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15 **UNITED STATES DISTRICT COURT**

16 **SOUTHERN DISTRICT OF CALIFORNIA**

17 SOUTH BAY ROD & GUN CLUB,  
INC.; GARY BRENNAN, an  
18 individual; CORY HENRY, an  
individual; PATRICK LOVETTE, an  
19 individual; VIRGINIA DUNCAN, an  
individual; RANDY RICKS, an  
20 individual; CITIZENS COMMITTEE  
FOR THE RIGHT TO KEEP AND  
21 BEAR ARMS; GUN OWNERS OF  
CALIFORNIA; SECOND  
22 AMENDMENT LAW CENTER; and  
CALIFORNIA RIFLE & PISTOL  
ASSOCIATION, INCORPORATED,  
23

24 Plaintiffs,

25 v.

26 ROB BONTA, in his official capacity  
as Attorney General of the State of  
27 California; and DOES 1-10,  
28

Defendants.

**CASE NO: 22-cv-01461-BEN-JLB**

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFFS’ EX PARTE  
APPLICATION FOR ORDER  
SHORTENING TIME FOR  
HEARING ON PLAINTIFFS’  
MOTION FOR PRELIMINARY  
INJUNCTION**

1 **INTRODUCTION**

2 Good cause exists to shorten time to hear Plaintiffs’ Motion for Preliminary  
3 Injunction. This motion must be heard urgently because Plaintiffs’ current and  
4 upcoming litigation is effectively all on hold until California Code of Civil  
5 Procedure section 1021.11 is enjoined. Individual Plaintiffs are considering  
6 dropping out of their pending litigation out of fear of being ordered to pay the  
7 State’s legal expenses for cases in which they have been participants for years.

8 Further, this case has now been related to another matter challenging the very  
9 same law, *Miller v. Bonta*, Case No. 3:22-cv-01446-BEN-JLB, filed in the Southern  
10 District of California on September 26, 2022. (“*Miller IP*”). The plaintiffs in that  
11 matter have filed a motion for preliminary injunction as well, with a hearing set for  
12 November 14, 2022 at 10:30 A.M. Given both matters deal with challenges to the  
13 same law and that there is significant overlap in the arguments made in plaintiffs’  
14 respective motions, it would be sensible for all parties to attend the same motion  
15 hearing and would likely serve judicial economy as well. Plaintiffs request that this  
16 Court move their hearing date to the same time as *Miller II*.

17 Counsel for the *Miller II* plaintiffs have confirmed they do not oppose this  
18 application so long as their own hearing date is not delayed, and so long as their  
19 motion be heard first on November 14<sup>th</sup>.

20 The Attorney General, through his counsel, has informed Plaintiffs he would  
21 support having both motions heard on November 21, 2022, but not November 14,  
22 2022, because he would have less time to oppose the additional claims made in this  
23 matter. Yet having a shortened time to oppose Plaintiffs’ motion is very unlikely to  
24 make any difference here. The legislative history behind Section 1021.11 shows that  
25 both the State Assembly and the Senate knew it was unconstitutional when they  
26 passed it, and the Attorney General himself signed onto an amicus brief arguing a  
27 similar provision in Texas law was unconstitutional. Section 1021.11 is so beyond  
28 the pale that there is no serious contention to be made that it can pass constitutional

1 muster. This Court should not continue to let it do anymore damage than it already  
2 has.<sup>1</sup>

3 **FACTUAL BACKGROUND**

4 In this matter, Plaintiffs are entities and individuals who face severe threats to  
5 their financial wellbeing as well as their constitutional rights due to Section 1021.11.  
6 Each of the Plaintiffs has submitted declarations in support of the motion for  
7 preliminary injunction that illustrate how Section 1021.11 harms them or the  
8 association or organization they represent.

9 Section 1021.11 was enacted as part of California’s Senate Bill (“SB”) 1327,  
10 cynically copying Texas’s SB 8 law on abortion. California essentially copied SB 8  
11 word-for-word but substituted in the word “firearms” everywhere that “abortion”  
12 was mentioned. Section 1021.11 commands that “notwithstanding any other law”  
13 (thus including even federal laws), “any person, including an entity, attorney, or law  
14 firm, who seeks declaratory or injunctive relief to prevent this state, a political  
15 subdivision, a governmental entity or public official in this state, or a person in this  
16 state from enforcing any statute, ordinance, rule, regulation, or any other type of law  
17 that regulates or restricts firearms, or that represents any litigant seeking that relief,  
18 is jointly and severally liable to pay the attorney’s fees and costs of the prevailing  
19 party.”

20 Under the plain language of Section 1021.11, if anyone seeks to challenge a  
21 state or local law in California related to firearms, they and their attorneys must be  
22 willing to bear the cost of the government’s attorney’s fees if they are not the  
23 prevailing party. And to be the “prevailing party” as defined under Section 1021.11,  
24 they must prevail on all claims. Under Section 1021.11(b), if the government

25 \_\_\_\_\_  
26 <sup>1</sup> If the hearing is set for November 14 as they request herein, to mitigate any  
27 prejudice to Defendant, Plaintiffs would support giving Defendant two additional  
28 days to oppose their motion beyond what the typical rules allow, such that his  
opposition is due on November 2 (instead of October 31). Plaintiffs’ reply would  
still be due on November 7.

1 defendant prevails on *even a single cause of action*—even if a plaintiff gets the law  
2 they are challenging enjoined or overturned on other causes of action—the plaintiff  
3 is not the prevailing party and plaintiff and their attorney must pay the government’s  
4 attorney’s fees and costs.

5 Under Section 1021.11, fees do not even need to be obtained in the immediate  
6 matter. Under subdivision (c), the government has three years to bring a separate  
7 civil action to recover fees and costs. What’s more, if Plaintiffs and their attorneys  
8 are sued in such a civil action, under subdivision (d)(2) fees and costs not being  
9 granted to defendants in the original matter are *not a defense* to the subsequent civil  
10 matter, in violation of basic principles of *res judicata*, collateral estoppel, and  
11 federal Supremacy. Defendants could have this Court deny with finality a request  
12 for attorney’s fees, yet nonetheless sue Plaintiffs and their attorneys in a state civil  
13 action up to three years later to try and retrieve them in that forum, as though this  
14 Court’s ruling and judgment on the fees issue was a nullity or merely advisory.

15 Additionally, in an outrageous act of contempt for the rule of law and our  
16 federal system, Section 1021.11(d)(3) declares that the “court in the underlying  
17 action [holding] that any provision of [Section 1021.11] is invalid, unconstitutional,  
18 or preempted by federal law” is not enough to bar the subsequent civil action for  
19 attorney’s fees and costs.

20 Section 1021.11 is an existential threat for the associational Plaintiffs.  
21 SBRGC, CRPA, GOC, and CCRKBA serve as Plaintiffs in many Second  
22 Amendment-related lawsuits on behalf of their thousands of members. Critically,  
23 they also pay for the expenses of such litigation. If Section 1021.11 is allowed to  
24 impact the parties’ liability for attorney’s fees and costs in those matters, their ability  
25 to petition courts to resolve their grievances would be chilled, if not entirely  
26 eliminated. The risk of losing on even a single claim and then having to pay the  
27 State’s attorney’s fees and costs would be too great a burden to risk. They also may  
28

1 struggle to find attorneys willing to challenge gun laws, given attorneys are also  
2 jointly liable for the government's fee bills under Section 1021.11.

3 Section 1021.11 takes effect January 1, 2023, but is retrospective, applying to  
4 any lawsuit that that was pending at any point in the three years prior to enactment  
5 of the law. That means that firearms laws being currently litigated—including by  
6 these Plaintiffs<sup>2</sup> in other matters in front of this District and others—and which were  
7 filed well before SB 1327 was first proposed, are currently being burdened by the  
8 law. Unsurprisingly, Section 1021.11 is unconstitutional for a number of reasons.

### 9 PROCEDURAL BACKGROUND

10 Plaintiffs filed their complaint on September 28, 2022, just two days after the  
11 plaintiffs in the *Miller II* matter filed their own complaint. This matter was initially  
12 assigned to the Honorable Jinsook Ohta. Knowing of the existence of *Miller II*,  
13 Plaintiffs filed a Notice of Related Case alongside their complaint. ECF No. 3. No  
14 immediate action was taken on that notice.

15 Then, on October 14, 2022, Judge Ohta recused herself from the matter, and it  
16 was reassigned to the Honorable Ruth Bermudez Montenegro. ECF No. 9. On  
17 October 17, 2022, Plaintiffs filed a Renewed Notice of Related Case as well as their  
18

19 \_\_\_\_\_  
20 <sup>2</sup> Plaintiffs are involved in other cases as follows:

- 21 - Plaintiffs Brennan, Henry, Ricks, and CRPA are also Plaintiffs in *Rhode v.*  
*Bonta*, Case No. 3:18-cv-00802-BEN-JLB filed in the Southern District.
- 22 - Plaintiffs Duncan, Lovette, and CRPA are also Plaintiffs in *Duncan v. Bonta*,  
Case No. 17-cv-1017-BEN-JLB filed in the Southern District.
- 23 - Plaintiffs South Bay Rod & Gun Club and CRPA are also Plaintiffs in *B&L*  
*Prods. v. Newsom*, Case No. 21-cv-01718-AJB-KSC filed in the Southern  
District.
- 24 - Plaintiff Citizen's Committee for the Right to Keep and Bear Arms is also a  
Plaintiff in *Renna v. Bonta*, Case No. 20-cv-2190-DMS-DEB filed in the  
Southern District.
- 25 - Plaintiff Gun Owners of California and CRPA are also Plaintiffs in *Junior*  
*Sports Magazines, Inc. v. Rob Bonta*, Case No. 2:22-cv-05663-CAS filed in the  
Central District.
- 26 - Lastly, CRPA is involved in a number of additional cases besides the ones  
27 mentioned already. A non-comprehensive listing of other active CRPA-backed  
28 cases can be found here: <<https://crpa.org/programs/litigation-program/>> (as of  
October 5, 2022).

1 motion for preliminary injunction. ECF Nos. 10-11. The next morning, this matter  
2 was transferred to this Court pursuant to the low number rule. ECF No. 13.

3 Plaintiffs’ motion was set for hearing on November 21, 2022 when it was  
4 filed, but given the order of transfer, it’s not clear to Plaintiffs whether that is still  
5 the hearing date or not. Regardless, through this application, they hope this Court  
6 will set their hearing for November 14, 2022 alongside the hearing set for *Miller II*.

7  
8 **ARGUMENT**

9 **1. Good Cause Exists to Shorten Time for a Hearing on Plaintiffs’ Motion  
for Preliminary Injunction**

10 An application for an order shortening time must be accompanied by a  
11 declaration showing “good cause” for the order. FED. R. CIV. P. 6(c)(1)(C). As stated  
12 in the Declaration of Konstadinos T. Moros and further described here, “good  
13 cause” exists to shorten time for the hearing of Plaintiffs’ Motion for Preliminary  
14 Injunction. Indeed, actual, irreparable harm to Plaintiffs’ constitutional rights has  
15 already resulted and will continue to result if Plaintiffs are unable to present their  
16 case for and obtain a preliminary injunction at the first possible opportunity.

17 As described more fully in Plaintiffs’ Motion for Preliminary Injunction,  
18 Section 1021.11 violates a multitude of constitutional provisions, including the right  
19 to petition the government for redress of grievances, interference with the right to  
20 counsel of Plaintiffs’ choosing in violation of the Fourteenth Amendment, violation  
21 of the Fourteenth Amendment right to Equal Protection, and violation of the  
22 Supremacy Clause of the Constitution. In addition, Section 1021.11 also suffers  
23 from significant vagueness issues, and functions as an illegal Bill of Attainder given  
24 its retroactive application and punitive intent.

25 That last point is the issue Plaintiffs and their counsel must wrestle with now.  
26 Although Section 1021.11 doesn’t technically take effect until January 1, 2023, there  
27 is no limiting language that says it does not apply retroactively. California state and  
28 local government defendants have three years to file a claim in state court to recover

1 their legal fees and costs. As a result, and as confirmed in the declarations submitted  
2 with the motion for preliminary injunction, Plaintiffs are terrified they could be  
3 found liable for the State’s expenses in their current lawsuits, some of which were  
4 filed well before Section 1021.11 was even proposed. They are thus considering  
5 dropping their lawsuits in hopes that the State does not pursue fee recovery actions  
6 against them, or to at least stop adding on further expenses they will be liable for  
7 with continued litigation.

8 But Section 1021.11 is so constitutionally infirm that even if Plaintiffs  
9 dropped their current challenges to firearms laws right now to avoid the burdens of  
10 the law before it takes effect in January, the result of such an action seemingly will  
11 be to have automatically made the government the “prevailing party” in those  
12 abandoned matters. Thus, Plaintiffs face a dilemma that cannot be resolved absent  
13 swift action by this Court. If they abandon their lawsuits now, they will be losers  
14 and subject to paying the government’s attorney’s fees at some point within the  
15 three years after they abandon their suits. If they continue their lawsuits, they could  
16 also be deemed to be losers for losing any one claim asserted in them<sup>3</sup> and subject to  
17 paying the government’s attorney’s fees at some point in the future.

18 The associational Plaintiffs like California Rifle and Pistol Association,  
19 Incorporated that typically fund Second Amendment challenges in California are in  
20 a particularly precarious position. They have filed numerous cases and would  
21 effectively be bankrupted if they had to foot the bill for the State’s litigation  
22 expenses. Even if Section 1021.11 was not retroactive and only applied to litigation  
23

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24 <sup>3</sup> In fact, on both the *Rhode* and *Duncan* matters, plaintiffs are already deemed to be  
25 losers under Section 1021.11 because not all of their legal theories survived the  
26 lengthy appellate proceedings in each matter. Thus, even if the respective laws  
27 challenged in both matters are ultimately enjoined by the trial court on remand, the  
28 Attorney General would still be entitled to seek the State’s attorney’s fees and costs  
as the prevailing party against plaintiffs and their attorney even though the laws  
being defended were struck down as unconstitutional.

1 filed on or after January 1, 2023, that would mean that the associational Plaintiffs  
2 cannot risk starting any new firearm-related litigation in the new year and would  
3 instead go silent in terms of their litigation efforts. While that may be the result the  
4 Attorney General would prefer, it is repugnant to the Constitution.

5 Section 1021.11 is also already blocking future possible plaintiffs from  
6 utilizing the court system to redress their grievances. One declaration in support of  
7 Plaintiffs' motion is from a major gun retailer in California, Turner's Outdoorsman,  
8 which was considering joining a recently-filed lawsuit but did not do so because of  
9 Section 1021.11's intentional chilling effect.

10 Fundamental constitutional avenues for redress are thus now already being  
11 thwarted by Section 1021.11. That would be bad enough for any law, but when the  
12 law's own legislative history admits it is unconstitutional, it becomes insulting. This  
13 Court should not make Plaintiffs wait any longer. It must move quickly to strike  
14 down this abject nonsense before it can do any further harm.

15 Finally, given this Court is scheduled to hear a motion for preliminary  
16 injunction from the *Miller II* plaintiffs on November 14, 2022, it would likely serve  
17 judicial economy to hear both motions on the same date and decide them  
18 simultaneously. While there are some differences in the arguments, the motions for  
19 preliminary injunction in both this matter and in *Miller II* argue that Section 1021.11  
20 violates the Supremacy Clause, the Equal Protection Clause, and the First  
21 Amendment right to petition. Plaintiffs believe it would benefit all parties and this  
22 Court for the matters to be heard together.

23  
24 **2. Plaintiffs have Complied with the Procedural Requirements Governing  
Ex Parte Motions**

25 Pursuant to Southern District Local Civil Rule 7.1(e)(5), Plaintiffs confirm  
26 they have included a proposed order with this application and also served this  
27 application and its accompanying documents on all parties. Additionally, pursuant to  
28 Local Civil Rule 83.3(g)(2), Counsel for Plaintiffs has submitted a declaration



1 confirming that he has informed counsel for Defendant about when and where this  
2 motion would be made. Moros Decl. ¶¶ 2-4. On October 21, 2022, Konstadinos T.  
3 Moros, counsel of record for Plaintiffs, contacted Elizabeth Watson, counsel of  
4 record for Defendant Rob Bonta, via email to provide notice that Plaintiffs intended  
5 to file an ex parte application for an order shortening time to hear their anticipated  
6 motion for preliminary injunction. *Id.*

7 Ms. Watson responded that her client would support a unified motion hearing  
8 date, but one set for November 21, not November 14. She wrote: “I agree that it  
9 makes sense to have one hearing date for both cases, but given that *South Bay* has  
10 more claims at issue than *Miller II*, I think it would make sense to have that single  
11 hearing on November 21, the date for which the *South Bay* case is currently  
12 scheduled. That way, defendants get the full time to which they are entitled to  
13 respond to the claims in *South Bay*.” *Id.* ¶ 4.

14 Ms. Watson’s contact information is as follows: Elizabeth Watson, Deputy  
15 Attorney General, California Department of Justice, 455 Golden Gate Avenue, Suite  
16 11000, San Francisco, CA 94102-7004. Her telephone number is (415) 510-3847.  
17 Her email is [Elizabeth.Watson@doj.ca.gov](mailto:Elizabeth.Watson@doj.ca.gov). ECF No. 8.

18 Although the matters have not been consolidated, ECF No. 13, because it  
19 could affect the scheduling of the *Miller II* motion, Counsel for Plaintiffs also  
20 contacted counsel for the *Miller II* plaintiffs in order to confirm that they do not  
21 oppose this application. Moros Decl. ¶ 5. Mr. Benbrook wrote: “We will not oppose  
22 having the two motions for preliminary injunction heard on November 14, provided  
23 that your team agrees that our motion will be heard first. We do not agree to move  
24 the hearing date back, so, assuming you agree our motion will be heard first, please  
25 note in your papers that we oppose a simultaneous hearing date if granting the  
26 request would involve moving the hearing date back.” The contact information for  
27 counsel for the *Miller II* plaintiffs is as follows:

28 1. Bradley A. Benbrook, 701 University Avenue, Suite 106, Sacramento, CA

1 958825. Telephone: (916) 447-4900. Email:  
2 [brad@benbrooklawgroup.com](mailto:brad@benbrooklawgroup.com).

3 2. David H. Thompson, 1523 New Hampshire Avenue, NW, Washington,  
4 D.C. 20036. Telephone: (202) 220-9600. Email:  
5 [dthompson@cooperkirk.com](mailto:dthompson@cooperkirk.com).

6 **CONCLUSION**

7 Plaintiffs respectfully request that the Court set the following schedule in this  
8 matter:

- 9 ■ Filing and service of opposition papers on or before November 2, 2022;
- 10 ■ Filing and service of reply papers on or before November 7, 2022;
- 11 ■ Hearing on Plaintiffs’ Motion for a Preliminary Injunction to be held on  
12 November 14, at 10:30 a.m.

13 Dated: October 25, 2022

**MICHEL & ASSOCIATES, P.C.**

*/s/ C.D. Michel*

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15 C.D. Michel  
16 Joshua Robert Dale  
17 Konstadinos T. Moros  
18 Counsel for Plaintiffs South Bay Rod & Gun  
19 Club, Inc. Gary Brennan, Cory Henry,  
20 Patrick Lovette, Virginia Duncan, Randy  
Ricks, Gun Owners of California, Second  
Amendment Law Center, and California  
Rifle and Pistol Association, Incorporated  
e-mail: [cmichel@michellawyers.com](mailto:cmichel@michellawyers.com)

21 Dated: October 25, 2022

**LAW OFFICES OF DON KILMER**

*/s/ Don Kilmer*

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23 Don Kilmer  
24 Counsel for Plaintiff Citizens Committee for  
25 the Right to Keep and Bear Arms

**CERTIFICATE OF SERVICE  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

Case Name: *South Bay Rod & Gun Club, Inc. v. Bonta*  
Case No.: 22-cv-01461-BEN-JLB

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, declare under penalty of perjury that I am a citizen of the United States over 18 years of age. My business address is 180 East Ocean Boulevard, Suite 200 Long Beach, CA 90802. I am not a party to the above-entitled action.

I have caused service of the following documents, described as:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
PLAINTIFFS’ EX PARTE APPLICATION FOR ORDER SHORTENING  
TIME FOR HEARING ON PLAINTIFFS’ MOTION FOR PRELIMINARY  
INJUNCTION**

on the following parties by electronically filing the foregoing on October 25, 2022, with the Clerk of the District Court using its ECF System, which electronically notifies them.

Robert Meyerhoff  
[Robert.Meyerhoff@doj.ca.gov](mailto:Robert.Meyerhoff@doj.ca.gov)  
Elizabeth Watson  
[Elizabeth.Watson@doj.ca.gov](mailto:Elizabeth.Watson@doj.ca.gov)  
1300 I Street, Suite 125  
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on October 25, 2022, at Long Beach, CA.

Additionally, the following party was served as follows:

Bradley A. Benbrook  
701 University Avenue, Suite 106  
Sacramento, CA 958825  
Email: [brad@benbrooklawgroup.com](mailto:brad@benbrooklawgroup.com)

By Electronic Mail As follows: I served a true and correct copy by electronic transmission. Said transmission was reported and completed without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

  
CHRISTINA CASTRON