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8

9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
11 CIVIL DIVISION  
12

13 **JAMES MILLER et al.,**

14 Plaintiffs,

15 **v.**

16 **ROB BONTA et al.,**

17 Defendants.  
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Case No. 3:22-cv-1446-BEN-JLB

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

Date: November 14, 2022  
Time: 10:30 a.m.  
Courtroom: 5A  
Judge: Hon. Roger T. Benitez  
Action Filed: Sept. 26, 2022

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## INTRODUCTION

The challenged California statute (SB 1327) was a response to, and was modeled upon, a recently enacted Texas statute (SB 8) that has itself been the subject of extensive litigation. SB 8 has two principal components. The first created a private “bounty hunter” provision that authorized onerous private suits against individuals who engaged in certain activities related to abortions; it was intended to defeat federal court jurisdiction by making the provision unenforceable by state officials. The second, relevant here, was a one-sided fee-shifting mechanism that was available to defendants (but not plaintiffs) in suits challenging state abortion restrictions (but not other laws), whenever even a single claim or cause of action was dismissed, and regardless of the reason for the dismissal. Because of those and other extraordinary features, that fee-shifting mechanism has been challenged by plaintiffs in Texas and roundly criticized for its chilling effects, including in opinions filed by Justices of the United States Supreme Court. To date, however, no court has adjudicated the legality of the SB 8 fee-shifting mechanism.

SB 1327 was premised on the view that if Texas were ultimately allowed to employ the mechanisms contained in SB 8, California should have the right to employ the same mechanisms to advance its own policy interests. Like SB 8, SB 1327 has two principal components. The first—which is not at issue in this case—creates a private right of action to enforce certain restrictions on assault weapons and ghost guns. The second—which is the focus of plaintiffs’ legal claims here—copies the SB 8 fee-shifting mechanism and applies to suits challenging laws that regulate or restrict firearms. Like the plaintiffs in the pending challenge to SB 8, the plaintiffs here contend that this fee-shifting mechanism violates the Constitution, including by infringing on their constitutionally protected right to access the courts.

1       The State of California has joined amicus briefs in lawsuits challenging SB 8,  
2 and those briefs have recognized that SB 8's fee-shifting scheme was an  
3 unprecedented attempt to thwart judicial review. Attorney General Bonta has  
4 publicly criticized SB 8 as an attempt by Texas to shield its laws from judicial  
5 review. To date, the Attorney General has committed not to seek fees under the  
6 fee-shifting mechanism in section 2 of SB 1327 in every particular action involving  
7 the California Department of Justice in which that issue has been raised. And  
8 defendants hereby commit—consistent with the original legislative objective of  
9 SB 1327—not to seek fees or costs from any plaintiff or plaintiff's attorney under  
10 section 2 of SB 1327 in any case, *unless and until* a court ultimately holds that the  
11 fee-shifting provision in section 4 of SB 8 is constitutional and enforceable and that  
12 decision is affirmed on appeal or no appeal is taken. Defendants' commitment  
13 extends to fees or costs incurred at any time in connection with any suit filed before  
14 the date on which a decision ultimately upholding the constitutionality of section 4  
15 of SB 8 is affirmed on appeal (or the time to file an appeal expires). And it applies  
16 to all prospective plaintiffs and their attorneys, regardless of whether they are a  
17 plaintiff or attorney in the present case. Defendants are prepared to enter a  
18 stipulation to this effect with plaintiffs should plaintiffs agree to do so.

19       In light of defendants' commitment, this Court lacks Article III jurisdiction to  
20 consider plaintiffs' claims or to grant the relief they request. Plaintiffs cannot  
21 identify any imminent injury that is fairly traceable to defendants, and their claims  
22 are unripe at this juncture. Plaintiffs are free to bring additional lawsuits against  
23 defendants challenging California firearms regulations without exposing themselves  
24 or their attorneys to liability for costs or fees under section 2 of SB 1327. The  
25 possibility that defendants might one day seek costs or fees under section 2 of SB  
26 1327—only in the event that a court ultimately holds that the fee-shifting provision  
27 in section 4 of SB 8 is constitutional and enforceable, and then only with respect to  
28 suits filed after the date on which such a ruling is affirmed on appeal or the time for

1 filing an appeal has expired—does not provide a basis for federal court jurisdiction  
 2 at this time. As the Supreme Court has recognized, a claim is premature under  
 3 Article III if, as here, it rests upon “contingent future events that may not occur as  
 4 anticipated, or indeed may not occur at all.” *Thomas v. Union Carbide Agric.*  
 5 *Prods. Co.*, 473 U.S. 568, 580–581 (1985) (internal quotation marks and citation  
 6 omitted).

## 7 BACKGROUND

### 8 A. Texas Senate Bill 8

#### 9 1. Enactment of SB 8

10 Senate Bill 8 was passed by the Texas Legislature and signed by Governor  
 11 Abbott in May 2021. Act of May 13, 2021, 87th Leg., R.S., ch. 62, 2021 Tex. Sess.  
 12 Law Serv. 125. SB 8’s first main provision, which is primarily contained in  
 13 Section 3, creates a private right of action that authorizes any person to sue, for at  
 14 least \$10,000 in damages, anyone who performs, induces, assists, or intends to  
 15 assist an abortion when the fetus has a detectable heartbeat. Tex. Health & Safety  
 16 Code §§ 171.201-.212. Section 3 may be enforced only by private civil actions, not  
 17 by the “state, a political subdivision, a district or county attorney, or an executive or  
 18 administrative officer or employee of this state or a political subdivision[.]” *Id.*  
 19 § 171.207(a); *see also id.* § 171.208(a). And it includes several other provisions  
 20 that “are considerable departures from the norm in Texas courts and in most courts  
 21 across the Nation.” *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 546 (2021)  
 22 (Sotomayor, J., concurring in judgment in part and dissenting in part).<sup>1</sup>

23  
 24 <sup>1</sup> *See, e.g.*, Tex. Health & Safety Code § 171.210(a)(4) (allowing plaintiffs to  
 25 sue in any county in which they live, even if that county has no relationship to the  
 26 defendants or the abortion procedure at issue); *id.* § 171.210(b) (allowing plaintiffs  
 27 to veto any venue transfer); *id.* § 171.208(e)(5) (prohibiting defendants from  
 28 invoking nonmutual issue or claim preclusion, making the defendant susceptible to  
 repeat lawsuits); *id.* § 171.208(b)(3) (guaranteeing attorney’s fees and costs to  
 prevailing plaintiffs); *id.* § 171.208(i) (categorically denying fees and costs to any

1 The second principal provision (which parallels the provision of SB 1327 that  
 2 is at issue in this suit) is contained in section 4 of SB 8. That provision adds section  
 3 30.022 to the Civil Practices and Remedies Code and provides that

4 Notwithstanding any other law, any person, including an entity,  
 5 attorney, or law firm, who seeks declaratory or injunctive relief to  
 6 prevent this state, a political subdivision, any governmental entity or  
 7 public official in this state, or any person in this state from enforcing  
 8 any statute, ordinance, rule, regulation, or any other type of law that  
 9 regulates or restricts abortion or that limits taxpayer funding for  
 individuals or entities that perform or promote abortions, in any state  
 or federal court, or that represents any litigant seeking such relief in  
 any state or federal court, is jointly and severally liable to pay the costs  
 and attorney's fees of the prevailing party.

10 For the purposes of section 30.022, a party is considered a "prevailing party" if a  
 11 state or federal court "dismisses any claim or cause of action brought against the  
 12 party that seeks the declaratory or injunctive relief described in Subsection (a),  
 13 regardless of the reason for the dismissal" or "enters judgment in the party's favor  
 14 on any such claim or cause of action." *Id.* § 30.022(b). Fees under section 30.022  
 15 are authorized in a separate civil action to recover costs and attorney's fees, up to  
 16 three years after the judgment becomes final. *Id.* § 30.022(c). And section  
 17 30.022(d) also provides that it is not a defense to an action brought under that  
 18 subdivision that a prevailing party did not seek fees in the underlying action; that  
 19 the court in the underlying action declined to recognize or enforce the requirements  
 20 of this section; or that the court in the underlying action held that any provisions of  
 21 this section are invalid, unconstitutional, or preempted by federal law. *Id.*

22 The Texas state senator who sponsored SB 8 acknowledged that the law was  
 23 crafted to deter the exercise of constitutionally protected rights, while also evading  
 24 federal judicial review.<sup>2</sup> At the time SB 8 was enacted, binding U.S. Supreme  
 25 defendants).

26 <sup>2</sup> Jacob Gershman, *Behind Texas Abortion Law, an Attorney's Unusual*  
 27 *Enforcement Idea*, The Wall St. J. (Sept. 4, 2021), available at  
 28 <https://tinyurl.com/2p85k7fc>; Jenna Greene, *Column: Crafty Lawyering on Texas*

1 Court precedent held that a State could not prohibit any person from choosing to  
 2 terminate a pregnancy before viability. *See, e.g., Jackson Woman’s Health Org. v.*  
 3 *Dobbs*, 945 F.3d 265 (5th Cir. 2019), *rev’d* 142 S.Ct. 2228 (2022). To avoid pre-  
 4 enforcement suits against state officers under 42 U.S.C. § 1983 and *Ex parte*  
 5 *Young*, 209 U.S. 123 (1908), Texas empowered private parties—but not state  
 6 officials—to enforce the substantive prohibitions laid out in SB 8. The sponsor of  
 7 the bill conceded that the law was “a way to pass a heartbeat bill that was going to  
 8 be upheld.”<sup>3</sup> And the architect of the bill, Jonathan Mitchell, admitted that the  
 9 “entire point of SB 8” was “to prevent the judiciary from ruling on the  
 10 constitutionality of the statute.”<sup>4</sup> Indeed, Mitchell wrote in a 2018 law review  
 11 article that laws like SB 8 can “[c]ounteract [t]he [e]ffects [o]f [a] [j]udicial  
 12 [i]njunction” because “they enable private litigants to enforce a statute even after a  
 13 federal district court has enjoined the executive from enforcing it.” *The Writ-of-*  
 14 *Erasure Fallacy*, 104 Va. L. Rev. 933, 1001 (2018). With respect to fee-shifting,  
 15 Mitchell’s 2018 article observed that “the need to foot one’s own legal bills may  
 16 induce statutory compliance even for those who expect to prevail on their  
 17 constitutional objections.” *Id.* at 1002. In Mitchell’s view, “[t]hese sorts of  
 18 provisions should be standard fare in legislation that is expected to encounter a  
 19 court challenge—assuming . . . that the legislature wants to induce compliance with  
 20 its statute[.]” *Id.* at 1003.

21  
 22  
 23 *Abortion Bill Withstood SCOTUS Challenge*, Reuters (Sept. 5, 2021), available at  
 24 <https://tinyurl.com/mvv8t338> (quoting Sen. Hughes as saying SB 8 is a “very  
 elegant use of the judicial system”).

25 <sup>3</sup> Gershman, *supra* n.2 (quoting Sen. Hughes).

26 <sup>4</sup> Stephen Paulsen, *The Legal Loophole That Helped End Abortion Rights*,  
 27 Courthouse News Service (July 30, 2022), available at  
 28 <https://tinyurl.com/2p8d9hya>.

## 2. Initial Legal Challenge to SB 8

Abortion providers and advocates sued Texas state officials in federal and state courts to enjoin enforcement of SB 8 before it could take effect. *Whole Woman's Health*, 142 S. Ct. at 530.<sup>5</sup> Both the state and federal lawsuits focused primarily on the private-right-of-action provisions in section 3 of SB 8.<sup>6</sup> But the plaintiffs also emphasized the chilling effect of the fee-shifting provision contained in section 4 of SB 8. For example, the plaintiffs in *Whole Woman's Health* explained that the fee-shifting mechanism was designed to “deter *any* challenges, including meritorious challenges, to state and local abortion restrictions in Texas, not just challenges to SB 8.” Compl. ¶ 11, *Whole Woman's Health v. Jackson*, No. 1:21-cv-616, Dkt. 1, 2021 WL 2945846 (W.D. Tex. July, 13, 2021). They argued that the fee-shifting provision “chill[ed] the exercise of rights to free speech and to petition” and that it was “directly at odds” with the federal statute governing fees in civil rights actions, 42 U.S.C. § 1988. *Id.* ¶¶ 158, 162.<sup>7</sup>

California joined amicus briefs in the lower courts and at the Supreme Court criticizing SB 8. In those briefs, California denounced Texas’s attempt to insulate its laws from pre-enforcement review. In a multistate amicus brief filed in the district court in a lawsuit instituted by the federal government, California explained that the fee-shifting provision of SB 8 was an “attempt[] to thwart judicial review,”

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<sup>5</sup> The United States separately sued to enjoin enforcement of SB 8’s private-right-of-action provisions on Supremacy Clause and preemption grounds. *United States v. Texas*, 566 F. Supp. 3d 605 (W.D. Tex. 2021).

<sup>6</sup> See, e.g., *Van Stean v. Tex. Right to Life*, No. D-1-GN-21-004179, slip op. at 46–48 (98th Dist. Ct., Travis County, Tex., Dec. 9, 2021) (enjoining enforcement of certain private-right-of-action provisions under state law).

<sup>7</sup> Several plaintiffs submitted declarations “averring that the possibility of fee awards in SB 8 cases will have a chilling effect on their ability to engage in constitutionally-protected activity[.]” *Whole Woman's Health v. Jackson*, 556 F. Supp. 3d 595, 615 (W.D. Tex. 2021), *rev'd* 142 S. Ct. 522 (2021) (collecting quotes from declarations).

1 and one of several “unusual” and “extraordinary provisions” designed to insulate  
 2 Texas’s abortion laws from challenge. Amici Curiae Br. of Mass. et al. in Supp. of  
 3 Pls.’ TRO & Prelim. Inj. 7–8, *United States v. Texas*, No. 1:21-cv-796, Dkt. 71, at  
 4 7–8 (W.D. Tex. Sept. 15, 2021). In another amicus brief, California criticized  
 5 Texas’s “unprecedented attack on the rule of law” and SB 8’s “attempts to thwart  
 6 judicial review and insulate the State from accountability[.]” Br. of Mass. et al. as  
 7 Amici Curie in Supp. of Pet’rs at 5, *Whole Woman’s Health v. Jackson*, Nos. 21-  
 8 463, 21-588, 2021 WL 5016707 (Oct. 27, 2021). In statements issued in  
 9 connection with those amicus briefs, California Attorney General Rob Bonta  
 10 condemned SB 8 as “blatantly unconstitutional” and specifically called out Texas’s  
 11 attempt to “shield[]” its laws “from federal judicial review.”<sup>8</sup>

12 Texas responded to the lawsuits by raising threshold jurisdictional arguments.  
 13 For example, in the federal lawsuit filed by the abortion providers against certain  
 14 state officers (including state court defendants, the Texas Attorney General, and  
 15 state licensing officials), Texas moved to dismiss the suit under the doctrine of  
 16 sovereign immunity. State Agency Defs.’ Mot. to Dismiss at 2, *Whole Woman’s*  
 17 *Health v. Jackson*, No. 21-616, Dkt. 48, 2021 WL 5141228 (W.D. Tex. August 8,  
 18 2021). Texas also argued that the plaintiffs lacked standing to challenge any  
 19 provision of SB 8—including the fee-shifting provision—because they had not  
 20 established any credible threat that the State might invoke its enforcement power in  
 21 the future. *Id.* The district court denied the motion to dismiss, concluding that the  
 22 providers had “sufficiently alleged a demonstrated willingness on the part of the  
 23 [state defendants] to enforce abortion restrictions through administrative actions”  
 24 and finding that the plaintiffs faced a “credible threat of enforcement” with respect  
 25 to the fee-shifting provision. *Whole Woman’s Health v. Jackson*, 556 F. Supp. 3d

26  
 27 <sup>8</sup> Press Release, Cal. Dept. of Justice, Attorney General Bonta: Texas Cannot  
 28 Avoid Judicial Review of its Unconstitutional Abortion Ban (Oct. 27, 2021),  
 available at <https://tinyurl.com/wpdjhzwk>.

1 595, 612–13, 615 (W.D. Tex. 2021) *rev'd* 142 S. Ct. 522 (2021).

2 The Supreme Court granted certiorari before judgment and then affirmed in  
3 part and reversed in part. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522  
4 (2021). The Supreme Court reached only the threshold question of which parties  
5 were proper defendants to the challenge to SB 8's private-right-of-action provision;  
6 the Court did not address the constitutionality of any section of SB 8, including the  
7 fee-shifting provisions. *Id.* at 531 (“[T]he ultimate merits question—whether S.B.  
8 8 is consistent with the Federal Constitution—is not before the Court.”).<sup>9</sup> The  
9 Court held that the state-court defendants were insulated from suit because of  
10 sovereign immunity, *id.* at 532, and that Texas's Attorney General was not a proper  
11 defendant because nothing would allow federal courts to “parlay” his “enforcement  
12 authority into an injunction against any and all unnamed private parties who might  
13 seek to bring their own S.B. 8 suits[,]” *id.* But the Court also concluded that the  
14 plaintiffs had plausibly alleged that the licensing-official defendants were duty-  
15 bound to bring disciplinary actions, and therefore held that the suit against those  
16 defendants could proceed. *Id.* at 537.

17 Chief Justice Roberts and Justice Sotomayor authored separate opinions  
18 concurring in the judgment in part and dissenting in part, both of which were joined  
19 by Justice Breyer and Justice Kagan. Chief Justice Roberts observed that SB 8  
20 “employed an array of stratagems designed to shield its unconstitutional law from  
21 judicial review.” *Whole Woman's Health*, 142 S. Ct. at 543 (Roberts, C.J.,

22 \_\_\_\_\_  
23 <sup>9</sup> Texas asserted that any challenge to the fee-shifting provision in section 4  
24 of SB 8 was “outside the question presented.” Reply Br. for Resp'ts Jackson,  
25 Carlton, Thomas Young, Benz, Paxton & the State of Texas 7, *Whole Woman's*  
26 *Health Org. v. Jackson*, Nos. 21-463, 21-588, 2021 WL 5044725 (Oct. 29, 2021).  
27 The question presented in the petition was “whether a State can insulate from  
28 federal-court review a law that prohibits the exercise of a constitutional right by  
delegating to the general public the authority to enforce that prohibition through  
civil action.” Pet. for Writ of Cert. Before J. at i, *Whole Woman's Health v.*  
*Jackson*, No. 21-463, 2021 WL 4463502, (Sept. 23, 2021).

1 concurring in the judgment in part and dissenting in part). In his view, SB 8  
 2 “effectively chill[ed] the provision of abortions in Texas.” *Id.* at 544. He would  
 3 have authorized the suit to proceed against additional defendants, including the  
 4 state court clerk and the Texas Attorney General. *Id.* Justice Sotomayor  
 5 recognized that SB 8 amounted to a “brazen challenge to our federal structure[,]”  
 6 with “the threat of [SB 8’s] punitive measures creat[ing] a chilling effect that  
 7 advances the State’s unconstitutional goals.” *Id.* at 547 (Sotomayor, J., concurring  
 8 in the judgment in part and dissenting in part). Justice Sotomayor specifically  
 9 described SB 8’s fee-shifting provision as “procedural meddling[,]” explaining that  
 10 it was designed—like the other provisions of SB 8—to “deter efforts to seek pre-  
 11 enforcement review[.]” *Id.* at 546 n.2.<sup>10</sup>

### 12 **3. The Pending Challenge to SB 8**

13 In August of this year, abortion providers and non-profit advocates in Texas  
 14 filed a separate challenge to several of Texas’s abortion laws, on the basis that those  
 15 laws violate the constitutional right to travel, the First Amendment, and the Due  
 16 Process clause. Compl., *Fund Texas Choice v. Paxton*, No. 22-cv-859, Dkt. 1  
 17 (W.D. Tex. Aug. 23, 2022). Relevant here, the plaintiffs challenged SB 8’s fee-  
 18 shifting scheme, contending that the law violated the First Amendment right to  
 19 petition the government for redress of grievances and was preempted by 42 U.S.C.  
 20 § 1988. *Id.* ¶¶ 192–204. The plaintiffs explained that the fee-shifting scheme was

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22 <sup>10</sup> The Fifth Circuit upon remand certified to the Texas Supreme Court the  
 23 question whether Texas law authorizes certain state licensing officials to directly or  
 24 indirectly enforce SB 8’s requirements. The state supreme court held that the  
 25 licensing officials did not have such authority. *Whole Woman’s Health v. Jackson*,  
 26 642 S.W.3d 569, 572 (Tex. 2022). In the district court, the plaintiffs thereafter  
 27 dismissed all counts in the complaint against all defendants. The court retained  
 28 jurisdiction “over any subsequent claims for fees and/or costs incurred in this  
 litigation.” Order, *Whole Woman’s Health v. Jackson*, No. 21-616, Dkt. 107 (W.D.  
 Tex. June 24, 2022).

1 “designed to insulate all Texas abortion restrictions from judicial challenge by  
 2 deterring even meritorious lawsuits[,]” Mot. for Prelim. Inj. 46, *Fund Texas Choice*  
 3 *v. Paxton*, No. 22-cv-859, Dkt. 6 (W.D. Tex. Aug. 24, 2022), and described how  
 4 they could not even file the *Fund Texas Choice* lawsuit until they had “secured  
 5 funding to ensure their continued financial viability” in the event that the fee-  
 6 shifting provision was ever applied to their claims, Reply in Supp. of Mot. 24, *Fund*  
 7 *Texas Choice v. Paxton*, No. 22-cv-859, Dkt. 56 (W.D. Tex. Sept. 26, 2022).<sup>11</sup>  
 8 California filed an amicus brief in support of the plaintiffs, focusing on plaintiffs’  
 9 claim that Texas unlawfully interfered with the right to interstate travel. Amici  
 10 Curiae Br. of Cal. et al., *Fund Texas Choice v. Paxton*, No. 22-cv-859, Dkt. 38-1  
 11 (W.D. Tex. Sept. 23, 2022).

12 Texas opposed the plaintiffs’ motion for a preliminary injunction. Resp. to  
 13 Pls.’ Mot. for Prelim. Inj. & Mot. to Dismiss Pls.’ Compl., *Fund Texas Choice v.*  
 14 *Paxton*, No. 22-cv-859, Dkt. 33 (W.D. Tex. Sept. 19, 2022). With respect to the  
 15 plaintiffs’ challenge to the fee-shifting provisions in section 4 of SB 8, Texas raised  
 16 jurisdictional and other threshold defenses. *Id.* at 11–14, 26, 30–32. Texas argued  
 17 that the plaintiffs lacked standing because the possibility that the Attorney General  
 18 might someday seek fees under that provision was conjectural and hypothetical, *id.*  
 19 at 11; asserted that the Attorney General was entitled to sovereign immunity  
 20 because he had not demonstrated a willingness to seek attorney’s fees, *id.* at 14; and

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22 <sup>11</sup> See also Reply in Supp. of Mot. 24, *Fund Texas Choice v. Paxton*, No. 22-  
 23 cv-859, Dkt. 56 (W.D. Tex. Sept. 26, 2022) (“The Texas legislature’s unique fee-  
 24 shifting provision that attaches to all affirmative abortion-related constitutional  
 25 challenges . . . is so chilling that few organizations can afford to test the scope of  
 26 the laws for fear of the financial ruin they may suffer in the case of any loss in  
 27 court. And few organizations will be able to find counsel willing to risk the severe  
 28 financial injury attendant to cases such as this, since section 30.022 imposes joint  
 and several liability on any counsel who assist in the challenge of an abortion  
 statute.”).

1 claimed that *Pullman* abstention principles weighed against federal intervention  
 2 before state courts could construe section 30.022, *id.* at 30–32. Significantly,  
 3 however, Texas did not make any commitment not to seek fees under the  
 4 challenged provision. Nor did Texas substantively respond to plaintiffs’ First  
 5 Amendment claim.<sup>12</sup> With respect to plaintiffs’ argument that the fee-shifting  
 6 provision is preempted by 42 U.S.C. § 1988, Texas argued that the Supremacy  
 7 Clause cannot be enforced through §1983 actions, *id.* at 16–17, and, in any event,  
 8 that “SB 8’s fee shifting provision does not directly conflict with § 1988 in all  
 9 circumstances and does not render compliance with federal law impossible or stand  
 10 as an obstacle to the purposes of § 1988[,]” *id.* at 27. The district court held an  
 11 evidentiary hearing on the motion for a preliminary injunction and the parties are  
 12 currently awaiting a decision from that court on the motion and on related  
 13 evidentiary matters.

#### 14 **B. California Senate Bill 1327**

15 California’s SB 1327 was a reaction to SB 8. The day after the Supreme Court  
 16 issued its decision regarding SB 8, Governor Newsom criticized the ruling on the  
 17 ground that it had the practical effect of “endorsing Texas’s scheme to insulate its  
 18 law from the fundamental protections of *Roe v. Wade*.”<sup>13</sup> The Governor explained  
 19 that “California opposed Texas’s ploy at the Supreme Court, and I wish the court  
 20 had agreed with us[,]” but he stated that if Texas was allowed to “shield [its] laws  
 21 from review by the federal courts” then California “should use that authority to  
 22 protect people’s lives.”<sup>14</sup>

23 \_\_\_\_\_  
 24 <sup>12</sup> In its section on standing, Texas quoted a decision from the Seventh  
 25 Circuit holding that ordinary fee regimes do not implicate the First Amendment.  
 26 *See Resp. to Mot. for Prelim. Inj.* 13–14.

27 <sup>13</sup> Cal. Office of the Governor, Governor Newsom Statement on Supreme  
 28 Court Decision (Dec. 11, 2021), available at <https://tinyurl.com/z2bpc6rn>.

<sup>14</sup> Gavin Newsom, Opinion: *The Supreme Court Opened the Door to Legal*

1 In furtherance of that objective, the Governor proposed and the Legislature  
 2 enacted SB 1327.<sup>15</sup> SB 1327 has two principal sections that closely track  
 3 provisions of SB 8. Section 1, which is not at issue in this case, creates a private  
 4 right of action to enforce certain existing restrictions on assault weapons and ghost  
 5 guns. SB 1327 § 1 (Cal. Bus. & Prof. Code § 22949.62). Like section 3 of SB 8,  
 6 section 1 of SB 1327 specifically prohibits the “state, a political subdivision, a  
 7 district or county or city attorney, or an executive or administrative officer or  
 8 employee of this state or a political subdivision” from enforcing its provisions and  
 9 explicitly provides that the law “shall be enforced exclusively through . . . private  
 10 civil actions.” *Id.* (Cal. Bus. & Prof. Code § 22949.64(a)). Section 1 of SB 1327  
 11 also incorporates the modifications to state-court procedures found in SB 8. Unlike  
 12 SB 8, however, SB 1327 did not seek to contravene any established judicial  
 13 precedent. As the author of SB 1327 explained, “[b]y enacting its abortion ban,  
 14 Texas . . . knowingly infring[ed] upon a well-established constitutional right.”<sup>16</sup> In  
 15 contrast, with respect to SB 1327’s private right of action, “while the Supreme  
 16 Court recognizes an individual constitutional right to bear arms, it certainly does  
 17 not recognize a constitutional right to own, manufacture, or sell an illegal assault  
 18 weapon or ghost gun.”<sup>17</sup> SB 1327 also expressly provides that its private-right-of-  
 19 action provision “shall become inoperative” if the analogous private right of action

20 *Vigilantism in Texas. California Will Use the Same Tool to Save Lives*, The Wash.  
 21 Post (Dec. 20, 2021), available at <https://tinyurl.com/3ky3pmkz>; Governor Newsom  
 22 Statement on Supreme Court Decision, *supra* n.13.

23 <sup>15</sup> Tweet of Senator Bob Hertzberg (Feb. 18, 2022),  
 24 <https://tinyurl.com/3eehjb5c> (“I’m proud to answer Gov. @GavinNewsom’s call  
 25 for legislation to help restrict illegal ghost guns and assault weapons in California.  
 Modeled after Texas’ #SB8, my bill creates a private right of action for  
 Californians to use against those selling and manufacturing illegal guns.”).

26 <sup>16</sup> Robert Hertzberg, Statement on Senate Bill 1327, Firearms: A Private  
 27 Right of Action (Feb. 18, 2022), available at <https://tinyurl.com/57xu5px5>.

28 <sup>17</sup> *Id.*

1 in SB 8 is “invalidat[ed] . . . in its entirety by a final decision of the United States  
 2 Supreme Court or Texas Supreme Court [.]” SB 1327 § 1 (Cal. Bus. & Prof. Code  
 3 § 22949.71).

4 Section 2 of SB 1327, which is at issue here, parallels the fee-shifting  
 5 provision in section 4 of SB 8. The language in the two fee-shifting provisions is  
 6 nearly identical, except for the subject matter of the lawsuit that triggers fees.  
 7 While section 4 of SB 8 applies to suits challenging abortion laws, SB 1327’s fee-  
 8 shifting provision is implicated in lawsuits seeking declaratory or injunctive relief  
 9 with respect to any law that regulates or restricts firearms. Specifically, section 2 of  
 10 SB 1327 provides that:

11 any person, including an entity, attorney, or law firm, who seeks  
 12 declaratory or injunctive relief to prevent this state, a political  
 13 subdivision, a governmental entity or public official in this state, or a  
 14 person in this state from enforcing any statute, ordinance, rule,  
 15 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.

16 S.B. 1327 § 2 (Cal. Code Civ. P. § 1021.11(a)). Like SB 8, a party is a “prevailing  
 17 party” if the court dismisses any claim, regardless of the reason for dismissal, or  
 18 enters judgment in favor of the party opposing the declaratory or injunctive relief.  
 19 *Id.* (Cal. Code Civ. P. § 1021.11(b)). As a result, as in SB 8, the only party that  
 20 could possibly qualify as the “prevailing party” is the defendant. Also like SB 8,  
 21 prevailing parties may seek costs and fees within three years of the date when the  
 22 dismissal or denial of a claim becomes final. *Id.* (Cal. Code Civ. P. § 1021.11(c)).  
 23 And as with SB 8, it is not a defense that the prevailing party did not seek  
 24 attorney’s fees in the underlying action; that the court in the underlying action  
 25 declined to recognize or enforce this provision; or that the court in the underlying  
 26 action held the challenged provision invalid, unconstitutional, or preempted by  
 27 federal law. *Id.* (Cal. Code Civ. P. § 1021.11(d)).  
 28

1 SB 1327 contains a severability clause with respect to the private right of  
 2 action (Cal. Bus. & Prof. Code § 22949.70), and declares in a separate severability  
 3 clause that “every statute that regulates or prohibits firearms is severable in each of  
 4 its applications to every person and circumstance,” SB 1327, § 3(c). SB 1327 is  
 5 scheduled to take effect on January 1, 2023.<sup>18</sup>

6 In evaluating SB 1327, the Report of the Senate Judiciary Committee of the  
 7 California Legislature acknowledged that the bill “is modeled after [SB 8], and  
 8 includes a number of the same problematic procedural mechanisms.” SB 1327  
 9 Senate Judiciary Report (Apr. 1, 2022), at 2. The report reiterated that “[t]he clear  
 10 premise of this bill is if Texas can use this clever scheme to subvert federal  
 11 supremacy and infringe on constitutional rights its Legislature and Governor do not  
 12 favor, then California should use it to carry out its own, constitutional policy  
 13 goals.” *Id.* at 12.

14 Attorney General Bonta similarly understood SB 1327 as a law that responded  
 15 to the Supreme Court’s decision regarding SB 8.<sup>19</sup> As the Attorney General saw it,  
 16 the Governor and the Legislature were attempting to use SB 8’s structure “in the  
 17 best way that it can be used, in a way that advances California values”; but the  
 18 Attorney General also recognized that the approach was “dangerous. It’s a  
 19 dangerous game. We’re using it responsibly. Now others can use it like Texas, and  
 20 maybe the Supreme Court will look at the landscape of how this approach is being  
 21 used and try to correct it. If that happens, that’s fine, too.”<sup>20</sup>

22 Governor Newsom signed SB 1327 into law in July 2022. Since then, several  
 23 plaintiffs and attorneys in pending Second Amendment challenges to California’s  
 24

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25 <sup>18</sup> Cal. Gov. Code § 9600(a).

26 <sup>19</sup> Ben Christopher, *What Would Rob Bonta do Next as California Attorney*  
*General*, *Cal Matters* (Oct. 13, 2022), <https://tinyurl.com/mr3bxmn8>.

27 <sup>20</sup> *Id.*

1 firearm laws sought assurances that SB 1327's fee-shifting provision would not be  
 2 invoked in those lawsuits. In each of those cases, the Attorney General committed  
 3 not to seek fees under SB 1327.<sup>21</sup> The Attorney General offered the same  
 4 commitment to the plaintiffs and attorneys in the lawsuit currently pending in  
 5 *Miller v. Bonta*, No. 3:19-cv-1537 (S.D. Cal.) (*Miller I*).<sup>22</sup>

### 6 **C. This Lawsuit**

7 The plaintiffs here include individuals and non-profit organizations who  
 8 either have pending cases, or assert that they desire to file new cases, against  
 9 California challenging its firearms regulations. Compl. ¶¶ 13-22. The plaintiffs  
 10 also include attorneys who currently represent litigants challenging California  
 11 firearms laws or attorneys who allege that they have refrained from filing suits  
 12 because of SB 1327. *Id.* ¶¶ 23-24. The complaint alleges that the fee-shifting  
 13 scheme in section 2 of SB 1327 is preempted and unconstitutional under the  
 14 Supremacy Clause, *id.* ¶ 78; violates the First Amendment right to petition the  
 15 government for redress of grievances, *id.* ¶ 81; and violates the Equal Protection  
 16 Clause of the Fourteenth Amendment, *id.* ¶ 84. The complaint does not challenge  
 17 the private right of action in section 1 of SB 1327. *See* Mem. of P. & A. 4.

18 Plaintiffs are currently seeking a preliminary injunction. Mot. 1. They have  
 19 also requested that the Court consolidate the preliminary injunction hearing with a  
 20 trial on the merits and enter "a permanent injunction order that declares  
 21 unconstitutional and restrains" defendants from enforcing SB 1327's fee-shifting  
 22 scheme before it takes effect on January 1, 2023. *Id.* In support of their motion,

23 \_\_\_\_\_  
 24 <sup>21</sup> *See, e.g., Renna v. Bonta*, No. 20-cv-2190, Dkt. 57 at 3 (S.D. Cal. Sept. 28,  
 25 2022); *Abrera v. Newsom*, No. 22-cv-1162, Dkt. 22 at 8–9 (E.D. Cal. Oct. 10,  
 26 2022); *Defense Distributed v. Bonta*, No. 22 CV 6200, Dkt. 19 at 9–11 (C.D. Cal.  
 27 Oct. 24, 2022); *Rupp v. Becerra*, No. 8:17-cv-00746, Dkt. 130 at 8–10 (S.D. Cal.  
 28 Oct. 21, 2022).

<sup>22</sup> Declaration of Elizabeth K. Watson, ¶¶ 3–4.

1 plaintiffs submitted several declarations from individual plaintiffs and attorneys  
 2 explaining that the declarants have dismissed or “refrain[ed] from bringing  
 3 additional lawsuits challenging California firearms regulations that they believe are  
 4 unconstitutional,” Mem. of P. & A. 22, for fear of “potentially ruinous fee  
 5 liability,” *id.* at 2.<sup>23</sup> The declarants point to the “threat of enforcement of SB  
 6 1327’s fee-shifting penalty” as reason for refraining from filing these suits and—  
 7 like the litigants challenging SB 8—call the fee-shifting scheme a “heavy-handed  
 8 deterrent to asserting civil rights claims.” *Id.* at 7, 12. In plaintiffs’ view, SB  
 9 1327’s fee-shifting scheme has an “obvious and impermissible purpose” of “scaring  
 10 away parties who may bring litigation over firearm regulations,” in violation of  
 11 their constitutional rights. *Id.* at 16.

#### 12 **D. Defendants’ Efforts to Resolve This Litigation**

13 After plaintiffs filed their motion in this case, defendants proposed a resolution  
 14 under which the parties would stipulate that defendants would not seek attorney’s  
 15 fees or costs under section 2 of SB 1327 from any plaintiff or plaintiff’s attorney—  
 16 including prospective plaintiffs who are not involved in this case—unless and until  
 17 a court ultimately holds that the fee-shifting provision in section 4 of SB 8 is  
 18 constitutional and enforceable, and that decision is affirmed on appeal or no appeal  
 19 is taken. As part of that stipulation, defendants would also commit not to seek  
 20 attorney’s fees or costs under section 2 of SB 1327 in connection with any suit filed  
 21 before the date on which any decision ultimately upholding the constitutionality of  
 22 section 4 of SB 8 is affirmed on appeal (or the time to file an appeal expires)—  
 23

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24 <sup>23</sup> Plaintiffs assert that the Attorney General has refused to take a position on  
 25 whether he will seek to enforce the fee-shifting statute in connection with *Miller I.*  
 26 Mem. P. & A. 7; Lee Decl. ¶¶ 4-5. That is untrue. The Attorney General already  
 27 committed not to seek fees in connection with *Miller I.* *Supra* p. 14–15. And he  
 28 has also committed not to seek fees under section 2 of SB 1327 unless its model,  
 section 4 of SB 8, is upheld on the merits. *Infra* p. 17.

again, regardless of whether the party bringing that suit is a plaintiff in the present case. But the parties were unable to agree to the terms of a stipulation.

### ARGUMENT

Plaintiffs’ legal claims are premised on the concern that the fee-shifting mechanism challenged here will chill prospective litigation. The Attorney General has previously recognized and criticized the potential chilling effect of that fee-shifting mechanism in the context of SB 8, and has acknowledged that California’s SB 1327 was a reaction to SB 8—founded on the Legislature’s view that if Texas were allowed to employ the problematic mechanisms in SB 8 to advance its policy interests, then California should be allowed to use the same mechanisms to advance its own policy interests. To date, however, no court has upheld the constitutionality of the fee-shifting mechanism contained in section 4 of SB 8. Accordingly, defendants hereby commit not to seek attorney’s fees or costs under section 2 of SB 1327 from any plaintiff or plaintiff’s attorney—including prospective plaintiffs who are not involved in this case—unless and until a court ultimately holds that the fee-shifting provision in section 4 of SB 8 is constitutional and enforceable, and that decision is affirmed on appeal or no appeal is taken. That commitment extends to attorney’s fees or costs incurred at any time in connection with any suit filed before the date on which a decision ultimately upholding the constitutionality of section 4 of SB 8 is affirmed on appeal (or the time to file an appeal expires)—again, regardless of whether the party bringing that suit is a plaintiff in the present case.

In light of that commitment, this Court lacks jurisdiction to consider the merits of plaintiffs’ claims or to grant the relief requested by plaintiffs. Article III confines the jurisdiction of the federal courts to actual “cases and controversies,” and “the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process.” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). “To satisfy the case or controversy requirement of Article

1 III, which is the irreducible constitutional minimum of standing,” plaintiffs must  
 2 demonstrate that they have “suffered injury in fact, that the injury is fairly traceable  
 3 to the actions of the defendant[s], and that the injury will likely be redressed by a  
 4 favorable decision.” *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (internal quotation  
 5 marks and citations omitted). Because of defendants’ commitment not to seek fees  
 6 under section 2 of SB 1327 in any case brought by the plaintiffs—in connection  
 7 with all pending cases as well as any cases that will be filed for the foreseeable  
 8 future—plaintiffs lack any injury in fact that is fairly traceable to the defendants.  
 9 That stands in contrast to the circumstances confronting the plaintiffs in Texas, who  
 10 have alleged injury precisely because Texas refuses to commit not to seek fees.<sup>24</sup>

11 The possibility that the defendants here might one day seek fees under section  
 12 2 of SB 1327—only in the event that a court ultimately holds that the fee-shifting  
 13 provision in section 4 of SB 8 is constitutional and enforceable, and then only with  
 14 respect to suits filed after the date on which such a ruling is affirmed on appeal or  
 15 the time for filing an appeal has expired—does not confer jurisdiction on this court.  
 16 When a plaintiff seeks to establish standing based on an anticipated future injury,  
 17 the plaintiff must show that the injury is “imminent.” *Lujan v. Defenders of*  
 18 *Wildlife*, 504 U.S. 555, 564 & n.2 (1992). A similar concern for the avoidance of  
 19 premature and possibly unnecessary litigation underlies the requirement that a suit  
 20 be “ripe” for adjudication. *See Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975)  
 21 (noting “close affinity” between ripeness and standing doctrines). An injury is not  
 22 imminent and a claim is not ripe for adjudication if it rests upon “contingent future

23  
 24 <sup>24</sup> The Texas state defendants point to the absence of *affirmative* evidence  
 25 that their Attorney General “has sought (or will imminently seek) attorneys’ fees  
 26 under S.B. 8” and contested plaintiffs’ standing to challenge section 4 of SB 8 in  
 27 the *Fund Texas Choice* litigation on that basis. Resp. to Pls.’ Mot. for Prelim. Inj.  
 28 11, *Fund Texas Choice*, No. 22-cv-859, Dkt. 33 (W.D. Tex. Sept. 19, 2022). As the  
 plaintiffs there explain, however, that very uncertainty is what inflicts their injury:  
 the “fee-shifting provision . . . is so chilling that few organizations can afford to test  
 the scope of the laws for fear of the financial ruin they may suffer in the case of any  
 loss in court.” Reply in Supp. of Mot. 24, *Fund Texas Choice v. Paxton*, No. 22-  
 cv-859, Dkt. 56 (W.D. Tex. Sept. 26, 2022).

1 events that may not occur as anticipated, or indeed may not occur at all.” *Thomas*  
 2 *v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–581 (1985) (internal  
 3 quotation marks and citation omitted). Applying those principles, courts have held  
 4 that disputes are not ripe if they are “contingent on the outcome of . . . other  
 5 ongoing lawsuits.” *In re BofI Holding, Inc. S’holder Litig.*, 848 F. App’x 234, 236  
 6 (9th Cir. 2021) (unpublished); *see, e.g., Trustgard Ins. Co. v. Collins*, 942 F.3d 195,  
 7 200 (4th Cir. 2019) (“Trustgard’s alleged injury . . . is of a hypothetical and  
 8 contingent nature: the injury may or may not occur depending on the outcome of  
 9 the state lawsuit.”).

10 For the same reasons, the dispute over the fee-shifting provision in section 2 of  
 11 SB 1327 is not ripe under the present circumstances. Defendants have now  
 12 expressly committed not to seek fees in any cases filed in the foreseeable future—  
 13 and defendants would be subject to principles of estoppel if they ever reneged on  
 14 the terms of that commitment to plaintiffs. *See generally Bock v. Washington*, 33  
 15 F.4th 1139, 1145 (9th Cir. 2022). For the time being—and perhaps for all time—  
 16 that commitment has eliminated any possibility that plaintiffs or their attorneys will  
 17 be “deter[red] . . . from bringing civil rights litigation” against defendants. Mem. P.  
 18 & A. 1. And the possibility that section 2 of SB 1327 might deter plaintiffs from  
 19 bringing some future suit against defendants “is of a hypothetical and contingent  
 20 nature.” *Trustgard Ins. Co.*, 942 F.3d at 200. It would only arise if the parallel  
 21 provision in section 4 of SB 8 is held to be constitutional and that decision is  
 22 affirmed on appeal or no appeal is taken—a scenario that plaintiffs must view as  
 23 remote in light of their position that litigants “are likely to succeed in demonstrating  
 24 that” the challenged fee-shifting mechanism “is unconstitutional.” Mem. P. &  
 25 A. 22.

26 For the same reason, plaintiffs cannot establish that they would suffer  
 27 irreparable harm absent a preliminary injunction. *See Winter*, 555 U.S. at 20; *see*  
 28 *also Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (“This

1 Court has ruled that ‘[s]peculative injury does not constitute irreparable injury  
 2 sufficient to warrant granting a preliminary injunction. A plaintiff must do more  
 3 than merely allege imminent harm sufficient to establish standing; a plaintiff must  
 4 *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive  
 5 relief.’”) (quoting *Caribbean Marine Services Co., Inc. v. Baldrige*, 844 F.2d 668,  
 6 674 (9th Cir. 1988)). And plaintiffs cannot, under these circumstances, demonstrate  
 7 that the equities tip in their favor or that an injunction is in the public interest. *See*  
 8 *Burgos v. Long*, No. 2:11-cv-01906-JAM-JFM, 2013 WL 5818093 (E.D. Cal.  
 9 Oct. 29, 2013) at \*11 (finding that “the balance of equities and public interest  
 10 weigh against injunctive relief” because “[p]laintiff will not suffer cognizable harm  
 11 if the injunction is not issued”).

## 12 CONCLUSION

13 In light of defendants’ commitment, the Court lacks jurisdiction to entertain  
 14 plaintiffs’ claims and the Court should deny the motion for preliminary injunction  
 15 on that basis.

16  
 17 Dated: October 31, 2022

Respectfully submitted,

18 ROB BONTA  
 19 Attorney General of California  
 20 R. MATTHEW WISE  
 Supervising Deputy Attorney General

21 *s/ Ryan R. Davis*

22  
 23 RYAN R. DAVIS  
 Deputy Attorney General  
 24 *Attorneys for Defendants Rob Bonta*  
 25 *and Blake Graham, in their official*  
 26 *capacities*

27 SA2022304288/43459593.docx

## CERTIFICATE OF SERVICE

Case Name: ***Miller, James, et al. v. Rob Bonta, et al. (S.D. Cal.)***

Case No. **3:22-cv-01446-BEN-JLB**

I hereby certify that on October 31, 2022, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**
- **ELIZABETH WATSON'S DECLARATION IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

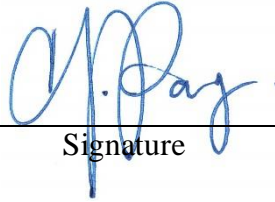
I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on October 31, 2022, at San Francisco, California.

G. Pang

Declarant

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Signature