CITIZEN ENFORCEMENT LAWS THREATEN DEMOCRACY

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In a democratic society based on the rule of law anything that encourages lawlessness undermines that democracy. That's especially true when elected representatives themselves implement policies that weaken democratic institutions—when the law's very servants act against it.

This Essay analyzes citizen enforcement (or so-called "bounty hunter") laws recently enacted in Texas and California and argues that these laws create anti-democratic effects by evading judicial review and handing citizens roving writs as private enforcers. And their fee-shifting provisions unfairly tilt the scales in the government's favor. If upheld, these laws will be copied and expanded, and potentially threaten independent judicial power and democratic government itself.

I. HOW CITIZEN ENFORCEMENT LAWS WORK

The Texas and California laws are broadly similar: both are designed with "bounty hunter" provisions that provide individual citizens with a financial incentive to enforce the law. Texas Senate Bill 8 ("SB 8") bans abortions after six weeks of pregnancy,[1] and California Senate Bill 1327 ("SB 1327") bans certain firearms.[2] SB 8 permits Texans to sue anyone involved in an abortion—such as clinics, doctors, nurses, and even rideshare drivers—for at least $10,000.[3] SB 1327 has analogous provisions, but instead concerns possession of already-unlawful firearms.[4] The point, as Justice Sonia Sotomayor explained when considering the Texas law, is that these states have "deputized the [s]tate's citizens as bounty hunters, offering them cash prizes for civilly prosecuting their neighbors' medical procedures."[5] (Or unlawful firearm possession in California's case.)

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[1] S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–212 (West 2021)); TEX. HEALTH & SAFETY § 171.204.

[2] S.B. 1327, 2022 Leg., Reg. Sess. (Cal. 2023) (codified at CAL. BUS. & PROF. CODE § 22949.60 (West 2023) and CAL. CIV. PROC. CODE § 1021.11 (West 2023)).

[3] TEX. HEALTH & SAFETY § 171.208.

[4] CAL. BUS. & PROF. § 22949.60.

[5] Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2498 (2021) (Sotomayor, J., dissenting).

Such laws have several pernicious systemic effects. They share anti-democratic features because they evade judicial review, reducing judicial power to the advantage of the other branches. Both create perverse incentives for individual citizens by encouraging snitching for profit, not for justice, setting citizens against each other. Private enforcement is problematic because outsourcing a government function can be used to evade federal court review, as the Texas law intends.[6] And the fee-shifting provisions favor the government, keeping litigants out of court with the potential of ruinous fee liability—which impairs legal processes by chilling speech and impairing rights to association, counsel, and access to courts.

A. The Adverse Effects from Evading Judicial Review

Citizen enforcement laws are designed to evade judicial review by enlisting private citizens for enforcement rather than state officials. Both states here deputized their citizens as bounty hunters, offering them cash prizes for civilly prosecuting their neighbors' medical procedures or firearm possession. In Texas, this scheme was necessary to avoid federal court review because federal constitutional challenges to state laws are ordinarily brought against the state officers charged with enforcing the law.[7] By prohibiting state officers from enforcing these laws, and relying instead on citizen enforcers, Texas is gambling that with no state official to sue federal courts will be stymied.

California's law is different in that it does not offload enforcement entirely to private citizens; instead, state and local authorities still retain power to prosecute the same firearm regulations that citizens are now also incentivized to pursue.[8] But it still shares the core problem of attempting to evade judicial review, because (as described in Part II) the fee-shifting provisions in California's law are designed to discourage legal challenges.[9]

Any law that the courts are powerless to review undermines the separation of powers. Dividing the powers of government is the chief safeguard of individual liberty.[10] This structural doctrine does

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[6] *See* Timothy S. Jost, *The Courts Weigh in on the Texas Antiabortion Statute*, COMMONWEALTH FUND (Dec. 21, 2021), https://www.commonwealthfund.org/blog/2021/courts-weigh-texas-antiabortion-statute [https://perma.cc/67RM-CDFS].

[7] *See, e.g.*, Va. Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247, 254 (2011) (citing Ex parte Young, 209 U.S. 123 (1908)).

[8] CAL. CIV. PROC. CODE § 1021.11 (West 2023).

[9] *Id.*

[10] The U.S. Supreme Court has often described protecting individual liberty as the principal function of the separation-of-powers doctrine, which is a "safeguard against the encroachment or aggrandizement of one branch at the expense of the

so by mitigating the danger of one branch aggrandizing its power at the expense of another.[11] Power is zero-sum: allowing citizen enforcement laws will increase the legislature's power to act while decreasing the power of judicial review.[12] That threatens to destroy the concept of divided government, leaving liberty hobbled.

And it surely is unlawful for laws to evade judicial review: "It cannot be the case that a State can evade federal judicial scrutiny by outsourcing the enforcement of unconstitutional laws to its citizenry."[13] That must at least violate the Supremacy Clause.[14] Once the law accepts the premise that states can exempt their acts from federal constitutional restrictions by making them citizen-enforced, a world of hazardous possibilities opens. If these laws are copied and expanded, and if federal courts establish a new abstention principle from *Whole Woman's Health v. Jackson*,[15] state officials will have a powerful incentive to think creatively about what other things they could do without federal court oversight. It is a pernicious business to allow state political actors to evade constitutional commands.

B. These Laws Undercut Democracy by Giving Citizens Perverse Incentives

Citizen enforcement laws are dangerous to democracy for two reasons. One is the direct negative effect on the democratic process. The other is the more subtle but potentially more dire effect of weakening public trust in the legal process and setting citizens against each other. Both have grave implications for judicial power and democratic government itself. A democracy depends on respect

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other." Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam); Mistretta v. United States, 488 U.S. 361, 380–82 (1989). *See also* THE FEDERALIST NO. 51 (James Madison) (describing that the separation of powers confers on each branch the means "to resist encroachments of the others.").

[11] Freytag v. C.I.R., 501 U.S. 868, 878 (1991).

[12] David A. Carrillo & Danny Y. Chou, *California Constitutional Law: Separation of Powers*, 45 U.S.F. L. REV. 655, 657–59 (2011).

[13] Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2499 (2021) (Sotomayor, J., dissenting). *See* Legal Services Corp. v. Velazquez, 531 U.S. 533, 548–49 (2001) (explaining that the federal constitution does not permit the government to insulate its interpretation of the constitution from judicial challenge).

[14] U.S. CONST. art. VI, cl. 2 ("This Constitution . . . shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). *See* JEFFREY S. SUTTON, WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 139 (2022) ("[T]he Supremacy Clause mentions state court judges by name, requiring them to follow federal law and amounting to the one clause in the US Constitution that seems to mandate judicial review.").

[15] 141 S. Ct. 2494 (2021).

for the law and a fair legal process—without them it's everyone for themselves.

Any law that sets citizens against each other with financial incentives to ferret out wrongdoing by invading their neighbors' privacy risks turning the neighborhood watch into a roving thought police. Neighbors already have enough flashpoints in existing law with ready-made disputes over property lines, school boundaries, notice requirements for improvements, and high-density zoning. Citizen enforcement laws turn everyone around a pregnant woman or gun owner into a potential threat. That's hardly a recipe for peaceful living.

A seductive comparison here is to private attorney general statutes, which include a citizen deputy element. For example, California's Private Attorney General Act ("PAGA")[16] is a labor-law-enforcing mechanism, allowing California employees to sue their employers (on the state's behalf) for civil penalties for labor code violations against themselves and their fellow employees.[17] This is an example of a qui tam statute.[18] The superficial similarity is that private attorney general laws also allow citizens to seek civil penalties in the state's name.

But private attorney general statutes are different—they work within the existing legal system, invoke official state action, and involve the courts. There is no argument that California's PAGA law evades judicial review by excluding executive officials. On the contrary, California's PAGA law *requires* executive branch involvement.[19] This gives the state executive sufficient control over the litigation to avoid any separation of powers problem.[20] Thus, private attorney general statutes do not comparably weaken the judicial branch as the citizen enforcement laws do.

Underlying these macro-level problems, one novel feature of these laws has its own set of problems: the fee-shifting provisions.

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[16] CAL. LAB. CODE § 2698–99.5 (West 2016).
[17] *Id.* § 2699(a).
[18] Qui tam is short for *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means "who as well for the king as for himself sues in this matter." It describes an action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive. *See Qui Tam Action*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[19] CAL. LAB. CODE § 2699.3.
[20] *See* Iskanian v. CLS Transp. Los Angeles, LLC, 59 Cal. 4th 348, 360 (2014) (stating that PAGA does not violate the separation of powers doctrine). Indeed, none of California's other qui tam statutes have been found to degrade the separation of powers.

II. GOVERNMENT-SIDE FEE-SHIFTING PENALTIES ARE ANTI-DEMOCRATIC AND UNCONSTITUTIONAL

The California and Texas laws share another unusual anti-democratic feature: both SB 8 and SB 1327 contain one-way fee-shifting provisions that advantage the government against plaintiffs bringing civil rights claims.[21] These substantively identical laws have a few key features. They target a narrow set of claims: lawsuits seeking declaratory or injunctive relief against government actors' enforcement of specific classes of regulation (abortion in Texas, firearms in California).[22] Both provide that plaintiffs, their attorneys, and their attorneys' firms are jointly and severally liable to pay costs and attorney's fees for a "prevailing party."[23] And "prevailing party" is defined broadly and exclusively in the government's favor: the government "prevails" in full if any claim is dismissed for any reason, while a civil rights plaintiff is never a prevailing party.[24] Finally, both laws allow the government three years to bring a separate action to recover fees.[25]

In short, both laws impose a one-way penalty that applies only to litigation challenging a discrete set of rights the state has marked for unfavorable treatment. Such laws, which tilt the playing field against litigants asserting civil rights claims, cannot pass constitutional muster for a host of reasons.[26]

A. First Amendment Problems

Chief among those constitutional problems is that the fee-shifting laws violate the First Amendment in several respects. These fee-shifting penalties chill litigants' access to the courts, which is a component of the right to petition the government to redress grievances.[27] In an unbroken series of decisions dating back to the civil rights movement, the United States Supreme Court has recognized that public interest litigation is a protected "form of political expression" essential to securing civil liberties, particularly for minority groups seeking to vindicate politically unpopular

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[21] CAL. CIV. PROC. CODE § 1021.11 (West 2023); TEX. CIV. PRAC. & REM. § 30.022 (West 2021).
[22] CAL. CIV. PROC. § 1021.11(a); TEX. CIV. PRAC. & REM. § 30.022(a).
[23] CAL. CIV. PROC. § 1021.11(a); TEX. CIV. PRAC. & REM. § 30.022(a).
[24] CAL. CIV. PROC. § 1021.11(b), (e); TEX. CIV. PRAC. & REM. § 30.022(b).
[25] CAL. CIV. PROC. § 1021.11(d); TEX. CIV. PRAC. & REM. § 30.022(d).
[26] The Author of Part II is counsel of record for plaintiffs in an ongoing constitutional challenge to California Code of Civil Procedure § 1021.11. Miller v. Bonta, 2022 WL 1781114 (S.D. Cal. Dec. 19, 2022). These arguments are adapted from the plaintiffs' complaint and briefs, which Mr. Duvernay co-authored.
[27] California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

rights.[28] By chilling civil rights litigation, government-side fee-shifting laws strike at the "fundamental" First Amendment right of "collective activity undertaken to obtain meaningful access to the courts."[29] In the context of public interest litigation, the right of petition is closely linked to the rights of association and free expression, particularly where people have organized around a cause or to assert their rights.[30] Consequently, "'litigation is not a technique of resolving private differences'; it is 'a form of political expression' and 'political association.'"[31]

And because the fee-shifting provisions operate to insulate laws from legitimate legal challenges, they fail yet another First Amendment test: "[t]he Constitution does not permit" the government to erect regulatory barriers to "insulate [its] interpretation of the Constitution from judicial challenge."[32] Finally, fee-shifting laws that single out a particular class of litigants are constitutionally suspect because they are content-based and viewpoint-discriminatory.[33] Thus, fee-shifting laws that target and penalize a particular class of litigants violate the First Amendment.

B. Supremacy Clause Problems

Beyond violating the First Amendment, fee-shifting laws that target civil rights claims may violate the Supremacy Clause.[34] The Supremacy Clause provides that federal law "shall be the supreme Law of the Land."[35] Consistent with that command, the high court "has long recognized that state laws that conflict with federal law are 'without effect.'"[36] Accordingly, "state law is naturally preempted to the extent of any conflict with a federal

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[28] In *NAACP v. Button*, 371 U.S. 415, 429 (1963), for example, the Court explained: "Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. . . . [U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." The remaining cases in this general line of authority include *In re Primus*, 436 U.S. 412, 428 (1978); *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 6–7 (1964); *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 221–23 (1967); and *Union v. State Bar of Mich.*, 401 U.S. 576, 580–81, 585 (1971).

[29] *In re Primus*, 436 U.S. at 426 (citation omitted).

[30] *See id.* at 426–28.

[31] *Id.* at 428 (quoting *Button*, 371 U.S. at 429, 431).

[32] Legal Services Corp. v. Velazquez, 531 U.S. 533, 548 (2001).

[33] *See, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552, 564–66, 577–79 (2011).

[34] California's fee-shifting law implicates the Supremacy Clause because it targets rights that are "secured" by the Second Amendment. *See infra* Part II.C. *See also* 42 U.S.C. § 1983. On this point, California's and Texas's laws may be on different footing given the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

[35] U.S. CONST. art. VI, cl. 2.

[36] Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008).

statute,"[37] and where state and federal law directly conflict, "state law must give way."[38]

Government-side fee-shifting penalties conflict with Congress's statutory scheme to enforce federal constitutional rights by awarding fees to civil rights plaintiffs under 42 U.S.C. § 1988. Under § 1988 "a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust,'"[39] while a prevailing defendant may recover fees only "where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant."[40] Critically, the high court has "made clear that plaintiffs may receive fees under § 1988 even if they are not victorious on every claim. A civil rights plaintiff who obtains meaningful relief has corrected a violation of federal law and, in so doing, has vindicated Congress's statutory purposes."[41]

The fee-shifting laws directly conflict with the plain text and subvert the manifest purpose of § 1988, which Congress enacted to encourage private action based on the premise that fee-shifting was essential to the effective enforcement of federal civil rights laws.[42] Put simply, "[t]he purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances."[43] Thus, government-side fee-shifting penalties that target civil rights claims directly conflict with § 1988's text and structure in general.

But the fee-shifting laws here go further by expansively permitting the government to recover fees if it wins on any aspect of any claim (thus eviscerating the "vexatious" or "frivolous" requirement for government-side fees under federal law)[44] while simultaneously excluding plaintiffs from recovery altogether (which controverts the federal command that recovery is appropriate where there has been "meaningful," if not complete, victory).[45] Not to mention the fee-shifting laws' provisions asserting that government defendants can recover fees even where a court has held the fee-shifting law to be "invalid, unconstitutional, or preempted." In sum,

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[37] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000).
[38] PLIVA, Inc. v. Mensing, 564 U.S. 604, 617 (2011) (citation omitted).
[39] Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (citing S. REP. NO. 94-1011, at 4 (1976)).
[40] *Id.* at 429 n.2 (citing H.R. Rep. No. 94-1558, at 7 (1976)). *See also* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).
[41] Fox v. Vice, 563 U.S. 826, 834 (2011).
[42] Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401–02 (1968). *See also* S. REP. NO. 94-1011, at 2 (1976); H.R. REP. NO. 94-1558 at 1, 7 (1976).
[43] *Eckerhart*, 461 U.S. at 429 (citation omitted). *See also* Evans v. Jeff D., 475 U.S. 717, 741 (1986) (observing that the statute is "a powerful weapon" for "victims of civil rights violations," which "improves their ability to employ counsel, to obtain access to the courts, and thereafter to vindicate their rights").
[44] *Eckerhart*, 461 U.S. at 429.
[45] *Fox*, 563 U.S. at 834.

state fee-shifting penalties are preempted because they directly conflict with § 1988.

C. California's Law Failed its First Judicial Challenge

Although challenges to SB 8 have been pending since shortly after the law's passage, no federal court has ruled on the constitutionality of Texas's fee-shifting law. But in California a federal judge held that SB 1327's fee-shifting regime was unconstitutional and issued an injunction barring its enforcement by any state official.[46] The court held that § 1021.11 violated the First Amendment and the Supremacy Clause, and noted that it likewise ran afoul of the Due Process and Equal Protection Clauses: "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."[47] 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.[48] That bodes ill for Texas's fee-shifting provision.

CONCLUSION

The California and Texas laws are anti-democratic because they strike at a democracy's very core: its democratic processes. They do this by validating the cynical view that the lawmaking process is corrupt. Our republic depends for its existence on faith in that democratic process's integrity. A king need only issue dictates, but a multitude can only set and practice policy through processes. The American experiment employs separated powers: one makes policy, another implements it, and a third settles legal questions.

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[46] Miller v. Bonta, 2022 WL 1781114 (S.D. Cal. Dec. 19, 2022). The path to a court ruling was unusual: California Attorney General Rob Bonta declined to defend the law on the merits. *See* Supplemental Brief for Defendants at 1, 9–10, Miller v. Bonta, No. 3:22-cv-01446-BEN-MDD (S.D. Cal. Dec. 8, 2022), ECF No. 29. Governor Gavin Newsom then intervened to represent the state's interest in the case, but his substantive defense of the law largely consisted of restating the arguments that Texas advanced in defending SB 8's fee-shifting law. In his trial brief, Governor Newsom acknowledged that SB 1327 was spurred by SB 8, and claimed that he "intervened to ensure that arguments in defense of such fee-shifting provisions could be fully aired and that the serious questions about their constitutionality could be resolved by the courts." Supplemental Brief for Intervenor-Defendants at 1–2, Miller v. Bonta, No. 3:22-cv-01446-BEN-MDD (S.D. Cal. Dec. 16, 2022), ECF No. 35.

[47] *Miller*, 2022 WL 17811114 at *3.

[48] *Id.* at *4.

Citizen enforcement laws attack that process by making policy immune from review and encouraging disrespect for and defiance of ordered processes. Such laws, once established, will be parroted and expanded—weakening the judicial power and the democratic process. That has dire implications for separated powers, and perhaps democracy itself.