

1 BENBROOK LAW GROUP, PC  
2 BRADLEY A. BENBROOK (SBN 177786)  
3 STEPHEN M. DUVERNAY (SBN 250957)  
4 701 University Avenue, Suite 106  
5 Sacramento, CA 95825  
6 Telephone: (916) 447-4900  
7 brad@benbrooklawgroup.com

8 Attorneys for Plaintiffs

9 **UNITED STATES DISTRICT COURT**  
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 FIREARMS POLICY COALITION,  
12 INC.; CALIFORNIA GUN RIGHTS  
13 FOUNDATION; SAN DIEGO  
14 COUNTY GUN OWNERS PAC,

15 Plaintiffs,

16 v.

17 CITY OF SAN DIEGO; COUNTY OF  
18 IMPERIAL; COUNTY OF ALAMEDA;  
19 COUNTY OF VENTURA; COUNTY  
20 OF LOS ANGELES; CITY OF SAN  
21 JOSE; and COUNTY OF SANTA  
22 CLARA,

23 Defendants.

Case No.: 3:23-cv-00400-LL-DDL

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION OR,  
ALTERNATIVELY, FOR  
SUMMARY JUDGMENT**

Date: May 2, 2023  
Courtroom 5D (5th Floor)  
Hon. Linda Lopez

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
I. INTRODUCTION.....	1
II. BACKGROUND.....	2
A. Section 1021.11 Creates A State-Law Fee-Shifting Regime, Applicable Only To Firearms Litigation, Designed To Suppress Such Cases And Insulate Firearms Regulations From Judicial Review .....	2
B. Section 1021.11 Violates Several Constitutional Provisions.....	3
C. Section 1021.11’s Fee-Shifting Regime Has Infringed On Plaintiffs’ Constitutional Rights By Depriving Them Of Access To Court .....	5
III. ALTERNATIVE MOTIONS.....	10
IV. ARGUMENT .....	11
A. Section 1021.11’s Fee-Shifting Regime Is Unconstitutional And Should Be Enjoined As To Defendants For The Same Reasons It Was Enjoined As To The State In <i>Miller</i> .....	11
1. Section 1021.11’s Fee-Shifting Regime Violates the First Amendment .....	11
2. Section 1021.11’s Fee-Shifting Regime is Preempted by 42 U.S.C. § 1988 .....	15
3. Section 1021.11’s Fee-Shifting Regime Violates The Equal Protection And Due Process Clauses.....	18
B. Plaintiffs Will Be Irreparably Harmed Without A Preliminary Injunction .....	19
C. The Balance Of Equities And Public Interest Both Favor Plaintiffs ....	20
D. The Court Should Waive Bond Or Require Only Nominal Security ...	21
E. The Court Should Advance The Merits Hearing And Consolidate It With The Preliminary Injunction Pursuant to FRCP 65(a)(2) .....	22
V. CONCLUSION .....	22

## TABLE OF AUTHORITIES

### Cases

<i>Alliance for the Wild Rockies v. Cottrell</i> , 632 F.3d 1127 (9th Cir. 2011) .....	10
<i>Altria Grp., Inc. v. Good</i> , 555 U.S. 70 (2008) .....	15
<i>Am. Bev. Ass'n v. City &amp; Cty. of San Francisco</i> , 916 F.3d 749 (9th Cir. 2019) .....	20
<i>Am. Trucking Ass'ns v. City of Los Angeles</i> , 559 F.3d 1046 (9th Cir. 2009) .....	19, 21
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986) .....	10
<i>Ariz. Right to Life Political Action Comm. v. Bayless</i> , 320 F.3d 1002 (9th Cir. 2003) .....	8, 9
<i>Arizona Dream Act Coal. v. Brewer</i> , 757 F.3d 1053 (9th Cir. 2014) .....	20
<i>Ashcroft v. Am. Civil Liberties Union</i> , 542 U.S. 656 (2004) .....	10
<i>Babbitt v. United Farm Workers Nat'l Union</i> , 442 U.S. 289 (1979) .....	9
<i>Barahona-Gomez v. Reno</i> , 167 F.3d 1228 (9th Cir. 1999) .....	21
<i>Bhd. Of R. R. Trainmen v. Virginia ex rel. Va. State Bar</i> , 377 U.S. 1 (1964) .....	13
<i>Cal. Motor Trans. Co. v. Trucking Unlimited</i> , 404 U.S. 508 (1972) .....	12
<i>Cal. Pharmacists Ass'n v. Maxwell-Jolly</i> , 563 F.3d 847 (9th Cir. 2009) .....	21
<i>Cayuga Nation v. Tanner</i> , 824 F.3d 321 (2d Cir. 2016) .....	9
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986) .....	10, 11
<i>Christiansburg Garment Co. v. EEOC</i> , 434 U.S. 412 (1978) .....	16
<i>Cnty. House, Inc. v. City of Boise</i> , 490 F.3d 1041 (9th Cir. 2007) .....	20
<i>Crosby v. Nat'l Foreign Trade Council</i> , 530 U.S. 363 (2000) .....	15
<i>Doe v. Harris</i> , 772 F.3d 563 (9th Cir. 2014) .....	20
<i>Drakes Bay Oyster Co. v. Jewell</i> , 747 F.3d 1073 (9th Cir. 2014) .....	20

1	<i>Elrod v. Burns</i> ,	19
2	427 U.S. 347 (1976).....	
3	<i>First Nat'l Bank of Bos. v. Bellotti</i> ,	14
4	435 U.S. 765 (1978).....	
5	<i>Fox v. Vice</i> ,	16
6	563 U.S. 826 (2011).....	
7	<i>Gade v. Nat'l Solid Wastes Mgmt. Ass'n</i> ,	15
8	505 U.S. 88 (1992).....	
9	<i>Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal</i> ,	10
10	546 U.S. 418 (2006).....	
11	<i>Hensley v. Eckerhart</i> ,	16, 18
12	461 U.S. 424 (1983).....	
13	<i>Holder v. Humanitarian L. Project</i> ,	9
14	561 U.S. 1(2010).....	
15	<i>In re Primus</i> ,	12, 14
16	436 U.S. 412 (1978).....	
17	<i>Italian Colors Rest. v. Becerra</i> ,	8
18	878 F.3d 1165 (9th Cir. 2018) .....	
19	<i>Kennedy v. Bremerton Sch. Dist.</i> ,	14
20	142 S.Ct. 2407 (2022) .....	
21	<i>Legal Services Corp. v. Velazquez</i> ,	13, 14
22	531 U.S. 533 (2001).....	
23	<i>Melendres v. Arpaio</i> ,	19, 20
24	695 F.3d 990 (9th Cir. 2012) .....	
25	<i>Miller v. Bonta</i> , No. 3:22-cv-1446-BEN-MDD,	passim
26	--- F.Supp.3d ----, 2022 WL 17811114 (S.D. Cal. Dec. 19, 2022).....	
27	<i>Nat'l Ass'n for Advancement of Colored People v. Button</i> ,	12, 13, 14
28	371 U.S. 415 (1963).....	
	<i>New York State Rifle &amp; Pistol Ass'n, Inc. v. Bruen</i> ,	14
	142 S.Ct. 2111 (2022) .....	
	<i>Newman v. Piggie Park Enters., Inc.</i> ,	18
	390 U.S. 400 (1968).....	
	<i>Nordlinger v. Hahn</i> ,	18
	505 U.S. 1 (1992).....	
	<i>PLIVA, Inc. v. Mensing</i> ,	15, 18
	564 U.S. 604 (2011).....	
	<i>Preminger v. Principi</i> ,	20
	422 F.3d 815 (9th Cir. 2005) .....	
	<i>Rodriguez v. Robbins</i> ,	21
	715 F.3d 1127 (9th Cir. 2013) .....	
	<i>Roman Cath. Diocese of Brooklyn v. Cuomo</i> ,	19
	141 S. Ct. 63 (2020).....	
	<i>Save Our Sonoran, Inc. v. Flowers</i> ,	21
	408 F.3d 1113 (9th Cir. 2005) .....	

1	<i>Slidewaters LLC v. Wash. State Dep't of Lab. &amp; Indus.</i> ,	22
2	4 F.4th 747 (9th Cir. 2021) .....	
3	<i>Sorrell v. IMS Health Inc.</i> ,	14
4	564 U.S. 552 (2011).....	
5	<i>South Bay Rod &amp; Gun Club, Inc. v. Bonta</i> ,	11
6	S.D. Cal. Case No. 3:22-cv-1461-BEN-JLB, 2022 WL 17811113 (S.D. Cal. Dec.	
7	19, 2022) .....	
8	<i>T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n</i> ,	11
9	809 F.2d 626 (9th Cir. 1987) .....	
10	<i>Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.</i> ,	16
11	489 U.S. 782 (1989).....	
12	<i>Tingley v. Ferguson</i> ,	8
13	47 F.4th 1055 (9th Cir. 2022) .....	
14	<i>United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n</i> ,	13
15	389 U.S. 217 (1967).....	
16	<i>United States v. California</i> ,	21
17	921 F.3d 865 (9th Cir. 2019) .....	
18	<i>United States v. Playboy Ent. Grp., Inc.</i> ,	15
19	529 U.S. 803 (2000).....	
20	<i>United States v. Stevens</i> ,	14
21	559 U.S. 460 (2010).....	
22	<i>United Transp. Union v. State Bar of Mich.</i> ,	13
23	401 U.S. 576 (1971).....	
24	<i>Virginia v. Am. Booksellers Ass'n, Inc.</i>	9
25	484 U.S. 383 (1988).....	
26	<i>Winter v. Natural Res. Def. Council, Inc.</i> ,	10
27	555 U.S. 7 (2008).....	
28	<i>Zepeda v. U.S. I.N.S.</i> ,	21
	753 F.2d 719 (9th Cir. 1983) .....	
	<b>Statutes</b>	
	42 U.S.C. § 1988 .....	15
	42 U.S.C. § 1988(b).....	16
	Cal. Code Civ. Proc. § 1021.11 .....	passim
	<b>Other Authorities</b>	
	Gavin Newsom, Opinion, <i>The Supreme Court Opened the Door to Legal Vigilantism</i>	
	<i>in Texas. California Will Use the Same Tool To Save Lives.</i> , Wash. Post (Dec. 20,	
	2021), <a href="https://wapo.st/3wxWoel">https://wapo.st/3wxWoel</a> .....	4
	H.R. Rep. No. 94-1558 (1976) .....	18
	Press Release, Cal. Dep't of Just., <i>Att'y Gen. Bonta: Texas Cannot Avoid Judicial</i>	
	<i>Review of Its Constitutional Abortion Ban</i> (Oct. 27, 2021), <a href="https://bit.ly/3pRWA4F">https://bit.ly/3pRWA4F</a>	4
	.....	
	S. Rep. No. 94-1011 (June 29, 1976) .....	18
	S.B. 1327, A. Jud. Comm. Analysis (June 10, 2022).....	4

1	S.B. 1327, S. Floor Analysis (June 28, 2022) .....	4
2	<b>Rules</b>	
3	Fed. R. Civ. P. 56, advisory comm. notes (2009 Amendments) .....	10
4	Fed. R. Civ. P. 56(a) .....	10
5	Fed. R. Civ. P. 65(a)(2) .....	10, 22
6	Fed. R. Civ. P. 65(c) .....	21

## I. INTRODUCTION

In *Miller v. Bonta*, this Court enjoined the State from enforcing California Code of Civil Procedure Section 1021.11, a one-sided fee-shifting provision that punishes firearms litigants and their attorneys for asserting constitutional claims, and held that the statute was unconstitutional on multiple fronts. No. 3:22-cv-1446-BEN-MDD, --- F.Supp.3d ----, 2022 WL 17811114 (S.D. Cal. Dec. 19, 2022). Because the Defendant local jurisdictions were not defendants in *Miller*, they are not directly bound by the injunction and could invoke Section 1021.11 against parties who challenge municipal firearms regulations. Plaintiffs are organizations that, but for the risk of ruinous fee liability under Section 1021.11, would challenge firearms regulations in the Defendant jurisdictions. Before filing this case, Plaintiffs requested that Defendants stipulate to non-enforcement of Section 1021.11 in light of *Miller*, but Defendants have refused to do so. As a result, Plaintiffs have refrained from challenging Defendants’ firearms regulations until this Court removes the cloud hanging over those claims by virtue of Section 1021.11’s operation.

As this Court has recognized, Section 1021.11 is an unconstitutional attempt by the State of California to deter citizens and firearms advocacy groups—through a novel, one-way fee-shifting penalty—from accessing the courts to litigate claims over firearms regulations. In *Miller*, the Court held that Section 1021.11 violated the First Amendment (2022 WL 17811114 at \*2–4); the Supremacy Clause (*id.* at \*4–7); and noted that it likewise ran afoul of the Due Process and Equal Protection Clauses (see *id.* at \*2–3). “A state law that threatens its citizens for questioning the legitimacy of its firearms regulations may be familiar to autocratic and tyrannical governments, but not American government. American law counsels vigilance and suspiciousness of laws that thwart judicial scrutiny.” *Id.* at \*3. Because “the purpose and effect of § 1021.11 is to trench on a citizen’s right of access to the courts and to discourage the peaceful vindication of an enumerated constitutional right,” the Court declared the statute invalid. *Id.* at \*4.

Section 1021.11's enforcement is unconstitutional, regardless of whether the State or these local-government Defendants seek to enforce it. This suit was filed on March 2, 2023, and every Defendant was served with the summons on March 3. But Defendants still have not disavowed an intent to enforce the law. Instead, Defendants appear poised to defend Section 1021.11's constitutionality, or at least benefit from the deterrent effect of having it remain in place. Injunctive relief is therefore necessary to secure Plaintiffs' rights.

Since this case presents only questions of law, there is no need for discovery or further development of the case. This Court should take expeditious action and enter judgment in Plaintiffs' favor. Defendants should be enjoined from enforcing this unconstitutional statute.

## II. BACKGROUND

### A. **Section 1021.11 Creates A State-Law Fee-Shifting Regime, Applicable Only To Firearms Litigation, Designed To Suppress Such Cases And Insulate Firearms Regulations From Judicial Review.**

Senate Bill 1327, enacted as Code of Civil Procedure § 1021.11, is based largely word-for-word on Texas's SB 8, enacted in 2021 in the abortion context. *See Miller*, 2022 WL 17811114, at \*1. This case challenges Section 1021.11's radical effort to suppress firearms-related litigation by putting civil rights litigants and their attorneys on the hook for the government's attorney's fees if a case results in anything short of victory on every claim alleged in a complaint.<sup>1</sup> Section 1021.11 provides, in relevant part:

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

<sup>1</sup> Senate Bill 1327 also created a private right of action to enforce state laws relating to the unlawful manufacture, distribution, or sale of specified firearms. 2022 Cal. Stat. ch. 146, § 1 (adding Bus. & Prof. Code §§ 22949.60–.71). This case does not challenge SB 1327's private attorney general features.

1 that relief, is jointly and severally liable to pay the attorney’s fees and  
2 costs of the prevailing party.

3 Cal. Code Civ. Proc. § 1021.11(a).

4 Unlike any other ordinary “fee shifting” statute, Section 1021.11 says that a  
5 “prevailing party” *cannot be a plaintiff* who brings a case seeking declaratory or  
6 injunctive relief regarding a state or local firearm regulation. Code Civ. Proc.  
7 § 1021.11(e). And it says that a government defendant in a firearms case, including a  
8 local-government defendant, will be treated as a “prevailing party” if the court either  
9 “[d]ismisses *any* claim or cause of action” in the case, “regardless of the reason for  
10 the dismissal,” or “[e]nters judgment in favor of the [government] party” “on any  
11 claim or cause of action.” Code Civ. Proc. § 1021.11(b) (emphasis added). In simple  
12 terms, then, Section 1021.11 would enable government defendants to recover fees if  
13 a firearms plaintiff loses *on any claim* in the case, while the plaintiff can only avoid  
14 liability for fees if it prevails on *every claim* in the case. This means, among other  
15 things, that a plaintiff could be liable for the government’s fees even if the plaintiff  
16 obtained all of the relief sought in the litigation—for example, if the plaintiff obtained  
17 declaratory and injunctive relief on a Second Amendment claim but the plaintiff’s  
18 Equal Protection claim was thereafter dismissed as moot.

19 Section 1021.11(c) further gives these “prevailing party” government  
20 defendants a three-year window to bring a state law action to recover their fees,  
21 notwithstanding that the vast majority of firearms litigation is brought under 42 U.S.C.  
22 § 1983 and federal law already provides for the treatment of attorney’s fees in those  
23 cases: 42 U.S.C. § 1988(b) provides that “prevailing part[ies]” in federal civil rights  
24 actions may recover “a reasonable attorney’s fee as part of [their] costs” in the  
25 underlying action itself.

## 26 **B. Section 1021.11 Violates Several Constitutional Provisions.**

27 Despite signing SB 1327 into law, Governor Newsom blasted the Supreme  
28 Court’s refusal to block SB 8, the Texas law on which SB 1327 was based, as

1 “outrageous” and “an abomination.” Gavin Newsom, Opinion, *The Supreme Court*  
 2 *Opened the Door to Legal Vigilantism in Texas. California Will Use the Same Tool*  
 3 *To Save Lives.*, Wash. Post (Dec. 20, 2021), <https://wapo.st/3wxWoeI>. Attorney  
 4 General Rob Bonta has likewise described SB 8 as “blatantly unconstitutional.” Press  
 5 Release, Cal. Dep’t of Just., *Att’y Gen. Bonta: Texas Cannot Avoid Judicial Review*  
 6 *of Its Constitutional Abortion Ban* (Oct. 27, 2021), <https://bit.ly/3pRWA4F>. And SB  
 7 1327’s legislative history includes similar acknowledgements. *See* S.B. 1327, S. Floor  
 8 Analysis, p. 6 (June 28, 2022) (“While the goal of repurposing the Texas law may be  
 9 sound, these problematic provisions may not justify those ends. They insulate  
 10 government action from meaningful challenge by creating a strong, punitive deterrent  
 11 for any that try and in the end, may violate due process guarantees.”); S.B. 1327, A.  
 12 Jud. Comm. Analysis, p. 13 (June 10, 2022) (describing SB 1327’s fee-shifting as “a  
 13 lose-lose scenario for plaintiffs who challenge the bill or a gun law; and a win-win  
 14 scenario for the government”).

15 Thus, the constitutionality of Section 1021.11—which was enacted to target  
 16 firearms litigation as a form of protest over Texas’s SB 8—has never been in serious  
 17 dispute. Indeed, the Attorney General declined to defend the law in *Miller*. *See* 2022  
 18 WL 17811114, at \*1. And though the Governor intervened to litigate the law’s  
 19 constitutionality on the merits, his defense amounted to the assertion that, “[w]hile  
 20 fee-shifting provisions like S.B. 8’s,” and therefore like Section 1021.11’s, “are  
 21 outrageous and objectionable, no court has yet held that this type of fee-shifting  
 22 provision is unconstitutional.” Intervenor-Def.’s Supp. Br. at 8:18–20, *Miller v.*  
 23 *Bonta*, No. 3:22-cv-1446, ECF No. 35 (Dec. 12, 2022).

24 That is no longer the case. In *Miller*, this Court held that Section 1021.11  
 25 violates the First Amendment, the Supremacy Clause, the Equal Protection Clause,  
 26 and the Due Process Clause. The Court’s reasoning will be discussed throughout this  
 27 brief. But the crux is as follows: “The principal defect of § 1021.11 is that it threatens  
 28 to financially punish plaintiffs and their attorneys who seek judicial review of laws

1 impinging on federal constitutional rights. Today, it applies to Second Amendment  
 2 rights. Tomorrow, with a slight amendment, it could be any other constitutional  
 3 right[.]” *Miller*, 2022 WL 17811114, at \*2.

4 **C. Section 1021.11’s Fee-Shifting Regime Has Infringed On Plaintiffs’**  
 5 **Constitutional Rights By Depriving Them Of Access To Court.**

6 As detailed in *Miller*, Section 1021.11 unconstitutionally chilled Plaintiffs’  
 7 ability to bring and continue to prosecute civil rights cases challenging California  
 8 firearm regulations. Section 1021.11 also purports to allow local jurisdictions to  
 9 enforce its onerous terms when they are sued in challenges to their firearm regulations.  
 10 Plaintiffs here are prepared to sue each of the Defendants for local regulations that  
 11 violate the Second Amendment. But Defendants were not parties to *Miller*, so they are  
 12 not directly bound by its injunction.

13 After the *Miller* ruling, Plaintiffs FPC and CGF asked Defendants to stipulate  
 14 that they would not enforce Section 1021.11, either in a current case or a case that  
 15 Plaintiffs intend to file. Each Defendant refused, either affirmatively or by declining  
 16 to respond. This resistance is indefensible in light of the *Miller* ruling enjoining the  
 17 law as to the State of California.

18 Specifically, Defendants responded as follows:

19 *City of San Diego*. Counsel for the plaintiffs (which include FPC and SDCGO)  
 20 in the pending case of *Fahr v. City of San Diego*, S.D. Cal. Case No. 3:21-cv-01676-  
 21 BAS-BGS, sent a letter to the San Diego City Attorney asking that it stipulate not to  
 22 enforce Section 1021.11 against the plaintiffs or their attorneys and law firms based  
 23 on the outcome of the case. The City Attorney’s office responded that “the City is not  
 24 in a position to stipulate as requested,” and that it did “not believe” that the Court’s  
 25 decision in *Miller* “warrants an unequivocal waiver from the City.” DiGuissepte  
 26 Decl., ¶¶ 2–4 & Ex. 1. As a result, FPC and SDCGO are forced to continue litigating  
 27 under the threat of Section 1021.11 fee liability. The uncertainty about potential  
 28 enforcement has created a chilling effect on the *Fahr* Plaintiffs’ (and their counsel’s)

1 ability to proceed with the case. DiGuissepte Decl., ¶¶ 5–6; Combs Decl., ¶ 8;  
2 Schwartz Decl., ¶ 5.

3 *County of Imperial.* Counsel for FPC and CGF sent a letter to the Office of the  
4 County Counsel for the County of Imperial asking that it stipulate not to enforce  
5 Section 1021.11 against the intended plaintiffs or their attorneys and law firms in a  
6 case they intend to file challenging the constitutionality of a county ordinance  
7 prohibiting the possession of firearms in any recreational park within the county’s  
8 jurisdiction. Imperial County did not respond. Benbrook Decl., ¶ 4 & Ex. 2.

9 *County of Alameda.* Counsel for FPC and CGF sent a letter to the Office of the  
10 County Counsel for the County of Alameda asking that it stipulate not to enforce  
11 Section 1021.11 against the intended plaintiffs or their attorneys and law firms in a  
12 case they intend to file challenging the constitutionality of the Alameda County  
13 Sherriff’s Office’s application and enforcement of the County’s licensing regime for  
14 carrying concealed firearms. Lee Decl., ¶ 3 & Ex. 4.

15 Alameda County Counsel responded by letter that it would not agree to non-  
16 enforcement. The County further suggested (baselessly) that Plaintiffs’ counsel were  
17 in potential breach of ethical obligations and “encouraged” counsel to “be mindful of  
18 your duties obligations [sic] before you make averments in any pleading regarding the  
19 intentions of the Sheriff and the County” regarding Section 1021.11, because claims  
20 against them purportedly “do not exist and would not be ripe despite your attempts to  
21 manufacture a claim.” Lee Decl., ¶ 3 & Ex. 4.

22 *County of Ventura.* FPC and CGF sent a letter to the Office of the County  
23 Counsel for the County of Ventura asking that it stipulate not to enforce Section  
24 1021.11 against the intended plaintiffs or their attorneys and law firms in a case they  
25 intend to file challenging the constitutionality of the Ventura County Sherriff’s  
26 Office’s application and enforcement of the County’s licensing regime for carrying  
27 concealed firearms. Ventura County did not respond. Benbrook Decl., ¶ 5 & Ex. 5.  
28

1           *County of Los Angeles.* Counsel for FPC and CGF sent a letter to the Office of  
 2 the County Counsel for the County of Los Angeles asking that it stipulate not to  
 3 enforce Section 1021.11 against the intended plaintiffs or their attorneys and law firms  
 4 in a case they intend to file challenging the constitutionality of (1) the Los Angeles  
 5 County Sherriff's Office's application and enforcement of the County's licensing  
 6 regime for carrying concealed firearms; and (2) a provision of the county code  
 7 prohibiting the possession of firearms in any public park within the county's  
 8 jurisdiction. County Counsel responded by letter that it would not agree to non-  
 9 enforcement, but that it "would be willing to discuss entereing into a case-specific  
 10 situation." Benbrook Decl., ¶ 6 & Exs. 6, 7.

11           *City of San Jose.* Counsel for FPC and CGF sent a letter to counsel for the City  
 12 of San Jose asking that the city stipulate not to enforce Section 1021.11 against the  
 13 intended plaintiffs or their attorneys and law firms in a case they intend to re-file  
 14 challenging the constitutionality of city ordinances requiring firearm owners to pay an  
 15 annual fee to a City-designated non-profit organization and obtain firearm-related  
 16 insurance. FPC had previously sued to invalidate those same regulations, but  
 17 dismissed the lawsuit in August 2022 because of the threat posed by Section 1021.11.  
 18 *Glass v. City of San Jose*, N.D. Cal. Case No 5:22-cv-02533-BL. FPC is prepared to  
 19 re-file this challenge against San Jose once San Jose is enjoined from attempting to  
 20 enforce Section 1021.11. Benbrook Decl., ¶ 7 & Ex. 8; Combs Decl., ¶ 13; Hoffman  
 21 Decl., ¶ 10.

22           Counsel for San Jose responded by letter that it would not agree to non-  
 23 enforcement, claiming that it was "inappropriate to respond" outside of the context of  
 24 an actual lawsuit. Benbrook Decl., ¶ 7 & Ex. 9. Counsel "decline[d] to comment on  
 25 what positions the City might take, or what remedies it might seek, in hypothetical  
 26 future litigation against the City." Furthermore, counsel for San Jose claimed it was  
 27 "impossible to know what specific City laws [the Plaintiffs] intend to file a lawsuit  
 28 over," *id.*, despite being advised that Plaintiffs "are now prepared to re-file litigation

1 seeking declaratory and injunctive relief as to at least the[] same regulations” at issue  
 2 in the *Glass* litigation. And counsel for San Jose accused Plaintiffs of sending the letter  
 3 to gain “some advantage in [their] ongoing lawsuit” in the *Miller* case, despite the fact  
 4 that the *Miller* court had already entered a permanent injunction forty-five days earlier.  
 5 *Id.*

6 *Santa Clara County.* Counsel for FPC and CGF sent a letter to the Office of the  
 7 County Counsel for the County of Santa Clara asking that it stipulate not to enforce  
 8 Section 1021.11 against the intended plaintiffs or their attorneys and law firms in a  
 9 case they intend to file challenging the constitutionality of the Santa Clara County  
 10 Sherriff’s Office’s application and enforcement of the County’s licensing regime for  
 11 carrying concealed firearms. Santa Clara County has not responded. Benbrook Decl.,  
 12 ¶ 8 & Ex. 10.

13 But for Section 1021.11’s fee-shifting provisions, Plaintiffs would forthwith  
 14 engage in the litigation outlined above, but they have refrained from bringing these  
 15 suits against Defendants due to the law’s threat of ruinous fee liability. Combs Decl.,  
 16 ¶¶ 5–16; Hoffman Decl., ¶¶ 3–12; Schwartz Decl., ¶¶ 4–7. Plaintiffs thus suffer a  
 17 classic First Amendment injury: they wish to engage in conduct protected by the First  
 18 Amendment but within Section 1021.11’s reach, and their constitutional rights to  
 19 engage in that conduct have been chilled by the statute. *Italian Colors Rest. v. Becerra*,  
 20 878 F.3d 1165, 1171–73 (9th Cir. 2018) (detailing standard for preenforcement  
 21 challenge based on chilled First Amendment activity); *Tingley v. Ferguson*, 47 F.4th  
 22 1055, 1066–67 (9th Cir. 2022) (“unique standing considerations in the First  
 23 Amendment context,” where “the Supreme Court has dispensed with rigid standing  
 24 requirements” and where chilled conduct is “a constitutionally sufficient injury,” “tilt  
 25 dramatically” in favor of pre-enforcement standing) (cleaned up). Plaintiffs’ injury is  
 26 akin to self-censorship—they have suffered injury by being “forced to modify [their]  
 27 speech and behavior to comply with the statute.” *Ariz. Right to Life Political Action*  
 28 *Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) (“*ARLPAC*”). Such “self-

1 censorship” is a sufficient injury under Article III “even without an actual  
2 prosecution.” *Virginia v. Am. Booksellers Ass’n, Inc.* 484 U.S. 383, 393 (1988); *see*  
3 *also ARLPAC*, 320 F.3d at 1007 n.6 (fact that Plaintiffs have “suffered actual harm  
4 dispenses with any ripeness concerns).

5 Indeed, Defendants’ uniform refusal to abide by the *Miller* ruling confirms why  
6 relief is necessary in this case. Plaintiffs filed this lawsuit on March 2, 2023. Each  
7 Defendant was served with the summons and complaint the next day. ECF Nos. 7–13.  
8 To date, no Defendant has disavowed an intent to enforce Section 1021.11 against  
9 Plaintiffs. Benbrook Decl., ¶ 9. It must therefore be presumed that Defendants will  
10 enforce the statute if Plaintiffs file the intended lawsuits and fail to prevail on every  
11 claim. *Cf. Cayuga Nation v. Tanner*, 824 F.3d 321, 331 (2d Cir. 2016) (“Courts are  
12 generally ‘willing to presume that the government will enforce the law as long as the  
13 relevant statute is recent and not moribund.’”) (citation omitted). Indeed, the Supreme  
14 Court has consistently held that preenforcement First Amendment challenges are  
15 justiciable when the government retains the threat to enforce an allegedly  
16 unconstitutional statute. *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289,  
17 302 (1979) (finding preenforcement First Amendment challenge justiciable despite  
18 argument that statute “has not yet been applied and may never be applied” because of  
19 the potential for enforcement); *Virginia v. Am. Booksellers Ass’n, Inc.*, *supra*, 484  
20 U.S. at 393 (permitting preenforcement First Amendment challenge where “[t]he State  
21 has not suggested that the newly enacted law will not be enforced, and we see no  
22 reason to assume otherwise”); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 16  
23 (2010) (allowing preenforcement First Amendment challenge and noting “[t]he  
24 Government has not argued to this Court that plaintiffs will not be prosecuted if they  
25 do what they say they wish to do”). This threat forced Plaintiffs to file a second lawsuit  
26 to obtain the same relief against the local-government Defendants that they obtained  
27 against State defendants in *Miller*.  
28

### III. ALTERNATIVE MOTIONS

Plaintiffs move for a preliminary injunction with an expedited trial on the merits or, alternatively, for summary judgment.

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A plaintiff must “make a showing on all four prongs” of the *Winter* test to obtain a preliminary injunction, but a court may employ a “sliding scale” approach in weighing the four factors. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011). “[T]he burdens at the preliminary injunction stage track the burdens at trial.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). So where, as here, the non-moving party bears the burden of persuasion at trial, the moving party “must be deemed likely to prevail” if the non-movant fails to make an adequate showing. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004). If the Court treats the motion as a motion for preliminary injunction, Plaintiffs request that the Court advance the trial on the merits and consolidate it with the preliminary injunction hearing. *See* Fed. R. Civ. P. 65(a)(2).

Alternatively, Plaintiffs are entitled to summary judgment under Federal Rule of Civil Procedure 56, which “allows a party to move for summary judgment at any time, even as early as the commencement of the action.” Fed. R. Civ. P. 56, advisory comm. notes (2009 Amendments). Summary judgment is appropriate if the moving party demonstrates that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d

626, 630 (9th Cir. 1987). Where the party moving for summary judgment does not bear the burden of proof at trial, “the burden on the moving party may be discharged by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case.” *Celotex Corp.*, 477 U.S. at 325. Treating this motion as a motion for summary judgment is appropriate because the case presents purely legal issues that this Court has already decided, and there will be no genuine disputes of material fact.

#### IV. ARGUMENT

##### A. **Section 1021.11’s Fee-Shifting Regime Is Unconstitutional And Should Be Enjoined As To Defendants For The Same Reasons It Was Enjoined As To The State In *Miller*.**

The State is now enjoined from enforcing Section 1021.11 under *Miller v. Bonta*. 2022 WL 17811114 (S.D. Cal. Dec. 19, 2022).<sup>2</sup> The Court in *Miller* found that Section 1021.11 violates the First Amendment, is pre-empted under the Supremacy Clause by 42 U.S.C. § 1988, and runs afoul of the Equal Protection and Due Process Clauses. For the same reasons, these local government Defendants should be enjoined from enforcing Section 1021.11.

##### 1. **Section 1021.11’s Fee-Shifting Regime Violates the First Amendment.**

Section 1021.11 encourages state and local governments to push the constitutional envelope when crafting firearms regulations by threatening would-be plaintiffs who might challenge those regulations with a potentially ruinous fee award. As the Court observed in *Miller*, “[t]he principal defect of § 1021.11 is that it threatens to financially punish plaintiffs and their attorneys who seek judicial review of laws impinging on federal constitutional rights.” 2022 WL 17811114 at \*2. “Laws like § 1021.11 that exact an unaffordable price to be heard in a court of law are

<sup>2</sup> The Court issued a substantively identical ruling in a related case. *South Bay Rod & Gun Club, Inc. v. Bonta*, S.D. Cal. Case No. 3:22-cv-1461-BEN-JLB, 2022 WL 17811113 (S.D. Cal. Dec. 19, 2022).

1 intolerable.” *Id.* at \*3. And the threat posed by Section 1021.11 extends beyond  
 2 imposing financial ruin on would-be plaintiffs: the law imposes the same threat of fee  
 3 liability on plaintiffs’ attorneys and their law firms. The *Miller* Court recognized that  
 4 this scheme “does a disservice to the courts” through suppressing “novel,”  
 5 “substantial” claims, thereby “threaten[ing] severe impairment of the judicial  
 6 function” by “insulat[ing] the Government’s laws from judicial inquiry.” *Id.* at \*4  
 7 (citations omitted).

8 Section 1021.11 thus improperly threatens the right of access to the courts. The  
 9 right to petition the government for redress of grievances includes “[t]he right of  
 10 access to the courts,” which “is indeed but one aspect of the right of petition.” *Cal.*  
 11 *Motor Trans. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). The *Miller* Court  
 12 noted that Section 1021.11 struck at the core of this right. “In our ordered system of  
 13 civil justice, the Second Amendment right, and for that matter all constitutional rights,  
 14 are ultimately protected by the First Amendment right to identify unconstitutional  
 15 infringements and seek relief from the courts.” 2022 WL 17811114 at \*2. And the  
 16 Court further emphasized “that maintaining the courts as a setting to resolve questions  
 17 about defective laws is necessary for a peaceful society.” *Id.*

18 This isn’t the first time a state has erected and enforced regulatory barriers to  
 19 avoid civil rights litigation. The Supreme Court rejected Virginia’s attempt to keep  
 20 the NAACP out of court in *Nat’l Ass’n for Advancement of Colored People v. Button*,  
 21 371 U.S. 415 (1963) (concerning the state’s ban against the “improper solicitation” of  
 22 legal business), and struck down South Carolina’s efforts to punish the ACLU’s  
 23 counsel in *In re Primus*, 436 U.S. 412 (1978) (concerning the state’s prohibition  
 24 against solicitation of prospective litigants).

25 The Supreme Court has recognized the central role the First Amendment plays  
 26 in securing access to the courts to preserve civil rights, particularly for groups unable  
 27 protect their rights through the political channels. “Groups which find themselves  
 28 unable to achieve their objectives through the ballot frequently turn to the courts. . . .

1 [U]nder the conditions of modern government, litigation may well be the sole  
 2 practicable avenue open to a minority to petition for redress of grievances.” *Button*,  
 3 371 U.S. at 429–30. Such is the case here, where Plaintiffs seek to assert their  
 4 constitutional rights in litigation against local governments that disfavor Second  
 5 Amendment rights.

6 Since *Button*, the Supreme Court has consistently enjoined state action that  
 7 imposes barriers on litigation that may chill protected activity. *See, e.g., Bhd. Of R. R.*  
 8 *Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 7 (1964) (a state cannot  
 9 “handicap[]” “[t]he right to petition the courts” through indirect regulation that  
 10 “infringe[s] in any way the right of individuals and the public to be fairly represented  
 11 in lawsuits authorized by Congress to effectuate a basic public interest”); *United Mine*  
 12 *Workers of Am., Dist. 12 v. Illinois State Bar Ass’n*, 389 U.S. 217, 222–23 (1967) (the  
 13 state cannot “erode [the First Amendment’s] guarantees by indirect restraints” on  
 14 citizens’ ability to assert their legal rights); *United Transp. Union v. State Bar of*  
 15 *Mich.*, 401 U.S. 576, 580–81, 585–86 (1971) (explaining that “the First Amendment  
 16 forbids . . . restraints” that effectively prevent groups from “unit[ing] to assert their  
 17 legal rights,” and striking down economic regulation that denied union members  
 18 “meaningful access to the courts”).

19 Because “[t]he Constitution does not permit” the government to “insulate [its]  
 20 interpretation of the Constitution from judicial challenge,” courts “must be vigilant  
 21 when [the government] imposes rules and conditions which in effect insulate its own  
 22 laws from legitimate judicial challenge.” *Legal Services Corp. v. Velazquez*, 531 U.S.  
 23 533, 548–49 (2001). Section 1021.11’s obvious and impermissible purpose is to give  
 24 state and local governments in California a free hand to regulate firearms by  
 25 suppressing litigation over firearm regulations, in violation of decades of First  
 26 Amendment precedent.

27 Section 1021.11’s fee-shifting regime further violates the First Amendment  
 28 because it is content-based and viewpoint-discriminatory. Section 1021.11 imposes a

1 unique burden on those who seek to vindicate their civil rights through firearms  
 2 litigation while favoring all other sorts of constitutional and statutory civil rights  
 3 claims, which are not subject to the same one-sided fee-shifting regime. Civil rights  
 4 litigation is core protected speech. *See Button*, 436 U.S. at 431 (civil rights litigation  
 5 is a “form of political expression”); *Primus*, 436 U.S. at 429; *Velazquez*, 531 U.S. at  
 6 545. Yet Section 1021.11 singles out such speech over firearms restrictions for special  
 7 unfavorable treatment. Laws that impose special burdens on disfavored speech and  
 8 single out disfavored speakers are constitutionally suspect. *Sorrell v. IMS Health Inc.*,  
 9 564 U.S. 552, 564–66 (2011). States are not permitted to advance their policy goals  
 10 “through the indirect means of restraining certain speech by certain speakers,” *id.* at  
 11 577, and “may not burden the speech of others in order to tilt public debate in a  
 12 preferred direction.” *Id.* at 578–79. Indeed, “the First Amendment is plainly offended”  
 13 when the government “attempt[s] to give one side of a debatable public question an  
 14 advantage in expressing its views to the people.” *First Nat’l Bank of Bos. v. Bellotti*,  
 15 435 U.S. 765, 785–86 (1978).

16 There is also no legitimate historical precedent for a fee-shifting statute that  
 17 only allows government defendants to recover fees in civil rights litigation. Section  
 18 1021.11 thus falls outside of the history and tradition of the First Amendment that is  
 19 the touchstone of First Amendment analysis. *See, e.g., United States v. Stevens*, 559  
 20 U.S. 460, 468–71 (2010) (placing the burden on the government to show that a type  
 21 of speech belongs to one of the “historic and traditional categories” of constitutionally  
 22 unprotected speech); *accord Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2428  
 23 (2022) (Establishment Clause analysis must be anchored to “historical practices and  
 24 understandings”); *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S.Ct. 2111,  
 25 2130 (2022) (“[T]o carry [its] burden, the government must generally point to  
 26 *historical* evidence about the reach of the First Amendment’s protections.”) (emphasis  
 27 in original). The lack of historical precedent further demonstrates that SB 1327  
 28 violates the First Amendment.

1 But even under First Amendment balancing tests, Section 1021.11 cannot  
 2 withstand the appropriate strict scrutiny. Defendants cannot possibly sustain their  
 3 burden of identifying a compelling interest, because it is impossible to imagine any  
 4 interest the Defendants could assert as compelling, or even permissible, in support of  
 5 this statute. There is no compelling interest for targeting a particular type of civil rights  
 6 litigant for unfavorable treatment when exercising the fundamental right to assert  
 7 constitutional claims. Moreover, Section 1021.11 is not narrowly tailored: the State  
 8 failed even to consider less restrictive alternatives that would serve such a purported  
 9 interest without imposing such severe burdens on core protected rights. *United States*  
 10 *v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000).

11 In short, and as this Court has already found, Section 1021.11’s fee-shifting  
 12 penalty violates the First Amendment.

## 13 **2. Section 1021.11’s Fee-Shifting Regime is Preempted by 42 U.S.C.** 14 **§ 1988.**

15 The Supremacy Clause provides that federal law “shall be the supreme Law of  
 16 the Land.” U.S. Const. Art. VI, Cl. 2. “Consistent with that command, [the Supreme  
 17 Court has] long recognized that state laws that conflict with federal law are without  
 18 effect.” *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (citation omitted). To that  
 19 end, “state law is naturally preempted to the extent of any conflict with a federal  
 20 statute,” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000), and  
 21 “[w]here state and federal law ‘directly conflict,’ state law must give way.” *PLIVA,*  
 22 *Inc. v. Mensing*, 564 U.S. 604, 617 (2011) (citation omitted); *see also Gade v. Nat’l*  
 23 *Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (“[U]nder the Supremacy Clause  
 24 . . . any state law, however clearly within a State’s acknowledged power, which  
 25 interferes with or is contrary to federal law, must yield.”) (internal quotation marks  
 26 and citation omitted).

27 Section 1021.11’s attempt to shift the government’s fees onto the shoulders of  
 28 civil rights plaintiffs conflicts with the text and structure of Section 1988, and it

1 strongly undermines Section 1988's purposes. Section 1988 provides that, in most  
 2 categories of federal civil rights litigation, the court "may allow the prevailing party,  
 3 other than the United States, a reasonable attorney's fee as part of the costs" of the  
 4 case. 42 U.S.C. § 1988(b). "[A] prevailing *plaintiff* 'should ordinarily recover an  
 5 attorney's fee unless special circumstances would render such an award unjust.'" *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (citation omitted and emphasis  
 6 added). By contrast, the Supreme Court has repeatedly held that, given the purposes  
 7 of Section 1988, prevailing *defendants* may recover fees only "where the suit was  
 8 vexatious, frivolous, or brought to harass or embarrass the defendant." *Id.* at 429 n.2;  
 9 *see Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (under analogous  
 10 fee award language in Title VII, establishing standard that "a plaintiff should not be  
 11 assessed his opponent's attorney's fees unless a court finds that his claim was  
 12 frivolous, unreasonable, or groundless").

14 Section 1988 does not require a plaintiff to win every claim in order to be a  
 15 "prevailing party." Relying on congressional guidance, the Supreme Court has "made  
 16 clear that plaintiffs may receive fees under [Section] 1988 even if they are not  
 17 victorious on every claim. A civil rights plaintiff who obtains meaningful relief has  
 18 corrected a violation of federal law and, in so doing, has vindicated Congress's  
 19 statutory purposes." *Fox v. Vice*, 563 U.S. 826, 834 (2011); *see Texas State Teachers*  
 20 *Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989) (Section 1988 fees are  
 21 appropriate if a party has "prevailed on a significant issue in the litigation and have  
 22 obtained some of the relief they sought").

23 Section 1021.11(e), however, says that only government defendants can be  
 24 "prevailing parties." And because it also says a government defendant is a "prevailing  
 25 party" if the plaintiff loses on any of its claims, the government would be entitled to  
 26 fees even where it has been found to violate the Constitution on other claims in the  
 27 case. In other words, Section 1021.11 flips Section 1988, putting government  
 28 defendants in a similar if not better position than plaintiffs under Section 1988.

1           Section 1021.11 thus directly conflicts with Section 1988 by establishing a  
 2 wholly separate state law fee regime. Indeed, Section 1021.11 asserts *reverse*  
 3 supremacy over federal law. The statute remarkably asserts that its fee-shifting  
 4 provision applies regardless of what any federal court does in an underlying Section  
 5 1983 case: Section 1021.11 pronounces that government officials may plow ahead  
 6 with enforcing the fee-shifting penalty against a Section 1983 plaintiff with a state  
 7 court collection action even when “[t]he court in the underlying action held that any  
 8 provision of this section is invalid, unconstitutional, or preempted by federal law,  
 9 notwithstanding the doctrines of issue or claim preclusion.” Code Civ. Proc.  
 10 § 1021.11(d)(3) (emphasis added). As the *Miller* Court observed, “[t]hrough its unfair  
 11 legal stratagems, the state law chills the First Amendment right to petition government  
 12 for the redress of grievances, which, in turn, chills the Second Amendment right. The  
 13 chill is deepened by the extraordinary provision that declares a plaintiff shall not be a  
 14 prevailing party. In the end, this state statute undercuts and attempts to nullify 42  
 15 U.S.C. § 1988.” 2022 WL 17811114 at \*4. Not only does “California’s fee shifting  
 16 provision turns [the federal] approach upside down,” but “California attorney’s fee-  
 17 shifting construct goes beyond § 1988 by discouraging attorneys from representing  
 18 civil rights plaintiffs.” *Id.* at \*6. And because Section 1021.11 “will have the effect of  
 19 thwarting federal court orders enforcing Second Amendment rights through § 1988  
 20 attorney’s fee awards,” the statute “cannot survive.” *Id.* at \*7.

21           Section 1021.11 also undermines the manifest purpose of Section 1988. Shortly  
 22 after the Civil Rights Act’s passage, the Supreme Court recognized the link between  
 23 fee-shifting and effective enforcement of civil rights laws. “When the Civil Rights Act  
 24 of 1964 was passed, it was evident that enforcement would prove difficult and that the  
 25 Nation would have to rely in part upon private litigation as a means of securing broad  
 26 compliance with the law. . . . If successful plaintiffs were routinely forced to bear their  
 27 own attorneys’ fees, few aggrieved parties would be in a position to advance the public  
 28 interest by invoking the injunctive powers of the federal courts. Congress therefore

1 enacted the provision for counsel fees . . . to encourage individuals injured by racial  
 2 discrimination to seek judicial relief . . . .” *Newman v. Piggie Park Enters., Inc.*, 390  
 3 U.S. 400, 401–02 (1968).

4 In short, “[t]he purpose of [Section] 1988 is to ensure ‘effective access to the  
 5 judicial process’ for persons with civil rights grievances.” *Hensley*, 461 U.S. at 429  
 6 (quoting H.R. Rep. No. 94–1558 at 1 (1976)); *see also* S. Rep. No. 94-1011 at 2 (June  
 7 29, 1976) (explaining that the federal “civil rights laws depend heavily upon private  
 8 enforcement, and fee awards have proved an essential remedy if private citizens are  
 9 to have a meaningful opportunity to vindicate the important Congressional policies”  
 10 embodied in those laws).

11 In direct conflict with Section 1988’s purpose, Section 1021.11 threatens to  
 12 bankrupt any plaintiff considering a challenge to a state or local firearm regulation if  
 13 the plaintiff does not achieve complete victory in the litigation. This is a heavy-handed  
 14 deterrent to asserting civil rights claims, whereas Section 1988 expresses  
 15 Congressional intent to *encourage* civil rights litigation.

16 Because Section 1021.11 “stands as an obstacle to the accomplishment and  
 17 execution of the full purposes and objective of Congress,” California’s law “must give  
 18 way.” *PLIVA, Inc.*, 564 U.S. 634, 617. As this Court again has already found, Section  
 19 1021.11’s fee-shifting penalty is preempted and its application is unconstitutional  
 20 under the Supremacy Clause.

### 21 **3. Section 1021.11’s Fee-Shifting Regime Violates The Equal** 22 **Protection And Due Process Clauses.**

23 A law also cannot baselessly discriminate the exercise of a constitutional right  
 24 without violating the Equal Protection Clause. *See, e.g., Nordlinger v. Hahn*, 505 U.S.  
 25 1, 10 (1992). In all the ways described above, Section 1021.11 discriminates against  
 26 federal constitutional rights, against gun rights plaintiffs in particular, and on the basis  
 27 of viewpoint. As this Court held in *Miller*, therefore, Section 1021.11 also violates the  
 28 Equal Protection Clause. Indeed, while such discrimination against those who seek to

1 exercise First and Second Amendment rights would be subject to, and plainly fail,  
 2 strict scrutiny, the classifications at issue here could not even survive rational basis  
 3 scrutiny as explained above. “Where money determines not merely ‘the kind of trial  
 4 a man gets,’ but whether he gets into court at all,” the *Miller* Court explained, “the  
 5 great principle of equal protection becomes a mockery.” 2022 WL 17811114 at \*3  
 6 (citation omitted).

7 The *Miller* Court further explained that due process separately “requires that a  
 8 citizen be able to be heard in court” and thus that, “[w]here the financial cost is too  
 9 high to enable a person to access the courts,” there is also a violation of the Due  
 10 Process Clause. *Id.* at \*2. Simply put, “[l]aws like § 1021.11 that exact an unaffordable  
 11 price to be heard in a court of law are intolerable.” *Id.* at \*3.

12 \* \* \*

13 Section 1021.11 is unconstitutional, and its lingering threat of enforcement by  
 14 the named Defendants is actively infringing on Plaintiffs’ right to access the courts.

15 **B. Plaintiffs Will Be Irreparably Harmed Without A Preliminary Injunction.**

16 Plaintiffs are irreparably harmed by Section 1021.11, which imposes a severe  
 17 burden on their right of access to the courts and deprives them of the full opportunity  
 18 to vindicate their Second Amendment rights. As the Ninth Circuit has repeatedly  
 19 emphasized, “[i]t is well established that the deprivation of constitutional rights  
 20 ‘unquestionably constitutes irreparable injury.’” *Melendres v. Arpaio*, 695 F.3d 990,  
 21 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); see *Roman*  
 22 *Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) (“the loss  
 23 of First Amendment freedoms, for even minimal periods of time, ‘unquestionably  
 24 constitutes irreparable injury.’”) (citation omitted). Because “constitutional violations  
 25 cannot be adequately remedied through damages [such violations] therefore generally  
 26 constitute irreparable harm.” *Am. Trucking Ass’n v. City of Los Angeles*, 559 F.3d  
 27 1046, 1059 (9th Cir. 2009) (citation omitted).  
 28

1 The constitutional violations manifested in Section 1021.11 have caused  
 2 concrete harm to Plaintiffs here. Section 1021.11 imposes a substantial potential cost  
 3 on Plaintiffs and has consequently caused Plaintiffs to dismiss or refrain from bringing  
 4 lawsuits challenging Defendants' firearms regulations that they believe are  
 5 unconstitutional. Combs Decl., ¶¶ 7–16; Hoffman Decl., ¶¶ 5–12; DiGuiseppe Decl.,  
 6 ¶¶ 3–6; Lee Decl., ¶¶ 3–4; Schwartz Decl., ¶¶ 6–7. Plaintiffs are thus unable to  
 7 exercise their First Amendment rights to assert Second Amendment rights in court.  
 8 These significant and ongoing injuries far exceed the Ninth Circuit's baseline for  
 9 establishing irreparable harm in a constitutional context. *See Am. Bev. Ass'n v. City &*  
 10 *Cty. of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) ("Because Plaintiffs have a  
 11 colorable First Amendment claim, they have demonstrated that they likely will suffer  
 12 irreparable harm if the Ordinance takes effect.") (citing *Doe v. Harris*, 772 F.3d 563,  
 13 583 (9th Cir. 2014)); *accord Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059  
 14 (9th Cir. 2007).

15 **C. The Balance Of Equities And Public Interest Both Favor Plaintiffs.**

16 When the government is a party, the balance-of-equities and public-interest  
 17 factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).  
 18 And by establishing a likelihood that Section 1021.11 violates the Constitution,  
 19 Plaintiffs have "also established that both the public interest and the balance of the  
 20 equities favor a preliminary injunction." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d  
 21 1053, 1069 (9th Cir. 2014). This is because "it is always in the public interest to  
 22 prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002  
 23 (citation omitted); *accord Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005)  
 24 ("Generally, public interest concerns are implicated when a constitutional right has  
 25 been violated, because all citizens have a stake in upholding the Constitution."). The  
 26 balance tips overwhelmingly in Plaintiffs' favor given the significant First  
 27 Amendment interests at stake. *See Am. Bev. Ass'n*, 916 F.3d at 758 ("[T]he fact that  
 28 [Plaintiffs] have raised serious First Amendment questions compels a finding that . . .

1 the balance of hardships tips sharply in [Plaintiffs'] favor,” and “we have consistently  
 2 recognized the significant public interest in upholding First Amendment principles.”)  
 3 (internal quotation marks and citations omitted). Likewise, as the Ninth Circuit has  
 4 put it, “it is clear that it would not be equitable or in the public’s interest to allow”  
 5 violations of “the requirements of federal law, especially when there are no adequate  
 6 remedies available. . . . In such circumstances, the interest of preserving the  
 7 Supremacy Clause is paramount.” *Cal. Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d  
 8 847, 853 (9th Cir. 2009), reiterated in *United States v. California*, 921 F.3d 865, 893–  
 9 94 (9th Cir. 2019); *see also Am. Trucking Ass’ns*, 559 F.3d at 1059–60 (determining  
 10 that the balance of equities and the public interest weighed in favor of enjoining a  
 11 likely preempted ordinance).

12 Conversely, the government “cannot suffer harm from an injunction that merely  
 13 ends an unlawful practice . . . .” *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir.  
 14 2013); *see also Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983) (the state  
 15 “cannot reasonably assert that it is harmed in any legally cognizable sense by being  
 16 enjoined from constitutional violations”). The public interest is unquestionably served  
 17 by preserving access to the courts for Plaintiffs who seek to vindicate their  
 18 constitutional rights, rather than by permitting the government to insulate certain laws  
 19 from judicial scrutiny.

20 **D. The Court Should Waive Bond Or Require Only Nominal Security.**

21 Because Defendants will not suffer monetary hardship and this matter involves  
 22 a constitutional violation and the public interest, the Court should either waive Rule  
 23 65(c)’s bond requirement or impose only a nominal bond. *See, e.g., Barahona-Gomez*  
 24 *v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (district court has “discretion as to the  
 25 amount of security required, if any”); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d  
 26 1113, 1126 (9th Cir. 2005) (“requiring nominal bonds is perfectly proper in public  
 27 interest litigation”).  
 28

**E. The Court Should Advance The Merits Hearing And Consolidate It With The Preliminary Injunction Pursuant to FRCP 65(a)(2).**

If the Court does not grant summary judgment, Plaintiffs request that the Court advance the trial on the merits and consolidate it with the preliminary injunction hearing pursuant to Federal Rule of Civil Procedure 65(a)(2), as the Court did in *Miller*. An expedited merits hearing is appropriate because Plaintiffs' challenge raises only issues of law such that discovery and additional factual development is unnecessary. *See Slidewaters LLC v. Wash. State Dep't of Lab. & Indus.*, 4 F.4th 747, 760 (9th Cir. 2021).

**V. CONCLUSION**

For the reasons set forth above, the Court should issue an order declaring unconstitutional and enter a permanent injunction enjoining enforcement or application of SB 1327's fee-shifting penalty set forth in California Code of Civil Procedure section 1021.11 against Plaintiffs, Plaintiffs' members, and any attorney or law firm representing any Plaintiff in any litigation involving Defendants potentially subject to SB 1327's fee-shifting penalty.

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BENBROOK LAW GROUP, PC

By s/ Bradley A. Benbrook  
BRADLEY A. BENBROOK  
Attorneys for Plaintiffs