

**PRESENTATION OF ACTING ATTORNEY GENERAL  
IAN S.A. CLEMENT  
THIRTY-FIFTH LEGISLATURE OF THE VIRGIN ISLANDS  
COMMITTEE ON HOMELAND SECURITY, JUSTICE, AND PUBLIC  
SAFETY  
MAY 14, 2024**

Good morning, Chairman Gittens, Committee on Homeland Security, Justice and Public Safety members, legislative staff, and the viewing and listening audience.

My name is Ian S.A. Clement, and I am the Acting Attorney General of the Virgin Islands. I am honored to be invited to provide a few remarks regarding Bill No. 35-0250, as proposed by Senator Dwayne DeGraff. Bill No. 35-0250 seeks to amend Title 23 of the Virgin Islands Code, Chapter 5, by adding a new section 454(b), which would ban assault rifles in the Virgin Islands. The Department of Justice has done a preliminary review and offers the following comments.

Bill No. 35-0250 addresses an issue that many states have considered in recent years. Currently, ten states and the District of Columbia ban the manufacturing, selling, and transferring of assault weapons. Some states take the ban a step further by also prohibiting the possession of assault weapons. Because there is not a federal assault rifle ban in place, states and territories have the freedom to decide whether assault weapons are prohibited within their jurisdiction. As a result, laws vary from state to state but have one common goal: to prevent assault weapons from being readily available to the general public.

Brady, a nonprofit advocate for gun control and against gun violence, found that 14 assault weapons and large capacity magazines are used in a public mass

shooting, nearly 14 times as many are injured, and twice as many people are killed.”<sup>1</sup> Bill No. 35-0250, if passed, hopes to decrease the potential for mass shooting events with mass casualties in the Virgin Islands. To be effective, Bill No. 35-0250 must also be constitutional. Probably of most concern is how Bill No. 35-0250 will fare next to the First and Second Amendments of the United States Constitution and the recent Bruen ruling.

First, we should consider if Bill No. 35-0250 infringes on the First Amendment, which protects freedom of speech, among other things. Specifically, does bearing arms constitute speech covered by the First Amendment? While these claims have been increasing recently, judges have consistently rejected them, finding that carrying a firearm does not constitute expressive conduct. Several courts have found that gun control laws are not entitled to First Amendment coverage because they do not satisfy either prong of the Spence test, which states that a nonverbal act is expressive if, and only if, 1) it is intended to communicate a particularized message and 2) in the circumstances in which the action is performed, the likelihood is great that observers will understand the message. While the Spence test's first prong concerns the speaker's intentions, the second concerns the listener. Courts have consistently recognized that the most likely reaction of bystanders to a firearm, especially an assault weapon, in public, is fear.

Next, we should look at the Second Amendment to the US Constitution, which protects the right to keep and bear arms. In 2008, the US Supreme Court ruled that Americans, through the Second Amendment, have the right to own guns absent military service and to use them for lawful purposes.<sup>2</sup> This right, however, is not

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<sup>1</sup> <https://www.bradyunited.org/resources/issues/what-are-assault-weapons-and-high-capacity-magazines>, last viewed May 13, 2024

<sup>2</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008)

without limits. Justice Antonin Scalia wrote in the *Heller* decision, “Like most rights, the right secured by the Second Amendment is not unlimited...[it is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>3</sup> Although the Second Amendment and the *Heller* decision opened the door to more Americans owning firearms, the ruling did not reverse prohibitions related to the possession of firearms by felons or the mentally ill or laws forbidding guns in certain places, including schools and government buildings. With self-defense in mind, the *Heller* opinion also found the right to bear arms does not include the right to carry dangerous or unusual weapons, which has been regularly upheld since.

We should also consider the Supreme Court’s recent Second Amendment decision in *New York State Rifle & Pistol Association v. Bruen*, which struck down a New York concealed carry license law and changed how future Second Amendment challenges will be reviewed.<sup>4</sup> Instead of using an analytical test that considers the nature of the government’s interest in regulating an activity, the new test is rooted in history. Under *Bruen*, courts must decide if the plain text of the Second Amendment covers the conduct at issue. If the conduct is covered, the regulation must be consistent with the country’s “historical tradition of firearms regulation.”<sup>5</sup>

With that said, the following should be considered as you evaluate and vote on proposed Bill No. 35-0250:

First, “assault rifle,” defined by 23 V.I.C. § 451(m), requires the weapon to be automatic. This narrow definition excludes semi-automatic weapons, including AR-

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<sup>3</sup> *Id.*

<sup>4</sup> *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022)

<sup>5</sup> *Id.*

15s, which are frequently used in mass shooting incidents and, alarmingly, are turning up on the streets of the Virgin Islands. Bill No. 35-0250 may not ban the weapon it was meant to target. I would consider modeling the Virgin Islands legislation after the laws in Connecticut, which explicitly includes semi-automatic weapons, and California, which creates classes of assault weapons subject to the ban and a class of named models, including AK and AR models.<sup>6</sup>

Second, the proposed penalty structure outlined in 23 V.I.C. § 454b(b) is inconsistent with other firearm penalties in the criminal code. Under 14 V.I.C. § 2253a, simple possession of an unlicensed weapon is a mandatory ten-year period of incarceration. The proposed penalty for simple possession of an assault weapon is not more than five years; as a result, an offender with an unlicensed 6-shot revolver could serve ten years in prison, but if he possessed a military-grade assault weapon, he would serve not more than five years. I would consider making the penalties at least even, if not greater, for owning, possessing, selling, or transferring an assault rifle.

This recent Supreme Court decision in *Bruen* has yet to play out fully. The *Bruen* Court suggests that any firearms regulation inconsistent with the nation's historical tradition would be invalid under the expanded post-*Bruen* reading of the Second Amendment. I recommend conducting further legal research to determine which assault weapons bans have withstood constitutional scrutiny and adopt similar language.

Finally, as a matter of housekeeping, I would add "Code" after "Virgin Islands" in the newly proposed 23 V.I.C. § 454b(a).

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<sup>6</sup> See Ct. Gen. Stat. § 53-202a and Cal. Pen. Code § 30510

I thank the Committee for the invitation to testify on Bill No. 35-0250. This concludes my formal remarks, and I remain available for any members' questions.