

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 1327 (Hertzberg)
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SUBJECT

Firearms: private rights of action

DIGEST

This bill establishes privately-enforced civil causes of action against any person who manufactures or causes to be manufactured, distributes, transports, or imports into the state, or causes to be distributed or transported or imported into the state, keeps for sale or offers or exposes for sale, or gives or lends any firearm lacking a required serial number, assault weapon, .50 BMG rifle, or firearm precursor part, as specified.

EXECUTIVE SUMMARY

Although most shooting deaths involve handguns, there has been a dramatic rise in the use of assault weapons in gun massacres with six or more deaths, owing to their ability to inflict greater damage at a quicker rate.¹ Research shows that laws restricting assault weapons reduce deaths; estimates find mass-shooting fatalities were 70 percent less likely during the period when the federal ban was in effect.² Another rising scourge is the prevalence of “ghost guns.” In 2020, California accounted for 65 percent of all ghost guns seized by the Bureau of Alcohol, Tobacco, Firearms and Explosives.³ The weapons have been linked to 24 killings and dozens of other crimes in 2020 in Los Angeles alone. The problem of gun violence in our society is not going away. In 2020, over 45,000 Americans died from gun-related injuries in the United States. This is the most on record by far, a 43 percent increase from a decade prior.

¹ Emily Shapiro, *The type of gun used in most US homicides is not an AR-15* (October 26, 2021) abcNews, <https://abcnews.go.com/US/type-gun-us-homicides-ar-15/story?id=78689504>. All internet citations are current as of March 22, 2022.

² Charles DiMaggio, et al., *Changes in US mass shooting deaths associated with the 1994-2004 federal assault weapons ban: Analysis of open-source data* (January 2019) *The Journal of Trauma and Acute Care Surgery*, <https://doi.org/10.1097/TA.0000000000002060>.

³ Justin Ray, ‘An instrument of death’: *The problem of ghost guns in California* (November 15, 2021) Los Angeles Times, <https://www.latimes.com/california/newsletter/2021-11-15/ghost-guns-california-essential-california>.

This bill seeks to curb the prevalence of these weapons by enlisting the help of Californians. The bill reproduces relevant Penal Code provisions relating to assault weapons, rifles, "ghost guns," and other illegal firearms into the Business and Professions Code, with limited extensions of existing restrictions. Any Californian is authorized to bring a civil action against anyone that manufactures or causes to be manufactured, distributes, transports, or imports into the state, or causes to be distributed or transported or imported into the state, keeps for sale or offers or exposes for sale, or gives or lends any assault weapon, .50 BMG rifle, firearm lacking a required serial number, or firearm precursor part, as specified. The bill is modeled after a controversial Texas abortion law, and includes a number of the same problematic procedural mechanisms.

The bill is sponsored by Governor Gavin Newsom. It is supported by several groups, including Everytown for Gun Safety Action Fund, Moms Demand Action for Gun Sense in America, and Students Demand Action for Gun Sense in America. The bill is opposed by the Gun Owners of California. If this bill passes out of this Committee, it will then be referred to the Senate Public Safety Committee.

PROPOSED CHANGES TO THE LAW

Existing federal law:

- 1) Provides, pursuant to the Second Amendment to the United States Constitution, that a well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed. (U.S. Const. Amend. 2.)
- 2) Requires licensed importers and licensed manufacturers to identify each firearm imported or manufactured by using the serial number engraved or cast on the receiver or frame of the weapon, in such manner as prescribed by the Attorney General (AG). (18 U.S.C. § 923, subd. (i).)
- 3) Specifies that the United States Undetectable Firearms Act of 1988 makes it illegal to manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm that is not as detectable by walk-through metal detection as a security exemplar containing 3.7 oz. of steel, or any firearm with major components that do not generate an accurate image before standard airport imaging technology. (18 U.S.C. § 922, subd. (p).)
- 4) Prohibits a qualified civil liability action from being brought in any Federal or State court. (15 U.S.C. § 7902.) A "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement,

restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party. (15 U.S.C. § 7903.)

Existing state law:

- 5) Provides that any person who manufactures or causes to be manufactured, distributes, transports, or imports into the state, keeps for sale, or offers or exposes for sale, or who gives or lends any assault weapon or any .50 BMG rifle, except as provided, is guilty of a felony. (Pen. Code § 30600.)
- 6) Establishes a detailed list of firearms falling within the definition of “assault weapon.” (Pen. Code §§ 30510, 30515.) It also defines what is considered a “.50 BMG rifle.” (Pen. Code § 30530.)
- 7) Requires, commencing July 1, 2022, that the sale of a firearm precursor part by any party be conducted by or processed through a licensed firearm precursor part vendor. (Pen. Code § 30412.) It also prohibits certain persons from owning or possessing firearm precursor parts and provides other limitations on such parts. (Pen. Code § 30400 et seq.)
- 8) Defines “firearm” as a device designed to be used as a weapon from which is expelled through a barrel, a projectile by the force of an explosion or other form of combustion. (Pen. Code § 16520.) It defines “firearm precursor part” to mean a component of a firearm that is necessary to build or assemble a firearm and is either an unfinished receiver or an unfinished handgun frame. (Pen. Code § 16531.)
- 9) Prohibits a person, firm, or corporation licensed to manufacture firearms pursuant to federal law from manufacturing firearms in California, unless the person, firm or corporation is also licensed under California law, as specified. (Pen. Code § 29010.)
- 10) Makes it illegal to change, alter, remove, or obliterate the name of the maker, model, manufacturer's number, or other mark of identification on any pistol, revolver, or any other firearm, without first having secured written permission from the Department of Justice (DOJ) to make that change, alteration, or removal. (Pen. Code § 23900.)
- 11) Allows the DOJ, upon request, to assign a distinguishing number or mark of identification to any firearm whenever the firearm lacks a manufacturer's number or other mark of identification, or whenever the manufacturer's number or other mark of identification, or a distinguishing number or mark assigned by the department has been destroyed or obliterated. (Pen. Code § 23910.)

- 12) Makes it a misdemeanor, with limited enumerated exceptions, for any person to buy, receive, dispose of, sell, offer to sell or have possession any pistol, revolver, or other firearm that has had the name of the maker or model, or the manufacturer's number or other mark of identification changed, altered, removed, or obliterated. (Pen. Code §§ 23920, 23925.)
- 13) Requires a person be at least 18 years of age to purchase a rifle or shotgun. To purchase a handgun, a person must be at least 21 years of age. (Pen. Code § 26840.)
- 14) Requires firearms dealers to obtain certain identifying information from firearms purchasers and forward that information, via electronic transfer to the DOJ to perform a background check on the purchaser to determine whether they are prohibited from possessing a firearm. (Pen. Code §§ 28160-28220.)

This bill:

- 1) Provides that no person shall manufacture or cause to be manufactured, distribute, transport, or import into the state, or cause to be distributed, transported, or imported into the state, keep for sale, offer or expose for sale, or give or lend, any assault weapon, .50 BMG rifle, or unserialized firearm, except as provided.
- 2) Provides that no person shall manufacture or cause to be manufactured, distribute, transport, or import into the state, or cause to be distributed or transported or imported into the state, keep for sale, offer or expose for sale, or give or lend, any firearm precursor part, except as provided.
- 3) Provides a series of exceptions to the above prohibitions, including where law enforcement agencies are involved.
- 4) Defines “.50 BMG rifle,” “assault weapon,” “firearm,” and “firearm precursor part” consistently with existing Penal Code provisions. “Unserialized firearm” is defined to mean a firearm that does not have a serial number as required by law or has had its serial number altered or obliterated.
- 5) Authorizes any person, other than an officer or employee of a state or local governmental entity, to bring a civil action against any person who knowingly:
 - a) violates the above;
 - b) engages in conduct that aids or abets a violation, regardless of whether the person knew or should have known that the person aided or abetted would be in violation; or
 - c) commits an act with the intent to engage in the conduct described above.

- 6) Clarifies that it is exclusively enforced through the above private civil action and that no enforcement may be taken or threatened by this state, a political subdivision, a district or county or city attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided. Nor shall any civil action predicated upon a violation be brought by this state, a political subdivision, a district or county or city attorney, or an executive or administrative officer or employee of this state or a political subdivision. It further prohibits this state, a state official, or a district, county, or city attorney from intervening in these actions.
- 7) Requires a court to award a prevailing claimant all of the following:
 - a) injunctive relief sufficient to prevent the defendant from further violations or engaging in acts that aid or abet violations;
 - b) statutory damages in an amount of not less than \$10,000 for each weapon or firearm precursor part in violation; and
 - c) attorney's fees and costs.
- 8) Provides that no relief shall be awarded if the defendant demonstrates that the defendant previously paid the full amount of any monetary award in a previous action for each weapon or firearm precursor part.
- 9) Requires such actions to be brought within four years of the cause of action accruing.
- 10) Deems an act or omission in violation an injury in fact to all residents of, and visitors to, this state, and any such person shall have standing to bring a civil action.
- 11) Provides that none of the following is a defense to the above action:
 - a) a defendant's ignorance or mistake of law;
 - b) a defendant's belief that these requirements are unconstitutional or were unconstitutional;
 - c) a defendant's reliance on any court decision that has been overruled on appeal or by a subsequent court, even if that court decision had not been overruled when the defendant engaged in the violation;
 - d) a defendant's reliance on any state or federal court decision that is not binding on the court in which the action is brought;
 - e) nonmutual issue preclusion or nonmutual claim preclusion;
 - f) any claim that such enforcement or the imposition of civil liability against the defendant will violate a constitutional right of a third party;
 - g) a defendant's assertion that this law proscribes conduct that is separately prohibited by the Penal Code or any other law of this state, or that it proscribes conduct beyond that which is already prohibited by the Penal Code or any other law of this state; or

- h) any claim that the assault weapon, .50 BMG rifle, or firearm precursor part at issue was not misused, or was not intended to be misused, in a criminal or unlawful manner.

- 12) Authorizes the following affirmative defenses to be proven by a defendant by a preponderance of the evidence:
 - a) a person sued for aiding or abetting reasonably believed, after conducting a reasonable investigation, that the person aided or abetted was in compliance; or
 - b) a person sued based on knowingly committing an act with intent to violate the law reasonably believed, after conducting a reasonable investigation, that the person was in compliance or was aiding or abetting another who was in compliance.

- 13) Provides that a defendant against whom an action is brought does not have standing to assert the right of another individual to keep and bear arms under the Second Amendment to the United States Constitution as a defense to liability unless either of the following is true:
 - a) the United States Supreme Court holds that the courts of this state must confer standing on that defendant to assert the third-party rights of other individuals in state court as a matter of federal constitutional law; or
 - b) the defendant has standing to assert the rights of other individuals under the tests for third-party standing established by the United States Supreme Court.

- 14) Authorizes a defendant to assert an affirmative defense to liability under the preceding section if both of the following are true:
 - a) the defendant has standing to assert the third-party right of an individual to keep and bear arms in accordance with the preceding section; and
 - b) the defendant demonstrates that the relief sought by the claimant will violate a third-party's rights under the Second Amendment to the United States Constitution right as defined by clearly established case law of the United States Supreme Court.

- 15) Clarifies that the preceding provisions do not limit or preclude a defendant from asserting the defendant's personal constitutional rights as a defense to liability, and prohibits a court from awarding relief if the conduct for which the defendant has been sued was an exercise of a state or federal constitutional right that personally belongs to the defendant.

- 16) Clarifies that it does not authorize the initiation of a cause of action against a person purchasing, obtaining, or attempting to purchase or obtain an assault weapon, .50 BMG rifle, unserialized firearm, or firearm precursor part from a person acting in violation of this law.

- 17) Prohibits a defendant from making an anti-SLAPP motion to strike and from being awarded attorney's fees or costs in such an action.
- 18) Establishes broad venue rules for these civil actions and restricts the ability to transfer venue.
- 19) Provides that it is inoperative and is thereafter repealed upon the total invalidation of a specific provision of Texas law by the United States Supreme Court or the Texas Supreme Court.
- 20) Provides that 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, in any state or federal court, or that represents any litigant seeking that relief in any state or federal court, is jointly and severally liable to pay the attorney's fees and costs of the prevailing party.
- 21) Includes a severability clause.

COMMENTS

1. Gun control laws in California

Existing Penal Code provisions provide specific limitations and guidelines around firearms and other weapons in California. Any person who manufactures or causes to be manufactured, distributes, transports, or imports into the state, keeps for sale, or offers or exposes for sale, or who gives or lends any assault weapon or any .50 BMG rifle, except as provided, is guilty of a felony. (Pen. Code § 30600.)

The law also deems it a public nuisance to possess any assault weapon or any .50 BMG rifle in violation of the law. (Pen. Code § 30800.) The law authorizes the Attorney General, any district attorney, or any city attorney, to, in lieu of criminal prosecution, bring a civil action or reach a civil compromise in any superior court to enjoin the manufacture of, importation of, keeping for sale of, offering or exposing for sale, giving, lending, or possession of an assault weapon or .50 BMG rifle that is a public nuisance. Superior courts can impose a civil fine for the possession of, manufacture of, importation of, keeping for sale of, offering or exposing for sale, giving, or lending of an assault weapon or .50 BMG rifle that is a public nuisance.

The law establishes a detailed list of firearms falling within the definition of "assault weapon." (Pen. Code §§ 30510, 30515.) It also defines what is considered a ".50 BMG rifle." (Pen. Code § 30530.)

Based on recent legislation, AB 879 (Gipson, Ch. 730, Stats. 2019), the law also requires, commencing July 1, 2022, that the sale of a firearm precursor part by any party be conducted by or processed through a licensed firearm precursor part vendor. (Pen. Code § 30412.) It also prohibits certain persons from owning or possessing firearm precursor parts and provides other limitations on such parts. (Pen. Code § 30400 et seq.)

Existing law at both the federal and state levels requires serial numbers and/or certain markers to be placed on all firearms. It subjects those in violation to criminal penalties.

2. Enlisting all Californians to enforce our critical gun control laws

A private right of action allows individuals or private entities the ability to take action and enforce the law and their rights without having to rely on a government entity to take action. Even where there is an established regulatory system, there are limits on the resources that public agencies and prosecutors can commit to upholding the law. The creation of an alternative enforcement mechanism that can be used by private parties is therefore often essential to more robust enforcement of California's laws. The author asserts that private rights of action are a standard form in modern law "for circumstances in which a government entity cannot, or in some cases will not, for one reason or another, enforce the law as required." He argues that the use of these mechanisms for purposes of enforcing California's gun control laws "is especially important to ensure the public health, safety, and security of its residents in situations in which local prosecutors in certain areas of the state may hesitate to bring forward these cases."

Writing in support, the Consumer Attorneys of California emphasize this point:

A law is only as good as its enforcement. Bills that provide a consumer enforcement remedy (also known as a private right of action) are exponentially more impactful than the vast majority of bills that do not. Bills that provide consumers with their own remedies give Californians an active role in enforcing their rights. Consumer legal rights are essential to ensure the important laws we pass in California are being followed since government enforcement is often limited due to resources.

This bill establishes these enforcement mechanisms for California's gun control laws by duplicating many of the prohibitions discussed above from the Penal Code into the Business and Professions Code. The definitions of assault weapon, .50 BMG rifle, and firearm precursor parts in the bill mirror those in existing law.

Specifically, the bill provides no person within this state may manufacture or cause to be manufactured, distribute, transport, or import into the state, or cause to be distributed, transported, or imported into the state, keep for sale, offer or expose for sale, or give or lend, any assault weapon or .50 BMG rifle, except as provided.

The bill also applies these prohibitions to unserialized firearms and firearm precursor parts. Existing state and federal law generally requires firearms to have certain markings or serial numbers. However, the bill goes beyond existing prohibitions in the Penal Code with regard to firearm precursor parts. As discussed above, there are limitations on who can possess these parts and requirements that transactions go through licensed vendors. However, there are no existing prohibitions on, for instance, manufacturing or selling such parts, as this bill establishes. Therefore, although a vendor could sell such parts consistent with current Penal Code provisions, this bill would now subject that vendor to significant civil liability.

The civil actions established by this bill can be brought against any person that knowingly violates the provisions of the bill or engages in conduct that aids or abets a violation, regardless of whether the person knew or should have known that the person aided or abetted would be in violation. It also holds liable anyone that knowingly commits an act with the intent to engage in the proscribed conduct. Any act or omission that violates these provisions is deemed an injury in fact to all residents of and visitors to this state and all such persons have standing to bring an enforcement action.

Plaintiffs in such cases are entitled to injunctive relief, attorney's fees and costs, and statutory damages. Courts are *required* to award *at least* \$10,000 for each weapon or part as to which a violation occurred. Ultimately, the authorization of private enforcement, especially with such broad standing and large penalties, ensures more thorough enforcement of these laws, which are crucial to protecting Californians' safety and wellbeing.

It should be noted that the federal Protection of Lawful Commerce in Arms Act prohibits a qualified civil liability action from being brought in any federal or state court. (15 U.S.C. § 7902.) A "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party. (15 U.S.C. § 7903.) These statutes stand to preempt state laws that impose liability on manufacturers, sellers, and trade associations for the misuse of firearms by third parties. Given that liability attaches in this bill only for the conduct of a potential defendant, regardless of the action of another party, there are arguably no reasonable preemption concerns.

3. Intent and motivation for the bill

According to the author:

Violent, gun-related crime is skyrocketing across the state. Continuing California's record as a pioneer in commonsense gun reform, SB 1327 offers a new tool to combat the rise in gun violence and save lives - a private enforcement scheme. Modeled on the structure of Texas' recent abortion ban, SB 1327 allows private citizens to sue anyone who manufactures, distributes, transports, imports, or sells assault weapons, .50 BMG rifles, ghost guns, or ghost gun kits in California. By enacting its abortion ban, Texas is knowingly infringing upon a well-established constitutional right. However, while the Supreme Court recognizes an individual constitutional right to bear arms, it certainly does not recognize a constitutional right to own, manufacture, or sell an illegal assault weapon or ghost gun.

As stated by the author, this enforcement scheme is based on a controversial Texas law that prohibits a physician from knowingly performing or inducing an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child, as specified, or failed to perform a test to detect a fetal heartbeat. (Tex. Health & Safety Code § 171.201 et seq. (enacted through Texas Senate Bill 8).) The law provides that any person, other than an officer or employee of a state or local governmental entity in Texas, may bring a civil action against any person who:

- performs or induces an abortion in violation of the law;
- knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of the law, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation; or
- intends to engage in the conduct described above.

Texas abortion providers led by Whole Women's Health and other independent abortion clinics, doctors, clinic staff, abortion funds, support networks, and clergy members filed a case in an attempt to stop the law before it took effect. The abortion providers sought pre-enforcement review of the law and an injunction barring its enforcement. They sought to certify a class and requested an order enjoining all state-court clerks from docketing such cases, and all state-court judges from hearing them. They also named a private individual and executive licensing officials. The district court denied motions to dismiss. The Fifth Circuit denied the plaintiffs' request for an injunction barring enforcement pending appeal.

The petitioning providers sought injunctive relief in the Supreme Court. On certiorari, the Supreme Court held that a pre-enforcement challenge to the law under the U.S. Constitution may only proceed against certain defendants but not others.⁴ The court did not address whether the law was constitutionally sound. However, the court's ruling essentially insulated the private enforcement of the law from challenge, allowing the law to remain in effect. This inability to challenge the law pre-enforcement therefore allows it to stand as a threat to all seeking or performing an abortion and thereby chills the exercise of Texans' constitutional rights, namely a pregnant person's right to control their body.

The author explains the logic of using this model:

In a just world, a woman's right to choose would be sacrosanct, and California's people would be protected from ghost guns and assault weapons. Sadly, common sense was turned on its head when the Supreme Court allowed Texas's egregious ban on most abortion services to remain in place. SB 1327 takes advantage of this flawed logic and creates an enforcement mechanism for our own laws aimed to protect all Californians and save lives – not flagrantly infringing upon an existing constitutional right.

Similar to the Texas law, this bill specifically prohibits any public enforcement and relies solely on the private right of action to hold those in violation liable. It reiterates in multiple provisions that public officials have no right to initiate or even intervene in such cases. The goal is to create an enforcement scheme that is similarly shielded from challenge. The central difference is that Texas' law almost certainly infringes on Texans' constitutional rights. Here, the bill's private enforcement mechanism is being used to carry out gun control laws that arguably fall within constitutional parameters.

Importantly, this bill does not prohibit anyone from possessing or using any weapon. In fact, it specifically clarifies that it does not authorize the initiation of a cause of action against a person for purchasing, obtaining, or attempting to purchase or obtain an assault weapon, .50 BMG rifle, unserialized firearm, or firearm precursor part from a person acting in violation of this law. This mirrors a similar provision in the Texas law that states it shall not be read to “authorize the initiation of a cause of action against or the prosecution of a woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of this [law].” (Tex. Health & Safety Code § 171.206.) The goal of the Texas provision is a bare attempt to insulate the law from constitutional challenge by eliminating causes of action directly against the people that seek an abortion, while holding the threat over any medical professional involved in the procedure, and even the person driving the pregnant person to the procedure.

⁴ *Whole Woman's Health v. Jackson* (2021) 142 S. Ct. 522, 530.

Despite the craftiness, these provisions effectively deprive the person seeking an abortion a meaningful opportunity to obtain one.

It should be noted that a recent case brought in a federal district court in California, *Miller v. Bonta* (S.D. Cal. 2021) 542 F. Supp. 3d 1009, enjoined enforcement of a number of the above Penal Code statutes as applied to assault weapons, finding the statutes unconstitutionally infringed on the Second Amendment rights of Californians. However, a Ninth Circuit appeals court has stayed the order and further litigation is ongoing. Should this bill pass out of this Committee, it will be referred to the Senate Public Safety Committee for a more thorough discussion on the relevant Penal Code provisions.

4. Concerns with legitimizing the Texas model: Listening to Justice Sotomayor

The clear premise of this bill is if Texas can use this clever scheme to subvert federal supremacy and infringe on constitutional rights its Legislature and Governor do not favor, then California should use it to carry out its own, constitutional policy goals. What's good for the goose is good for the gander. It is certainly clear that this mechanism will advance the policy of the state to restrict the relevant weapons, as it has declared "the proliferation and use of assault weapons [and .50 BMG rifles] poses a threat to the health, safety, and security of all citizens of this state." (Pen. Code § 30505.)

However, there is a risk that utilizing this model only legitimizes it further, which could have negative ramifications across the nation. Already, Idaho has passed a law just weeks ago that essentially bans abortions after six weeks based on the Texas model.

Beyond just simply allowing for private rights of action, the bill also includes a series of procedural mechanisms that are particularly problematic, and arguably raise serious due process concerns.

For instance, as discussed, liability attaches if a person knowingly engages in conduct that aids or abets a violation, *regardless of whether the person knew or should have known that the person aided or abetted would be violating this law*. Many lambasted the Texas law for exposing too wide a swath of people to liability. Using the same language, this bill could also open up endless possibilities for who is vulnerable to suit, including a taxi driver that takes a person to a gun shop.

Another provision reads:

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, in

any state or federal court, or that represents any litigant seeking that relief in any state or federal court, is jointly and severally liable to pay the attorney's fees and costs of the prevailing party.

This is based directly off of a provision included in the Texas law. This provision makes not only a party, but their attorney and law firm, jointly and severally liable to pay the attorneys' fees and costs for challenging a law in this state regarding firearms in either federal or state court. The challenge need only fail on a single claim or cause of action on any basis for the liability to attach.

Therefore, an attorney could properly represent a client in seeking to strike down an unconstitutional law, win on all but one count, and break no other statutory or professional duties, and be held responsible for paying the defendant's attorney's fees. In fact, even if the defendant fails to seek attorney's fees in the underlying action or the court refuses to award them and *finds this provision unconstitutional*, this bill allows the defendant to bring an action within three years to hold the attorney responsible for those fees and costs.

Again mirroring the Texas law, the bill prohibits a person, including an entity, attorney, or law firm, who seeks declaratory or injunctive relief in actions described above, from being deemed a prevailing party under this section of the bill or any other provision of the relevant chapter of the Code of Civil Procedure. This includes Section 1021.5, which authorizes an award of attorney's fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest. Therefore, even if the hypothetical attorney above wins on every single claim and the court determines such a result furthers the public interest, the attorney is not eligible to seek attorneys' fees.

The bill also duplicates very unusual venue rules that leaves a great deal of discretion in the hands of a suing plaintiff under the bill and restricts the ability of the court or other party from transferring venue. This stacking of the deck is exacerbated by the provision that invalidates nonmutual issue preclusion and nonmutual claim preclusion as defenses to actions brought pursuant to this bill. This means a defendant could be sued repeatedly all over the state for the same conduct, despite having already succeeded in defending against the same claims. One device that could protect against plaintiffs abusing this is California's anti-SLAPP statute. That law provides that a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike. (Civ. Proc. Code § 425.16.) The Legislature asserted that the law was justified because "it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." This bill prohibits such anti-SLAPP motions.

In her opinion in *Whole Woman's Health*, Justice Sotomayor outlines the Texas law's "numerous procedural and substantive anomalies," which she denounces as the "manipulation of state-court procedures and defenses."⁵ These are the same provisions that this bill carries over. In part, she writes:

S. B. 8 also modifies state-court procedures to make litigation uniquely punitive for those sued. It allows defendants to be hauled into court in any county in which a plaintiff lives, even if that county has no relationship to the defendants or the abortion procedure at issue. §171.210(a)(4). It gives the plaintiff a veto over any venue transfer, regardless of the inconvenience to the defendants. §171.210(b). It prohibits defendants from invoking nonmutual issue or claim preclusion, meaning that if they prevail, they remain vulnerable to suit by any other plaintiff anywhere in the State for the same conduct. §171.208(e)(5). It also bars defendants from relying on any nonbinding court decision, such as persuasive precedent from other trial courts. §171.208(e)(4). Although it guarantees attorney's fees and costs to prevailing plaintiffs, §171.208(b)(3), it categorically denies them to prevailing defendants, §171.208(i), so they must finance their own defenses no matter how frivolous the suits. These provisions are considerable departures from the norm in Texas courts and in most courts across the Nation.

She ultimately concludes:

As a whole, these provisions go beyond imposing liability on the exercise of a constitutional right. If enforced, they prevent providers from seeking effective pre-enforcement relief (in both state and federal court) while simultaneously depriving them of effective post-enforcement adjudication, potentially violating procedural due process.

While the goal of repurposing the Texas law may be sound, these problematic provisions may not justify those ends. They insulate government action from meaningful challenge by creating a strong, punitive deterrent for any that try and in the end, may violate due process guarantees. These provisions undermine our justice system and the policy of the State of California.

⁵ *Whole Woman's Health v. Jackson* (2021) 142 S. Ct. 522, 546.

5. Stakeholder positions

In a joint letter, Everytown for Gun Safety, Moms Demand Action, and Students Demand Action write in support:

SB 1327 strengthens California gun laws by empowering individuals to bring civil actions against those who manufacture, distribute, transport, import into California, or sell dangerous and illegal assault weapons and ghost guns. This measure continues California's record as a pioneer in commonsense gun reform and offers a new tool to combat the rise in gun violence and keep communities safe.

Gun Owners of California write in opposition to the bill:

SB 1327 would make legal gun manufacturers liable for the illegal act of another. Not only is it firmly unconstitutional – given that the 2nd Amendment is explicitly spelled out in the Bill of Rights, but it's also a clear violation of federal law. In 2005, Congress passed The Protection of Lawful Commerce in Arms Act specifically for this reason – to protect the firearm industry from lawsuits that target the actual gun rather than the person whose finger was on the trigger. The act does not protect anyone who commits a crime, only those involved in the legal commerce of a legal product.

Just as it would be improper to sue an automobile manufacturer – or more to the point, the owner of a winery – for a fatal drunk driving crime after imbibing there, it is equally inappropriate to sue a lawful gun maker for engaging in lawful commerce. The same logic would apply to the makers and sellers of eating utensils such as forks and spoons, because they lead to overeating and the possible deadly consequences of heart disease or diabetes.

SUPPORT

Governor Gavin Newsom (sponsor)
Consumer Attorneys of California
Everytown for Gun Safety Action Fund
Moms Demand Action for Gun Sense in America
Students Demand Action for Gun Sense in America

OPPOSITION

Gun Owners of California

RELATED LEGISLATION

Pending Legislation:

AB 1621 (Gipson, 2022), among other things, prohibits the sale, transfer, or possession of an unserialized firearm precursor part, except as specified, and explicitly prohibits the possession or transfer of a firearm without a serial number or mark of identification. This bill is currently in the Assembly Public Safety Committee.

Prior Legislation:

SB 118 (Committee on Budget, Ch. 29, Stats. 2020), adjusts the timeline for implementation of AB 879 (Gipson, Ch. 730, Stats. 2019).

AB 879 (Gipson, Ch. 730, Stats. 2019) *See* Comment 1.

AB 857 (Cooper, Ch. 60, Stats. 2016), required a person, commencing July 1, 2018, to apply to and obtain from the DOJ a unique serial number or other mark of identification prior to manufacturing or assembling a firearm.
