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

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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

[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.

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