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# **SENATE FLOOR ALERT**

## Assembly Bill 61 (Ting)
## *Ex Parte* Gun Violence Restraining Orders.

## ***OPPOSE***

**SUMMARY:**

While the CCLA takes the position in *District of Columbia v. Heller* (2008) 554 U.S. 570 that states are generally free to regulate firearms for public safety purposes, AB 61 will not improve public safety. AB 61 allows employers, employees, teachers, and co-workers to obtain an *ex parte* Gun Violence Restraining Order (GVRO) and is nothing more than civil rights violation waiting to be adjudicated by the courts, including the chilling of political speech, along with constitutional guarantees of due process, and protections against unreasonable searches and seizures. AB 61 will also adversely affect the rights of state-legal cannabis users.

**"SWATTING"**

First of all, there is the issue of "swatting," which is a form of retaliation in which someone makes a false report to the authorities in order to induce a SWAT team to respond to the another person's address.[i] In a dispute that arose between online video gamers, a man who was not related to the dispute was killed when one of the players, attempting to "swat" the other, gave police the wrong address.[i] A similar incident happened to Parkland survivor and gun control activist David Hogg in 2018; thankfully, Mr. Hogg was not home and the incident ended without injury.[ii] If AB 61 is signed into law, we fear that California may be inadvertently legalizing the practice, so long as the complainant first files the proper documentation with the court.

**JUDGES TEND TO ERR ON THE SIDE OF THE PETITIONER**

The next issue is the ease with which restraining orders are generally granted. The standard of proof is lower than in criminal cases[iii], and judges are likely to "err on the side of caution," when determining whether or not to grant the order.[iv] In a layperson's parlance, *they're too easy to get*. For instance, in December 2005, New Mexico resident Colleen Nestler petitioned for a restraining order against the former Late Show host David Letterman, "accusing him of mental cruelty and blaming him for her bankruptcy and sleep deprivation . . . with coded messages that he sent through the TV."[v] Incredibly, Judge Daniel Sanchez approved the order.[v] If judges would grant orders on such frivolous sworn statements as these, then why would a judge show any more restraint when someone makes a sworn statement that they fear someone will commit a mass shooting?

In California, there is no fee to file a petition for a gun violence restraining order and the sheriff will serve the order for free and take away guns, ammunition, and magazines.[vi] This also raises Fourth Amendment concerns (see below) since law enforcement officers will be able to search the restrained person's home while enforcing the order.

## EMPLOYERS AS ARBITRATORS

AB 61 is being packaged and sold as a mechanism to prevent school shootings. But the language of the bill specifically provides for "[a]n employer of the subject of the petition," "[] coworker," in addition to "an employee or teacher" of a school. The bill was amended to require coworkers to have had "substantial and regular interactions with the subject for at least one year and have obtained the approval of the employer." So now we're going to make employers arbitrators who must either grant or deny preliminary approval to file the petition. What if the employer granting the right to request the *ex parte* order has had non-substantial or infrequent interactions with the subject of the petition? Such as seeking permission above a direct supervisor by going to upper-level management who may be less familiar with the parties involved. So how does requiring a coworker to seek the employer's approval to file the petition solve anything? The simple answer is that it doesn't. And how will this rule be enforced? Will there be a standardized form or affidavit for employers to sign, and which the coworker may present to the court? Will the employer be required to testify? Furthermore, if a coworker wishes to "swat" out of retribution, vengeance, or as a prank, then what difference does having regular interactions for one year make? It does not make any difference. The best of friends, spouses, and business partners regularly have falling outs and sever ties, and commonly misuse the legal system to exact revenge or malice.

## CONSTITUTIONAL ISSUES

AB 61 is riddled with Constitutional problems. By granting laypersons the right to petition for an *ex parte* GVRO, California will effectively be making ordinary citizens a surveillance tool of law enforcement, sidestepping both federal and state constitutional protections against unreasonable searches and seizures. Currently, law enforcement must meet the probable cause standard to obtain a warrant; AB 61 will instead allow judges to grant *ex parte* orders based on the affidavit or sworn statement of a layperson. In effect, the provisions of AB 61 practically operate as warrant.

### Due Process

While all of the provisions of the Bill of Rights apply to federal governmental actions, some provisions of the Bill of Rights have been made applicable to state and local governments via the Due Process Clause of the Fourteenth Amendment including:

- Fourth Amendment protections against searches and seizures;
- The Fifth Amendment privilege against self-incrimination and prohibition against double jeopardy;
- Sixth Amendment rights to counsel, a speedy trial, a public trial, trial by jury, to confront witnesses, and compulsory process; and
- The Eighth Amendment's prohibition of cruel and unusual punishment.

In *Gluck v. County of Los Angeles* (1979), the court held that, when issuing temporary restraining orders (TRO's), judges should balance the need for immediate action against the parties' due process

rights to have notice and to be heard.[vii] But as the above research shows, judges tend to err on the side of the petitioner. When an *ex parte* order is issued, as is will be the case under the provisions of AB 61, the respondent receives no notice and the order is executed (and the residence searched) prior to a hearing, absent a warrant, and without giving the respondent time to consult with counsel. When the result of either a warrant or an *ex parte* any kind of protection order is the same—that an individual is taken into police custody or charged with a criminal offense, the distinction between the two lacks substance.

**Chilling Effect on Free Speech**

Another problem with AB 61 is that the language is overbroad, in that people who legally own firearms may be hesitant to engage in free speech or expression due to fears of frivolous *ex parte* GVRO's being issued against them by any of the classes of persons identified in the language of AB 61.

Within the purview of the First Amendment, a law that burdens a substantial amount of speech or other conduct constitutionally protected by the First Amendment is "overbroad" and therefore void. A statute's overbreadth must be substantial both in an absolute sense and relative to the statute's plainly legitimate reach. The mere fact that some impermissible applications of a statute can be conceived of is not sufficient to render a statute overbroad.[viii]

In order to prevent a "chilling effect" (i.e. frightening people into not speaking for fear of prosecution), overbroad statutes may be challenged as "facially invalid" even by those who are validly regulated on behalf of those who are not.[ix] Established case law also provides that the party bringing the claim bears the burden of establishing that substantial overbreadth exists.[x] Regardless of how long it takes before a party with standing brings such a claim, the CCLA strongly believes that the provisions of AB 61 will be held as overbroad, and thereby chilling the protected speech of many law-abiding citizens.

**Unreasonable Searches and Seizures**

AB 61 inadvertently makes laypersons a law enforcement surveillance tool, sidestepping Fourth Amendment warrant requirements. The Fourth Amendment of the U.S. Constitution establishes two important safeguards: (1) a prohibition on unreasonable searches and seizures, and (2) the requirement that the government obtain a valid warrant based on probable cause. The entire Fourth Amendment applies to both state and local governments.[xi]

According to *California v. Greenwood* (1988), a search arises whenever the government intrudes upon any area in which a subject has a sincerely held expectation of privacy that society is prepared to recognize as objectively reasonable.[xii] Absent exigent circumstances, the plain-view doctrine, or other exceptions, a search and seizure must not be effectuated absent a warrant based on probable cause[xiii], and when done so without a warrant, is generally presumed to be unreasonable.[xiv]

***Skinner v. Superior Court* (1977)**

In *Skinner v. Superior Court* (1977)[xv], in an action brought by the District Attorney under the Red Light Abatement Act, the court held that (1) that no statute, regardless of its purpose or entitlement, may authorize a police search or seizure in contravention of the Fourth Amendment, and

(2) there may be no preliminary or temporary restraint in a Red Light Abatement Law action upon an *ex parte* application based solely upon a verified complaint or affidavit.[xvi] Although Skinner deals the Red Light Abatement Act, the procedural aspects are similar to those introduced by AB 61, in that private citizens could seek an *ex parte* order, based solely on "a verified complaint or affidavit" that would grant law enforcement sweeping powers to conduct a warrantless search and seizure.

***Plain View Doctrine***

The plain view doctrine is an exception to the warrant requirement that justifies the warrantless seizure of items. For the plain-view doctrine to apply, two requirements must be met:[xvii]

1. It must be immediately apparent that probable cause exists to believe the item is contraband or evidence of crime, without the need for further testing, touching, handling, manipulation, physical invasion, or examination of any kind; and

2. Law enforcement officers must be lawfully in a position to see and obtain the item. The discovery of the item need not be inadvertent. The plain-view doctrine applies whether the police had any prior knowledge or expectation that they would come across the item.

**Right to Counsel**

The Sixth Amendment guarantees that, upon the initiation of formal criminal proceedings against a suspect, the suspect has the right, at every critical stage of the prosecution, to the effective assistance of counsel. The Sixth Amendment may also guarantee that an indigent defendant has the right to counsel appointed for the defendant at government expense. The Sixth Amendment right to counsel applies to state and local prosecutions.[xviii]

"Critical stages of prosecution" include all deliberate efforts by the government to elicit incriminating information from the defendant, whether directly by asking questions or surreptitiously, as through the use of a confidential informant or remote-eavesdropping technology. This deliberate-elicitation standard is satisfied whenever the police take affirmative action with the subjective goal of gleaning incriminating information.[xix]

The problem is that, by obtaining an *ex parte* order based solely on the verified complaint or affidavit of a layperson, whether or not it is done in good faith, the police are then free to execute a search and seizure, where the plain view doctrine would apply to contraband (e.g. cannabis products [see below]) found while searching the respondent's residence for firearms. Anything found during the search may be taken into evidence and used to support the filing of criminal charges or deferment to federal law enforcement authorities, before the right to counsel would attach, as a hearing to determine probable cause under the Fourth Amendment to detain an arrestee is generally not considered a "critical stage."[xx]

**CONFLICT WITH FEDERAL FIREARM AND CANNABIS LAWS**

Despite the fact that cannabis is now legal in 33 states (10 for non-medical use)[xxi] federal law mandates that cannabis is still a Schedule I controlled substance pursuant to the Controlled Substance Abuse Act of 1970.[xxii] This creates a dilemma for otherwise law-abiding citizens who choose to consume cannabis products as legal under state law. The courts have ruled that no Constitutional

right exists for persons who use cannabis legally under state law to purchase, own, or possess firearms. As such, all state laws affecting cannabis use and firearm ownership are still preempted by federal law, which effectively prohibits cannabis users from owning, possessing, or purchasing firearms. Due to the due process and Fourth Amendment concerns mentioned above, if a frivolous petition were filed against a cannabis user who owned, or had in their possession, firearms, and the police discovered that fact while serving the GVRO, then the respondent could be subject to criminal prosecution for violation of federal firearms laws.

**Ninth Circuit Ruling**

In 2016, the Ninth Circuit Court of Appeals held *Wilson v. Lynch* that medical marijuana users have no constitutional right to gun ownership.[xxiii] In that case, the plaintiff, a marijuana registry cardholder, brought suit challenging sections of federal Gun Control Act, accompanying regulation, and administrative policy effectively criminalizing the possession of a firearm by the holder of a state marijuana registry card, as violating her constitutional rights. Provision of federal Gun Control Act prohibiting sales of firearms to individuals whom sellers had reasonable cause to believe were drug users, accompanying regulation, and administrative policy effectively criminalizing the possession of a firearm by the holder of a state marijuana registry card did not violate the cardholder's First Amendment, Second Amendment, due process, or equal protection rights.

***First Amendment***

After considering the plaintiff's argument that purchase and possession of a state cannabis registry card constituted an exercise of free expression under the First Amendment, the Ninth Circuit held that no violation of the plaintiff's First Amendments had occurred because the government has constitutional authority to regulate the possession and sale of firearms, the law furthered the important governmental interest of preventing violent crime, that interest was unrelated to the suppression of free expression, and any restriction on the plaintiff's First Amendment rights was no greater than necessary to further that interest.

***Second Amendment***

Contending that provisions in the law unconstitutionally burdened her individual right to bear arms, the Ninth Circuit held that the plaintiff's Second Amendment rights were not violated, because the government had a substantial interest in preventing gun violence, empirical data and other evidence supported strong link between drug use and the risk of irrational or unpredictable behavior, including gun violence, and it was reasonable for federal regulators to assume that a registry cardholder was more likely to use marijuana than an individual who did not hold such a card.

***Due Process***

The plaintiff also made Fifth Amendment claims that her due process rights were violated. However, the Ninth Circuit held that no due process rights were violated because the plaintiff lacked any protected liberty interest in simultaneously holding a registry card and purchasing a firearm.

***Equal Protection***

The plaintiff finally argued that the law disadvantage several groups, including registry cardholders versus users of medical marijuana in states where registry cards are not required. She also argues that she was being treated differently from other persons with similar medical conditions who have pursued other methods of treatment. The Ninth Circuit held, however, that the law did not violate the plaintiff's right to equal protection on the grounds that the holder of registry cards were not suspect class, and the laws did not interfere with the exercise of any fundamental rights, and were reasonably related to reducing gun violence.

**18 U.S.C. § 922(g)(3)**

Under 18 U.S.C. § 922(g)(3) it is illegal for "any person . . . who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Thus, federal law effectively prohibits cannabis users from owning, possessing, or purchasing firearms; federal law also prohibits anyone from selling or giving firearms to a person they know or suspect to be a drug user or even the owner of a medical marijuana card.

A violation of § 922(g) may be punishable by up to ten years in prison.[xxiv]

***ATF Form 4473***

The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) uses a "Firearms Transaction Record", ATF Form 4473, to collect purchase data from licensed gun dealer transactions and transfers. The dealer may determine whether the applicant is a prohibited person based on their responses to the questions on the form.[xxv]

Question 11e asks:

> "Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance? The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside."

Thus, giving a false answer to Question 11e constitutes perjury, for which is punishable by up to ten years in prison.[xxiv]

**Cole Memo and Federal Enforcement of Cannabis Laws**

The Cole Memo was put in place during the Obama administration to protect state-legal cannabis businesses. The policy was later rescinded by former U.S. Attorney General Jeff Sessions in a move that alarmed the cannabis industry.[xxvi]

Nearly a year after Sessions rescinded the Cole Memo, incoming Attorney General William Barr stated in response to written questions from senators during confirmation hearings that he "do[es] not intend to go after parties who have complied with state law in reliance on the Cole Memorandum," and that he had "not closely considered or determined whether further administrative guidance would

be appropriate following the Cole Memorandum and the January 2018 memorandum from Attorney General Sessions, or what such guidance might look like . . ."[xxvii]

Since both the California electorate and state lawmakers have made clear the State's pro-cannabis policy since the adoption of the Compassionate Use Act of 1996, the California State Legislature would do well to consider whether granting law enforcement officers the right to search and seize firearms merely on the affidavit of a GVRO petitioner, which will have an adverse impact cannabis users, thereby opening the door to criminal liability at the federal level, accurately represents "California values."

**CONCLUSION**

As stated at the outset of this letter, AB 61 is a civil rights violation waiting to be struck down. It opens thousands of legal gun owners, who are in compliance with the law, to loss of fundamental liberty as the language is overbroad. It would not be fair to subject legal gun owners to the whims of laypersons who may have an axe to grind, to subject them to a search and seizure, invasion of privacy, or having to hire an attorney and pay exorbitant legal fees to fight the order or later attempt to clean up their record. There is also the issue of possibly being injured or killed if the officers mistakenly shoot the restrained person. The current standard of allowing immediate family members and law enforcement officers to file such petitions is sound. There may be another way to accomplish the author's purpose, but the current language of AB 61 is not the answer.

***For all of the reasons mentioned above, the CCLA strongly urges a "Noe" vote for Assembly Bill 61 (Ting).***

[i] Associated Press, California Man Sentenced to 20 Years in Fatal 'swatting', 209 Los Angeles Times, Mar. 19, 2019 at (2019), https://www.latimes.com/nation/la-na-tyler-barriss-swatting-sentencing-20190329-story.html (last visited June 11, 2019).

[ii] Victor, D. & Hagg, M., 'Swatting' Prank Sends Police to Home of David Hogg, Parkland Survivor, 2018 N.Y. Times, June 5, 2018 at (2018), https://www.nytimes.com/2018/06/05/us/david-hogg-swatting.html (last visited June 11, 2019).

[iii] Cal. Pen. Code §§ 18175(c)(2), 18185(b), 18190(b), 18190(d), & 18190(e).

[iv] Heleniak, D.N., Esq., Erring on the Side of Hidden Harm: The Granting of Domestic Violence Restraining Orders, 1 Partner Abuse (2010).

[v] Watson, B., The High Price of Restraining Orders, 2010 AOL.com, May 30, 2010 at (2010), https://www.aol.com/2010/03/30/the-high-price-of-restraining-orders/ (last visited June 11, 2019).

[vi] Cal. Courts, Gun Violence Restraining Orders (Judicial Council of Cal. 2019), https://www.courts.ca.gov/33961.htm (last visited June 11, 2019).

[vii] *Gluck v. Los Angeles* (1979) 93 Cal.App.3d 121

[viii] *United States v. Williams* (2008) 553 U.S. 285.

[ix] *Broadrick v. Oklahoma* (1973) 413 U.S. 601.

[x] *New York State Club Association v. City of New York* (1988) 487 U.S. 1.

[xi] *Wolf v. Colorado* (1949) 338 U.S. 25

[xii] *California v. Greenwood* (1988) 486 U.S. 35

[xiii] *Payton v. New York* (1980) 445 U.S. 573

[xiv] *Katz v. United States* (1967) 389 U.S. 347; *Horton v. California* (1990) 496 U.S. 128; *Mincey v. Arizona* (1978) 437 U.S. 385.

[xv] *Skinner v. Superior Court of Santa Clara County* (1977) 69 Cal.App.3d 183

[xvi] *Skinner v. Superior Court* (1977) 69 Cal. App. 3d 183

[xvii] See *Horton, supra.*

[xviii] See *Gideon v. Wainwright* (1963) 372 U.S. 335; *Klopfer v. North Carolina* (1967) 386 U.S. 213; *In re Oliver* (1948) 333 U.S. 257; *Pointer v. Texas* (1965) 380 U.S. 400; Duncan v. Louisiana (1968) 391 U.S. 145; *Washington v. Texas* (1967) 388 U.S. 14.

[xix] See *Kansas v. Ventris* (2009) 556 U.S. 586; *Brewer v. Williams* (1977) 430 U.S. 387; *Kuhlmann v. Wilson* (1986) 477 U.S. 436.

[xx] *Gerstein v. Pugh* (1975) 420 U.S. 103.

[xxi] National Cannabis Industry Association, State Policy Map, (2019), at https://thecannabisindustry.org/ncia-news-resources/state-by-state-policies/ <As of August 25, 2019>.

[xxii] 21 U.S.C. §§ 801, et seq.

[xxiii] *Wilson v. Lynch* (2016) 835 F.3d 1083

[xxiv] 18 U.S.C. § 924(a)(1)(A)

[xxv] https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download

[xxvi] Staff, AG Sessions rescinds Cole Memo, roiling marijuana industry, Marijuana Business Dialy, (Jan. 4, 2019), at https://mjbizdaily.com/report-sessions-rescind-cole-memo-creating-cloud-uncertainty-marijuana-businesses/

[xxvii] Angell, T., Trump Attorney General Pick Puts Marijuana Enforcement Pledge In Writing, Forbes, (Jan. 28, 2019), at https://www.forbes.com/sites/tomangell/2019/01/28/trump-attorney-general-pick-puts-marijuana-enforcement-pledge-in-writing/#514add635435