

Date of Hearing: April 25, 2023
Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 36 (Gabriel) – As Amended March 23, 2023

SUMMARY: Provides that any person subject to a civil or criminal protective order issued on or after July 1, 2024, shall not own, possess, purchase, or receive a firearm or ammunition within three years after expiration of the order. Specifically **this bill**:

- 1) Provides that any person who owns or possesses a firearm or ammunition within three years after the expiration of an order is guilty of a misdemeanor punishable by imprisonment in a county jail not exceeding one year, by a fine not exceeding \$1,000, or by both.
- 2) Provides that any person who purchases or receives, or attempts to purchase or receive, a firearm or receive, a firearm or ammunition within three years after the expiration of an order is guilty of a misdemeanor punishable by imprisonment in a county jail not exceeding one year or as a felony, punishable by imprisonment in a county jail not exceeding one year or a felony or in the state prison, or by a fine not exceeding \$1,000, or by both.
- 3) Requires, for orders issued on or after July 1, 2024 after notice and hearing, the order to state that the respondent is prohibited from owning, possessing, purchasing, receiving, or attempting to purchase or receive a firearm within three years after expiration of the protective order.
- 4) Authorizes a search warrant to be issued when the property or things to be seized include a firearm that is owned by, or in the possession of, or in the custody or control of, a person against whom a protective order has been issued, if the person has been lawfully served with that order, and the person has failed to relinquish the firearm as required by law.

EXISTING FEDERAL LAW: Provides that the right of the people to keep and bear arms shall not be infringed. (U.S. Const., 2nd Amend.)

EXISTING STATE LAW:

- 1) Authorizes a court to issue criminal and civil protective orders, including domestic violence restraining orders (DVRO), emergency protective orders, temporary restraining orders, civil harassment restraining orders, workplace violence restraining orders, school violence restraining orders, and elder or dependent abuse restraining orders. (Fam. Code, §§ 6200 *et seq*; Code Civ. Proc., §§ 527.6, 527.8, 527.85; Welf. & Inst. Code, § 15657.03, subd. (d); Pen. Code, § 136.2 subd. (a).)
- 2) Prohibits a person subject to a protective order from owning, possessing, purchasing, or receiving a firearm or ammunition while the order is in effect. (Fam. Code, § 6389; Code Civ. Proc., §§ 527.6, 527.8, 527.85; Welf. & Inst. Code, § 15657.03, subd. (d); Pen. Code, §

29825.)

- 3) Provides that a violation of the prohibition is a misdemeanor for owning or possessing a firearm when prohibited from doing so by a restraining order punishable by imprisonment in a county jail not exceeding one year, by a fine not exceeding \$1,000, or by both. (Fam. Code, § 6389; Code Civ. Proc., §§ 527.6, 527.8, 527.85; Welf. & Inst. Code, § 15657.03, subd. (d); Pen. Code, §§ 1524, subd. (a)(11), Pen. Code, § 29825.)
- 4) Provides that a criminal protective order may be valid for up to 10 years, as determined by the court. A court may modify, extend or terminate a criminal protective order. (Pen. Code, § 136.2 subds. (g) & (i).)
- 5) Provides that a violation of the prohibition is an alternative felony-misdemeanor for purchasing or receiving or attempting to purchase or receive a firearm when prohibited from doing so by a restraining order, punishable by imprisonment in a county jail not exceeding one year or a felony or in the state prison, or by a fine not exceeding \$1,000, or both. (Fam. Code, § 6389; Code Civ. Proc., §§ 527.6, 527.8, 527.85; Welf. & Inst. Code, § 15657.03, subd. (d); Pen. Code, § 29825.)
- 6) Requires the Judicial Council to provide notice on all protective orders issued within the state that the person that is the subject of the protective order is prohibited from owning, possessing, purchasing, receiving, or attempting to purchase or receive a firearm while the protective order is in effect. (Pen. Code, § 29825, subd. (d).)
- 7) Provides that DVROs may have a duration of not more than five years, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party. DVROs may be renewed, upon the request of a party, either for five years or permanently, without a showing of further abuse since the issuance of the original order. (Fam. Code, § 6345, subd. (a).)
- 8) Provides that a temporary restraining order shall remain in effect, at the court's discretion, for a period not to exceed 21 days, or, if the court extends the time for hearing, not to exceed 25 days, unless otherwise modified or terminated by the court. An order issued after notice and hearing may have a duration of no more than five years. The order may be renewed, upon the request of a party, for a duration of no more than five additional years, without a showing of any further harassment since the issuance of the original order. (Code Civ. Proc., § 527.6, subds. (f) & (j).)
- 9) Provides that knowingly violating a protective or restraining order is a misdemeanor punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding \$1,000 or both. (Pen. Code § 273.6.)
- 10) Provides that a search warrant may be issued when the property or things to be seized include a firearm that is owned by, or in the possession of, or in the custody or control of, a person who is the subject of a DVRO or a gun violence protective order (GVRO) if the person has been lawfully served with that order and has failed to relinquish the firearm. (Pen. Code, § 1524, subds. (a)(11) & (a)(14).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, “More than a million acts of domestic violence occur in the United States every year, and the presence of a firearm vastly increases the chance that violence will escalate to homicide. AB 36 is a common-sense measure to address the all-too-often deadly intersection of domestic violence and gun violence by prohibiting individuals subject to domestic violence protective orders from purchasing or possessing firearms for three years after the expiration of that protective order. This bill will help ensure that we are keeping guns out of the hands of abusive partners and reducing incidents of gun violence and intimate partner violence.”
- 2) **Impetus for this Bill:** Under existing law, the prohibition on ownership of firearms and ammunition expires when a protective order expires or is terminated by the court. A violation of the prohibition punishable as a misdemeanor if the person owns or possesses a firearm when prohibited from doing so by a restraining order, which is punishable by imprisonment in a county jail not exceeding one year. A violation of the prohibition is an alternative misdemeanor-felony, if the person purchases or receives or attempts to purchase or receive a firearm when prohibited from doing so by a restraining order, which is punishable by imprisonment in the state prison, or by a fine not exceeding \$1,000, or by both. (Pen. Code, § 29825.)

This bill would extend the prohibition on ownership and possession of firearms and ammunition that apply to persons who are subject to a civil or criminal protective order for three years after expiration of the order. Specifically, this bill provides that any person who owns or possesses a firearm or ammunition within three years after the expiration of an order is guilty of a misdemeanor punishable by imprisonment in a county jail not exceeding one year, by a fine not exceeding \$1,000, or by both. Any person who purchases or receives, or attempts to purchase or receive, a firearm or receive, a firearm or ammunition within three years after the expiration of an order is guilty of a misdemeanor punishable by imprisonment in a county jail not exceeding one year or a felony, punishable by imprisonment in the state prison, or by a fine not exceeding \$1,000, or by both.

According to background information provided by the author, the intent of this bill is to “help address our gun violence epidemic and prevent incidents of gun violence in domestic violence situations by prohibiting the purchase and possession of firearms for individuals subject to domestic violence protective order.” Notably, this bill would apply not only to DVROs, but also to any civil or criminal protective order, including emergency protective orders, temporary restraining orders, and protective orders issued to enjoin harassment, workplace violence, school violence, intimidation of a victim or witness, and elder or dependent abuse.

- 3) **Protective Orders Can be Renewed and Extended:** Civil DVROs “may have a duration of not more than five years, subject to termination or modification by further order of the court.” (Fam. Code, § 6345, subd. (a).) A restraining order “may be renewed, upon the request of a party, either for five years *or permanently*, without a showing of further abuse since the issuance of the original order, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party.” (*Ibid.*, italics added.) “Section 6345 makes it unnecessary for the protected party to introduce or the court to consider actual acts of abuse the restrained party committed after the

original order went into effect. It would be anomalous to require the protected party to prove further abuse occurred in order to justify renewal of that original order. If this were the standard, the protected party would have to demonstrate the initial order had proved ineffectual in halting the restrained party's abusive conduct just to obtain an extension of that ineffectual order." (*Ashby v. Ashby* (2021) 68 Cal.App.5th 491, 509-510; see *Lister v. Bowen* (2013) 215 Cal.App.4th 319, 333 ["the existence of the initial order certainly is relevant [to a request for renewal,] and the underlying findings and facts supporting that order often will be enough in themselves to provide the necessary proof" to warrant renewal].)

Likewise, temporary restraining orders can remain in effect for up to 25 days. An order issued after notice and hearing may have a duration of five years. The order may be renewed, upon the request of a party, for a five additional years, without a showing of any further harassment since the issuance of the original order. (Code Civ. Proc., § 527.6, subs. (f) & (j).) In the context of criminal protective orders, the order may be valid for up to 10 years, as determined by the court. (Pen. Code, § 136.2 subd. (i).) Existing law allows a court to modify, extend or terminate a criminal protective order. (Pen. Code, § 136.2, subd. (g)(iii).)

Extending the firearm prohibition for three years after the expiration of all civil and criminal protective orders may be both arbitrary and unnecessary. It is unclear as to why this bill deemed three years the appropriate amount of time to extend a prohibition against possessing or purchasing a firearm. Given that courts can renew and extend the duration of a protective order on an individualized case by case basis, as necessary, this bill also seems unnecessary.

- 4) **Search Warrant:** Under existing law a search warrant may be issued when the property or things to be seized include a firearm that is owned by, or in the possession of, or in the custody or control of, a person who is the subject of a domestic violence protective order, if the person has been lawfully served with that order and has failed to relinquish the firearm. (Pen. Code, § 1524, subs. (a)(11).) This bill would additionally authorize a search warrant to be issued when the property or things to be seized include a firearm that is owned by, or in the possession of, or in the custody or control of, a person against whom any civil or criminal protective order that includes a prohibition on owning, possessing, or having custody or control of a firearm has been issued, if the person has been lawfully served with that order, and the person has failed to relinquish the firearm as required by law.

In order for a search warrant to be issued, law enforcement would have to demonstrate via an affidavit supported by probable cause both, that the person was served with a protective order that includes a notice that they are prohibited from owning firearms, and that the person failed to surrender their firearms. (Pen. Code, § 1525.)

- 5) **Constitutional Considerations:** The Second Amendment provides that right of the people to keep and bear arms shall not be infringed. In *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen* (2022) 597 U.S. 2022 ___, the United States Supreme Court held that the only question for a reviewing court is whether the government has proved that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms. (*Ibid.*)

Recently, the Fifth Circuit Court of Appeals held that the prohibition of gun ownership by persons who are subject to a DVRO under federal law, 18 U.S.C. § 922(g)(8), is unconstitutional. (*United States v. Rahimi* (5th Cir. 2023) 61 F.4th 443.) The Fifth Circuit

relied on the U.S. Supreme Court's Second Amendment jurisprudence as articulated in *Bruen*. Applying that standard to 18 U.S.C. § 922(g)(8), the Fifth Circuit held as follows:

The Government fails to demonstrate that § 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation. The Government's proffered analogues falter under one or both of the metrics the Supreme Court articulated in *Bruen* as the baseline for measuring "relevantly similar" analogues: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." As a result, § 922(g)(8) falls outside the class of firearm regulations countenanced by the Second Amendment.

(*United States v. Rahimi* (5th Cir. 2023) 61 F.4th 443.) Pre-*Bruen*, the prohibition of gun ownership by persons who are subject to protective orders has survived a constitutional challenge. (See, e.g., *Altafulla v. Ervin* (2015) 238 Cal.App.4th 571.) However, if this bill was challenged and reviewed under the standard set forth in *Bruen* and *Rahimi*, it is conceivable that it would not withstand constitutional scrutiny.

- 6) **The Armed Prohibited Persons System:** The Armed and Prohibited Persons Systems (APPS) database cross-references firearms purchasers against other records for individuals who are prohibited from owning or possessing firearms. The DOJ Bureau of Firearms (Bureau) utilizes Crime Analysts, Special Agents, and Special Agent Supervisors to locate and seize firearms from prohibited persons identified through the APPS database. (DOJ, *2021 Armed and Prohibited Persons System Annual Report to the Legislature* <<https://oag.ca.gov/system/files/media/2021-apps-report.pdf>> [as of March 2, 2023].)

Prohibitions may be due to a felony conviction, domestic violence conviction, a qualifying misdemeanor conviction, mental health-based event, various types of civil or criminal restraining orders, as well as other prohibitory categories. Between 2013 and 2021, changing laws have introduced new offenses that prohibit firearm ownership and/or possession, placing a growing number of individuals into the Prohibited Armed Persons File. (DOJ, *supra*, *2021 Armed and Prohibited Persons System Annual Report to the Legislature*.) Accordingly, DOJ built up a backlog of prohibited persons DOJ needed to investigate. As of January 1, 2022, the APPS database contained 3,199,394 individuals, of which 24,509 were prohibited from owning or possessing firearms. (*Ibid.*) As of January 1, 2022, there were 10,033 active cases and 14,476 pending cases. (*Ibid.*) In 2021, 8,937 armed and prohibited people were removed from the APPS database. At the same time, 9,848 prohibited persons were added to the APPS database. (*Ibid.*)

There are five databases that feed into APPS for firearm association and prohibition determinations, including the California Restraining and Protective Order system (CARPOS). CARPOS is a statewide database of individuals subject to restraining and protective orders. Individuals prohibited from owning a firearm due to a protective order remain in APPS for the period of time that the court order is effect. (DOJ, *Armed and Prohibited Persons System Report 2022* <<https://oag.ca.gov/system/files/media/2022-apps-report.pdf>> [as of April 19, 2023].) This bill would extend the period of time these individuals remain in APPS for a period of three years after the expiration of a protective order. Given the backlog of APPS, should the Legislature prioritize the efficient relinquishment of firearms, rather than substantially increasing the amount of time a person

remains in APPS?

- 7) **Argument in Support:** According to *Brady United Against Gun Violence*, “Under California law, a person subject to a domestic violence restraining order (whether issued as an emergency order, ex parte, after notice and hearing, or in a judgment) is prohibited from owning, possessing, purchasing, receiving, or attempting to purchase or receive a firearm or ammunition until the order is no longer in effect. California also prohibits people who are subjects of domestic violence restraining orders from owning or possessing ammunition and certain ghost gun kits and firearm components.

“This bill will prohibit the purchase and possession of firearms for people who are subject to domestic violence protective orders for three years after the expiration of their protective order. The individual will have the option to petition and potentially regain their ability to purchase and possess firearms if a judge finds they are not a threat to public safety. This is a common-sense measure to keep guns out of the hands of abusive partners and reduce gun violence and intimate partner violence.”

- 8) **Argument in Opposition:** According to a *private individual*, “It is a common tactic to slap a restraining order on someone who is not a threat to the person brining the order. It would turn people with legally acquired firearms into criminals simply by owning the firearms at the time of the restraining order. It is a violation of the 2nd Amendment without due process.”

9) **Related Legislation:**

- a) AB 303 (Davies) would require the Attorney General to provide local law enforcement agencies enumerated information related to prohibited persons APPS database. AB 303 is pending hearing in the Assembly Appropriations Committee.
- b) AB 667 (Maienschein) would extend the duration of gun violence restraining order (GVRO) renewals from a maximum of five years to a maximum of ten years. The hearing on AB 667 was canceled at the request of the author.
- c) AB 732 (M. Fong) would, among other things, require a defendant not in custody to relinquish their firearms within 48 hours. AB 732 is being heard by this Committee today.
- d) AB 818 (Petrie-Norris) would require a temporary restraining order, emergency protective order, or an order issued after a domestic violence hearing be served on the respondent by a law enforcement officer who receives a request from the petitioner to serve the order. AB 818 is being heard by this Committee today.
- e) SB 2 (Portantino) would, among other things, add misdemeanor convictions for several firearm offenses to the list of offenses that trigger a 10-year ban on the purchase and possession of firearms. SB 2 is pending in the Senate Appropriations Committee.

10) **Prior Legislation:**

- a) AB 178 (Ting), Chapter 45, Statutes of 2022, allocates \$40 million to the Judicial Council to support a court-based firearm relinquishment program to ensure the consistent

and safe removal of firearms from individuals who become prohibited from owning or possessing firearms and ammunition pursuant to court order.

- b) SB 320 (Eggman), Chapter 685, Statutes of 2021, required the court to determine whether a respondent has complied with the firearm relinquishment requirement and required every law enforcement agency in the state to develop, adopt, and implement written policies and standards for law enforcement officers who request immediate relinquishment of firearms or ammunition.
- c) AB 532 (Lieu), Chapter 450, Statutes of 2009, authorized the issuance of a search warrant when the property or things to be seized include a firearm or any other deadly weapon at the scene of, or at the premises occupied or under the control of the person arrested in connection with, a domestic violence incident involving a threat to human life or a physical assault.
- d) SB 950 (Brulte), Chapter 944, Statutes of 2001, created APPS.

REGISTERED SUPPORT / OPPOSITION:

Support

Brady Campaign
Brady Campaign California
Giffords
Peace Officers Research Association of California (PORAC)

Opposition

1 Private Individual

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