

MEMORANDUM

TO Interested Parties
FROM Americans for Responsible Solutions and the Law Center to Prevent Gun Violence and the Educational Fund to Stop Gun Violence
DATE May 9, 2017
RE Extreme Risk Protective Order in Massachusetts

Understanding the proposed Extreme Risk Protective Order in Massachusetts

Under existing Massachusetts law, a variety of dangerous people are prohibited from purchasing or possessing firearms, including those who have been convicted of misdemeanor crimes of domestic violence and felonies.¹ Massachusetts law also prohibits firearm purchase or possession by individuals who are subject to domestic violence protective orders, and certain categories of people who have been committed to any hospital or institution for mental illness, or appointed a guardian or conservator on the grounds that he or she lacks the mental capacity to manage his or her affairs.² In 2014, Massachusetts enacted a law allowing a local licensing authority to petition a court to revoke an individual's Firearm Identification Card if it determines that the individual is "unsuitable" to possess firearms.³

An Extreme Risk Protective Order (ERPO) is civil court order that would expand these protections by temporarily restricting access to firearms by persons who exhibit dangerous or threatening behaviors towards themselves or others, but are not otherwise prohibited under federal or state law. Furthermore, unlike abuse prevention orders, a court may issue an ERPO if the individual poses a threat to someone with whom he or she does not have a domestic relationship. Ultimately, the

¹ Mass. Gen. Laws ch. 140, §§§ 129B(1)(i)(f).

² Mass. Gen. Laws ch. 140, § 129B(1); see *also* Mass. Gen. Laws ch. 140, §§ 129B; 131; ch. 265 § 13N.

³ Mass. Gen. Laws ch. 140, § 129B.

ERPO would create a legal mechanism to prevent individuals who may be experiencing a crisis, for whatever reason, from using firearms to commit violence.

The procedures for obtaining, enforcing, and terminating an ERPO would closely follow the procedures for obtaining, enforcing, and terminating abuse prevention orders in Massachusetts, thereby utilizing many of the court and law enforcement systems already in place.

The following memo analyzes the proposed ERPO bill text. Part I discusses the two different types of ERPOs that a court may issue and the provisions that apply to both. Part II discusses the main legal issues implicated by ERPOs and demonstrates that both types of orders: (1) do not infringe Second Amendment rights; and (2) provide adequate due process protections.

I. Extreme Risk Protective Orders

A. General

The proposed Massachusetts ERPO would allow law enforcement officers, district attorneys, family members, and health care providers to petition a court for an order restraining individuals from purchasing, possessing, or controlling firearms and ammunition for as short as 10 days and as long as one year if the individuals pose a credible threat to the health and safety of themselves and/or others. It would also provide a mechanism to remove firearms and ammunition from a person subject to an ERPO. The law would establish two types of ERPOs: a temporary ERPO of limited duration and a yearlong ERPO.

B. Who May Petition for an ERPO

The ERPO grants standing to those categories of individuals who are most likely to notice warning signs of an individual in crisis – law enforcement officers, family members, and health care providers. These individuals may file a verified petition in the superior, district, or Boston municipal court department which has jurisdiction over the respondent’s residence.

A family member⁴ is someone who is or was married to the respondent; is or was residing with the respondent in the same household; is or was related by blood or marriage to the respondent; has, or is having, a child with the respondent, regardless of whether they have ever married or lived together; or is, or has been, in a substantive dating or engagement relationship⁵ with the respondent. A health care provider is defined as a licensed physician, licensed clinical psychologist, licensed social worker, or licensed mental health clinician.

C. Temporary ERPOs

The process for seeking both types of ERPOs is the same. If the judge determines that, based on allegations in the petition, the petitioner has met the standard of proof, discussed in the next section, for a temporary ERPO, the judge will issue that order and set a hearing for a yearlong ERPO.

Any petition for an ERPO must allege facts based on personal knowledge, and describe the number, types, and locations of any firearms or ammunition the petitioner believes the respondent owns, possesses, or controls. The petition must also state whether the respondent is subject to an existing abuse prevention order and whether there is a pending lawsuit, complaint, petition, or other action between the parties.

1. Standard of Proof

a. Health Care Providers

A health care provider may seek an ERPO under two circumstances.⁶ The first is when (1) the patient has communicated to the provider an explicit threat to kill or inflict serious bodily injury upon a reasonably identified victim or victims; (2) the

⁴ For the purposes of an ERPO, family member is defined in the same way Massachusetts defines family members who are eligible to petition for a domestic violence order. Mass. Gen. Laws ch. 209A, § 1.

⁵ The court will consider the following factors when determining whether the parties are or were in a substantive dating or engagement relationship: (1) the length of time of the relationship; (2) the type of relationship; (3) the frequency of interaction between the parties; and (4) if the relationship has been terminated by either person, the length of time elapsed since the termination of the relationship.

⁶ These circumstances track the circumstances under which a mental health professional has a duty to warn another individual that his or her patient poses a credible and serious risk to the individual's physical safety. Mass. Gen. Laws ch. 123, § 36B.

patient has the apparent intent and ability to carry out the threat, and; (3) the health care provider knows or has reason to believe that the patient controls, owns, or possesses a firearm.

Providers may also seek an ERPO when (1) the patient has a history of physical violence which is known to the healthcare provider; (2) the healthcare provider has a reasonable basis to believe that there is a clear and present danger that the patient will attempt to kill or inflict serious bodily injury against a reasonably identified victim or victims, and; (3) the health care provider knows or has reason to believe that the patient controls, owns, or possesses a firearm. Healthcare providers shall otherwise be bound by federal law and regulations relative to the confidentiality of patient health information.

If the court finds that a temporary ERPO is necessary to prevent the substantial likelihood of immediate and present physical harm to the respondent, petitioner, or another person, it may issue a temporary ERPO which will stay in effect for no more than ten days.

b. Law Enforcement, District Attorneys, and Family Members

Other categories of petitioners requesting temporary ERPOs must allege, based on personal knowledge, that the respondent poses an immediate and present danger of causing injury to themselves, the petitioner, or others by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition.

In determining whether the petitioner has met the burden of proof, the court must consider all relevant evidence presented by the petitioner, including an examination under oath of the petitioner and any witnesses the petitioner may produce. The court may also consider other relevant evidence of respondent's likelihood to engage in violence, including but not limited to the respondent's (1) unlawful, reckless, or negligent use, display, storage, possession, or brandishing of a firearm; (2) acts or threats of violence against oneself or another, whether or not this violence involves a firearm; (3) violation of an abuse prevention order; (4) abuse of controlled substances or alcohol, or any criminal offense that involves controlled substances or alcohol; or (5) recent acquisition of firearms, ammunition, or other deadly weapons.

If the court finds that a temporary ERPO is necessary to prevent the substantial likelihood of immediate and present physical harm to the respondent, petitioner, or another person, it may issue an ERPO which will stay in effect for no more than ten days.

Before issuing a temporary ERPO the court shall ensure that a reasonable search has been conducted of all available records to determine whether the respondent owns any firearms or ammunition, and confirm with the local licensing authority whether the respondent owns or possesses firearms. The court shall also ensure that a reasonable search has been conducted for criminal history records related to the respondent.

All petitioners may seek a temporary ERPO when the court is closed for business. Under those circumstances, any justice of the superior, district, or Boston municipal court departments may issue an ERPO. The justice has discretion whether to order the petitioner to appear or issue the order by telephone. If, however, an order is requested and issued by phone, the petitioner must appear in court on the next available business day to file the petition.

2. Noticed Hearing Requirement

Within ten days of issuing a temporary ERPO, the court must hold a hearing for which the respondent receives notice and an opportunity to appear. At the hearing, the court will determine whether to issue a yearlong ERPO or terminate the temporary ERPO. In order to determine whether grounds exist to issue a yearlong ERPO, the court will follow the procedures and standards governing non-temporary ERPOs, as described in the next section. Once the court issues a temporary ERPO, however, it will automatically set a hearing for a yearlong ERPO.

D. Yearlong ERPOs

1. Standard of Proof

To obtain a yearlong ERPO, the petitioner must allege in a verified petition that the respondent poses a significant danger of causing physical harm to themselves, the petitioner, or others by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition. Upon receiving the petition, the

court will schedule a hearing to occur within ten days, regardless of whether the court issues a temporary ERPO.

To obtain a yearlong ERPO, the petitioner has the burden of proving by a preponderance of the evidence that the respondent poses the risk alleged in the petition. As with a temporary ERPO, the court must consider all relevant evidence presented by the petitioner, including an examination under oath of the petitioner and any witnesses the petitioner may produce. The court may also consider other relevant evidence of respondent's likelihood to engage in violence, including but not limited to the respondent's (1) unlawful, reckless, or negligent use, display, storage, possession, or brandishing of a firearm; (2) acts or threats of violence against oneself or another, whether or not this violence involves a firearm; (3) violation of an abuse prevention order; (4) abuse of controlled substances or alcohol, or any criminal offense that involves controlled substances or alcohol; or (5) recent acquisition of firearms, ammunition, or other deadly weapons.

If the court determines that the petitioner has met the burden of proof, the court will issue the order and inform the respondent that he or she is entitled to request one hearing to terminate the order.

2. Order Renewal

A yearlong ERPO may be renewed for another period of one year. The petitioner may request renewal at any time within 30 days of the order's expiration date. The court will schedule a renewal hearing at least 14 days prior to the expiration of the order. The petitioner bears the same burden of proof, and the court shall consider the same evidence, as is required to obtain an initial yearlong ERPO.

E. Provisions Applicable to Both Types of ERPOs

a. Service of Order and Firearms Relinquishment

A law enforcement officer must serve the respondent with a copy of the ERPO. The order shall include notice to the respondent that he or she is prohibited from purchasing, possessing, controlling, or attempting to purchase or receive a firearm or ammunition while the order is in effect. In the case of a temporary ERPO, the order

must include a date for a full hearing of the petition to determine whether the court should issue a yearlong ERPO.

Upon issuance of the order, the respondent's firearms identification card and license to carry firearms are immediately suspended. The respondent must relinquish those licenses, as well as any firearms and ammunition he or she controls, owns, or possesses, to the law enforcement officer serving the ERPO. If someone other than a law enforcement officer serves the ERPO, the respondent has eight hours from the time of service to relinquish his or her firearms and licenses to the licensing authority where the respondent resides. In accordance with existing Massachusetts law, the respondent has the right to arrange for the transfer or sale of the relinquished firearms to any federally licensed dealer (FFL) or individual who is legally allowed to possess the weapons.⁷

b. Reporting of orders

Both types of ERPOs shall be reported to the Department of Public Safety according to existing law governing reporting of abuse prevention orders.⁸ The Department will report the orders for inclusion in the FBI's National Instant Criminal Background Check System (NICS). ERPO case records shall not be available to the general public.

c. Termination of an ERPO

The respondent may file one written request at any time during the effective period of the order for a hearing to terminate. The court must set a hearing no sooner than 14 days from service on the petitioner. At the hearing, the respondent bears the burden of proving by a preponderance of the evidence that he or she does not pose a significant danger of causing personal injury to him- or herself, or others, by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition.

When a court terminates an ERPO or when it expires, the law enforcement agency or FFL in possession of the respondent's firearms must notify the respondent that he or

⁷ Mass. Gen. Laws ch. 140, § 129D.

⁸ See Mass. Gen. Laws ch. 209A, § 3D.

she may request the return of the firearms and ammunition. If, after conducting a background check, the respondent is otherwise eligible to receive his or her firearms and ammunition, the agency will return them to the respondent. A respondent who does not wish to have his or her firearms or ammunition returned or who is no longer eligible to own or possess firearms or ammunition may sell or transfer title of the firearm or ammunition to an FFL.

d. Penalties

A person who is found to have violated an ERPO is liable for a fine of not more than \$5,000, and/or by imprisonment for not more than 2 ½ years. The court that issued the ERPO may also enforce under the civil contempt procedure as a violation of its own court order.

To safeguard against frivolous petitions, an individual who files a petition for an ERPO knowing the information in the petition to be materially false, or with intent to harass the respondent, shall be punished by a fine of no more than \$1,000 or by imprisonment for no more than 2 ½ years.

II. Legal Issues

A. Second Amendment

Suspending the rights of individuals subject to ERPOs to purchase or possess firearms is consistent with the Second Amendment. In the landmark case, *District of Columbia v. Heller*, the Supreme Court determined that the Second Amendment guarantees the right of law-abiding, responsible citizens to keep a firearm in the home for self-defense.⁹ The Supreme Court also stated, however, that the Second Amendment is not unlimited and the Court identified a non-exhaustive list of “presumptively lawful regulatory measures”¹⁰ under the Second Amendment, such as those that prohibit “possession of firearms by felons and the mentally ill.”¹¹

⁹ *District of Columbia v. Heller*, 554 U.S. 570, 679 (2008).

¹⁰ *Id* at 627 f.26.

¹¹ *Id* at 626.

Massachusetts case law indicates that the ERPO would be held constitutional under the Second Amendment. In a challenge to the state’s former firearms licensing statute, the plaintiff claimed the revocation of his firearms license, because the licensing agency deemed him “unsuitable” to possess firearms, violated the Second Amendment.¹² The licensing agency determined the plaintiff was unsuitable to possess firearms based on his wife’s recent allegations of domestic violence. The state supreme court upheld the license revocation because the ability to deny a firearms license to a person deemed unsuitable was substantially related to the important government interest of “limiting access to deadly weapons by irresponsible persons,” and “preventing the temptation and the ability to use firearms to inflict harm, be it negligently or intentionally, on another or on oneself.”¹³ Quoting from a Connecticut case that reviewed a similar challenge, the court stated, “It is impossible for the Legislature to conceive in advance each and every circumstance in which a person could pose an unacceptable danger to the public if entrusted with a firearm.”¹⁴ In so ruling, the Massachusetts Supreme Court recognized that dispossessing an individual of his or her right to possess a firearm pursuant to a credible determination of dangerousness is consistent with the Second Amendment.

Other courts that have had the opportunity to review this issue have come to similar conclusions. A California court concluded that “the state may ensure that firearms are not in the hands of someone who may use them dangerously” and dangerous people may be prohibited from possessing firearms consistent with their Second Amendment rights, as long as they are afforded adequate due process.¹⁴ In 2013, an Indiana Court of Appeals upheld a law similar to the proposed ERPO against a Second Amendment challenge and ruled that the state may restrict access to

¹² *Chief of Police of the City of Worcester v. Holden*, 470 Mass. 845, 848-51.

¹³ *Id.* at 859 (internal citations removed).

¹⁴ *Id.* (internal quotations removed), quoting from *Kuck v. Danaher*, 822 F. Supp. 2d 109, 129 (D. Conn. 2011).

¹⁴ See *City of San Diego v. Boggess*, 216 Cal. App. 4th 1494 (2013) (Firearms seized from individuals who are deemed to be dangerous to themselves or others due to mental illness fall outside the scope of the Second Amendment.); *People v. Jason K.*, 188 Cal. App. 4th 1545 (2010) (An individual’s temporary loss of the right to possess firearms is balanced against the state’s strong interest in protecting society from the potential misuse of firearms by a mentally unstable person.).

firearms by dangerous persons in the interest of public safety and welfare.¹⁵ In 2016, an Appellate Court of Connecticut upheld a law similar to the proposed ERPO against a Second Amendment challenge and held that the statute restricting the right to keep and bear arms of those whom a court has adjudged to pose a risk of imminent physical harm to themselves or others does not violate the Second Amendment.¹⁶

Because the ERPO law provides a mechanism for that very purpose – restricting firearms possession by persons adjudicated to be a substantial danger to themselves or to the public – it does not run afoul of Second Amendment protections.

B. Due Process

Similar to a respondent who is subject to an ex parte abuse prevention order, an ERPO respondent may have his or her rights to purchase, possess, or control firearms temporarily restricted without notice or an opportunity to be heard. The temporary ERPO does not violate the respondent’s due process rights.

Current Massachusetts law allows a court to issue temporary abuse prevention orders.¹⁷ The process for obtaining an ERPO would follow similar procedures. Both procedures require the petitioner to file a verified document¹⁸ alleging an immediate and present danger of harm.¹⁹ Both procedures require the court to hold a full hearing on the merits within a prompt period of time following the issuance of a temporary order. Hearings for both abuse prevention orders and yearlong ERPOs must be held within ten days of a court issuing a temporary order.²⁰

¹⁵ *Redington v. Indiana*, 992 N.E.2d 823 (Ind. Ct. App. 2013), trans. denied (rejecting challenges based on the Second Amendment, the Indiana right to bear arms, the takings clause of the U.S. Constitution, and vagueness). The Indiana Supreme Court subsequently refused to hear an appeal of the case. 997 N.E.2d 356 (Nov. 7, 2013).

¹⁶ *Hope v. State*, 163 Conn. App. 36, 133 A.3d 519 (2016).

¹⁷ Mass. Ann. Laws ch. 209A, § 4.

¹⁸ See, Complaint for Protection from Abuse, available at <http://www.mass.gov/courts/docs/forms/trial/209a/fa-1.pdf>, last visited March 23, 2017,

¹⁹ Mass. Ann. Laws ch. 209A, § 4.

²⁰ *Id.*

Furthermore, case law has established that ex parte orders satisfy due process protections if they include:²¹

- Judicial participation
- A verified petition containing detailed allegations before the ex parte order is issued
- Prompt deprivation hearing
- An allegation of risk of imminent and irreparable harm based on personal knowledge of the subject of the order

The temporary ERPO meets all of these requirements. It requires a petitioner to file a verified petition containing allegations that the respondent poses an immediate and present danger to self or others. It also requires a judge to determine whether the petitioner has met the standard of proof. Accordingly, the ERPO satisfies the first two elements described above.

Once a temporary ERPO is issued, the person subject to the order is entitled to a full hearing before a judge within ten days to determine whether the order should be dissolved and the firearms returned, thus satisfying the requirement for a “prompt deprivation hearing.” California’s version of the ERPO requires that a hearing be set within 21 days of the issuance of an ex parte order.²² To date, no party has filed a lawsuit challenging California’s law.

A petitioner seeking a temporary order must allege that the respondent poses an immediate and present danger of causing injury, which satisfies the requirement that risk is “imminent.” Only law enforcement officers, district attorneys, health care practitioners, and family members can file a petition, and the court must determine that the allegations establish a “substantial likelihood” of imminent danger. It is very

²¹ *Blazel v. Bradley*, 698 F. Supp. 756, 768 (W.D. Wis. 1988) (holding that a Wisconsin law allowing victims of domestic abuse to seek ex parte restraining orders against their abusers was constitutional and satisfied due process requirements). *Blazel* incorporates the factors identified in *Mathews v. Eldridge*, 424 U.S. 319 (1976) by the United States Supreme Court as determinative of whether a law violates due process under the Fifth and Fourteenth Amendments to the U.S. Constitution.

²² Cal. Penal Code § 18125(b).

unlikely that the “substantial likelihood” standard could be met if the petitioner did not have personal knowledge of the facts alleged in the petition.

Accordingly, the provisions of the temporary ERPO satisfy the respondent’s right to due process.

ABOUT THE EDUCATIONAL FUND TO STOP GUN VIOLENCE

The Educational Fund to Stop Gun Violence (Ed Fund) was founded in 1978 as a 501(c)(3) organization that makes communities safer by translating research into policy to reduce gun violence. The Ed Fund achieves this by engaging in policy development, advocacy, community and stakeholder engagement and technical assistance.

*ABOUT THE LAW CENTER TO PREVENT GUN VIOLENCE
& AMERICANS FOR RESPONSIBLE SOLUTIONS*

Led by former Congresswoman Gabrielle Giffords and Navy combat veteran and retired NASA astronaut Captain Mark Kelly, Americans for Responsible Solutions and the Law Center to Prevent Gun Violence are committed to advancing commonsense change that makes communities safer from gun violence.

Operating out of offices in Washington DC, San Francisco, and New York, our staff partners with lawmakers and advocates at the federal, state, and local levels to craft and enact the smart gun laws that save lives. We provide expertise in critical firearms litigation, lead grassroots coalitions, and educate the public on the proven solutions to America’s gun violence epidemic.