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EXTREME RISK PROTECTION ORDERS IN THE POST-*BRUEN* AGE: WEIGHING EVIDENCE, SCHOLARSHIP, AND RIGHTS FOR A PROMISING GUN VIOLENCE PREVENTION TOOL

Andrew Willinger[*] *& Shannon Frattaroli*[**]

*Extreme Risk Protection Orders (ERPOs) are civil court orders that temporarily prohibit gun purchase and possession by people who are behaving dangerously and at risk of committing imminent violence. As of September 2023, ERPOs are available in 21 states and the District of Columbia. This Article presents an overview of ERPO laws, the rationale behind their development, and a review and analysis that considers emerging constitutional challenges to these laws (under both the Second Amendment and due process protections) in the post-*Bruen *era. This Article notes that the presence of multiple constitutional challenges in many ERPO-related cases has confused judicial analysis and argues that, especially in light of* Bruen*'s novel text, history, and tradition test, courts should be especially careful to clarify how cumulative-rights arguments are impacting their analysis. An examination of Second Amendment court decisions concerning another type of civil protection order, Domestic Violence Protection Orders, informs the approach used to further consider ERPO rights deprivation claims and the constitutionally relevant distinctions among different civil dispossession proceedings.*

The Article further considers the state of ERPO law in the context of the evolving evidence documenting the uptake and impact of ERPOs on gun violence in the United States, including a review of scholarship that seeks to

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*understand how ERPO statutes are being implemented and to determine whether the laws prevent interpersonal gun violence and suicide. Finally, this Article concludes with a commentary and set of recommendations to inform the practice and future scholarship of ERPO as a tool for preventing gun violence in the United States, in accord with constitutional protections in the post-*Bruen *age.*

INTRODUCTION

Policy efforts to reduce (and that aspire to eliminate) firearm violence are controversial in the United States, where the Second Amendment to the Constitution has been the subject of much debate — especially following the Supreme Court's 2008 decision in *District of Columbia v. Heller*[1] holding that the amendment protects an individual right to own firearms for self-defense. In 2014, California enacted the Gun Violence Restraining Order, a civil court order that provides a mechanism to temporarily prohibit firearm purchase and possession when someone is behaving dangerously and at risk of committing violence (including suicide).[2] In the ten years that followed California's law, 18 states and the District of Columbia (D.C.) established similar laws.[3] These statutes are often referred to as Extreme Risk Protection Order (ERPO) laws, a name first used in Washington state in 2016.[4] Here we use "extreme risk order," "ERPO," and "red flag" to refer to this category of state laws. As of September 2023, 21 states and D.C. have ERPO laws in place.[5] By establishing a non-criminal route to intervene when violence is likely imminent but before a violent crime has occurred, ERPOs offer targeted firearm violence prevention tools that resonate with lawmakers (as evidenced by the uptake and passage of ERPO laws in states throughout the country) and a majority of the public.[6] This speedy legislative progress stands in sharp contrast to the stalemate that typically characterizes U.S. gun violence prevention policy efforts, and calls into question the popular notion that firearm violence prevention policies are destined to be mired in legislative gridlock.

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1. 554 U.S. 570, 628 (2008).

2. CAL. PENAL CODE § 18150 (West 2023).

3. BLOOMBERG AMERICAN HEALTH INITIATIVE, EXTREME RISK PROTECTION ORDER: A TOOL TO SAVE LIVES, at 46 (2023), https://americanhealth.jhu.edu/implementERPO [https://perma.cc/Z28H-QGGN].

4. *Id.* at 47.

5. Connecticut and Indiana in 1999 and 2005, respectively, enacted risk warrant laws that, together with domestic violence protection orders, provided the foundation for ERPO laws. *See* CONSORTIUM FOR RISK-BASED FIREARMS POLICY, GUNS, PUB. HEALTH AND MENTAL ILLNESS: AN EVIDENCE-BASED APPROACH FOR STATE POLICY 25, https://riskbasedfirearmpolicy.org/ [https://perma.cc/W6NT-LC2F] (last visited Oct. 15, 2023); *see also* CONN. GEN. STAT. ANN. § 29-38c (West 2023); IND. CODE ANN. § 35-47-14-1(a) (West 2023).

6. Mike DeBonis & Emily Guskin, *Americans of Both Parties Overwhelmingly Support 'Red Flag' Laws, Expanded Background Checks for Gun Buyers, Washington Post-ABC News Poll Finds*, WASH. POST (Sept. 9, 2019, 6:00 AM), https://www.washingtonpost.com/politics/americans-of-both-parties-overwhelmingly-support-red-flag-laws-expanded-gun-background-checks-washington-post-abc-news-poll-finds/2019/09/08/97208916-ca75-11e9-a4f3-c081a126de70_story.html [https://perma.cc/YW6P-BWVG].

With the Supreme Court's 2022 decision in *New York State Rifle and Pistol Association, Inc. v. Bruen*,[7] some scholars and advocates have questioned whether ERPO laws have sufficient historical support to withstand Second Amendment challenges. In light of the *Bruen* decision and the Supreme Court's forthcoming review of *United States v. Rahimi*,[8] this Article assesses the history of ERPO and related case law to date — with a focus on post-*Bruen* challenges to ERPO laws in state court — and considers aspects of ERPO laws that may invite scrutiny under *Bruen*. In Part I, the Article provides context for the statutory and legal analysis by assessing the current state of ERPO uptake and research. Part II surveys relevant court decisions regarding ERPO laws and considers how such legal challenges may play out under *Bruen*. Part III concludes by analyzing the impact of state ERPO laws and recommending a path forward for policy, practice, and scholarship.

I. EXTREME RISK PROTECTION ORDERS: A HISTORY AND OVERVIEW

On December 14, 2012, 20 children and six teachers were shot and killed by a 20-year-old who walked into his former school and opened fire.[9] The massacre at Sandy Hook Elementary School led to calls for change.[10] Elected officials made promises and heard demands from survivors, constituents, and the media, and prominent leaders joined the chorus.[11] These calls for change often centered on mental illness and people with mental illness as the reason for the high rates of gun violence in the United States.[12] Policy proposals banning people with a mental illness from purchasing and possessing guns and increasing access to treatment services

7. New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111 (2022).; *see infra* Section II.A.

8. United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023), *cert. granted*, 143 S.Ct. 2688 (2023). *See generally* Kelly Roskam et al., *The Case for Domestic Violence Protective Order Firearm Prohibitions Under* Bruen, 51 FORDHAM URB. L.J. 221 (2023).

9. *See* James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. TIMES (Dec. 14, 2012), https://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html [https://perma.cc/5TXJ-C6QW].

10. For an analysis of the post-Sandy Hook response, see generally James M. Shultz et al., *The Sandy Hook Elementary School Shooting as Tipping Point: "This Time is Different,"* 1 DISASTER HEALTH 65 (2013).

11. *Id.* at 65.

12. *See, e.g.*, Anna Gorman, *Connecticut Shooter's Problems All Too Familiar to Many Parents*, L.A. TIMES (Dec. 20, 2012, 12:00 AM), https://www.latimes.com/entertainment/la-xpm-2012-dec-20-la-me-mental-illness-20121220-story.html [https://perma.cc./DE8N-7R8L].

for people with mental illness diagnoses were among the solutions that emerged.[13]

In March 2013, a group of researchers, advocates, legal scholars, and clinicians working in the fields of mental health and firearm violence prevention gathered in Baltimore to review what was known about the relationship between mental illness and gun violence.[14] At the conclusion of the meeting the group released a consensus statement that included a commitment to develop policy recommendations informed by the best available evidence.[15] In November 2013, the group, newly named the Consortium for Risk-Based Firearm Policy (the "Consortium"), released a report with three recommendations and the supporting evidence for each.[16] The third recommendation called for states to enact a new civil court order, the Gun Violence Restraining Order (GVRO), that authorized courts to temporarily prohibit firearm purchase and possession when someone is behaving dangerously and at risk of committing violence (including suicide).[17] The GVRO was conceived as an expansion of the scope of Domestic Violence Restraining Orders (DVROs), an established tool for protecting people experiencing partner violence available in all 50 states, and as a more accessible version of risk protection order laws that had been in place for years in Connecticut and Indiana.[18] The GVRO recommendation expanded the DVRO model by including imminent risk of all violence, not only partner violence.[19] It also adapted the Connecticut and Indiana risk protection orders to include family and partners as petitioners — in addition to law enforcement — and to temporarily prohibit firearm purchases in addition to possession.[20]

Interest from local and state organizations followed release of the report. In response, the Consortium worked with local groups to organize educational forums in communities across the country to discuss the recommendations, including support for GVRO policy — what would come

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13. *See, e.g.*, New York SAFE Act of 2013, S.B. 2230, 236th Leg., 2013–2014 Reg. Sess. (N.Y. 2013).

14. Emma E. McGinty et al., *Using Research Evidence to Frame the Policy Debate around Mental Illness and Guns: Process and Recommendations*, 104 AM. J. PUB. HEALTH e22 (2014).

15. *Id.* at e22–23.

16. *See* CONSORTIUM FOR RISK-BASED FIREARMS POLICY, *supra* note 5, at 4–5.

17. *Id.*

18. *See* Shannon Frattaroli, et al., *Gun Violence Restraining Orders: Alternative or Adjunct to Mental Health-Based Restrictions on Firearms*, 33 BEHAV. SCIS. & L. 290, 293–296 (2015).

19. *See* CONSORTIUM FOR RISK-BASED FIREARMS POL'Y, *supra* note 5, at 25–26.

20. *Id.* at 28–30.

to be known as ERPO.[21] As described by some Consortium members, by responding to local level interest in the recommendations and explaining the rationale behind the evidence-informed recommendations, the information disseminated and discussed at these forums offered a viable path forward for people interested in preventing gun violence.[22] Engagement with community members helped Consortium members to understand how people across the United States were thinking about gun violence and hear how the recommendations were being received.[23] Opportunities to discuss ERPO, in particular, were common as forum attendees often resonated with the need for a tool to intervene when people are behaving dangerously and at risk of committing violence, and anecdotes of scenarios where ERPO may have helped were often part of discussions during and after forums.[24] These forums, and the associated media coverage, also helped to raise awareness about ERPO as a gun violence prevention policy option that may help to address the leading cause of firearm death (suicide) and the mass shootings that drive many gun policy discussions.[25]

A. Responses from States and the Federal Government

As of September 2023, most people in the United States live in a state where ERPO is law.[26] ERPO laws were passed by legislatures with Democratic majorities and Republican majorities, and signed by governors of both political parties.[27] Washington voters in 32 of the State's 39 counties passed an ERPO ballot initiative in a show of bipartisan support for the proposal.[28] Legislators have introduced ERPO bills in almost every state in

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21. Emma E. McGinty et al., *Improving the Use of Evidence in Public Health Policy Development, Enactment, and Implementation: A Multiple Case Study*, 34 HEALTH EDUC. RSCH. 129, 137 (2019).

22. *See* Joshua Horwitz et al., *Beyond the Academic Journal: Unfreezing Misconceptions about Mental Illness and Gun Violence through Knowledge Translation to Decision-Makers*, 33 BEHAV. SCIS. & L. 356, 361–62 (2015).

23. *Id.*

24. *Id.* at 361.

25. *See* McGinty et al., *supra* note 21, at 131.

26. *See* EVERYTOWN FOR GUN SAFETY & JOHNS HOPKINS CTR. FOR GUN VIOLENCE SOLUTIONS, PROMISING APPROACHES FOR IMPLEMENTING EXTREME RISK LAWS: A GUIDE FOR PRACTITIONERS AND POLICYMAKERS 9 (2023).

27. *See Extreme Risk Protection Orders in State Legislatures*, BALLOTPEDIA, https://ballotpedia.org/Extreme_risk_protection_orders_in_state_legislatures [https://perma.cc/KT6E-JRAN] (last visited Oct. 7, 2023).

28. *See Washington Individual Gun Access Prevention by Court Order, Initiative 1491*, BALLOTPEDIA, https://ballotpedia.org/Washington_Individual_Gun_Access_Prevention_by_Court_Order,_Initiative_1491_(2016) [https://perma.cc/8MK9-X3WY] (last visited Sept. 19, 2023); Initiative Measure No. 1491 Concerns Court-Issued Extreme Risk Protection Orders Temporarily Preventing Access to Firearms – County Results, WASH. SEC. STATE (Nov. 30,

the nation.[29] Federal lawmakers have proposed national ERPO bills and both Republican and Democratic Presidents have expressed their support for ERPO laws.[30] In the span of a decade, ERPO policy has achieved a level of bipartisan backing from elected officials that has traditionally eluded firearm violence prevention policy in 21st-century America.

One explanation for states' uptake of ERPO policy is the response ERPO provides to mass shootings that create a "window of opportunity"[31] for policy change.[32] Then Assemblywoman Nancy Skinner, the lead sponsor of California's GVRO bill, introduced the measure to prevent tragedies like the massacre that took place at the University of California, Santa Barbara in 2014.[33] During the debate in Michigan about proposed ERPO bills, hearing testimony included survivors from the Michigan State University massacre that happened days before House legislators joined their Senate colleagues on the ERPO bill that later became law.[34]

With the increase in the number of states with ERPO laws also came attention to the policies and processes being developed to ensure their implementation and enforcement. In May 2019, members of the Consortium organized a meeting in Baltimore of implementers from jurisdictions where ERPO uptake was robust and representatives from jurisdictions where early

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2016), https://results.vote.wa.gov/results/20161108/state-measures-initiative-measure-no-1491-concerns-court-issued-extreme-risk-protection-orders-temporarily-preventing-access-to-firearms_bycounty.html [https://perma.cc/PMG5-B2W6] (discussing county breakdowns).

29. *See generally* Northwell Health, *Gun Violence Prevention Learning Collaborative for Health Systems and Hospitals, Session 11: Gun Violence Prevention Policy, ERPO, Bipartisan Safer Communities Act*, YOUTUBE (July 27, 2022), https://www.youtube.com/watch?v=GUJG0CuPWCY [https://perma.cc/FYX3-2PD6] (discussing the scope of ERPO laws in the United States).

30. *See, e.g.*, H.R. 2377, 117th Cong. (2021); S. 2521, 115th Cong. (2018); *see also* Liz Szabo, *Trump Wants to Take Guns Away from People in Crisis: Will That Work?*, KFF HEALTH NEWS (Aug. 5, 2019), https://kffhealthnews.org/news/trump-wants-to-take-guns-away-from-people-in-crisis-will-that-work/ [https://perma.cc/SG4G-DMME]; Annie Karni, *Biden Takes Initial Steps to Address Gun Violence*, N.Y. TIMES (Apr. 8, 2021), https://www.nytimes.com/2021/04/08/us/politics/biden-gun-control.html [https://perma.cc/U398-SZCZ] (covering Presidential support for ERPO).

31. JOHN KINGDON, AGENDAS, ALTERNATIVES, & PUBLIC POLICIES 169–77 (1984).

32. *See* McGinty et al., *supra* note 14, at e22; Elizabeth A. Tomisch et al., *The Origins of California's Gun Violence Restraining Order Law: A Case Study Using Kingdon's Multiple Streams Framework*, 23 BMC PUB. HEALTH 1, 7–8 (2023).

33. Tomisch et al., *supra* note 32, at 8.

34. *See, e.g.*, Laina G. Stebbins, *Senate Panel Hears Wrenching Testimony from Survivors, County Prosecutors on Gun Control Bills*, MICH. ADVANCE (Mar. 3, 2023, 11:49 AM), https://michiganadvance.com/2023/03/03/senate-panel-hears-wrenching-testimony-from-survivors-county-prosecutors-on-gun-control-bills/ [https://perma.cc/HWM7-GEGM]. *See also* Press Release, Michigan Senate Democrats, Michigan Dems Introduce Gun Violence Prevention Bills (Feb. 21, 2023) (on file with author).

implementation efforts were underway and deemed to be promising.[35] The goal of the meeting was to share best practices and problem-solve any barriers to implementation participants were experiencing. Participants from four states shared their implementation practices and preliminary data about ERPO use.[36] At the conclusion of the meeting, those in attendance learned from the featured jurisdictions about four distinct approaches to ERPO implementation.[37] Each was developed in response to the needs of their communities, using the resources available to implementers, and the vision of a few champions for how to leverage the available resources to meet the identified needs with the new tool that is ERPO.[38]

What also was increasingly evident as the meeting progressed was the need for deliberate attention to the infrastructure to support ERPO implementation.[39] While the concept of a civil court order to prevent violence or its escalation was not new (DVROs provide that foundation), expanding civil orders to be responsive to suicide risk and interpersonal violence beyond partner relationships was a paradigm shift.[40] Importantly, law enforcement has a more direct role in initiating ERPOs relative to DVROs.[41] Unlike with DVROs where the person experiencing violence petitions for the order, law enforcement are authorized ERPO petitioners in all 21 states and the District of Columbia – and in five states they are the only petitioner named in statute.[42] Furthermore, data from states where

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35. *See generally* Bloomberg American Health Initiative, *Extreme Risk Protection Orders Livestream*, YOUTUBE (June 3, 2019), https://www.youtube.com/watch?app=desktop&v=suICugqYELg [https://perma.cc/B8N2-ZZ5V].

36. *See id.*

37. *See id.* The four featured jurisdictions were King County, WA; Pinellas County, FL; San Diego, CA; and the state of Maryland. Participants from these jurisdictions were engaged with ERPO implementation efforts that include the use of designated law enforcement units to manage the ERPO process (King County and San Diego), statewide training for law enforcement (MD), and a sheriff's office that processes all of the ERPO petitions for their county (Pinellas County). *Id.*

38. *See id.*

39. *See id.*

40. *See* Shannon Frattaroli et al., *Extreme Risk Protection Orders in King County, Washington: The Epidemiology of Dangerous Behaviors and an Intervention Response*, INJ. EPIDEMIOLOGY, July 2020, at 2; *see also* Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: "Red Flag" Laws and Due Process*, 106 VA. L. REV. 1285, 1305 (2020).

41. Frattaroli et al., *supra* note 40, at 296.

42. *Extreme Risk Protection Orders: A Tool to Save Lives*, BLOOMBERG AM. HEALTH INITIATIVE, https://americanhealth.jhu.edu/implementERPO [https://perma.cc/VX9Z-AGH6] (last visited Sept. 25 2023). Florida, Indiana, Rhode Island, Vermont, and Virginia are the five states that authorize only law enforcement to petition for ERPOs. *Extreme Risk Protection Orders: State Laws at a Glance*, BLOOMBERG AM. HEALTH INITIATIVE, https://americanhealth.jhu.edu/sites/default/files/website-media/high-

civilians (e.g., family, partners, clinicians, school officials, and co-workers) can petition, law enforcement represents the majority of petitioners in every state where that data has been published.[43] We note that the majority varies across the jurisdictions where law enforcement and non-law enforcement petitioners have been documented.[44]

In 2022, calls for federal action to address gun violence were receiving attention as a series of high profile mass shooting events and the associated media coverage made the issue difficult for Congress to ignore.[45] In June 2022, President Biden signed into law the Bipartisan Safer Communities Act that included $750 million dollars for state efforts to support implementation of crisis intervention initiatives, including ERPO.[46] This new federal investment, combined with the experiences of a few state and local jurisdictions fielding implementation models, and emerging research about the initial use of ERPO in early adopting states[47] positioned the country well to support ERPO and its implementation alongside other crisis intervention initiatives.

With the commitment of federal funds to support ERPO implementation, the Johns Hopkins Center for Gun Violence Solutions partnered with Everytown for Gun Safety to co-host a second meeting focused on ERPO implementation in December 2022.[48] As with the 2019 meeting, the focus was those on the front-lines of ERPO implementation and their experiences with state ERPO laws.[49] Unlike 2019, the main goal of the 2022 meeting was to produce a set of recommended best practices for ERPO

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impact/ERPO/resources/ERPO_GENERAL_StateLawTable.pdf [https://perma.cc/5WUS-J9UJ] (last visited Oct. 7, 2023).

43. *See, e.g.*, Ali Rowhani-Rahbar et al., *Extreme Risk Protection Orders in Washington: A Statewide Descriptive Study*, 173 ANNALS OF INTERNAL MED. 342, 344 (2020); Frattaroli et al., *supra* note 40, at 4; April M. Zeoli et al., *Use of Extreme Risk Protection Orders to Reduce Gun Violence in Oregon*, 20 CRIMINOLOGY & PUB. POL'Y 243, 252 (2021); Leslie M. Barnard et al., *Colorado's First Year of Extreme Risk Protection Orders*, INJ. EPIDEMIOLOGY, Oct. 2021, at 3; Veronica A. Pear et al., *Gun Violence Restraining Orders in California, 2016-2018: Case Details and Respondent Mortality*, 28 INJ. PREVENTION 465, 467 (2022).

44. *See supra* note 43 and accompanying text.

45. Mass shooting events cited in the discussions about federal policy included the elementary school shooting in Uvalde, Texas and the supermarket shooting in Buffalo, New York among others. *See, e.g.*, Christopher Poliquin, *After Mass Shootings Like Uvalde, National Gun Control Fails – But States Often Loosen Gun Laws*, THE CONVERSATION (May 25, 2022, 5:40 PM), https://theconversation.com/after-mass-shootings-like-uvalde-national-gun-control-fails-but-states-often-loosen-gun-laws-183879 [https://perma.cc/9Z3R-MTKC].

46. Bipartisan Safer Communities Act of 2022, Pub. L. No. 117–159, 136 Stat. 1325 (2022).

47. *See infra* Part II.

48. EVERYTOWN FOR GUN SAFETY & JOHNS HOPKINS CENTER FOR GUN VIOLENCE SOLUTIONS, *supra* note 26, at 10.

49. *Id.*

implementation given the federal investment in ERPO implementation that would soon be available through the Bipartisan Safer Communities Act.[50] The resulting report, Promising Approaches for Implementing Extreme Risk Laws: A Guide for Practitioners and Policymakers, includes six sections that offer "key considerations" and "model approaches" for various aspects and stages of ERPO implementation.[51]

B. The Rationale for ERPO Statutes

The March 2013 meeting in Baltimore and subsequent Consortium report detailing the new ERPO policy recommendations provided a concrete proposal that was rooted in the available evidence, prevention-oriented, and responsive to calls for change.[52] ERPO was also viable in that by combining the Connecticut and Indiana risk order laws' focus on risk of violence generally (not restricted to partner violence) with the civil court infrastructure in place through DVROs, key elements of ERPOs were familiar and tested from a legal and systems perspective.[53]

1. Recognizing Dangerous Behaviors

One conclusion from the March 2013 meeting was the recognition that threatening violence or acting violently are good indicators of future violence risk — both interpersonal violence and self-directed violence — and sufficiently supported by the evidence to warrant policy action.[54] Contrary to the direction pursued by many policymakers and supported by media accounts at the time, mental illness is a poor marker for determining who is likely to commit interpersonal violence.[55] And while depression and other mental illnesses are risk factors for suicide, the suicide warning signs recognized by suicide prevention organizations are reflected in the dangerous behaviors language of ERPO laws,[56] and these warning signs offer signals of who is at risk of dying by suicide.[57] An ERPO is responsive to this understanding. By centering dangerousness and risk of committing

50. *Id*. at 6.

51. *Id*. at 7. The six sections are: 1) State and Local ERPO Infrastructure; 2) Pre-Petition Inquiry; 3) Petition Process; 4) Service of Order and Firearm Dispossession; 5) Special Considerations for Family and Members and Other Non-Law Enforcement Petitioners; and 6) Ensuring Transparency and Accountability. *Id.*

52. CONSORTIUM FOR RISK-BASED FIREARM POLICY, *supra* note 5, at 25–31.

53. Frattaroli et al., *supra* note 18, at 294–96.

54. CONSORTIUM FOR RISK-BASED FIREARM POLICY, *supra* note 5, at 6–9.

55. Horwitz et al., *supra* note 22, at 358–59.

56. Joseph C. Franklin et al., *Risk Factors for Suicidal Thoughts and Behaviors: A Meta-Analysis of 50 Years of Research*, 143 PSYCH. BULL. 187, 189 (2017).

57. *Id*. Warning signs include: no reason or purpose for living, talking about or planning suicide, and talking about hurting oneself. *Id.*

violence, an ERPO offers a targeted strategy for intervening when someone can reasonably be described as progressing along a violent trajectory.

2. Orienting toward Prevention

The focus on dangerous behaviors that precede violence as the point of intervention for ERPOs provides opportunities to prevent violence from occurring or escalating. Identifying dangerousness and assessing the risk of violence is an important first step; responding to that risk in a way that will reduce the likelihood of subsequent violence is a necessary complement to realizing the violence prevention goal. As ERPO laws become more numerous and their use more commonplace, statutory definitions of dangerousness are being applied to real world cases, further informing how dangerousness is being operationalized under ERPO at the local level.[58] By temporarily prohibiting firearm purchase and possession for as long as an ERPO is in effect, ERPO policies aim to prevent dangerous behaviors from becoming violent behaviors.

3. Addressing a Gap in Legal Response Options

In the absence of an ERPO law, firearm purchase and possession prohibitions fall short of addressing the trajectory of progressive dangerousness that often characterizes violence, resulting in missed opportunities for prevention. Violence that rises to the level of a crime tends to follow an escalation of threatening and dangerous behaviors.[59] Credible threats of violence (including suicide)[60] can be a precursor to violent actions. ERPO policies are responsive to warning signs that violence may be

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58. For example, in 2019 Washington state amended its ERPO law to remove "dangerous mental health issues" from the list of criteria for considering an ERPO and added "behaviors that present an imminent threat of harm to self or others." This 2019 amendment also added convictions for hate crimes and explicitly named minors as eligible ERPO respondents. *See* Engrossed Substitute S.B. 5027, 2019 Sess. (Wash. 2019), https://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Passed%20Legislature/5027-S.PL.pdf?q=20230911005056 [https://perma.cc/V243-QHPN].

59. There are several publications that describe trajectories of increasingly violent behavior and consider the implications for prevention. For example, a threat management model offered by Frederick S. Calhoun & Stephen W. Weston offers practical guidance for assessing threats of violence. *See generally* Frederick S. Calhoun & Stephen W. Weston, *Perspectives on Threat Management*, 2 J. OF THREAT MGMT. & ASSESSMENT 258 (2015). Jennifer M. Reingle focuses on youth. *See generally* Jennifer M. Reingle et al., *Risk and Protective Factors for Trajectories of Violent Delinquency among a Nationally Representative Sample of Early Adolescents*, 10 YOUTH VIOLENCE & JUV. JUST. 261 (2012). Allison Snow Jones describes trajectories of violence among domestic violence offenders. *See generally* Allison S. Jones et al., *Complex Behavioral Patterns and Trajectories of Domestic Violence Offenders*, 25 VIOLENCE & VICTIMS 3 (2010).

60. Franklin et al., *supra* note 56, at 189.

imminent and provide a tool for intervening in a way that is responsive to the available evidence about violence.[61]

By creating a process to temporarily pause firearm purchase and possession, ERPOs are designed to eliminate ready access to firearms by those who are behaving dangerously and at risk of being violent.[62] The case for early intervention based on threats of harm is compelling, as the numerous experiences with mass shootings demonstrate.[63] Media coverage reveals that mass shooters' threats to commit the violence they ultimately perpetrated were often known to others.[64] This media coverage is consistent with analyses of mass shooter profiles, and findings that almost half of people who commit mass shootings disclosed their plans to others prior to committing violence.[65] The firearms used in mass shootings are often legally purchased for the purpose of carrying out the mass shooting plan.[66] Although recent scholarship examining the sequencing of risk factors in advance of mass shootings suggests that "acquisition of a firearm may signal the beginning, not the end, of practical progress toward an attack," the authors regard firearm acquisition as a marker of risk within the context of a larger collection of behaviors.[67] If firearm acquisition is early in the planning stage of mass shooter sequencing, the sharing of plans (i.e., threat of violence) is one of the last components in the progression to carrying out a planned attack and therefore should be regarded with great weight in assessing whether to intervene and the swiftness of that intervention.[68]

We have paid a high price for ignoring this gap. Mass shooting incidents where the risk was clear but authorities lacked the tools to intervene in the

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61. CONSORTIUM FOR RISK-BASED FIREARM POLICY, *supra* note 5, at 25–31.

62. *Id.* at 25–31.

63. Jillian Peterson et al., *Communication of Intent to Do Harm Prior to Mass Shootings in the United States, 1966-2019*, 4 JAMA NETWORK OPEN e2133073, e2133078 (2021).

64. *See* Ashley Southall et al., *Before the Massacre, Erratic Behavior and a Chilling Threat*, N.Y. TIMES (May 15, 2022, 03:53 PM), https://www.nytimes.com/2022/05/15/nyregion/gunman-buffalo-shooting-suspect.html [https://perma.cc/J4KS-N7TY].

65. Peterson et al., *supra* note 63, at e2133073, e2133077.

66. It has been found that of the cases for which purchase information was known, "77% of those who engaged in mass shootings purchased at least some of their guns legally." The prominence of legally purchased guns by mass shooters stands in sharp contrast to the 80% of K-12 mass shooters who stole the guns they used from family members. *Public Mass Shootings: Database Amasses Details of a Half Century of U.S. Mass Shootings with Firearms, Generating Psychosocial Histories*, NAT'L INST. JUST. (Feb. 3, 2022), https://nij.ojp.gov/topics/articles/public-mass-shootings-database-amasses-details-half-century-us-mass-shootings [https://perma.cc/N3LE-37XN].

67. James Silver & Jason Silva, *A Sequence Analysis of the Behaviors and Experiences of the Deadliest Public Mass Shooters*, 37 J. OF INTERPERSONAL VIOLENCE NP23468, NP23484 (2022).

68. *Id*.

absence of a crime have been documented[69] and reveal a fundamental system failure. Those witnessing dangerous behaviors and the authorities they turn to should not be left waiting for a crime to trigger a consequential response. Waiting is not acceptable when the danger is clear and violence can reasonably be judged as imminent. While this gap may be most acute under the modern spotlight on mass shootings, unheeded warning signs are also the reality of prevention efforts that center suicide and interpersonal violence, including partner violence, and are aspects of firearm violence that an ERPO is designed to address.[70]

4. Focusing on Firearms

Means matter when it comes to violence. People who attempt suicide by poisoning, suffocation, or cutting are far more likely to survive than if they had used a gun.[71] Firearms increase the risk that people in violent relationships will be murdered if firearms are part of the abuse.[72] Firearms are the weapon most often used in homicides, although non-fatal violent crimes with weapons other than firearms are more common.[73] The highly lethal nature of firearms and their outsized contribution to violent deaths relative to other weapons are reasons that ERPO laws target firearm access when people are behaving dangerously and at risk of committing violence.[74] Meaningful reductions in suicides and homicides cannot be achieved without reducing the number of people who die by firearm suicide and firearm homicide. One demonstrated strategy for reducing intimate partner homicides is to temporarily prohibit firearm purchase and possession by respondents to DVROs.[75] This evidence informed the decision to incorporate aspects of DVRO policy into the Consortium's ERPO recommendation.[76]

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69. *See* Frattaroli et al., *supra* note 18, at 291–93.

70. *See* McGinty et al., *supra* note 14, at e22-23; *see also* Frattaroli et al., *supra* note 18, at 296–300 (discussing the scope of ERPO as originally conceived).

71. *See generally* Andrew Conner et al., *Suicide Case-Fatality Rates in the United States, 2007 to 2014*, 171 ANNALS OF INTERNAL MED. 885 (2019).

72. *See* Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1090 (2003).

73. *See* Anthony A. Braga et al., *Firearm Instrumentality: Do Guns Make Violent Situations More Lethal?* 4 ANN. REV. OF CRIMINOLOGY 147, 152–55 (2021) (discussing weapon instrumentality).

74. *See* Conner et al., *supra* note 71, at 893.

75. *See* April M. Zeoli et al., *Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and Their Associations with Intimate Partner Homicide*, 187 AM. J. OF EPIDEMIOLOGY 2365, 2367–69 (2018).

76. *See* McGinty et al., *supra* note 14, at e22–23; *see also* Frattaroli et al., *supra* note 18, at 296–300 (discussing how ERPO was originally conceived).

5. Domestic Violence Restraining Orders and ERPO

A review of the available evidence regarding the effectiveness of gun violence prevention policies makes clear that state DVRO laws that include temporary prohibitions on firearm purchase and possession offer a promising strategy for preventing intimate partner firearm homicides. As a civil order, DVROs are responsive to threats and actions that may not rise to the level of a crime. They are available and used to prevent violence that is threatened or anticipated and are initiated by those arguably best-positioned to assess risk: people experiencing or at risk of violence by respondents to the orders. Furthermore, the gun prohibition provision of state and federal DVRO laws had, at the time ERPO laws were being conceived, withstood legal challenges and established due process protections in place.[77] Most importantly, the available research was clear: states where DVRO laws included a prohibition on firearm purchase and possession experienced statistically significant reductions in intimate partner homicides overall, and in intimate partner firearm homicides specifically.[78] In short, DVRO laws were effective, accepted, and constitutionally sound.[79] From a practical standpoint, DVROs provide an infrastructure for receiving and evaluating petitions, serving orders, and prohibiting respondents from purchasing firearms from federally-licensed firearm dealers while DVROs are in place.[80]

ERPOs are a tool for responding to dangerous behaviors that signal violence is likely imminent. Given the size and scope of firearm violence in the United States, the implications are potentially wide-reaching and responsive to individual violence risk (e.g., suicide and intimate partner violence) and risks associated with mass violence.

C. Gun Violence and the Role of ERPO

In 2021, 48,830 people were killed by firearms in the United States at an age adjusted rate of 14.6 per 100,000 people.[81] Both the absolute and

77. *See* Roskam et al., *supra* note 8 at 228–45 (reviewing and discussing Domestic Violence Protection Order (DVPO) firearm prohibitions, including relevant case law); *see also infra* Section III.D.2.

78. *See* Zeoli et al., *supra* note 75, at 2367.

79. *See generally* Roskam et al., *supra* note 8 (reviewing cases that withstood challenges to the firearms prohibition of DVPOs).

80. DVRO implementation of the possession prohibition is more challenging than the purchase prohibition because the former requires active engagement by law enforcement to ensure firearms are dispossessed. *See generally* Shannon Frattaroli et al., *Armed, Prohibited and Violent at Home: Implementation and Enforcement of Restrictions on Gun Possession by Domestic Violence Offenders in Four U.S. Localities*, 36 J. FAM. VIOLENCE 573 (2021).

81. Data reports with this information can be made through the Fatal Injury Reports at the Centers for Disease Control (CDC) Web-Based Injury Statistics Query and Reporting System

population-adjusted numbers in 2021 were the highest in 20 years, reflecting a steady increase in firearm deaths.[82] Most firearm deaths in the United States are by suicide (58.6% between 2002 and 2021), although a sharp increase in firearm homicides reduced that majority to 53.9% in 2021.[83] Approximately 2.1% of firearm deaths in 2021 were the result of unintentional or undetermined motives.[84] Explorations of these trends are common in the public health literature.[85] Explanations of the disparities among race, gender, ethnic and age groups, which are significant in size and important to understand the United States gun violence problem, are best understood through an ecological lens that accounts for contextual factors such as racism, poverty, access to quality education, employment, and housing, as well as the prevalence of firearms in society.[86] Understanding the role of contextual factors leads to interventions designed to address the environmental influences that can determine whether violence occurs and the severity of violence when it does happen, such as ERPO laws that focus on temporary firearm removal when people are behaving dangerously and at risk of committing violence.

1. Suicide

In the United States,[87] the leading cause of firearm death is suicide, and firearms are the most common method of suicide.[88] Firearms make violence more lethal, particularly self-directed violence.[89] A recent study estimated nearly 92% of people who attempt suicide by any means survive,[90] while

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(WISQARS). *WISQARS*, CTRS. FOR DISEASE CONTROL, https://wisqars.cdc.gov/reports/?o=MORT&y1=2021&y2=2021&t=0&i=0&m=20890&g=00&me=0&s=0&r=0&ry=0&e=0&yp=65&a=ALL&g1=0&g2=199&a1=0&a2=199&r1=INTENT&r2=NONE&r3=NONE&r4=NONE [https://perma.cc/DN6R-6HUK] (last visited Oct. 10, 2023).

82. *Id.*

83. *Id.*

84. *Id.*

85. For two recent publications, see generally Bailey K. Roberts et al., *Trends and Disparities in Firearm Deaths among Children*, 152 PEDIATRICS 1 (2023); Maryann Mason et al., *Changes in the Demographic Distribution of Chicago Gun-Homicide Decedents From 2015-2021: Violent Death Surveillance Cross-Sectional Study.* 9 JMIR PUB. HEALTH SURVEILLANCE e43723 (2023).

86. *See generally* Michele R. Decker et al., *An Integrated Public Health Approach to Interpersonal Violence and Suicide Prevention and Response*, 133 PUB. HEALTH REPS. 65S (2018).

87. The United States is an outlier in the high proportion of firearm use in suicide. *See* Vladeta Ajdacic-Gross et al., *Methods of Suicide: International Suicide Patterns Derived from the WHO Mortality Database*, 86 BULL. OF THE WORLD HEALTH ORG. 726, 728 (2008).

88. *WISQARS*, *supra* note 81.

89. *See* Conner et al., *supra* note 71, at tbls. 2, 4.

90. *Id.* at tbl.2.

approximately 10% who attempt suicide with a firearm survive.[91] There is robust literature establishing access to firearms as a risk factor for suicide,[92] a relationship that is particularly strong among youth.[93] Because suicide crises are often brief,[94] the method available tends to be the method used.[95] Given the often short timeframe between the decision to end one's life and acting on that decision, access often determines the method used and when the available method is a highly lethal one, death is more likely.[96] Therefore, restricting access to firearms by those at heightened risk of suicide holds tremendous promise as a prevention strategy. The life-saving potential of intervening in these moments of crisis should not be underestimated. Most people who survive a suicide attempt do not later die by suicide.[97] The best available estimate suggests that more than 90% of people who survive a suicide attempt will later die of some other cause.[98] The permanence of suicide should weigh heavily when balancing states' responsibility to safeguard citizens from predictable and preventable harms against temporary suspension of ready access to firearms through mechanisms such as ERPO.

2. Homicide

As with firearm suicide, the United States is an outlier in terms of the high rate of firearm homicide that plagues our nation.[99] During the 20-year period between 2002 and 2021, 272,066 people were shot and killed by another person, representing 72% of all homicides that occurred in the United

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91. *Id.*

92. For a consideration of that literature and an example of an analysis supporting this relationship, see Matthew Miller et al., *Household Firearm Ownership and Rates of Suicide Across the 50 United States*, 62 J. TRAUMA 1029, 1029–30 (2007).

93. Knopov et al., *Household Gun Ownership and Youth Suicide Rates at the State Level, 2005-2015*, 56 AM. J. OF PREVENTIVE MED. 335, 339–40 (2019). The authors estimate that a 10% increase in household firearm ownership is associated with a 27% increase in suicide among young people.

94. Eberhard Deisenhammer et al., *The Duration of the Suicidal Process: How Much Time Is Left for Intervention between Consideration and Accomplishment of a Suicide Attempt?*, 70 J. OF CLINICAL PSYCHIATRY 19, 20 (2009). The authors documented that 47% of people who survived a suicide attempt reported the time between the decision to die by suicide and the attempt was ten minutes or less.

95. *Id.* at 23.

96. *Id.* at 22 tbl.2; Conner et al., *supra* note 71, at 889, tbl.2.

97. David Owens et al., *Fatal and Non-Fatal Repetition of Self-Harm: A Systematic Review*, 181 BRITISH J. PSYCHIATRY 193, 195 (2002).

98. *Id.* at 195, fig. 1.

99. A recent analysis ranked the United States as having the eighth highest firearm homicide rate among 64 nations. *See* Katherine Leach-Kemon & Rebecca Sirull, *On Gun Violence, the United States is an Outlier*, INST. FOR HEALTH METRICS AND EVALUATION (May 31, 2022), https://www.healthdata.org/news-events/insights-blog/acting-data/gun-violence-united-states-outlier [https://perma.cc/NS29-LEHK].

States.[100] In 2021 the dominance of firearms as a method of homicide reached an historic high when 81% of all homicides were firearm homicides.[101] As with suicide, the lethality of firearms affects the likelihood of surviving an assault. While levels of violent assault in the United States are similar to rates experienced by peer countries, firearms make interpersonal violence more deadly and homicides more common.[102]

While much attention in recent years has been focused on mass shootings, and mass shootings have undoubtedly moved some policymakers to rally in support of ERPO laws,[103] the vast majority of people who die by firearms are not mass shooting victims.[104] Firearm homicide in the context of partner and family violence in homes occurs every day in the United States, and it also occurs in communities. Calls in the literature and among policymakers for greater investment in community violence interventions that center Black, Indigenous, and People of Color (BIPOC) communities are an essential part of the response,[105] as are other communities that experience disproportionately high rates of gun violence including gender and sexual minorities.[106] Whether and how ERPOs are used as part of community violence interventions is an implementation question that is still being answered.

As with all forms of violence briefly reviewed here, partner violence is made more deadly with guns.[107] Most women who are murdered in the United States are killed by their intimate partners, and when that happens, the weapon used is most often a gun.[108] Efforts to separate batterers from their firearms are associated with reductions in intimate partner homicide,

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100. *See WISQARS*, *supra* note 81.

101. ARI DAVIS ET AL., A YEAR IN REVIEW: 2021 GUN DEATHS IN THE U.S. 9 (2021), https://publichealth.jhu.edu/sites/default/files/2023-06/2023-june-cgvs-u-s-gun-violence-in-2021.pdf [https://perma.cc/5ZKP-WFFN].

102. *Id.* at 10.

103. See for example, the case of California as described in Tomisch et al., *supra* note 32 at Figure 1.

104. *Id.*

105. Joseph Richardson, Jr., *How Researchers of Color Are Left Out of the Gun Violence Conversation in Media and Academia*, DIVERSE ISSUES IN HIGHER EDUC. (Dec. 20, 2018), https://www.diverseeducation.com/opinion/article/15103858/how-researchers-of-color-are-left-out-of-the-gun-violence-conversation-in-media-and-academia [https://perma.cc/HQF4-NYH5].

106. ADAM P. ROMERO ET AL., GUN VIOLENCE AGAINST SEXUAL AND GENDER MINORITIES IN THE UNITED STATES: A REVIEW OF RESEARCH FINDINGS AND NEEDS 18 (2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/SGM-Gun-Violence-Apr-2019.pdf [https://perma.cc/VW2M-HHAE].

107. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. OF PUB. HEALTH 1089, 1091 (2003).

108. Emma E. Fridel & James Alan Fox, *Gender Differences in Patterns and Trends in U.S. Homicide, 1976-2017*, 6 VIOLENCE & GENDER 27, 29, 32-35 (2019).

with no evidence of weapon substitution at the population level.[109] The nexus between partner violence and mass shootings suggests that targeting people known to be violent towards their partners and who are threatening mass violence is a strategy informed by evidence.[110]

While the state of firearm violence in the United States is grim, targeted strategies to limit firearm access when people are behaving dangerously and at risk of committing violence is one approach that is increasingly available through ERPO laws. And given the relationship between access to firearms and risk of multiple forms of violence, the potential to make meaningful strides towards reducing firearm violence is within reach.

D. Balancing Ready Access to Firearms with Individual and Community Safety

On the heels of the COVID-19 pandemic, the number of privately owned firearms in the United States is at an historic high.[111] While the precise number of firearms in circulation is unknown, there is a general acknowledgement that there are more privately owned firearms in the United States than people, with one media outlet citing estimates ranging from 352 million to 434 million firearms.[112] Data from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) illustrate a steep increase in guns produced by U.S. manufacturers from 1,397 firearms manufactured per 100,000 people in 2000 to 3,410 per 100,000 in 2020.[113] This uptick in manufacturing tracks with estimates that in 2020 and 2021, people in the United States bought more than 40 million firearms — two record breaking years for gun sales.[114]

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109. Zeoli et al., *supra* note 75, at 2367.

110. *See* April M. Zeoli & Jennifer K. Paruk, *Potential to Prevent Mass Shootings through Domestic Violence Firearm Restrictions*, 19 CRIMINOLOGY & PUB. POL'Y 129, 138 tbl.1 (2019); *see also* Lisa B. Geller et al., *The Role of Domestic Violence in Fatal Mass Shootings in the United States, 2014-2019*, 8 INJ. EPIDEMIOLOGY 1, 5–6 (2020) (explaining research that demonstrates when people with a history of partner violence commit a mass shooting and/or target their partners in mass shootings, those shootings result in a higher case fatality rate than shooters who are not known to be violent toward their partners).

111. Jennifer Mascia & Chip Brownlee, *How Many Guns Are Circulating in the U.S.?*, THE TRACE (Mar. 6, 2023), https://www.thetrace.org/2023/03/guns-america-data-atf-total/ [https://perma.cc/A66D-P34H].

112. *Id.*

113. U.S. DEP'T OF JUST., BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, NAT'L FIREARMS COMMERCE AND TRAFFICKING ASSESSMENT: FIREARMS IN COMMERCE 14 tbl.M-03 (2022), https://www.atf.gov/firearms/docs/report/national-firearms-commerce-and-trafficking-assessment-firearms-commerce-volume/download [https://perma.cc/BCW2-YN5B].

114. Tom Kutsch, *How Pandemic First-Time Gun Buyers Share Existing Owners' Views*, THE TRACE (Mar. 25, 2022), https://www.thetrace.org/newsletter/how-pandemic-first-time-gun-buyers-share-existing-owners-views/ [https://perma.cc/3C98-PGSH].

The increase in firearms sales has been accompanied by increases in firearm deaths. With guns flowing into more homes and homes already owning guns increasing their stocks, combined with the evidence of the risks associated with ready access to guns when someone is behaving dangerously and at risk of violence, clear strategies are needed for dispossession when risk is evident and violence imminent. ERPOs address this need with a civil protection order that complements the existing civil court infrastructure for partner violence in place in every state. Efforts to ensure that firearms are available for sale and background checks are processed swiftly have resulted in the National Instant Criminal Background Check System.[115] Domestic firearm manufacturing output is at historic high levels and sales data indicate that this high production is supported by a robust retail infrastructure.[116] Ensuring that when (not if) some proportion of firearm owners are behaving dangerously and at risk of committing violence there is a systemic response available with due process protections that allows for a temporary pause on their access to firearms is a reasonable counterbalance to the continuous flow of firearms into homes and communities throughout our country. When we consider the stakes — that a life lost to suicide or to homicide is forever gone, and that a temporary prohibition on firearm purchase can be easily reversed and any dispossessed firearms returned, it is clear that ERPOs provide a well-justified check on the right to bear arms that courts have repeatedly established is not without limits.[117]

II. ERPO IMPLEMENTATION AND IMPACT: EMERGING EVIDENCE

This Part reviews the empirical literature examining how ERPOs are being implemented and early studies that measure their impact, as a complement to the legal analysis that follows. ERPO research is evolving quickly as jurisdictions identify and adapt strategies to address their communities' needs and improve safety when danger is apparent.[118] At the

115. *See* FBI, *Firearms Check (NICS)*, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics [https://perma.cc/5N83-VLUE] (last visited Oct. 14, 2023) (describing the National Instant Criminal Background Check System).

116. Mascia & Brownlee, *supra* note 111.

117. In *Heller*, the Supreme Court explained that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *See* District of Columbia v. Heller, 544 U.S. 570, 626 (2008).

118. *See* A Call for Research on Extreme Risk Protection Orders, ARNOLD VENTURES (Sept. 22, 2022), https://www.arnoldventures.org/stories/a-research-agenda-for-extreme-risk-protection-orders [https://perma.cc/AT2N-QKTK]. This call highlights a research agenda written by April Zeoli that provided guidance for the Summer 2023 call for proposals from the National Collaborative on Gun Violence Research. *National Collaborative of Gun Violence Research Announces $3.1M in New Funding for Research on Red-Flag Laws*, NAT'L COLLABORATIVE ON GUN VIOLENCE RSCH. (July 17, 2023),

time of this writing, examinations of the impact of ERPO laws on firearm injury and death were nascent, with studies that will help inform the central question of whether ERPOs save lives underway.[119] For readers who are eager for a definitive answer to this question, there are several reasons we conclude this review with characterizing ERPO laws as promising. ERPO laws are a relatively new policy intervention, as previously described, and time is needed for implementation and any subsequent impacts to be realized at levels that can be measured with confidence.[120] ERPO implementation requires coordinated participation among local agencies, and an infrastructure to support the processes associated with ERPO laws.[121] For example, whether a jurisdiction is prepared to implement its state ERPO law will depend on whether courts are ready to receive and hear ERPO petitions and if law enforcement officers are trained and equipped to assess when ERPO may be used and useful, file petitions, and testify in court.[122] Upon granting of an ERPO, processes for serving those orders, explaining the terms to respondents, facilitating dispossession of any firearms, storing the firearms for safekeeping, and ensuring those orders will be included in the firearm purchase background check system also need to be established.[123] At the conclusion of an ERPO, ensuring there are clear mechanisms in place for returning any firearms removed and updating the background check system so that former respondents are able to purchase firearms is also part of the infrastructure needed to support ERPO implementation.[124] In states where petitioners include those outside of law enforcement (e.g., family

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https://www.ncgvr.org/news/2023/funding-for-research-on-red-flag-laws.html [https://perma.cc/4QAA-7LDN].

119. The current funded grant program of The National Collaborative on Gun Violence Research that includes funding for ERPO research. *See* NAT'L COLLABORATIVE ON GUN VIOLENCE RSCH., https://www.ncgvr.org/ [https://perma.cc/TQ8C-2WMR] (last visited Sept. 22, 2023).

120. For a critique of one ERPO study that explains the challenges associated with finding a statistically significant effect on gun violence outcomes, see Jeffrey W. Swanson et al., *Evaluating Extreme Risk Protection Order Laws: When is it Premature to Expect Population Level Effects?*, 5 JAMA NETWORK OPEN 1, 1–4 (2022).

121. The Implement ERPO website contains a flow chart of ERPO processes in each state. BLOOMBERG AM. HEALTH INITIATIVE, EXTREME RISK PROTECTION ORDER: A TOOL TO SAVE LIVES, https://americanhealth.jhu.edu/implementERPO [https://perma.cc/L95L-FXTY] (last visited Sept. 24, 2023) (select each individual state's hyperlink then click "Download Fact Sheet").

122. For a description of the stages of ERPO implementation, see PROMISING APPROACHES FOR IMPLEMENTING EXTREME RISK LAWS: A GUIDE FOR PRACTITIONERS AND POLICYMAKERS 1, 7 (2023), https://publichealth.jhu.edu/sites/default/files/2023-05/2023-may-cgvs-promising-approaches-for-implementing-extreme-risk-laws.pdf [https://perma.cc/WB2X-U4AH] (offering a detailed explanation of recommended infrastructure to support ERPO laws).

123. *Id*. at 14.

124. *Id*. at 34.

members, partners, clinicians, and school administrators), additional considerations for how to support their participation in the process also take time.[125] In most jurisdictions, the time between enactment of ERPO and robust implementation occurs over months and years.[126]

The pace of implementation affects the ability of researchers to pursue answers to questions about whether ERPO laws result in lives saved. In order to detect an impact of the law, the law needs to be used, and used with sufficient frequency and precision to expect that any impact of the law would be able to be detected through appropriate methods.[127] In short, laws need to be implemented before questions of impact can be asked and answered. Laws that are not implemented, poorly implemented, or occasionally implemented are not ready for study.

Finally, there is also the matter of the time needed to conduct research. Gun violence prevention research tends to be funded through competitive review processes.[128] The time to identify a funding source, prepare an application that includes designing a study and securing data, and receiving an award is significant.[129] The conduct of research, particularly for a new topic of inquiry, takes years. For example, the first multi-state analysis of ERPO laws involved a year-long process of planning and securing funding, and three years to collect, code, and analyze more than 6,500 ERPO case files from six participating states.[130] As of this writing, the findings from that study were in various stages of analysis, writing, and publication.[131]

While ERPO research has yet to yield definitive findings about the laws' impacts on firearm violence, the developing literature holds many insights

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125. *Id*. at 36.

126. *See* Jeffrey Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does It Prevent Suicides?*, 80 LAW & CONTEMP. PROBS. 179, 189 fig.1 (2017); *see also* Rocco Pallin et al., *Assessment of Extreme Risk Protection Order Use in California from 2016-2019*, 3 JAMA NETWORK OPEN 1, 5 (2020).

127. Swanson et al., *supra* note 126 at 189, fig. 1 (showing few gun removals were effectuated in first eight years of statute's implementation, and after mass shooting, usage of the statute increased nearly fivefold).

128. *See generally* Kirsten Weir, *A Thaw in the Freeze on Federal Funding for Gun Violence and Injury Prevention Research*, 52 AM. PSYCH. ASS'N 22 (2021).

129. *See id.*

130. *See generally* April M. Zeoli et al., *Extreme Risk Protection Orders in Response to Threats of Multiple Victim/Mass Shooting in Six U.S. States: A Descriptive Study*, 165 PREVENTIVE MEDICINE, Oct. 17, 2022; NAT'L COLLABORATIVE ON GUN VIOLENCE RSCH., A MULTI-STATE EVALUATION OF EXTREME RISK PROTECTION ORDERS: IMPLEMENTATION, OUTCOMES, AND JURISDICTIONAL VARIATIONS, https://www.ncgvr.org/grants/2020/a-multi-state-evaluation-of-extreme-risk-protection-orders.html [https://perma.cc/W9B6-Z624] (last visited Sept. 25, 2023).

131. There are two publications, thus far, from this effort. *See generally* April M. Zeoli et al., *supra* note 130; Marian E. Betz et al., *Extreme Risk Protection Orders in Older Adults in Six U.S. States: A Descriptive Study*, CLINICAL GERONTOLOGY (2023).

into how ERPOs are being used, lessons from implementation experiences across multiple jurisdictions, and early indicators that the laws hold promise for reducing firearm violence, as detailed in the following sections.

A. Assessing the State of ERPO Implementation

One category of ERPO research is characterized by descriptive studies providing a foundation on which to understand both the data available through ERPO processes underway thus far and how ERPOs are being used within and across states. These initial studies make clear the varied pace of ERPO uptake and that counties' approaches to implementing ERPO are evolving into different model infrastructures to support ERPO use. County-level analyses in several states reveal a patchwork of ERPO uptake (e.g., whether ERPOs are being used and the frequency of use) in the initial years following enactment of ERPO laws.[132] Attention to the ways in which ERPO laws are being used by law enforcement[133] and the challenges faced by clinicians[134] when they are authorized petitioners is also part of this literature. In some jurisdictions, dedicated law enforcement units formed to assess, initiate and manage ERPO cases specifically, and civil firearm dispossession cases more generally, are also referenced in the literature and larger media coverage of ERPO implementation.[135] The role of specialized law enforcement units to coordinate ERPO implementation provides an initial example of how implementation efforts can be tailored to meet the needs of local agencies and the communities they serve.

The evidence is clear that ERPOs are being used in response to suicide risk, when interpersonal violence is threatened, and in cases involving

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132. For examples of the varied ERPO uptake reported in different states, see Pallin et al., *supra* note 126, at 5–6 (California); *see also* Rowhani-Rahbar et al., *supra* note 43, at 346 (Washington); Barnard et al., *supra* note 43, at 2 (Colorado); Zeoli et al., *supra* note 43, at 248–50 (Oregon).

133. See Swanson et al., *supra* note 126, at 194–98 for insight from Connecticut's law enforcement community about the early implementation of the State's risk warrant law.

134. *See generally* Shannon Frattaroli et al., *Assessment of Physician Self-Reported Knowledge and Use of Maryland's Extreme Risk Protection Order Law*, 2 JAMA NETWORK OPEN 1 (2019) (survey results from Maryland physicians about ERPO use in clinical settings); *see also* Ashley Hollo et al., *Physicians' Perspectives on Extreme Risk Protection Orders (ERPOs) In the Clinical Setting: Challenges and Opportunities for Gun Violence Prevention*, 17 PLOS ONE 1 (2022) (discussing findings from a series of in-depth interviews with Maryland physicians; Maryland was the first state to include licensed clinicians as petitioners).

135. *See* Frattaroli et al., *supra* note 40, at 2 (describing the King County Regional Domestic Violence Firearms Enforcement Unit). For an example of media coverage of specialized units in Ft. Lauderdale, Florida, see Sheryl Gay Stolberg, *A Florida School Received a Threat. Did a Red Flag Law Prevent a Shooting?* N.Y. TIMES (Jan. 16, 2023), https://www.nytimes.com/2023/01/16/us/politics/red-flag-laws-mass-shootings.html [https://perma.cc/2G3F-E6XR].

credible threats to shoot multiple people, including scenarios targeting schools and workplaces.[136] The extent to which ERPOs are filed in response to different types of violence risks varies across jurisdictions.[137] While the precise proportions of self-harm related petitions, interpersonal violence, and mass shootings varies across counties and states, the data consistently report that ERPO petitions are being filed in response to the range of violent threats. Indeed, as one author concludes, "ERPO petitions are overwhelmingly being used as intended, that is, specifically for cases of imminent risk of harm to self or others."[138]

Furthermore, clear evidence exists that dangerous behaviors and risk of violence directed at multiple named individuals and unnamed community members are motivating ERPO petitions.[139] A detailed review of ERPO files from six states provides insight into the scenarios that led to ERPO petitions constituting a threat against multiple victims, and the ways in which ERPO is being used to protect individuals and improve community safety more generally.[140] Of the more than 6,700 ERPO files reviewed, researchers identified 9.8%, or 662, cases in which the dangerous behaviors described involved threatened violence directed at three or more people (not including the respondent).[141] Half of these cases (49.6%) were petitions filed in response to "mass casualty" threats, one-third of which named K-12 schools

136. *See generally* Garen J. Wintemute et al., *Extreme Risk Protection Orders Intended to Prevent Mass Shootings: A Case Series*, 171 ANNALS INTERNAL MED. 655 (2019) (California); Pallin et al., *supra* note 126, at 3 (California); Rowhani-Rahbar et al., *supra* note 43, at 347 fig.2 (Washington); Zeoli et al., *supra* note 43, at 253–55 (Oregon); Barnard et al., *supra* note 43, at 3 (Colorado); Frattaroli et al., *supra* note 40, at 1 (King County, Washington).

137. *See* Frattaroli et al., *supra* note 40, at 5 tbl.2 (finding ERPOs in King County, Washington were filed in roughly equal proportions in response to risk of suicide, interpersonal violence, and both); *cf.* Rowhani-Rahbar et al., *supra* note 43, at 342 (observing that 28.3% of ERPOs in Washington were filed in response to risk of harm to self, 36.3% because of a concern about harm to others, and 35.4% of petitions described a threat to both self and others). *But see* Barnard et al., *supra* note 43, at 3 (noting that in Colorado, most (58%) ERPO petitions are filed in response to interpersonal violence threats, with 13% filed for self-harm alone, and the remaining 29% of petitions include threats of harm to self and others). An examination of the early ERPO states notes that suicide was the risk described in 68% of cases, other violence in 21% of cases, and psychosis in 16%. *See* George F. Parker, *Circumstances and Outcomes of a Firearm Seizure Law: Marion County, Indiana 2006-2013*, 33 BEHAV. SCI. & L. 308, 308 (2015); *see also* Swanson et al., *supra* note 126, at 192 (finding where 61% of respondents were described as having threatened self-harm or presented other evidence of suicidality, 32% were at risk of harming others, and 9% were identified as at risk of harm both to self and to others).

138. Zeoli et al., *supra* note 43, at 23.

139. Two publications detail multiple/mass shooting threats that prompted ERPOs. *See generally* Wintemute et al., *supra* note 136; Zeoli et al., *supra* note 43.

140. *See* Zeoli et al., *supra* note 43, at 6–10 (describing the methods used in this analysis).

141. *Id.* at 10 tbl.1.

as the target.[142] A subset of the California cases are the subject of an earlier publication and provide insight into the fact patterns that prompted ERPO petitions filed in response to mass shooting threats and the information presented to judges who decided whether to issue an ERPO in the initial three years that the law was in effect.[143]

Published descriptive analyses of ERPO files in states where multiple categories of petitioners are named in statute reveals that law enforcement are the group most often filing ERPO.[144] However, there is variation in these findings. While reports of ERPO petitioners in California and Washington report law enforcement files more than 80% of ERPO petitions,[145] early data from Colorado, Maryland, and Oregon reveal greater participation from family and partners with 40%, 42%, and 32% filing petitions in those states, respectively.[146] In Colorado, Maryland, and Oregon, petitions filed by law enforcement were more likely to result in an ERPO relative to ERPOs initiated by non-law enforcement petitioners.[147] Additional explorations of these differences among petitioner groups is warranted.

Within the category of non-law enforcement petitioners, findings from a survey of physicians in one Maryland hospital suggest that clinicians rarely file (1 out of 92 respondents reported filing an ERPO petition).[148] That only 4% indicated they were "very familiar" with ERPOs may explain this low reported use.[149] When respondents read a description of ERPOs, most (93%) noted that they see patients who they would consider for an ERPO at least "a few times per year" and more than half (60%) would be "somewhat or very likely" to initiate a petition if they encountered a patient at extreme risk of suicide or interpersonal violence.[150] Feedback from the clinical community

142. *Id*. at 15–17 tbls. 3 & 4.

143. Wintemute et al., *supra* note 136, at Appendix: Case Summaries.

144. *See* Pallin et al., *supra* note 126, at 4 (finding that 96% of ERPO petitions were filed by law enforcement in California); Rowhani-Rahbar et al., *supra* note 43, at 342 (finding that 87% of ERPO petitions were filed by law enforcement in Washington state); Frattaroli et al., *supra* note 40, at 7 (finding that 97% of ERPO petitions in King County, WA were filed by law enforcement); Zeoli et al., *supra* note 43, at 10 (finding that 65% of ERPO petitions in Oregon were filed by law enforcement); Barnard et al., *supra* note 43, at 3 (finding that 60% of ERPO petitions in Colorado were filed by law enforcement); Frattaroli et al., *supra* note 40, at 4 (finding that 57% of ERPO petitions in Maryland were filed by law enforcement).

145. *See, e.g.*, Pallin et al., *supra* note 126, at 4; Rowhani-Rahbar et al., *supra* note 43, at 342; Frattaroli et al., *supra* note 40, at 7.

146. *See, e.g.*, Zeoli et al., *supra* note 43, at 252; Barnard et al., *supra* note 43, at 3; Frattaroli et al., *supra* note 134, at 3.

147. *See, e.g.*, Zeoli et al., *supra* note 43, at 257; Barnard et al., *supra* note 43, at 3; Frattaroli et al., *supra* note 134, at 3.

148. Frattaroli et al., *supra* note 134, at 3.

149. *Id.*

150. Frattaroli et al., *supra* note 134, at 3–4. Physicians from the departments of emergency medicine, pediatrics, and psychiatry were included and variation across these three specialties

identifies both barriers to ERPO use in the clinical setting (e.g., time to complete ERPO petitions and appear in court) and suggestions for addressing those barriers (e.g., access to an ERPO clinical coordinator who would petition and testify, ERPO training, option to testify remotely, and consultation with a legal expert),[151] offering a path forward for improving implementation among clinicians — a topic that has invited commentary from others outside of Maryland as well.[152]

While law enforcement officers are initiating most ERPO petitions, especially considering that in five states law enforcement are the only authorized petitioners,[153] some proportion of these cases are occurring at the behest of people outside of law enforcement.[154] An analysis of the initial two years of ERPO petitions in King County, Washington included an examination of who initiated contact with law enforcement (73 of the 75 petitions were filed by law enforcement).[155] Approximately half (51%) of the requests for service that led to law enforcement initiating petitions came from family or friends, and the next most frequent category (17%) were respondents requesting self-help, such as through a crisis hotline.[156] Members of the public (12%), neighbors (8%), and representatives from health care agencies (5%) were also identified as initiating the contacts that led law enforcement to file ERPO petitions.[157] A separate statewide review

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was noted with emergency medicine physicians most likely to report encountering patients who they would consider for an ERPO and most likely to express a willingness to file an ERPO petition. *See also* Hollo et al., *supra* note 134, at 5, 6 (discussing findings from a series of qualitative interviews with Maryland physicians that speak to physician willingness to use ERPOs in their clinical practice).

151. Other, less common barriers noted were concerns that filing an ERPO petition would negatively affect their relationship with their patients, that time spent on ERPOs is not a billable service, and some stated they do not believe clinicians should file ERPO petitions. *See* Frattaroli et al., *supra* note 134, at 3–4.

152. *See generally* Kristy L. Blackwood & Paul P. Christopher, *U.S. Extreme Risk Protection Orders to Prevent Firearm Injury: The Clinician's Role*, 174 ANNALS OF INTERNAL MEDICINE 1738 (2021); Jeffrey W. Swanson et al., *Risk-Based Temporary Firearm Removals: A New Legal Tool for Clinicians*, 29 HARV. REV. PSYCHIATRY 6, 6–9 (2021).

153. Florida, Indiana, Rhode Island, Vermont, and Virginia are the five states that authorize only law enforcement to petition for an ERPO. *See Implement ERPO*, AM. HEALTH https://americanhealth.jhu.edu/implementERPO [https://perma.cc/483E-SM7J] (last visited Oct. 14, 2023). Authorized law enforcement officials vary among the states, but include combinations of state and local police, sheriffs, and state or common wealth and local government attorneys.

154. Among the 49% of risk warrant cases reviewed in Connecticut where the person who alerted law enforcement was known, 41% were originally referred by family and 8% were referred by clinicians or employers. At the time of the analysis, only law enforcement could petition for an ERPO-like risk warrant. Swanson et al., *supra* note 126, at 192.

155. Frattaroli et al., *supra* note 40, at 1.

156. *Id*. at 4.

157. *Id*.

of ERPO files in Washington also noted that some law enforcement petitions were prompted by "concerned family members who had called the police."[158]

Even though law enforcement officers are most often initiating ERPO petitions, their presence in the lead-up to an ERPO petition is often at the invitation of someone from within the respondent's social circle.[159] This is likely someone who knows them and is perhaps well-positioned to assess whether their behaviors should be considered dangerous and signal a risk of imminent violence. In these situations, a first consideration of dangerousness and assessment of violence risk is made by a member of the public, and then reviewed by a law enforcement officer who is responding to a call for service. If those perspectives result in an ERPO petition, a judge then decides whether to issue an order. The multiple perspectives that may inform a decision to grant or deny an ERPO petition are a useful reminder that while ERPOs are designed to provide a quick response to crises where the risk of violence is imminent, information to guide those decisions is not sacrificed for expediency. The process invites perspectives that allow for individualized assessments that both embrace the opportunity to prevent violence that threatens public and individual safety, and respect respondents' rights.

Most ERPO petitions are granted,[160] with differences among jurisdictions, type of order, and categories of petitioners noted. In general, petitions for temporary orders are granted at higher rates than orders after hearing; and law enforcement initiated petitions are more likely to result in an order than those filed by non-law enforcement petitioners.[161] Analyses that detail the reasons judges do not grant orders include both dismissals prompted by, for example, petitioners failing to appear in court and respondents' cases being heard in criminal court, and denials based on a failure to meet the legal standard required to grant an order.[162] Analyses that include details about judges' denials[163] revealed one instance of malicious intent that led to the petitioner being charged with perjury.[164] That petitions initiated by family,

158. Rowhani-Rahbar et al., *supra* note 43, at 346.

159. *See id.*

160. *See, e.g.*, Rowhani-Rahbar et al., *supra* note 43, at 346; Frattaroli et al., *supra* note 40, at 6; Zeoli et al., *supra* note 43, at 257; Barnard et al., *supra* note 43, at 3 (providing details of the percentages of cases granted at the different stages of the ERPO process).

161. *See* Frattaroli et al., *supra* note 40, at 6–7; Zeoli et al., *supra* note 43, at 256; Barnard et al., *supra* note 43, at 3.

162. *See, e.g.*, Frattaroli et al., *supra* note 40, at 7; Zeoli et al., *supra* note 43, at 257; Barnard et al., *supra* note 43, at 3.

163. *See, e.g.*, Frattaroli et al., *supra* note 40, at 7; Zeoli et al., *supra* note 43, at 257; Barnard et al., *supra* note 43, at 3.

164. Barnard et al., *supra* note 43, at 4.

partners, and household members are less likely to be granted by judges prompted one author to recommend legal support for non-law enforcement petitioners when engaging in ERPO processes.[165]

B. Assessing the Impact of ERPO Laws on Firearm Injury and Death

With the caveats explained at the start of this Part of the Article, there are a few noteworthy studies that begin to answer the question: do ERPO laws affect firearm violence? This literature includes articles examining the laws in Connecticut and Indiana, where the longer timeframe of those laws is more conducive to studies of impact, as previously described.[166] Suicide is the outcome most often explored in these studies, both because suicide comprises the largest proportion of firearm deaths[167] and because ERPOs are often used in response to threats of self-harm and suicide risk, as detailed in the previous Section, Assessing the State of ERPO Implementation. Importantly, suicide or self-harm risk was the justification behind more than 60% of petitions in Connecticut and Indiana.[168] These factors combine to make measures of effect more feasible than in other jurisdictions or with another outcome where there are fewer data points to include in models. Two approaches to quantifying impact are reported in the literature, and both conclude that ERPO laws are associated with reductions in firearm suicide in Connecticut and Indiana.[169]

Under the first approach, Swanson employed a counterfactual analysis to estimate the effect of the Connecticut risk warrant law by comparing respondents who died by suicide against the expected suicide deaths among respondents in the absence of the risk warrant law.[170] The authors concluded that "approximately ten to twenty gun seizures were carried out for every averted suicide."[171] A replication of this method using Indiana data yielded a similar estimate: for every 10.1 gun removals under Indiana's law, one death by suicide was prevented.[172] In both articles, the authors emphasize

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165. *See* Zeoli et al., *supra* note 43, at 257–58.

166. *Contra* Swanson et al., *supra* note 126, at 190 (arguing that the evaluation occurred too early in the implementation process for one to reasonably expect to see an effect).

167. *See supra* Part I (reviewing suicide literature and the role of firearms).

168. Swanson et al., *supra* note 126, at 192; Parker, *supra* note 137, at 314.

169. Swanson et al., *supra* note 126, at 180–81; Jeffrey A. Swanson et al., *Criminal Justice and Suicide Outcomes Associated with Indiana's Risk-Based Gun Seizure Law*, 47 J. AM. ACAD. PSYCHIATRY & L. 188, 193–97 (2019) (discussing the two counterfactual studies (Approach 1)); 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, 855 (2018) (discussing the synthetic control approach (Approach 2)).

170. Swanson et al., *supra* note 126, at 201–02.

171. *Id.* at 206.

172. Swanson et al., *supra* note 169, at 193.

that ERPO respondents experienced a higher rate of suicide than that of each state's general population (31 times higher in Indiana, and approximately 40 times higher in Connecticut), "demonstrating that the law is being applied to a population at genuinely high risk"[173] and providing some additional context to understand the findings.

Under the second approach, Kivisto and Phalen used a synthetic control approach to estimate the effects of the Connecticut and Indiana laws on firearm suicide.[174] Their analyses estimate a 13.7% reduction in firearm suicide in Connecticut and a 7.5% reduction in Indiana but also suggest a substitution effect that may negate the gains in Connecticut, muddling the implications[175] — particularly since means replacement for suicide is not supported by the literature.[176] A second application of synthetic control methodology by Pear et al. sought to assess an association between California's ERPO law in San Diego and firearm violence (both interpersonal and self-harm), finding no effect.[177] The authors cautioned that the results should be interpreted as "preliminary" given the small numbers and short time frame included.[178] This caution is echoed rather forcefully in an accompanying commentary.[179]

Finally, we note that an analysis of several state laws' effects on police-involved shootings found no association (positive or negative) with ERPO laws.[180] Because law enforcement are most often initiating ERPO petitions and serving orders, and thus engaging with people who may be armed, are behaving dangerously, at risk of violence, and in crisis, the authors reasoned that ERPO policies should be included, along with other policies that may affect the outcome, in their model.[181] Continued attention to police-involved shootings in the context of ERPO laws is warranted.

The available literature about ERPO laws is evolving rapidly as more states enact ERPO laws, and local jurisdictions increase uptake of ERPO and

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173. *Id.* at 188; *see also* Swanson et al., *supra* note 126, at 205–06.

174. Kivisto, *supra* note 169, at 855.

175. *Id.*

176. Means substitution for suicide has been refuted by several studies. *See generally*, Richard H. Seiden, *Where Are They Now? A Follow-up Study of Suicide Attempters from the Golden Gate Bridge*, 8 SUICIDE & LIFE THREATENING BEHAV., 1 (1978); Ian O'Donnell, et al., *A Follow-up Study of Attempted Railway Suicides*, 38 SOC. SCI. & MED. 437–42 (1994); Norman Kreitman, *The Coal Gas Story. United Kingdom Suicide Rates, 1960-71*, 30 BRIT. J. OF PREVENTIVE & SOC. MED. 86 (1976).

177. Veronica A. Pear et al., *Firearm Violence Following the Implementation of California's Gun Violence Restraining Order Law*, 5 JAMA NETWORK OPEN 1, 9 (2022).

178. *Id.* at 1, 9.

179. Swanson et al., *supra* note 169, at 196–97.

180. Cassandra K. Crifasi et al., *The Association Between Permit-to-Purchase Laws and Shootings by Police*, 10 INJ. EPIDEMIOLOGY 1, 3–4 (2023).

181. *Id.* at 2.

embrace the many resources that exist to support ERPO implementation.[182] While the current state of science is unsettled with regard to whether and how ERPO impacts firearm violence, on the topic of firearm suicide, the available evidence is promising. Furthermore, given the information-rich findings that speak to implementation processes and models, we are optimistic that as ERPO implementation expands, those efforts will be informed by a literature that provides guidance as to best practices for implementing ERPO laws in ways that will maximize the potential for positive impacts on individual and community safety.

III. OVERLAPPING CONSTITUTIONAL RIGHTS, ERPO CASE LAW, AND CIVIL DISARMAMENT

This Part will explore potential constitutional challenges to state ERPO statutes in the post-*Bruen* world, focusing on how the Supreme Court's novel text, history, and tradition test for Second Amendment challenges impacts the interaction between the Second Amendment and other constitutional rights. Legal challenges to state ERPO laws have, generally speaking, been few and far between. Moreover, the main claim often raised in these cases is an alleged due process violation — in other words, an argument that the ERPO law provides insufficient procedural protections for an *ex parte* deprivation of a property interest in firearms.[183] However, these claims are often accompanied by, or cloaked in the language of, the Second Amendment.[184] Thus, ERPO decisions are an important case study for how the Second Amendment intersects with other constitutional rights.

It is typical for legal rights to overlap and, in some cases, to reinforce one another. As Kerry Abrams and Brandon Garrett observe, "[l]itigants raising First Amendment or Fourteenth Amendment Equal Protection Clause claims also routinely assert a due process violation concerning the arbitrary denial of the underlying right" — claiming some form of "cumulative" constitutional injury.[185] So too in the Second Amendment context. A plaintiff might argue that her Second Amendment rights have been violated

182. Consider the $750 million in funding to support ERPO and other crisis response interventions available through the Bipartisan Safer Communities Act, and ERPO implementation guidance. *See* CHELSEA PARSONS ET AL., PROMISING APPROACHES FOR IMPLEMENTING EXTREME RISK LAWS: A GUIDE FOR PRACTITIONERS AND POLICYMAKERS: A GUIDE FOR PRACTITIONERS AND POLICYMAKERS (2023), https://publichealth.jhu.edu/sites/default/files/2023-05/2023-may-cgvs-promising-approaches-for-implementing-extreme-risk-laws.pdf [https://perma.cc/A77N-EWPK].

183. Blocher & Charles, *supra* note 40, at 1291 ("[A]s a matter of doctrine the more serious objections ha[ve] to do with due process.").

184. See cases cited *infra* notes 186–87.

185. Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1310–11 (2017).

and that the statute disarming her violates the Fourteenth Amendment's equal protection clause;[186] another plaintiff may assert both that his Second Amendment rights are violated by a ban on carrying firearms in places of worship and that the statute violates the Free Exercise Clause.[187] The question, then, is whether such claims necessarily overlap and should reinforce each other (the Free Exercise challenge making the Second Amendment claim more likely to succeed, and vice versa), or whether courts should instead disaggregate the claims and perform separate, independent legal analyses.

Here, we observe that *Bruen* has created confusion in this regard by seemingly directing that a Second Amendment claim necessarily renders other claims related to firearms brought in the same case more meritorious. Analyzing the universe of post-*Bruen* cases on ERPO laws, we conclude that *Bruen* should not be read to change, or swallow, the separate procedural due process analysis weighing the government's interest in an *ex parte* deprivation, the private property interest at stake, and the risk of an erroneous deprivation.[188] While some of *Bruen*'s language — namely its exhortation that the Second Amendment is not a "second class right" — has caused lower courts to apply seemingly stricter tests to gun-related deprivations, we offer two conclusions about the path forward in this area. First, courts deciding Second Amendment challenges also implicating other constitutional provisions (such as due process) should take special care to "be clear about what interests are mutually reinforcing or not, why, and how this affects the analysis or the scrutiny."[189] Second, courts should recognize the atypical nature of *Bruen*'s test for Second Amendment claims and resist the temptation to reflexively resort to history-based evaluations in other jurisprudential areas. This may, in fact, lead to under-protection of other constitutional rights — for example, a purely historical test in the First Amendment context might endorse certain restrictions that most today accept are unconstitutional infringements of the right under scrutiny-based judicial tests.[190]

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186. *See, e.g.*, United States v. Sitladeen, 64 F.4th 978, 988–89 (8th Cir. 2023) (applying rational-basis review to illegal alien's equal protection challenge to federal ban on gun possession by illegal aliens, rejecting the notion that a higher level of equal protection scrutiny should apply because "the statute burdens the fundamental right to keep and bear arms").

187. *See, e.g.*, Antonyuk v. Hochul, 639 F. Supp. 3d 232, 322 (N.D.N.Y. 2022) (finding that a church gun ban violates the Second Amendment and "treads too close to infringing on one's First Amendment right to participate in congregate religious services").

188. *See infra* Section III.C and accompanying notes.

189. Abrams & Garrett, *supra* note 185, at 1355.

190. *See generally* Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUP. CT. REV. 109 (describing the original Founding Era view of the First Amendment as prohibiting only prior restraints and governing the relationship between

A. *Bruen* and Text, History, and Tradition

In *New York State Rifle & Pistol Association, Inc. v. Bruen,* the Supreme Court repudiated a legal test for Second Amendment challenges that had been adopted across the appellate courts and honed across over 1,000 cases.[191] The prior approach looked quite similar to the "tiers of scrutiny" that courts use to evaluate any number of constitutional challenges outside of the Second Amendment:[192]

> Judges use various tools to map out the first, rule-like coverage questions[,] . . . rely[ing] on some mix of precedent, history, and tradition, or even abstract moral claims rooted in the concept of self-defense. If the challenge fails this coverage question, then the case is over. If not, or if the coverage question proves too difficult or divisive, the court moves to the second, more standard-like protection question: Whether the regulation satisfies the applicable type of means-end tailoring.[193]

This two-step test was adopted by every federal court of appeals to reach the question.[194] In *Bruen*, a majority of the Supreme Court rejected the second step of the test that asked whether a gun regulation was sufficiently tailored to a legitimate government objective.[195] *Bruen* held that, "[d]espite the popularity of this two-step approach, it is one step too many" because the test allowed excessive "judicial deference to legislative interest

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states and the federal government, which only later shifted to a libertarian, individual rights perspective); *see also* Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 553 (2018) ("Beginning in the 1950s . . . [t]he Court also expanded upon both who counted as a speaker and what counted as speech."); *see also* G. Alex Sinha, *First Amendment Analogies and Second-Class Rights under Bruen*: *Is it Time for a Government-Arms Doctrine?*, DUKE CTR. FOR FIREARMS L. SECOND THOUGHTS BLOG (Oct. 4, 2023), https://firearmslaw.duke.edu/2023/10/first-amendment-analogies-and-second-class-rights-under-bruen-is-it-time-for-a-government-arms-doctrine/ [https://perma.cc/7FCA-B8EK] (observing that "[t]he current Court's reading of First Amendment protections would diverge enormously from the reading occasioned by a *Bruen*-style approach to the First Amendment").

191. 597 U.S. __, 142 S. Ct. 2111 (2022).

192. *See generally* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007); Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575 (2013). *But see* Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting) (noting that "[t]he Constitution does not prescribe tiers of scrutiny," and arguing that the Court's use of tiered scrutiny has created a jurisprudence where "nothing but empty words separates our constitutional decisions from judicial fiat").

193. DARRELL A. H. MILLER & JOSEPH BLOCHER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* 110 (Alexander Tsesis ed., 2018).

194. *See, e.g.*, United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Heller v. District of Columbia, 670 F.3d 1244, 1252 (D.C. Cir. 2011); Ezell v. City of Chicago, 651 F.3d 684, 701–04 (7th Cir. 2011); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

195. *See Bruen*, 142 S. Ct. at 2126–27.

balancing."[196] In its place, the *Bruen* majority set forth a framework that "requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding."[197] The Court explained that this test entails drawing historical analogies, that the government bears the burden of showing a historical tradition of analogous regulation, and that courts should compare historical and modern laws in terms of "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[198]

Bruen applied the historical tradition test to invalidate New York's proper-cause concealed carry licensing framework.[199] The case did not implicate status-based gun prohibitions, and one concurring Justice took pains to specify that the "holding decides nothing about who may lawfully possess a firearm . . . [and] does not expand the categories of people who may lawfully possess a gun."[200] That is true, but it is also somewhat incomplete. *Bruen* articulated a new legal test that applies to all Second Amendment challenges. Nothing in the majority decision limits that test to questions of licensing or public carry, and lower courts have broadly accepted that the new test also applies to status-based regulation; moreover, the *Bruen* majority cannot claim to be *too* surprised with these developments because the historical pedigree of status-based bans such as the federal felon-in-possession law was raised multiple times at oral argument in the case.[201] In just over one year, *Bruen* has had a tremendous impact on Second Amendment jurisprudence.[202] Numerous courts applying this new legal standard have struck down laws restricting *who* may possess or receive a firearm — for the most part, laws that had been universally upheld under the old two-step framework.[203] This uncertainty (which already includes at least

196. *Id.* at 2127, 2131.

197. *Id.* at 2131.

198. *Id.* at 2130–33.

199. *See id.* at 2135–56.

200. *Id.* at 2157 (Alito, J., concurring).

201. *See* Transcript of Oral Argument at 9–10, 41–44, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111 (2022) (No. 20-843) ("JUSTICE KAGAN: . . . In *Heller*, we made very clear that laws that restricted felons from carrying or possessing arms and laws that forbade mentally ill people from doing the same—we, you know, basically put the stamp of approval on those laws. And those laws really came about in the 1920s, didn't they?").

202. *See* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen, *Gun Rights, and the Shackles of History*, 73 DUKE L.J. 101, 154, 156 (2023) (describing how the number of successful Second Amendment claims after *Bruen* vastly exceeds the number in the immediate aftermath of *Heller*, although the success rate for challenges brought by criminal defendants remains low).

203. *See, e.g.*, United States v. Rahimi, 61 F.4th 443, 461 (5th Cir. 2023) (federal ban on those subject to certain domestic violence restraining orders possessing firearms); Range v. Att'y Gen. United States of Am., 69 F.4th 96, 106 (3d Cir. 2023) (federal ban on felony possession of firearms, as applied to a nonviolent felon); United States v. Quiroz, 629 F. Supp.

one major circuit split)[204] has led the Supreme Court to take up a new Second Amendment case just one year after issuing its decision in *Bruen*.[205] In *United States v. Rahimi*, the Court will directly confront the constitutionality of a status-based gun prohibition restricting *who* may possess firearms for the first time.[206]

Rahimi holds special relevance when thinking about future constitutional challenges to state ERPO laws. In *Rahimi*, a unanimous Fifth Circuit panel applied *Bruen* to invalidate the federal ban on gun possession for those subject to certain state domestic-violence restraining orders (or DVROs) issued after notice and a hearing.[207] The Fifth Circuit first held that the Second Amendment covers all members of the political community and that those subject to DVROs are within "the people" — rejecting the notion that only both "law abiding" and " responsible" individuals have Second Amendment protections.[208] Next, the court considered whether the government had shown a historical tradition that supported disarming the defendant in the case.[209] The court found that each set of potential analogues was not relevantly similar to the DVRO ban in 18 U.S.C. Section 922(g)(8).[210] Historical bans on groups considered to be dangerous were too old, animated by different purposes, targeted groups not accorded Second

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3d 511, 527 (W.D. Tex. 2022) (federal ban on those under felony indictment receiving firearms); United States v. Harrison, __ F. Supp. 3d __, 2023 WL 1771138, at *24–25 (W.D. Okla. 2023) (federal ban on unlawful users of controlled substances possessing firearms, as applied to user of marijuana); Firearms Policy Coalition, Inc. v. McGraw, 623 F. Supp. 3d 740, 756 (N.D. Tex. 2022) (state restriction on individuals between the ages of 18 and 20 carrying handguns in public); United States v. Bullock, __ F. Supp. 3d __, 2023 WL 4232309, at *31 (S.D. Miss. 2023) (federal ban on felony possession of firearms, as applied to a violent felon with a post-release history of nonviolent conduct).

204. *Compare* Range, 69 F.4th at 106 (granting as-applied challenge to federal felon-in-possession law based on the nature of the underlying felony and post-release conduct), *with* United States v. Jackson, 69 F.4th 495, 502 (8th Cir. 2023) (rejecting Second Amendment challenge to felon-in-possession law and explicitly rejecting "felony-by-felony litigation regarding the constitutionality of § 922(g)(1)").

205. *See* United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (Mem) (June 30, 2023) (No. 22-915). From 2010 to 2019, the Court issued only one brief *per curiam* decision in a single Second Amendment case, *see generally* Caetano v. Mass., 136 S. Ct. 1027 (2016), and generally abstained from taking Second Amendment challenges despite numerous petitions for certiorari and several strong dissenting voices among the justices, *see, e.g.*, Silvester v. Becerra, 138 S. Ct. 945 (Mem) (2018) (Thomas, J., dissenting from denial of certiorari).

206. 61 F.4th. Oral arguments in the *Rahimi* case will be held on November 7, 2023. *See* Monthly Argument Calendar November 2023, U.S. SUP. CT., https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalNovember2023.pdf [https://perma.cc/BS2M-CEPA].

207. *Rahimi*, 61 F.4th at 448; *see also* 18 U.S.C. § 922(g)(8).

208. *Rahimi*, 61 F.4th at 452–53.

209. *See id.* at 455–60.

210. *See id.*

Amendment protections at the time, or otherwise not instructive as to the originally understood scope of the Second Amendment.[211] Laws that codified the common-law offense of going armed to the terror of the people applied only through criminal proceedings, often did not provide for weapons forfeiture as a penalty, and "appear to have been aimed at curbing terroristic or riotous behavior . . . rather than [threats] to identified individuals."[212] Finally, the court determined that historical surety laws — which allowed an individual who reasonably feared another person would cause harm or damage property to demand posting of a surety bond — came close to being analogous to Section 922(g)(8) and were motivated by the same legislative purpose, but "imposed [only] a conditional, partial restriction on the Second Amendment right" and did not ban public carry or gun possession for any period of time.[213]

The panel majority distinguished certain potential historical comparators in part because — unlike Section 922(g)(8) — those laws "only disarmed an offender after criminal proceedings and conviction," and emphasized that Rahimi was disarmed "without counsel or other safeguards that would be afforded him in the criminal context."[214] In a concurring opinion, Judge James Ho emphasized two points that could have profound consequences not only for Section 922(g)(8), but also for ERPO laws similarly premised on civil, not criminal, proceedings.[215] First, Judge Ho seemed to argue that *any* civil disarmament process is unconstitutional because it is not consistent with history:

> 18 U.S.C. § 922(g)(8) disarms individuals based on civil protective orders — not criminal proceedings. As the court today explains, there is no analogous historical tradition sufficient to support § 922(g)(8) under *Bruen*.[216]

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211. *See id.*

212. *Id.* at 459.

213. *Id.* at 459–60.

214. *Id.* at 458–59.

215. *See id.* at 461–68 (Ho, J., concurring). Legal provisions that disarm certain individuals subject to DVROs, including Section 922(g)(8) and state analogues, and red flag laws are the two main civil disarmament processes in the United States. State-analogue DVRO provisions vary, with some states providing that those subject to protective orders are automatically disarmed, *see, e.g.*, Ala. Code § 13A-11-72(a) (2023) (criminalizing possession of a firearm under terms similar to 18 U.S.C. § 922(g)(8)), while other states merely authorize the family court judge to disarm a respondent but do not require it, *see, e.g.*, Ind. Code § 34-26-5-9(d)(4) (2023) (authorizing, but not requiring, a court to prohibit a respondent from using or possessing firearms).

216. *Rahimi*, 61 F.4th at 465 (Ho, J., concurring). The respondent's brief to the Supreme Court appears to endorse this general theory of the Second Amendment. *See* Brief for Respondent at. 27, United States v. Rahimi, No. 22-914 (filed Sept. 27, 2023), ("We do not know for certain that the Founders would have insisted on an indictment and jury trial for

Second, Judge Ho asserted that this conclusion is supported by a modern-day rationale: civil protective orders (and, potentially, other civil orders such as ERPOs to the extent initiated by intimate partners in states that allow those individuals to petition) are too easy to obtain and thus easily subject to abuse, especially in divorce proceedings.[217]

As described above in Section I.C, more states are adopting ERPO laws and there are now concerted efforts to publicize these statutes, provide funding to support law enforcement officers and others who may petition for extreme risk orders under the laws, and increase the number of ERPO petitions that are filed.[218] Yet, the evolving Second Amendment case law in this area makes the legal status of ERPOs increasingly uncertain. Judge Ho's concurring opinion in *Rahimi* specifically can be read as a prospective strike against the constitutionality of ERPO statutes.[219] As the following analysis of certain post-*Bruen* ERPO decisions below illustrates, however, it is often unclear which doctrinal test is actually "doing the work" in these cases.

B. Constitutional Challenges to ERPO Laws

Bruen has spurred renewed attention to the possible Second Amendment implications of ERPO laws. As Joseph Blocher and Jake Charles observed in 2020, "Second Amendment challenges to extreme risk laws have not fared well. There have been few such challenges, and they have been unsuccessful."[220] This may be due in part to the fact that it is nearly

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conduct that would disqualify a citizen from possessing arms . . . [but] that does seem to be the only method they found acceptable for other rights of citizenship.").

217. *Id.* at 465–66. Courts have also appeared receptive to similar arguments in legal challenges to other subsections of Section 922(g) which are not based on an indictment or criminal conviction. *See, e.g.*, *Harrison*, 2023 WL 1771138, at *9 ("Section 922(g)(3), however, is an outlier in our legal tradition in that it deprives persons of a fundamental right with *no* pre-deprivation process."); Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 699 (6th Cir. 2016) (McKeague, J., concurring) ("[I]t cannot be constitutional to *permanently* prevent Clifford Tyler from exercising his Second Amendment right without affording him some sort of process to demonstrate that the *non-permanent* label of 'mentally ill' no longer applies to him.").

218. *See, e.g.*, Bipartisan Safer Communities Act, Pub. L. No. 117–159, § 12003(a), 136 Stat. 1313, 1325 (2022) (providing federal funding to implement state extreme risk laws meeting certain criteria).

219. Indeed, many scholars who oppose ERPOs focus on concerns about the process afforded to respondents and whether orders may be too easy to obtain. *See, e.g.*, David B. Kopel, *Red Flag Laws: Proceed with Caution*, 45 L. & PSYCH. REV. 39, 59–79 (2020) (describing process-based objections to most existing ERPO statutes); *Extreme Risk Protection Order Use: Lack of Process Leads to Abuse*, NRA-ILA (Feb. 3, 2020), https://www.nraila.org/articles/20200203/extreme-risk-protection-order-uselack-of-process-leads-to-abuse/ [https://perma.cc/7H6V-TGVK].

220. Blocher & Charles, *supra* note 40, at 1301. While Blocher and Charles focus on due process, others have evaluated the constitutionality of red flag laws under the pre-*Bruen* Second Amendment — though this analysis is likely moot post-*Bruen*. *See, e.g.*, Coleman

impossible for someone to challenge an ERPO statute *pre*-enforcement — because the laws address extraordinary situations that people do not plan for or know about in advance, one who is ultimately subject to an ERPO petition has no redressable injury until the petition is actually brought to temporarily remove that individual's firearms.[221] In addition, the laws are a relatively recent innovation. Connecticut passed the first ERPO predecessor statute in the nation in 1999, and many states with ERPO laws do not see a high volume of petitions until the law has been in effect for at least several years.[222] For example, the number of annual removal proceedings initiated under the Connecticut law remained below 60 until 2010.[223]

Before *Bruen*, at least two state courts dismissed Second Amendment challenges to ERPO statutes because they found that the laws did not implicate or place a material burden on Second Amendment rights.[224] The doctrinal analysis in these two cases was distinct. *Redington v. State* involved a challenge under Indiana's state-analogue provision to the Second Amendment, which Indiana courts had interpreted to permit "reasonable restrictions" on the right to keep and bear arms.[225] In *Hope v. State*, a

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Gay, Note, *"Red Flag" Laws: How Law Enforcement's Controversial New Tool to Reduce Mass Shootings Fits within Current Second Amendment Jurisprudence*, 61 B.C. L. REV. 1491, 1533–34 (2020) (arguing that Second Amendment challenges to red flag laws should be evaluated under intermediate scrutiny). This Article is the first to examine whether and how *Bruen* may change the constitutional calculus.

221. *See, e.g.*, Sgaggio v. Polis, No. 23-CV-01065-PAB-MDB, slip op, at 5 (D. Colo. July 6, 2023) ("Mr. Sgaggio's allegations concerning the possibility of being subject to an ERPO do not demonstrate a credible threat of prosecution and are insufficient to establish standing.").

222. *See* Swanson et al., *supra* note 126, at 189 (tracing the history of Connecticut's ERPO statute, which was used sparingly for nearly a decade after being enacted in 1999); *see also* Frattaroli et al., *supra* note 134 (describing lack of physician knowledge about Maryland's ERPO law shortly after the law took effect); *and* Bernard Condon, *'Red Flag' Laws Get Little Use Even as Mass Shootings, Gun Deaths Soar*, PBS NEWS HOUR (Sept. 2, 2022), https://www.pbs.org/newshour/politics/red-flag-laws-get-little-use-even-as-mass-shootings-gun-deaths-soar [https://perma.cc/H6T2-X72W]; *supra* Part II.

223. *See* Swanson et al., *supra* note 126, at 189.

224. Hope v. State, 133 A.3d 519, 524–25 (Conn. App. Ct. 2016); Redington v. State, 992 N.E.2d 823, 834–35 (Ind. Ct. App. 2013). At least one other state appellate court considered an ERPO challenge that did not involve a Second Amendment claim. In Davis v. Gilchrist Cnty. Sheriff's Off., a Florida state appellate panel rejected vagueness and due process challenges to Florida's ERPO statute. 280 So. 3d 524, 532–33 (Fla. Dist. Ct. App. 2019) (noting that "the statute's purpose is not punitive, but rather preventative," the court further held that the ERPO law "afford[s] a respondent due process and a prompt opportunity to resist a final order [and] incorporates an added due process safeguard by requiring proponents to meet the heightened 'clear and convincing' burden of proof standard").

225. 992 N.E.2d at 831; *see also* Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL'Y REV. 593, 595 (2006) ("State courts universally reject strict scrutiny or any heightened level of review in favor of a standard that requires weapons laws to be only 'reasonable regulations' on the arm right.").

Connecticut state court relied primarily on *Heller*'s list of "presumptively lawful" regulations to conclude that the Second Amendment was not implicated — rather than an independent textual or historical analysis.[226] Nevertheless, if these decisions were correct and ERPO laws do not implicate the Second Amendment at "step one," *Bruen* does not seem to change that analysis.[227] Since *Bruen* was decided in June of 2022, there have been numerous Second Amendment challenges to a wide variety of state and federal firearms restrictions.[228] However, Second Amendment and constitutional challenges to red flag laws remain rare.[229] Even including proceedings where the challenge is not constitutional in nature — but rather to the sufficiency of the evidence or to other procedural aspects of an ERPO statute[230] — legal challenges post-*Bruen* are few in number. Again, this may be due to the fact that pre-enforcement challenges are difficult and that few ERPOs are issued in most states in the years immediately post-enactment,

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226. 133 A.3d at 524-25 (citing District of Columbia v. Heller, 554 U.S. 570, 627 n.26 (2008)).

227. *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2127 (2022) ("Step one of the predominant framework is broadly consistent with *Heller*"); *see also id.* at 2162 (Kavanaugh, J., concurring) (reproducing *Heller*'s endorsement of certain gun regulations as "presumptively lawful"). By contrast, at least one court pre-*Bruen* upheld a state ERPO law under intermediate scrutiny reasoning that the law "bear[s] a substantial relationship to the government's responsibility of protecting the public at large and preventing crime and serious injury to others." Anonymous Detective at Westchester Cnty. Police v. A.A., 71 Misc. 3d 809, 822 (N.Y. Sup. Ct. 2021). This conclusion, however, can no longer stand after *Bruen*.

228. *See, e.g.*, Charles, *supra* note 202, at 151.

229. A search in Westlaw for ("Red flag law" OR ERPO OR "extreme risk") /45 Bruen returned only four results, all of which are discussed in this Article. A search for ("Red flag law" OR ERPO OR "extreme risk") /45 "due process" returned 32 results, and only two additional relevant cases decided after *Bruen*. In a California state court decision issued in December 2022, a judge rejected procedural appellate challenges to the use of hearsay and sufficiency of the evidence in an ERPO proceeding (with no constitutional challenge). San Diego Police Dep't v. Geoffrey S., 302 Cal. Rptr. 3d 545, 549 (Cal. Ct. App. 2022). In a New York case, a judge held that an indigent ERPO respondent was entitled to counsel "where it is apparent on the face of the ERPO application that the allegation involves a criminal investigation, potential criminal liability, and a possible loss of liberty." J.P. v. W.M., No. 2023-141 at *2 (N.Y. Sup. Ct. Apr. 5, 2023). Due to inconsistent reporting of state trial court decisions, it is difficult to discern accurately through Westlaw whether ERPO laws are being challenged at the trial court level in states other than New York, at least until the time when one would expect state appellate decisions to begin to appear. These searches did not return any *federal* trial court opinions, which is notable given the volume of post-*Bruen* firearm litigation in the federal court system generally.

230. *See, e.g.*, Gaughan v. Anonymous, 174 N.Y.S. 3d 544 (N.Y. Sup. Ct. 2022) (denying ERPO against sufficiency of evidence challenge); D.J.S. v. Volusia Sheriff's Off., 343 So. 3d 684 (Fla. Dist. Ct. App. 2022) (affirming ERPO except for drug test, which the court found was not warranted by the evidence).

although by almost any measure that number has recently increased on an annualized basis.[231]

The most prominent decisions applying *Bruen* to ERPO statutes thus far come from New York trial courts. This could be because New York regularly submits *trial* court opinions, as opposed to only appellate opinions, to the legal database Westlaw — unlike most other states. Another contributing factor is that the number of extreme risk orders issued in New York has increased sharply since 2022 and because the state's decision to use language from its civil commitment statute (the Mental Hygiene Law[232]) in the ERPO law has created a legal opening that may not exist in other states.[233] New York's ERPO law was enacted in 2019 but invoked relatively infrequently in its first few years of existence (which also coincided with the COVID-19 pandemic).[234] In May 2022, New York Governor Kathy Hochul required that prosecutors and law enforcement officers initiate an ERPO petition under the ERPO law any time "there is probable cause to believe the respondent is likely to engage in conduct that would result in serious harm" to themselves or others.[235] This directive, combined with increased awareness of the law, has caused the number of petitions and orders issued to rise dramatically.[236] Per the state's own statistics, the rate of ERPO issuance more than doubled in the four months following the executive order making them mandatory in certain circumstances, with more than 1,900

231. *See, e.g.*, Swanson, *supra* note 126, at 189; *see also* Rocco Pallin et al., *Assessment of Extreme Risk Protection Order Use in California From 2016 to 2019*, JAMA NETWORK OPEN (July 1, 2021), https://pubmed.ncbi.nlm.nih.gov/32556258/ [https://perma.cc/B8HJ-QX2R] (describing significant increase in the number of ERPO respondents in California between 2016 and 2019).

232. *See* An Act to Repeal the Mental Hygiene Law, and to Enact a Recodified Mental Hygiene Law, 1972 Sess. (N.Y. 1972), https://www.nysenate.gov/legislation/laws/MHY/-CH27 [https://perma.cc/2PKM-CKNC].

233. N.Y. C.P.L.R. 6340–47; *see also supra* note 229 and accompanying text. It is also possible that the disproportionately high number of New York state cases is due, in part, to their availability on legal research databases such as Westlaw — compared to state trial court decisions from other states with ERPO statutes in place which can be more difficult to locate.

234. *See* Eleonora Francica, *Red Flag Laws: Cases Soared in New York, but Constitutionality Questioned*, POLITICO (May 18, 2023, 5:00 AM), https://www.politico.com/news/2023/05/18/red-flag-law-cases-soar-new-york-00097405 [https://perma.cc/DB8H-TYWS].

235. N.Y. Exec. Order No. 19 (May 18, 2022), https://www.governor.ny.gov/executive-order/no-19-directing-state-police-file-extreme-risk-protection-orders [https://perma.cc/LD2V-KUFT].

236. Francica, *supra* note 234; *see also* Nick Reisman, *As New York's Red Flag Law Expanded, so Did Work of State Police*, SPECTRUM NEWS (May 22, 2023 6:49 PM), https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2023/05/22/as-new-york-s-red-flag-law-expanded—so-did-work-of-state-police [https://perma.cc/AA2J-Z7TU].

orders issued during that time.[237] It should be noted that some of these New York judicial decisions (namely, those striking down the ERPO law as unconstitutional) have been appealed and are currently pending at the appellate level of the state court system.[238]

In general, legal challenges to the law tend to come from individual ERPO respondents outside of New York City, perhaps in part because the city maintains additional requirements for obtaining a firearm that may be enforced more strictly than those in many upstate counties.[239] These challenges are usually raised to temporary ERPOs, which can be issued *ex parte* without notice to the respondent or a hearing based on a showing of probable cause.[240] The New York law requires that a hearing be held "no sooner than three nor more than six business days after service of the temporary order" to determine whether a final order should be entered, which means that the temporary order itself will last for no more than six business days (without considering any possible continuance of the final order

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237. *Governor Hochul and Attorney General James Announce Major Expansion in Red Flag Law Usage to Protect New Yorkers from Gun Violence*, N.Y. STATE GOVERNOR'S PRESS OFF. (Oct. 24, 2022), https://www.governor.ny.gov/news/governor-hochul-and-attorney-general-james-announce-major-expansion-red-flag-law-usage-protect [https://perma.cc/H29B-4L8X].

238. While state court case dockets are difficult to track, it is fair to assume that New York has appealed the rulings in *G.W. v. C.N.* and *R.M. v. C.M.*, striking down the state's ERPO law and that those cases will be heard by the appellate courts in the coming months. New York state court rules grant the government an automatic stay in certain circumstances, which may be implicated here. *See* N.Y. C.P.L.R. 5519(a)(1).

239. *See Gun Laws*, N.Y.C. 311, https://portal.311.nyc.gov/article/?kanumber=KA-01307 [https://perma.cc/84WX-XEPR] (noting that "New York City has its own rules for purchasing and carrying firearms"); Complaint at 2–4, Meissner v. City of New York, (S.D.N.Y. 2023) (No. 1:23-cv-01907, Doc. 1) (class-action allegation that New York City is delaying the issuance of handgun permits, compared to New York state); *cf.* Gwynne Hogan & Suhail Bhat, *NYPD Granting Fewer Gun Permits After Supreme Court Ruled It Had to Grant More, Data Shows*, THE CITY (July 23, 2023, 5:05 AM), https://www.thecity.nyc/2023/7/23/23803195/nypd-gun-permit-approvals-bruen-supreme-court-ghost [https://perma.cc/W9WC-G2CV] (noting that "[t]he NYPD approved fewer new licenses to people requesting permits to carry or keep firearms in their homes or businesses in 2022 than the year prior."). While concealed carry permits are likely not strictly correlated with gun ownership, it is reasonable to assume that some may choose not to obtain firearms in the first place if they believe the prospects of receiving a permit to carry in public are low. It is also possible that no-gun covenants in New York City apartment building leases may impact gun ownership in the city. *See* David Brand, *No Loud Music. No Smoking. No Guns. Can NYC Landlords Ban Firearms?*, CITY LIMITS (June 27, 2022), https://citylimits.org/2022/06/27/no-loud-music-no-smoking-no-guns-can-nyc-landlords-ban-firearms/ [https://perma.cc/ZHX7-JSP5] (quoting a lawyer who believes that "landlords can add a 'no guns' provision to leases as long as the same rules apply to everyone in a multi-unit building").

240. N.Y. C.P.L.R. 6342(1); *see also* Blocher & Charles, *supra* note 40, at 1331 ("One of the biggest flashpoints in the debate over extreme risk laws is the possibility that property can be seized before the gun owner receives notice or an opportunity to contest the order.").

hearing).[241] By contrast, a final order issued after a hearing can last for up to one year in New York.[242]

1. Cases Upholding New York's ERPO Law: Haverstraw *and* J.B.

In *Haverstraw Town Police v. C.G.*, one New York Supreme Court judge followed the lead of *Hope* and *Redington* and concluded that:

> There is nothing in the jurisprudence of *Heller* and *Bruen* to suggest that [ERPO] proceedings are an affront to the Second Amendment. Indeed, such individualized assessments, which place the burden on the party seeking to remove the weapons, are exactly what *Bruen* embraces.[243]

Finding that the law merely established a procedural mechanism for individualized, temporary deprivations and was not "a generally-applicable gun control regulation," the court in *Haverstraw* rejected the Second Amendment challenge.[244] Of note, a two-judge New Jersey state appellate panel in *Matter of P.L.* reached largely the same conclusion in what may be the only post-*Bruen* Second Amendment case outside of New York state (and the only case decided by an appellate court).[245] *P.L.* held "that [*District of Columbia v.*] *Heller, McDonald* [*v. City of Chicago*], and [*N.Y. State Rifle & Pistol Ass'n, Inc. v.*] *Bruen* only pertain to regulating gun ownership and possession by law abiding, mentally healthy people" and thus do not cast any doubt on red flag laws.[246] *P.L.* focused on the Supreme Court's use of the term "law abiding" to determine that ERPO statutes do not implicate the Second Amendment.[247] The decision also held that, because New Jersey's red flag law uses the same "preponderance of the evidence" standard as domestic-violence restraining orders, the law comports with due process.[248]

A Cortland County, New York judge in *J.B. v. K.S.G.* similarly held that no substantive Second Amendment claims exist as to ERPO statutes, instead moving straight to the due process analysis and "agree[ing] that Second Amendment rights must be afforded the same level of protection as all other constitutional rights."[249] In *J.B.*, however, the court determined that the

241. N.Y. C.P.L.R. 6342(4)(d)(ii).

242. N.Y. C.P.L.R. 6343(3)(c).

243. 190 N.Y.S.3d 588, 594 (N.Y. Sup. Ct. 2023).

244. *Id.* at 593.

245. *See* No. 2813-21, 2023 WL 4074022, at *1, *7 (N.J. Super. June 20, 2023).

246. *Id.* at *7.

247. *See id.* (citing District of Columbia v. Heller, 554 U.S. 570; McDonald v. City of Chicago, 561 U.S. 742, 780 (2010); N.Y. Pistol & Rifle Ass'n, Inc. v. Bruen, 597 U.S. __, 142 S. Ct. 2111).

248. *See id.* ("The State notes that the preponderance of the evidence standard has been held to be constitutional for the issuance of final restraining orders in domestic violence cases, and the same reasoning should apply here. We agree.").

249. *See* 189 N.Y.S.3d 888, 889–90 (Supreme Ct., Cortland Cnty., Apr. 6, 2023).

ERPO law "provides for a fact-based inquiry that does not require proof of mental illness or expert opinion," and therefore comparisons to the state's Mental Hygiene Law governing involuntary commitment are misplaced.[250] Ultimately, *J.B.* concluded that "[t]he extreme risk protection statute provides ample procedural safeguards against an improper deprivation of an individual's Second Amendment right to keep and bear arms."[251]

J.B. observed that the ERPO law is focused on likelihood of harm rather than mental illness, and therefore held that requiring identical alignment with the procedural protections of the Mental Hygiene Law is illogical.[252] Evaluating the ERPO law independently, *J.B.* upheld the ERPO law under a due process analysis because the law requires an initial probable-cause finding, provides notice to the respondent, and requires a swift post-deprivation hearing with safeguards including the right to be represented by counsel, the right to present evidence and cross-examine witnesses, and a clear and convincing evidentiary standard.[253] The analysis in *Haverstraw* is similar, although the court there more forcefully rejected the Mental Hygiene Law comparison, ultimately concluding that the ERPO law provides *greater* procedural protections than the Mental Hygiene Law.[254] The ERPO law requires initial factual findings, whereas the Mental Hygiene Law allows commitment based solely on a doctor's statement ("the say-so of a private citizen armed only with a medical license," under *Haverstraw*'s analysis).[255] And the ERPO law automatically contemplates a full post-deprivation hearing, unlike the Mental Hygiene Law process where a hearing must be formally requested. [256]

2. Cases Invalidating New York's ERPO Law: G.W. *and* R.M.

By contrast, a Monroe County, New York judge in *G.W. v. C.N.* struck down the ERPO law as unconstitutional in December when ruling on a Second Amendment challenge.[257] *G.W.* emphasized the Supreme Court's statement in *Bruen* that the Second Amendment is not a "second-class right."[258] The decision grounded itself in procedural due process while emphasizing "the United States Supreme Court's interpretation of the value

250. *See id.* at 890, 892.
251. *Id.* at 893.
252. *See id.* at 891–92.
253. *Id.* at 892–93.
254. *See* Haverstraw Town Police v. C.G., 190 N.Y.S.3d 588, 596–97 (Sup. Ct. 2023).
255. *See id.*
256. *See id.*
257. 181 N.Y.S.3d 432, 441 (Supreme Ct., Monroe Cnty. Dec. 22, 2022).
258. *Id.* at 435.

of the Second Amendment."[259] *G.W.* noted that "New York has a long history of providing a base level of procedural due process to a citizen when the State undertakes to deprive that citizen of a fundamental right" and implied that, under some version of the historical analysis required by *Bruen*, the state had failed to sufficiently protect the exercise of a constitutional right when designing the ERPO law.[260]

In an April decision in *R.M. v. C.M.*, a judge in Orange County, New York similarly stressed the importance of Second Amendment rights and held that "New York's Red Flag Law, as currently written, lacks sufficient statutory guardrails to protect a citizen's Second Amendment Constitutional right to bear arms."[261] As with the decision in *G.W.*, the decision in *R.M.* relied in an ancillary way on the Supreme Court's evolving Second Amendment jurisprudence to hold that procedural protections are *especially* critical in the context of gun deprivation statutes such as the ERPO law.[262]

G.W. and *R.M.* both forcefully invoked *Bruen* but were actually grounded in procedural due process — which, as scholars noted pre-*Bruen*, has typically been "the more substantive and pressing concern" with ERPO laws.[263] These cases focused primarily on a comparison to the state's Mental Hygiene Law and its procedures for involuntary commitment (although, as noted in Part II.B.2 *infra*, there are other similar civil proceedings that can deprive constitutional rights), yet reached the opposite conclusion as *Haverstraw* and *J.B.* The judges instead emphasized that the ERPO and Mental Hygiene Law laws both use the phrase "likelihood to result in serious harm."[264] For example, in *G.W.*, the judge focused on this overlap and held that, "in order to pass constitutional muster, the legislature must provide that a citizen be afforded procedural guarantees, such as a physician's determination that a respondent presents a condition 'likely to result in serious harm,' before a petitioner files for a [Temporary ERPO] or ERPO."[265] The *G.W.* decision also referenced so-called *Rivers* hearings

259. *Id.*

260. *See id.* at 439.

261. 189 N.Y.S.3d 425, 427 (Supreme Ct., Orange Cnty., Apr. 4, 2023)

262. *See id.* (citing McDonald v. City of Chicago, 561 U.S. 742, 780 (2010)).

263. Blocher & Charles, *supra* note 40, at 1291. For other evaluations of due process arguments in the ERPO context, see John R. Richardson, *Red Flag Laws and Procedural Due Process: Analyzing Proposed Utah Legislation*, 2021 UTAH L. REV. 743 (2021); Caitlin M. Johnson, Note, *Raising the Red Flag: Examining the Constitutionality of Extreme Risk Laws*, 2021 ILL. L. REV. 1515 (2021).

264. *Compare* N.Y. C.P.L.R. 6342(1), 6343(2) (requiring a determination that an individual is "likely to engage in conduct that would result in serious harm to himself, herself or others"), *with* NY MHL § 9.41(a) (authorizing a law enforcement officer to "take into custody any person who appears to be mentally ill and is conducting himself or herself in a manner which is likely to result in serious harm to the person or others").

265. G.W. v. C.N., 181 N.Y.S.3d 432, 437 (Sup. Ct. 2022).

required to forcibly medicate a patient — where the judge observed that a physician must be the one to offer proof and where indigent respondents are entitled to representation — and Article 10 proceedings for commitment of sex offenders.[266] In closing, the judge in *G.W.* asked rhetorically: "Why should a respondent subject to a CPLR § 63-a proceeding not be afforded the same constitutional protections as the aforementioned cases, when all are based upon allegations of mental illness?"[267] *R.M.* largely adopted the analysis in *G.W.* and would require a physician's determination to support a finding of likelihood of serious harm to obtain an ERPO.[268]

Legal challenges to ERPOs sometimes include other claims, such as Fourth Amendment claims, arguments that the laws are impermissibly vague, and allegations that constitutional guarantees typically present only in the criminal context — like the right to counsel — should similarly apply to civil ERPO proceedings.[269] Some have also expressed First Amendment objections, arguing that ERPOs may be initiated based on protected speech.[270] Courts have generally rejected such claims,[271] and Section III.D will focus on Second Amendment and due process challenges to ERPO laws.

C. Evaluating Post-*Bruen* ERPO Decisions

It is a matter of considerable scholarly debate, and a topic beyond the scope of this Article, whether the constitutionality of the procedure for depriving an individual of a protected interest is a fundamentally distinct inquiry from the question of whether the substantive constitutional right at issue has been violated (and, indeed, the extent to which substance and procedure can even logically be separated at all).[272] ERPOs illustrate squarely how this issue might arise: must a plaintiff merely allege that their Second Amendment rights have been violated, with the subsequent legal analysis inquiring into *both* substance *and* procedure, or must the plaintiff

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266. *See id*. at 439–41.

267. *Id*. at 441.

268. *See* R.M. v. C.M., 189 N.Y.S.3d at 427.

269. *See, e.g.*, Haverstraw Town Police v. C.G., 190 N.Y.S.3d 588, 594–600 (Sup. Ct. 2023).

270. *See, e.g.*, San Diego Police Dep't v. Geoffrey S., 302 Cal. Rptr. 3d 566–67 (Cal. Ct. App. 2022) (rejecting claim that ERPO petition violated the First Amendment because it was based on "strange . . . [but] lawful" speech).

271. *See, e.g.*, Haverstraw, 190 N.Y.S. 3d at 594–600; *Geoffrey S.*, 86 Cal. App. 5th at 566–67. *But see* Counterman v. Colorado, 143 S. Ct. 2106, 2113, 2117–19 ("holding that the State must prove in true-threats cases that the defendant had some understanding of his statements' threatening character" by showing a *mens rea* of recklessness).

272. *See, e.g.*, Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 112–13 (1982); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 215–19 (2004).

bring separate claims for Second Amendment and due process violations to be evaluated under different legal standards? Case law on procedural due process from the Supreme Court and lower federal courts generally suggests that these *are* independent inquiries because the interest at stake in a procedural due process challenge is a liberty or property interest that is not necessarily identical to the interest at stake when a substantive constitutional violation is alleged.[273] The Supreme Court has found violations of procedural due process even where a constitutionally protected right is *not* at stake.[274] If the inquiries were identical, then a violation of procedure would appear to lie only where the procedure related to the deprivation of a constitutionally protected right (and proper procedure would necessarily rule out a substantive challenge). Yet, a procedural due process claim *may* lie based on the allegation that a plaintiff's liberty interest in possessing and carrying a firearm — or property interest in seized firearms — has been removed or withheld without due process of law.[275] By contrast to a substantive due process claim, which is subsumed within the Second Amendment analysis,[276] such a procedural claim is analyzed under a three-factor interest-balancing approach weighing the private interest, the government interest in the deprivation, and the risk of an improper or erroneous deprivation.[277]

With that said, legal scholars have argued persuasively "that procedural constitutional rights are part of and derived from substantive constitutional rights,"[278] and the line between substance and procedure is famously difficult to navigate. Moreover, even when constitutional claims remain formally separate, courts often construe the presence of multiple claims as mutually reinforcing or articulating a cumulative-rights theory.[279] Thus, the presence

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273. *See, e.g.*, Wolf v. McDonnell, 418 U.S. 539, 557–58 (1974).

274. *Compare* Dandridge v. Williams, 397 U.S. 471, 487 (1970) ("[T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court."), *with* Goldberg v. Kelly, 397 U.S. 254, 270 (1970) ("Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department.").

275. *Cf.* Kuck v. Danaher, 600 F.3d 159, 163 (2d Cir. 2010) ("Appellees concede that Kuck possesses a liberty interest . . . in his right to carry a firearm. They dispute, however, that the time required to resolve Kuck's appeal violated due process." (cleaned up)).

276. *See* Clifton v. United States Dep't of Just., 615 F. Supp. 3d 1185, 1204–05 (E.D. Cal. 2022).

277. *See* Kuck, 600 F.3d at 163 ("Our procedural due process analysis is controlled by the three-factor test prescribed in *Mathews v. Eldridge*."); *see also infra* notes 284–86 and accompanying text.

278. *See, e.g.*, Larry Alexander, *Are Procedural Rights Derivative Substantive Rights?*, 17 L. & PHIL. 19, 31 (1998).

279. *See, e.g.*, Abrams & Garrett, *supra* note 185; Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 136–37 (2007) (observing this phenomenon in the context of equal protection and due process).

of a separate Second Amendment claim may influence a court's decision on a procedural due process challenge related to the alleged deprivation of a gun-related liberty or property interest.

Prior to *Bruen*, the question of whether substantive Second Amendment violations and procedural due process claims relating to firearms deprivation were independent inquiries was largely academic. That is because the legal test that a court would use in each instance was nearly identical: the judge would weigh the private and government interests at stake and ask how well-designed the law was to accomplish the government's stated objective without straying into constitutionally protected territory.[280] No matter whether the court conducted a separate procedural inquiry or folded that inquiry into the Second Amendment analysis, the result would almost certainly be the same because the government and private interests in each instance overlapped substantially. In the ERPO context, presumably, a state would have offered a public safety rationale to justify ERPO statutes under the pre-*Bruen* two-step test. Similarly, the government interest in a due process challenge will be an interest in protecting public safety by temporarily removing firearms from individuals considered to be dangerous or risky. Therefore, it is not surprising that the few state courts to consider ERPO challenges after *Bruen* have blended substance and procedure — which would have made sense under the pre-*Bruen* legal test.[281] This is also to be expected because opponents of ERPOs often invoke the Second Amendment and due process in the same breath.[282]

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280. *Compare* United States v. Marzzarella, 614 F.3d 85, 96–98 (3d Cir. 2010) (requiring that, to be constitutional under the Second Amendment, "the asserted governmental end [must] be more than just legitimate, either '*significant*,' 'substantial,' or 'important.' [. . . and that] the fit between the challenged regulation and the asserted objective be reasonable, not perfect" (emphasis added)), *with* Gilbert v. Homar, 520 U.S. 924, 932 (1997) (crediting the state's "*significant* . . . interest in maintaining public confidence" in state government by suspending government employees charged with felonies (emphasis added)).

281. *See, e.g.*, J.B. v. K.S.G., 189 N.Y.S. 3d 888, 892–93 (Sup. Ct. 2023); G.W. v. C.N., 181 N.Y.S.3d 432, 435 (Supreme Ct., Monroe Cnty. Dec. 22, 2022).

282. *See, e.g.*, Graham Filler and Andrew Fink, *Opinion: Michigan Red Flag' Laws Infringe on Due Process and Don't Work*, BRIDGE MICHIGAN (Feb. 27, 2023), https://www.bridgemi.com/guest-commentary/opinion-michigan-red-flag-laws-infringe-due-process-and-dont-work [https://perma.cc/A5P8-HJF9] (arguing that ERPO laws "endanger the First Amendment's protection of the right to express political views the government disfavors, the Second Amendment's protection of the right to keep and bear arms and, perhaps most importantly, the 14th Amendment's protection of the right to basic due process"). Due to these objections, ERPOs continue to be a major target of the Second Amendment sanctuary movement. *See, e.g.*, Ivan Pereira, *Lawmaker Introduces 'Anti-Red Flag' Bill in Georgia To Combat Gun Control Proposals*, ABC NEWS (Jan. 15, 2020), https://abcnews.go.com/-%20US/lawmaker%20introduces-anti-red-flag-bill-georgia-combat/story?id=68299434 [https://perma.cc/X3U5-9RUV]; Lucas Smolcic Larson, *Livingston County Leaders Take Aim at Red Flag Gun Laws, Vote to Become 'Constitutional County'*, MLIVE (Apr. 26, 2023), https://www.mlive.com/news/2023/04/livingston-county-

However, *Bruen* removed any possibility for the inquiries to overlap completely by setting forth a new history-focused test that, according to the *Bruen* majority, applies only in the substantive Second Amendment context.[283] *Bruen* does not purport to alter the body of case law dealing with the issue of when a deprivation of constitutional rights — either *ex parte* or with notice and a hearing — comports with due process. And as described in *infra* Section II.D.2, there is no basis to believe *Bruen* can or should be read to extend its historical-analogy test to procedural challenges related to Second Amendment rights. The Supreme Court articulated the following test for a procedural due process claim in *Mathews v. Eldridge*:

> [T]hat identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[284]

Applying this test, the Court has upheld deprivations of constitutionally protected interests in a wide variety of cases against a due process challenge.[285] And, almost by definition, the *Mathews* test rules out the idea that *all* constitutional rights require *identical* procedural safeguards before they can be deprived — especially because two factors (the private interest and the government's interest) will necessarily differ depending on the nature of the deprivation and the factual circumstances. A correspondingly stronger government objective may be required in cases involving involuntary commitment, for example, than in cases dealing with the temporary removal of property. Indeed, the Supreme Court has held that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[286]

The post-*Bruen* New York ERPO decisions described above are all, ultimately, based on a due process — not a Second Amendment — analysis.

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leaders-take-aim-at-red-flag-gun-laws-vote-to-become-constitutional-county.html [https://perma.cc/23VV-KY2K] (describing a Michigan county that passed a sanctuary ordinance and refused to enforce, or use public resources to support, the state's newly-enacted red flag law).

283. *See* New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2129 (2022) ("We reiterate that the standard *for applying the Second Amendment* is as follows . . . ." (emphasis added)).

284. 424 U.S. 319, 335 (1976).

285. *See* Blocher & Charles, *supra* note 40, at 1322–23.

286. Cafeteria & Rest. Workers Union, Loc. 473, AFL-CIO v. McElroy, 367 U.S. 886, 895 (1961).

As the judge in *J.B.* observed, the decisions striking down the ERPO law "conclude[] that the extreme risk protection statute is unconstitutional because it effectively treats the Second Amendment as a second-class right by failing to provide the same procedural safeguards for the Second Amendment rights at issue."[287] The New York cases suggest that *Bruen*'s only real contribution in this area is to remind courts about the importance of Second Amendment rights in the context of any gun-related deprivation and, potentially, to reinforce or strengthen a due process challenge. Yet *Bruen* makes such overlapping analyses much more difficult because the legal test is now different for Second Amendment challenges than it is for due process challenges. To the extent that the due process claim is based on a protected property interest in firearms, then, the plaintiff's substantive claim must be evaluated under *Bruen*'s historical tradition test while the due process claim for a property or rights deprivation is evaluated under *Mathews*. This is borne out by the fact that even those decisions, such as *Haverstraw*, that find the Second Amendment to not be implicated at all in the ERPO context, continue on to evaluate whether the ERPO law provides sufficient procedural protections under the due process clause.[288]

Bruen's impact then, is mainly directive rather than doctrinal: the New York judges are heeding the Court's exhortation not to treat the Second Amendment as a disfavored right by applying closer scrutiny to gun-related challenges even outside of the Second Amendment. That said, the idea that *dicta* in *McDonald*[289] and *Bruen*[290] *should* have a significant impact on due process claims (by, for example, requiring all ERPO laws to mirror procedural protections in the relevant state involuntary commitment statute) is not all that convincing because those cases do not purport to change anything about the procedural due process required for deprivation of Second Amendment rights — or, even, who can be prohibited from possessing firearms and under what circumstances.[291] This is especially true when one considers the gravity of the deprivation in the New York comparisons. Being involuntarily committed is, by any stretch, a *far* more serious deprivation

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287. J.B. v. K.S.G., 189 N.Y.S. 3d 888, 890 (Sup. Ct. 2023).

288. Haverstraw Town Police v. C.G., 190 N.Y.S.3d 588, 593–95 (Sup. Ct. 2023).

289. McDonald v. City of Chicago, 561 U.S. 742, 780 (2010) (rejecting the concept of treating "the right recognized in *Heller* as a second-class right").

290. New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2156 (2022) ("The constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" (quoting *McDonald*, 561 U.S. at 780)).

291. *Id.* at 2157 (Alito, J., concurring) ("Our holding decides nothing about who may lawfully possess a firearm.").

than temporary loss of access to firearms.[292] Indeed, this should not be a tremendously controversial observation, but it has been a point of contention in recent debates over red flag laws, even within the ranks of gun-rights groups.[293] A major talking point among some gun-rights advocates is that red flag laws should be entirely displaced by involuntary commitment proceedings, other measures focused solely on mental illness, or incarceration.[294] While there are those who would prefer to rely entirely on mental health commitment processes that necessarily also separate individuals from firearms, likely on a permanent basis, others argue persuasively that "round[ing] up mentally ill people and depriv[ing] them of other liberties, including their Second Amendment rights," is a far greater deprivation than temporary removal of property pursuant to an ERPO.[295] Absent a pronouncement from the Court that gun deprivations must accord with procedural protections provided in involuntary commitment proceedings — which would represent a major shift in procedural due process law — requiring such homogeneity makes little sense.[296]

Of course, it is also true that lower courts are now operating in a post-*Bruen* world where the Supreme Court has emphasized that the Second Amendment is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be

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292. No current state ERPO law authorizes permanent deprivation. The maximum time period for an *ex parte* order is 21 days, *see* CAL. PENAL CODE § 18155(c), and California also allows a final ERPO entered after notice and a hearing to last for up to five years, the longest maximum time period authorized by any state red flag law. *See* 2019 CA AB 12, amending Cal. Pen Code § 18175(d); *see also Extreme Risk Protection Orders*, GIFFORDS LAW CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/ [https://perma.cc/33BU-D28H] (last visited Oct. 7, 2023).

293. *See, e.g.*, John Crump, *Where Gun Groups Stand on Red Flag Laws*, AMMOLAND (June 8, 2022), https://www.ammoland.com/2022/06/where-gun-groups-stand-on-red-flag-laws/#axzz8ATz7Fphh [https://perma.cc/K5TU-5MRR] (quoting the executive vice president of the Second Amendment Organization as arguing that "Red Flag Laws are disingenuous, thinly veiled, Gun Control because they create a mechanism to take someone's firearms, but they do not involve mental health care professionals to diagnose or treat any real problem").

294. *See generally* Memorandum, Off. of Tenn. Gov. Bill Lee, How We Can Improve Tennessee's Existing Protective Order Framework to Ensure Public Safety (2023) (public records request published by Associated Press), https://s3.documentcloud.org/documents/23832994/gov-bill-lee-public-records.pdf [https://perma.cc/6CG5-7H5T] (talking points prepared for Tennessee Governor Bill Lee, who has proposed a "mental health order of protection law" in the state).

295. *Id.* at 2; *see also* 18 U.S.C. § 922(g)(4) (lifetime ban on firearm possession for those adjudicated as mentally ill).

296. A state could, of course, affirmatively choose to adopt a legal standard for civil commitment into a red flag statute.

incorporated into the Due Process Clause."[297] It is natural, then, that lower courts would err on the side of over-rather than under-protecting the Second Amendment and *any* gun-related rights and giving greater attention to cumulative-rights arguments. And some lower court decisions strictly follow *Bruen*'s directive even while expressing serious reservations about the workability of the Supreme Court's test.[298] However, *Bruen*'s reference to the Due Process Clause — a quotation from *McDonald* — is, somewhat clearly, to the concept that the Fourteenth Amendment incorporates a set of *substantive* protections contained in the Bill of Rights against state governments.[299] In *McDonald*, the Court was concerned with the question of whether the substantive Second Amendment right to keep and bear arms applied against the states.[300] And, in *Bruen*, the Court was concerned with the legal test that courts apply when adjudicating *substantive* Second Amendment challenges.[301] Thus, in neither decision was the Court dealing with a question of what *process* is required for a firearms deprivation, and it seems unlikely that the Court intended its holding in *Bruen* to *swallow* other established areas of constitutional law simply because guns are involved.

D. Charting a Path Forward

This Section seeks to provide some clarity to the muddled universe of post-*Bruen* ERPO cases by developing a framework for how future legal challenges to extreme risk laws might be evaluated — with a focus on possible Second Amendment and due process litigation, including instances where multiple, related constitutional challenges to an ERPO statute are brought within the same case.

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297. McDonald v. City of Chicago, 561 U.S. 742, 780 (2010); New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2156 (2022).

298. *See, e.g.*, United States v. Bullock, __ F. Supp. 3d __, No. 18-CR-165, 2023 WL 4232309, at *2 (S.D. Miss. June 28, 2023) (granting a constitutional challenge to the federal felony possession ban while observing that "[t]he new standard has no accepted rules for what counts as evidence").

299. *See McDonald*, 561 U.S. at 780 (2010) (rejecting the idea that the Second Amendment should be treated as a "second-class right" *because* this would "disregard 50 years of incorporation precedent").

300. *See id.* at 791 (Scalia, J., concurring) ("Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights 'because it is both long established and narrowly limited.'") (quoting *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring)).

301. *Bruen*, 142 S. Ct. at 2129.

1. The Second Amendment

One possibility is that ERPO statutes are squarely subject to *Bruen*'s historical-analogy test on a Second Amendment challenge.[302] On one hand, most, if not all, courts to consider Second Amendment challenges to ERPO laws pre-*Bruen* found that the Second Amendment was not implicated at the threshold coverage inquiry — because the laws are not generally applicable gun regulations or do not apply to responsible, law-abiding citizens.[303] *Bruen* is explicit that it does not overrule the initial, threshold inquiry of whether a regulation implicates the Second Amendment (which the Court found "broadly consistent" with *Heller*[304]), and some post-*Bruen* courts have applied that same rationale to dismiss ERPO challenges.[305]

However, the law in this area is unsettled. The Supreme Court has never explicitly endorsed ERPOs (as it has, albeit in dicta, laws such as the felon ban and restrictions on possession by the mentally ill[306]), and courts frequently apply a fulsome Second Amendment analysis in non-ERPO cases dealing with temporary, individualized civil disarmament such as what occurs pursuant to Section 922(g)(8).[307] Justice Amy Coney Barrett, when she was a judge on the Seventh Circuit, argued that it makes little sense to exclude *people* from the amendment's scope at the threshold, textual inquiry — which "means that the question is whether the government has the power to disable the exercise of a right that they otherwise possess, rather than whether they possess the right at all."[308] Because legal challenges to ERPOs

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302. *See id.* at 2131–32 (explaining the historical tradition test).

303. *See, e.g.*, Hope v. State, 133 A.3d 519, 524–25 (Conn. App. Ct. 2016); Redington v. State, 992 N.E.2d 823, 832–33, 834–35 (Ind. Ct. App. 2013).

304. *Bruen*, 142 S. Ct. at 2117–18.

305. *See, e.g.*, Haverstraw Town Police v. C.G., 190 N.Y.S.3d 588, 593–94 (Sup. Ct. 2023); In re P.L., No. 2813-21, 2023 WL 4074022, at *7 (N.J. App. Div. June 20, 2023).

306. *See* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008) ("[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.").

307. *See, e.g.*, United States v. Rahimi, 61 F.4th 443, 448, 451, 460–61 (5th Cir. 2023) (finding § 922(g)(8) unconstitutional after concluding that the provision implicates the Second Amendment and is subject to the *Bruen* framework); *see also* United States v. Kays, 624 F. Supp. 3d 1262, 1265–67 (W.D. Okla. 2022) (upholding 922(g)(8)'s DVRO ban after concluding that the provision implicates the Second Amendment and is subject to the *Bruen* framework).

308. Kanter v. Barr, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting). Since *Bruen*, courts have divided over whether a certain status renders an individual outside of "the people" at step one or, rather, whether "the people" is construed broadly. *Compare* United States v. Sitladeen, 64 F.4th 978, 987 (8th Cir. 2023) ("[U]nlawful aliens are not part of 'the people' to whom the protections of the Second Amendment extend."), *with* United States v. Leveille, __ F. Supp. 3d __, No.18-CR-02945, 2023 WL 2386266, at *3 (D.N.M. 2023) (assuming

similarly implicate questions of *who* is entitled to Second Amendment protection, it is entirely possible that a future court may find the Second Amendment to be implicated and apply *Bruen*'s historical-tradition analogical test; notwithstanding that ERPO laws are based on an individualized risk assessment and produce only a temporary deprivation of the right. I think that is, at the least, a defensible application of current Second Amendment doctrine.

Interestingly, no court has yet analyzed an ERPO challenge directly under the *Bruen* test — in other words, asked whether a state ERPO law is justified because analogous laws exist from the relevant historical time period. The closest is the opinion in *Hines v. Doe*.[309] There, a New York state trial court judge noted that certain *applications* of the ERPO law, such as applications to those who are suicidal and those who are mentally ill, are consistent with historical tradition.[310] *Hines* first observed that historical laws criminalized suicide as "self-murder" and that "a private person's use of force to prevent suicide was privileged."[311] Therefore, in the judge's view, the use of ERPO in cases of imminent suicide is consistent with history.[312] The judge also concluded that application of the statute to the mentally ill accords with *Heller*'s statement that laws prohibiting gun possession by the mentally ill are "presumptively" lawful.[313] By separating the ERPO law into discrete applications and asking whether each, individually, is consistent with history, *Hines* suggests how as-applied challenges (as opposed to facial challenges) to ERPO laws may play out in the future in certain cases. However, *Hines* also leaves open whether red flag laws are constitutional when applied to individuals outside of the discrete categories of the mentally ill and suicidal. Many ERPO applications do not involve individuals who are clinically diagnosed as mentally ill (and may thus be independently

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"that the Second Amendment's reference to the right of 'the people' to bear arms includes 'at least some aliens unlawfully here'" (quoting United States v. Huitron-Guizar, 678 F.3d 1164, 1169 (10th Cir. 2012))).

309. *See* Hines v. Doe, 78 Misc.3d 1092 (Sup. Ct. 2023).

310. *Id.* at 1097–1100. *Hines*, then, suggests the possibility of as-applied Second Amendment challenges when an ERPO statute is applied in cases other than those dealing with an imminent risk of suicide or a mentally ill respondent (for example, where a family member petitions for an ERPO based on concerning statements that do not indicate suicidal intent). This approach, if adopted, might ultimately look similar to the approach some courts have used in the felony possession context: granting as-applied challenges only where the specific factual circumstances suggest a lack of dangerousness or that disarming a particular individual is not consistent with history. *See, e.g.*, Range v. Att'y Gen., 69 F.4th 96, 103, 106 (3d Cir. 2023); Binderup v. Att'y Gen., 836 F.3d 336, 343, 344, 351–52 (3d Cir. 2016).

311. *Hines*, 78 Misc.3d at 1099.

312. *See id.* at 1099–1100 ("[B]ased upon historical analogues, when a rational person attempts suicide to escape the maladies of life, he should be disarmed as long as he may attempt suicide.").

313. *Id.* at 1095.

subject to other, permanent firearm prohibitions[314]) or individuals who have explicitly professed a suicidal intention (rather than merely exhibited warning signs).[315]

Red flag laws themselves are a recent innovation, so any historical analogue will, of course, not be an identical match.[316] However, *Rahimi* provides something of a window into how such challenges might play out. ERPOs may be analogized to either dangerousness-based prohibitions or to historical peace bonds and surety statutes as a modern-day analogue of the state's police power to take steps to address potentially dangerous conduct. To credit such laws under *Bruen*, the analogical inquiry would likely need to be more flexible than the inquiry that was conducted in *Bruen* and in the Fifth Circuit's *Rahimi* decision. A court may find that ERPO laws are based on unprecedented societal concerns and thus trigger a more nuanced analysis, which is broadly consistent with the evidence outlined below about gun violence around the time of the Founding.

ERPO statutes are driven largely by concerns about gun suicide and the use of firearms to commit mass shootings; indeed, evidence shows that ERPOs are likely most effective in preventing suicide.[317] Historians have noted that at the time of the Founding "firearms were rarely used in intrafamilial homicides" and that guns, indeed, were entirely ill-suited to close-quarters confrontation or to heat-of-the-moment outbursts because they took a long time to load and were unreliable compared to other weapons like knives and axes.[318] The same factors that made firearms of the time unsuitable for homicide — their tendency to misfire, the time it took to load a gun, and the fact that guns were almost never kept loaded — almost certainly made firearms unsuitable for suicide (similarly, an impulsive

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314. *See, e.g.*, 18 U.S.C. § 922(g)(4).

315. *See generally supra* Section II.A. For example, a detailed study regarding Connecticut's red flag law found that 32% of removal cases with narrative information available listed a concern about risk of harm to others and 16% of cases left the risk unspecified (and thus did not list suicide or mental health concerns). The study also found applications to intoxicated and "emotionally agitated" individuals, without documented concerns of suicide or mental illness. Swanson et al., *supra* note 126, at 192.

316. Swanson et al., *supra* note 126, at 180.

317. *See, e.g.*, Swanson et al., *supra* note 126, at 206 (noting that "suicide concern was the most common type of risk motivating [] gun removals" under Connecticut's ERPO statute and estimating "that approximately ten to twenty gun seizures were carried out for every averted suicide"); *see also* Kivisto & Phalen, *supra* note 169, at 858 (estimating that 383 firearm suicides may have been prevented in 10 years by Indiana's red flag law).

318. *See* Eric Ruben, *Law of the Gun: Unrepresentative Cases and Distorted Doctrine*, 107 IOWA L. REV. 173, 205–06 (2021); *see also* Randolph Roth, *Why Guns Are and Are Not the Problem: The Relationship Between Guns and Homicide in American History*, *in* A RIGHT TO BEAR ARMS? 113 (Jennifer Tucker, Barton C. Hacker & Margaret Vining eds., 2019)

act).[319] This is especially true given the negligible civilian ownership of handguns at the Founding.[320] Historian Randolph Roth has noted that "[t]here is reason to believe . . . that high levels of gun ownership have increased the suicide rate substantially in the United States . . . . primarily because firearms are far more likely than drugs, cuts, poison, or carbon monoxide to inflict fatal injuries and to forestall life-saving interventions."[321] By contrast, in 2021, over half of the 48,183 suicides in the United States were committed with a firearm.[322]

What is more, ERPOs perhaps more clearly implicate *unprecedented*, or fundamentally *modern*, concerns than even domestic violence-related firearm restrictions. As historian Laura Edwards has shown, while many "historians have assumed that wives in the nineteenth century . . . had no legal recourse against domestic violence," in fact "husbands who beat their wives could be charged with disrupting the peace."[323] The legal regime at that time did not focus on vindicating an individual woman's rights, but domestic violence itself was still a concern that overlapped to some extent with modern concerns about domestic violence (in terms of its impact on children and other members of the local community, for example).[324] In other words, domestic violence *was* viewed as a profound moral and societal wrong even if the legal mechanisms to address it were different than they are today.[325] By contrast, the modern societal treatment of those who are at risk of suicide shares almost *nothing* with the treatment of suicide around the time of the Founding. Early American governments moved away from the

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319. Roth, *supra* note 318, at 117 (observing that "muzzle-loading firearms had limitations as murder weapons," "took at least a minute (and plenty of elbow room) to load," and often "could be used only as clubs in hand-to-hand combat"); Beth Duff-Brown, *Handgun Ownership Associated with Much Higher Suicide Risk*, STAN. MEDICINE (June 3, 2020), https://med.stanford.edu/news/all-news/2020/06/handgun-ownership-associated-with-much-higher-suicide-risk.html [https://perma.cc/TZD5-UEDP] (discussing impulsive nature of suicides); *see also supra* Section I.C.1.

320. Kevin M. Sweeney, *Firearms, Militias, and the Second Amendment*, in THE SECOND AMENDMENT ON TRIAL 310, 342 (Saul Cornell & Nathan Kozuskanich eds., 2013). Today, handgun ownership is correlated with a significantly higher risk of suicide. *See, e.g.*, Duff-Brown, *supra* note 319.

321. Roth, *supra* note 318, at 115.

322. *See Suicide and Self-Harm Injury*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nchs/fastats/suicide.htm [https://perma.cc/23RE-SJW3] (last visited Oct. 14, 2023).

323. LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE 183 (2009); *see also id.* at 184 (describing how women "scored important legal points, placing limits on the meaning of their subordination within the patriarchal order").

324. *See id.* at 183 ("[T]he maintenance of quiet, orderly households was central to the community").

325. *See id.* at 181 ("The crime was the injury to the public body . . . on what abusive husbands did, not why they did it."); *id.* at 183 ("[R]ights were not the basis for mounting criminal charges against husbands.").

English tradition of criminalizing suicide and disallowing inheritance for the next of kin, but they continued to condemn suicide as a "grievous . . . wrong" and moral weakness.[326] Our modern approach to suicide focuses on mental health, does not involve state condemnation or criminalization, and increasingly *allows* physician-assisted suicide in certain circumstances.[327] These attitudes are distinct from historical attitudes toward suicide in a way that demands nuance. While it is possible to draw a broad through-line from societal (and even legal) approaches to domestic violence in the 18th and 19th centuries to approaches today,[328] any such attempt in the suicide context quickly disintegrates. Americans today share very few, if any, of their ancestors' views about suicide and thus would not consider or support regulatory measures to address suicide remotely similar to those supported in the past.[329]

Mass shootings are also frequently invoked as a major concern driving the enactment of red flag laws — if those who intend to commit mass shootings engage in concerning behavior, ERPOs may be one way to intervene and prevent violence before it is too late.[330] The concern about the use of firearms to commit mass shootings is also an unprecedented concern that did not exist at the Founding. There is no evidence that a firearm was *ever* used in a mass shooting (when defined as an event resulting in ten or more

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326. Washington v. Glucksberg, 521 U.S. 702, 713–14 (1997); *see also* Bigelow v. Berkshire Life Ins. Co., 93 U.S. 284, 286 (1876) (referring to suicide as "an act of criminal self-destruction"); *City Suicides in 1860*, N.Y. TIMES (Jan. 17, 1861), https://www.nytimes.com/1861/01/17/archives/city-suicides-in-1860-number-of-suicides-ratio-cepidemic.html [https://perma.cc/8VLE-QS7F] (referring to a suicide wave as an "appalling moral plague"); *see also* Helen Y. Chang, *A Brief History of Anglo-Western Suicide: From Legal Wrong to Right*, 46 S.U. L. REV. 150, 169–75 (2018); Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 63–100 (1985).

327. Lisa Rathke, *Vermont Allows Out-of-Staters to Use Assisted Suicide Law*, AP News (May 2, 2023, 5:29 PM) https://apnews.com/article/assisted-suicide-vermont-residency-requirement-10ce4f29063f5bbb1873583f9aa89947 [https://perma.cc/C529-U2WF] (noting that "Vermont is one of 10 states that allow medically assisted suicide").

328. *See, e.g.*, Brief for Respondent, at 14–18, United States v. Rahimi (Sept. 27, 2023) (No. 22-915) (describing early American condemnation of domestic violence and associated legal efforts to address domestic violence).

329. *See* Chang, *supra* note 326, at 168 (noting that, "[a]s the association between mental health treatment and suicide became more substantiated, the criminality of suicide became less defensible").

330. *See, e.g.*, *supra* Section I.B.3; *Red Flag Laws, Not Gun Control, Are the Way to Stop Mass Shootings, Proponent Says*, NPR MORNING EDITION (June 1, 2022, 5:08 AM), https://www.npr.org/2022/06/01/1102335402/red-flag-laws-not-gun-control-are-the-way-to-stop-mass-shootings-proponent-says [https://perma.cc/N3PJ-MGJH] (arguing that "a majority of mass shooters actually leak or broadcast or advertise their intention in some way to commit murder . . . . and [] red flag laws are designed to deal with this situation").

fatalities) until the mid-20th century.[331] This is not surprising when one considers that firearms capable of discharging multiple rounds in succession without reloading developed very gradually during the 19th and early 20th centuries and were initially mere curiosities that were neither mass produced for the civilian market nor capable of consistent, reliable operation.[332] Therefore, this concern should similarly trigger the "more nuanced" analysis *Bruen* requires in such situations.

Rahimi provides a roadmap for how the *Bruen* analysis might look as to ERPOs (similar to Section 922(g)(8), a civil proceeding that results in temporary disarmament), but there are several major points where the analysis might differ. As described above, there appears to be an even stronger case in the ERPO context for applying a more nuanced inquiry due to unprecedented societal concerns surrounding suicide and mass shootings. Second, historical laws that are predicated on "dangerousness" may be a closer analogue to ERPO statutes than to Section 922(g)(8) in terms of legislative purpose. While *Rahimi* distinguishes these historical laws partly because "[t]he purpose . . . was ostensibly the preservation of political and social order, not the protection of an identified person," ERPOs *are* in many instances designed to protect public safety generally, rather than a specific individual or individuals.[333] ERPOs might well be granted in cases where there is no specific threat to an identified individual, but rather disturbing conduct that suggests general risk of future dangerous behavior involving firearms.[334] As Justice Barrett noted in her *Kanter* dissent, if one accepts a historical "dangerousness" purpose behind disarmament laws, that rationale likely extends to "dangerous people who have not been convicted of felonies."[335]

Similar to historical surety statutes, ERPOs are premised on an individualized finding of likely future harm and cannot be used to remove firearms based solely on the text of an underlying order. The relevant distinction here is that — while the threat is not necessarily to an identified individual — the assessment of dangerousness *is* and this assessment must be made as a factual finding before the ERPO can issue. The Fifth Circuit noted that Section 922(g)(8) might be invoked solely because of the language

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331. *See* Oregon Firearms Fed'n, Inc. v. Brown, No. 2:22-cv-01815, 2022 WL 17454829, at *13 (D. Or. Dec. 6, 2022), *appeal dismissed* No. 22-36011, 2022 WL 18956023 (9th Cir. Dec. 12, 2022).

332. *See, e.g.*, Kevin Sweeney, *In Search of Repeating Firearms in Eighteenth-Century America*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (July 26, 2023), https://firearmslaw.duke.edu/2023/07/in-search-of-repeating-firearms-in-eighteenth-century-america/ [https://perma.cc/QQ3N-FMCG].

333. United States v. Rahimi, 61 F.4th 443, 457 (5th Cir. 2023).

334. *See supra* Section I.B.

335. Kanter v. Barr, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting).

used in the underlying restraining order (barring use of force) without a specific finding of likely future dangerousness, which made the statute relevantly distinct from surety laws in the court's view.[336] In terms of the burden an ERPO places on Second Amendment rights, there remains substantial debate about how to construe the burden imposed by historical surety laws.[337] A court following *Rahimi*'s lead may conclude that the burden is materially different because surety laws did not deprive an individual of their firearms or right to carry.[338] Yet, if the inquiry is indeed a more nuanced one, it seems likely that a court should interpret both ERPO statutes and surety laws as imposing a temporary burden on the Second Amendment right tailored to specific, time-limited allegations of dangerousness.

2. Due Process

In the due process realm, legal challenges to state ERPO statutes might play out in three different ways after *Bruen*. First, it is most likely that nothing in this area of law will change. In 2020, scholars noted that due process provided the most serious grounds for challenging red flag laws.[339] *Bruen*, a case dealing only with the Second Amendment, did not purport to overrule or modify the Court's procedural due process precedent in any way, and the decision is best read to leave such precedent undisturbed.[340] In this instance, the legal analysis will continue to turn on a balancing test that weighs the private interest, the government's objective, and the risk of an erroneous deprivation of rights.[341] While reasonable minds may differ as to how this analysis comes out in the case of a red flag law, and it may depend in part on the circumstances of each individual case, scholars have

336. *Rahimi*, 61 F.4th at 460.

337. *Compare* New York State Rifle & Pistol Assoc., Inc. v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2150 (2022) ("It is unlikely that these surety statutes constituted a 'severe' restraint on public carry, let alone a restriction tantamount to a ban."), *with id.* at 2188 (Breyer, J., dissenting) ("The surety laws and broader bans on concealed carriage enacted in the 19th century demonstrate that even relatively stringent restrictions on public carriage have long been understood to be consistent with the Second Amendment and its state equivalents.").

338. *See Rahimi*, 61 F.4th at 460 ("Where the surety laws imposed a conditional, partial restriction on the Second Amendment right, § 922(g)(8) works an absolute deprivation of the right, not only publicly to carry, but to possess any firearm, upon entry of a sufficient protective order.").

339. Blocher & Charles, *supra* note 40, at 1291.

340. *See Bruen*, 142 S. Ct. at 2129 (articulating a "standard for applying the Second Amendment"); *see also id.* at 2157 (Alito, J., concurring) (emphasizing the narrow scope of the ruling).

341. *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

persuasively argued that the procedural protections in most if not all state red flag statutes accord with this legal test.[342]

Second, it could be that *Bruen* displaces procedural due process in gun-related cases with a purely historical analysis. This option seems the least consistent with *Bruen* and the most unlikely, as it would overrule large swathes of procedural due process jurisprudence sub silentio and require awkwardly specific historical analogies.[343]

Third, *Bruen* might produce a hybrid analysis where, in cases dealing with a firearms deprivation, courts are required to determine whether the procedural safeguards in an ERPO law accord with those in other civil rights-deprivation statutes such as laws governing restraining orders, authorizing involuntary commitment, and so on. At least some New York courts have interpreted *Bruen* in this way, reasoning that the decision requires or suggests homogeneity in procedural protections among all civil proceedings where constitutional rights are implicated (in contrast to *Mathews* and subsequent cases, which stress that procedural due process is a fact- and context-specific analysis).[344] This is not a wholly illogical result, given *Bruen*'s "second-class right" rhetoric, its emphatic rejection of interest balancing in the substantive Second Amendment context, and its clear directive to lower courts to protect the Second Amendment at the appropriate level.[345] That said, *Bruen* does not explicitly institute a procedural-equality-among-rights rule, nor would a majority of Justices necessarily endorse such a rule. This analysis also may produce somewhat surprising results. To the extent courts look to history in the due process context outside of firearms-related deprivations, the Founding-era historical record of providing procedural protections before Constitutionally protected and Constitution-adjacent rights and interests were deprived, outside of the criminal context, is bleak. Rather than recognizing the importance of guarding against erroneous

342. *See, e.g.*, Blocher & Charles, *supra* note 40, at 1331–43.

343. There may be efforts underway to implement a similar approach in the First Amendment context, where the historical approach is perhaps less perplexing than in the procedural due process context, but still likely produces odd results. *See, e.g.*, Spectrum WT v. Walter Wendler, 2023 WL 6166779, at *2–3 (N.D. Tex. Sep. 21, 2023) ("[H]istorical analysis reveals a Free Speech ecosystem drastically different from the 'expressive conduct' absolutism of Plaintiffs' briefing."). *But see* Jimmy Hoover, *Justice Barrett on Originalism and Why She Doesn't Write So Many Opinions*, NAT'L L. J. (Sept. 21, 2023) (quoting Justice Barrett as stating that she "do[esn't] think originalists are obligated to take everything down to the studs" and that tiers of scrutiny are "here to stay"; also noting that "a different question is what about different areas of the law like the Second Amendment, where we don't have that precedent yet").

344. G.W. v. C.N., 181 N.Y.S.3d 432, 439–41 (N.Y. Sup. Ct. 2022).

345. *See Bruen*, 142 S. Ct. at 2131 ("But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here.").

deprivations, "[d]uring the era of institutionalization, the societal view in America was that persons with mental illness lacked the capacity to make decisions."[346] "Because the law provided no clear standard for commitment, its imposition was arbitrary and often unnecessary" and almost completely lacking in procedural safeguards.[347] That is all to say the historical record of procedural protection for deprivation was largely limited to the criminal context and states could — and did — deprive individuals of property interests with little to no process.[348] These proceedings, of course, were woefully inadequate to protect the interests of the respondent, with the benefit of hindsight. They are recited here only to illustrate that, if a court were to ask how the procedural guarantees in a red flag law compare to the historical practice of depriving other constitutionally affected interests through civil proceedings, the short answer is likely that red flag laws contain significantly more fulsome protections.

If courts focus on the *modern* levels of procedural protection in other civil deprivation proceedings, as a number of New York courts have done since *Bruen*, they should consider first that other, more fundamental constitutional rights are often deprived based on similar proceedings.[349] The underlying protective order in the *Rahimi* case, for example, deprived the respondent of his First Amendment rights to communicate with his ex-girlfriend in most instances and travel within 200 yards of her residence or place of work.[350]

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346. *See generally* Megan Testa & Sara West, *Civil Commitment in the United States*, 7 PSYCHIATRY (EDGMONT) 30 (2010). Another source notes that "[a]dmissions were involuntary ('insane' persons were considered by definition to be unable to recognize their own interests and make decisions about hospitalization), typically initiated by family or friends, and the length of stay was linked to ongoing private financial support." Stuart Anfang & Paul Appelbaum, *Civil Commitment – The American Experience*, 43 ISR. J. PSYCHIATRY & RELATED SCI. 209, 210 (2006).

347. Christyne E. Ferris, *The Search for Due Process in Civil Commitment Hearings: How Procedural Realities Have Altered Substantive Standards*, 61 VAND. L. REV. 959, 963 (2008). *See also Ex Parte Crouse*, 4 Whart. 9, 11 (Penn. 1839) (upholding deprivation of parental rights in juvenile commitment process by observing that "[t]he infant has been snatched from a course which must have ended in confirmed depravity").

348. *See, e.g.*, Kevin Arlyck, *The Founder's Forfeiture*, 119 COLUM. L. REV. 1449, 1473 (2019) (describing Founding era civil forfeiture as "highly punitive in both theory and practice, imposing significant penalties for minor transgressions, through procedures that both gave the government significant advantages and provided significant personal rewards to the enforcers").

349. *See, e.g.*, Blocher & Charles, *supra* note 40, at 1325–31 (observing that "lower courts have routinely upheld seizures prior to a hearing, even in cases involving extremely weighty—indeed fundamental—private interests, . . . [including] (1) removing a child from a parent's care and custody, (2) confining a person in psychiatric care against their will, and (3) imposing restraints on a person's right to contact or be around another person or live in one's own home, most often in the domestic violence context").

350. Joint App'x at 3–4, United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023) (No. 22-915).

While some New York courts have focused on the state's Mental Hygiene Law because the more recent red flag law used language that is similar to the Mental Hygiene Law, it is not at all clear that this is an appropriate comparison. As one judge observed, the two laws deal with different situations, the red flag law is not premised on a condition that can be "diagnosed" by a doctor or medical expert, and thus it makes little sense to assume that the laws should contain identical procedural safeguards.[351] By contrast, state DVRO laws may be a more appropriate analogue. All existing state red flag laws authorize some form of *ex parte* deprivation, followed by notice and a hearing before a final order can be entered. Section 922(g)(8), by contrast, covers only restraining orders that are issued *after* a hearing — but a number of states disarm individuals subject to *ex parte* domestic violence restraining orders.[352] In fact, "many states have partially modeled their extreme risk laws on domestic violence restraining order[]" laws and disarmament processes at the state level.[353]

The underlying domestic violence restraining order provisions in states that disarm those subject to *ex parte* orders, then, are an apt analogue if courts decide that *Bruen* requires a comparison to other civil deprivation proceedings.[354] Because these are state laws and Section 922(g)(8) is a federal statute, it is not immediately clear that the outcome in *Rahimi* will govern (for one, the historical inquiry may focus on a different time period). In terms of procedural protections, a comprehensive survey of state approaches to DVRO-based disarmament is beyond the scope of this Article. However, one potentially instructive state is Connecticut, which has an ERPO statute and automatically disarms those subject to both *ex parte* and final DVROs.[355] In Connecticut, an *ex parte* DVRO may issue if "[t]he court, in its discretion, . . . deems appropriate for the protection of the applicant and such dependent children or other persons as the court sees fit."[356] By contrast, a Connecticut judge may issue an *ex parte* ERPO when there is "probable cause to believe that a person . . . poses a risk of imminent

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351. J.B. v. K.S.G., 189 N.Y.S. 3d 888, 891-92 (N.Y. Sup. Ct. 2023).

352. By one current count, 12 states automatically remove firearms from individuals subject to *ex parte* DVROs, *see, e.g.*, Tex. Penal Code Ann. § 25.07(a), Tex. Fam. Code ANN. § 83.001, while another 13 states *permit* individuals subject to such orders to be disarmed but do not require it, *see, e.g.*, Neb. Rev. Stat. § 42-924(1)(g), 42-925(1). *See also Domestic Violence & Firearms*, GIFFORDS LAW CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms [https://perma.cc/T6VX-E4FR] (last visited Sept. 27, 2023).

353. Blocher & Charles, *supra* note 40, at 1328.

354. In the DVRO context, an order would deprive a liberty interest in associating with named individuals, ancillary to the First Amendment right to associate.

355. CONN. GEN. STAT. § 29-38c(a); CONN. GEN. STAT. § 46b-15(b).

356. CONN. GEN. STAT. § 46b-15(b).

personal injury to such person's self or to another person," based on a petition filed by the state or law enforcement officers.[357] Other states similarly appear to employ at least identical procedural protections for *ex parte* ERPOs than for *ex parte* DVROs[358] — notably, a number of state ERPO laws require that risk or danger be found by preponderance of the evidence or clear and convincing evidence, *higher* evidentiary standards than the probable cause required for a *criminal* indictment.[359]

Courts have consistently upheld DVRO laws against due process challenges over the past several decades.[360] As one court observed, "[c]learly, the procedural safeguards employed under the statute are sufficient to meet respondent's due process challenge."[361] Domestic violence protective orders, moreover, will almost always impinge on spoken words and often impose tremendous restrictions on an individual's rights to speech and association — for example, restraining respondents from seeing their children or coming within a certain distance of their family home.[362] Courts have most often emphasized a showing of imminent harm (the same concern at play with ERPOs) as the reason such orders are constitutionally valid when issued *ex parte*.[363] When such a showing is made, courts have

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357. CONN. GEN. STAT. § 29-38c(a).

358. *Compare* COLO. REV. STAT. § 13-14-104.5 (authorizing entry of a civil protective order "if the issuing judge or magistrate finds that an imminent danger exists to the person or persons seeking protection under the civil protection order"), *with* COLO. REV. STAT. § 13-14.5-103(3) ("If a court finds by a preponderance of the evidence that, based on the evidence presented . . . , the respondent poses a significant risk of causing personal injury to self or others in the near . . . , the court shall issue a temporary extreme risk protection order."). *Compare also* FLA. STAT. § 741.30(5)(a) (ex parte DVRO may be issued "[i]f it appears to the court that an immediate and present danger of domestic violence exists"), *with* Fla. Stat. § 790.401 (authorizing a temporary ex parte ERPO to be issued "[i]f a court finds there is reasonable cause to believe that the respondent poses a significant danger of causing personal injury to himself or herself or others in the near future").

359. *See* Heidi L. Hansberry et al., *Legal Standards by the Numbers*, 100 JUDICATURE 56, 65 (2016).

360. *See, e.g.*, Kampf v. Kampf, 603 N.W.2d 295, 296 (Mich. Ct. App. 1999); Blazel v. Bradley, 698 F. Supp. 756, 768 (W.D. Wis. 1988); Schramek v. Bohren, 429 N.W.2d 501, 502–03 (Wis. Ct. App. 1988); *cf.* Gilbert v. State, 765 P.2d 1209, 1211 (Okla. Crim. App. 1988) (rejecting due process challenge to protective order); *see also* Catherine Klein & Leslye Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 905–09 (1993) (describing various state court decisions upholding restraining and protective orders).

361. *Kampf*, 603 N.W.2d at 299.

362. *See, e.g.*, Town of Castle Rock v. Gonzales, 545 U.S. 748, 751–52 (2005).

363. *See, e.g.*, *Blazel*, 698 F. Supp. at 768 ("Because the statute's requirement of a showing of physical violence encompasses a requirement that the violence be shown to be imminent, the statute provides all the procedural safeguards necessary to satisfy the due process clause."); Olson v. State, 77 P.3d 15, 18 (Alaska Ct. App. 2003) ("Because the orders are temporary, and the need is urgent, . . . notice of the order after it is issued suffices to protect the respondent's due process rights.").

upheld ERPO's very procedural safeguards in the domestic violence context.[364] That such orders are generally valid, even when issued in an *ex parte* process followed immediately by notice and hearing, suggests that the legal landscape should be no different for ERPOs. If the analysis is comparative as of the present day, consulting state laws other than those governing civil commitment (which are more analogous in terms of both the objectives and the nature of the disarmament) may result in a finding that ERPO statutes accord with, or even exceed, the relevant procedural threshold.

Finally, to the extent that concern about misuse or lack of procedural safeguards are driving the analysis, these concerns are likely mitigated substantially in the case of ERPOs.[365] In fact, one can likely be much more satisfied that ERPOs are *not* being misused (by conniving family members for example), especially in the large number of states that only permit law enforcement officers or other professionals to file ERPO petitions — or where the vast majority of petitions are initiated by law enforcement.[366] The fact that the majority of ERPOs are initiated by trained professionals who do not have a personal relationship with the respondent should largely mitigate concerns about whether orders are subject to abuse.

CONCLUSION

Gun violence prevention efforts in America are currently at an important inflection point. The COVID-19 pandemic triggered an unprecedented surge in firearm sales,[367] and the Supreme Court's 2022 decision in *Bruen* is likely to make the public carry of firearms more common across the country.

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364. *See, e.g.*, *Olson*, 77 P.3d at 18; Hamilton ex rel. Lethem v. Lethem, 270 P.3d 1024, 1033 (Haw. 2012) ("The availability of a prompt post-deprivation hearing (by way of a show cause hearing), combined with the fact that the petitioner retains the burden of proof during the hearing, ensures that the respondent's interests are adequately protected.").

365. *See supra* Section III.D.2 and accompanying notes.

366. *See, e.g.*, Pallin et al., *supra* note 126, at 4 (noting that a law enforcement officer was the petitioner in 96.3% of California ERPO proceedings); Rowhani-Rahbar et al., *supra* note 43, at 344 (finding that 87% of ERPOs in Washington state were filed by law enforcement officers); *see also supra* Section I.A. ERPOs initiated by intimate partners, family members, or friends, by contrast, likely do implicate similar concerns about abuse to those sometimes raised in the domestic violence protective order context. *See, e.g.*, United States v. Rahimi, 61 F.4th 443, 465 (4th Cir. 2023) (Ho, J., concurring) ("Scholars and judges have expressed alarm that civil protective orders are too often misused as a tactical device in divorce proceedings").

367. Daniel Nass & Champe Barton, *How Many Guns Did Americans Buy Last Month*, THE TRACE (Sept. 5, 2023, 3:26 PM), https://www.thetrace.org/2020/08/gun-sales-estimates/ [https://perma.cc/2242-LFHV] (noting that "no spike compares to the surge which began with the arrival of the coronavirus pandemic in the U.S. in March 2020").

Deaths caused by firearms (including suicides) and mass shooting events have also increased rapidly over the past decade.[368]

This Article has reviewed the current state of ERPO implementation and empirical literature surrounding ERPO uptake and effectiveness. The initial results are inconclusive but promising: while implementation progress varies widely across jurisdictions and even within states, early indicators are that the laws are being used as intended and have high potential for reducing firearm violence. The evidence shows that dangerous behaviors and risk of violence directed at named individuals and unnamed community members, as well as self-directed violence, are the primary factors driving ERPO petitions. Perhaps not surprisingly, more states have recently enacted ERPO laws[369] and states continue to explore new ways to encourage uptake, publicize the availability of the ERPO process, and otherwise implement frameworks to facilitate ERPO usage. In recognition of these developments, the 2022 Bipartisan Safer Communities Act (BSCA) — the first major piece of federal gun legislation enacted in almost 30 years — included substantial federal funding for state-level ERPO implementation.[370] BSCA's funding mechanisms, however, also recognize the necessity of balancing increased ERPO uptake with due process protections for ERPO respondents. Due process concerns have traditionally been at the fore in discussions surrounding ERPO laws, and BSCA itself recognizes this fact by requiring that any federal funds be used only to support extreme risk protection order programs which "include, at a minimum . . . pre-deprivation and post-deprivation due process rights that prevent any violation or infringement of the Constitution."[371]

Due process also remains the most serious challenge to ERPO laws in the courts. This Article has considered how the new Second Amendment test set forth in *Bruen* might impact legal challenges to state ERPO statutes. As states continue to pass and implement ERPO laws and the statutes are used

368. *See* GUN VIOLENCE ARCHIVE, https://www.gunviolencearchive.org/ [https://perma.cc/E2C6-C5KL] (last visited Oct. 14, 2023) (noting an increase in "deaths" from 15,139 in 2016 to 21,009 in 2021, an increase in "suicides by gun" from 22,938 to 26,328 in the same time period, and an increase in "mass shootings" from 383 to 690 in the same time period. There is substantial debate not about the actual numbers, but rather threshold definitional questions such as how to define a "mass shooting" and whether suicides should be counted within overall gun deaths. *See, e.g.*, Konstadinos Moros, *Analysis: Should Gun-Related Suicides be Counted as Gun Violence?*, THE RELOAD (Feb. 24, 2023, 5:05 AM), https://thereload.com/analysis-should-gun-related-suicides-be-counted-as-gun-violence/ [https://perma.cc/2A3L-3FMR].

369. *See, e.g.*, S. 83, 102 Leg., Reg. Sess. (Mich. 2023) (enacted); MINN. STAT. § 624.7171 *et seq*.

370. Bipartisan Safer Communities Act, Pub. L. No. 117–159, § 12003(a), 136 Stat. 1313, 1325 (2022).

371. *Id*. § 12003(a)(2)(I)(iv).

more frequently, it is fair to expect legal challenges under both the Second Amendment and the Due Process Clause. The temptation will be strong in such cases to construe *Bruen* broadly and extend its impact outside of the Second Amendment, as some state courts have already done. In sum, the post-*Bruen* state court decisions regarding the constitutionality of New York's ERPO statute show a state judiciary largely at sea — seeking to heed the Supreme Court's directive in *Bruen*, but grasping at aspects of the text, history, and tradition test and attempting to import them into the due process analysis. While there may be situations where a reinforcing-rights holding along those lines is appropriate, it is difficult to imagine how a court would logically conduct such an analysis given *Bruen*'s largely *sui generis* historical test. In other words, the post-*Bruen* Second Amendment is uniquely ill-suited to a mutually-reinforcing evaluation with other constitutional rights because it necessarily rules out judicial consideration of anything *other than* history:[372] including a judge's choice to consider whether the government's actions potentially impact other rights.

Thus, *Bruen* is best read to leave related areas of jurisprudence such as procedural due process untouched, and courts should evaluate Second Amendment and due process claims separately (or, at the least, be clear about how exactly the Second Amendment is impacting the outcome as to non-Second Amendment claims). When the claims are disaggregated in this way, ERPO statutes likely raise unprecedented societal concerns even more clearly than similar provisions such as DVRO disarmament laws, calling for a nuanced analysis under *Bruen*. Due process claims should be evaluated separately. Under the *Mathews* test, and when compared to procedural protections in similar statutes such as state domestic violence restraining order laws (and associated disarmament provisions), most, if not all, state ERPO statutes likely provide sufficient pre- and post-deprivation process. The Supreme Court's upcoming decision in *United States v. Rahimi* may clarify some aspects of the interplay between Second Amendment and due process, likely with important consequences for ERPO statutes.

372. New York State Rifle & Pistol Assoc., Inc. v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2131 (2022) (emphasizing "unqualified deference" to the "balance [] struck by the traditions of the American people").