This comment is in response to the State Bar's comment in opposition to my petition, R-09-0045.

My apologies in advance if I'm not presenting Mr. Furlong's argument accurately. I had hoped that, by this late date, members of the Bar smarter than this layman would have countered. But I suppose much like crossing a union picket line (with predictable results), it's unrealistic to expect members of the Bar to cross their sanctioning organization. (Also with predictable results.) Since no attorney has responded to champion my petition, I'm compelled to respond in my prolix layman fashion. My apologies in advance for that too.

Parenthetically, I suppose I should be flattered that the State Bar felt compelled to comment in opposition, given that it says mine is a "meritless" petition. (Methinks the Bar doth protest too much?) But as with many of the petitions presented in this forum, this one had its genesis in real life and one judge thought it had merit. While I realize this isn't precedent setting, my original petition cited the same arguments a defendant made challenging an unlawful Brady Disqualification in an Injunction. Judge Mary Hamm must have thought the arguments had merit because she rescinded her previous Order. (See www.maryhammmaryhamm.blogspot.com [1])

I also parenthetically add that it seems to this layman the Bar is making an inconsistent (i.e., political) argument triggered by the Second Amendment rather than a logically consistent one. For example, I was taught in grade school you cannot argue facts. I was taught in college that you cannot make an argument from silence. But if I'm understanding correctly, this is exactly what the State Bar is doing! The Bar is arguing 1) absent any specific law from the Legislature granting jurisdiction, citing only A.R.S. § 12-1809(F)(3) as a broad basis, a judge can do "whatever" he wants in an Injunction Against Harassment, even suspending a constitutional right, as long as it seems "reasonable" to the judge. And 2) the Second Amendment is not an individual fundamental right.

In effect, the Bar is saying what the policy rule should be even if the law doesn't say it. Reminds me of a speech by Judge Kozinski.[2] If the Bar believes the Legislature erred in the law it did not give judges about firearms and Injunctions, then the proper venue is for the Bar to lobby the Legislature to make new law. Not to make (or sustain) it here.

As to the merits of the Bar's first point, not even the Rules Committee, which was careful to cite the law as its basis for its various rules, made the argument Mr. Furlong makes. While it quotes A.R.S. § 12-1809(F)(3) verbatim as basis for its Rule 6(E)(4)(e)(1), it did not cite (F)(3) or any law to justify its paragraph (2)— the paragraph to repeal—because the fact is, there is no law. There is only silence.

Not even the Legislature, which was careful to specifically mention firearms and the prohibitions

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[1] Emergency Petition to Rescind Unlawful Notice of Brady Disqualification, Bodine v. Palmer, 20081217J in the Prescott Consolidated Court. The court file was tampered with. It's unknown if these documents remain.

[2] *The Wrong Stuff: How You Too Can...Lose Your Appeal* "What you want to do is start out by discussing policy. Judges love policy; it gives us a sense of power. So instead of talking about what [the Legislature] did [not do], talk about what it should have done."

thereof in its Order of Protection law (A.R.S. § 13-3602 (G)(4)) makes any mention of firearms in its Injunction law. Again, there is no law here. Only silence.[3]

Mr. Furlong argues liberally that there should be broad interpretation of A.R.S. § 12-1809(F)(3) giving a judge broad jurisdiction, even when not explicitly statutorily given. But the D.C. court of appeals says such an argument is without merit, rejecting a similar argument by the FCC when, absent any lawful basis, it attempted to impose "net neutrality" regulations on Comcast. Quoting the coa with emphasis on "broad": "It is true that Congress gave the [FCC] broad and adaptable jurisdiction so that it can keep pace with rapidly evolving communications technologies . . . [Yet] the allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer . . . Because the Commission has failed to tie its assertion of ancillary authority to any statutorily mandated responsibility, we vacate the Order.[4] (Abridged. Internal quotation marks and footnote omitted.)

Testing for merit from the standpoint of common sense, which the Arizona Court of Appeals cited in making an argument in State v. Fish[5], the Bar's argument doesn't make sense. It is arguing that a judicial officer can effectively reduce an individual to criminal status—namely, a felon— by prohibiting firearm possession. Worse, this is not done under the Criminal Code (Title 13), but under the guise of Title 12, mere Rules of Court Procedure! This, then, also violates an individual's Fourteenth Amendment right to due process. Again, the Legislature did not give this power to the court in Title 12.

And again from a common sense standpoint, what more is needed? Already the judge has jurisdiction in an Injunction to "1. Enjoin the defendant from committing a violation of one or more acts of harassment and 2. Restrain the defendant from contacting the plaintiff or other specifically designated persons and from coming near the residence, place of employment or school of the plaintiff or other specifically designated locations or persons." Assuming the defendant is law-abiding, this will be enough to protect the alleged victim, as he will be prohibited from any contact. There is no need to punish him and/or keep him from defending his loved ones by suspending his Second Amendment right, denying him the right to "defense of himself." (Per the Arizona Constitution.)

I suggested earlier that the Bar's argument is illogical, inconsistent (political), triggered by the Second Amendment, as opposed to a logical legal one. Let's test for consistency in the abstract and see if the Bar would sustain its own argument after review.

Starting with the Fifth Amendment and working our way down to the First, let's see if the Bar is

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[3] Thus, Mr. Furlong errs when he says "Legislative enactments should be presumed to be constitutional." (p2, line 17-18) As it pertains to weapons and firearms, there aren't any legislative enactments for A.R.S. § 12-1809(F)(3) or Rule 6(E)(4)(e)(2).

[4] Comcast Corporation v. FCC & USA, No. 08-1291 (D.C. Cir.), p 36, Section V

[5] State v. Fish, 222 Ariz. 109, 213 P.3d 258 (App. 2009), para 38.

consistent in its own reasoning that a judge, in an Injunction matter, can do whatever is reasonable to grant relief necessary for the protection of an alleged victim. If he can't, then its argument against the Second Amendment is invalid as well.[6]

Let's suppose that, as Judge Donahoe recently tried, a judge decided it was reasonable to force a defendant to waive his Fifth Amendment right and confess to harassment. (As Correction Officer Stoddard was recently ordered to confess (apologize) in a contempt action.) Would the Bar argue a judge can suspend an individual's Fifth Amendment right? I trust not. The court of appeals vacated that unusual sanction.[7]

Or let's suppose that in the interest of "whatever," a judicial officer thought it reasonable to seize (jail) a defendant, suspending his Fourth Amendment right for the protection of the alleged victim. Or monitor his email and phone conversations. There's nothing specific in the law about this, but it comes under the Bar's liberal interpretation of whatever "relief necessary." Would the Bar argue a judge can suspend an individual's Fourth Amendment right? The ACLU screamed the FISA Amendments Act violated the Fourth Amendment,[8] even though the Act arguably had clear statutory authority. Whereas Injunction law does not.

To continue: While anachronistic nowadays, suppose a judge thought it reasonable that, instead of seizing a defendant, the judge forced the defendant to quarter an agent of the state in his house to watch over the defendant. And, consistent with quartering, the defendant had to pay for it. Would the Bar argue a judge can suspend an individual's Third Amendment right in an Injunction?

Skipping over the Second Amendment, suppose a judge thought it reasonable for the "protection" of the alleged victim that the judge suspend the defendant's First Amendment Free Speech and Freedom of Religion rights, going beyond Injunction law to prohibit a defendant from having contact with <u>anyone</u> the alleged victim may know, prohibiting the defendant from expressing his religious conviction to them, that, say, the alleged victim is in sin? This is not a hypothetical. It has actually happened.[9] How far down the slippery slope do we slide?

Or suppose a judge in an Injunction hearing, ostensibly to protect the alleged victim, though it reasonable to engage in ex parte communication with the alleged victim? Or thought it reasonable to suspend the Rules of Procedure and the Rules of Evidence at trial? To call witnesses for the alleged victim to make her case? Again, this is not a hypothetical. It has actually

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[6] It is not merely coincidence that the first Five Amendments are grouped together. They are grouped together because they all deal with individual rights.

[7] Interestingly, Stoddard did not cite his Fifth Amendment right so the coa did not address it. (Stoddard cited his First Amendment right instead.) Stoddard v. The Honorable Gary E. Donahoe, No. 1 CA-SA 09-0300.

[8] http://www.aclu.org/cpredirect/32524

[9] See www.maryhammmaryhamm.blogspot.com for details

happened.[10] I trust the Bar does not argue that a broad interpretation of Injunction law allows a judge to violate an individual's Fourteenth Amendment right to due process as here?

We need not slide down these slopes if we stay within the boundaries set by the Legislature.

As to the Bar's second point, that the Second Amendment is not an individual right and/or applies only to the Federal government: the nuances of that legal argument are too high for me. But 1) the abstract example above shows the Second Amendment is no less an individual right than the First, Third, Fourth & Fifth. 2) Since the SCOTUS has taken *McDonald v. Chicago*, doesn't that imply that enough Justices believe the Second Amendment is an individual right and that fact needs to be finally adjudicated?

Deferring to the experts on this in the Arizona Executive and Legislative branches who recently passed SB1108/HB2347 (no permit to concealed carry), Governor Brewer said, "I believe this legislation not only protects the Second Amendment rights of Arizona citizens, but restores those rights as well." Clearly, the Legislature and Executive believe the Second Amendment is an individual right. Even the Bar acknowledged the Rule could "in application, violate the Second Amendment."

And I thank Mr. Furlong for his openness, citing Article 2 § 26 of the Arizona Constitution, "The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired . . . " Had I been smarter, I would have said in my petition then that Rule 6(E)(4)(e)(2) is a violation of not only the Second Amendment but a violation of A.R.S. Const. Art. 2 § 26 as well. I trust the Court will take judicial notice of this even though not in my original petition.

To conclude: Speaking about Congress, impeached judge Alcee Hastings was recently quoted saying, "There are no rules here. We make them up as we go along."[11] Fortunately, in the 30 years I've been watching the Arizona Supreme Court, this has not been our history. We have rules and they are based on law. Judges are to echo laws the Legislature gives them. In the matter of Rule 6(E)(4)(e)(2), there is nothing to echo because the Legislature did not speak. Whatever the Legislature intended in A.R.S. § 12 - 1809(F)(3), it did not allow a judge to suspend a defendant's First, Third, Fourth, Fifth—or Second—Amendment right. Had it meant to suspend the Second, it would have said so as it plainly did in A.R.S. § 13 - 3602 (G)(4).

Regardless of how this rule got into the system, the purpose of this public forum is to challenge rules which need challenging. For the reasons stated herein and in my original petition, Rule 6(E)(4)(e)(2) should be repealed.

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[10] Ibid. A pro se §1983 federal civil right lawsuit has been filed. It needs professional help.

[11] www.youtube.com/watch?v=9prQt3SLYCQ