COUNTY COURT, GUNNISON COUNTY, COLORADO 200 E. Virginia Ave. Gunnison, CO 81230	
GUNNISON POLICE DEPARTMENT, Petitioner, v. NICHOLAS MAXIMILIANO VALLEJO, Respondent.	
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AMICUS CURIAE BRIEF OF THE STATE OF COLORADO

Respondent brings a sweeping challenge to the constitutionality of Colorado's Deputy Zackari Parrish III Violence Prevention Act, § 13-14.5-101, *et seq*., claiming it violates the Second Amendment and the Fifth Amendment to the United States

Constitution, as well as similar provisions in the Colorado Constitution. As with all laws passed by the General Assembly, the State of Colorado has a strong interest in defending the constitutionality of the challenged statute. *Lucchesi v. State*, 807 P.2d 1185, 1194 (Colo. App. 1990).

The Violence Prevention Act is constitutional. The General Assembly acted well within the bounds of the Constitution when it enacted the Violence Protection Act to temporarily authorize the removal of firearms from persons who the Court determines, after a hearing, pose a significant risk of causing personal injury to themselves or others. Every court that counsel is aware of that has examined the constitutionality of similar laws has reached the same conclusion: these laws satisfy constitutional requirements.

STANDARD OF REVIEW

Respondent brings a facial challenge to the Violence Prevention Act. Like all statutes passed by the General Assembly, the Act is presumed constitutional. *Danielson v. Dennis*, 139 P.3d 688, 691 (Colo. 2006). Respondent must prove its unconstitutionality beyond a reasonable doubt. *Huber v. Colo. Mining Ass'n*, 264 P.3d 884, 889 (Colo. 2011). And for facial challenges, as here, Respondent must demonstrate "no conceivable set of circumstances" under which the law can be constitutionally applied. *Danielson*, 139 P.3d at 691. t

This rigorous standard is imposed because courts "do not lightly declare a statute unconstitutional." *Higgs v. W. Landscaping & Sprinkler Sys., Inc.*, 804 P.2d

161, 165 (Colo. 1991). Rather, declaring a statute unconstitutional is "one of the gravest duties impressed upon the courts." *City of Greenwood Vill. v. Pet'rs for Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000). The conflict between the law and the Constitution should be "clear and unmistakable" before a court substitutes its judgment for that of the General Assembly by declaring a statute unconstitutional. *Id.* (quoting *People v. Goddard*, 8 Colo. 432, 437, 7 P. 301, 304 (1885)). The constitutionality of a statute is a question of law for the court. *Coffman v. Williamson*, 348 P.3d 929, 934 (Colo. 2015).

I. The Violence Prevention Act is constitutional under both the Second Amendment and article II, § 13 of the Colorado Constitution.

Respondent asserts that the Act violates the Second Amendment and Colorado's constitutional analog. The Act amply satisfies the standards of both the Second Amendment and the Colorado Constitution.

As articulated in both documents, the right to bear arms is not absolute. *See, e.g.*, *Robertson v. City and Cty. of Denver*, 874 P.2d 325, 329 (Colo. 1994). It is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008). Rather, courts repeatedly uphold the reasonable regulation of firearms, specifically including prohibitions on the possession of firearms by persons considered to be dangerous. *Id.* (holding that the Second Amendment does not preclude "longstanding prohibitions on the possession of firearms by felons and the mentally ill"); *see also McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010) (recognizing

ongoing efforts by state and local governments to preserve public safety through experimentation with regulation of firearms).

A. The Act does not violate the Second Amendment.

After the Supreme Court's *Heller* decision, courts have largely coalesced around a two-step approach to evaluate restrictions on firearm possession. A reviewing court first determines whether the law burdens conduct falling within the scope of the Second Amendment, and if it does, then applies an appropriate level of scrutiny. *See, e.g.*, *United States v. Reese,* 627 F.3d 792, 800–01 (10th Cir. 2010).

The constitutionality of the Violence Prevention Act may be resolved at the first step of the inquiry because the Act does not fall within the scope of the Second Amendment. The Second Amendment is aimed at "the right of *law-abiding, responsible citizens* to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635 (emphasis added). "Traditionally, individuals who were considered dangerous to the public or to themselves were outside of the scope of Second Amendment protection." *Beers v. Att'y Gen. United States*, 927 F.3d 150, 157 (3d Cir. 2019), *petition for cert. filed*, Jan. 10, 2020. For this reason, restrictions on possession by these individuals are "presumptively lawful regulatory measures." *Heller*, 554 U.S. at 627 n.26.

When it comes to red-flag statutes, other courts have concluded that the laws do "not implicate the [S]econd [A]mendment" because they do "not restrict the right

of law-abiding, responsible citizens to use arms in defense of their homes," but rather restrict access only by "those whom a court has adjudged to pose a risk of imminent physical harm to themselves or others." *Hope v. State*, 133 A.3d 519, 524 (Conn. Ct. App. 2016) (emphasis added); *see also City of San Diego v. Boggess*, 157 Cal. Rptr. 3d 644, 654 (Cal. Ct. App. 2013) (concluding that a comparable law authorizing seizure of firearms due to an individual's mental condition fell outside the scope of the Second Amendment).

Colorado's Violence Prevention Act similarly regulates firearm possession by only those persons who a court has found pose a significant risk of injury. The Act, therefore, covers conduct beyond the bounds of the intended protection of the Second Amendment for law-abiding, responsible citizens. As a result, this Court's inquiry may be complete at the first step. *See Reese,* 627 F.3d at 800-01.

But even if the Act falls within the scope of the Second Amendment, it easily passes further review. At the second step, the rigor of judicial review turns on how closely a particular law or policy approaches the core of the Second Amendment right and how severely it burdens that right. *See, e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011). Most courts apply familiar principles of intermediate scrutiny, asking whether there is a substantial relationship or a reasonable fit between the challenged law and a significant or important governmental interest. *See, e.g.*, *United States v. Huitron-Guizar,* 678 F.3d 1164, 1169 (10th Cir. 2012)

(applying intermediate scrutiny to uphold federal statute prohibiting firearm possession by aliens).

The State's interests in public safety and saving lives are "indisputably important interests." *Id.* at 1170 (internal citations omitted); *see also Davis v. Gilchrist Cty. Sheriff's Office*, 280 So. 3d 524, 532 (Fla. Dist. Ct. App. 2019) ("[T]he prevalence of public shootings, and the need to thwart the mayhem and carnage contemplated by would-be perpetrators does represent an urgent and compelling state interest."). As its name suggests, Colorado's Violence Prevention Act is targeted at protecting lives by addressing real and immediate threats of violence.

The Act is appropriately tailored in several ways to have a substantial relationship to the State's interest. First, the Act focuses on a very small group of people. It covers only those who have been subjected to rigorous judicial findings, after extensive due process, that they pose a significant risk to themselves or others. Second, the Act is limited in time. Even following entry of an Extreme Risk Protection Order, a respondent's ability to bear arms is curtailed only for a defined period of time. An Extreme Risk Protection Order does not permanently alter his or her ability to purchase, own, or use firearms. A respondent may fully engage in these activities when the conditions that lead to the imposition of the Extreme Risk Protection Order are resolved. For these reasons, the Act is a measured method of achieving the State's interest in violence prevention and does not violate the Second Amendment.

B. The Violence Prevention Act does not violate Article II, section 13 of the Colorado Constitution.

In Colorado, "[t]he right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons." Colo. Const. art. II, § 13. At the core of Colorado's right is the right of self-defense, and Colorado courts have long focused on whether challenged regulations operate to deny that right. *See Robertson*, 874 P.2d at 328-29 (tracing Colorado's line of cases). Colorado courts also recognize a companion principle – that the right to bear arms is subject to reasonable regulation to protect public safety. *Id.* at 329. As with the Second Amendment, the Colorado Constitution does not grant "an absolute right to bear arms under all situations." *People v. Blue*, 190 Colo. 95, 103, 544 P.2d 385, 391 (1975).

In keeping with the plain differences between Colorado's right to bear arms and the text of the Second Amendment, Colorado currently follows its own course in assessing challenges brought under its right to bear arms provision. Colorado courts have not yet declared whether the right described in article II, section 13 is a "fundamental" right. In fact, Colorado courts have expressly declined to assign a particular label to the nature of the right to bear arms in Colorado. *Robertson*, 874 P.3d at 331; *Rocky Mountain Gun Owners v. Hickenlooper*, 2018 COA 149, ¶ 18, 2018 WL 5074555, at *4 (Colo. App. Oct. 18, 2018) (holding that state courts

currently are bound by the *Robertson* analysis), *cert. granted*, No. 18SC817, 2019 WL 1768233 (Apr. 22, 2019).

For the last 25 years, Colorado has examined "whether the law at issue constitutes a reasonable exercise of the state's police power." *Robertson*, 874 P.2d at 329. *Robertson*'s "reasonable exercise" test assesses whether a restriction "is reasonably related to a legitimate governmental interest such as the public health, safety, or welfare." *Id.* at 331. This test is more robust than mere rational basis review. *Students for Concealed Carry v. Regents*, 280 P.3d 18, 27-28 (Colo. App. 2010). It assesses whether a law imposes such an onerous restriction on the right to bear arms that it amounts to an illegitimate exercise of the police power. *Robertson*, 874 P.2d at 333; *City of Lakewood v. Pillow*, 180 Colo. 20, 23, 501 P.2d 744, 745 (Colo. 1972) (holding that regulation of the right to bear arms "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms"). This assessment aims to separate those restrictions that are so arbitrary or severe as to amount to a denial of the right from those restrictions that may burden the right but nonetheless leave open ample means to exercise the core of the right. *See Students for Concealed Carry*, 280 P.3d at 28.

Other states engaging in similar analysis on the constitutionality of red flag laws have found that the laws do not materially burden the core constitutional value of the right to bear arms. In assessing the "magnitude of the impairment" on one subject to an Extreme Risk Protection Order, the Indiana Court of Appeals

found that an Extreme Risk Protection Order does not present a "substantial obstacle" to the right of self-defense. *Redington v. State*, 992 N.E.2d 823, 834 (Ind. Ct. App. 2013). Laws like Colorado's provide both a mechanism to recover the ability to possess firearms, including an ability to continue to petition for recovery of the right, as well as an ability to possess other weapons for self-defense. As a result, red flag laws do not eviscerate the right to bear arms. *Id.*

For the same reasons that the Act satisfies Second Amendment standards, it is reasonably related to a legitimate government interest, and thereby satisfies Colorado's reasonable exercise test. The Act does not sweep broadly to deny the right to bear arms to law-abiding responsible citizens. Instead, the Act applies to a narrow class of individuals who have been adjudicated by a court to pose a significant risk of injury, including in some cases, a significant risk of unlawful conduct. And even for the small class of citizens subject to the Act, the law is limited in scope because Extreme Risk Protection Orders have reasonable expiration dates. As a result, the Act leaves open ample means for citizens to exercise the core of the right to self-defense. Because the Act is a reasonable exercise of the State's police power, it is constitutional under article II, section 13.

II. The Violence Protection Act protects due process through numerous safeguards.

Colorado's Violence Protection Act provides many meaningful due process protections. The initial, temporary protective order requires that an independent judge, in a hearing, review sworn testimony to determine whether the respondent "poses a significant risk of causing personal injury to self or others in in the near future" because of having a firearm. § 13-14.5-103(3), C.R.S. (2019). Once established, this order remains in effect, absent extension by consent, for no more than fourteen days or a full hearing, whichever comes first. *Id.* § 103(5)(a), (b).

At this full hearing, the Act requires notice to respondent, *id.* § 105(1)(a), counsel for respondent paid, if necessary, by the court, *id.* § 104(1), the opportunity for evidence from the respondent, and cross examination by respondent, *id.* § 105(5). After this full hearing, in order to enter an Extreme Risk Protection Order, the court must find, by clear and convincing evidence, that "respondent poses a significant risk of causing personal injury to self or others by having in his or her custody or control a firearm or by purchasing, possessing, or receiving a firearm[.]" *Id.* § 105(2). This order cannot last longer than 364 days. *Id.* And anyone who "files a malicious or false petition for a temporary extreme risk protection order or an extreme risk protection order may be subject to criminal prosecution[.]" *Id.* § 113(2). Finally, Respondent may seek to terminate this risk protection order before it would otherwise expire. *Id.* § 107(1)(a).

These procedural protections fall well within the constitutional requirements for due process. Indeed, temporary administrative action (without such independent review) satisfy due process when the respondent has the right to a prompt hearing. In *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 298 (1981), the Supreme Court found a statute that allowed an administrator to shut down a mine based on a finding of "immediate danger to the health or safety of the public" satisfied due process. The operator could appeal this finding to the head of the agency within five days and then to a court. *Id.* at 298–99. The Court recognized that due process permits such "summary administrative action" for the "[p]rotection of the health and safety of the public[.]" *Id.* at 300. There, this procedure satisfied due process because the operators had "prompt and adequate post-depravation administrative hearings and an opportunity for judicial review." *Id.* at 303.

Here, a respondent receives even more due process protections. An independent judge, not an administrator, must make the determination. And the respondent receives a full judicial hearing within a set timeframe—no more than fourteen days—rather than, as in *Hodel*, just an opportunity to seek judicial review.

This same framework of allowing a full hearing after the State exercises its authority applies to rights that are even more fundamental than the right to bear arms, such as the "protected liberty interest in the care, custody, and control of [one's] children." *Gomes v. Wood*, 451 F.3d 1122, 1127 (10th Cir. 2006). The State can remove children from their parents without a hearing consistent with due

process based on "reasonable suspicion of an immediate threat" so long as the State provides the "parents a prompt post-removal hearing." *Id.* at 1130; *see also In re Marriage of Fiffe*, 140 P.3d 160, 162 (Colo. App. 2005) (permitting ex parte hearings to obtain temporary protection orders for "extreme circumstances of imminent danger"). The Violence Prevention Act provides similar safeguards, but with specific time requirements for that full hearing after the court issues the initial order.

Finally, to obtain an Extreme Risk Protection Order longer than fourteen days requires a full hearing, with respondent provided counsel and the opportunity to cross examine and present evidence. In parental termination hearings, "[p]rocedural due process requires that a parent be given notice of the proceedings, an opportunity to be heard, and the assistance of legal counsel. These rights are satisfied if the parent appears through counsel and is given the opportunity to present evidence and cross-examine witnesses." *People ex rel A.E.L.*, 181 P.3d 1186, 1192 (Colo. App. 2008); *People in Interest of M.B.*, 2020 COA 13 ¶30 (reaffirming these due process standards); *accord Davis*, 280 So. 3d at 533 (holding similar law satisfied due process because of requirement of a full hearing within fourteen days). Because the Violence Prevention Act provides all of these protections, it meets due process requirements.

III. The Violence Prevention Act is not unconstitutionally vague.

Respondent argues that the Violence Prevention Act is unconstitutionally vague because its definition of those to whom the Act applies – persons who "pose a

significant risk of causing personal injury to self or others," § 13-14.5-105(2) – is imprecise. But the Act does not leave this key standard to mere guesswork and the statute's definition amply satisfies constitutional standards.

The controlling consideration in a void-for-vagueness challenge under both the Colorado and United State Constitutions is whether the challenged statute is sufficiently specific to apprise persons of ordinary intelligence of what conduct is prohibited. *People v. Riley*, 708 P.2d 1359, 1362 (Colo. 1985); *Johnson v. United States*, 135 S. Ct. 2551, 2576 (2015). Statutes must provide sufficiently definitive standards so as to provide fair notice to the public and guard against arbitrary or discriminatory enforcement. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). "[A] law is unconstitutional only if it is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *People v. Hickman*, 988 P.2d 628, 643 (Colo. 1999) (internal quotations omitted). And to demonstrate vagueness on a facial challenge, Respondent must clear a particularly high bar by showing that the Violence Protection Act is "'impermissibly vague in all of its applications." *Id.* (internal quotations omitted).

State and federal courts have rejected vagueness challenges like the one raised here because "significant" has a well-established and widely understood meaning. *Dr. John's Inc. v. City of Roy*, 465 F.3d 1150, 1158 (10th Cir. 2006) (holding that phrase "significant or substantial" could be understood by a person of

ordinary intelligence); *City of Colorado Springs v. Bd. of Cty. Comm'rs*, 895 P.2d 1105, 1114 (Colo. App. 1994) (noting that "significant" is used in over 200 state statutes "without any reported interpretative difficulty"). "While determining whether a person's freedom is restrained 'in any significant way' will likely require a case-by-case, fact-specific inquiry, this is not a basis to strike down an entire statutory provision as void for vagueness." *Denver Health & Hosp. Auth. v. City of Arvada ex rel. Arvada Police Dep't*, 405 P.3d 308, 314 (Colo. App. 2016), *rev'd on other grounds*, 403 P.3d 609 (Colo. 2017). And courts reviewing red-flag statutes in other states have rejected similar vagueness challenges. *See Davis*, 280 So. 3d at 532 (holding that the phrase "significant danger" in Florida's statute is not unconstitutionally vague).

The Violence Prevention Act's standards are sufficiently defined so as to satisfy any constitutional concerns. Not only does that Act require a "significant risk" of harm, it provides further guidance by listing twelve specific factors that may be grounds for entry of an ERPO. And the statute then goes even a step further by requiring that the grounds for entry of an ERPO must be demonstrated by clear and convincing evidence. The Act, therefore, provides fair notice of the grounds for entry of an Extreme Risk Protection Order and is not impermissibly vague.

IV. The Violence Prevention Act does not violate any separation of powers principles.

The Act does not violate the separation of powers nor does it unconstitutionally delegate legislative authority to family members of respondents,

law enforcement, or courts. The non-delegation doctrine, which is rooted in the constitutional separation of powers, typically is raised to challenge the General Assembly's delegation of rulemaking authority to an administrative agency or conferral of discretionary authority to an agency or individual. *See, e.g., People v. Lowrie*, 761 P.2d 778 (Colo. 1988) (considering whether the legislature permissibly delegated authority to an agency executive director to make rules for establishments serving alcoholic beverages); *People v. Holmes*, 959 P.2d 406 (Colo. 1998) (addressing a non-delegation doctrine challenge to a statute conferring authority to detention facility administrators to determine what constitutes contraband).

The non-delegation doctrine is not applicable here. The statute does not delegate rulemaking authority, nor does it confer discretionary authority to any person to set variable standards for either filing petitions or entering Extreme Risk Protection Orders. The Act operates in the same manner as innumerable other civil and criminal statutes – it defines standards to govern the conduct of the public and law enforcement and sets procedures for courts to enforce those standards.

And even if the non-delegation doctrine has some applicability here, the Act passes muster because it sufficiently "describes what job must be done, who must do it, and the scope of his authority." *Swisher v. Brown*, 157 Colo. 378, 402 P.2d 621, 626 (1965). The Violence Protection Act defines a limited class of persons who may petition for a protection order, provides parameters for such petitions, and sets forth

a detailed list of factors that a court may consider in issuing a protection order as well as the evidentiary burden that must be satisfied. Because the detailed framework for the law's operation "provides sufficient standards and safeguards to protect against the unreasonable exercise of discretionary power and offers adequate notice of the penalties applicable to a violator," *Lowrie*, 761 P.2d at 781-82, the Act does not violate any separation of powers principles.

CONCLUSION

The Violence Prevention Act establishes a robust and fair procedure for temporarily removing weapons from those who a court has found to pose a significant risk of causing personal injury in the near future. The Act provides law enforcement a valuable tool for saving lives, while honoring constitutional protections.

Respectfully submitted this 27th day of April, 2020.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **AMICUS CURIAE BRIEF OF THE STATE OF COLORADO** upon all parties through their counsel of record herein electronically via CCES, at Denver, Colorado, this 27th day of April, 2020 addressed as follows:

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