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AN ANALYSIS OF 18-H 7688 AND 18-S 2492, RELATING TO EXTREME RISK PROTECTIVE ORDERS MARCH 2018

SUMMARY

This pending legislation would allow family members and law enforcement officers to petition a judge to issue an "extreme risk protective order" (ERPO) against an individual who legally owns firearms but who is alleged to pose a "significant danger of causing personal injury to self or others."

While the ACLU of Rhode Island recognizes the bill's laudable goal, we are deeply concerned about its breadth, its impact on civil liberties, and the precedent it sets for the use of coercive measures against individuals not because they are alleged to have committed any crime, but because somebody believes they might, someday, commit one.

* The court order authorized by this legislation could be issued without any indication that the person poses an imminent threat to others.

* The order could be issued without any evidence that the person ever committed, or has even threatened to commit, an act of violence with a firearm.

* The court order would require the confiscation for at least a year of any firearms lawfully owned by the person and place the burden on him or her to prove by clear and convincing evidence that they should be returned after that time. If denied, the person would have to wait another year to petition for return of his or her property.

* The person could be subjected to a coerced mental health evaluation, and the court decision on that and all these other matters would be made at a hearing where the person would not be entitled to appointed counsel.

* With the issuance of an order, police would have broad authority to search the person's property.

* The standard for seeking and issuing an order is so broad it could routinely be used against people who engage in "overblown political rhetoric" on social media or against alleged gang members when police want to find a shortcut to seize lawfully-owned weapons from them.

* Even before a court hearing was held, and a decision was made, on a petition for an ERPO, police could be required to warn potentially hundreds of people that the individual might posed a significant danger to them.

* Without the presence of counsel, individuals who have no intent to commit violent crimes could nonetheless unwittingly incriminate themselves regarding lesser offenses.

The heart of the legislation's ERPO process requires speculation – on the part of both the petitioner and judges - about an individual's risk of possible violence. But psychiatry and the medical sciences have not succeeded in this realm, and there is no basis for believing courts will do any better. The result will likely be a significant impact on the rights of many innocent individuals in the hope of preventing a tragedy.

Any legislation should focus on addressing serious imminent threats to the public safety while safeguarding robust due process procedures before granting the courts and law enforcement agencies potentially intrusive powers over the liberty of individuals charged with no crime.

AN ANALYSIS OF 18-H 7688 AND 18-S 2492,
RELATING TO EXTREME RISK PROTECTIVE ORDERS

A number of bills have been, and will be, proposed this year to address the serious problem of gun violence, and particularly the scourge of mass shootings taking place around the country. The ACLU of Rhode Island believes that there are many ways that the state can try to address this issue through the regulation of firearms without infringing on the constitutional rights of residents to bear arms. For example, we have not opposed efforts to restrict the types of weapons available for purchase, or many other gun control measures that have been introduced in the past and that courts have found to be reasonable regulation of Second Amendment rights.

At the same time, attempts to regulate the possession of firearms can implicate other constitutional rights, including rights to privacy and due process. That is the case with H-7688/S-2492 and their proposal to allow for the issuance of "extreme risk protective orders." These are orders that could be issued by a judge to, in the words of the legislative news release announcing the introduction of the House bill, "disarm people whose behavior is believed by authorities to pose a serious threat to others or themselves."

One cannot argue with the goal, but the ACLU of Rhode Island is deeply concerned about the breadth of this legislation, its impact on civil liberties, and the precedent it sets for the use of coercive measures against individuals not because they are alleged to have committed any crime, but because somebody believes they might, someday, commit one.

Before going through the bill in detail, it is worth emphasizing that last point. The legislation allows a court to intervene in potentially major and intrusive ways on a person's liberty and property interests without any indication, much less suggestion, that the person

has engaged in any criminal conduct – or even that he or she may do so imminently. In that regard, the bill places judges in the unenviable – indeed, impossible – position of trying to predict who may and may not become a mass murderer. Psychiatry and the medical sciences have not succeeded in this realm, and there is no basis for believing courts will do any better. The result will likely be a significant impact on the rights of many innocent individuals in the hope of preventing a tragedy.

It is also worth emphasizing that while a seeming urgent need for the bill derives from recent egregious and deadly mass shootings, the bill's reach goes far beyond any efforts to address such extraordinary incidents. As written, a person could be subject to an extreme risk protective order (ERPO) without ever having committed, or even having threatened to commit, an act of violence with a firearm. While aimed at responding to "red flags," the bill sets a low threshold for judicial intervention, particularly when one compares it to the myriad and blatant "red flag" warnings that the Parkland shooter left but that were ignored by law enforcement agencies. And, contrary to popular belief, the bill is not limited to addressing people who pose an immediate threat of harm. In short, there is a great disparity between whom the bill actually affects and the high-profile shooting incidents that make passage of legislation like this seem so pressing.

The potential impact on individuals subject to an ERPO also involves much more than a long-term seizure of lawfully owned firearms. Without a right to appointed counsel, respondents[1] can be forced to submit to a mental health evaluation, be the subject of fairly widespread "danger" notifications even before a court order has been issued against them, face contempt proceedings and prison for failing to abide by any part of an ERPO, and

[1] In accordance with the bill's terminology, this memo will generally refer to the person seeking an ERPO the "petitioner" and the person to whom it applies the "respondent."

unwittingly place themselves in jeopardy of criminal charges in the absence of the advice of counsel.

We recognize that this legislation is based, in part, on statutes enacted thus far by five other states. Those laws suffer many of the same defects we outline here, although in a few instances, some of them contain a few modest safeguards missing from H-7688/S-2492.[2] It is one thing to craft focused legislation aimed at disarming people who are credibly deemed to be an *imminent* danger; it is another to adopt procedures, as H-7688/S-2492 do, that cover much more speculative fears of danger. While a carefully and narrowly crafted bill aimed at stopping imminent threats might address many of the civil liberties concerns raised in this analysis, the problems with the proposed legislation, as we attempt to document below, are pervasive and deep.

"RED FLAG" STANDARDS

Two key elements of the legislation are the standard for filing a petition for an extreme risk protective order (ERPO) and the criteria to be used by a judge in determining whether to grant one. Both of these elements are, in our view, extremely flawed.

The bill grants "family or household members," local law enforcement officers, and the Attorney General the power to file an ERPO petition. The petition must allege, with specific facts, "that the respondent poses a significant danger of causing personal injury to self or others by having in their custody or control, purchasing, possessing, or receiving a firearm." [Page 2, lines 24-26.]

[2] For example, Connecticut's "red flag" law – the first in the country to be enacted – is limited to situations where a person "poses a risk of imminent personal injury" and an independent determination has concluded there is "no reasonable alternative" to confiscating their firearms in order to prevent the person from causing imminent harm to him- or herself with the firearms he or she possesses. Sec. 29-38c. California's statute similarly requires a consideration of "less restrictive alternatives."

There are a number of points to be made about this standard. First, it makes no attempt to define what constitutes a "significant danger," nor does it impose any sort of temporal limitation on that anticipated danger. In contrast to a separate provision in the bill authorizing ex parte orders when the danger is "imminent" [see Page 5, §8-8.3-5], the alleged danger posed by respondents can be anytime in the indefinite future. Further, the purported danger need not be to more than one person, nor does the potential harm even need to be a threat of *serious* personal injury – any type of possible injury will suffice to trigger the possible issuance of an ERPO.[3]

Indeed, the way the bill is worded, one does not even have to claim that the feared injury is likely to be caused by a firearm; only that the person's possession of one creates a significant danger of inflicting some type of injury. We are sure that evidence could be garnered that the mere possession of firearms poses a "significant danger of causing personal injury to self or others," leaving the scope of the bill's use to the mercy and good faith of those making use of the powers granted by the legislation.

We point out these distinctions not to diminish the seriousness of a person's alleged plan to injure only one person, rather than dozens, or to only slightly harm people, rather than kill them, but instead to note how much the actual language of the bill veers from its purported aim at mass shooters.

Since the Attorney General and local police departments have the independent power to seek these orders without the request of any family members [Page 2, lines 18-19], one can easily imagine this bill's petitioning authority being used in scenarios far outside the context that has prompted it. For example, almost by definition, individuals

[3] The state's assault and other criminal statutes often differentiate between the level of injury in determining the severity of criminal penalties to be imposed.

targeted by police as gang members – who, it is worth noting, are most often people of color – would fit the statute's amorphous standard of potentially posing a "significant danger" of injury to others by "having in their custody" a firearm. What is to stop police from using this law to file petitions against them in order to seize any lawfully owned firearms they have? Filing, and being granted, such a petition has the additional bonus of serving as a general search warrant that could conveniently allow police to "stumble across" evidence of unrelated illegal activity, because the bill allows police officers granted an ERPO to "conduct any search permitted by law" at a respondent's residence in order to search for firearms. [Page 9, lines 33-34.] Similarly, the increased practice of law enforcement trolling of social media for "harmful" or "threatening" posts could vastly increase the use of a bill like this against innocent people who engage in overblown political rhetoric.[4]

These are hardly far-fetched scenarios. If there is anything we have learned over the decades, it is that law enforcement-related legislation enacted to address specific and serious crimes often is expanded for uses well beyond the initial intent. After all, who would have acknowledged that a law specifically aimed at mobsters – the Racketeer Influenced and Corrupt Organizations Act – would one day be used to go after anti-abortion protesters?[5] Who would have predicted that expanded "civil asset forfeiture" laws – initially aimed at major drug dealers – would one day be so routinely used against innocent parties to take houses, cars, money and other property away without any criminal charges,

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[4] For an older but still very relevant offline example, see, e.g., http://riaclu.org/news/post/aclu-responds-to-secret-service-investigation-of-student-essay/

[5] *Scheidler v. National Organization for Women*, 547 U.S. 9 (2006)

much less criminal convictions, involved?[6]

An ERPO petition has a wide-scale impact on presumptively innocent individuals even before a judge considers the request. If the petition is being initiated by law enforcement, the police agency must first make a good faith effort to notify family and household members and "any known third party who may be at risk of violence." [Page 3, lines 6-12.] This is required even if the danger is not considered imminent, and must take place before a judge has even reviewed the petition. When dealing with an alleged prospective mass shooter, whom do the police notify? To be on the safe side, isn't it likely that every known family member will be apprised? Will every school within reasonable driving distance be subject to notification? What about the respondent's employer? Over-notification is inevitable, especially when tied to the broad standard for petitioning described above. The consequences for the individual, even if an ERPO is never issued, could be enormous.

A second major concern with the legislation involves the wide range of criteria a judge is given to consider in deciding whether to issue an ERPO. [Page 4, lines 12-31.] We do not object to the lengthy list per se, but we do question the weight some of those factors may be given and the lack of any prioritization. For example, it seems axiomatic that the granting of an ERPO should be premised on allegations of recent acts of violence or threats of violence by the respondent. But that is *not* required under this bill. The judge can consider those factors, which one would presume exist, but they do not need to be present or even a critical consideration in order to issue an ERPO. Further, even if there have been

[6] See, e.g., "Policing for Profit: The Abuse of Civil Asset Forfeiture," Cato Institute, March 2010; "Guilty Property: How Law Enforcement Takes $1 Million in Cash from Innocent Philadelphians Every Year — and Gets Away with It," ACLU of Pennsylvania, June 2015, available at: https://www.aclupa.org/index.php/download_file/view/2322/888/

past threats or acts of violence by the respondent, they need not be connected to firearms in any way. Instead, a court can, in theory, rely solely on a person's mental health, drug abuse or felony crime history – outside any context of violence, much less firearm violence – in issuing an order. In light of the stakes involved, it is not unreasonable to assume that the courts' default, once presented with a petition, will be to find grounds for sustaining the petition even when the evidence presented is less than compelling.

Another disconcerting aspect of the court's powers under the bill is that, in addition to confiscating any firearms, the judge can order a mental health or substance abuse evaluation, presumably against the respondent's will and upon contempt of court if he or she fails to comply. [Page 5, lines 6-7; Page 12, lines 25-27.] An ERPO petition can thus function as an end-run around the state's mental health statutes, which have very detailed standards before compelling a person's participation in the mental health system.

The length of time an ERPO is in effect once issued is also troubling. It remains in effect for at least one year before the respondent can challenge it. [Page 4, line 10; Page 8, lines 20-22]. This is a long time to maintain the property of a person who has not been charged with, much less convicted of, a crime. The time period for renewal of an ERPO should be shorter.[7]

Just as problematic is the method the bill provides to a respondent to secure return of any lawfully owned firearm confiscated through an ERPO and to have the order terminated. After a year has passed, the burden is on the respondent to prove by clear and convincing evidence that he or she is no longer a danger. [Page 8, lines 28-32.] How does one prove this negative, and how does one do it with such a high burden of proof? He or

[7] At least one "red flag" state – Indiana – authorizes respondents to file a petition for a firearm's return 180 days after the order has been entered. IC 35-47-14-8.

she can't even necessarily rely on the fact that they have committed no violence in the year, since the Catch-22 response from the state can be that it was only because of the ERPO that the respondent did not engage in violent conduct. Whatever timeframe is used for renewal of an ERPO, the burden should be on the petitioner to prove by clear and convincing evidence that it should remain in effect, not on the respondent to halt its continued imposition.

The bill establishes a separate, though related, time-compressed ex parte procedure for "imminent" threats, and that is where we believe the focus of any legislative effort like this should be. If there is no reason to believe a threat is imminent, why not go through regular investigatory steps to examine the allegations rather than establish a process like this, with all of its potential ramifications for innocent people or for people targeted by police for reasons unrelated to mass shooting fears?[8]

THE COURT PROCESS

While this is a civil proceeding where respondents have no clear constitutional right to counsel, there are potentially significant consequences to an ERPO respondent beyond losing possession of lawfully owned weapons. Those consequences, we believe, militate in favor of requiring the state to provide counsel. The respondent can be put under oath by the court [Page 4, lines 32-33], and the lack of an attorney under such circumstances can cause a respondent great harm. That is so in light of the potentially serious consequences emanating from a hearing like this. For example, the allegations against him or her may

[8] While it might be unfair to call it a bait-and-switch, some proponents of "red flag" legislation cite a recent study suggesting that Connecticut's "red flag" law has averted some suicides. Without being able to address the methodology or validity of that study, issued only last year, we note that this justification is a far cry from the incidents that have generated the support for this type of legislation and its coercive powers.

very well implicate criminal statutes relating to threats or other offenses, but no attorney will be around to advise the respondent on exercising his or her Fifth Amendment rights. And precisely because the alleged harm is speculative, an attorney is in a much better position than a layperson to question the validity and weight of the evidence against the respondent.

The respondent also faces contempt charges for failing to comply with any obligations imposed under the ERPO and, as noted previously, he or she potentially must submit to, upon contempt of court, a mandatory mental health examination. Under all the circumstances, we believe respondents should be entitled to appointed counsel at the hearing if they cannot afford one.

Relatedly, the ERPOs issued by a court are required to indicate that the respondent "may seek the advice of an attorney." [Page 5, lines 25-26; Page 6, lines 31-32.] But that advice is given *after* an ERPO has been issued, and after the respondent has been barred for at least a year from having firearms. In the short period of time between the filing of a petition and the court hearing, most respondents are unlikely to be able to find, or to afford, an attorney for the hearing itself, at a time when the critical decisions on whether to issue the protective order or to mandate a mental health evaluation are being made by the judge.

Finally, as noted earlier, the bill provides that in effectuating an ERPO, the police "shall conduct any search permitted by law" to find firearms. [Page 9, lines 33-34.] This can only encourage police to engage in extremely invasive searches of respondents' residences with the potential for turning those searches into fishing expeditions for other potential contraband (e.g., drugs).

ADDITIONAL CONCERNS

We believe the legislation raises a number of other miscellaneous concerns, and they are summarized below.

* The definition of "family or household member" follows that of the state's domestic violence laws. [Page 1, lines 11-14.] While the relatively expansive definition in those laws makes sense in the domestic violence context, it may be unnecessarily broad here where individuals who may have grudges or ulterior motives can allege non-criminal conduct that does not affect them, but that will lead to serious hardships to respondents. Once one accepts such a broad definition, it becomes too easy to expand it in the future to allow neighbors, colleagues and others the same ability to file petitions.

* The petitioner is authorized to omit his or her address if the petition "states" that disclosure of the address would risk harm to the petitioner or family members. [Page 3, lines 13-18.] We believe that a court should make an independent determination about that, rather than rely solely on the petitioner's statement. Like empaneling anonymous juries, the mere fact that the address is withheld seems to lend more credence to the allegations – rightly or wrongly.

* While the bill seems to establish a clear and automatic process for returning weapons once an ERPO has terminated [Page 11, lines 16-23], it also commands the State Police to develop rules and procedures pertaining to the return of firearms. [Page 11, lines 11-12.] Having had to sue police departments a number of times over their seizure of firearms and then their failure to timely return them once an investigation has been

concluded,[9] we are wary of what such a procedure might look like. To avoid any confusion, we would urge that the "rules and procedures" language make an explicit reference to the section following it (Section 8-8.3-10) that provides for automatic return of the firearms.

* ERPOs are entered into police databases, and the bill makes provision for removing that information once an ERPO is terminated. [Page 12, lines 8-9, 21-23.] However, ERPOs are also entered into a public judicial database [Page 11, lines 28-30], but there does not appear to be a comparable requirement for removing terminated ERPOs from that system. A publicly accessible record showing that a person once had their gun rights taken away based on being an "extreme risk" could erect barriers for them for decades when they undergo a background check for employment or housing, and could end up being just as harmful as if they had actually been convicted of a violent felony offense.

* If a bill like this is to be enacted, we urge the inclusion of an annual reporting requirement to provide indications to policy-makers of how the statute is operating. Among other things, the report could indicate the number of petitions filed and orders granted or denied; the number of requests for renewal or termination of orders and their outcome, etc. As a corollary to that, the General Assembly should also consider including a sunset clause. This would allow for an examination of the law's effectiveness and its impact after a certain period of time, including a review of research conducted on other states' "red flag" laws, and a consideration of the efficacy of alternative gun control measures in addressing the issue.

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[9] See, e.g., *Richer v. Parmalee*, 2016 WL 2094487 (D.R.I. 2016).

CONCLUSION

People who are not alleged to have committed a crime should not be subject to severe deprivations of liberty interests, and deprivations for lengthy periods of time, in the absence of a clear, compelling and immediate showing of need. As well-intentioned as this legislation is, its breadth and its lenient standards for both applying for and granting an ERPO are cause for great concern.

The ACLU urges legislators to focus bills like these on addressing serious imminent threats to the public safety while safeguarding robust due process procedures before granting the courts and law enforcement agencies potentially intrusive powers over the liberty of individuals charged with no crime. A narrower bill with basic due process protections can provide the proper balance in promoting both public safety and constitutional safeguards.

Gun violence is a deeply serious problem deserving of a legislative response, but not, *Minority Report*-like, at the expense of basic due process for individuals whose crimes are speculative, not real. The precedent it creates could reverberate in unexpected and distressing ways in years to come.