

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

AB 1594 (Ting)
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SUBJECT

Firearms: civil suits

DIGEST

This bill establishes the “firearm industry standard of conduct,” which places a series of requirements on industry members and prohibits specified practices.

EXECUTIVE SUMMARY

In 2022, the United States has averaged more than one mass shooting per day.¹ Not a single week has thus far passed without at least four mass shootings, where four or more people – not including the shooter – are injured or killed. This alone has resulted in the deaths of 256 people with 1,010 more injured through the end of May. In just a two-year period from 2020 through 2021, there were over 88,000 gun violence deaths in this country.²

Giffords Law Center to Prevent Gun Violence ranks California first in gun safety with a gun death rate 37 percent lower than the national average.³ Despite its ranking and the strength of existing laws, the Legislative and Executive branches of California have put forward a host of bills “aimed at curbing gun violence and increasing safety in California Communities” to continue the fight against this rising scourge.⁴ As part of that effort, this bill seeks to counter the prevalence and danger of these weapons by

¹ Julia Ledur & Kate Rabinowitz, *There have been over 200 mass shootings so far in 2022* (June 2, 2022) The Washington Post, <https://www.washingtonpost.com/nation/2022/06/02/mass-shootings-in-2022/>. All internet citations are current as of June 5, 2022.

² *Gun Violence Archive* (June 5, 2022) Gun Violence Archive, <https://www.gunviolencearchive.org/past-tolls>.

³ *Annual Gun Law Scorecard*, Giffords Law Center to Prevent Gun Violence, <https://giffords.org/lawcenter/resources/scorecard/?scorecard=CA>.

⁴ Fact Sheet: California’s Gun Safety Policies Save Lives, Provide Model for a Nation Seeking Solutions (June 2, 2022) Office of Governor Gavin Newsom, <https://www.gov.ca.gov/2022/06/02/fact-sheet-californias-gun-safety-policies-save-lives-provide-model-for-a-nation-seeking-solutions/>.

establishing a “firearm industry standard of conduct.” The standard requires industry members to establish reasonable controls, follow the law, and prevent abnormally dangerous weapons from being sold. The bill is co-sponsored by Attorney General Rob Bonta and the Brady Campaign. It is supported by a variety of groups including Giffords and the City of Los Angeles. It is opposed by gun-rights groups, including the National Rifle Association.

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) 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:

- 1) 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.)
- 2) Defines “ammunition” to include any bullet, cartridge, magazine, clip, speed loader, autoloader, ammunition feeding device, or projectile capable of being fired from a firearm with a deadly consequence. (Pen. Code § 16150(b).)
- 3) 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.)

- 4) 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.)
- 5) 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.)
- 6) 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.)
- 7) Requires a person be at least 18 years of age to be sold most firearms and at least 21 years of age to be sold a handgun, except as specified. (Pen. Code §§ 27505, 27510.)
- 8) Establishes the Privacy Rights for California Minors in the Digital World (PRCMDW), which prohibits an operator of an internet website, online service, online application, or mobile application (“operator”) from the following:
 - a) marketing or advertising specified products or services, such as firearms, cigarettes, and alcoholic beverages on its internet website, online service, online application, or mobile application that is directed to minors;
 - b) marketing or advertising such products or services to minors who the operator has actual knowledge are using its site, service, or application online and is a minor, if the marketing or advertising is specifically directed to that minor based upon the personal information of the minor; and
 - c) knowingly using, disclosing, compiling, or allowing a third party to use, disclose, or compile, the personal information of a minor with actual knowledge that the use, disclosure, or compilation is for the purpose of marketing or advertising such products or services to that minor, where the website, service, or application is directed to minors or there is actual knowledge that a minor is using the website, service, or application. (Bus. & Prof. Code § 22580.)
- 9) Requires, pursuant to the Parent’s Accountability and Child Protection Act, a person or business that conducts business in California, and that seeks to sell any product or service in or into California that is illegal under state law to sell to a minor to, notwithstanding any general term or condition, take reasonable steps, as specified, to ensure that the purchaser is of legal age at the time of purchase or

delivery, including, but not limited to, verifying the age of the purchaser. (Civ. Code § 1798.99.1(a)(1).)

This bill:

- 1) Establishes, and requires a firearm industry member to comply with, the firearm industry standard of conduct.
- 2) Defines a “firearm industry member” to include a person, firm, corporation, company, partnership, society, joint stock company, or any other entity or association engaged in the manufacture, distribution, importation, marketing, wholesale, or retail sale of firearm-related products.
- 3) Defines a “firearm-related product” as a firearm, ammunition, a firearm precursor part, a firearm component, or a firearm accessory that is made in; or is, or is intended to be, sold or distributed in; or is or was possessed in, and it was reasonably foreseeable that the item would be possessed in, California.
- 4) Requires a member to establish, implement, and enforce reasonable controls and to take reasonable precautions to ensure it does not sell, distribute, or provide a firearm-related product to a downstream distributor or retailer who fails to establish, implement, and enforce reasonable controls.
- 5) Defines “reasonable controls” to mean reasonable procedures, acts, or practices that are designed, implemented, and enforced to do the following:
 - a) prevent the sale or distribution of a firearm-related product to a straw purchaser, a firearm trafficker, a person prohibited from possessing a firearm under state or federal law, or a person who the member has reasonable cause to believe is at substantial risk of using the product to harm themselves or another or of possessing or using the product unlawfully;
 - b) prevent the loss or theft of a firearm-related product from the firearm industry member; and
 - c) ensure that the firearm industry member complies with all provisions of California and federal law and does not otherwise promote the unlawful manufacture, sale, possession, marketing, or use of a firearm-related product.
- 6) Provides that there shall be a rebuttable presumption that the firearm industry member failed to implement reasonable controls if the member’s action or failure to act created a reasonably foreseeable risk that the harm alleged by the claimant would occur and the member could have established, implemented, and enforced reasonable controls to prevent or substantially mitigate the risk that the harm would occur. If established, the member has the burden of proving by a

preponderance of the evidence that it established, implemented, and enforced reasonable controls.

- 7) Provides that a firearm industry member shall not manufacture, market, import, offer for wholesale sale, or offer for retail sale a firearm-related product that is abnormally dangerous and likely to create an unreasonable risk of harm to public health and safety in California. A product is not in violation based on a firearm's inherent capacity to cause injury or lethal harm.
- 8) Establishes a presumption that a firearm-related product is abnormally dangerous and likely to create an unreasonable risk of harm to public health and safety if the product:
 - a) has features that render the product most suitable for assaultive purposes instead of lawful self-defense, hunting, or other legitimate sport and recreational activities;
 - b) is designed, sold, or marketed in a manner that foreseeably promotes conversion of legal firearm-related products into illegal products; or
 - c) is designed, sold, or marketed in a manner that is targeted at minors or other individuals who are legally prohibited from accessing firearms.
- 9) Prohibits a firearm industry member from engaging in any conduct related to the sale or marketing of firearm-related products that is in violation of the False Advertising Law, Bus. & Prof. Code § 17500 et seq., the Unfair Competition Law, Bus. & Prof. Code § 17200 et seq., and the Consumers Legal Remedies Act.
- 10) Authorizes the Attorney General, a city attorney, a county counsel, or a person who has suffered harm in California to bring a civil action against a firearm industry member in violation of the firearm industry standard of conduct laid out above.
- 11) Authorizes a court to award injunctive relief sufficient to prevent the firearm industry member and any other defendant from further violating the law, damages, attorney's fees and costs, and other appropriate relief.
- 12) Provides that an intervening act by a third party, including, but not limited to, criminal misuse of a firearm-related product, shall not preclude a firearm industry member from liability under this section.
- 13) Includes an operative date of July 1, 2023, and 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. Epidemic of gun violence

Gun violence in the United States has surged in recent years. Most shooting deaths involve handguns, however 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.⁵ Research shows that laws restricting assault weapons reduce deaths; estimates find mass-shooting fatalities were 70 percent less likely during the

⁵ Emily Shapiro, *The type of gun used in most US homicides is not an AR-15* (October 26, 2021) ABC News, <https://abcnews.go.com/US/type-gun-us-homicides-ar-15/story?id=78689504>.

period when the federal ban was in effect.⁶ 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.⁷ 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.

In the United States, children are more likely to die from gun violence than in any other high-income country. In 2020, gun violence overtook car accidents to become the number one cause of death for U.S. children and adolescents.⁸ This is a problem that is increasingly involving children from an early age:

On May 24th an 18-year-old gunman, Salvador Ramos, walked into an elementary school in Uvalde, a town in south-west Texas, and shot dead at least 21 people, including 19 children. Mr. Ramos was himself killed, reportedly by police. His motive remains unclear. It is the latest in a spate of mass shootings in America, and the toll is the biggest at a school since a gunman killed 26 people at Sandy Hook Elementary in Newtown, Connecticut, in 2012.

In the decade since Sandy Hook there have been over 900 shootings on school grounds in America. After more than 60 years in which motor-vehicle crashes were the leading cause of death for young people, since 2017 guns have killed more Americans between the ages of one and 24. In 2020 more than 10,000 young Americans were killed by firearms, up from just under 7,000 two decades earlier. Pupils at almost all schools take part in active-shooter drills, learning to hide beneath their desks. Some drills use pellet guns and fake blood to simulate an attack.⁹

3. The Firearm Industry Standard of Conduct

This bill establishes the “firearm industry standard of conduct,” which regulates “firearm industry members,” defined as “a person, firm, corporation, company,

⁶ 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>.

⁷ 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>.

⁸ Laurel Wamsley, *The U.S. is uniquely terrible at protecting children from gun violence* (May 28, 2022) NPR, <https://www.npr.org/2022/05/28/1101307932/texas-shooting-uvalde-gun-violence-children-teenagers>.

⁹ *Guns are the things most likely to kill young people in America* (May 25, 2022) The Economist, <https://www.economist.com/graphic-detail/2022/05/25/guns-are-the-things-most-likely-to-kill-young-people-in-america>.

partnership, society, joint stock company, or any other entity or association engaged in the manufacture, distribution, importation, marketing, wholesale, or retail sale of firearm-related products.” “Firearm-related products” include firearms, ammunition, firearm precursor parts, firearm components, and firearm accessories. The standard of conduct lays out various obligations and prohibitions with accompanying presumptions.

a. Reasonable controls

The standard requires firearm industry members to establish, implement, and enforce “reasonable controls.” “Reasonable controls” are reasonable procedures, acts, or practices that are designed, implemented, and enforced to do several things. First, they must prevent the loss or theft of firearm-related products. They must also ensure the member complies with applicable state and federal law, including refraining from promotion of the unlawful manufacture, sale, possession, marketing, or use of a firearm-related product. Finally, these controls must prevent the sale or distribution of a firearm-related product to various persons, including a straw purchaser, a firearm trafficker, a person prohibited from possessing a firearm, or a person who the firearm industry member has reasonable cause to believe is at substantial risk of using a firearm-related product to harm themselves or another or of possessing or using a firearm-related product unlawfully. This latter requirement places an affirmative obligation on firearm industry members to act on circumstances that give them a strong basis to think the product will be used in these problematic ways.

The bill creates a rebuttable presumption, in a civil action alleging a violation, that the firearm industry member failed to implement reasonable controls if both of the following conditions are satisfied:

- the firearm industry member’s action or failure to act created a reasonably foreseeable risk that the harm alleged by the claimant would occur; and
- the firearm industry member could have established, implemented, and enforced reasonable controls to prevent or substantially mitigate the risk that the harm would occur.

Once the presumption is established, the burden shifts to the member to prove by a preponderance of the evidence that they established, implemented, and enforced reasonable controls.

The standard also requires firearm industry members to take reasonable precautions to ensure that they do not sell, distribute, or provide a firearm-related product to a downstream distributor or retailer of such products who fails to establish, implement, and enforce the reasonable controls described above. This again places obligations on members to take affirmative steps to prevent misconduct that could occur after the firearm products leave their hands.

b. Prohibition on abnormally dangerous firearm-related products

The firearm industry standard of conduct provides that a firearm industry member shall not manufacture, market, import, offer for wholesale sale, or offer for retail sale a firearm-related product that is *abnormally dangerous* and likely to create an unreasonable risk of harm to public health and safety.

The term “abnormally dangerous” is used in existing jurisprudence to describe certain activities that subject an actor to strict liability for any physical harm resulting from the activity.¹⁰ The Restatement of the Law, Third, Torts, states that an activity is abnormally dangerous if: (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and (2) the activity is not one of common usage. (*Ibid.*)

The bill seeks to add clarity to its usage of the term by providing that a firearm-related product shall not be considered abnormally dangerous and likely to create an unreasonable risk of harm to public health and safety based on a firearm’s inherent capacity to cause injury or lethal harm. However, it establishes a presumption that a firearm-related product meets this threshold if any of several conditions are met. The first is the product’s features “render the product most suitable for assaultive purposes instead of lawful self-defense, hunting, or other legitimate sport and recreational activities.” This essentially establishes a civil assault-weapons ban.

The second condition creating the presumption is where the firearm related-product is designed, sold, or marketed in a manner that foreseeably promotes conversion of legal firearm related-products into illegal firearm-related products. This appears to target various firearm accessories, which are defined in the bill as attachments or devices designed or adapted to be inserted into, affixed onto, or used in conjunction with a firearm that is designed, intended, or functions to alter or enhance the firing capabilities of a firearm, the lethality of the firearm, or a shooter’s ability to hold and use a firearm. Such gun modifications have drawn public and regulatory scrutiny for their roles in increasing gun violence.¹¹

The final condition is where the firearm-related product is designed, sold, or marketed in a manner that is targeted at minors or other individuals who are legally prohibited from accessing firearms. This seeks to address the incidence of marketing and advertising of firearm-related products to children. In California, children are generally restricted from purchasing and possessing firearms and ammunition, except under specified circumstances. However, concerns have arisen that children are still being

¹⁰ Restat 3d of Torts: Liability for Physical and Emotional Harm, § 20.

¹¹ See e.g., Ivan Pereira, *Senators push Justice Department to crack down on illegal gun modifications* (November 2, 2021) ABC News, <https://abcnews.go.com/Politics/senators-push-justice-department-crack-illegal-gun-modifications/story?id=80927340>.

marketed to by the gun industry. A report from the Violence Policy Center (VPC) outlines the problem:

The gun industry has long understood that it faces a slow-motion demographic collapse. With the industry's customer base growing older, household gun ownership in America has steadily declined. As its primary market of white males ages and dies off, the firearms industry has set its sights on America's children. Much like the tobacco industry's search for replacement smokers, the gun industry is seeking replacement shooters to purchase its deadly products. Firearms companies have teamed up with "corporate partners" like the National Rifle Association of America, the gun industry's trade association the National Shooting Sports Foundation (NSSF), and online publications such as Junior Shooters in an industry-wide effort to market firearms to kids. They do this by promoting websites and magazines targeted at children, designing "kid-friendly" guns to appeal to the youth market, and even working to create the equivalent of "'reality' video" games to encourage gun use from an early age.

The industry's focus on recruiting children into the gun culture has been acknowledged since at least the 1990s.¹²

c. Abiding by laws regulating business practices

Finally, the firearm industry standard of conduct prohibits any conduct related to the sale or marketing of firearm-related products that is in violation of specified laws pertaining to unfair methods of competition, unfair or deceptive acts or practices, or false advertising. This includes California's False Advertising Law, Bus. & Prof. Code § 17500 et seq., the Unfair Competition Law, Bus. & Prof. Code § 17200 et seq., and the Consumers Legal Remedies Act, Civ. Code § 1750 et seq.

d. Enforcement

Violations of the firearm industry standard of conduct can be enforced by the Attorney General, any city attorney or county counsel, and by a person who has suffered harm as a result of the violation. A court is authorized to award injunctive relief, "damages," attorney's fees and costs, and any other appropriate relief necessary to enforce the law and remedy the harm caused by the conduct. The bill makes clear that an intervening act by a third party, including, but not limited to, criminal misuse of a firearm-related product, shall not preclude a firearm industry member from liability under this section.

¹² Josh Sugarmann, "Start Them Young" How the Firearms Industry and Gun Lobby Are Targeting Your Children (February 2016) VPC, <https://www.vpc.org/studies/starttheyoung.pdf>.

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. Its inclusion here, along with empowering public prosecutors at both the state and local levels, ensures that all hands are on deck to enforce the firearm industry standard of conduct.

4. Legal obstacles

The Second Amendment to the United States Constitution holds: "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." In the period between 1791 when the amendment was ratified until 2008, no law regulating the possession of firearms was found to be unconstitutional by the United States Supreme Court.¹³

However, in 2008, the Supreme Court ruled along ideological lines that a District of Columbia law banning handguns violated the Second Amendment.¹⁴ The Court held for the first time that the Second Amendment protected an individual right to possess a firearm unconnected with service in a militia and to use that firearm for traditionally lawful purposes, such as self-defense within the home. Two years later, the Supreme Court reaffirmed, again along ideological lines, that the Second Amendment protected the right to keep and bear arms for the purpose of self-defense and further held that the Second Amendment was fully applicable to the states.¹⁵

While it is clear that states have authority to regulate firearms, any robust regulation, such as this bill, will be susceptible to challenge. Indeed, in one relevant example, a federal appeals court recently struck down California's laws limiting sales of semiautomatic rifles to persons under 21 years of age.

The court's reasoning is illuminating as to the federal judiciary's conception of gun rights and the vulnerability of gun control laws, and strikes a stark contrast to the quantitative realities detailed above and the news reports increasingly flooding our screens:

Handguns are the quintessential self-defense weapon, *see Heller*, 554 U.S. at 629, but young adults already cannot purchase them, Cal. Penal Code § 27505, 18 U.S.C. § 922(b)(1). And under this ban, they also cannot purchase semiautomatic centerfire rifles. That leaves non-semiautomatic

¹³ Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (5th ed., 2015) The Second Amendment Right to Bear Arms, § 10.10, p.956.

¹⁴ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹⁵ *McDonald v. City of Chi.*, 561 U.S. 742 (2010).

centerfire rifles, rimfire rifles, and shotguns. Non-semiautomatic rifles are not effective as self-defense weapons because they must be manually cycled between shots, a process which becomes infinitely more difficult in a life or death situation. Rimfire rifles generally aren't good for self-defense either, because rimfire ammunition has "poor stopping power" and are mostly used for things like hunting small game. David Steier, *Guns* 101, 13 (2011). So for self-defense in the home, young adults are left with shotguns.

Even acknowledging that shotguns are effective weapons for self-defense in the home, shotguns are outmatched by semiautomatic rifles in some situations. Semiautomatic rifles are able to defeat modern body armor, have a much longer range than shotguns and are more effective in protecting roaming kids on large homesteads, are much more precise and capable at preventing collateral damage, and are typically easier for small young adults to use and handle.

Thus, we hold that California's ban is a severe burden on the core Second Amendment right of self-defense in the home. Young adults already cannot buy the quintessential self-defense weapon, *Heller*, 554 U.S. at 629, and this ban now stops them from buying semiautomatic rifles, leaving only shotguns. So handguns aside, this law takes away one of the two remaining practical options for self-defense in the home, and leaves young adults with a self-defense weapon which is not ideal or even usable in many scenarios. That is a severe burden.¹⁶

The court ruled California's limitations on the sale of semiautomatic rifles to persons under age 21 unconstitutional.

This comes after a Federal District Court overturned California's assault weapons ban in 2021. Although the ruling has been stayed on appeal, the reasoning of the court again provides insight, arguably disturbing insight, into the future of federal jurisprudence regarding the Second Amendment:

Like the Swiss Army Knife, the popular AR-15 rifle is a perfect combination of home defense weapon and homeland defense equipment. Good for both home and battle, the AR-15 is the kind of versatile gun that lies at the intersection of the kinds of firearms protected under *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) and *United States v. Miller*, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939). Yet, the State of California makes it a crime to have an AR-

¹⁶ *Jones v. Bonta*, No. 20-56174, 2022 U.S. App. LEXIS 12657, at *41-43 (9th Cir. May 11, 2022).

15 type rifle. Therefore, this Court declares the California statutes to be unconstitutional.¹⁷

In addition to the barriers faced by courts' interpretation of the Second Amendment, the federal Protection of Lawful Commerce in Arms Act (PLCAA), signed into law in 2005 by President Bush, 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.

This bill seeks to hold firearm industry members, including manufacturers and sellers, accountable for harms they foreseeably cause and to require them to institute reasonable practices to avoid harm. Challenge on these grounds is likely but there are certainly exceptions to the PLCAA's preemptive effect, including one that explicitly provides it does not preempt "an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought." (15 U.S.C. § 7903.)

In his letter in support, Attorney General Bonta, a co-sponsor of the bill, highlights the PLCAA's restrictions but asserts that the bill successfully takes advantage of the room provided to the states:

In 2005, the federal government stripped Americans of the right to hold gun manufacturers and distributors responsible for the damage their conduct causes when their products are used unlawfully – leaving only a narrow exception for such lawsuits. Today, using that exception, we begin the process of restoring these rights in California. AB 1594 requires the gun industry to take reasonable steps to make sure their products are not used unlawfully. If the gun industry ignores this responsibility – one that is common for companies in nearly every industry in the country – this bill gives victims and their families an additional legal pathway for holding the firearm industry financially responsible.

¹⁷ *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1014 (S.D. Cal. 2021)

5. Stakeholder positions

According to the author:

Almost every industry in the U.S. is held liable for what their products do, but the gun industry is not held to the same standard. In 2005, President Bush signed the Protection of Lawful Commerce in Arms Act (PLCAA), which provides gun manufacturers and dealers with some immunity from lawsuits. This was a result of the gun industry's lobbying after a series of lawsuits in the 1990's held the firearm industry liable for reckless practices.

PLCAA shields gun manufacturers and dealers from legal accountability, consequently disincentivizing the firearms industry from following all federal, state and local laws ensuring all firearms meet California standards, and educating gun purchasers of their responsibilities. Though there are some exceptions to PLCAA, there remains limited liability ability to hold the industry accountable and as a result, those impacted by gun violence are often unable to seek accountability and justice.

According to a 2021 PPIC report, California saw a rise of more than 500 homicides in 2020 of which gun deaths accounted for 91 percent.

AB 1594 will allow the California Attorney General, local governments, and survivors of gun violence to pursue legal action in California courts against irresponsible, reckless, and negligent gun manufacturers, importers and dealers. It is critical that the gun industry not be able to evade basic principles of civil justice that all others in society are subject to.

Everytown for Gun Safety, Moms Demand Action, and Students Demand Action write in support:

AB 1594 will function as an exception to PLCAA, ensuring that valid civil claims can be brought against the gun industry for their dangerous, negligent, and even unlawful actions. The possibility of civil liability will not only provide civil justice to victims and survivors but also encourage the gun industry to act responsibly to help stem the tide of crime guns that harm Californians, particularly in urban areas where communities of color are disproportionately harmed. Having operated with special protections for years, the industry has had no financial incentive to curb irresponsible conduct and instead puts profits over people. The prospect of civil liability can lead to safer products and better conduct that the industry has resisted for years.

AB 1594 must be enacted because no industry should be above the law, especially not one that makes and sells lethal weapons. AB 1594 will make sure that bad actors in the gun industry are held accountable and victims of gun violence are able to get justice through the law. This bill would allow lawsuits against manufacturers and sellers of firearms for the harm caused by their product. AB 1594 utilizes an exception to the federal statute that allows gun makers or sellers to be sued for violations of state laws concerning the sale or marketing of firearms.

Writing in opposition, the National Rifle Association asserts:

AB 1594 seeks to frustrate law-abiding gun owners and the firearms industry by empowering tort attorneys and politically-motivated public attorneys to drive firearm, ammunition, and firearm accessories manufacturers, wholesalers, and dealers out of business with frivolous litigation. Under the legislation, members of the firearm industry would be required to implement “reasonable controls” on their businesses. The term “reasonable controls” is not defined as conforming to a specific set of measures or regulations, rather these “controls” are indeterminate and would be above and beyond what California and federal law explicitly require. Moreover, industry members would be required to ensure that any other member of the industry that they deal with has implemented such “reasonable controls.”

The ambiguity of the term “reasonable controls” in the legislation is purposeful. That ambiguity is designed to permit private actors and governments to torment the firearms industry through costly litigation in the widest array of circumstances, even when those industry members comport their behavior to the specific state and federal statutes and regulations governing their conduct.

As with all efforts to pervert tort law to target the gun industry, the ultimate goal is to make it more difficult for law-abiding American[s] to exercise their Second Amendment rights by choking off the supply of firearms, ammunition, and firearms accessories.

Writing in support, the City of Los Angeles argues:

Firearm industry members’ failures to adopt reasonable controls to protect public health and safety have led to foreseeable and grave public harms that could have been reasonably prevented with minimal cost or effort. For decades mass shootings and gun homicides committed across the country have resulted in severe loss of life, disproportionately impacting low income and communities of color, and remains a constant reminder of

the importance of firearm regulation. This trend has only worsened since the onset for the COVID-19 pandemic, with 46% increase in gun homicides in 2020 and January 2021 being the deadliest month for gun homicides since 2007.

AB 1594 will protect public health and safety in California by promoting fair firearm industry practices and holding its members accountable for its role in facilitating gun violence.

SUPPORT

Attorney General Rob Bonta (co-sponsor)
Brady California (co-sponsor)
Brady Campaign to Prevent Gun Violence (co-sponsor)
Team Enough (co-sponsor)
City and County of San Francisco
City of Berkeley
City of Los Angeles
Consumer Attorneys of California
County of San Diego
Everytown for Gun Safety
Giffords
March for Our Lives
Moms Demand Action for Gun Sense in America
Students Demand Action for Gun Sense in America
Women Against Gun Violence

OPPOSITION

California Rifle and Pistol Association, Inc.
National Rifle Association

RELATED LEGISLATION

Pending Legislation:

SB 1327 (Hertzberg, 2022) 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. This bill is currently in the Assembly Judiciary Committee.

AB 452 (Friedman, 2022) requires local educational agencies to inform parents, through a notice, of California's child access prevention laws and other firearm laws. This bill is currently in the Senate Appropriations Committee.

AB 2571 (Bauer-Kahan, 2022) prohibits firearm industry members from advertising or marketing, as defined, firearm-related products to minors. The bill restricts the use of minors' personal information in connection with marketing or advertising firearm-related products to those minors. This bill is in this Committee and is being heard at the same hearing.

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 Senate 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.

PRIOR VOTES:

Assembly Floor (Ayes 50, Noes 20)

Assembly Appropriations Committee (Ayes 12, Noes 4)

Assembly Judiciary Committee (Ayes 7, Noes 2)
