 26905, 27565, 27875, 27966, or 28000, paragraph (1) of subdivision (a) of Section 27560, or paragraphs (1) and (2) of subdivision (a) of, and subdivisions (b), (c), and (d) of, Section 27920.

(4) For the actual costs associated with the electronic or telephonic transfer of information pursuant to Section 28215.

(b) If the department charges a fee pursuant to paragraph (2) of subdivision (a), it shall be charged in

the same amount to all categories of transaction that are within that paragraph.

(c) Any costs incurred by the Department of Justice to implement this section shall be reimbursed from fees collected and charged pursuant to this section. No fees shall be charged to the dealer pursuant to Section 28225 for implementing this section.

Cal. Penal Code § 28235

All moneys received by the department pursuant to this article shall be deposited in the Dealers' Record of Sale Special Account of the General Fund, which is hereby created, to be available, upon appropriation by the Legislature, for expenditure by the department to offset the costs incurred pursuant to any of the following:

(a) This article.

(b) Section 18910.

(c) Section 27555.

(d) Subdivisions (d) and (e) of Section 27560.

(e) Chapter 4.1 (commencing with Section 28010).

(f) Article 6 (commencing with Section 28450).

(g) Section 31110.

(h) Section 31115.

(i) Subdivision (a) of Section 32020.

(j) Section 32670.

(k) Section 33320.

Cal. Penal Code § 29510

(a) The Department of Justice shall recover the full costs of administering the entertainment firearms

permit program by assessing the following application fees:

(1) For the initial application: one hundred four dollars ($104). Of this sum, fifty-six dollars ($56) shall be deposited into the Fingerprint Fee Account, and forty-eight dollars ($48) shall be deposited into the Dealers' Record of Sale Special Account.

(2) For each annual renewal application: twenty-nine dollars ($29), which shall be deposited into the Dealers' Record of Sale Special Account.

(b) The department shall annually review and shall adjust the fees specified in subdivision (a), if necessary, to fully fund, but not to exceed the actual costs of, the permit program provided for by this chapter, including enforcement of the program.

Cal. Penal Code § 29800

(a) (1) Any person who has been convicted of, or has an outstanding warrant for, a felony under the laws of the United States, the State of California, or any other state, government, or country, or of an offense enumerated in subdivision (a), (b), or (d) of Section 23515, or who is addicted to the use of any narcotic drug, and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony.

(2) Any person who has two or more convictions for violating paragraph (2) of subdivision (a) of Section 417 and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony.

(b) Notwithstanding subdivision (a), any person who has been convicted of a felony or of an offense enumerated in Section 23515, when that conviction results from certification by the juvenile court for prosecution as an adult in an adult court under Section 707 of the Welfare and Institutions Code, and who owns or has in possession or under custody or control any firearm is guilty of a felony.

(c) Subdivision (a) shall not apply to a person who has been convicted of a felony under the laws of the United States unless either of the following criteria is satisfied:

(1) Conviction of a like offense under California law can only result in imposition of felony punishment.

(2) The defendant was sentenced to a federal correctional facility for more than 30 days, or received a fine of more than one thousand dollars ($1,000), or received both punishments.

Cal. Penal Code § 30000

(a) The Attorney General shall establish and maintain an online database to be known as the Prohibited Armed Persons File. The purpose of the file is to cross-reference persons who have ownership or possession of a firearm on or after January 1, 1996, as indicated by a record in the Consolidated Firearms Information System, and who, subsequent to the date of that ownership or possession of a firearm, fall within a class of persons who are prohibited from owning or possessing a firearm.

(b) The information contained in the Prohibited Armed Persons File shall only be available to those

entities specified in, and pursuant to, subdivision (b) or (c) of Section 11105, through the California Law Enforcement Telecommunications System, for the purpose of determining if persons are armed and prohibited from possessing firearms.

Cal. Penal Code § 30005

The Prohibited Armed Persons File database shall function as follows:

(a) Upon entry into the Automated Criminal History System of a disposition for a conviction of any felony, a conviction for any firearms-prohibiting charge specified in Chapter 2 (commencing with Section 29800), a conviction for an offense described in Chapter 3 (commencing with Section 29900), a firearms prohibition pursuant to Section 8100 or 8103 of the Welfare and Institutions Code, or any firearms possession prohibition identified by the federal National Instant Criminal Background Check System, the Department of Justice shall determine if the subject has an entry in the Consolidated Firearms Information System indicating possession or ownership of a firearm on or after January 1, 1996, or an assault weapon registration, or a .50 BMG rifle registration.

(b) Upon an entry into any department automated information system that is used for the identification of persons who are prohibited by state or federal law from acquiring, owning, or possessing firearms, the department shall determine if the subject has an entry in the Consolidated Firearms Information System indicating ownership or possession of a firearm on or after January 1, 1996, or an assault weapon registration, or a .50 BMG rifle registration.

(c) If the department determines that, pursuant to subdivision (a) or (b), the subject has an entry in the Consolidated Firearms Information System indicating possession or ownership of a firearm on or after January 1, 1996, or an assault weapon registration, or a .50 BMG rifle registration, the following information shall be entered into the Prohibited Armed Persons File:

(1) The subject's name.

(2) The subject's date of birth.

(3) The subject's physical description.

(4) Any other identifying information regarding the subject that is deemed necessary by the Attorney General.

(5) The basis of the firearms possession prohibition.

(6) A description of all firearms owned or possessed by the subject, as reflected by the Consolidated Firearms Information System.

Cal. Penal Code § 30010

The Attorney General shall provide investigative assistance to local law enforcement agencies to better ensure the investigation of individuals who are armed and prohibited from possessing a firearm.

Cal. Penal Code § 30015

(a) The sum of twenty-four million dollars ($24,000,000) is hereby appropriated from the Dealers' Record of Sale Special Account of the General Fund to the Department of Justice to address the backlog in the Armed Prohibited Persons System (APPS) and the

illegal possession of firearms by those prohibited persons.

(b) No later than March 1, 2015, and no later than March 1 each year thereafter, the department shall report to the Joint Legislative Budget Committee all of the following for the immediately preceding calendar year:

(1) The degree to which the backlog in the APPS has been reduced or eliminated.

(2) The number of agents hired for enforcement of the APPS.

(3) The number of people cleared from the APPS.

(4) The number of people added to the APPS.

(5) The number of people in the APPS before and after the relevant reporting period, including a breakdown of why each person in the APPS is prohibited from possessing a firearm.

(6) The number of firearms recovered due to enforcement of the APPS.

(7) The number of contacts made during the APPS enforcement efforts.

(8) Information regarding task forces or collaboration with local law enforcement on reducing the APPS backlog.

(c)(1) The requirement for submitting a report imposed under subdivision (b) is inoperative on March 1, 2019, pursuant to Section 10231.5 of the Government Code.

(2) A report to be submitted pursuant to subdivision (b) shall be submitted in compliance with Section 9795 of the Government Code.

Cal. Code Regs. tit. 11, § 4001

As authorized pursuant to sections 28225, 28230 and subdivisions (a) and (b) of section 28240 of the Penal Code, the Dealer's Record of Sale (DROS) fee is $19 for one or more firearms (handguns, rifles, shotguns) transferred at the same time to the same transferee.

Cal. Code Regs. tit. 11, § 4002

As authorized pursuant to section 28230 and subdivision (b) of section 28240 of the Penal Code, the Bureau of Firearms processing fee is $19 for each of the following reports:

(a) Firearm Ownership Record, BOF 4542A (Rev. 01/2014), which is hereby incorporated by reference.

(b) Report of Operation of Law or Intra-Familial Firearm Transaction, BOF 4544A (Rev. 01/2014), which is hereby incorporated by reference.

(c) New Resident Report of Firearm Ownership, BOF 4010A (Rev. 01/2014), which is hereby incorporated by reference.

(d) Curio or Relic Firearm Report, BOF 4100A (Rev. 01/2014), which is hereby incorporated by reference.

(e) Collector In-State Acquisition of Curio or Relic Long Gun Report, BOF 961 (01/2014), which is hereby incorporated by reference.

Act of Oct. 9, 2011, 2011 Cal. Legis. Serv. Ch. 743 (S.B. 819)

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) California is the first and only state in the nation to establish an automated system for tracking handgun and assault weapon owners who might fall into a prohibited status.

(b) The California Department of Justice (DOJ) is required to maintain an online database, which is currently known as the Armed Prohibited Persons System, otherwise known as APPS, which cross-references all handgun and assault weapon owners across the state against criminal history records to determine persons who have been, or will become, prohibited from possessing a firearm subsequent to the legal acquisition or registration of a firearm or assault weapon.

(c) The DOJ is further required to provide authorized law enforcement agencies with inquiry capabilities and investigative assistance to determine the prohibition status of a person of interest.

(d) Each day, the list of armed prohibited persons in California grows by about 15 to 20 people. There are currently more than 18,000 armed prohibited persons in California. Collectively, these individuals are believed to be in possession of over 34,000 handguns and 1,590 assault weapons. The illegal possession of these firearms presents a substantial danger to public safety.

(e) Neither the DOJ nor local law enforcement has sufficient resources to confiscate the enormous backlog of weapons, nor can they keep up with the daily influx of newly prohibited persons.

(f) A Dealer Record of Sale fee is imposed upon every sale or transfer of a firearm by a dealer in California. Existing law authorizes the DOJ to utilize these funds

for firearms-related regulatory and enforcement activities related to the sale, purchase, loan, or transfer of firearms pursuant to any provision listed in Section 16580 of the Penal Code, but not expressly for the enforcement activities related to possession.

(g) Rather than placing an additional burden on the taxpayers of California to fund enhanced enforcement of the existing armed prohibited persons program, it is the intent of the Legislature in enacting this measure to allow the DOJ to utilize the Dealer Record of Sale Account for the additional, limited purpose of funding enforcement of the Armed Prohibited Persons System.

SEC. 2. Section 28225 of the Penal Code is amended to read:

§ 28225.

(a) The Department of Justice may require the dealer to charge each firearm purchaser a fee not to exceed fourteen dollars ($14), except that the fee may be increased at a rate not to exceed any increase in the California Consumer Price Index as compiled and reported by the Department of Industrial Relations.

(b) The fee under subdivision (a) shall be no more than is necessary to fund the following:

(1) The department for the cost of furnishing this information.

(2) The department for the cost of meeting its obligations under paragraph (2) of subdivision (b) of Section 8100 of the Welfare and Institutions Code.

(3) Local mental health facilities for state-mandated local costs resulting from the reporting

requirements imposed by Section 8103 of the Welfare and Institutions Code.

(4) The State Department of Mental Health for the costs resulting from the requirements imposed by Section 8104 of the Welfare and Institutions Code.

(5) Local mental hospitals, sanitariums, and institutions for state-mandated local costs resulting from the reporting requirements imposed by Section 8105 of the Welfare and Institutions Code.

(6) Local law enforcement agencies for state-mandated local costs resulting from the notification requirements set forth in subdivision (a) of Section 6385 of the Family Code.

(7) Local law enforcement agencies for state-mandated local costs resulting from the notification requirements set forth in subdivision (c) of Section 8105 of the Welfare and Institutions Code.

(8) For the actual costs associated with the electronic or telephonic transfer of information pursuant to Section 28215.

(9) The Department of Food and Agriculture for the costs resulting from the notification provisions set forth in Section 5343.5 of the Food and Agricultural Code.

(10) The department for the costs associated with subdivisions (d) and (e) of Section 27560.

(11) The department for the costs associated with funding Department of Justice firearms-related regulatory and enforcement activities related to

the sale, purchase, possession, loan, or transfer of firearms pursuant to any provision listed in Section 16580.

(c) The fee established pursuant to this section shall not exceed the sum of the actual processing costs of the department, the estimated reasonable costs of the local mental health facilities for complying with the reporting requirements imposed by paragraph (3) of subdivision (b), the costs of the State Department of Mental Health for complying with the requirements imposed by paragraph (4) of subdivision (b), the estimated reasonable costs of local mental hospitals, sanitariums, and institutions for complying with the reporting requirements imposed by paragraph (5) of subdivision (b), the estimated reasonable costs of local law enforcement agencies for complying with the notification requirements set forth in subdivision (a) of Section 6385 of the Family Code, the estimated reasonable costs of local law enforcement agencies for complying with the notification requirements set forth in subdivision (c) of Section 8105 of the Welfare and Institutions Code imposed by paragraph (7) of subdivision (b), the estimated reasonable costs of the Department of Food and Agriculture for the costs resulting from the notification provisions set forth in Section 5343.5 of the Food and Agricultural Code, the estimated reasonable costs of the department for the costs associated with subdivisions (d) and (e) of Section 27560, and the estimated reasonable costs of department firearms-related regulatory and enforcement activities related to the sale, purchase, possession, loan, or transfer of firearms pursuant to any provision listed in Section 16580.

(d) Where the electronic or telephonic transfer of applicant information is used, the department shall establish a system to be used for the submission of the fees described in this section to the department.