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## MEMORANDUM

**TO:** The Pennsylvania House Judiciary Committee

**FROM:** Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

**DATE:** June 19, 2018

**RE: OPPOSITION TO HOUSE BILL 2227 P.N. 3344 (STEPHENS)**

A number of bills have been, and will be, proposed this year to address the serious problem of gun violence. Similar to “red flag” laws being considered in other states, [HB 2227](#) would permit Pennsylvania judges to issue extreme risk protective orders (ERPO) in order to “temporarily prohibit individuals who demonstrate an extreme risk of causing harm to themselves or others from possessing firearms or ammunition in addition to any other relief necessary.”<sup>1</sup> Certainly one cannot argue with this laudable goal, but attempts to regulate the possession of firearms can implicate other constitutional rights, including rights to privacy and due process.

The heart of the ERPO process requires speculation – on the part of both the petitioner and judges – about an individual’s risk of possible violence. And the consequences that follow from an ERPO – search and seizure of private property, data entered into state and federal criminal databases – are enforced against individuals not because they are alleged to have committed a crime, but because somebody believes they might, someday, commit one.

**On behalf of the 59,000 members of the ACLU of Pennsylvania, I urge you to vote ‘no’ on House Bill 2227 for the following reasons:**

- Issuing an ERPO does not require that the threat posed by a person is either **imminent** or **present**.
- An alarmingly wide range of people, including former spouses, current or former sexual or intimate partners, and police officers, have standing to file ERPOs.
- Judges are given an overly broad list of criteria to consider when deciding whether to issue an ERPO.
- Issuing an ERPO does not require that a person has engaged in any **recent** actual, attempted, or threats of violence.
- The issuance of an ERPO grants police search and seizure authority – and in three instances, authorizes search warrants before or without a hearing on the petition.
- The bill creates three new crimes – one third-degree and two first-degree misdemeanors
- ERPOs are entered into state and federal background check systems, but no provision exists in the bill to remove orders once they have expired or have been terminated.

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<sup>1</sup> Stephens, Todd. “Extreme Risk Protective Order.” House Co-Sponsorship Memoranda (2017-2018 Reg. Sess.) Feb. 21, 2018, <http://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20170&cosponId=25241>

### **Issuing an ERPO does not require that the danger posed by a person is either present or imminent**

Extreme risk protective orders are defined as a “court order prohibiting a person from having in the person's possession or control, purchasing or receiving, or attempting to purchase or receive, a firearm, based upon a finding by clear and convincing evidence that the person presents a danger of suicide or of causing serious bodily injury<sup>2</sup> to another person.”<sup>3</sup> Unlike definitions found in other states’ red flag laws, which require a person pose an “imminent threat” or “present danger,”<sup>4</sup> HB 2227 does not specify or impose any sort of temporal limitation on that threat. The threat need not be imminent – *any* danger to oneself or others is sufficient grounds to issue an ERPO. This leaves the decision to impose an ERPO subject to broad and rather limitless interpretation.

### **An alarmingly wide range of people are permitted to file an ERPO against another person**

HB 2227 grants “family or household members” and law enforcement officers standing to file a petition for an ERPO. The “family or household member” definition appears to be borrowed from the [Protection from Abuse Act](#), namely “a spouse or person who has a spouse, person living as a spouse or who lived as a spouse, parent or child, other person related by consanguinity or affinity, current or former sexual or intimate partner or person who shares biological parenthood.”<sup>5</sup> While this expansive definition makes sense in the domestic violence context, it is excessively broad here. Including current sexual partners and those who are no longer married to / involved with a person invites any number of unreliable, questionable, spurious, or ill-intentioned allegations. Moreover, granting police officers the independent power to seek these orders without the request of any family members risks enabling this bill’s petitioning authority to be used in scenarios far outside the context that has prompted it.

### **Judges permitted to consider an overly broad list of criteria in deciding whether to issue an ERPO**

The criteria judges are permitted to consider include:

- (1) A history of suicide threats or attempts.
- (2) A history of threats or acts of violence or attempted acts of violence.
- (3) A history of domestic abuse.
- (4) A history of cruelty to animals.
- (5) A history of driving under the influence of alcohol or a controlled substance.
- (6) Recent unlawful use of controlled substances.
- (7) Previous unlawful or reckless use, display or brandishing of a firearm.
- (8) A previous violation of a protection from abuse order.
- (9) Acquisition or attempted acquisition within the previous 180 days of a firearm.
- (10) Failure to voluntarily and consistently take medication necessary to control a mental illness.
- (11) A propensity for violent or emotionally unstable conduct.<sup>6</sup>

It seems axiomatic that granting an ERPO should be premised on allegations of **recent** acts of violence or threats of violence. But that is not required under this bill. The judge can, of course, consider recent acts, which one would presume exist, but they do not need to be present or even a critical consideration in order to issue an ERPO. In fact, for those criteria that do reference acts of violence, there is no time frame provided for the “history” of any past indicators of violence. Finally, these criteria are not weighted in any way – the

<sup>2</sup> HB 2227, P.N. 3344 (2017-2018 Reg. Sess.) defines serious bodily injury as: “Bodily injury that creates a substantial risk of death or causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ” [p. 8, lines 19-22].

<sup>3</sup> HB 2227, P.N. 3344 [p. 7, lines 20-25].

<sup>4</sup> Connecticut’s “red flag” law is limited to situations where a person “poses a risk of imminent personal injury” and an independent determination concluding there is “no reasonable alternative” to confiscating their firearms in order to prevent the person from causing imminent harm. ([Conn. Gen. Stat. § 29-38c](#)). California’s statute similarly requires the person pose “an immediate and present danger” and a consideration of “less restrictive alternatives.” ([Cal. Pen. Code § 18125](#)).

<sup>5</sup> 23 Pa.C.S. § 6102

<sup>6</sup> HB 2227, P.N. 3344 [p. 9, lines 17-30; p. 10, lines 1-7].

bill provides no guidance to judges about which factors to prioritize. As a result, a court can, in theory, rely solely on a person's mental health, drug or alcohol use, or past (distant) criminal history – outside any context of recent 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.

### **Issuance of an ERPO grants police immediate search and seizure authority, even without a hearing**

In three instances, HB 2227 grants police the authority to search and seize property<sup>7</sup> without a hearing on the petition to issue the order: when judges issue a temporary order before a hearing<sup>8</sup>; if a person fails to appear for a hearing on a petition and the court issues an ERPO<sup>9</sup>; and if an emergency order is served.<sup>10</sup> Granting search and seizure warrants without a hearing raises serious due process concerns and can only encourage police to engage in invasive searches of respondents' residences, potentially turning those searches into fishing expeditions for other potential contraband.

HB 2227's inclusion of the right to counsel is to be applauded, as this protection is not routinely guaranteed in other states' red flag laws. However, as Pennsylvania remains the only state that does not provide state-level funding for indigent defense, [counties are strapped with 100% of the costs](#) associated with defending its poorest residents. As a result, HB 2227 will likely increase the cost and workload of already underfunded county public defenders' offices.<sup>11</sup>

### **Bill creates three new offenses: one third-degree and two first-degree misdemeanors**

If you are the subject of an ERPO, failure to surrender a firearm, other weapon or ammunition constitutes a first-degree misdemeanor, punishable by up to five years in prison and/or \$10,000 in fines. If you intentionally or knowingly return to or allow someone under active ERPO access to a firearm, other weapon or ammunition, you can also be charged with a first-degree misdemeanor. And anyone who intentionally or knowingly accepts possession of a firearm, other weapon or ammunition from someone under an active ERPO can be charged with a third-degree misdemeanor, punishable by up to one year of imprisonment and/or \$1000 in fines.

### **No provision to remove ERPOs submitted to state and federal background check systems**

Once an ERPO is issued, it is submitted to two databases: PICS (Pennsylvania Instant Check System) and NICS (Federal Bureau of Investigation National Instant Criminal Background Check System).<sup>12</sup> The bill includes no provision or process for removing that information once an ERPO has expired or has been terminated. The existence of an extreme risk protective order on someone's record in either/both of these databases could create barriers for people when they undergo a background check for access to basic services such as employment or housing.

As well-intentioned as this legislation is, its breadth and its lenient standards for both petitioning for and granting an ERPO are cause for concern. People not charged with a crime should not be subject to undue deprivations of liberty interests in the absence of a clear, compelling, and immediate showing of need. A narrower bill with basic due process protections can provide the proper balance in promoting both public safety and constitutional safeguards.

### **For these reasons, we urge you to vote 'no' on House Bill 2227.**

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<sup>7</sup> Specifically, the bill states that the issuance of an ERPO "shall be served concurrent with a warrant to search for and seize any firearm or concealed carry license in the respondent's possession or control."

<sup>8</sup> HB 2227, P.N. 3344 [p. 10, lines 10-15].

<sup>9</sup> *Id.* at p. 10, lines 22-26.

<sup>10</sup> *Id.* at p. 14, lines 20-22.

<sup>11</sup> The Sixth Amendment Center: Know Your State – Pennsylvania, <http://sixthamendment.org/know-your-state/pennsylvania/>

<sup>12</sup> HB 2227, P.N. 3344 [p. 11, lines 6-10].