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To: Chairman Anderson and Members of the Assembly Judiciary Committee  
Date: February 20, 2009  
Re: **Opposition to AB 46, regarding changes concerning the right of certain persons to purchase or possess a firearm**

Thank you for your time and attention to this significant matter of constitutional import. This written testimony encompasses the ACLU of Nevada's position on this bill that would seriously jeopardize an individual's Second Amendment rights. Should you have any concerns or questions about our position on this matter or would like additional information, please do not hesitate to contact me.

Sincerely,

Rebecca S. Gasca  
Public Advocate, ACLU of Nevada

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**AB 46 would deny Nevadans their constitutionally-protected due process right when subjected to guardianship proceedings that would result in the elimination of their right to possess or purchase a firearm. It also gives total immunity to any individual involved in the processing of those records, thus eliminating any checks on potential abuse of the system.**

The Supreme Court has ruled that the right to own a gun is a constitutionally protected individual right. Nevada's Constitution could not be any clearer (Article One, Sec. 11): **"Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes."** While the full contours of this right have not yet been established by the federal courts, we believe it is important to maintain full due process rights any time a court may take away a constitutionally-protected right. This is why we have serious concerns about this bill, both to particular sections and language used throughout. We oppose it, even with the amendments offered by the Attorney General.

Current Nevada law prohibits those individuals from owning or possessing a firearm whose "guilty but mentally ill" pleas are accepted by a court (NRS 202.360). Although the ACLU of Nevada does not oppose the proposed language of forced commitment, we believe that this can be easily elaborated upon without creating the guardianship issues we have identified.

The inclusion of all guardianship orders, even if restricted to the "person," is overbroad *and includes people who have no mental defect*. There should not be an automatic inclusion to the NCIC, but rather a tailored report only when someone's adjudication genuinely involves a condition that would directly impact their right to own a gun. However, "guardianship of the

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person" is a broad category that includes temporary and permanent guardianships, guardians ad litem (for children), and may be in response to various needs, including medical – **but no specific finding of mental incapacity is required** (NRS 159.0487 - NRS159.055).

Troublingly, unlike with a court finding or civil commitment, for guardianships, no notice of or even presence at the hearing where guardianship is granted is required. Therefore, a temporary guardianship could be granted without notice or presence of the supposed "incompetent" individual and such a record could be transmitted under this bill before he could even appeal.

Indeed, this has happened in Nevada in *Smolen v. Smolen* (114 Nev. 342 (1998)) when a wife put her husband, who had a brain tumor, into temporary guardianship without his knowledge and forced him into a convalescent home against his will. His nephew hired him an attorney and the court subsequently found him competent in his presence and revoked the wife's power. If this bill had been in place at the time, he would have had to fight with the federal government - likely unsuccessfully - for his right to purchase a hand gun to protect himself at home once he finally got back there. In fact, he would have an uphill battle even here in Nevada because there is a higher evidentiary bar for those found incompetent (NRS 159) to apply for a court order reversing that finding as opposed to those found Guilty But Mentally Ill (see page 7, ll 26-31).

In addition to the due process concerns about linking the guardianship system automatically to a loss of gun rights, we have concerns about the aftermath of such a record as well. Although the bill requires the transmission of any order depriving someone of a gun (e.g. - page 3, ll 31-36; page 4, ll 13-19; page 5, ll 13-19; page 6, ll 29-35; page 7, ll 1-4), there is no such requirement for transmitting an order (page 7, ll 5-25) restoring those rights to NCIC - only the NV Repository - it only requires a good faith effort to remove the original record from NCIC (page 7, ll 32-40).

Principally, it is important to note that Nevada can never guarantee that the federal database will correct or remove a record. The bill notes that a court may enter an order that "(c) The information reported in the record must be removed from the National Instant Criminal Background Check System" (page 7, ll 13-14) - but it is our understanding that the state of Nevada has no jurisdiction to order something removed from the federal database. It is important to know that each and every order submitted in this bill could end up in a lifelong gun ban by the federal government, regardless of an individual's situation. This is why it is so crucial not to cause the transmission of such a record without very good cause.

Indeed, because of the broad and absolute immunity from lawsuit or any other action or inaction in Section 8 of the Bill, this Bill does not really even require Nevadan authorities even to make a good faith effort, because no individual could enforce the requirement that such efforts be made to correct the NCIC system (page 8, ll 1-14). This essentially removes all government incentive to ensure that records affecting a fundamental right are handled in a fair, equitable, and professional manner.

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