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 8

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

13 **JAMES MILLER, et al.,**
 14 Plaintiffs,
 15 v.
 16 **ROB BONTA, et al.,**
 17 Defendants.
 18

Case No. 3:22-cv-1446-BEN-JLB
 Case No. 3:22-cv-1461-BEN-JLB

**DEFENDANTS' SUPPLEMENTAL
 BRIEF**

Date: December 16, 2022
 Time: 10:00 a.m.
 Courtroom: 5A
 Judge: Hon. Roger T. Benitez

Actions Filed: Sept. 26, Sept. 28, 2022

20 **SOUTH BAY ROD & GUN CLUB,
 21 INC., et al.,**
 22 Plaintiffs,
 23 v.
 24 **ROB BONTA, et al.,**
 25 Defendants.
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INTRODUCTION

As Defendants explained in their opposition to Plaintiffs’ motions for a preliminary injunction, the California statute challenged here (SB 1327) was a response to a recently enacted and roundly criticized Texas statute (SB 8). California’s statute is premised on the view that if Texas is ultimately allowed to employ the mechanisms contained in SB 8 (both the “bounty hunter” provision and the one-sided fee-shifting mechanism at issue here), then SB 1327 should similarly be upheld. To date, however, no court has ruled on the constitutionality of the fee-shifting scheme contained in SB 8. But the Attorney General has acknowledged that laws designed to thwart legitimate judicial review are constitutionally problematic, including in amicus briefs addressing SB 8, which were filed well before SB 1327 was conceived, let alone signed into law. Given the constitutional concerns expressed previously in our amicus briefs, and SB 1327’s unique origins, the Attorney General has committed not to seek fees under the materially-identical fee-shifting provision of SB 1327 unless and until a court ultimately holds that SB 8’s fee-shifting provision is constitutional and enforceable.

In light of the position the Attorney General has taken regarding the nearly identical fee-shifting provision in SB 8, and consistent with his commitment to avoid seeking fees under SB 1327 unless SB 8 is upheld as constitutional, Defendants are not in a position to defend SB 1327’s constitutionality on the merits. Other constitutional officers and state officials, who may be defendants entitled to seek fees under the terms of SB 1327, may take a different view. The Governor’s Office has indicated that it intends to intervene in this case for the purpose of addressing the merits of SB 1327’s fee-shifting provision. Defendants do not object to the Governor’s intervention.

BACKGROUND

A. Texas Senate Bill 8

Senate Bill 8 was passed by the Texas Legislature and signed by Governor

1 Abbott in May 2021. Act of May 13, 2021, 87th Leg., R.S., ch. 62, 2021 Tex. Sess.
2 Law Serv. 125. The provision that parallels the portion of SB 1327 at issue in this
3 suit is contained in section 4 of SB 8. That provision adds section 30.022 to the
4 Civil Practices and Remedies Code and provides that

5 Notwithstanding any other law, any person, including an entity,
6 attorney, or law firm, who seeks declaratory or injunctive relief to
7 prevent this state, a political subdivision, any governmental entity or
8 public official in this state, or any person in this state from enforcing
9 any statute, ordinance, rule, regulation, or any other type of law that
10 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.

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

23 Abortion providers and advocates sued Texas state officials in federal and
24 state courts to enjoin enforcement of SB 8 before it could take effect. *Whole*
25 *Woman's Health*, 142 S. Ct. at 530. Both the state and federal lawsuits focused
26 primarily on the separate private-right-of-action provisions in section 3 of SB 8, but
27 the plaintiffs also emphasized the chilling effect of the fee-shifting provision
28 contained in section 4 of SB 8.

1 In September and October of 2021, the Attorney General, as California’s chief
2 law enforcement officer, joined amicus briefs criticizing SB 8. In those briefs, the
3 Attorney General denounced Texas’s attempt to insulate its laws from pre-
4 enforcement review. In a multistate amicus brief filed in the district court on
5 September 15, 2021, in a lawsuit instituted by the federal government, the Attorney
6 General explained that the fee-shifting provision of SB 8 was an “attempt[] to
7 thwart judicial review,” and one of several “unusual” and “extraordinary
8 provisions” designed to insulate Texas’s abortion laws from challenge. Amici
9 Curiae Br. of Mass. et al. in Supp. of Pls.’ TRO & Prelim. Inj. 7–8, *United States v.*
10 *Texas*, No. 1:21-cv-796, Dkt. 71, at 7–8 (W.D. Tex. Sept. 15, 2021). In another
11 amicus brief filed on October 27, 2021, the Attorney General criticized Texas’s
12 “unprecedented attack on the rule of law” and SB 8’s “attempts to thwart judicial
13 review and insulate the State from accountability[.]” Br. of Mass. et al. as Amici
14 Curie in Supp. of Pet’rs at 5, *Whole Woman’s Health v. Jackson*, Nos. 21-463, 21-
15 588, 2021 WL 5016707 (Oct. 27, 2021). In statements issued in connection with
16 those amicus briefs, California Attorney General Rob Bonta condemned SB 8 as
17 “blatantly unconstitutional” and specifically called out Texas’s attempt to “shield[]”
18 its laws “from federal judicial review.”¹

19 Texas responded to the lawsuits by raising threshold jurisdictional arguments.
20 After the district court denied a motion to dismiss, the Supreme Court granted
21 certiorari before judgment and then affirmed in part and reversed in part. *Whole*
22 *Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021). The Supreme Court reached
23 only the threshold question of which parties were proper defendants to the
24 challenge to SB 8’s private-right-of-action provision; the Court did not address the
25 constitutionality of any section of SB 8, including the fee-shifting provisions. *Id.* at

26 _____
27 ¹ 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/wpdjhwk>.

1 531.

2 In August of this year, abortion providers and non-profit advocates in Texas
3 filed a separate challenge to several of Texas’s abortion laws, on the basis that those
4 laws violate the constitutional right to travel, the First Amendment, and the Due
5 Process clause. Compl., *Fund Texas Choice v. Paxton*, No. 22-cv-859, Dkt. 1
6 (W.D. Tex. Aug. 23, 2022). Relevant here, the plaintiffs challenged SB 8’s fee-
7 shifting scheme, contending that the law violated the First Amendment right to
8 petition the government for redress of grievances and was preempted by 42 U.S.C.
9 § 1988. *Id.* ¶¶ 192–204. On September 23, 2022, the Attorney General filed an
10 amicus brief in support of the plaintiffs, focusing on plaintiffs’ claim that Texas
11 unlawfully interfered with the right to interstate travel. Amici Curiae Br. of Cal. et
12 al., *Fund Texas Choice v. Paxton*, No. 22-cv-859, Dkt. 38-1 (W.D. Tex. Sept. 23,
13 2022). The case is still pending as the parties await rulings on a preliminary
14 injunction motion and a motion to dismiss.

15 **B. California Senate Bill 1327**

16 California’s SB 1327 was a reaction to SB 8. On December 11, 2022, the day
17 after the Supreme Court issued its decision regarding SB 8, Governor Newsom
18 criticized the ruling on the ground that it had the practical effect of “endorsing
19 Texas’s scheme to insulate its law from the fundamental protections of *Roe v.*
20 *Wade*.”² The Governor explained that “California opposed Texas’s ploy at the
21 Supreme Court, and I wish the court had agreed with us[,]” but he stated that if
22 Texas was allowed to “shield [its] laws from review by the federal courts” then
23 California “should use that authority to protect people’s lives.”³

24 ² Cal. Office of the Governor, Governor Newsom Statement on Supreme
25 Court Decision (Dec. 11, 2021), available at <https://tinyurl.com/z2bpc6rn>.

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

1 In furtherance of that objective, the Governor proposed and the Legislature
2 enacted SB 1327 in July, 2022. SB 1327 has two principal sections that closely
3 track provisions of SB 8. Section 2 of SB 1327, which is at issue here, parallels the
4 fee-shifting provision in section 4 of SB 8. The language in the two fee-shifting
5 provisions is nearly identical, except for the subject matter of the lawsuit that
6 triggers fees. While section 4 of SB 8 applies to suits challenging abortion laws,
7 SB 1327’s fee-shifting provision is implicated in lawsuits seeking declaratory or
8 injunctive relief with respect to any law that regulates or restricts firearms. SB
9 1327 contains a severability clause with respect to its separate provision regarding a
10 private right of action (Cal. Bus. & Prof. Code § 22949.70), and declares in a
11 separate severability clause that “every statute that regulates or prohibits firearms is
12 severable in each of its applications to every person and circumstance,” SB 1327, §
13 3(c). SB 1327 is scheduled to take effect on January 1, 2023. See Cal. Gov. Code
14 § 9600(a).

15 Governor Newsom signed SB 1327 into law in July 2022, approximately nine
16 months after the Attorney General joined the amicus briefs regarding SB 8 and
17 issued the press release referring to SB 8 as “blatantly unconstitutional.” Since SB
18 1327 was approved, several plaintiffs and attorneys in pending Second Amendment
19 challenges to California’s firearm laws sought assurances that SB 1327’s fee-
20 shifting provision would not be invoked in those lawsuits. In each of those cases,
21 the Attorney General committed not to seek fees under SB 1327.⁴ The Attorney
22 General offered the same commitment to the plaintiffs and attorneys in the lawsuit
23 currently pending in *Miller v. Bonta*, No. 3:19-cv-1537 (S.D. Cal.) (*Miller I*).⁵

24 ⁴ 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.
Oct. 21, 2022).

28 ⁵ Elizabeth K. Watson Decl. in Support of Opp. to Prelim. Inj., ¶¶ 3–4.

1 Defendants stated in their opposition to Plaintiffs' preliminary injunction
2 motions that they would not seek fees under section 2 of SB 1327 unless and until a
3 court ultimately holds that the fee-shifting provision in section 4 of SB 8 is
4 constitutional and enforceable and that decision is affirmed on appeal or no appeal
5 is taken. Defendants reiterate and reaffirm that same commitment here.
6 Defendants' commitment extends to fees or costs incurred at any time in connection
7 with any suit filed before the date on which a decision ultimately upholding the
8 constitutionality of section 4 of SB 8 is affirmed on appeal (or the time to file an
9 appeal expires), and to all prospective plaintiffs and their attorneys, regardless of
10 whether they are a plaintiff or attorney in the present case.

11 PROCEDURAL HISTORY

12 The *Miller* Plaintiffs case include individuals and non-profit organizations
13 who either have pending cases, or assert that they desire to file new cases, against
14 California challenging its firearms regulations. *Miller* Compl. ¶¶ 13-22. They also
15 include attorneys who currently represent litigants challenging California firearms
16 laws or attorneys who have refrained from filing suits because of SB 1327. *Id.* ¶¶
17 23-24. Their complaint alleges that the fee-shifting scheme in section 2 of SB 1327
18 is preempted and unconstitutional under the Supremacy Clause, *id.* ¶78; violates the
19 First Amendment right to petition the government for redress of grievances, *id.* ¶
20 80; and violates the Equal Protection Clause of the Fourteenth Amendment, *id.* ¶
21 84. The *Miller* Plaintiffs are not challenging the private right of action in section 1
22 of SB 1327.

23 The *South Bay* Plaintiffs include individuals, non-profit organizations, and a
24 Second Amendment scholarship and legal resource center who either have pending
25 cases, or assert that they desire to file new cases, against California challenging its
26 firearm regulations. *South Bay* Compl. ¶¶ 32-49. Their complaint alleges that the
27 fee-shifting scheme in section 2 of SB 1327 is a Bill of Attainder, *id.* ¶ 89; violates
28 the First Amendment right to petition the government for redress of grievances, *id.*

1 ¶ 95; violates due process, *id.* ¶¶ 101, 125; violates the Equal Protection Clause of
2 the Fourteenth Amendment, *id.* ¶ 109; and is preempted and unconstitutional under
3 the Supremacy Clause, *id.* ¶ 118. Their complaint also seeks relief under the All
4 Writs Act. *Id.* ¶ 134. The *South Bay* Plaintiffs are also not challenging the private
5 right of action in section 1 of SB 1327.

6 Both sets of Plaintiffs are seeking a preliminary injunction. In *Miller*, on
7 October 18, 2022, the parties jointly submitted a motion and stipulation requesting
8 an order extending the time for defendants to respond to the complaint, from
9 October 18, to 15 days after the Court enters an order resolving the preliminary
10 injunction motion, which this Court signed. The stipulated order found good cause
11 to extend the time for defendants to respond to the complaint “because Defendants
12 require more time to analyze the Complaint and to consider and prepare their
13 response” and “because preparation of a response to all allegations would require a
14 substantial expenditure of time and effort—one that may not be wholly necessary if
15 preliminary injunction proceedings narrow or resolve the issues.” Order 2. In
16 *South Bay*, on October 21, 2022, the parties also submitted a motion and stipulation
17 requesting an order extending time for defendants to respond to the complaint until
18 after the Court rules on the preliminary injunction motion, but this Court has not yet
19 responded to that request. Pursuant to the *Miller* order and the motions and
20 stipulations filed in both cases, Defendants have not yet responded to either
21 complaint. And because Defendants only raised jurisdictional arguments in
22 response to the preliminary injunction motions, without addressing the likelihood
23 that Plaintiffs will succeed on the merits, Defendants have not yet taken a position
24 on the merits of Plaintiffs’ claims.

25 On December 1, 2022, this Court adopted the tentative order it previously
26 issued on November 15, 2022, concluding that there is a case or controversy
27 between the parties under Article III, consolidating a trial on the merits with a
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1 hearing on the preliminary injunction motion under Federal Rule of Civil Procedure
2 65(a)(2), and setting a bench trial on December 16, 2022.

3 ARGUMENT

4 This case involves a unique statute that presents an unusual legal issue.
5 Ordinarily, statutes are entitled to the general presumption of constitutionality. *See,*
6 *e.g., Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1133 (9th Cir. 2021). But under
7 the particular circumstances of this case, the Attorney General will not be defending
8 the merits of SB 1327. Consistent with the constitutional concerns the Attorney
9 General has raised about SB 8, including well before SB 1327 became law, he has
10 committed not to seek fees under section 2 of SB 1327 unless and until the nearly
11 identical provision in SB 8 is judicially determined to be constitutional and
12 enforceable. In light of those same constitutional concerns that this type of fee-
13 shifting provision interferes with the right of access to the courts, and consistent
14 with his commitment not to seek fees under SB 1327, the Attorney General is not in
15 a position to defend SB 1327's fee-shifting provision on its merits.

16 That said, SB 1327 was duly passed by the Legislature and signed by the
17 Governor. It is California law. Certainly, if the fee-shifting provision in SB 8 is
18 ultimately upheld as constitutional, the identical provision in SB 1327 should be
19 enforceable to the same extent. But at this time, the Attorney General is not in a
20 position to defend the merits of a provision that is indistinguishable in relevant part
21 from a provision that he has opined is unconstitutional. As noted above, other
22 constitutional officers and state officials may take a different view, and the
23 Governor has provided Defendants notice that he intends to move to intervene to
24 address the merits of SB 1327. Defendants do not oppose the Governor's motion to
25 intervene in this case.

26 Finally, Defendants offer the following regarding the question of remedy. If,
27 after considering arguments from the parties and the Governor, the court determines
28 that the fee-shifting mechanism in SB 1327 is unconstitutional, it would be

1 appropriate for the Court to enter a declaratory judgment that the fee-shifting
2 mechanism in SB 1327 unconstitutionally interferes with the right of access to the
3 courts and may not be enforced by Defendants against Plaintiffs and their attorneys.
4 The judgment should not address SB 1327’s separate provision regarding a private
5 right of action, which is not at issue in this case. If the courts in the pending
6 litigation in Texas ultimately hold that the fee-shifting provision in section 4 of SB
7 8 is constitutional and enforceable, however, then the identical provision in SB
8 1327 should be valid and enforceable to the same extent. For that reason, any
9 judgment against Defendants should state that it is without prejudice to Defendants
10 returning to this Court to apprise the court of developments in the SB 8 litigation
11 and to seek modification of the judgment in the event that SB 8’s fee-shifting
12 mechanism is upheld as constitutional and that decision is affirmed on appeal or no
13 appeal is taken. Defendants reserve the right to seek modification of any judgment
14 under Federal Rule of Civil Procedure 60(b) in light of any such ruling.

15 **CONCLUSION**

16 For the foregoing reasons, Defendants are not in a position to defend the
17 constitutionality of the fee-shifting provision of SB 1327 on the merits. Defendants
18 do not oppose the Governor’s motion to intervene.

19
20 Dated: December 9, 2022

Respectfully submitted,

21 ROB BONTA
22 Attorney General of California
23 R. MATTHEW WISE
Supervising Deputy Attorney General

24 s/ Ryan R. Davis

25 RYAN R. DAVIS
26 Deputy Attorney General
27 *Attorneys for Defendants Rob Bonta
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capacities*

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CERTIFICATE OF SERVICE

Case Name: **Miller, James, et al. v. Rob** No. **3:22-cv-01446-BEN-JLB**
Bonta, et al. (S.D. Cal.)

I hereby certify that on December 8, 2022, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANT'S SUPPLEMENTAL BRIEF

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 December 8, 2022, at Sacramento, California.

R. Davis
Declarant

/s/ R. Davis
Signature

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CERTIFICATE OF SERVICE

Case Name: **South Bay Rod & Gun Club,
Inc., et al. v. Rob Bonta** No. **3:22-cv-01461-JO-WVG**

I hereby certify that on December 8, 2022, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANT'S SUPPLEMENTAL BRIEF

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 December 8, 2022, at Sacramento, California.

R. Davis
Declarant

/s/ R. Davis
Signature

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