



VIRGIN ISLANDS DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

December 5, 2023

Honorable Ray Fonseca
35th Legislature of the Virgin Islands
Capitol Building
P.O. Box 1690
Charlotte Amalie, USVI 00804

Re: *Bill No. 35-0187 – Amendment to Title 19, Chapter 45 to add Subchapter XI – Extreme Risk Protection Orders*

Dear Senator Fonseca:

The Office of the Attorney General appreciates the opportunity to comment on Bill No. 35-0187. The Department of Justice has done a preliminary review and offers the following comments. The purpose behind Bill No. 35-0187 is to amend Title 19 of the Virgin Islands Code, Chapter 45 by adding Subchapter XI, titled Extreme Risk Protection Orders. The stated intent of the proposed legislation is to allow certain people to intervene by filing a petition with the court to temporarily confiscate and ban a person's access to guns if that person is deemed a risk to themselves or others.

Bill No. 35-0187, as proposed, attempts to address an issue that many states have looked at in recent years. Specifically, it aims to allow a family or household member, law enforcement officer, healthcare worker, educator or coworker to petition for a temporary extreme risk protection order if a person poses a significant danger of causing injury to themselves or others with a firearm. Extreme risk laws, or “red flag” laws, are intended to allow for quick intervention when a person is at serious risk of harming themselves or others with a firearm.¹ Currently, 21 states and the District of Columbia have adopted similar laws.² Prior to the mass shooting at a Parkland, Florida

¹ <https://everytownresearch.org/rankings/law/extreme-risk-law/#:~:text=Extreme%20Risk%20laws%20allow%20for,person%20from%20buying%20new%20guns>.

² Cal. Penal Code §§ 18100—18205; Colo. Rev. Stat. §§ 13-14.5-101—13-14.5-114; Conn. Gen. Stat. § 29-38c; Del. Code Ann. tit. 10, §§ 7701—7709; Fla. Stat. § 790.401; Haw. Rev. Stat. §§ 134-61—134-72.; 430 Ill. Comp. Stat. §§

St. Thomas

3438 Kronprindsens Gade | GERS Complex, 2nd Floor | St. Thomas, VI 00802-5749 | (340) 774-5666
Division of Paternity & Child Support | 8000 Nisky Shopping Center | 2nd Floor, Suite 500 | St. Thomas, VI 00802 | (340) 775-3070

St. Croix

213 Estate La Reine | Kingshill, St. Croix, VI 00850 | (340) 773-0295
Division of Paternity & Child Support | 3018 Orange Grove, Suite 4 | Christiansted, St. Croix, VI 00821 | (340) 775-3070

Letter to Honorable Ray Fonseca, 35th Legislature of the Virgin Islands
Re: Bill No. 35-0187 – Amendment to Title 19, Chapter 45 to add Subchapter XI – Extreme Risk Protection Orders
December 5, 2023
Page 2

school in February 2018, five states had extreme risk laws.; During 2018 legislative sessions, 10 states considered similar laws with eight ultimately enacting legislation.³ Supporters of these types of laws believe they help de-escalate emergency situations including suicides and mass shootings.

Perhaps one of the most obvious arguments against extreme risk laws is they violate a person’s Second Amendment rights, or the right to keep and bear arms. While there has been some resistance based on the Second Amendment rights, this has not been the focus of most complaints. Many people, including Second Amendment defenders, recognize the legislature’s power to prevent certain people from possessing firearms, including people who are a danger to themselves or others. Extreme risk protection orders do not attempt to restrict the rights of responsible, law-abiding citizens.

Recently argued before the U.S. Supreme Court is *U.S. v. Rahimi*. In this case, the Supreme Court will consider whether 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by persons subject to domestic violence restraining orders, violates the Second Amendment on its face.⁴ Although not exact in nature, the Rahimi ruling could clarify an earlier gun “red flag” decisions and set a precedent that may impact Extreme Risk Protection laws, throughout the country.

Arguments abound on both sides of the aisle regarding Extreme Risk Protection laws. Opponents argue that extreme risk laws violate due process protections guaranteed by the Constitution. Supporters, however, argue that extreme risk protection orders include protections for due process and standards of evidence. For example, the burden of proof lies with the person filing the petition and ranges from probable cause to clear and convincing evidence based on the jurisdiction. However, the respondent of an extreme risk protection order has the opportunity to appear in court and participate in a full hearing. They can also challenge and oppose evidence presented and advise the court why the protection order should not be granted.

One of the important components of extreme risk laws is that they allow a judges to temporarily remove a person’s access to firearms when there is evidence they pose a serious risk to themselves or others. While a judge may enter an ex parte order, or some other temporary emergency order, upon receiving proof someone is an immediate risk, a hearing must be held within a short time limit and before a final protection order can be entered. Again, the person

67/1—67/85; Ind. Code §§ 35-47-14-1—35-47-14-13.; Md. Code Ann., Pub. Safety §§ 5-601—5-610.; Mass. Gen. Laws ch. 140, §§ 121, 129B(C), 131(C), 131R-Z; Michigan Senate Bill 83 (2023); Minn. Stat. § 624.7171, et. seq.; Nev. Rev. Stat. §§ 33.500—33.670.; N.J. Stat. Ann. §§ 2C:58-20—2C:58-32; N.M. Stat. Ann. §§ 40-17-1, —40-17-13; N.Y. C.P.L.R. §§ 6340—6347; Or. Rev. Stat. §§ 166.525—166.543; 8 R.I. Gen. Laws §§ 8-8.3-1—8-8.3-14; Vt. Stat. Ann. tit. 13, §§ 4051—4061; Va. Code Ann. §§ 19.2-152.13—19.2-152.17; RCW 7.105

³https://ballotpedia.org/Extreme_risk_protection_orders_in_state_legislatures#:~:text=As%20of%20May%202023%2C%2021,to%20issue%20extreme%20risk%20protection

⁴ Oral arguments in United States v. Rahimi were heard on Nov. 7, 2023

petitioning for an extreme risk protection order must prove the other person (respondent) is a serious risk to themselves or others.

Once ordered, an extreme risk protection order is only valid for a specified time, usually up to one year. Extreme risk protection orders are temporary and do not permanently prohibit or restrict a person from purchasing or possessing firearms, beyond the prescribed period. They cannot be extended without another hearing. During a subsequent hearing, an extreme risk protection order can only be extended if there is additional evidence the person continues to be a threat to themselves and others. Once again, the respondent is allowed to present evidence in support of removing restrictions to his or her possession of the firearm.

While the proposed bill only permits certain parties to file a petition for an extreme risk protection order, including family and household members, we should be sensitive to incidents of false reporting. In states with extreme risk laws, studies show they are typically used in high-risk scenarios.⁵ Virgin Islands Code currently establishes criminal causes of action for perjury and false reporting. Some states also impose criminal penalties for filing false or harassing extreme risk petitions. Punishments for filing false extreme risk petitions could include fines, jail time or both.

For the reasons stated above, extreme risk laws have been successful against constitutional challenges and will probably continue to do so. Bill No. 35-0187 is in line with "red flag" statutes in many states. With that said, the following changes would strengthen and clarify proposed Bill No. 35-0187:

First, in §1102(e), in addition to in person and telephonic hearings, I would suggest that hearings should also be permitted to be conducted by virtual platforms such as Zoom or Teams. This would help facilitate court activities and provide another avenue for parties to participate in hearings.

Second, extreme risk protection orders, should be clearly understood to be civil actions, and not criminal prosecutions. It is also important for this body to clarify the process by which persons, defined in the statute, can petition the court for the relief contemplated by the statute.

Third, in §1114(a), it states the Office of the Administrator of Courts "shall develop and prepare instructions and informational brochures, standard petitions and risk protection order forms, and a court staff handbook on the extreme risk protection order process," including translated versions. This requirement may have unintended consequences for the Office of the Administrator of Courts, both fiscal and practical, which this body should consider. For example, the legislation contemplates the brochures and information to be in multiple languages. At a minimum, translators would need to be retained by the Court for it to fulfill this mandate.

⁵ <https://www.bradyunited.org/fact-sheets/what-are-extreme-risk-laws>

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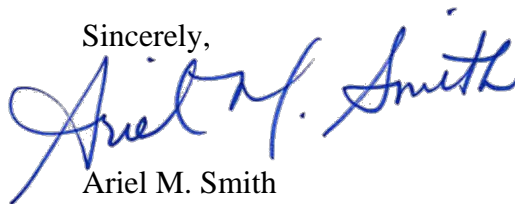
Page 4

Fourth, §1108 permits transfer of firearms and ammunition to an individual of the respondent's choice, if they are eligible to "own or possess a firearm and ammunition" under both federal and Virgin Islands law. This body may want to consider a vetting of the respondent's choice by the court and also consider including language that specifically states that the transferee must apply for a permit in order to possess the "transferred" firearm. The current language in §1108 (1) is vague. Some states have dispensed with transferring the firearm to an individual altogether. The state of Colorado has an Extreme Risk Protection statute that may be instructive on this issue. *See*, Colorado Revised Statutes, 13-14.5-108.

Finally, I would suggest a review of the section numbers throughout the bill. It appears the section numbers were misidentified starting at line 5 on page 5.

This communication reflects the comments and concerns of the Virgin Islands Department of Justice, Office of the Attorney General regarding Bill No. 35-0187. If you have any questions, please do not hesitate to contact either myself or Solicitor General Pamela Tepper.

Sincerely,



Ariel M. Smith

U.S. Virgin Islands Attorney General