



LEGISLATIVE ALERT

Friday, March 9, 2018

Regarding: **S.2521 / “Extreme Risk Protection Orders”**
Position: **OPPOSED**

S.2521 would “authorize the issuance of extreme risk protection orders” (ERPOs), also known as “Gun Violence Restraining Orders” (GVRs). FPC strongly opposes these restraining order schemes on practical, policy, and constitutional grounds.

- **ERPOs virtually never result in any immediate action—if there is ever any real action taken at all.**
- ERPOs operate on the presumption that people will be law-abiding until an order issues, if one does, and that people subject to an order are voluntarily going to be law-abiding until all of their weapons are taken away from them, if ever. *If someone is actually insane, mentally unstable, or plain evil, that is a very irrational and dangerous presumption.*
- In an *ex parte* ERPO situation, the subject of an order might not even know about it, let alone voluntarily decide to give up their property once they do know. And if it’s an order issued after notice and a hearing, then that subject, if they truly are dangerous, gets to maintain possession of their weapons until an order issues, a warrant is secured, a search is conducted, and a seizure of property takes place—if they can even find the weapons, which may be stored at another location.
- While a firearm is, of course, personal property, the interest at stake here is far more substantial than the deprivation of a mere possession. “[T]he right to keep and bear arms” is “among those fundamental rights necessary to our system of ordered liberty.” *McDonald v. City of Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 3042 (2010). And by establishing a scheme that would prohibit possession (and allow for seizure) of firearms, ERPOs strike at the core of the Second Amendment: the right to keep and bear arms in the home for self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 630 635 (2008).
- ERPOs and their underlying statutes skip past due process. The Due Process Clause guarantees that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. Const., amend. V. Because “[t]he right to prior notice and a hearing is central to the Constitution’s command of due process,” *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993), the “general rule” is “that individuals must receive notice and an opportunity to be heard before the Government deprives them of property.” *Id.* at 48.
- ERPOs stand for the proposition that everyone is guilty unless they can prove their way out of an accusation. Moreover, ERPOs are an ineffective way to deal with mental health, because they do not in any way address the core issues of untreated mentally

unstable people or the un-institutionalized severely mentally ill. And ERPOs do not address the fundamental problems inherent to violent criminals.

- If someone is dangerous enough, due to criminal activity or mental health problems, to be a real threat to themselves or others, then there are many laws by which families, friends, or law enforcement can more appropriately and effectively respond to them.
- In 2014, the California Legislature enacted Assembly Bill 1014, creating three different kinds of so-called “Gun Violence Restraining Orders,” including two procedures for *ex parte* GVRO proceedings. That means a petitioning law enforcement officer or qualified family member may present their arguments to the court with the subject of the petition not necessarily present, or even aware, of the petition and hearing. AB 1014 also created a procedure for a GVRO to be issued after notice and a hearing. Even if there was “notice” given, that does not mean the subject of the petition must personally know about it.
- In California, GVROs can be issued either immediately against someone who doesn’t know (in the case of an *ex parte* proceeding) or after many days or weeks (after notice and a hearing). And even if a GVRO is issued, they are to be personally served on the subject only “if the restrained person can reasonably be located.” All of these factors undermine the entire stated basis for ERPOs.
- Also deeply troubling is that, in California’s GVRO system, a court “may consider any other evidence of an increased risk for violence, including, but not limited to....[e]vidence of recent acquisition of firearms, ammunition, or other deadly weapons.” In other words, if someone recently exercised their Second Amendment rights, that could be construed as evidence that they are an “increased risk for violence” and should have a GVRO issue against them.
- **If the government does not have enough evidence to investigate or charge a person with a crime or hold them for a mental health evaluation, then the government has not met its burden for taking away rights and property under any scheme.**

AMERICA’S DESPERATE NEED FOR MENTAL HEALTH SYSTEM IMPROVEMENTS AND FUNDING FOR MENTAL HEALTH CARE

- America is experiencing an un-debatable mental health crisis and troubling lack of funding for necessary mental health care. *See, e.g.*, Cynthia McFadden and Kate Snow, “Generation at risk: America’s youngest facing mental health crisis,” Dec. 11, 2017, NBC News (online at <http://nbcnews.to/2Eoxajv>). *See also* Samantha Raphelson, “How The Loss Of U.S. Psychiatric Hospitals Led To A Mental Health Crisis,” Nov. 30, 2017, National Public Radio (online at <http://n.pr/2ESwIg8>).

- Unlike California, which has had many mental health laws that have been on the books for decades (like those in Cal. Welfare and Institutions Code § 5150, et seq.), many states have inadequate mental health codes and processes for holding and evaluating people who could be dangerous.
- Under Cal. W&IC § 5150, et seq., if someone is a real danger to themselves or others, they can be taken in for an evaluation. If there is cause, they can be held. And in California, these events can trigger temporary (and, where cause exists, permanent) gun prohibition that is reported to state and federal law enforcement agencies. *See, e.g.,* Cal. Welfare and Inst. Code § 8100, et seq.
- Under e.g. California’s mental health framework, if someone is mentally unstable or mentally ill they can be voluntarily or involuntarily held, evaluated, and placed into the care of trained mental health professionals—and physically kept away from any weapons they might otherwise be able to access.

For these and other reasons we OPPOSE S.2521 / “Extreme Risk Protection Orders” and urge a “Nay” vote.

Please do not hesitate to contact us at **(916) 378-5785** or **policy@fpchq.org** to discuss these or other matters in detail. Thank you for your time and consideration.