No. 20-56174

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MATTHEW JONES, *et al.*,
Plaintiffs-Appellants,

v.

ROB BONTA, in his official capacity as
Attorney General of the State of California, *et al.*,
Defendants-Appellees,

Appeal from United States District Court for the Southern District of California
Civil Case No. 3:19-cv-01226-L-AHG (Honorable M. James Lorenz)

PLAINTIFFS-APPELLANTS' PETITION PURSUANT TO THE ALL WRITS ACT, 28 U.S.C. § 1651

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INTRODUCTION

In Section 2 of the recently enacted Senate Bill 1327 ("S.B. 1327," 2021–2022 Reg. Sess.), California has enacted a one-way fee- and cost-shifting provision that can be understood in no way other than as an attempt to chill Second Amendment lawsuits and punish the plaintiffs and attorneys who are not deterred by Section 2's threat of ruinous monetary liability. Unless this Court (or, failing this Court, the Supreme Court) promptly exercises its authority under the All Writs Act to enjoin Defendants from enforcing Section 2 against Plaintiffs in relation to this action, Section 2 will deprive the federal courts of jurisdiction over this action.

By its plain terms, Section 2 applies *only* to suits that seek "declaratory or injunctive relief" against the enforcement of any "law that regulates or restricts firearms." S.B. 1327 § 2 (to be codified at CAL. CODE CIV. P. § 1021.11(a)). And it provides the potential for an attorneys' fee award *only* to defendants in such suits; a plaintiff "shall not be deemed a prevailing party." *Id.* (CAL. CODE CIV. P. § 1021.11(e)). What is more, unlike a typical fee-shifting statute, fee liability under Section 2 extends not only to the parties bringing a lawsuit but also to their lawyers and their law firms. And the trigger for making the government a "prevailing party" entitled to fees is the dismissal or entry of judgment for the government on *any* claim in the case, no matter how inconsequential in the context of the broader litigation. *See id.* (CAL. CODE CIV. P. § 1021.11(b)). For example, Plaintiff Firearms Policy

Coalition, Inc. ("FPC") recently secured a victory in the Northern District of Texas on a claim that Texas's law making it illegal for 18-to-20-year-olds to carry firearms in public is unconstitutional. *See* Amended Final Judgment, *FPC v. McCraw*, No. 4:21-cv-1245 (N.D. Tex. Aug. 29, 2022), ECF No. 76. Because FPC won on this broad claim, the court dismissed as moot an alternative, narrower claim that the law was unconstitutional as applied to women. *Id*. In the upside-down world of Section 2, the defendants in *McCraw* would be considered "prevailing parties" despite the plaintiffs having secured all of the relief they sought in the litigation. Finally, in a further departure from typical fee-shifting statutes, Section 2 creates an independent cause of action allowing "prevailing" defendants to seek fees in state court and provides that issue preclusion will not apply if the court in the underlying action held that Section 2 is invalid. *See* S.B. 1327 § 2 (CAL. CODE CIV. P. § 1021.11(d)(3)).

Section 2 is unlawful and unenforceable for several reasons. First, Section 2 is preempted by 42 U.S.C. § 1988(b), which seeks to facilitate and encourage lawsuits invoking federal civil rights, including Second Amendment rights, by providing the incentive of a fee award for successful plaintiffs. Section 2, by contrast, opposes this goal by seeking to *discourage* and *punish* suits raising Second Amendment claims. Second, Section 2 violates the First Amendment rights to freedom of speech and assembly and to petition the government for redress of grievances by impeding access to the courts for litigants seeking to challenge firearm

regulations. And third, Section 2 violates the Equal Protection Clause because it singles out for especially unfavorable treatment litigants who seek to exercise their fundamental right to petition the courts to vindicate their equally fundamental Second Amendment rights.

Section 2 is set to become effective on January 1, 2023. While the matter is not free from doubt, it is reasonable to expect that the law may be interpreted to apply to fees incurred after that date in suits that have already been filed. Due to this risk, and barring unforeseen circumstances (such as a binding commitment from Defendants not to enforce Section 2 in relation to pending suits), Plaintiffs plan to seek to dismiss this appeal and this suit entirely if, by January 1, 2023, they have not obtained an injunction foreclosing Defendants from seeking to obtain fees and costs under Section 2 on the basis of this lawsuit. Plaintiffs' risk is particularly pronounced given the nature of the claims and the time it takes to litigate a case like this to conclusion. Indeed, the individual plaintiffs have already turned 21, *see Jones v. Bonta*, 34 F.4th 704, 714 (9th Cir. 2022), which means that their claims may be dismissed as moot, creating potential liability under Section 2 even if Plaintiffs otherwise are fully successful on the merits.

Accordingly, to preserve this Court's jurisdiction over this matter, Plaintiffs respectfully petition this Court to issue a writ pursuant to its authority under the All Writs Act, 28 U.S.C. § 1651, enjoining Defendants from seeking any litigation costs

or attorneys' fees in relation to this action. Because Section 2 effectively forces Plaintiffs to dismiss their action, it works to strip the federal courts of their existing jurisdiction. This Court will lose the authority to consider the pending rehearing petition, the District Court will lose any jurisdiction on remand (which this Court has already ordered it to exercise, subject to the rehearing petition), and this Court would lose any continuing oversight. Under the All Writs Act, this Court has the power to issue "all writs necessary or appropriate in aid of" its jurisdiction. 28 U.S.C. § 1651(a). The only way to protect federal jurisdiction here is to issue a writ enjoining Defendants from enforcing Section 2's fee-shifting provision in relation to this action.

Plaintiffs acknowledge that the relief they are seeking is extraordinary, but Section 2 is an extraordinary law that stands as an affront to our Nation's system of constitutional governance. The All Writs Act provides this Court with the authority to act in extraordinary cases, and the Court should exercise that authority here. Plaintiffs respectfully request that the Court act promptly on this Petition to allow them time before January 1, 2023 to seek relief in the United States Supreme Court, if necessary.

RELEVANT FACTS

This case concerns California laws that restrict the rights of 18-to-20-year-old law-abiding adults to purchase long guns. Plaintiffs seek a declaration that these

restrictions violate the Second Amendment to the U.S. Constitution and a preliminary and permanent injunction against their enforcement. *See* ER 2877; *see also* ER 2874–75. The district court denied a preliminary injunction.

This Court affirmed in part and reversed in part. First, the panel majority held that "the district court did not abuse its discretion in declining to enjoin the requirement that young adults obtain a hunting license to purchase a long gun." *Jones v. Bonta*, 34 F.4th 704, 710 (9th Cir. 2022). Under the then-existing framework for Second Amendment claims, the majority held that this restriction was subject to intermediate scrutiny and likely to withstand such scrutiny. *See id*. at 727–28. Second, the majority held that the district court did err in "not enjoining [California's] almost total ban on [selling] semiautomatic centerfire rifles" to 18-to-20-year-olds. *Id*. at 710. Although this restriction was subject to strict scrutiny under the then-existing framework, it was unlikely to survive even intermediate scrutiny, and "the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Id*. at 732 (cleaned up). Judge Stein would have affirmed the denial of a preliminary injunction against both restrictions and therefore dissented in part. *See id*. at 750 (Stein, D.J., dissenting in part).

The Court remanded not for the entry of a preliminary injunction against the semiautomatic ban, but for reconsideration of the remaining preliminary-injunction

factors. *See id*. at 733. Defendants nevertheless petitioned for rehearing. That petition is pending.

Shortly before the filing of that petition, on July 22, 2022, Governor Newsom signed S.B. 1327 into law. As relevant here, S.B. 1327 provides:

> Notwithstanding any other law, any person, including an entity, attorney, or law firm, who seeks declaratory or injunctive relief to prevent this state, a political subdivision, a governmental entity or public official in this state, or a person in this state from enforcing any statute, ordinance, rule, regulation, or any other type of law that regulates or restricts firearms, or that represents any litigant seeking that relief, is jointly and severally liable to pay the attorney's fees and costs of the prevailing party.

S.B. 1327 § 2 (CAL. CODE CIV. P. § 1021.11(a)). Under this provision, "a party is considered a prevailing party if a court does either of the following: (1) Dismisses any claim or cause of action brought by the party seeking the declaratory or injunctive relief . . . regardless of the reason for the dismissal. (2) Enters judgment in favor of the party opposing the declaratory or injunctive relief . . . on any claim or cause of action." *Id*. (CAL. CODE CIV. P. § 1021.11(b)).

In other words, *only defendants* can be considered "prevailing parties" under Section 2, and they can collect costs and fees from the plaintiffs—and the plaintiffs' attorneys and their firms—if a court dismisses or denies *any* of the plaintiffs' claims for *any* reason. Thus, for example, if a plaintiff sought declaratory and injunctive relief against two municipal firearm regulations, obtained partial summary judgment against one of them, and if the municipality then rescinded the second and the court

dismissed the claim against that regulation as moot, plaintiffs would still be liable for the municipality's costs and attorney's fees.

Although S.B. 1327's effective date is January 1, 2023, *see* CAL. CONST. art. IV, § 8(c)(1), Section 2 may be interpreted to apply retroactively to suits filed before that date—and at a minimum to fees in such suits incurred after that date. "Prevailing" defendants may seek costs and fees within three years of the date when the dismissal or denial of a claim becomes final on appellate review or when the time for seeking appellate review expires. *See* S.B. 1327 § 2 (CAL. CODE CIV. P. § 1021.11(c)). It does not matter "whether a prevailing [defendant] sought to recover attorney's fees or costs in the underlying action." *Id*. Nor does it matter whether "[t]he court in the underlying matter held that any provision of this section *is invalid, unconstitutional, or preempted* by federal law, notwithstanding the doctrines of issue or claim preclusion." *Id*. (CAL. CODE CIV. P. § 1021.11(d)(3)) (emphasis added). In short, if a plaintiff dares to challenge any firearm regulation in the State of California, Section 2 will make him strictly liable for the defense's costs and fees should any of his claims fail.

S.B. 1327, including Section 2, is based largely word-for-word on Texas's S.B. 8, which Defendant Bonta described as "blatantly unconstitutional." Press Release, Cal. Dep't of Just., Att'y Gen. Bonta: Texas Cannot Avoid Judicial Review of Its Constitutional Abortion Ban (Oct. 27, 2021), https://bit.ly/3pRWA4F. Like

Texas S.B. 8, S.B. 1327 has two basic components: one, reflected in Section 1, deputizing private parties to enforce certain California gun laws (and providing those parties with eligibility for fee awards if they prevail); and two, reflected in Section 2, making parties who challenge California gun laws and fail in any respect liable for the defendants' attorneys' fees. In an amicus brief filed on behalf of the challengers when S.B. 8 was before the Supreme Court, California (along with several other States) highlighted the law's "one-sided attorney's fees provisions that award attorney's fees and costs to any plaintiff who prevails [in exercising the law's private enforcement mechanism] while statutorily *barring* [abortion] providers from recovering their attorney's fees and costs even if they prevail." Br. of Mass. et al. as *Amici Curiae* in Supp. of Pet'rs at 21, *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (internal citation omitted). Of course, this criticism of one-way-fee-shifting applies equally to Section 2's fee-shifting analogue to S.B. 8, not just Section 1's. As the challengers elaborated, such one-sided fee shifting "create[s] a heads-I-win-tails-you-lose regime whose evident purpose is to deter and obstruct access to federal and state court." Pet'rs Br. at 10, *Jackson*, 142 S. Ct. 522. After the Supreme Court held that the pre-enforcement challenge could proceed "against some of the named defendants but not others," 142 S. Ct. at 530, Governor Newsom himself dubbed the opinion "outrageous" and "an abomination" because it did not prevent enforcement of S.B. 8. Gavin Newsom, *The Supreme Court Opened the*

Door to Legal Vigilantism in Texas. California Will Use the Same Tool To Save Lives., WASH. POST (Dec. 20, 2021), https://wapo.st/3wxWoeI. Even so, he called on the California legislature to introduce the bill that became S.B. 1327. *See id*.

Faced with a similar dilemma as Plaintiffs in this case, counsel for the plaintiffs in another pending Second Amendment case asked counsel for Defendants Bonta and Lopez[1] to agree not to enforce S.B. 1327's fee-shifting provisions with respect to that case, including on the ground that the provision should not be given retroactive effect. *See* Second Am. Compl. ¶ 185, *Renna v. Bonta*, No. 3:20-cv-02190, Doc. 49 (S.D. Cal. Aug. 22, 2022). Defense counsel responded: "We take no position at this time, and nothing in this response should be construed as a position of any kind." *Id*. ¶ 188.

As a result, Plaintiffs and their counsel face a significant risk of fee liability from this matter. This is the exact type of suit that Section 2 targets. Plaintiffs have sought "declaratory [and] injunctive relief to prevent . . . public official[s] . . . from enforcing" statutes that "regulat[e] or restric[t] firearms." S.B. 1327 § 2 (CAL. CODE CIV. P. § 1021.11(a)). Although Plaintiffs believe their claims are meritorious, it would be malpractice to assure a client of victory on all claims, especially where, as here, the claims raise unsettled questions of law. Indeed, because the individual

[1] Luis Lopez is now the Director of the California Department of Justice Bureau of Firearms and is therefore automatically substituted as a party under FED. R. CIV. P. 25(d).

plaintiffs have already aged out, the risk is substantial that at a minimum their claims will be dismissed as moot. And given that this case is still at the preliminary injunction stage, the resources it will take on both sides to litigate this case to conclusion likely will be substantial. The possibility of incurring extra thousands (if not tens or hundreds of thousands or millions) of dollars in costs and fees merely for asserting a constitutional right is unacceptable for Plaintiffs—who include individuals, small businesses, and advocacy groups—and their counsel. If that possibility remains, Plaintiffs will be forced to seek dismissal of this suit.

WHY THE WRIT SHOULD ISSUE

To preserve federal jurisdiction over this matter, this Court must issue a writ enjoining Defendants from enforcing Section 2 in relation to this suit. Such an injunction is proper under the All Writs Act and is fully warranted here. Section 2 is both unconstitutional and preempted, and the equities and public interest strongly favor Plaintiffs.

I. The Requested Injunction Is Proper Under the All Writs Act.

The All Writs Act provides that "all courts established by Act of Congress," such as this one, "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act "does not confer *original* jurisdiction." *Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir. 1971) (emphasis added). Rather, the Act confers ancillary

jurisdiction to protect existing federal jurisdiction. "But once jurisdiction has attached, powers under § 1651(a) should be broadly construed." *Id*. A court may issue an "auxiliary" writ not just when "'necessary' in the sense that the court could not otherwise physically discharge its appellate duties," but whenever "calculated in its sound judgment to achieve the ends of justice entrusted to it." *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 273 (1942). And a court may direct such writs to any "persons who . . . are in a position to frustrate the implementation of a court order or the proper administration of justice[,] . . . even those who have not taken any affirmative action to hinder justice." *United States v. New York Tel. Co.*, 434 U.S. 159, 174 (1977) (internal citations omitted).

In particular, there is substantial precedent for enjoining the initiation of "a state-court proceeding [that] would interfere with ongoing federal oversight of a case." *Garcia v. Bauza-Salas*, 862 F.2d 905, 909 (1st Cir. 1988); *see also* 16B CHARLES A. WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. § 4005 (3d ed. 2021) ("Power to protect the Court's jurisdiction by extraordinary writ is most clearly justified to prevent direct interference by another court in a case actually pending before the Court.").[2] Thus in school-desegregation cases, "where a federal

[2] Section 2 creates a state-law cause of action for costs and attorney's fees that, if brought independently of this suit, would need to be brought in state court because Plaintiffs and Defendants lack "complete diversity." *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001); *see* S.B. 1327 § 2 (CAL. CODE

court's jurisdiction continues until desegregation is achieved, courts have allowed federal injunctions to stay state proceedings that would interfere with this jurisdiction." *Garcia*, 862 F.2d at 909 (citing examples).

Similar injunctions have issued from federal courts overseeing multidistrict litigation, "where a parallel state court action threatens to frustrate" the federal "proceedings and disrupt the orderly resolution of those proceedings" by, among other things, reducing defendants' incentive to reach settlements. *In re Am. Honda Motor Co., Inc., Dealerships Rel. Litig.*, 315 F.3d 417, 441 (4th Cir. 2003).[3] This principle has specifically been invoked to enjoin state-court fee litigation that threatens to disrupt resolution of the federal litigation. *See In re Linerboard Antitrust Litig.*, 361 F. App'x 392, 396 (3d Cir. 2010).

Importantly in this case, no parallel state-court litigation is underway. Thus, the Anti-Injunction Act, 28 U.S.C. § 2283, which generally bars federal injunctions

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CIV. P. § 1021.11(c)). To the extent that Defendants could seek costs and fees as a counterclaim in this suit, the requested injunction would necessarily not interfere with state-court jurisdiction in barring such a claim.

[3] *See also, e.g.*, *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 202–03 (3d Cir. 1993) (affirming, as necessary in aid of the district court's jurisdiction in an asbestos class action, a writ enjoining absent members of the plaintiff class from asking a state court to permit a mass opting out of all plaintiffs in that state); *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 (7th Cir. 1996) ("Where a litigant's success in a parallel state court action would make a nullity of the district court's [discovery] ruling, and render ineffective its efforts effectively to manage the complex litigation at hand, injunctive relief is proper.").

against pending state proceedings, does not apply. *See Dombrowski v. Pfister*, 380 U.S. 479, 484 n. 2 (1965). Nor does any concern about intruding on state courts' authority. Although "[o]rdering the parties not to proceed is tantamount to enjoining the proceedings," *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 805 (9th Cir. 2002), the requested injunction would affect only Defendants, not the state courts, because only the federal courts currently have jurisdiction over this controversy. And even where, unlike here, state and federal courts do have concurrent jurisdiction, "federal injunctive relief may be necessary," and therefore appropriate under the All Writs Act, "to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility *and authority* to decide that case." *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970) (emphasis added).

Here, the specter of state-court fee litigation will interfere with the federal courts' authority over this case; after all, that is the only conceivable purpose of Section 2. As explained, unless Defendants are enjoined from invoking that provision in relation to this action, Plaintiffs will be forced to seek dismissal, depriving this Court of its current jurisdiction over the rehearing petition and of its authority to issue a mandate on the merits, depriving the district court of a "path to judgment," *In re Diet Drugs*, 282 F.3d 220, 234 (3rd Cir. 2002), and depriving this Court (and the U.S. Supreme Court) of any oversight over that judgment. This case

is therefore like *In re Baldwin-United Corp.*, where the Second Circuit held that the district court properly granted multidistrict defendants' request for an All Writs Act injunction on the commencement of any state-court actions against the multidistrict defendants, because "as a practical matter no defendant in the consolidated federal actions . . . could reasonably be expected to consummate a settlement of those claims if their claims could be reasserted under state laws." 770 F.2d 328, 336–37 (2d Cir. 1985). And this case is unlike *Negrete v. Allianz Life Insurance Co. of North America*, where this Court distinguished cases like *In re Baldwin-United Corp.*, because the contemplated state-court action presented no practical threat of diverting the case from its path to judgment. *Negrete*, 523 F.3d 1091, 1099 (9th Cir. 2008). Absent an injunction (and barring an unforeseen development that precludes application of Section 2 against them), Plaintiffs *will* be forced to seek dismissal. "[A]s a practical matter," they have no other choice. *In re Baldwin-United Corp.*, 770 F.2d at 336. Like the defendants' anticipated refusal to consummate settlements in *In re Baldwin-United Corp.*, Plaintiffs' forced dismissal would divert this case from its path to judgment, so Plaintiffs are entitled to an injunction against the action that will force a dismissal.

Granted, this case is not a multidistrict action. At the same time, the issue here is not just whether enjoining state actions would enable federal courts to resolve this action more efficiently. The issue is whether the federal courts can resolve this

pending action at all, or whether a State can effectively strip the federal courts of jurisdiction through a draconian fee-shifting statute. If the All Writs Act permits injunctions against state actions (even already pending state actions) to preserve parties' practical *incentive* to resolve mature federal actions through settlement, the Act must also permit injunctions against potential state actions to preserve parties' practical *ability* to maintain mature actions within the federal courts' jurisdiction.

It is possible, of course, that the federal courts could eventually resolve Plaintiffs' claims even if Plaintiffs were forced to seek dismissal now; as explained below, Section 2 is itself unlawful, and Plaintiffs (or at least some of them) could refile their current claims if and when Section 2 is held to be unlawful in a separate action. But federal courts could eventually resolve unsettled multidistrict claims as well. And here, refiling would likely not be possible for many months if not years—months and years in which law-abiding 18-to-20-year-olds would continue to suffer violations of their constitutional rights. *See Jones*, 34 F.4th at 728. California's interference with this suit is thus akin to state interference with federal desegregation jurisdiction: both threaten to prolong constitutional violations by inhibiting federal courts from addressing them.

Plaintiffs recognize that relief under the All Writs Act is exceptional and reserved for problems without alternative solutions. But Section 2 is an exceptional statute. It compels litigants to abandon potentially meritorious civil-rights claims,

even *likely* meritorious claims, effectively divesting the federal courts of authority to ensure that a fundamental constitutional protection is observed in California. In this case, the only way to preserve existing federal jurisdiction is to enjoin Defendants from bringing a claim under Section 2. Otherwise, Section 2 will force this case out of federal court.

II. The Requested Injunction Is Warranted.

Courts have held that "[t]he requirements for a traditional injunction do not apply to injunctions under the All Writs Act because a court's traditional power to protect its jurisdiction, codified by the Act, is grounded in entirely separate concerns." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100 (11th Cir. 2004). Accordingly, a party seeking an injunction under the Act "must simply point to some ongoing proceeding, or some past order or judgment, the integrity of which is being threatened by someone else's action or behavior." *Id.*; *see also id*. at 1101 (collecting Supreme Court and other appellate decisions affirming All Writs Act injunctions without reference to the "traditional" injunction factors). Plaintiffs have pointed to an ongoing federal proceeding—this one—that is threatened by Defendants' behavior, namely their authority to seek costs and fees under Section 2. The requested injunction is warranted on these facts alone.

In any event, the traditional injunctive factors, *see, e.g.*, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006), further demonstrate why the

requested injunction is warranted. Section 2 is unlawful in at least three ways: it is preempted by 42 U.S.C. § 1988(b), and it is unconstitutional under both the First Amendment and the Equal Protection Clause. Plaintiffs face irreparable injury absent an injunction—namely, deprivations of their First Amendment and Equal Protection rights, and ongoing deprivations of their Second Amendment rights. The public interest favors an injunction allowing Plaintiffs to continue to exercise and defend those constitutional rights, and prohibiting the unconstitutional application of Section 2. And the injunction would cause no harm to Defendants, who obtain only a gratuitous (and unlawful) benefit from Section 2.

a. Section 2 Is Preempted by 42 U.S.C. § 1988(b).

The Supremacy Clause makes the "Constitution" and "the laws of the United States which shall be made in pursuance thereof" the "supreme law of the land." U.S. CONST. art. VI, cl. 2. One such law, 42 U.S.C. § 1983, allows plaintiffs to seek relief, including declaratory and injunctive relief, against state officials who have deprived them of their constitutional rights while acting under color of state law. A related provision, 42 U.S.C. § 1988(b), creates a comprehensive scheme for awarding costs and attorney's fees to the "prevailing party" in such an action.

Section 1988(b) provides that "the court, in its discretion, may [generally] allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs," and it does not forbid such awards to plaintiffs. § 1988(b). In

fact, "a prevailing plaintiff *should* ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (emphasis added; internal quotation marks omitted). Plaintiffs therefore qualify as prevailing parties if they have "prevailed on a significant issue in the litigation and have obtained some of the relief they sought." *Tex. State Tchrs. Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989). And that is true "even if they are not victorious on every claim." *Fox v. Vice*, 563 U.S. 826, 834 (2011). Prevailing defendants, by contrast, "may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley*, 461 U.S. at 429 n.2.

Section 2 flips this scheme on its head. As seen, prevailing plaintiffs can *never* recover their costs and attorney's fees under Section 2, even if they are victorious on every claim. If they are not, defendants can recover their costs and attorney's fees automatically. And unlike Section 1988(b), Section 2 does not even require that these attorney's fees be "reasonable."

Under the Supremacy Clause, federal law preempts conflicting state law. Such preemption occurs where, as relevant here, the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *United States v. Locke*, 529 U.S. 89, 109 (2000) (internal quotation marks omitted). In that case, the state law is "without effect." *Altria Grp., Inc. v. Good*, 555 U.S. 70,

76 (2008) (internal quotation marks omitted). "The purpose of Congress is the ultimate touchstone in every pre-emption case." *Id*. (cleaned up).

Section 2 plainly stands as an obstacle to the accomplishment of Section 1988(b)'s purpose, which courts have long recognized is to *encourage* civil-rights lawsuits by removing the cost barrier to constitutional litigation and enabling "plaintiffs to obtain the assistance of competent counsel in vindicating their rights." *Kay v. Ehrler*, 499 U.S. 432, 436 (1991); *see also id*. at 436 n.8 ("Both the Senate and House Reports explain that the attorney's fee provision was intended to give citizens access to legal assistance so that they could enforce their civil rights[.]" (citing S. Rep. No. 94-1011 (1976); H. Rep. No. 94-1558 (1976))). Section 2 discourages exactly those kind of suits where the civil right at issue involves keeping and bearing arms. Section 1988(b) contains no such carveout, because this "is not a second-class right." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2156 (2022) (internal quotation marks omitted).

It is no answer that recoveries under Section 2 and Section 1988(b) could potentially offset—for example, if a plaintiff prevailed on a significant issue, and was therefore entitled to fees under Section 1988(b), but did not prevail on every issue and was therefore liable for fees under Section 2. Even assuming the "reasonable" fees authorized by Section 1988(b) match the automatic Section 2 fees, the plaintiff will still have ended up paying for attorneys, in this case the

government's. That remains a practical obstacle to filing a civil-rights claim and thus to the accomplishment of Section 1988(b)'s goals.

Indeed, Section 2 tacitly acknowledges its own conflict with Section 1988(b), purporting to eliminate any defense on the ground that "[t]he court in the underlying action held that any provision of this section is invalid, unconstitutional, or preempted by federal law." S.B. 1327 § 2 (CAL. CODE CIV. P. § 1021.11(d)(3)). But California can insulate Section 2 from the Supremacy Clause no more than it can insulate other laws from constitutional scrutiny. Section 1988(b) recognizes that civil-rights enforcement relies "in part upon private litigation" and that, if forced to pay attorney's fees, "few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968). By attempting to remove aggrieved parties from that position, Section 2's fee-shifting provision conflicts with Section 1988(b) and is therefore "without effect." *Altria Grp., Inc.*, 555 U.S. at 76 (internal quotation marks omitted).

b. Section 2 Violates the First Amendment.

The First Amendment preserves "the freedom of speech," "the right of the people peaceably to assemble," and the right "to petition the Government for a redress of grievances." U.S. CONST. amend. I. These rights are applicable against the States. *See Gitlow v. New York*, 268 U.S. 652 (1925); *De Jonge v. Oregon*, 299 U.S.

353 (1937). And together they preserve access to the courts from infringements such as Section 2.

The right of access to courts is "essential to freedom," *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 382 (2011), and "is subsumed under the first amendment right to petition the government for redress of grievances." *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989). This right also has expressive elements protected by the First Amendment's provisions for speech and expressive association. Indeed, "association for litigation may be the *most effective form* of political association," *N.A.A.C.P. v. Button*, 371 U.S. 415, 431 (1963) (emphasis added), especially for groups—like the Plaintiff associations and their members—organized to advocate for rights that the government clearly disfavors. "[A]ll citizens, regardless of the content of their ideas, have the right to petition their government." *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196 (2003).

This right is essential not only because of its expressive nature, but also because, without access to courts, citizens cannot defend *any* of their constitutional rights. Accordingly, courts "must be vigilant when Congress imposes rules and conditions which *in effect* insulate its own laws from legitimate judicial challenge." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (emphasis added). The same is no less true when state legislatures do so. The Constitution simply "does not

permit the Government to confine litigants and their attorneys" by "insulat[ing] the Government's interpretation of the Constitution from judicial challenge." *Id*.

That is precisely what Section 2 does. Section 2 imposes potential fee liability on, and only on, parties and their attorneys who bring declaratory and injunction claims against firearm regulations—in other words, only upon those who disagree with the State or its subdivisions that the Second Amendment permits those regulations. If a State governmental entity passed one of the few types of firearm regulations that is squarely foreclosed by existing precedent, litigants could be reasonably certain that declaratory and injunctive claims would not incur fee liability—though even then, Section 2's grant of fees where defendants prevail on *any* claim would have a significant *in terrorem* effect. And outside of that limited sphere, constitutional litigation will be stifled entirely. Plaintiffs will have a difficult time finding counsel willing to subject themselves to possible joint and several fee liability. Section 2 also conflicts with counsel's duty of zealous advocacy, which often requires asserting alternative claims that are "reasonable" even "if not ultimately successful," and which each carry a potential for fee liability under S.B. 1327. *Fox*, 563 U.S. at 834. Faced with a new incursion on the Second Amendment, therefore, the only way for plaintiffs and their counsel to avoid this potential liability (aside from not challenging the regulation at all) would be to seek only damages and, if they prevail, repeatedly seek damages against every successive enforcement

action, a strategy that is itself cost-prohibitive for most litigants. Of course, where the merits are not already clear under existing law, qualified immunity likely will foreclose a claim for damages in cases like this one against state officials, making that avenue for relief largely illusory as well.

Although Section 2 does not expressly prohibit suits, this prohibitory "effect" is itself a First Amendment violation. *Velazquez*, 531 U.S. at 548. As the Supreme Court recognized in *Button*, "[t]he threat of sanctions may deter th[e] exercise [of First Amendment freedoms] almost as potently as the actual application of sanctions." 371 U.S. at 433; *see also United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("The First Amendment would . . . be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such."). California's own caselaw recognizes "the disastrous effect of closing the courtroom door to plaintiffs who have meritorious claims but who dare not risk the financial ruin caused by an award of attorney fees if they ultimately do not succeed." *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro*, 91 Cal. App. 4th 859, 874 (2001).

In short, "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *In re Primus*, 436 U.S. 412, 426 (1978) (internal quotation marks omitted). And Section 2

will prevent that activity from occurring—as this case illustrates, it already threatens to do so. This provision therefore violates the First Amendment. *See Velazquez*, 531 U.S. at 548–49.

If interest-balancing were called for, it would yield the same result. Section 2 must receive strict scrutiny, since it "regulate[s] expressive and associational conduct at the core of the First Amendment's protective ambit," *In re Primus*, 436 U.S. at 424, and especially since it restricts this conduct based solely on a party's viewpoint—namely, if that viewpoint is opposed to the government's on matters of firearm regulation. *See, e.g.*, *Boardman v. Inslee*, 978 F.3d 1092, 1136 (9th Cir. 2020). Regardless, even under intermediate scrutiny, the State must at least show that it seriously considered less-restrictive alternatives. *See McCullen v. Coakley*, 573 U.S. 464, 494 (2014). There is no indication here that the State considered any alternatives whatsoever. And under any level of scrutiny, the fee-shifting provision would need to serve some legitimate governmental interest. California has no legitimate interest in merely insulating regulations from judicial review. It certainly has no legitimate interest in insulating *unconstitutional* regulations from judicial review. Yet that is precisely the effect that Section 2 will have by deterring even meritorious Second Amendment claims. "Whatever might be said of [California's]

objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." *United States v. Jackson*, 390 U.S. 570, 582 (1968).

Moreover, assuming California could assert some valid interest in addressing the costs of constitutional litigation, governments can address those costs in ways that do not restrict a subset of citizens' access to the courts, such as increasing general taxes to supplement their litigation budgets as necessary. The First Amendment does not permit the State to target particular law-abiding citizens simply because it is more politically expedient.

c. Section 2 Violates the Equal Protection Clause.

The Fourteenth Amendment forbids a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. This clause guarantees the right to freely exercise other constitutional rights. Thus, the Supreme Court has held, state laws that draw "classifications affecting fundamental rights" must be "given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

Section 2 draws such a classification. The provision effectively separates plaintiffs into two classes: those who "see[k] declaratory or injunctive relief to prevent th[e] state" or public officials from enforcing any firearm regulation, and all others. S.B. 1327 § 2 (CAL. CODE CIV. P. § 1021.11(a)). Plaintiffs in the first group are subject to potential fee liability, and thereby impeded from accessing the courts

as described above, while those in the second are not. In other words, Section 2 "impinges on [the] fundamental rights" of certain plaintiffs to access the courts based exclusively on the types of claims they bring. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (describing fundamental rights as those "explicitly or implicitly protected by the Constitution"). In this way, Section 2 classifies not only with respect to the fundamental right to access the courts, but also classifies in a way that impinges on the fundamental Second Amendment right itself by preventing plaintiffs from defending that right from regulatory infringement in court. On either basis, Section 2 is subject to strict scrutiny.

As explained above, Section 2 cannot satisfy strict scrutiny. Indeed, it lacks even a rational basis. That is particularly pronounced in the context of the Equal Protection Clause, where California must defend Section 2's laser-like focus on plaintiffs challenging firearm restrictions. There certainly is no *legitimate* reason for this focus of the law; it either is meant simply to chill Second Amendment lawsuits or, perhaps, retaliate for Texas's enactment of S.B. 8 (or both). Either way, Section 2's distinction between plaintiffs lacks connection to any rational government interest and is a violation of equal protection.

d. The Equities and Public Interest Favor the Requested Injunction.

As the Court has noted in this case, "the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Jones*, 34 F.4th at 732 (cleaned up). Without the requested injunction, Plaintiffs will be forced to dismiss this suit and thereby be deprived of their First Amendment and Fourteenth Amendment rights of equal access to the courts. That is on top of the ongoing Second Amendment injury that they suffer as a result of the underlying laws at issue here. Indeed, this Court has already found a likelihood of harm as a result of the semiautomatic-rifle ban. *See id*. at 732–733.

Meanwhile, enjoining Defendants from seeking costs and fees from Plaintiffs would cause them no comparable harm. Defendants cannot be assured of victory either, and they thus can have no recognizable expectation of a fee award. In any event, governments have stably funded litigation arms whose purpose is to defend their laws in litigation. They are not the type of litigants who need encouragement or an award for doing so.

As the balance of the equities favors "preventing the violation of a party's constitutional rights," so does the public interest. *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (cleaned up). "It is clear that it would not be equitable or in the public's interest to allow the state to violate the requirements of federal law, especially when there are no adequate remedies available." *Id*. (cleaned

up). And no other remedy is available here. A forced dismissal of this suit will immediately deprive Plaintiffs of their constitutional rights to maintain this suit. That impending constitutional injury can be prevented only with the requested injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court issue a writ pursuant to its authority under 28 U.S.C. § 1651 enjoining Defendants from initiating a future action to obtain costs and attorneys' fees under Section 2 regardless of the outcome of the present action.

Dated: September 2, 2022

Respectfully submitted,

s/David H. Thompson

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the page limit of Ninth Circuit Rule 21-2(c) because the petition does not exceed 30 pages, excluding the parts exempted by Federal Rule of Appellate Procedure 21(a)(2)(C) and 32(f).

I further certify that this petition complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared using Microsoft Office 365 for Word in a proportionally spaced typeface, 14-point Times New Roman font.

Dated: September 2, 2022

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 2, 2022. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 2, 2022

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