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May 2, 2022

The Honorable Bob Hertzberg
California State Capitol
Sacramento, California 95814

**Re: SB 1327 – as amended 4/7/22
OPPOSE**

The Honorable Anthony Portantino
California State Capitol
Sacramento, CA 95814

Dear Senator Hertzberg and Senator Portantino:

American Civil Liberties Union California Action regrets that we must respectfully oppose your SB 1327, a measure that unfortunately seeks to enact gun regulation in a manner that offends the constitutional structure of California and the United States and would set a dangerous legal precedent – not only undermining fundamental principles of due process, but eliminating the judiciary as a check and balance against the political branches, effectively unravelling the separation of powers doctrine. Indeed, by weakening the power of courts to review the validity of laws passed by the legislature this bill strikes at the very concept of constitutional rights, the recognition and enforcement of which rests on the judicial branch.

Despite being framed as a gun regulation, we understand that this bill is sponsored by Governor Newsom – knowing that it is an attack on the constitution – in a proxy battle meant to deter the United States Supreme Court from upholding a virtually identical law enacted in Texas to rescind abortion rights. We admire and share the Governor’s commitment to reproductive freedom, and we do not take issue with his legitimate concerns about the deadly proliferation of illegal guns. But there is no way to ‘take advantage of the flawed logic’ of the Texas law.¹ No worthy motive and no permissible goal can justify such a radical and dangerous assault on our constitutional structure. Replicating the reprehensible Texas model only serves to legitimize and promote it, as evidenced by the copycat measures already enacted in some states, with many more pending around the country.²

¹ “Hertzberg Bill Creates Landmark Private Right Of Action To Limit Spread Of Illegal Weapons,” <https://sd18.senate.ca.gov/news/2182022-hertzberg-bill-creates-landmark-private-right-action-limit-spread-illegal-weapons>

² Oklahoma House sends Texas-style abortion ban to governor, Associated Press, April 28, 2022, available at <https://www.politico.com/news/2022/04/28/oklahoma-house-sends-texas-style-abortion-ban-to-governor-00028818>; Idaho Enacts Law Copying Texas’ Abortion Ban — And These States Might Be Next, March 23, 2022, <https://www.forbes.com/sites/alisondurkee/2022/03/23/idaho-enacts-law-copying-texas-abortion-ban---and-these-states-might-be-next/?sh=bba624c25c05>

The problem with this bill is the same problem as the Texas anti-abortion law it mimics: it creates an end run around the essential function of the courts to ensure that constitutional rights are protected. Specifically, this bill creates a “bounty-hunter” scheme that authorizes private individuals to bring costly and harassing lawsuits designed and intended to intimidate people from engaging in a proscribed activity without requiring – or even permitting – the government to defend the law the defendants are alleged to have violated. In the case of SB 8 in Texas, the massive liability risk created by the bounty-hunting provisions has coerced doctors and clinics into not providing constitutionally protected abortions in the state. Indeed, lawsuits against Texas challenging SB 8 as unconstitutional have been tossed out on the technical ground that state officials, none of whom have the power to enforce the law, are not proper defendants – just as the extremist drafters of SB 8 intended.

This legal framework is unsound and invalid no matter what activity it is directed at because it eviscerates basic principles of constitutional government by destroying an individual’s ability to petition a court to block the state from violating a legal right. It is no exaggeration that, without the power of judicial review, the very purpose and reason for our constitutional form of government is lost – leaving rights to the whims of whatever a political majority in one place allows at any moment. Without court review of state laws, there would be no *Roe v. Wade* – as is evidently the goal of the Texas politicians behind SB 8. Moreover, without judicial review there would be no *Brown v. Board of Education*, no *Gideon v. Wainwright*, no *Miranda v. Arizona*, no *Buckley v. Valeo*, no *Loving v. Virginia*, no *Obergefell v. Hodges*, and indeed no *Marbury v. Madison*. As four justices recently noted, it is a basic principle that our constitution is the fundamental and paramount law of the nation, and it is province and duty of the courts to say what the constitution means. The nature of the right infringed does not matter; it is the role of the courts in our constitutional system that is at stake under this bill.³

Further, SB 1327 undermines due process of law in many smaller but no less important ways. 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 defendant. It allows defendants to be sued repeatedly all over the state for the same conduct, despite having already succeeded in defending against the same claims. It imposes liability for aiding or abetting a violation, regardless of whether the person knew or should have known that the person aided or abetted would be violating this law. It bars defendants from relying on any nonbinding court decision, such as persuasive precedent from other trial courts. It guarantees attorney’s fees and costs to prevailing plaintiffs while categorically denying them to prevailing defendants. It makes not only a party but their attorney and law firm jointly and severally liable to pay the attorneys’ fees and costs for challenging the law if the challenge fails on merely a single claim or cause of action. As the Senate Judiciary Committee analysis bravely noted, “These provisions undermine our justice system and the policy of the State of California.”

Because we oppose restricting Californians’ access to justice through the court system, we cannot stand silently by while California leaders escalate an “arms race” of new weapons to curtail the adjudication of rights by setting up bounty-hunting schemes on politically sensitive issues, particularly at a time when so many of our rights across this nation are under attack: the right to access abortion, contraception, and gender-affirming care, and the right to vote, to name

³ *Whole Woman's Health v. Jackson* (2021) 142 S. Ct. 522, 545. (Roberts, Breyer, Sotomayor, and Kagan, concurring in the judgment in part and dissenting in part).

just a few examples. For further explanation of our views, please see <https://acluaction.org/2022/05/how-californias-proposed-gun-safety-law-threatens-to-erode-constitutional-rights-for-all/>

Sincerely,



Kevin G. Baker
Director of Governmental Relations

cc: Members and committee Staff, Senate Judiciary, Public Safety and Appropriations committees