CAL☆FFL

Monday, June 16, 2014

County of Santa Barbara Board of Supervisors
Clerk of the Board
105 East Anapamu Street
Santa Barbara, CA 93101

VIA FAX AND EMAIL

RE: File no. 14-00471 | Board Meeting of: Tuesday, June 17, 2014
Board consideration of recommendations regarding potential advocacy position on legislation: Assembly Bill 1014 (Skinner/Williams) "Gun Violence Restraining Orders"

Dear Members of the Santa Barbara County Board of Supervisors and Clerk of the Board:

California Association of Federal Firearms Licensees ("CAL-FFL") is the Golden State's most tenacious advocacy group for Second Amendment and related rights. CAL-FFL's thousands of members include law-abiding gun owners, collectors, training professionals, shooting ranges, dealers, manufacturers, and others who participate in the firearms ecosystem. CAL-FFL advances the interests of its members and the general public through direct lobbying, legal actions, education, and public outreach.

I write you today regarding your file no. 14-00471 (consideration of recommendations regarding potential advocacy position on legislation: Assembly Bill 1014 (Skinner/Williams) "Gun Violence Restraining Orders") to be heard at the Tuesday, June 17, 2014, meeting of the Board of Supervisors.

For the reasons outlined in our letters to AB 1014's authors (attached), we encourage you to select Option 1 ("Take no position on Assembly Bill (AB) 1014

(Skinner/Williams) on Gun Violence Restraining Orders..."). However, should you select Option 2 ("Take an advocacy position" on AB 1014), we strongly encourage you to "[d]irect staff to forward, and approve and authorize the Chair to execute a letter stating the Board's position" of either "watch" or "oppose" to the bill's authors, "members of the legislature including, but not limited to, the county legislative delegation, appropriate committee chairs and the Governor..."

On behalf of our members, California's millions of law-abiding gun owners (including thousands of Santa Barbara residents), everyone who considers the Constitutionally-enshrined right of due process to be fundamental, and all who share our view that people are presumptively innocent, we respectfully request that AB 1014 be opposed or unsupported by the County of Santa Barbara.

Sincerely,

Brandon Combs
President

Encl: Copy of CAL-FFL letters of opposition to AB 1014

Cc: Mona Miyasato, CEO
Dennis Bozanich, Assistant to the CEO, Legislative Coordinator
Jason Davis, Davis & Associates (CAL-FFL counsel)
CAL-FFL Policy (file)

CAL☆FFL

June 12, 2014

Assembly Member Nancy Skinner
Assembly Member Das Williams
State Capitol
Sacramento, CA 95814

RE: **AB 1014 (Skinner, Williams) | As Amended June 11, 2014**
Position: **OPPOSE**

Dear Assembly Members Skinner and Williams,

California Association of Federal Firearms Licensees remains staunchly opposed to AB 1014.

While your amendments of June 11, 2014, reflect a more honest evaluation of what the bill would actually do—e.g., *ex parte* hearings and restraining orders—they offer little comfort. The recent amendments to this draconian bill do not address the measure's numerous violations of constitutional rights nor do they soothe the tension between people who would heartlessly leverage the *Ex Parte* Gun Violence Restraining Order system (and its corollary search warrant provisions) and their social enemies or those having opposing political views.

Additionally, the noticing provisions of AB 1014 remain terminally flawed. Persons subject to an *Ex Parte* Gun Violence Restraining Order will only know that they have been stripped of their rights and placed into a prohibited category if they "can reasonably be located." The cross-jurisdictional issues that present here are many.

Since a restraining order, which might be petitioned for and issued in San Diego County, but, due to factors such as residency, school, or work, "shall be served on the restrained person by a law enforcement officer" in Shasta County, for example, there is no guarantee that local officials will have the available resources to serve the order in time for the subject to request a hearing, surrender their firearms in accordance with the issued order, acquire child care, seek and be granted time off work, and travel to San Diego to be heard "within 14 days after the date on the order before the court that issued the order or another court in that same jurisdiction." The subject would then be yoked with an immovable and un-appealable loss of property, civil rights, and a lasting social stigma.

We note here that, in the case of Isla Vista murderer Elliot Rodger, even if family members (in Los Angeles) had access to the restraining order system created by this bill, neither they nor law enforcement would have been able to prevent the tragedy since "they heard about

the shooting en route." [1] In fact, "Rodger....had been receiving treatment for years from several psychologists and counselors," [2] and yet none of those who knew him to have "warning signs that [he]....harbored violent tendencies"—including his family and mental health professionals—saw fit to demand a mental health evaluation and hold under Welfare and Institutions Code § 5150. AB 1014 would not have prevented the Isla Vista shooting, but a mental health evaluation and prohibition under *existing* law might have.

And how will our budged-strapped courts and law enforcement agencies across our 58 counties communicate and accommodate the new mandate? Little over a year ago, California Supreme Court Chief Justice Tani Cantil-Sakauye said, "I am afraid California is on the wrong side of history when it comes to its funding of justice." [3] Given the poor fiscal health and long dockets of our court system, this measure will surely lead to even more desperate conditions for those seeking speedy trials, judicial relief, and timely remedy of grievances.

Finally, given this bill's patent nexus with mental health matters, this far-reaching measure compels additional public hearings and review by, at minimum, the Senate Committee on Health.

I encourage you to see our June 4, 2014, letter of opposition (attached) for a more thorough review of the constitutional implications of your bill. We again respectfully request that you withdraw Assembly Bill 1014, and, failing that, for the Legislature to summarily reject it.

Sincerely,

Brandon Combs
President

[1] "Virgin killer's parents read his hate-filled manifesto then called the police and rushed to stop him when they heard of murder spree on their car radio," at http://www.dailymail.co.uk/news/article-2639177/Parents-shooter-read-manifesto-driving-stop-son-heard-massacre-radio-revealed-investigators-search-moms-house.html, last visited June 12, 2014.

[2] "In Elliot Rodger, authorities in Calif. saw warning signs but didn't see a tipping point," at http://www.washingtonpost.com/national/sheriff-calif-shooter-rodger-flew-under-the-radar-when-deputies-visited-him-in-april/2014/05/25/88123026-e3b4-11e3-8dcc-d6b7fede081a_story.html, last visited June 12, 2014.

[3] "Justice Assails California Court Budget Cuts," at http://www.courthousenews.com/2013/03/12/55621.htm, last visited June 12, 2014.

CAL☆FFL

June 4, 2014

Assembly Member Nancy Skinner
Assembly Member Das Williams
State Capitol
Sacramento, CA 95814

RE: **AB 1014 (Skinner, Williams)**
Position: **OPPOSE**

Dear Assembly Members Skinner and Williams,

California Association of Federal Firearms Licensees (the "Association") submits this letter in opposition to Assembly Bill 1014.

AB 1014 would allow "any person" to apply for a court to issue a "gun violence restraining order" prohibiting another person from possessing a firearm based on a showing that "the named person poses a significant risk of personal injury to himself or herself or others by possessing firearms." § 18101(a). While many provisions of the bill concern the Association and its members, we write to address the central defect of the bill: **It is unconstitutional**. By creating a process by which a person may be deprived of both liberty and property without notice and an opportunity to be heard, the bill violates the Due Process Clause of the Fifth Amendment.

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. AB 1014 violates this basic standard because it allows any person to make a one-sided showing to a court to prevent another person from buying or continuing to possess a firearm, with no notice whatsoever to the person accused of being a risk to themselves or others. Persons can be stripped of their firearms, without notice, based only on the allegations of another person.

The United States Supreme Court "tolerate[s] some exceptions to the general rule requiring predeprivation notice and hearing, but only in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the

event.'" *James Daniel Good*, 510 U.S. at 53 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972)). "These situations, however, must be truly unusual." *Fuentes*, 407 U.S. at 90.

Due process "is a flexible concept that varies with the particular situation," *Zinermon v. Burch*, 494 U.S. 113, 127 (1990), and to determine what process is constitutionally due, courts balance three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Where, as here, a potential deprivation stems from a dispute between private parties, the third *Mathews* factor is modified to require "principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interests the government may have in providing the procedure or forgoing the added burden of providing the greater protections." *Connecticut v. Doehr*, 501 U.S.1, 11 (1991).

Application of these factors demonstrates that AB 1014's restraining order scheme would be unconstitutional, as courts have forbidden far less serious deprivations of process. *E.g.*, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 3, (1978) (notice and hearing required before cutting off utility services); *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (notice and hearing required before suspending student for disobedient behavior).

1. <u>The private interest at stake is substantial</u>.

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. ----, 130 S. Ct. 3020, 3042 (2010). And by establishing a scheme that would prohibit possession (and allow for seizure) of firearms, AB 1014 strikes 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).

The bill also threatens an individual's liberty interest in protecting their good name and reputation by depriving them of the opportunity to be heard before a restraining order is issued. *See Wisconsin v. Constantineau*, 400 U.S. 433, 436-37 (1971) ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential"); *accord Goss*, 419 U.S.

574-75 (1978) (recognizing that a protectable liberty interest is implicated by accusation of misconduct). In *Goss*, for example, the U.S. Supreme Court extended the guaranty of procedural due process to the suspension of public high school students accused of disruptive and disobedient conduct. In doing so, the Court explained that

> [D]ue process requires in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.

419 U.S. at 581. Those facing a far more serious deprivation should be accorded at least as much process as a student who speaks out of turn.

2. <u>The ex parte procedure creates an unacceptable risk of erroneous deprivation and affords no protection to the subject</u>.

Remarkably, AB 1014 allows denial of the constitutional right to purchase a firearm based on a secret proceeding. "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking." *James Daniel Good*, 510 U.S. at 55. "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring); *see also James Daniel Good*, 510 U.S. at 55 (*ex parte* seizure "create[d] an unacceptable risk of error" where subject could not provide a defense against government's claims). In *Doehr*, the Supreme Court held that there was a substantial risk of error where a statute allowed for attachment of property in civil assault proceeding based on a plaintiff's affidavit:

> It is self-evident that the judge could make no realistic assessment concerning the likelihood of an action's success based upon these one-sided, self-serving, and conclusory submissions. ... [I]n a case like this involving an alleged assault, even a detailed affidavit would give only the plaintiff's version of the confrontation. Unlike determining the existence of a debt or delinquent payments, the issue does not concern "ordinarily uncomplicated matters that lend themselves to documentary proof."

510 U.S. at 14 (citation omitted). These same concerns are present here, and demonstrate that basic procedures – notice to the subject and an opportunity to be heard – are necessary to protect the subject from the entry of an unjust restraining order. The fact that the bill provides for a postdeprivation hearing does not adequately address this concern.

The Supreme Court has long recognized that a subsequent hearing "would not cure the temporary deprivation that an earlier hearing might have prevented." *James Daniel Good*, 510 U.S. at 56 (quoting *Doehr*, 501 U.S. at 15).

3. <u>The government and private interests do not justify forgoing a predeprivation hearing, particularly since the statute allows self-interested private parties to initiate the deprive subject's liberty and property interests</u>.

The statute's breadth – that "any person" can seek a restraining order – is fatal. While the state has an interest in reducing gun violence, the risk of abuse and erroneous deprivation at the hands of self-interested applicants inherent in the statute's design demonstrate that it cannot withstand due process scrutiny. The statute provides no disincentive or penalty for wrongful accusations, leading to a likelihood that the process will be used as means to attack political or other "enemies."

On this score, AB 1014 is unlike the "extraordinary circumstances" and "unusual" situations where the Supreme Court has allowed a departure from the notice and hearing requirement. Indeed, the Court's precedents demonstrate a wariness of "self-interested private parties," and a refusal to depart from the general rule of notice and a hearing where the deprivation is not initiated by the government. *See United States v. $8,850, 461 U.S. 555*, 562 n.12 (1983); *Fuentes*, 407 U.S. at 91; *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974) (distinguishing *Fuentes*).

Finally, it is no burden on the government to provide notice and a hearing before issuing a restraining order, since the statute requires an automatic hearing within 14 days regarding whether the order should remain in place. *See James Daniel Good*, 510 U.S. at 59 (no significant burden imposed by predeprivation hearing where postdeprivation hearing required); *Doehr*, 501 U.S. at 16 (same).[1] By contrast, many law-abiding people, facing a hearing after being confronted by the authorities and told they have to surrender their firearms, may be inclined to simply throw in the towel rather than fight, and the deprivation would be complete.

* * *

[1] We recognize that "[p]rocedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken." *Fuentes*, 407 U.S. 90 n.22. Even so, it is worth noting that a predeprivation hearing would be more efficient for the state, which bears the burden, at a post deprivation hearing, of proving "by clear and convincing evidence" that a restraining order should stay in place. Requiring a predeprivation hearing would weed out some unmeritorious claim (either through self-selection or the adversary process) before the state goes through the burden of executing a restraining order and seizure warrant, and incurs the expense of appearing at a postdeprivation hearing.

At one level, AB 1014 reflects a laudable shift in the approach to preventing illegal gun violence. The typical (and massively overbroad) "solution" offered in response to the problem of mentally deranged individuals who go on killing sprees is to make it impossible for ordinary, law-abiding people to obtain firearms. While the statute may be aimed at preventing a mass murder by the next Adam Lanza (Newtown) or Elliot Roger (Isla Vista), the ease with which the constitutional right to possess a firearm may be secretly restricted makes AB 1014 fertile ground for more mundane battles, such as family law disputes between angry spouses or run of the mill grudge matches between neighbors. The law would likewise provide opportunities to target political minorities.

Good intentions do not make a law constitutional and this bill is plainly unconstitutional. People cannot be denied their constitutional right to acquire and possess firearms based on secret proceedings. Where there are lawful reasons for denying a person their right to purchase a firearm, there is no legitimate reason for denying the person notice and an opportunity to present their side of the case. The courts have overturned far less substantial deprivations of process, and there is no doubt that this deprivation would be struck down as well.

The Legislature should avoid this result and we respectfully urge you to withdraw AB 1014 from consideration.

Sincerely,

Brandon Combs
President