

## Citizen enforcement laws are a Pandora's box

By David A. Carrillo and Brandon V. Stracener | July 29, 2022

California recently passed a law that allows private citizens to enforce the state's gun regulations ([SB 1327](#)), adapting a Texas law that allows private citizens to enforce that state's abortion restrictions ([SB 8](#)). Both laws will serve as test cases for whether citizen enforcement laws can serve their chief aims: avoiding judicial review, and permitting the government to indirectly do things it is prohibited from doing overtly. The U.S. Supreme Court's preliminary decision on the Texas law in [Whole Woman's Health v. Jackson](#) suggests that citizen enforcement laws indeed can evade federal court review. If such laws cannot be meaningfully challenged in federal court, states can use them to escape an important limit on their powers, leaving only state courts as the last bulwark against delegating police powers to citizens. This scenario risks undermining the nation's federalist design and poses a dire threat to individual liberty in every state.

Texas SB 8 prohibits abortions after a fetal heartbeat has been detected and encourages private citizens to sue anyone who performs, aids, or abets an abortion. The law also bans "enforcement" by state and local government — except that a Texas state court must award an injunction, statutory damages not less than \$10,000, and attorney fees if the claimant prevails. Anyone who challenges the law and loses on even one claim risks paying the government's entire legal bill.

California SB 1327 closely copies Texas SB 8, including the same mechanisms for private citizens enforcing the law through civil actions in California state courts. Like Texas, California's law encourages suits with guaranteed statutory damages (\$10,000 for each weapon or precursor) and attorney fees for winning — with no risk of paying the other party's fees if the claim fails.

If they survive, these laws will set dangerous precedents. When the political branches of government can evade judicial review, citizens should be concerned about the unchecked exercise of government power. Legislatures delegating their police powers and negating judicial powers is bad enough, [raising separation-of-powers concerns](#). Even greater concerns about republican government itself arise when legislatures can delegate enforcement powers to the public writ large. Due process, the constitutional petition right, and access to the courts — all are negated by arbitrary government acts that evade judicial review. And the substance of citizen enforcement laws can authorize acts that courts likely would quash if the government itself attempted them. The result is that these bounty-hunter laws encourage our worst impulses, imperiling individual liberty and allowing the minority oppression that American government was designed to prevent.

Simple math strongly discourages challenging these laws or defending against claims made under them. In both the Texas and California laws, the lack of fee-risk reciprocity makes the challenger or defendant act at their peril — even their lawyers are personally liable for a government defendant's fees. And nothing stops the government defendant from hiring outside private defense counsel, with hourly rates far exceeding a government lawyer's. The fee liability applies if the government wins on just one claim. Nor is defending individual private lawsuits economically feasible when faced with \$10,000 in statutory damages per violation and paying each plaintiff's fees, with no reciprocal prospect of recouping fees even for a complete defense

verdict. Thus, would-be challengers face a dilemma: challenge the law, and face fatal fees; or wait to be sued under the law, and face fatal fees. With those choices, anyone would fold their tent.

On the merits, challenges to these two test-case laws in federal court have dubious prospects. The Court's refusal in *Whole Woman's Health* to enjoin the Texas law pre-enforcement effectively forces litigation targets to mount an unaffordable merits defense against a barrage of lawsuits. And a successful facial or as-applied attack against the Texas law is uncertain at best given the Court's ruling in *Dobbs v. Jackson Women's Health Organization* abrogating federal protection for abortion rights. Combined, these cases likely compel a decision that federal courts have no subject matter jurisdiction over a claim that the Texas law violates the federal constitution.

Similarly, the California law arguably implicates no federal constitutional right because it targets only firearms that are already unlawful. Given the similarities between these laws (now that the Court has eliminated federal constitutional abortion rights) the Ninth Circuit is likely to reach the same conclusion as the Fifth Circuit: *Whole Woman's Health* applies, and then precedent throughout both circuits exempts citizen enforcement laws from meaningful federal constitutional challenge. Even if the high court reviews the circuit court opinions on these laws, from a political perspective there's little downside to declining jurisdiction and allowing state courts to sort it out.

The results in those state courts are equally predictable. California and Texas courts will consider separation of powers, particularly the implications for judicial review, due process, the right to petition the government, and meaningful access to courts. Differences in the state laws, and in composition of the respective courts, likely produces similar outcomes: a Texas court upholds SB 8, and a California court upholds SB 1327. The upshot: both red and blue states can seize the opportunity to advance their respective policy goals with citizen enforcement laws, all without judicial review.

If these laws survive, someday soon California will see a citizen enforcement law on the ballot as an initiative. It will be a grave threat to a minority group, who will fail to defeat the proposition because (as a minority) they lack the votes. When the minority group sues to protect themselves, California courts will confront a conundrum. The minority group should lose under the SB 1327 precedent. And California courts rarely invalidate ballot propositions, even those targeting minorities (see [Strauss v. Horton](#)). Yet a court rightly will be concerned that declining judicial review removes any barrier to a majority group oppressing a minority group through unchecked direct democracy. Even the most ardent populist must recognize that meaningful judicial review is integral to protecting individual liberty and maintaining republican government. The courts should stuff these dangerous laws back in their box and throw away the key.

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