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## RAISING THE RED FLAG: EXAMINING THE CONSTITUTIONALITY OF EXTREME RISK LAWS

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*This Note examines the constitutionality of extreme risk protection orders, specifically, their burden on the Second Amendment right to keep and bear firearms. Part I explores the current demand for greater government intervention in light of the increase in mass shootings in the United States. Part II examines the evolution of the Second Amendment since the Founding and provides an overview of the current extreme risk petition process. Part III analyzes the constitutionality of enforcing extreme risk protection orders against law-abiding citizens. Finally, Part IV recommends future legislative safeguards that balance the fundamental interests of possessing firearms and promoting public safety.*

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## I. INTRODUCTION

On February 14, 2018, a teenage gunman entered Marjory Stoneman Douglas High School with a semi-automatic rifle and multiple magazines.<sup>1</sup> The gunman, Nikolas Cruz, killed fourteen students and three staff members,<sup>2</sup> and injured an additional seventeen individuals.<sup>3</sup> The attack marked the deadliest high school shooting in United States history<sup>4</sup>—surpassing the death toll of the Columbine High School massacre on April 20, 1999.<sup>5</sup>

Prior to the shooting, local deputies received numerous calls concerning acts of violence and threats made by Cruz,<sup>6</sup> including his plan “to shoot up the school.”<sup>7</sup> Cruz’s multiple threats of violence against his family members and other individuals were reported to authorities, and well documented, in the years leading up to the massacre.<sup>8</sup> Cruz also made his threats public on social media,

1. Elizabeth Chuck, Alex Johnson, & Corky Siemaszko, *17 Killed in Mass Shooting at High School in Parkland, Florida*, NBC NEWS (Feb. 15, 2018, 9:20 AM), <https://www.nbcnews.com/news/us-news/police-respond-shooting-parkland-florida-high-school-n848101> [https://perma.cc/X4UT-4XA2].

2. See Eric Levenson & Joe Sterling, *These Are the Victims of the Florida School Shooting*, CNN (Feb. 21, 2018, 11:56 AM), <https://www.cnn.com/2018/02/15/us/florida-shooting-victims-school/index.html> [https://perma.cc/VH57-8Y8D].

3. Amy Held, ‘We Live with It Every Day’: Parkland Community Marks 1 Year Since Massacre, NPR (Feb. 14, 2019, 12:31 PM), <https://www.npr.org/2019/02/14/694688365/we-live-with-it-every-day-parkland-community-marks-one-year-since-massacre> [https://perma.cc/X96Y-V53D].

4. See Meghan Keneally, *The 11 Mass Deadly School Shootings that Happened Since Columbine*, ABC NEWS (Apr. 19, 2019, 8:28 AM), <https://abcnews.go.com/US/11-mass-deadly-school-shootings-happened-columbine/story?id=62494128> [https://perma.cc/QFY9-HGEE].

5. Emily Shapiro, *20 Years After Columbine, What’s Changed—and What Hasn’t—for School Shootings in America*, ABC NEWS (Apr. 20, 2019, 7:58 AM), <https://abcnews.go.com/US/20-years-columbine-changed-school-shootings-america/story?id=62248885> [https://perma.cc/QVF3-M9QC].

6. Brett Murphy & Maria Perez, *Florida School Shooting: Sheriff Got 18 Calls About Nikolas Cruz’s Violence, Threats, Guns*, USA TODAY (Feb. 23, 2018, 1:11 PM), <https://www.usatoday.com/story/news/nation-now/2018/02/23/florida-school-shooting-sheriff-got-18-calls-cruzs-violence-threats-guns/366165002/> [https://perma.cc/47V9-EMKB].

7. *Id.*

8. *Id.*

posting a photo of himself with a gun on his personal Instagram.<sup>9</sup> Additionally, the comment “Im [sic] going to be a professional school shooter” was posted on YouTube by a commenter under the username “nikolas cruz.”<sup>10</sup>

Family members, neighbors, social workers, teachers, and sheriff’s deputies in two Florida counties were aware of Cruz’s threats and propensity for violence.<sup>11</sup> The Broward County Sheriff’s Office received at least forty-five calls related to the shooter or his brother between 2008 and 2017.<sup>12</sup> In the months leading up to the attack, the calls regarding Cruz’s behavior and threats became increasingly concerning.<sup>13</sup> On November 1, 2017, less than three month before the attack, Katherine Blaine, a cousin of Cruz’s mother, called the Broward County Sheriff’s Office to report Cruz’s firearm possession and to request the weapons be recovered by the police.<sup>14</sup> In the weeks following, on November 29, 2017, the Palm Beach Sheriff’s Office received a call from the family Cruz was living with after the death of his mother.<sup>15</sup> The family reported that after a fight with their son, Cruz threatened to “get his gun and come back” and stated that he had “put the gun to others’ heads in the past.”<sup>16</sup> The next day an anonymous caller contacted the Broward County Sheriff’s Office to report that Cruz was collecting weapons, including guns and knives.<sup>17</sup> The caller voiced concern that Cruz could be a “school shooter in the making.”<sup>18</sup> Prior to the incident at Marjory Stoneman Douglas High School, the Federal Bureau of Investigation (“FBI”) received a hotline tip that Cruz demonstrated “a desire to kill people, [engaged in] erratic behavior[,] and [had shared] disturbing social media posts.”<sup>19</sup> But the FBI failed to investigate this tip.<sup>20</sup>

9. Nicholas Nehamas, ‘School Shooter in the Making’: All the Times Authorities Were Warned About Nikolas Cruz, MIA. HERALD (Feb. 22, 2018, 8:28 PM), <https://www.miamiherald.com/news/local/community/broward/article201684874.html> [https://perma.cc/X6P5-A5EC].

10. Adam Goldman & Patricia Mazzei, *YouTube Comment Seen as Early Warning in Shooting Left Little for F.B.I. to Investigate*, N.Y. TIMES (Feb. 15, 2018), <https://www.nytimes.com/2018/02/15/us/politics/nikolas-cruz-youtube-comment-fbi.html> [https://perma.cc/W958-EHXF].

11. Joel Rose & Brakkton Booker, *Parkland Shooting Suspect: A Story of Red Flags, Ignored*, NPR (Mar. 1, 2018, 7:03 AM), <https://www.npr.org/2018/02/28/589502906/a-clearer-picture-of-parkland-shooting-suspect-comes-into-focus> [https://perma.cc/M9ZJ-2SL9].

12. Curt Devine & Jose Pagliery, *Sheriff Says He Got 23 Calls About Shooter’s Family, but Records Show More*, CNN (Feb. 27, 2018, 2:35 PM), <https://www.cnn.com/2018/02/27/us/parkland-shooter-cruz-sheriff-calls-invs/index.html> [https://perma.cc/AUT5-FTND].

13. See Nehamas, *supra* note 9 (describing increasingly concerning events prior to the shooting).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Katie Benner, Patricia Mazzei & Adam Goldman, *F.B.I. Was Warned of Florida Suspect’s Desire to Kill but Did Not Act*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/us/fbi-nikolas-cruz-shooting.html> [https://perma.cc/D3XN-WATX].

20. *Id.*

Although the number of warnings raised prior to the Stoneman Douglas attack are significant, they are not unusual.<sup>21</sup> Compared to other industrialized countries, the United States “consistently maintains the highest per capita rate of gun deaths.”<sup>22</sup> The number of mass shootings in the United States has increased substantially over the past ten years.<sup>23</sup> Fourteen of the twenty-five most deadly shootings in the United States have occurred within the last decade.<sup>24</sup> Many of the warning signs and documented threats which preceded these shootings,<sup>25</sup> much like those displayed by Cruz, were overlooked or disregarded.<sup>26</sup>

The increase in mass shootings has galvanized a strong public demand for government intervention.<sup>27</sup> One proposed solution for combatting the increased gun violence is through the enactment of red flag laws, also known as extreme risk laws.<sup>28</sup> As of February 2020, eighteen states and the District of Columbia have implemented laws that allow for law enforcement officials and family members to petition a state court judge to temporarily confiscate firearms from individuals deemed to be a risk to themselves or others.<sup>29</sup> The process of removing firearms from law-abiding citizens, however, gives rise to a number of constitutional issues, including the rights to bear arms and due process.<sup>30</sup> This Note asserts that although extreme risk laws burden fundamental constitutional rights conferred by the Second Amendment, these laws pass constitutional muster.

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21. Press Release, Everytown for Gun Safety, New Report on U.S. Mass Shootings Shows That in Half of Mass Shootings, the Shooter or Shooters Displayed Warning Signs Before the Shooting, (Dec. 6, 2018), <https://everytown.org/press/new-report-on-u-s-mass-shootings-shows-that-in-half-of-mass-shootings-the-shooter-or-shooters-displayed-warning-signs-before-the-shooting/> [https://perma.cc/XW38-JM1J].

22. ROBERT J. SPITZER, THE RIGHT TO BEAR ARMS: RIGHTS AND LIBERTIES UNDER THE LAW 2 (2001); Nurith Aizenman & Marc Silver, *How the U.S. Compares with Other Countries in Deaths from Gun Violence*, NPR (Aug. 5, 2019, 2:29 PM), <https://www.npr.org/sections/goatsandsoda/2019/08/05/743579605/how-the-u-s-compares-to-other-countries-in-deaths-from-gun-violence> [https://perma.cc/422S-YY7P].

23. See Chris Wilson, *41 Years of Mass Shootings in the U.S. in One Chart*, TIME (Aug. 7, 2019, 7:00 PM), <https://time.com/4965022/deadliest-mass-shooting-us-history/> [https://perma.cc/75YF-W3GZ].

24. *Worst Mass Shootings in the U.S., as of December 2019*, STATISTA (Nov. 6, 2019), <https://www.statista.com/statistics/476101/worst-mass-shootings-in-the-us/> [https://perma.cc/LL7K-98S2].

25. Emily Deruy & National Journal, *The Warning Signs of a Mass Shooting*, ATLANTIC (Dec. 2, 2015), <https://www.theatlantic.com/politics/archive/2015/12/the-warning-signs-of-a-mass-shooting/433527/> [https://perma.cc/F3FD-G7TM].

26. Tom Vanden Brook & Kevin Johnson, *Red Flags: Warning Signs Before Previous Mass Shootings Went Unseen and Unheeded Even in Military*, USA TODAY (Aug. 7, 2019, 4:56 PM), <https://www.usatoday.com/story/news/politics/2019/08/07/mass-shootings-red-flags-unseen-unheeded-before-previous-killings/1934303001/> [https://perma.cc/7DBZ-NSHG].

27. See Vivian Yee & Alan Blinder, *National School Walkout: Thousands Protest Against Gun Violence Across the U.S.*, N.Y. TIMES (Mar. 14, 2018), <https://www.nytimes.com/2018/03/14/us/school-walkout.html> [https://perma.cc/LY6C-G587].

28. Timothy Williams, *What Are ‘Red Flag’ Gun Laws, and How Do They Work?*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/us/red-flag-laws.html> [https://perma.cc/R14F-XTXT]; see *Extreme Risk Protection Orders*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/> (last visited Mar. 31, 2021) [https://perma.cc/EDK5-CFF4] [hereinafter GIFFORDS L. CTR.].

29. *Browse State Gun Laws*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/law-center/gun-laws/browse-state-gun-laws/?filter0=307> (last visited Mar. 31, 2021) [https://perma.cc/RS6M-47PU].

30. See MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY 68 (2014).

Part II of this Note examines the evolution of Second Amendment and Fourteenth Amendment due process, as well as the development of extreme risk laws across the United States. It also provides an overview of the extreme risk petition process. Part III analyzes the constitutionality of implementing and enforcing extreme risk laws against law-abiding citizens through the lens of strict scrutiny. Finally, Part IV recommends federal and state legislatures enact safeguards to protect the Second and Fourteenth Amendment due process rights of law-abiding citizens from unintended consequences in order to balance these rights with the government's interest in promoting public safety.

## II. BACKGROUND

Part II of this Note discusses the evolution and current status of Second Amendment protections within the home. Additionally, Part II reviews the history of red flag laws, the present status of enacted and proposed federal and state legislation, and the process of petitioning a court for an extreme risk protection order.

### A. *Evolution of the Second Amendment*

The Second Amendment declares, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>31</sup> As a part of the Bill of Rights, the Second Amendment was ratified in 1791 for the purpose of providing a constitutional check on congressional power under Article I, Section 8 of the United States Constitution, for “organizing, arming, and disciplining, the Militia . . . .”<sup>32</sup> The ambiguous language of the Amendment has led to numerous debates regarding the scope of the Second Amendment inside and outside of the home.<sup>33</sup> This debate has coincided with a shift in national perception on the right to possess firearms.<sup>34</sup>

The Second Amendment was developed and adopted as a safeguard for colonial militias during the years following the country’s founding.<sup>35</sup> The American public’s perception of the Amendment’s purpose, however, began to transform over time.<sup>36</sup> This sentiment is reflected in the shift in state constitutional provisions regarding gun ownership prior to and following the Civil War.<sup>37</sup> State constitutions dating nearer to the founding tended to include language protecting the right to bear arms for the purpose of protecting “themselves and the state.”<sup>38</sup>

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31. U.S. CONST. amend. II.

32. *Id.* art. I, § 8, cl. 16; Patrick J. Charles, *Second Amendment*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Second-Amendment> (last visited May 16, 2021) [<https://perma.cc/8T2B-L3ML>].

33. *District of Columbia v. Heller*, 554 U.S. 570, 644 (2008) (Stevens, J., dissenting).

34. See generally WALDMAN, *supra* note 30, at 68 (discussing changes through time of how people have viewed the right bear arms).

35. *Id.* at 65–67.

36. *Id.* at 68.

37. *Id.*

38. Saul Cornell, *Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”* 56 UCLA L. REV. 1095, 1112 (2009).

But state constitutions written in the late nineteenth century illuminated the right through the lens of individual protections—promoting the idea that each citizen has the right to bear a firearm “in defence of himself and the State.”<sup>39</sup> These individualistic undertones of the Second Amendment have remained in the forefront of the American consciousness into the modern era.<sup>40</sup>

Presently, the Second Amendment is interpreted as protecting an individual’s fundamental right to carry and use firearms for lawful self-defense within the home.<sup>41</sup> The scope of the right was not recognized by the Supreme Court until 2008 in the groundbreaking case *District of Columbia v. Heller*.<sup>42</sup> In *Heller*, the Supreme Court held the core fundamental right of the Second Amendment “elevate[s] above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>43</sup> The *Heller* majority ruled for the first time that the Second Amendment extends beyond military service alone,<sup>44</sup> and recognized the individual right to own a gun.<sup>45</sup> This move was significant because it was the first time the Supreme Court acknowledged the Second Amendment’s conferral of the fundamental right to carry firearms to all individuals, even those not in militias.<sup>46</sup>

The *Heller* Court held the District of Columbia’s ban on firearms within city limits was unconstitutional.<sup>47</sup> The core lawful purpose of self-defense provides a foundation for the constitutional right to possess and carry firearms within the home.<sup>48</sup> The majority stated a “ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.”<sup>49</sup> The Court did not recognize an extension of Second Amendment protections to public places, but lower courts have extended the right to carry firearms in locations outside the home to law-abiding citizens.<sup>50</sup>

*Heller* established that although the scope of Second Amendment protections are greatest in the home, these protections are not without limits.<sup>51</sup> The

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39. WALDMAN, *supra* note 30, at 68; Cornell, *supra* note 38, at 1112, 1115.

40. See WALDMAN, *supra* note 30, at 97.

41. See Charles, *supra* note 32.

42. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (affirming the right of individuals who are not affiliated with any state-regulated militia to keep handguns and firearms for private use in their homes).

43. *Id.* at 635; see also Christopher M. Johnson, *Second-Class: Heller, Age, and the Prodigal Amendment*, 117 COLUM. L. REV. 1585, 1588–89 (2017).

44. *Heller*, 554 U.S. at 635.

45. WALDMAN, *supra* note 30, at 121 (“For the first time, the Court ruled that the Second Amendment recognizes an individual right to own a gun unrelated to military service.”).

46. *Heller*, 554 U.S. at 635.

47. *Id.*

48. *Id.* at 630–34.

49. *Id.* at 635.

50. See, e.g., *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012); *Woppard v. Gallagher*, 712 F.3d 865, 874 (4th Cir. 2013).

51. *Heller*, 554 U.S. at 626–27 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”).

Court's recognition of the right to own and possess a firearm, like other fundamental rights,<sup>52</sup> is not unlimited and thus can be subjected to government regulation.<sup>53</sup> For example, convicted felons and the mentally ill are prohibited from purchasing firearms.<sup>54</sup> *Heller*'s holding applied only at the federal level but was applied to the states two years later in *McDonald v. City of Chicago*.<sup>55</sup>

In *McDonald*, the Supreme Court extended *Heller*'s articulated Second Amendment protections to the states.<sup>56</sup> The *McDonald* majority held "that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments."<sup>57</sup> The Fourteenth Amendment incorporated the individual right to keep and bear arms against the states.<sup>58</sup> Thus, the Court recognized that the Second Amendment affords citizens certain protections from federal and state infringement.<sup>59</sup> Again, the majority utilized this opportunity to reaffirm that American citizens not only possess a right to keep a functioning gun in the home, but also that this right is definitively fundamental.<sup>60</sup> Despite the Court's clarity regarding the fundamental nature of the right,<sup>61</sup> the extent of these in-home protections remain unclear.<sup>62</sup> Tension continues to exist between such rights and government regulation, most notably in the case of red flag laws.<sup>63</sup>

#### B. Development of Extreme Risk Laws: Connecticut Case Study

Red flag laws, often referred to as extreme risk laws, place temporary restrictions on an individual's access to guns.<sup>64</sup> The process of petitioning a court based upon concerns of violence, allows police officers or family members to request a court to issue a temporary order to seize firearms from individuals who pose a threat to themselves or others.<sup>65</sup> The goal of such laws is to remove firearms from the individuals who display warning signs, such as threatening behaviors or suicidal tendencies.<sup>66</sup>

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52. WALDMAN, *supra* note 30, at 144–45.

53. *Id.*

54. 18 U.S.C. § 922 (2018).

55. *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

56. *Id.*; see WALDMAN, *supra* note 30, at 144.

57. *McDonald*, 561 U.S. at 763.

58. *Id.* at 791.

59. *Id.*

60. See *McDonald*, 561 U.S. at 778; WALDMAN, *supra* note 30, at 144.

61. *McDonald*, 561 U.S. at 778.

62. *Id.*

63. See generally GIFFORDS L. CTR., *supra* note 28 (explaining that red flag laws allow for the temporary suspension of a person's access to firearms).

64. *Id.*

65. Jason Hanna & Laura Ly, *After the Parkland Massacre, More States Consider 'Red Flag' Gun Bills*, CNN, <https://www.cnn.com/2018/03/07/us/gun-extreme-risk-protection-orders/index.html> (last updated Mar. 7, 2018, 10:25 AM) [<https://perma.cc/G2BW-ED4P>] ("This would be based not primarily on criminal history or mental health disqualification already enshrined in law, but rather over allegations that the person is likely to harm themselves or others.").

66. GIFFORDS L. CTR., *supra* note 28.

In 1999, Connecticut became the first state to enact an extreme risk law.<sup>67</sup> The legislation was proposed and enacted in response to a mass shooting that occurred at the Connecticut Lottery Corporation.<sup>68</sup> On March 6, 1998, Matthew Beck, an accountant at the Connecticut Lottery, entered the company's executive offices and murdered four of his supervisors before turning the gun on himself.<sup>69</sup> Beck was motivated by a salary dispute and his failure to receive a promotion.<sup>70</sup> Similar to many subsequent shootings, there were indications prior to the event indicating Beck was troubled.<sup>71</sup> In the months leading up to the murders, Beck was granted a leave of absence due to stress-related issues, for which he was undergoing medical treatment.<sup>72</sup> He also vocalized his belief to his supervisor and coworkers that he was being treated unfairly by the Connecticut Lottery on a number of occasions.<sup>73</sup> Additionally, a prior suicide attempt prompted a call to the police.<sup>74</sup>

In response to the tragedy, the Connecticut General Assembly proposed and enacted the Public Act 98-129, "An Act Concerning Handgun Safety,"<sup>75</sup> which required the development of a protected database used for tracking civil commitments and gun permits.<sup>76</sup> The gun seizure provision was originally intended as a minor modification of existing state gun permit statutes,<sup>77</sup> but in the wake of the 1999 Columbine High School shooting,<sup>78</sup> the bill was expanded to permit gun seizures with a warrant.<sup>79</sup> The final form of the bill, Public Act 99-212,<sup>80</sup> authorizes the "seizure of firearms from putatively dangerous persons who are not otherwise legally prohibited from purchasing or possessing guns, before they have committed an act of violence."<sup>81</sup> The removal of firearms in Connecticut is based solely on concerns of "a risk of imminent personal injury"<sup>82</sup> regardless of an

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67. *Id.*

68. Ken Dixon, *CT's Red Flag Gun Law Increasingly Used Life Saver, Records Show*, MIDDLETOWN PRESS, <https://www.middletownpress.com/middletown/article/CT-s-red-flag-gun-law-increasingly-used-life-14294288.php> (Aug. 11, 2019, 12:00 AM) [<https://perma.cc/YR5H-5KQL>]; see Jonathan Rabinovitz, *Rampage in Connecticut: The Overview; Connecticut Lottery Worker Kills 4 Bosses, Then Himself*, N.Y. TIMES (Mar. 7, 1998), <https://www.nytimes.com/1998/03/07/nyregion/rampage-connecticut-overview-connecticut-lottery-worker-kills-4-bosses-then.html> [<https://perma.cc/R7WY-8GL7>].

69. Rabinovitz, *supra* note 68.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. 1998 Conn. Acts 98-129 (Reg. Sess.).

76. *See id.*

77. Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does It Prevent Suicides?*, 80 L. & CONTEMP. PROBS., 179, 185 n.37 (2017).

78. *Columbine High School Shootings*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Columbine-High-School-shootings> (last visited May 16, 2021) [<https://perma.cc/72GB-4YAL>]; see also ROBERT J. SPITZER, *THE RIGHT TO BEAR ARMS: RIGHTS AND LIBERTIES UNDER THE LAW* 1 (2001).

79. Swanson et al., *supra* note 77, at 185 n.37.

80. 1999 Conn. Acts 99-212 (Reg. Sess.).

81. Swanson et al., *supra* note 77, at 185.

82. CONN. GEN. STAT. § 29-38c (1999).

individual's mental health history.<sup>83</sup> The Connecticut statute allows police to obtain a court warrant to remove guns from an individual who poses a risk to themselves or others after conducting an independent investigation and establishing probable cause.<sup>84</sup>

### C. Overview of Extreme Risk Laws Across the United States

In response to the success of the Connecticut statute, a total of eighteen states and the District of Columbia have enacted similar legislation.<sup>85</sup> In 2006, Indiana was the second state to adopt a comparable law following Connecticut's enactment in 1999.<sup>86</sup> Under this statute, police can seize firearms from individuals deemed to be "dangerous"<sup>87</sup> without a warrant, while a judicial hearing is pending.<sup>88</sup> The state has the burden to show by clear and convincing evidence the person from whom the gun was seized was displaying threatening behavior at the time of the seizure.<sup>89</sup> Subsequent state adoption of comparable laws was slow.<sup>90</sup>

California passed similar legislation in 2014, becoming the third state to enact a risk-based gun removal statute, known as a "gun violence restraining order."<sup>91</sup> The California State Assembly passed the law in the aftermath of a 2014 shooting in which the legal owner of three 9mm pistols murdered seven individuals and injured thirteen more.<sup>92</sup> In response to the tragedy, the State Assembly passed legislation authorizing gun violence restraining orders,<sup>93</sup> which allow family members or law enforcement officers to petition a court to prohibit an individual from possessing a gun, ammunition, or magazines.<sup>94</sup> In the wake of numerous mass shootings in the United States in recent years, the rate in which

83. Swanson et al., *supra* note 77, at 186–87.

84. *Id.* at 187.

85. GIFFORDS L. CTR., *supra* note 28.

86. IND. CODE § 35–47 to 14–3 (2013).

87. *Id.* at § 35–47 to 14–3.

88. *Id.* at § 35–47 to 14–3.

89. Swanson et al., *supra* note 77, at 185 n.38.

90. See Michael Livingston, *More States Approving 'Red Flag' Laws to Keep Guns Away from People Perceived as Threats*, L.A. TIMES (May 14, 2018, 3:00 AM), <https://www.latimes.com/nation/la-na-red-flag-laws-20180514-story.html> [https://perma.cc/9JJ6-62XT] (explaining the momentum of states enacting extreme risk laws in the wake of the Marjory Stoneman Douglas High School shooting).

91. CAL. CODE REGS. § A.B. 1014; Swanson et al., *supra* note 77, at 185 n.38.

92. Swanson et al., *supra* note 77, at 185 n.38; Shelby Lin Erdman & Greg Botelho, *Timeline: A Killer's Rampage Through a California College Town*, CNN (May 27, 2014, 8:17 PM), <https://www.cnn.com/2014/05/24/us/california-rampage-timeline/> [https://perma.cc/V8L4-K23E].

93. CAL. CODE REGS. § A.B. 1014; Swanson et al., *supra* note 77, at 185 n.38; see also Virginia Senate Passes "Red Flag" Gun Law Over Fierce Opposition, CBS NEWS (Jan. 23, 2020, 7:51 AM), <https://www.cbsnews.com/news/virginia-senate-passes-red-flag-gun-law-over-fierce-opposition/> [https://perma.cc/8UZK-B4KK].

94. See *Gun Violence Restraining Orders*, CALIFORNIA COURTS: THE JUDICIAL BRANCH OF CALIFORNIA, <https://www.courts.ca.gov/33961.htm?rdeLocaleAttr=en> (last visited May 16, 2021) [https://perma.cc/GY4M-8ZAM].

states have adopted these types of laws has greatly accelerated.<sup>95</sup> In the last decade alone, fifteen states have adopted similar legislation with the goal of combatting mass violence and suicides.<sup>96</sup>

A number of states are considering similar proposed legislation.<sup>97</sup> In February 2020, nearly a dozen states were considering extreme risk bills.<sup>98</sup> These laws would allow for the temporary removal of firearms from individuals considered by the court to be an imminent threat.<sup>99</sup> Despite the substantial number of states considering proposed legislation, not all states are willing to adopt extreme risk laws.<sup>100</sup> For example, in January of 2020, the Virginia Senate passed a bill that allows law enforcement to confiscate guns and prevent the purchase of firearms by people deemed to be threats to themselves or others.<sup>101</sup> But similar legislation in Arkansas<sup>102</sup> and South Dakota<sup>103</sup> was defeated the following month.<sup>104</sup>

In response to the passage of extreme risk laws, a number of counties across the country are seeking ways to counteract the legislation.<sup>105</sup> As of December 2019, more than forty local governments have passed resolutions seeking to protect the right to keep and bear arms.<sup>106</sup> Alarm among citizens regarding extreme risk protection order legislation has led to many local governments declaring themselves Second Amendment “sanctuaries.”<sup>107</sup> The resolutions passed by these governments seek to establish local jurisdictions where they will not enforce state gun laws that they deem to be unconstitutional infringements on the

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95. See *Virginia Senate Passes “Red Flag” Gun Law Over Fierce Opposition*, *supra* note 93.

96. Grace Segers, *What Are “Red Flag” Laws, and Which States Have Implemented Them?*, CBS NEWS, <https://www.cbsnews.com/news/what-are-red-flag-laws-and-which-states-have-implemented-them/> (Aug. 9, 2019, 10:42 AM) [<https://perma.cc/73BS-6SBD>]; see also Livingston, *supra* note 90.

97. Miles Kohrman & Alain Stephens, *States Are Embracing Red Flag Laws for Gun Owners. Here’s How They Work.*, TRACE (Feb. 18, 2020), <https://www.thetrace.org/2020/02/states-are-embracing-red-flag-laws-for-gun-owners-heres-how-they-work/> [<https://perma.cc/RV6K-HWVN>].

98. *Id.*

99. *Id.*

100. See, e.g., *South Dakota ‘Red Flag’ Law Shot Down in Legislative Committee*, KOTA TV (Feb. 4, 2020, 10:12 AM), <https://www.kotatv.com/content/news/South-Dakota-Red-Flag-law-shot-down-in-legislative-committee-567553801.html> [<https://perma.cc/4GQ6-X4E6>].

101. Kelly Mena, *Virginia Senate Passes ‘Red Flag’ Bills Days After Large Gun Rights Rally*, CNN, <https://www.cnn.com/2020/01/22/politics/virginia-senate-passes-red-flag-bill/index.html> (Jan. 22, 2020, 8:22 PM) [<https://perma.cc/P3BR-J3LL>].

102. Marine Glisovic, *Debate Continues Over Red Flag Laws in Arkansas*, KATV (Feb. 5, 2020), <https://katv.com/news/local/red-flag-law-proposal-fails-in-arkansas> [<https://perma.cc/6CKV-VU89>].

103. *South Dakota “Red Flag” Law Shot Down in Legislative Committee*, *supra* note 100.

104. See, e.g., *id.*

105. See, e.g., Ryan W. Miller, *Virginia Counties Are Declaring Themselves ‘Sanctuaries’ for Second Amendment. Will It Affect Gun Laws?*, USA TODAY (Dec. 11, 2019, 6:00 AM), <https://www.usatoday.com/story/news/nation/2019/12/11/2nd-amendment-sanctuary-virginia-counties-not-enforce-gun-laws/2610411001/> [<https://perma.cc/UQ6E-K8MH>].

106. *Id.*

107. Mary B. McCord, *Second Amendment ‘Sanctuaries’ Will Never Hold Up in Court*, WASH. POST (Jan. 8, 2020, 10:24 AM), <https://www.washingtonpost.com/outlook/2020/01/08/second-amendment-sanctuaries-will-never-hold-up-court/> [<https://perma.cc/MTR8-Y5FL>].

Second Amendment rights of their citizens.<sup>108</sup> But these resolutions are largely symbolic because many state laws prohibit local governments from enacting resolutions or other ordinances that directly contradict state laws.<sup>109</sup> The greatest issue arises in counties where the local legislatures or judicial officials abide by these resolutions regardless of their legal validity.<sup>110</sup>

#### *D. Current Status of Federal Laws and Proposed Legislation*

Under federal law, a person is not prohibited from purchasing and possessing a firearm unless he or she has: (1) been formally, and involuntarily, committed to a mental institution; (2) been found not guilty by reason of insanity; or (3) undergone some other formalized adjudicative proceeding regarding his or her mental illness.<sup>111</sup> Federal law also does not prohibit individuals who have committed acts of violence against others from owning or possessing a firearm unless they “are the subject of a domestic violence restraining order, ha[ve] been convicted of a felony, or have been convicted of a domestic violence misdemeanor.”<sup>112</sup>

In February 2019, United States Senator Dianne Feinstein introduced a bill, the Extreme Protection Order Act,<sup>113</sup> which would allow states to utilize federal grants to develop extreme risk laws.<sup>114</sup> The legislation states, “[i]f the court finds by a preponderance of the evidence that the respondent poses a danger of causing harm to himself, herself, or others by having access to a firearm, the court may issue an extreme risk protection order.”<sup>115</sup> If enacted, the law would allow for *ex parte* orders to be issued if a court finds that there is reasonable cause to believe the respondent poses a danger to themselves or others.<sup>116</sup> Further, the legislation would amend 18. U.S.C. § 922(g)<sup>117</sup> to make a violation of extreme risk protection orders a federal felony.<sup>118</sup> The proposed legislation is currently supported

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108. See, e.g., Justine Coleman, *Virginia Gun Control Fight Sparks Rush to Join 2nd Amendment Sanctuaries Movement*, HILL (Jan. 26, 2020, 7:37 PM), <https://thehill.com/homenews/state-watch/479864-virginia-gun-control-fight-sparks-rush-to-join-2nd-amendment-sanctuaries> [https://perma.cc/BG9S-KJ5X].

109. Miller, *supra* note 105.

110. *See id.*

111. 18 U.S.C. § 922(d)(4); see also Extreme Risk Protection Order Act of 2019, S. 506, 116th Cong. § 5 (2019) (seeking to add persons subject to extreme risk protection orders to the list of “prohibited persons” under 18 U.S.C. § 922(g)).

112. GIFFORDS L. CTR., *supra* note 28; see also Ryan J. Foley, *Gun-Seizure Laws Grow in Popularity Since Parkland Shooting*, U.S. NEWS & WORLD REP. (Feb. 10, 2019), <https://www.usnews.com/news/us/articles/2019-02-09/more-states-adopting-gun-seizure-laws-after-parkland-tragedy> [https://perma.cc/QB25-SAU3].

113. S. 506, 116th Cong. (2019).

114. *Id.* § 3 (2019); Jordain Carney, *Senators Ask for Committee Vote on ‘Red Flag’ Bills After Shootings*, HILL (Aug. 5, 2019, 6:33 PM), <https://thehill.com/homenews/senate/456279-senators-ask-for-committee-vote-on-red-flag-bills-after-shootings> [https://perma.cc/5232-B8ZA].

115. S. 506, 116th Cong. § 4 (2019).

116. *Id.*

117. 18. U.S.C. § 922(g) (2019).

118. S. 506, 116th Cong. § 5 (2019).

by twenty-seven senators.<sup>119</sup> Senator Marco Rubio also proposed similar legislation, the Extreme Risk Protection Order and Violence Prevention Act,<sup>120</sup> seeking to provide grants to states as a means of encouraging them to pass risk-prevention legislation.<sup>121</sup> Similar to the legislation proposed by Senator Feinstein, the bill would utilize federal funding to incentivize states to enact extreme risk laws.<sup>122</sup>

#### *E. Petitioning a Court for Temporary Removal of Firearms*

The resulting judicial orders from such petitions vary in name from state to state,<sup>123</sup> including Extreme Risk Protection Orders,<sup>124</sup> Risk Protection Orders,<sup>125</sup> Gun Violence Restraining Orders,<sup>126</sup> risk warrants,<sup>127</sup> and Proceedings for the Seizure and Retention of a Firearm.<sup>128</sup> Although the process varies from state to state, the extreme risk law process allows a police officer or family member to request from the court a temporary order to seize firearms from individuals who pose a threat to themselves or others.<sup>129</sup>

##### *1. Who Can Petition the Court?*

A majority of states have enacted legislation that allows law enforcement officials, as well as family or household members, to bring a petition to a court.<sup>130</sup> These extreme risk laws typically resemble the domestic violence restraining order process of the state in which they were enacted.<sup>131</sup> Three states and the District of Columbia allow law enforcement and individuals other than family or household members to petition a court.<sup>132</sup> Hawaii<sup>133</sup> and Maryland<sup>134</sup> allow men-

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119. Carney, *supra* note 114.

120. S.7, 116th Cong. (2019).

121. *Id.* at § 3.

122. Press Release, Marco Rubio US Senator for Florida, ICYMI: Rubio on Red Flag Bill: I'll Come Back to Washington 'Right Away' (Aug. 7, 2019), <https://www.rubio.senate.gov/public/index.cfm/2019/8/icymi-rubio-on-red-flag-bill-i-ll-come-back-to-washington-right-away> [https://perma.cc/G6M2-H6VD].

123. *Data Behind Extreme Risk Laws*, EDUCATIONAL FUND TO STOP GUN VIOLENCE (2018), <http://efsgv.org/wp-content/uploads/2018/05/Data-behind-Extreme-Risk-Laws-FINAL-2.pdf> [https://perma.cc/S5KC-PT7V].

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. Jason Hanna & Laura Ly, *After the Parkland Massacre, More States Consider "Red Flag" Gun Bills*, CNN (Mar. 7, 2018, 10:25 AM), <https://www.cnn.com/2018/03/07/us/gun-extreme-risk-protection-orders/index.html> [https://perma.cc/G2BW-ED4P] ("This would be based not primarily on criminal history or mental health disqualifications already enshrined in law, but rather over allegations that the person is likely to harm themselves or others.").

130. GIFFORDS L. CTR., *supra* note 28.

131. *Id.*

132. *Id.*

133. 2019 Haw. Sess. Laws 1466.

134. MD. CODE ANN., PUB. SAFETY § 5-601(E)(2) (West 2018).

tal health professionals to bring forth a petition. Additionally, school administrators in New York can file a petition.<sup>135</sup> But three states (Florida,<sup>136</sup> Rhode Island,<sup>137</sup> and Vermont<sup>138</sup>) only allow for law enforcement or state officials to petition the court to temporarily seize firearms.<sup>139</sup>

## 2. Evidence Required by the Court.

The central purpose of each of these laws, regardless of who may petition a court, is to temporarily remove guns and ammunition from individuals who are at a high risk of imminently committing violence against themselves or others.<sup>140</sup> Courts consider a number of factors, including threats or acts of violence by an individual within the past year,<sup>141</sup> violations of domestic violence protective orders,<sup>142</sup> and convictions for any crime that prohibits the possession of a gun.<sup>143</sup> Some courts additionally require a petitioner to provide information relating to the number, types, and locations of firearms in a respondent's possession.<sup>144</sup> As a result, if the order is granted and a respondent does not relinquish all of the listed firearms, the court may issue a search warrant allowing law enforcement officials to search the respondent's property for any missing firearms.<sup>145</sup>

## 3. Types of Orders and Standards of Proof

In all states that have enacted extreme risk legislation, courts may issue emergency and non-emergency orders.<sup>146</sup> Courts may issue two types of orders: (1) *ex parte* orders; and (2) final orders.<sup>147</sup> With the exception of Massachusetts, New York, and the District of Columbia, all states require that the alleged danger be imminent.<sup>148</sup>

*Ex parte* motions are motions for orders that can be granted by a court without waiting for the response of the subject of the motion.<sup>149</sup> In order to obtain an *ex parte* order, the burden of proof falls on the petitioner to provide enough credible evidence that the respondent is a danger to themselves or others.<sup>150</sup> The standard of proof for these orders ranges from the most burdensome, "clear and convincing,"<sup>151</sup> to the least burdensome, "reasonable, probable or good

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135. N.Y. C.P.L.R. Art 63-A (McKinney 2019).

136. FLA. STAT. § 790.401(1)(a) & (2)(a) (2020).

137. 8 R.I. GEN. LAWS § 8-8.3-1 (2018).

138. VT. STAT. ANN. tit. 13, § 4053(a) (2018).

139. GIFFORDS L. CTR., *supra* note 28.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. See *Ex Parte*, BLACK'S LAW DICTIONARY (11th ed. 2010).

150. GIFFORDS L. CTR., *supra* note 28.

151. *Id.*

cause.”<sup>152</sup> The duration of these orders also varies by state.<sup>153</sup> But most courts issue *ex parte* orders that last no more than fourteen days.<sup>154</sup>

Final orders, however, require a higher stand of proof because these orders can last more than six months—potentially depriving an individual of his or her firearm permanently.<sup>155</sup> Most final orders expire after one year, with the option to petition a court to extend the order, although some states allow such orders to last indefinitely.<sup>156</sup> When orders do expire, petitioners may ask the court to renew the order if the respondent continues to pose a danger.<sup>157</sup> Respondents who are subject to such orders have the opportunity to request a hearing in order to prove that they no longer pose a risk.<sup>158</sup> In these cases the same burden of proof that was used by the petitioner is the same burden of proof that falls to the respondent.<sup>159</sup>

#### 4. *Relinquishment Process*

Most extreme risk protection orders require the respondent to voluntarily relinquish their firearms and ammunition.<sup>160</sup> In reality, cooperation is not necessarily guaranteed by the respondent, so search warrants are the main tool utilized by law enforcement to seize firearms once a judicial order has been issued.<sup>161</sup> Many states allow for law enforcement officials to obtain a warrant to seize firearms and ammunition in addition to the extreme risk protection order.<sup>162</sup> The warrant is issued simultaneously to the extreme risk protection order but only if there is probable cause to believe the respondent still possesses weapons after the extreme risk protection order has been serviced.<sup>163</sup>

Proposed legislation that would restrict citizens’ firearm possession who are deemed to pose a threat to the general public, but who do not have criminal records, raises concerns about violating their rights under the Second Amendment and the Fourteenth Amendment’s Due Process Clause.

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152. *Id.*

153. See Foley, *supra* note 112.

154. GIFFORDS L. CTR., *supra* note 28.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Firearm Relinquishment*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/law-center/gun-laws/policy-areas/who-can-have-a-gun/firearm-relinquishment/> (last visited May 16, 2021) [<https://perma.cc/U4RB-7J3R>].

161. See, e.g., Julia Manchester, *Colorado Sheriff Warns ‘Red Flag’ Gun Laws Could Put Officers at Risk*, HILL (Apr. 8, 2019), <https://thehill.com/hilltv/rising/437838-colorado-sheriff-warns-red-flag-legislation-could-put-officers-at-risk> [<https://perma.cc/G3YU-4CHJ>].

162. *Firearm Relinquishment*, *supra* note 160.

163. See *id.*

### III. ANALYSIS

Despite the many safety benefits that extreme risk laws provide, there are many questions left unanswered regarding their compliance with the Second Amendment. The Supreme Court has provided little guidance regarding the standards for analyzing the constitutionality of extreme risk laws, which restrict the rights of law-abiding citizens.<sup>164</sup>

This Part examines the constitutionality of implementing and enforcing extreme risk laws through the lens of the strict scrutiny standard, which courts apply in cases where a government regulation places a burden on a fundamental right. First, courts consider whether these statutes burden conduct protected by the Second Amendment.<sup>165</sup> If so, the court determines the appropriate level of scrutiny to apply.<sup>166</sup> If the court determines that a state law survives scrutiny, in spite of the burden placed on a fundamental right by the regulation, the statute will pass constitutional muster.<sup>167</sup>

#### A. *The Heller Court's Approach to Scrutiny Analysis*

*Heller* adopted a two-pronged approach to the review of Second Amendment challenges.<sup>168</sup> First, the Court considers if the statute in question burdens conduct that falls within the Second Amendment's scope.<sup>169</sup> If so, courts will review the law under some form of scrutiny.<sup>170</sup> Extreme risk laws provide a clear example of state laws encumbering the Second Amendment rights of law-abiding citizens.<sup>171</sup> The Supreme Court has not yet established a standard of scrutiny for courts to utilize when analyzing government regulations that burden the Second Amendment.<sup>172</sup> The Court has provided some guidance, however, previously recognizing that the application of strict scrutiny is warranted when state or federal legislation touches upon constitutionally protected rights.<sup>173</sup> Additionally, the Court held that a heightened standard of review should be applied in *Heller*.<sup>174</sup>

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164. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

165. *Id.* at 573.

166. *See id.* at 628–29.

167. *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

168. *Id.*

169. *Heller*, 554 U.S. at 635.

170. *See id.* at 628–29 (explaining that this law would fail under any standard of scrutiny).

171. *See, e.g.*, MD. CODE ANN., PUB. SAFETY § 5-604(a)(1) (West 2018); VT. STAT. ANN. tit. 13, § 4053(c) (2018).

172. *Heller*, 554 U.S. at 634.

173. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 38 (1973).

174. *Heller*, 554 U.S. at 628 n.27 (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”).

### B. Application of Strict Scrutiny to Extreme Risk Laws

Strict scrutiny is required when a fundamental right is burdened by government action or regulation.<sup>175</sup> The Supreme Court established in *Heller*, and affirmed in *McDonald*, that citizens of the United States possess a fundamental right to keep and bear firearms within the home.<sup>176</sup> Thus, because extreme risk laws impose a burden on law-abiding citizens' right to keep and bear arms,<sup>177</sup> these laws must be analyzed through the lens of strict scrutiny.<sup>178</sup>

Under strict scrutiny, federal or state laws may constitutionally burden a fundamental right if the government can demonstrate a compelling interest and the law or regulation in question is narrowly tailored to achieving that interest.<sup>179</sup> Although extreme risk laws burden the right of law-abiding citizens to keep and bear arms, by temporarily removing firearms from dangerous individuals, extreme risk laws are narrowly tailored to a compelling government interest—public safety.<sup>180</sup> Thus, even if strict scrutiny is applied, such laws will pass constitutional muster.

#### I. Government's Compelling Interest

In order for extreme risk laws to survive strict scrutiny, state governments must establish a compelling interest for restricting an individual's ability to possess a firearm within his or her home.<sup>181</sup> Justice Breyer provided a strong argument illuminating the government's compelling interest to regulate firearm ownership and possession.<sup>182</sup> He asserted that the government's interest in the case of guns can be distinguished from the legislative burden placed on other rights.<sup>183</sup> Justice Breyer argued that unlike other Amendments which seek to "protect individuals who might otherwise suffer unfair or inhumane treatment[,]"<sup>184</sup> the "private self-defense right does not significantly seek to protect individuals who might otherwise suffer unfair or inhumane treatment at the hands of a majority."<sup>185</sup>

Additionally, government interest in protecting the health and safety of the public provides a compelling interest.<sup>186</sup> The Supreme Court held in *Hodel*, "[p]rotection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action."<sup>187</sup> The government's

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175. *Id.*

176. *Id.* at 595.

177. See GIFFORDS L. CTR., *supra* note 28.

178. *Rodriguez*, 411 U.S. at 38.

179. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

180. *See id.*

181. *Heller*, 554 U.S. at 630.

182. *McDonald v. City of Chicago*, 561 U.S. 742, 921 (Breyer, J., dissenting).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Mackey v. Montrym*, 443 U.S. 1, 17 (1979).

187. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981).

compelling interest in protecting the public from gun violence outweighs the individual right to keep and bear arms—even by law-abiding citizens.<sup>188</sup>

In *Hope v. State*, the plaintiff who had his firearms removed by a Connecticut court, challenged the statute as a violation of his Second Amendment rights.<sup>189</sup> The respondent in this case argued that § 29-38(c) of the Connecticut State Code violated his Second Amendment rights.<sup>190</sup>

In the respondent's case, the police had been called to his home on a number of occasions in response to concerns about his mental health, for which he was subsequently hospitalized.<sup>191</sup> The court also found that he continued to suffer from an underlying medical condition that caused delusions, influencing its decision to order that his firearms be seized for one year.<sup>192</sup> The court held the Connecticut statute did not implicate the Second Amendment because it does not restrict the rights of "law-abiding responsible citizens"<sup>193</sup> from keeping and using firearms to protect their homes.<sup>194</sup>

Here, the *Hope* court held that the law "restrict[ed] for up to one year the rights of only those whom a court has adjudged to pose a risk of imminent physical harm to themselves or others after affording due process protection to challenge the seizure of the firearms."<sup>195</sup> The statute is an example of the longstanding "presumptively lawful regulatory measures"<sup>196</sup> that were described by the Supreme Court in *Heller*.<sup>197</sup> Thus, *Hope* provides a strong example of the compelling government interest justifying the removal of firearms from individuals who pose a danger to others in order to promote public safety.<sup>198</sup>

Opponents may assert that the right to self-defense within the home is more important than the government's interest because confrontation can happen at any moment.<sup>199</sup> But the collective rights of the public still outweigh the rights of the individual within his or her home because the "primary concern of every government—a concern for the safety and indeed the lives of its citizens" outweighs the private right to self-defense.<sup>200</sup> Thus, state governments can firmly establish a compelling interest in enacting and enforcing laws that temporarily

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188. See, e.g., Aaron J. Kivisto & Peter Lee Phalen, *Effects of Risk-Based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981–2015*, 69 PSYCHIATRIC SERVS. 855, 861 (2018) (explaining that firearm seizure laws have typically been enacted after mass homicides); Swanson et al., *supra* note 77, at 207–08.

189. *Hope v. State*, 133 A.3d 519, 521–22 (Conn. App. Ct. 2016).

190. *Id.*

191. *Id.* at 522–23.

192. *Id.* at 523.

193. *Id.* at 524.

194. *Id.*

195. *Id.*

196. *Id.*

197. *District of Columbia v. Heller*, 554 U.S. 570, 627 n.26 (2008).

198. *Hope*, 133 A.3d at 525.

199. See, e.g., *Redington v. State*, 992 N.E.2d 823, 831 (Ind. Ct. App. 2013).

200. *United States v. Salerno*, 481 U.S. 739, 755 (1987); *McDonald v. City of Chicago*, 561 U.S. 742, 921 (2010) (Breyer, J., dissenting).

restrict firearm possession.<sup>201</sup> Similar legislation has been successfully implemented within other jurisdictions<sup>202</sup> and found to be constitutional.<sup>203</sup> Additionally, increased regulations involving the removal of firearms from dangerous individuals have been found to reduce gun violence<sup>204</sup> and therefore furthers the government's goal that only law-abiding citizens who do not pose an imminent risk to others can continue to keep and bear firearms. To survive strict scrutiny, however, state governments must also demonstrate that extreme risk laws are narrowly tailored and the least restrictive means for promoting this compelling interest.<sup>205</sup>

## 2. *Narrowly Tailored and Least Restrictive Means*

Second, the government must establish that the legislation or regulation is narrowly tailored and the least restrictive means to the state legislature's compelling interest in public safety.<sup>206</sup> Although guns are often seized from law-abiding citizens in the cases of judges granting extreme risk protection orders, these orders target individuals who pose a threat to themselves or others, and thus are narrowly tailored only to individuals posing a risk to individual or public safety.<sup>207</sup>

In *Redington v. State*, the Court of Appeals of Indiana considered whether the state law that allows police officers the ability to temporarily seize firearms from individuals who pose an imminent threat violated constitutional rights.<sup>208</sup> The plaintiff appealed the district court's order to remove his firearms because the State had proven by clear and convincing evidence that the plaintiff was dangerous as defined by Ind. Code §35-47-14-1, and ordered that the local police department retain the fifty-one firearms seized from the plaintiff.<sup>209</sup> The plaintiff had a history of delusional and paranoid thoughts, as well as making threats of violence against others.<sup>210</sup> The plaintiff argued that the statute as applied to him was unconstitutional on the basis that it violated his Second Amendment right to own and possess firearms.<sup>211</sup> The court analyzed the law using a “magnitude of the impairment” analysis<sup>212</sup> in examining whether or not the law created a substantial obstacle for citizens to bear arms for self-defense.<sup>213</sup>

As *Redington* demonstrates, extreme risk laws satisfy the “narrowly tailored” branch of strict scrutiny because the laws are limited to individuals who

201. See *McDonald*, 561 U.S. at 921.

202. See Swanson et al., *supra* note 77, at 185.

203. Kachalsky v. County of Westchester, 701 F.3d 81, 101 (2d Cir. 2012); Woppard v. Gallagher, 712 F.3d 865, 882 (4th Cir. 2013).

204. *Woopard*, 712 F.3d at 879.

205. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16–17 (1973).

206. See *Roe v. Wade*, 410 U.S. 113, 155 (1973).

207. GIFFORDS L. CTR., *supra* note 28.

208. *Redington v. State*, 992 N.E.2d 823, 828 (Ind. Ct. App. 2013).

209. *Id.*

210. *Id.* at 825–28.

211. *Id.* at 834.

212. *Id.* at 833–34.

213. *Id.* at 834.

pose a risk of imminent harm to themselves or others.<sup>214</sup> Thus, a proper view of these laws is that they are the least restrictive means of regulating public safety and not meant to infringe upon the rights of law-abiding citizens to keep firearms in their home.<sup>215</sup>

Ultimately the *Redington* court held that the right of citizens was not overly burdened, and the police were acting in pursuit to a valid police power.<sup>216</sup> Indiana state law allows police “to secure the public health, safety, [and] welfare”<sup>217</sup> of its citizens.<sup>218</sup> Further, the statue defined an individual as “dangerous” if he or she poses an imminent risk to themselves or others, has a mental illness and has not demonstrated a pattern of consistently taking prescribed medications, or is the subject of documented evidence that the individual has a propensity for violent or emotionally unstable conduct.<sup>219</sup> Ultimately, because the court recognized the law applied narrowly to the plaintiff’s situation, the Indiana Supreme Court subsequently refused to hear an appeal.<sup>220</sup>

### C. Opposition and First Amendment Comparison

Opponents assert that extreme risk laws are overly restrictive because they may remove guns from individuals who themselves do not pose a risk to others, but live in the same household as someone who does pose such a risk.<sup>221</sup> But the extreme risk protection orders only target those who could potentially or inadvertently provide a dangerous or at-risk individual access to a firearm.<sup>222</sup> Citizens who do not pose a risk are protected by the requirement that the police establish probable cause of an imminent threat before seizing firearms and ammunition.<sup>223</sup> Extreme risk laws are thus a moderate means of regulating guns because firearms are not seized from individuals without probable cause and evidence of threats of violence or self-harm.<sup>224</sup>

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214. *Id.* at 833; District of Columbia v. Heller, 554 U.S. 570, 626–27 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . .”); Hope v. State, 133 A.3d 519, 521 (Conn. App. Ct. 2016). See generally, George F. Parker, *Circumstances and Outcomes of a Firearm Seizure Law: Marion County, Indiana, 2006–2013*, 33 BEHAV. SCI. & L. 308 (2015).

215. *See Heller*, 554 U.S. at 635.

216. *Redington*, 992 N.E.2d at 833, 835.

217. *Id.* at 836 (citation omitted).

218. Ind. Code § 35-47-14-1(a)(2).

219. *Id.*

220. *Redington*, 992 N.E.2d at 825.

221. *See* Mike Hammond, *Why ‘Red Flag’ Gun Confiscation Orders are Not a Constitutional Option*, GUN OWNERS OF AM. (Aug. 28, 2019), <https://gunowners.org/why-red-flag-gun-confiscation-orders-are-not-a-constitutional-option/> [<https://perma.cc/XU7J-Z2HX>].

222. *See generally* Parker, *supra* note 214, at 322.

223. *See Extreme Risk Laws Save Lives*, EVERYTOWN FOR GUN SAFETY, <https://everytownresearch.org/extreme-risk-laws-save-lives/> (Jan. 22, 2021) [<https://perma.cc/4JVQ-KBQC>].

224. *See id.*

Additionally, opponents maintain that extreme risk laws are overly restrictive because people who may need guns for protection are having firearms removed from their possession.<sup>225</sup> But statutory removal requirements and processes do not prevent all people from carrying firearms; they keep guns in the hands of the people who really need them and out of the hands of those who pose a significant or imminent threat to themselves or others.<sup>226</sup> This moderate approach to firearm regulation balances the government interest of public safety while ensuring that law-abiding individuals in need of a firearm for protection do not have guns removed from them.<sup>227</sup> The law demonstrates the focus of the government's compelling interest on those deemed to be dangerous.<sup>228</sup> The Indiana law explicitly states mentally ill individuals or those released from a mental health facility are not preempted from owning a firearm.<sup>229</sup>

#### *D. Second Amendment's Inherent Limitations*

As discussed in preceding sections, the Second Amendment confers the fundamental right to keep and bear arms.<sup>230</sup> The Supreme Court established that the core of this right is to keep a gun and ammunition in one's home for self-defense.<sup>231</sup> The Court in *Heller*, however, also recognized the inherent limitations to the right to bear arms.<sup>232</sup> These limitations include "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."<sup>233</sup> Extreme risk laws do not fall explicitly within these inherent limitations and thus create a burden on the fundamental right to possess and carry firearms for lawful purposes.<sup>234</sup> Judicial review of legislation that burdens fundamental rights protected by the Constitution demands strict scrutiny.<sup>235</sup>

Courts view the Second Amendment as essentially different from other fundamental rights because of the inherently dangerous nature of firearms, as compared to other fundamental freedoms, such as speech or religious practices.<sup>236</sup> The inherent danger of guns gives rise to a greater governmental interest in regulating the possession of firearms, even those within the home.<sup>237</sup> The government has a strong interest in the safety of the public and has traditionally regulated gun ownership and possession without violating rights protected by the

225. See, e.g., *Kachalsky v. County of Westchester*, 701 F.3d 81, 87–88 (2d Cir. 2012).

226. *Id.* at 100.

227. See, e.g., *id.* at 98–99; *Woppard v. Gallagher*, 712 F.3d 865, 881 (4th Cir. 2013).

228. *McDonald v. City of Chicago*, 561 U.S. 742, 921 (2010) (Breyer, J., dissenting).

229. IND. CODE § 35-47-14-1(b) (2013).

230. U.S. CONST. amend. II ("A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

231. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

232. *Id.* at 626–27.

233. *Id.*

234. See *id.*

235. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37–38 (1973).

236. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 921 (2010) (Breyer, J., dissenting).

237. *Heller*, 554 U.S. at 593.

Second Amendment.<sup>238</sup> Thus, laws that allow courts to utilize extreme risk protection orders must be narrowly tailored and the least restrictive means of accomplishing a compelling government interest.

#### E. Analogy to Restrictions on the First Amendment

The fundamental right to free speech as conferred by the First Amendment<sup>239</sup> provides a strong constitutional analogue to the fundamental right to bear arms and the power of the government to regulate such fundamental rights.<sup>240</sup> The *Heller* majority acknowledged the comparison, stating, “[t]he First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets . . .”<sup>241</sup> Thus, although the First Amendment demands that strict scrutiny be applied to laws that burden the freedom of speech, this right is not without limitations.<sup>242</sup>

Freedom of speech poses many of the same issues existing in the debates over Second Amendment rights.<sup>243</sup> Courts must balance the fundamental right of speech with the government’s interest in public safety.<sup>244</sup> Although the First Amendment protects a wide range of speech, speech can be regulated if it encourages violence or threatens public safety.<sup>245</sup> This issue has been seen frequently over the last decade, most notably during the aftermath of a controversial grand jury decision in Ferguson, Missouri which led to many debates over freedom of speech and riot incitement.<sup>246</sup>

In *Bradenburg v. Ohio*, the Supreme Court held that the “constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>247</sup> *Bradenburg* demonstrates that while a fundamental right is burdened by government action, the need to protect the public from the incitement of imminent violence or other “lawless action” passes constitutional muster.<sup>248</sup> The notion of burdening a fundamental right by regulating

238. See *McDonald*, 561 U.S. at 921 (Breyer, J., dissenting).

239. U.S. CONST. amend. I.

240. *Heller*, 554 U.S. at 635.

241. *Id.*

242. *Id.*

243. See Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 61 (2012).

244. See Factbox: When Can Free Speech Be Restricted in the United States?, REUTERS (Aug. 14, 2017, 4:29 PM), <https://www.reuters.com/article/us-virginia-protests-speech-factbox/factbox-when-can-free-speech-be-restricted-in-the-united-states-idUSKCN1AU2E0> [https://perma.cc/D6K6-EMEP].

245. See Magarian, *supra* note 2453, at 67.

246. See Ray Sanchez, *Michael Brown’s Stepfather at Rally: “Burn this Bitch Down!”*, CNN (Dec. 8, 2014, 2:05 PM), <https://www.cnn.com/2014/11/25/us/michael-brown-stepfather-video/index.html> [https://perma.cc/9QMV-KGU2]; see also Adam Carlson, *Police: Did Michael Brown’s Stepfather Incite a Riot?*, ATLANTA J.-CONST. (Dec. 2, 2014), <https://www.ajc.com/news/police-did-michael-brown-stepfather-incite-riot/GWX3iYPWHIcgj0NUvEqq5H/> [https://perma.cc/RQW7-QJF5] (describing protests in Ferguson following a speech given in response to the grand jury decision).

247. *Bradenburg v. Ohio*, 395 U.S. 444, 447 (1969).

248. *Id.*

conduct that could lead to imminent threats of violence or danger provides a similar foundation for the regulation of the Second Amendment.<sup>249</sup>

In *Heller*, the Court acknowledged similar restraints on the fundamental right to keep and bear firearms.<sup>250</sup> Although the Second Amendment protects the rights of law-abiding citizens, it does not confer the “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>251</sup> Thus, the Court recognized that although the Second Amendment confers the right to possess and carry a firearm for self-defense in the home,<sup>252</sup> the right is not unlimited and thus can be subjected to certain government regulations.<sup>253</sup> The Court held that state legislatures may still enact and utilize a variety of “presumptively lawful regulatory measures”<sup>254</sup> in order to prevent violence that can result from firearm possession.<sup>255</sup> Thus, in turning to an analogous right, freedom of speech as conferred by the First Amendment, strict scrutiny would be appropriate in the case of extreme risk laws.

Ultimately, such laws are narrowly tailored to the government’s interest because extreme risk laws serve the government’s overall goal of reducing shooting violence and self-harm by identifying individuals who pose a risk to society and reducing their access to firearms.<sup>256</sup> The probable cause requirement ensures that firearms are not removed from law-abiding citizens without evidence that public safety or the safety of the individual’s person is in danger.<sup>257</sup> Although such laws burden the right to carry and possess a firearm, the government has a compelling interest in protecting the collective interests of the public and has traditionally done so without violating the Second Amendment’s constitutionally protected right, as demonstrated in the *Hope* and *Redington* cases.<sup>258</sup>

#### F. Fourteenth Amendment Assertions

Even if extreme risk laws survive a strict scrutiny analysis regarding their burden on Second Amendment rights, opponents contend a Fourteenth Amendment due process violation exists.<sup>259</sup>

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249. See Magarian, *supra* note 243, at 93.

250. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

251. *Id.*

252. *Id.* at 593.

253. *Id.* at 626 (“[T]he right [is] not a right to keep and carry any weapon whatsoever in any manner whatsoever for whatever purpose.”).

254. *Id.* at 627 n.26.

255. *Id.* at 636.

256. See *Hope v. State*, 133 A.3d 519, 524 (Conn. App. Ct. 2016).

257. See *id.* at 522.

258. See *id.* at 524; *Redington v. State*, 992 N.E.2d 823, 833 (Ind. Ct. App. 2013).

259. See David Harsanyi, *GOA Warns Senators on Dangers of Red Flag Laws*, GUN OWNERS OF AM. (Oct. 5, 2018), <https://gunowners.org/goa-warns-senators-on-dangers-of-red-flag-laws/> [https://perma.cc/R55U-84P2].

### 1. *Property Rights and Due Process*

Advocacy groups, such as Gun Owners of America, have taken a more hardened approach to the Second Amendment and extreme risk protection orders.<sup>260</sup> The organization asserts that extreme risk laws, or what they call “gun confiscation orders,”<sup>261</sup> allow the government to take away guns from law-abiding citizens and then place the burden upon the subject of the extreme risk protection order to prove his or her innocence.<sup>262</sup> Gun Owners of America asserts that extreme risk laws are dangerous violations of due process rights.<sup>263</sup> The organization contends that stripping individuals of their due process rights is a means of the government restricting liberty of law-abiding citizens in order to maintain control over their citizens.<sup>264</sup> Such arguments are founded in rhetoric that disregards the scope of extreme risk protection orders, which only serve to target individuals who have been deemed to be a threat to themselves or others.<sup>265</sup>

Although there is minimal case law regarding this issue, the District Court of Appeal of Florida of the First District addressed the issue of due process and the state’s “red flag” statute in *Davis v. Gilchrist County Sheriff’s Office*.<sup>266</sup> The court held the Florida statute did not violate due process.<sup>267</sup> The plaintiff in this case was a local deputy sheriff whose firearms were removed based on a petition filed by the Gilchrist County Sheriff’s Office.<sup>268</sup> Prior to the execution of the order and the subsequent removal of the plaintiff’s firearms, there were a number of documented instances in which the plaintiff demonstrated violent behavior and made threats against coworkers.<sup>269</sup> On one occasion he verbalized this threat to his employer stating he “want[ed] to shoot [his girlfriend’s alleged lover] in the face, eat his food, and wait for [law enforcement] to pick [him] up.”<sup>270</sup>

The court considered the issue of evaluating the intentions behind the plaintiff’s words and whether they should be accepted as serious threats or merely emotionally driven hypotheticals.<sup>271</sup> The court held that the petitioners were in a position to evaluate the plaintiff’s sincerity and the credibility behind his threats.<sup>272</sup> Further, the court held that the plaintiff’s due process argument failed the test of strict scrutiny because the state had a specific and compelling interest:

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260. *See id.*

261. *Id.*

262. John Velleco, *Red Flag Laws and the Misguided Worship of Due Process*, GUN OWNERS OF AM. (Oct. 3, 2019), <https://gunowners.org/red-flag-laws-and-the-misguided-worship-of-due-process/> [https://perma.cc/238E-EGRJ].

263. *Id.*

264. *Id.*

265. *See id.*

266. *Davis v. Gilchrist Cty. Sheriff’s Off.*, 280 So. 3d 524, 532–33 (Fla. Dist. Ct. App. 2019).

267. *Id.* at 531.

268. *Id.* at 528.

269. *Id.* at 529.

270. *Id.*

271. *Id.*

272. *Id.*

“the prevalence of public shootings, and the need to thwart the mayhem and carnage contemplated by would-be perpetrators does represent an urgent and compelling state interest.”<sup>273</sup>

Additionally, the court reasoned that the Florida statute “requires a hearing within fourteen days of an extreme risk protection order petition being filed, thus affording a respondent due process and a prompt opportunity to resist a final order.”<sup>274</sup> “Moreover, the statute incorporates an added due process safeguard by requiring proponents to meet the heightened ‘clear and convincing’ burden of proof standard.”<sup>275</sup> Because the plaintiff had the opportunity to petition the court within a reasonable amount of time and the application of a heightened standard of evidence was utilized, his due process rights were not violated.<sup>276</sup>

## 2. *Ex Parte Nature of Extreme Risk Laws*

A second argument utilized by opponents of extreme risk is that extreme risk laws violate due process rights conferred by the Fourteenth Amendment because respondents are absent during the first hearing.<sup>277</sup> The National Rifle Association (“NRA”) is one such opponent of extreme risk laws.<sup>278</sup> The basis of the NRA’s argument is that such laws deprive citizens of “a fundamental right without due process of law.”<sup>279</sup> The solution proposed by the NRA is to require certain protections for individuals who are the subject of extreme risk protection orders.<sup>280</sup> For example, they assert the process should include criminal penalties for those who bring false charges or for purposes of harassment.<sup>281</sup> But with these proposed protections in place, the NRA acknowledges that laws should be utilized to prevent “truly dangerous individuals from accessing firearms.”<sup>282</sup>

The extreme risk protection order petition procedure is very similar to temporary restraining orders obtained in claims of domestic violence.<sup>283</sup> In these cases, the respondent does not have to be present in court when the judge issues an order.<sup>284</sup> Traditionally, “due process requires each party have a reasonable

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273. *Id.* at 532.

274. *Id.* at 533.

275. *Id.*

276. *Id.*

277. U.S. CONST. amend. XIV (stating “[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”); see Matt Vasilogambros, *Red Flag Laws Spur Debate over Due Process*, PEW CHARITABLE TRS. (Sep. 4, 2019) <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/09/04/red-flag-laws-spur-debate-over-due-process> [https://perma.cc/35ZQ-ZL5Y].

278. See Charles C.W. Cooke, *Why NRA Is Raising a Red Flag Over “Red Flag” Laws*, AM.’S 1ST FREEDOM (May 23, 2019), <https://www.americas1stfreedom.org/articles/2019/5/23/why-nra-is-raising-a-red-flag-over-red-flag-laws/> [https://perma.cc/BG6Z-6DDM]; *Extreme Risk Protection Order Use: Lack of Process Leads to Abuse*, NRA-ILA (Feb. 3, 2020), <https://www.nraila.org/articles/2020/02/03/extreme-risk-protection-order-use-lack-of-process-leads-to-abuse> [https://perma.cc/GQ5Q-LSA6].

279. *Emergency Risk Protection Orders (ERPOS)*, NRA-ILA (Jan. 8, 2019) <https://www.nraila.org/get-the-facts/emergency-risk-protection-orders-erpos/> [https://perma.cc/T29P-RU3T].

280. *Id.*

281. *Id.*

282. *Id.*

283. See *Extreme Risk Laws Save Lives*, *supra* note 223.

284. FED. R. CIV. P. 65(b)(1).

opportunity to prove or disprove allegations, once trial proceedings have commenced . . . .<sup>285</sup> However, the hearings before a judge are civil and not criminal, thus, the law does not require that a respondent be present for the initial hearing.<sup>286</sup>

Alternatively, opponents may argue that the Fourteenth Amendment fundamental right to due process is being impaired by these proceedings.<sup>287</sup> Through the lens of strict scrutiny, however, extreme risk laws survive constitutional muster because of the safeguards that exist within the court system to protect due process rights.<sup>288</sup> Under the Federal Rules of Civil Procedure, a court may issue a temporary restraining order, without advanced written or oral notice to the adverse party if: (1) “specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition,”<sup>289</sup> and (2) “the movant’s attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.”<sup>290</sup> Facially, temporary restraining orders appear to violate due process because they are issued against individuals on the basis of complaint without providing notice to the opposing party prior to the issuance.<sup>291</sup>

Much like the process for extreme risk protection orders, a temporary restraining order is only a temporary restraint placed on an individual’s rights.<sup>292</sup> Temporary restraining orders expire after a limited time, and cannot exceed fourteen days.<sup>293</sup> Similarly, in order to protect the rights of the respondent in cases of extreme risk protection orders, most courts allow the respondent to petition the court within thirty days of the order—thus providing the respondent with an opportunity to contest the order in a timely manner.<sup>294</sup>

While extreme risk protection orders, much like temporary restraining orders, do burden the respondent’s right to due process, this burden is outweighed by the government’s interest in protecting citizens in emergency or dangerous situations.<sup>295</sup> The ability to challenge such orders within a reasonable amount of time in order to regain possession of firearms, affirms the notion that safety of

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285. See, e.g., *Davis v. Gilchrist Cnty. Sheriff's Off.*, 280 So. 3d 524, 531 (Fla. Dist. Ct. App. 2019).

286. FED. R. CIV. P. 65(b)(1).

287. See, e.g., *Emergency Risk Protection Orders (ERPOS)*, *supra* note 279; see also David Harsanyi, *Democrats’ New Anti-Gun Laws Are Also an Attack on Due Process*, FEDERALIST (Oct. 4, 2018), <https://thefederalist.com/2018/10/04/dnew-anti-gun-laws-attack-due-process/> [https://perma.cc/WZ6M-34DW]; Tony Lovasco, “Red Flag Laws” Violate More than Just Gun Rights, HILL (Aug. 12, 2019, 8:45 AM), <https://thehill.com/blogs/congress-blog/politics/457058-red-flag-laws-violate-more-than-just-gun-rights> [https://perma.cc/3GFT-R3CK].

288. See, e.g., *Davis*, 280 So. 3d at 533.

289. FED. R. CIV. P. 65(b)(1)(A).

290. *Id.* at 65(b)(1)(B).

291. See Amber Fink, *Every Reasonable Means: Due Process and the (Non) Enforcement of Restraining Order in Gonzales v. Town of Castle Rock*, 24 L. & INEQ. 375, 385 (2006).

292. See *id.* at 385–86.

293. FED. R. CIV. P. 65(b)(2).

294. See GIFFORDS L. CTR., *supra* note 28.

295. See, e.g., *Mackey v. Montrym*, 443 U.S. 1, 17 (1979); Fink, *supra* note 291, at 381.

the public outweighs the temporary burden placed on Fourteenth Amendment due process rights.<sup>296</sup>

Although extreme risk laws burden fundamental rights conferred by the Second and Fourteenth Amendments, such laws pass constitutional muster when analyzed through the lens of strict scrutiny. But as states continue to consider and adopt extreme risk legislation, they must ensure new laws do not impermissibly drift into unconstitutional territory.

#### IV. RECOMMENDATION

Extreme risk laws serve an important societal function in reducing gun violence by removing firearms from individuals who pose a threat.<sup>297</sup> These laws target individuals who have made threats of violence or self-harm.<sup>298</sup> Everytown for Gun Safety conducted a nationwide study demonstrating that mass shooters showed warning signs 51% percent of the time prior to the incident.<sup>299</sup> This high percentage suggests that extreme risk protection orders have the potential to greatly impact the nation's number of mass shootings over time.<sup>300</sup> The greatest concern from opponents regarding new legislation arises, however, from the effect it will have on individuals who are not the subject the extreme risk protection orders.<sup>301</sup> In order to ensure that the rights of law-abiding persons are protected, state legislatures and courts must take active steps.<sup>302</sup>

There are several factors considered in proposed extreme risk legislation, yet it is difficult for states to determine the most effective way to define, implement, and enforce these new laws.<sup>303</sup> Yet state legislatures considering these new laws should look to the early adopters of similar legislation, such as Connecticut, Indiana, and California, because of their demonstrated success.<sup>304</sup> Extreme risk laws are a more recent development, and thus there is not a tremendous amount of available data.<sup>305</sup> But the lives these extreme risk protection orders saved in these three states demonstrates the states' worthwhile efforts of combating mass violence and suicide.<sup>306</sup>

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296. See GIFFORDS L. CTR., *supra* note 28.

297. *Extreme Risk Laws Save Lives*, *supra* note 223.

298. *Id.*

299. Everytown for Gun Safety, *supra* note 21.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. GIFFORDS L. CTR., *supra* note 28.

305. *Id.*

306. *Id.*

*A. Success of Extreme Risk Laws*

Although most states' extreme risk laws have only been developed and implemented within the last several years, the extreme risk laws in Connecticut, Indiana, and California have produced successful outcomes.<sup>307</sup> In August 2018, Dr. Aaron Kivisto and Peter Phalen released a study in *Psychiatric Services* which analyzed the effect of firearm seizure laws on suicide rates in Connecticut and Indiana, the first two states to enact extreme risk legislation.<sup>308</sup> The study evaluated the effect of firearm seizure legislation in the two states over the span of three decades, to determine if overall suicide rates were reduced as a result of these laws and if firearm suicide rates were offset by an increase in non-firearm suicides.<sup>309</sup> Ultimately, the study concluded that despite the intention of the firearm seizure laws to counteract mass homicides, the laws have created a meaningful reduction in population-level firearm suicide rates.<sup>310</sup>

A California study on the state's gun violence restraining orders produced similar results.<sup>311</sup> The study focused on the relationship between the removal of firearms from individuals posing a threat to the public.<sup>312</sup> They found that most subjects of the state's court ordered gun violence restraining orders made explicit threats and owned firearms.<sup>313</sup> In the cases analyzed, the gun violence restraining orders allowed for immediate and swift action to reduce firearm access as the result of timely reports from individuals threatened or members of the public.<sup>314</sup> Although it is challenging to explicitly connect the issuance of gun violence restraining orders, "these cases suggest that this urgent, individualized intervention can play a role in efforts to prevent mass shootings, in health care settings and elsewhere."<sup>315</sup>

Yet, these successes do not come without challenges. In many situations, law-abiding citizens who legally own firearms are placed in the difficult position of having their property seized because of their proximity to the subject of an extreme risk protection order.<sup>316</sup> Thus, as states continue to adopt extreme risk laws in the wake of the successes demonstrated by Connecticut, Indiana, and California,<sup>317</sup> state legislatures must carefully decide which aspects of these laws to adopt.

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307. Kivisto & Phalen, *supra* note 188, at 855; Garen J. Wintemute et al., *Extreme Risk Protection Orders Intended to Prevent Mass Shootings*, ANNALS OF INTERNAL MED., 655, 655 (Aug. 20, 2019).

308. Kivisto & Phalen, *supra* note 188, at 856.

309. *Id.*

310. *Id.* at 855.

311. Wintemute et al., *supra* note 307, at 655.

312. *Id.* at 657.

313. *Id.*

314. *Id.* at 658.

315. *Id.*

316. *Extreme Risk Laws Save Lives*, *supra* note 223.

317. Swanson et al., *supra* note 77, at 185.

### B. Recommended Proposed Legislation in Other States

In order to protect the fundamental rights conferred by the Second and Fourteenth Amendments, state legislatures proposing to adopt similar legislation should consider the following limitations: (1) The standard of evidence utilized by the courts should be “clear and convincing”;<sup>318</sup> (2) the time between the first hearing and the second should not exceed 30 days;<sup>319</sup> (3) new laws should clearly define the “red flags”;<sup>320</sup> (4) new laws should also define access to firearms; and (5) each provision should apply to both firearms and ammunition.<sup>321</sup>

The concern arising from vague definitions is that law-abiding citizens who do not live directly with the individual in question could temporarily have their property seized.<sup>322</sup> Greater uniformity across the states would ensure that states provide the protections that are needed for the public while ensuring that the laws do not impermissibly burden the fundamental rights of keeping and bearing arms, as well as due process, in instances of property seizure.<sup>323</sup>

#### 1. Standard of Evidence

Standards of proof to obtain the *ex parte* orders should also follow the Connecticut standard.<sup>324</sup> In order to obtain an *ex parte* order in Connecticut, the petitioner must present probable cause that: (1) a person poses a risk of imminent personal injury to themselves or to others; (2) that person possesses one or more firearms; and (3) if such firearm or firearms “are within or upon any place, thing or person, such judge may issue a warrant commanding a proper officer to enter into or upon such place or thing, search the same or the person and take into such officer’s custody any and all firearms and ammunition.”<sup>325</sup> This evidence can be established through documented evidence that would give rise to a reasonable belief that an individual has a propensity for violence or suicidal conduct.<sup>326</sup> The behaviors and threats made by Nikolas Cruz, *supra*,<sup>327</sup> are strong indicators of imminent dangers.<sup>328</sup>

#### 2. Timing Standards

New statutes should contain the following timing standards: (1) courts should hear petitions within twenty-four hours of submission;<sup>329</sup> (2) respondents

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318. GIFFORDS L. CTR., *supra* note 28.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. Swanson et al., *supra* note 77, at 188.

324. CONN. GEN. STAT. ANN. § 29-38c (2013).

325. *Id.*

326. GIFFORDS L. CTR., *supra* note 28.

327. See *supra* Part I.

328. Goldman & Mazzei, *supra* note 10.

329. GIFFORDS L. CTR., *supra* note 28.

should have the ability to petition the court for early termination of the order;<sup>330</sup> and (3) a permanent extreme risk protection order should not exceed fourteen days without a hearing in which the respondent is present.<sup>331</sup>

State courts should increase the immediacy of reviewing extreme risk protection order petitions. Ideally, courts will review such emergency petitions within twenty-four hours.<sup>332</sup> The courts' immediate action has the potential to prevent any harm that could arise by allowing the subject of the petition to continue to have access to firearms.<sup>333</sup> The quick timing of a court's review would allow the court to also make a judgment regarding whether the subject of the petition will attempt to conceal the guns, while simultaneously allowing law enforcement to seize guns from dangerous individuals much more quickly.<sup>334</sup>

While the Connecticut statute provides a strong foundation for timing standards, the law does not allow for early termination of the order, a process recognized in many other states.<sup>335</sup> For example, under Illinois's extreme risk protection order law the respondent has the ability to petition the court once during the duration of the order for early termination.<sup>336</sup> If a respondent chooses to petition the court for early termination, that individual bears the burden of proving by a preponderance of the evidence that he or she no longer poses a significant danger to themselves, or others.<sup>337</sup>

Finally, the length of time in which an extreme risk protection order is effective should be standardized—allowing such initial orders to last no more than fourteen days.<sup>338</sup> Once a hearing has been held before a court, where the respondent has the opportunity to participate and present a defense, the court should be able to issue an order for a longer period of time, such as one year, if the respondent poses a danger to society.<sup>339</sup> By enforcing timing standards, petitioners will be able to have their emergency order reviewed in a timely manner, while still protecting respondents' rights by not impermissibly burdening their fundamental rights for an excessive period of time.<sup>340</sup>

### 3. Defining the "Red Flags" More Narrowly

Numerous studies have demonstrated that prior to violent attacks or suicides, individuals often exhibit concerning behaviors.<sup>341</sup> According to a study

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330. *Id.*

331. *Id.*

332. James Silver, Andre Simons & Sarah Craun, *A Study of the Pre-Attack Behaviors of Active Shooters in the United States*, FED. BUREAU OF INVESTIGATION (June 2018), <https://www.fbi.gov/file-repository/pre-attack-behaviors-of-active-shooters-in-us-2000-2013.pdf/view> [https://perma.cc/Y4P4-CAF2].

333. *See id.*

334. *See id.*

335. CONN. GEN. STAT. ANN. § 29-38c (2013).

336. 430 ILL. COMP. STAT. 67/35 (f).

337. *Id.*

338. GIFFORDS L. CTR., *supra* note 28.

339. *Id.*

340. *Id.*

341. *See, e.g., Suicide*, MENTAL HEALTH AM., <https://www.mhanational.org/conditions/suicide> (last visited May 16, 2021) [https://perma.cc/4AGT-DL43].

conducted by Mental Health America, up to 80% of people provide some indication of suicidal intentions prior to the act.<sup>342</sup> An FBI study found that shooters display four to five observable concerning behaviors over time, “often related to the shooter’s mental health, problematic interpersonal interactions, or other signs of violent intentions.”<sup>343</sup> However, there remains a great challenge in defining the “red flags” that should allow for a court to issue an extreme risk protection order.<sup>344</sup>

Comments on social media should be considered as a factor, especially when such threats directly target locations, such as high schools, or specific individuals.<sup>345</sup> Reports made to police officers or school officials by family members, or other individuals who are familiar with the situation should also be considered when developing a list of potential “red flag” behaviors.<sup>346</sup>

Additionally, law enforcement officials should be notified when an extreme risk protection order has been filed.<sup>347</sup> By increasing the speed in which law enforcement receives notification, they will be able to more quickly assess whether the subject of the extreme risk protection order possess a gun or has easily available access to one.<sup>348</sup> Working closely with law enforcement may also provide additional insights to courts regarding an individual’s past threats against themselves or others, which may assist a court in determining whether an extreme risk protection order is necessary.<sup>349</sup>

Yet, in order to protect individuals from unnecessary judicial burdens and harassment, the law should impose a criminal penalty on any individual who knowingly files a false petition with the intent to cause harm.<sup>350</sup> To prevent abuse of the extreme risk protection order process, some states have also enacted statutes that make it a crime to file false petitions or to file petitions with the intent to harass another person.<sup>351</sup> For example, the California law states: “[e]very person who files a petition for an *ex parte* gun violence restraining order . . . or a gun violence restraining order issued after notice and a hearing . . . knowing the information in the petition to be false or with the intent to harass, is guilty of a misdemeanor.”<sup>352</sup> Four other states currently have similar laws that prevent the misuse of court petitions, including Illinois, Massachusetts, Oregon, and Washington.<sup>353</sup> Thus, states should consider adopting a similar provision in order to provide citizens with an additional protection.

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342. *Id.*

343. Silver et al., *supra* note 332.

344. Compare CONN. GEN. STAT. § 29-38c (1999) with CAL. CODE REGS. § A.B. 1014.

345. Goldman & Mazzei, *supra* note 10.

346. *Id.*

347. GIFFORDS L. CTR., *supra* note 28.

348. *See id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. CAL. PENAL CODE § 18200 (Deering 2016).

353. GIFFORDS L. CTR., *supra* note 28.

#### 4. Defining Access to Firearms

Thus, as national trends have demonstrated, states will continue to propose and adopt similar legislation.<sup>354</sup> In order to achieve the successful results seen in states, such as Connecticut, a standardization of the system, reflecting many of the aspects of the law while also incorporating the strong due process aspects found in other state laws is necessary.<sup>355</sup>

This aspect is most notably important for the family members or co-habitants of the subject of an extreme risk protection order.<sup>356</sup> New laws should provide that a firearm may not be seized from someone other than the subject of the extreme risk protection order, if the family member or co-habitant can provide evidence to the court that the firearm or firearms are stored in a manner that prevents access to the weapon.<sup>357</sup> This protection should extend to storage facilities and gun safes that belong to individuals who are not the subject of such orders, to prevent police searches against law-abiding individuals who are properly storing his or her firearm because proper storage eliminates the concern of access.<sup>358</sup>

### V. CONCLUSION

Extreme risk laws pose a unique challenge to state legislatures seeking to balance the government's interest in protecting the public with the private rights of individuals to own and possess firearms.<sup>359</sup> Although extreme risk protection orders burden fundamental rights conferred by the Second and Fourteenth Amendments by temporarily seizing firearms from law-abiding citizens, such legislation passes constitutional muster.<sup>360</sup> The fundamental right to keep and bear arms, as well as the associated due process rights, while broad, are not without limitations.<sup>361</sup> Extreme risk laws and protection orders survive strict scrutiny because they seek to further a compelling government interest of reducing gun violence and these statutes are narrowly tailored to the furtherance of this goal.<sup>362</sup> They allow state government to further the important interest of public safety through removing available firearms from dangerous individuals, while still ensuring law-abiding citizens in need of guns for protection or other purposes, can still access firearms.<sup>363</sup>

In the case of mass shootings, like the Valentine's Day tragedy that occurred at Marjory Stoneman Douglas High School, and the increase in suicides nationally, the need for public safety outweighs any claimed individual right

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354. See Carney, *supra* note 114.

355. *Id.*

356. GIFFORDS L. CTR., *supra* note 28.

357. *Id.*

358. *Id.*

359. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

360. See *id.*

361. *Id.*

362. *Id.* at 630.

363. See, e.g., *Woppard v. Gallagher*, 712 F.3d 865, 880 (4th Cir. 2013).

against temporary seizure of firearms. Extreme risk laws, though burdensome, only target individuals who pose a threat to themselves or others. They are a necessary step by state governments in protecting the public from dangerous individuals who present an imminent threat. In the wake of the growing number of tragedies at schools, churches, and public events, states are on the verge of an opportunity to save lives by encouraging their citizens to raise a red flag in the face of potential violence.

