

STOP GUN VIOLENCE: EXTREME RISK ORDER/“RED FLAG” LAWS

HEARING
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED SEVENTEENTH CONGRESS

FIRST SESSION

APRIL 28, 2021

Serial No. J-117-16

Printed for the use of the Committee on the Judiciary



www.judiciary.senate.gov
www.govinfo.gov

U.S. GOVERNMENT PUBLISHING OFFICE

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STOP GUN VIOLENCE: EXTREME RISK ORDER/“RED FLAG” LAWS

WEDNESDAY, APRIL 28, 2021

UNITED STATES SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:38 p.m., in Room 226, Dirksen Senate Office Building, Hon. Richard Blumenthal, Chair of the Subcommittee, presiding.

Present: Senators Blumenthal [presiding], Whitehouse, Cruz, Cornyn, and Lee.

Also present: Senators Durbin, Grassley and Graham.

OPENING STATEMENT OF HON. RICHARD BLUMENTHAL, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Chair BLUMENTHAL. I am going to call to order this first meeting of the Subcommittee on the Constitution and welcome my colleagues. Most especially, the Ranking Member on the Subcommittee, Senator Cruz, thank you so much for your cooperation in scheduling this first hearing, and I look forward to this kind of collaborative effort going forward.

I know we have been joined by Senator Grassley, the Ranking Member of the Committee. I am going to turn to you after Senator Cruz, and I think we may be joined by Senator Durbin for some opening remarks as well.

Last month, the Judiciary Committee held a very important hearing, as my colleagues know, on constitutional and common-sense steps to reduce the epidemic of gun violence in this country that has recently claimed so many lives in Atlanta, Boulder, Indianapolis, and elsewhere.

Gun violence is a real problem. We all know it. But there are also real solutions, and I believe, strongly and passionately, that we have a path to put some of those solutions into law during this session, and I believe we can with bipartisan cooperation.

I am not naive. I do not believe that all gun violence prevention proposals will be adopted by unanimous consent. But I hope this afternoon, at least, we can focus on one topic where there does appear to be at least some measure of common ground. Extreme risk orders, also known as “risk warrants,” that is the name in Connecticut we have adopted, or “red flag” laws, whatever you call them, we know they save lives. We know that red flag/extreme risk orders save lives. They are practical and proven tools that allow law enforcement under some statutes and others, including family

members, to keep guns out of the hands of individuals who possess and pose a danger to themselves or others. In other words, separate people from guns when they are in crisis.

Firearms make dangerous decisions far more deadly and irreversible. Just to give you one example, among commonly used methods of self-harm, firearms are, by far, the most lethal. For people who seek to take their own lives, the fatality rate is approximately 85 percent with a firearm. It is 5 percent by any other method. Firearms are used in less than 6 percent of suicide attempts, but they account for more than half of the suicide deaths.

In 1999, my home State of Connecticut became the first in the Nation to enact an extreme risk order. We call it a “risk warrant.” Studies have shown that in the first 14 years of Connecticut’s law, for every 10 to 20 risk warrants issued, at least 1 suicide was prevented. In addition, many of those who tried to take their own lives were compelled or persuaded to seek help, professional help, that made a real difference in their lives.

That is not some sort of abstract statistic. States across the country have used extreme risk or red flag statutes as critical suicide prevention tools. In Portland, Oregon, law enforcement was able to remove 10 firearms and bar future firearms purchases after a man called 911 and threatened to kill himself and his 3-year-old son with a gun because he was frustrated that he was not able to make a child support payment. The same is true probably in all of your States. I know you have heard these stories. I am not going to recount more, but I will put my full statement in the record. These laws don’t just prevent suicide. They have also been used to stop mass shootings, homicide, terrorist threats, and hate crimes.

Authorities in Florida used the State’s extreme risk order law to remove an AR-15 from a high school student who had said he would kill himself and his ex-girlfriend if they didn’t get back together—if she did not get back together with him.

As my colleague Senator Graham has pointed out, the Parkland shooting resulted after the killer, in that instance, practically put an ad in the phone book saying he was going to shoot people, but authorities there could not stop him for lack of a red flag statute. After it happened, they adopted one in Florida.

These laws are also bipartisan among the American public in State legislatures and in Congress. In fact, polling has found that 84 percent of Americans, including 78 percent of Republicans, support red flag laws. There are now 20 jurisdictions, blue States and red States, with these critical tools in place, and others are on their way to passing and implementing the laws.

President Biden has announced that the Justice Department will soon publish model legislation for States that will help them to adopt these statutes, and I have worked closely with not only my colleague Senator Graham, who has been very constructive, but also Senator Feinstein. Senators Rubio and Scott have introduced their own bill, and I look forward to making progress.

Let me just touch on two points in conclusion.

First, Indianapolis. The tragic events in Indianapolis show just how crucial effective implementation and enforcement is to the success of these efforts. Indiana has a strong red flag law named in honor of a police officer who was killed in the line of duty in a situ-

ation that might have been prevented had a red flag been in place at that time.

Earlier this month, as we all know, a shooter killed eight people at a FedEx warehouse in Indianapolis. Several months prior, police had taken a shotgun from him after his mother reported that he might try to commit suicide by cop. Law enforcement knew he was dangerous. Prosecutors just didn't use Indiana's red flag law to bar that individual from purchasing new guns, and he did, in fact, purchase two semiautomatic rifles in the months that followed, which he used in that massacre.

Some have said that Indianapolis shows red flag laws don't work, they ought to be scrapped. I think that point is ridiculous. There are 6 million car accidents in the United States every year. That does not mean we throw out seat belt requirements or speed limits. We insist on more effective enforcement of those laws that might have prevented those accidents or crashes or deaths.

What the preventable loss of life in Indianapolis does prove is that even in jurisdictions where these laws exist, effective implementation is critical. We will hear today from witnesses who will tell us how Federal grants would support training for prosecutors and others to enhance those States' development and effective use and enforcement. All of us who have been in law enforcement know laws are dead letter unless they are implemented and enforced effectively, and our proposals on red flag statutes are designed to provide the resources, the training, procedures, other kinds of basic nuts-and-bolts steps that are important here.

Due process. To those critics who raise the specter of due process concerns, let me just say extreme risk orders provide robust due process protections that comport with both the Constitution and the Supreme Court precedent governing due process considerations, and that is my goal, here and in whatever we do, formulating and passing red flag statutes, to provide models and require that those grants and resources provided to States are conditioned on due process protections.

These orders are temporary. They are used only by judges. The judges have to take evidence. The determinations are based on those evidence. The evidence is submitted under penalty of perjury. When a temporary order is issued, but before it becomes permanent, the individual subject to it is provided with notice and an opportunity to both challenge the evidence against them and present evidence of their own. Once the order expires, the individual subject to it must have a firearm returned to them, so long as they are not otherwise prohibited from having it.

So, I think we are in an era that feels very different about gun violence. I am hoping that we can reach bipartisan consensus. Gun violence isn't inevitable. Extreme risk order laws, red flag statutes, prove it. I again welcome my colleagues this afternoon and hope that we will indeed make progress.

Thank you to all my colleagues. I turn to Senator Grassley. I understand he would like to be recognized because of time constraints, and I am happy to do so.

**OPENING STATEMENT OF HON. CHARLES E. GRASSLEY,
A U.S. SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. As Ranking Member of the Full Committee, I thought I ought to come and show my support for this hearing and the very important issue of crimes that are committed with individuals struggling with mental health issues.

I was going to start out by talking about the Indianapolis situation, but Senator Blumenthal already covered that very well, so I will move on to the fact that earlier this month, tragedy struck when a 25-year-old man rammed his vehicle into the security barricade just mere steps from this chamber. As we all know, this man's actions tragically took the life of U.S. Capitol Police Officer Billy Evans. While the Capitol attacker's exact motive is unknown, social media profiles indicate the man was a follower of a group that reportedly holds racist, anti-Semitic, anti-LGBTQ+ beliefs.

It is too early to tell if those beliefs motivated this man to commit the act of terrorism, but what is clear is the man was struggling with mental health issues.

Today we are talking about red flag laws. I think that we should be looking into possible solutions for gun violence, so a hearing is the right thing to do, and so I thank you for having this hearing.

I do think that red flag laws are generally a State rather than a Federal issue. I also want to state my strong beliefs that any State that does decide to enact red flag laws should do so with strong due process protections to safeguard an important constitutional right. I just heard what Senator Blumenthal said about those strong due process laws, and I just want to make sure that they are always followed.

I also want to say that red flag laws are scarcely the only option for ensuring that persons with mental issues are prevented from engaging in violence or self-harm. I turn to some legislation I put in that has bipartisan support called the "EAGLES Act of 2021." It's a commonsense piece of legislation building upon what the Secret Service successfully does over a period of decades. This bill carries the namesake of Parkland, Florida, Marjory Stoneman Douglas High School's mascot, the Eagles, and it is a tribute to the 17 Eagles who tragically lost their lives 3 years ago, at the hands of a fellow student who long struggled with severe behavioral problems and mental health problems. If he had been sent to get the help that he ought to have had, he would have been in the database and would not have been able to purchase a gun.

This legislation helps proactively mitigate threats of violence in our country through, reauthorizing and expanding the U.S. Secret Service's National Threat Assessment Center, also known as "NTAC." A family member, teacher, coach, fellow employee, or neighbor's ability to observe someone's behavior, home life circumstances, work factors, and other potential stressors, coupled with NTAC's threat assessment training, can prevent harmful outcomes from occurring. But in order for this to be effective, we need to increase NTAC's capacity to continue their research and threat assessment training.

Just this week, the EAGLES Act got the resounding endorsement from the National Association of Attorneys General. Forty attorneys general from all over the United States believe that the

NTAC's proactive approach is critical to violence prevention. We cannot afford to ignore their urgent pleas of assistance.

I ask my colleagues, hopefully all of them, to support the EAGLES Act. The more research and threat assessment and training that can come from it, that we can provide, the more violence we can prevent.

Thank you, Senator, for bearing with me.

Chair BLUMENTHAL. Thank you, thank you Senator Grassley, and thanks for your input. You know, we are really working, as Senator Graham and I have done for quite some time over the years, to adopt an approach that is as inclusive as possible, that is respectful of due process, and that meets all of the challenges that you have raised. Thank you for being here today.

With your permission, Senator Cruz, I would like to turn to Senator Durbin if he—Senator Cruz.

**OPENING STATEMENT OF HON. TED CRUZ,
A U.S. SENATOR FROM THE STATE OF TEXAS**

Senator CRUZ. Thank you, Mr. Chairman.

There is no one in this country who isn't fed up and furious when we hear that another monster has used a gun to take an innocent life. And there isn't a person in this country who is not heartbroken when they learn about another suicide. Every life is a gift from God, and every innocent life that is lost is unique and a tragedy.

I can tell you in Texas, we have seen far too many mass murders at the hands of deranged and sick individuals. I was in Santa Fe the morning of that shooting. Santa Fe High School is less than an hour away from my house. I was in El Paso, at the Walmart, after another mass murder. I was in Midland-Odessa after yet another. I was in Dallas where five police officers were murdered by a deranged radical. I was in Sutherland Springs in that beautiful sanctuary where a monster murdered innocent women and children.

I care deeply about stopping violent crime and gun crime in particular. I have spent much of my adult life in law enforcement trying to stop violent criminals who prey upon the innocent, and working to ensure that they receive the most stringent punishment.

But one thing is abundantly clear. If the objective is to stop violent crime, restricting the rights of law-abiding citizens doesn't work. In fact, it typically makes crime worse, because when you disarm law-abiding citizens, you make them more likely to be victims.

Two years ago, when we had a hearing on red flag laws in the Full Committee, I said, at the time, that those laws could potentially be part of the solution set at the State level. I still believe that. The States are laboratories of democracy. They are the proper place to debate the substance of red flag laws. We shouldn't be imposing a Federal standard or putting the Federal Government's very heavy thumb on the scale with coercive grant programs, especially when 19 States and the District of Columbia are already experimenting with these laws.

But I also said and continue to believe, that even at the State level, laws must be narrowly targeted to those who pose an extreme risk, while simultaneously giving full force to the funda-

mental rights of all law-abiding Americans. Many of the State laws that have been implemented fall short of this standard in one or more ways, and none of the Democrats' current proposals come close to meeting it.

Rather than taking a measured and respectful approach, radical gun control advocates see red flag laws as a way to open the door to comprehensive gun control. One of the drafters of Connecticut's red flag law, which we heard about earlier, the first in the country, admitted this last week on CNN, stating that these laws only work as part of comprehensive gun control legislation.

The fact is, Democrats don't want Americans to own guns. In August 2019, a television interviewer asked then-candidate Joe Biden the following question: "So, to gun owners out there who say, well, a Biden administration means they are going to come for my guns," Biden's response? "Bingo." They are not hiding it.

It is no surprise that this administration and that Democrats in Congress and anti-gun groups are all pushing red flag laws that will take guns from law-abiding Americans. In Connecticut, for example, 32 percent of confiscation orders are overturned when a judge finally hears both sides of the story, and this is after the Government has already seized the firearm. This means that one out of every three people who has his or her firearm seized by the Government under Connecticut's red flag law is an innocent, law-abiding citizen. That is an unacceptable rate of protecting constitutional rights.

One reason that the error rate is so high is that most of these laws do not even purport to satisfy due process. Every red flag law currently in operation permits the Government to order the confiscation of firearms without notice to the individual and a hearing only to follow at some later time. Ex parte hearings may be necessary in some extreme cases, but they should not be the default standard.

Moreover, in many States the word of a spurned romantic partner or disgruntled coworker is sufficient to meet the watered-down standard for unilateral, albeit temporary, deprivation of Second Amendment rights. Put simply, red flag laws empower the Government to take firearms first and ask questions later, often much, much later.

No one would tolerate these procedures to deprive Americans of any of their other fundamental constitutional rights. But Democrats do not care that law-abiding Americans lose their rights under these laws because they do not believe in the Second Amendment and the right to self-defense.

In a shockingly candid statement, President Biden's nominee to lead the ATF told one of the witnesses testifying today that it did not matter if a law-abiding citizen lost their rights due to red flag laws because the disarmed victims can just purchase a replica gun to scare criminals away. That is an answer that reveals a contempt for the Second Amendment right to keep and bear arms, and it is dangerous.

The Second Amendment is not about hunting. It is not about recreational shooting. It is about the fundamental right to protect our lives, to protect our homes, to protect our families. It is about the right we have, if somebody comes into our home at night seeking

to harm our children, to defend our children and to defend our lives.

The red flag laws being pushed by Democrats and gun control activists are designed to deprive Americans of that fundamental right. And for what? As one of today's witnesses wrote in 2020, after reviewing all of the available literature, "No research—no research has found any statistical reduction in crime, including mass shooting fatalities, from confiscation laws, and studies about suicide reduction show mixed results." That is what the data show.

We need to act, and we need to act forcefully, to stop gun crimes, and I have introduced legislation and fought for legislation to do that. But Federal red flag laws, I don't believe are the answer. We do not need to impose Connecticut's dismissive approach to Second Amendment rights on the entire country.

Thank you.

Chair BLUMENTHAL. Thanks, Senator Cruz.

Just before we go to Senator Durbin, I want to make the point, Senator Cruz. I can't speak for every Democrat. I can speak for myself. I am not against Americans owning guns. I am very much in favor of the law, as it is interpreted by the United States Supreme Court, that Americans have Second Amendment rights. I would oppose any law that took away Second Amendment rights. As we know, no right is absolute.

And so far as the Connecticut study is concerned, we have been through this issue again and again and again. That 2014 study reported, "Judges ruled that the weapons needed to be held by the State 68 percent of the time."

In the remaining 32 percent of the cases, the guns were not given back to the individual. The orders were not overturned. In many of those cases, the guns were given to someone else so the State did not have to keep them, a family member or someone else. In only 10 percent of known cases, in risk warrants in Connecticut, were the guns actually returned to the individuals.

Now we can debate the percentages one way or the other, but I just think we need to be very clear on the fact that these red flag statutes preserve constitutional rights, that misleading numbers and statistics can be cited. The plain fact is that they save lives.

I am going to turn to the Chairman of our Committee.

**OPENING STATEMENT OF HON. RICHARD J. DURBIN,
A U.S. SENATOR FROM THE STATE OF ILLINOIS**

Chair DURBIN. Thank you, Mr. Chairman. Senator Blumenthal, I realize this is your first hearing as Chair of the Constitution Subcommittee, and I want to thank you for starting off this Congress with a series of hearings on critical topics, including the epidemic of gun violence, and it is truly an epidemic. In my home State of Illinois and the city of Chicago, which I am honored to represent, we have the equivalent of at least one mass shooting every weekend, when you put together the number of people who are injured and killed by gun every weekend in the city of Chicago.

I always thought the problem with those numbers is they don't hit you in one big number. They just keep coming at you every single weekend. If it is a holiday weekend, it is even worse, dramatically worse.

The stories in recent weeks of the profligate use of guns by those who think they can never have enough guns out in circulation, where children are being shot, a 2-year-old in a car on Lake Shore Drive, a 7-year-old at a McDonald's drive-in a week ago. It is just an out-of-control situation. The question is: When will it reach a point where we do something, do something effective?

I thought the point had been reached on December 14, 2012. I believed that that was the moment when a gunman murdered 20 children and 6 educators at Sandy Hook Elementary School in Newtown, Connecticut. I thought, "That has got to be it." A roomful of little kids that looked just like my granddaughter, gunned down in the classroom, six educators. Finally, we are going to do something. Countries have responded to far fewer deaths by changing the whole approach to guns. But sadly, in the months after Sandy Hook, we held hearings; we voted on some gun safety reform. But even key reforms, not universally but just overwhelmingly supported, like universal background checks, were filibustered and failed.

While Congress sits here again and fails to act every day, the deadly toll of gun violence grows, not just in Illinois and Chicago, but across this country. I am not giving up on commonsense reforms, and I know Senator Blumenthal is not either.

I want to say one thing in prefacing my remarks. When we often speak about people who are mentally unstable who should not be owning firearms, I hope we quickly add, the vast majority of people dealing with mental illness are not violent people and they are not dangerous people, and we should not assume that they are. Many of them need treatment and help, and they can lead perfectly normal and safe lives for themselves and others. But there are exceptions, and many times, deadly exceptions.

Look at what happened in Indianapolis just 2 weeks ago. A 19-year-old gunman murdered eight people at the FedEx facility. It was horrific. In March 2020, last year, that gunman's mother had contacted the Indianapolis Metropolitan Police Department, to inform them that her son's recent firearm purchase concerned her because he had suggested he planned to threaten police with a firearm in order to provoke a shooting. The police department placed him on a temporary mental health hold and removed the shotgun from his possession. Prosecutors, for reasons I do not know, never filed an extreme risk protection order petition under Indiana's law. In July and September of 2020, the gunman was able to legally buy two semiautomatic rifles, which he used to commit this mass murder.

Let me tell you my experiences in Illinois which believe some of the extreme statements that have been said about these laws.

We have a firearm restraining order that took effect in 2019. The law allows family members and law enforcement to petition a court to temporarily remove firearms from the possession of an individual who presents a significant risk to himself or others. According to information reported by the Illinois State Police, a firearm restraining order has been issued 59 times under this Illinois law. In 2 years, a State of 12.7 million people, it has been used 59 times. We have 2.2 million licensed gun owners in Illinois, so,

clearly, this is a targeted intervention. This is not a broad, sweeping thing denying due process to legal gun owners.

I have talked with law enforcement officials in Illinois who point out that it takes resources to carry out these orders. They need some help. I think this is a tool. It is not the overall answer, but it is an important tool. In some cases it can save lives. In Indianapolis, had it been used, I think it could have saved those eight lives. At least we know that possibility.

I thank you for calling us together today to discuss this, and as I said at one point here, one bill is not going to solve gun violence in America. But shame on us if we reject a commonsense approach that most gun owners endorse as the only sensible way to take guns out of the hands of people who are dangerous.

Chair BLUMENTHAL. Thank you, Senator Durbin.

I am going to introduce our witnesses and then, as is our practice here on the Judiciary Committee, swear them in.

First, Vic Bencomo is a resident of Denver, Colorado, and the current president of Colorado Gun Owners for Safety, a chapter of Giffords Nationwide Gun Owners for Safety Coalition. Bencomo is a father and a proud veteran, having served for over 20 years in the United States Navy. He is also a gun owner, hunter, and advocate for laws to prevent gun violence. He has previously testified before both the Colorado State Legislature and the United States House of Representatives' Gun Violence Prevention Task Force.

David Kopel is a—the research director of the Independence Institute and associate policy analyst with the Cato Institute in Washington and adjunct professor of advanced constitutional law at the University of Denver's Sturm College of Law. Mr. Kopel writes on constitutional law, criminal justice, civil rights, firearms policy, international affairs, technology, politics, environmental policy, and the media. He is the author of 17 books, hundreds of newspaper and magazine articles, and over 100 scholarly journal articles. Before joining the Independence Institute, Mr. Kopel served as an assistant attorney general of the State of Colorado, and he is going to join us remotely.

Kimberly Wyatt is senior deputy prosecuting attorney with the King County Prosecuting Attorney's Office. She has been with the office since 2001. She has worked on cases involving domestic violence, stalking, sexual assault, child abuse, and other crimes of violence. Most recently, she has been part of a newly formed Domestic Violence Regional Firearms Enforcement Unit. In this role, she advises law enforcement and families on all aspects of extreme risk protection orders, from investigations to court proceedings. Ms. Wyatt also works on firearm compliance cases and high-risk domestic violence firearms offenders.

Ms. Nikki Goesser lives in Tennessee and is the executive director for the Crime Prevention Research Center. She became a Second Amendment activist and victim rights advocate after the brutal murder of her husband, Ben, by a man who had been stalking her. She is a graduate of the University of Tennessee at Knoxville, and she earned her degree in psychology.

Joshua Horwitz is the executive director for the Coalition to Stop Gun Violence. He has spent nearly three decades working on gun violence prevention issues. In 2013, Mr. Horwitz helped found the

Consortium for Risk-Based Firearm Policy. The consortium released a set of policy recommendations designed to promote policies that can prevent those at a heightened risk of violent behavior from possessing firearms. One of the consortium's recommendations was the basis for California's first-in-the-Nation gun violence restraining order, which passed in September 2014.

I am going to ask all of you to please stand so that I can administer the oath. Do you swear that the testimony that you will give is the truth, the whole truth, so help you God?

Mr. BENCOMO. I do.

Mr. KOPEL. I do.

Ms. WYATT. I do.

Ms. GOESER. I do.

Mr. HORWITZ. I do.

[Witnesses are sworn in.]

Chair BLUMENTHAL. Thank you. Mr. Bencomo, we will start with you.

**STATEMENT OF VIC BENCOMO, PRESIDENT,
GIFFORDS GUN OWNERS FOR SAFETY COALITION,
COLORADO CHAPTER, DENVER, COLORADO**

Mr. BENCOMO. Good afternoon. Thank you, Chairman Blumenthal and Members of the Committee, for this opportunity to testify today. My name is Vic Bencomo. I am a parent, gun owner, hunter, and a proud Colorado resident for over 30 years.

As a retired combat veteran with 21 years of service in the United States Navy, I know what it means to be a patriot. I have seen the carnage of war and personally know the emotional and physical scars that it leaves.

I am the president for the Colorado Chapter of Giffords Gun Owners for Safety. We are a national organization of gun owners who support responsible gun ownership and commonsense gun laws. We proudly support the Second Amendment, but we can no longer ignore that our country is in the midst of an epidemic. The daily threat of gun violence is a shocking reality in countless communities across the country, especially in our veterans' community. As a veteran, I am witnessing my fellow servicemembers take their lives at a tragic rate. More than 17 veterans die by suicide daily nationwide. That is over 6,400 veteran suicides a year. In comparison, that is more than all the servicemembers killed in action during the last 18 years of Operation Iraqi Freedom.

Tragically, Colorado's veteran suicide rate is above the national average. Out of the 173 veterans who died by suicide in our State in 2018, 112 of them used a firearm. As we know, firearms are the most lethal means used in suicides and account for nearly 70 percent of the veterans' deaths.

Our veterans are a segment of the population that is uniquely positioned to own firearms. When faced with a crisis such as suicide, they often choose the most convenient and lethal form, which is a firearm.

On more than one occasion, I have received a call from a wife, a concerned family member, or even a veteran who is displaying suicidal tendencies. Generally, veterans do not seek medical help. Not knowing where else to turn, the family often calls the police.

However, law enforcements do have their limitations. Instead, I was the one that answered the call that night. I was the one that drove to their house. I was the one who convinced him to seek help. I was the one who took them to the hospital. I was the one who took possession of their firearms. I was the one who agreed to take custody of them once they were released from the hospital. But sadly, for 6,400 veterans that committed suicide last year, they did not have someone like me to help them.

Temporarily keeping the guns out of the hands of people who have been found, by a court, to pose a significant risk to themselves and others is not an infringement on their Second Amendment rights. It is an opportunity for a pause, which we have seen save lives in Colorado.

In 2019, I testified in front of the Colorado State Legislature to support House Bill 1177. The bill passed, and Colorado became the 17th State with an extreme risk law. As of April 2020, 19 additional States, including the District of Columbia, have enacted similar legislation.

Admittedly, the path to passing an extreme risk law in Colorado was not an easy one. There were many opponents of gun safety who raised unfounded fears that such a law would lead to mass confiscations of weapons from law-abiding gun owners, or that the law could be weaponized and used to retaliate against others. But after a year of the law being in place, it has been proven to be effective without infringing on the Second Amendment right.

In 2020, Colorado had 112 petitions filed by law enforcement and family members. It is important to note that only approximately 40 petitions filed resulted in issuing a risk protection order. A notable petition was used to disarm a 47-year-old veteran who threatened to shoot himself and police officers. Colorado has proven that this law works. It protects individuals' rights, doesn't allow a person's guns to be removed without real evidence, and if a person is a danger to themselves or others.

As a veteran, I have a single request of the Senate: Please do everything in your power to save the lives of gun violence and save veterans from suicide. I urge this—I urge this Congress to support States' efforts to pass and implement risk protection orders.

On behalf of the veteran community, I would like to thank Senator Blumenthal and Senator Feinstein for their courage and leadership on this issue.

Thank you.

[The prepared statement of Mr. Bencomo appears as a submission for the record.]

Chair BLUMENTHAL. Thank you, Mr. Bencomo.

I am now going to call on Mr. Kopel, who will be joining us remotely.

**STATEMENT OF DAVID B. KOPEL, RESEARCH
DIRECTOR, INDEPENDENCE INSTITUTE, ADJUNCT
SCHOLAR, CATO INSTITUTE, AND ADJUNCT PROFESSOR
OF CONSTITUTIONAL LAW, UNIVERSITY OF DENVER,
STURM COLLEGE OF LAW, DENVER, COLORADO**

Mr. KOPEL. Great. Thank you. Thank you, Mr. Chairman and Subcommittee Members. As you know, the United States Senate

Subcommittee on the Constitution has jurisdiction over enforcement and protection of constitutional rights and statutory guarantees of civil rights and civil liberties. I agree with the American Civil Liberties Union that gun confiscation laws may “be a reasonable way to further public safety. To be constitutional,” the ACLU continues, “they must at a minimum have clear, nondiscriminatory criteria for defining persons as dangerous and a fair process for those affected to object and be heard by a court.”

Persons who are blasé about due process in the firearms confiscation context should recognize that Fourth and Fifth Amendment loopholes created for one type special circumstance eventually become widespread and normal, for example, asset forfeiture without proof of guilt, wireless secret surveillance, and police militarization. Any procedure that forces a judge to hear only one side of the case necessarily can produce a high error rate, and, Senator Blumenthal, you are right and I will correct my written testimony about Connecticut. While we were waiting, I reviewed the study that I had cited, and you described it correctly and I had misread it. But as another study, also in my written testimony, points out, in Marion County, Indiana, when they studied what happened, when the due process hearing finally took place, 29 percent of orders were dismissed when the judge heard both sides of the case. In fact, in the large majority of cases where the respondent appeared, the confiscation order was reversed.

People should not be subjected to confiscation for exercising First Amendment rights. For example, in Florida, an *ex parte* confiscation order was issued against a man because of a pair of social media posts. The first was a photo of a rifle that he had built at home, which is perfectly legal in every State, along with the caption, “It is done. Hooray.” The second post criticized teenage anti-gun activists for trying to take away people’s rights.

In Massachusetts, 84-year-old Stephen Nichols had served in the Korean War and for six decades as a police officer in the town of Tisbury, Massachusetts. In retirement, he worked as a school crossing guard. One day at a diner, he complained that the school’s assigned police officer was often “leaving his post” to buy coffee. Mr. Nichols worried that a criminal might exploit the officer’s frequent absences and “shoot up the school.” As a result, an *ex parte* confiscation order was issued against Mr. Nichols; his firearms license, which had first been issued in 1958, was confiscated, as were all his guns and ammunition. It took nearly half a year before his firearms license was restored, after Mr. Nichols filed suit.

Under some circumstances—some confiscation laws, a petitioner does not—the accuser does not need to show up in court ever. Instead, he or she can testify by telephone. Thus, the judge is deprived of the ability to observe the accuser’s demeanor, which is essential for a court to be able to make credibility judgments.

As in other judicial proceedings, telephonic testimony should be allowed only when there is a specific showing of good cause in the individual case.

Sometimes Government attorneys discourage people from having counsel, even at their own expense. My written testimony includes a former Connecticut prosecutor explaining how he talked respondents out of using lawyers, by warning them if they did, they would

have to pay for an attorney if they did not go along with what the prosecutor wanted.

Colorado has taken steps to prevent such abuse by making court-appointed counsel available to all respondents, whether or not they are indigent. Federal funding can encourage States to broaden the availability of court-appointed counsel.

According to the U.S. Supreme Court, cross-examination “is beyond any doubt the greatest legal engine ever invented for the discovery of truth.” But under some statutes, the accuser and witnesses supporting the accuser never need testify and be subject to cross-examination. Instead, accusations can simply be made by affidavit. That makes a sham of due process.

No-knock raids should be the exception and not the norm. In Colorado, no-knocks require a judicial warrant issued at the request of a district attorney. But Colorado’s new confiscation law was written to negate this requirement for gun confiscation orders.

Violent no-knock raids, for any purpose, should only be allowed when authorized by a court, based on the specific circumstances of a case. Law enforcement officers should not routinely be put in the position of having to forcibly confiscate firearms based on a court order for which the accuser never appeared before a judge, and for which the accuser’s claims were never verified or investigated by law enforcement.

Finally, because perjury prosecutions are extremely rare, victims of intentionally false and malicious accusations should have a right to sue for damages. The U.S. Senate Subcommittee on the Constitution can properly exercise its jurisdiction by encouraging States to enact or improve statutes so they adhere to best practices.

Thank you.

[The prepared statement of Mr. Kopel appears as a submission for the record.]

Chair BLUMENTHAL. Thanks, Mr. Kopel.

I would like to now ask Kimberly Wyatt to give her testimony. Again, I think it is by remote.

**STATEMENT OF KIMBERLY WYATT, SENIOR
DEPUTY PROSECUTING ATTORNEY, KING COUNTY
PROSECUTING ATTORNEY’S OFFICE, SEATTLE, WASHINGTON**

Ms. WYATT. Yes, good afternoon, Chairman Blumenthal, Ranking Member Cruz, and distinguished Members of the Senate Judiciary Committee.

My name is Kimberly Wyatt, and I am a senior deputy prosecuting attorney from King County, Washington. I am grateful for the opportunity to testify and share with you the importance of having an extreme risk protection order law, in our State, known as “ERPO,” and how this law has worked over the past years. You will hear about the need for ERPO implementation, the benefits of increased coordination with local and Federal law enforcement, and real-life applications of how ERPO has been used to save lives.

As our Nation faces the most recent tragedies and senseless losses of life in Indianapolis, Boulder, Atlanta, and many others, our Nation grieves, as it all too frequently does in the aftermath of mass shootings. I am here today, speaking from experience, to say we have an opportunity to get ahead and create a viable path

forward. It is time for us to act and lean into the tools that can make a difference in curbing firearm violence, and one of those tools is extreme risk protection orders.

Extreme risk protection orders are a critical tool to intervene to prevent a firearm-related tragedy from occurring. Countless reports published by the U.S. Secret Service and many others have found that people who intend to do harm to themselves or others often share that information in one form or another. Being alert to this information is the key to saving lives. Extreme risk protection orders and how our unit was formed, the Regional Domestic Violence Firearms Enforcement Unit, has helped intervene and disrupt several potential suicides, mass shootings, and other threats to the community.

Extreme risk protection orders allow family members and law enforcement who have seen those warning signs to come immediately before the court and petition for a temporary order that prevents the at-risk individual from purchasing and possessing firearms. Intervening at the time of the warning signs and threats can make the difference between life and death. ERPOs also have due process built in, as a judge oversee each phase.

As we have learned locally, ERPO laws do not implement themselves. We quickly realized the need for ERPO education. Having a law alone is insufficient. It is critically important that law enforcement and other system partners and community members are aware that ERPO is a tool, specifically a tool to prevent suicides, threats to others—including threats of mass violence. Equally essential is the need for the public to know that if their loved one is in crisis, there is a tool perhaps that they could use. Having a designated ERPO prosecutor and advocate to help assist families to educate and to guide through that—the process of petitioning for an ERPO in real time has proved to be a successful model. Federal funding is needed to provide States a model policy to adopt ERPOs.

To understand how ERPO has worked in my jurisdiction, I want to give a very brief context of where I am from in King County. King County, Washington, has a population of approximately 2.2 million people and is comprised of more than 30 different law enforcement agencies. The county has densely populated areas like Seattle, but also many urban, suburban and rural areas. In 2020, our unit assisted with 79 ERPO petitions. The numbers do not tell the stories alone. We need to look at the facts of several of the cases that we assisted on.

In one suicide prevention case, a father reached out to our unit, expressing concerns that his son was actively suicidal, had access to firearms, and had a significant substance abuse issue. An ERPO was filed to temporarily remove the firearms from the home. The father testified at the hearing and told the court that he “believes in the law of commonsense,” and that the ERPO, this law of commonsense, was needed to protect his son and family.

We have also worked in coordination with Federal partners on several ERPOs, including one where a Federal employee made threats of mass violence toward his employer after he was placed on leave. The employee made threats that included a reference to a “massive massacre in the Federal workplace” and stated he had nothing to live for and it was going to be “a blood bath.” Our unit

was contacted to assist with the ERPO, and while Federal law enforcement was investigating the threats, a temporary ERPO was obtained. In coordination with law enforcement, the respondent was served, and the firearm parts that the respondent had purchased were intercepted by law enforcement before he could carry out his plot.

In another case in cooperation with Federal and local law enforcement, an ERPO was filed against a self-admitted member of a neo-Nazi group known for promoting and advocating and advancing a violent ideology.

The respondent was organizing hate camps that included firearms training, access to firearms while promoting threats of mass violence—including threats to kill members of the Jewish community. A temporary ERPO was served, and numerous firearms were recovered, including ghost guns.

Every example above illustrates the importance of acting when behaviors suggest that someone might be a danger to themselves or others. In so many situations, we do not get a second chance to intervene. Extreme risk protection orders save lives. I know this firsthand. Every State in the Nation deserves to have this life-saving legislation.

Thank you.

[The prepared statement of Ms. Wyatt appears as a submission for the record.]

Chair BLUMENTHAL. Thanks, Ms. Wyatt.

I would like to introduce Nikki Goeser, and as you begin, let me just speak, I am sure, on behalf of the entire Committee to say how deeply our hearts go out to you on your loss, and we really appreciate your being here today.

**STATEMENT OF NIKKI GOESER, EXECUTIVE
DIRECTOR, CRIME PREVENTION RESEARCH
CENTER, NASHVILLE, TENNESSEE**

Ms. GOESER. Thank you, Mr. Chairman. Can you hear me okay?

Chair BLUMENTHAL. We can hear you.

Ms. GOESER. Thank you, Mr. Chairman and Members of the Committee. I am here speaking as a victim of a violent crime. I would like to give you some insight on how red flag laws can have devastating, unintended consequences for many Americans.

In 2009, my husband, Ben, was shot seven times and killed in front of me by a man who I had just realized, that very night was stalking me. This occurred in a gun-free zone. I asked management to please remove the man from the establishment because I realized I was being stalked. There was no confrontation or words exchanged with my stalker. When management approached him and asked him to leave, he pulled a handgun, came up behind Ben, shot him in the head, and then stood over Ben and continued to fire six more rounds into him.

My stalker was in complete control. He was the only one with a gun. Because of the law, I had to leave my legal, permitted firearm that I normally carried for self-defense, locked inside my vehicle that night. I obeyed that gun control law; my stalker did not.

When police searched his vehicle at the crime scene, they found two more guns, ammunition, a baseball bat, binoculars, gloves,

rope, and a knife. Ben's murderer has been sending me twisted love letters for years from prison, to traumatize me even further. Much to my dismay, he is set to be released early for "good behavior" in just 7 more years. I have very real fears about what he will do once released. This horrifying experience will be with me for the rest of my life.

The days, months, and years that followed were very difficult. Depression, nightmares, grief, trauma, loss, concern for my safety were all things I dealt with and had to work through. Put yourself in my shoes. How would you feel?

I remember thinking at the time that if I just happened to pass away in my sleep, I would be okay with that, because I did not know how I could face another day. I was never suicidal, but you can see where someone may misinterpret that. If red flag laws had been in place in my State of Tennessee, even those with the best of intentions could have had an exaggerated concern and assume they were acting in my best interest by having my guns taken from me. It would be devastating for a victim like me to be unable to protect myself after this stalker violated me in such a horrific and life-altering way. If he comes after me someday, my gun may be the only thing that could save my life.

Red flag laws have a real chilling effect and can cause victims to fear losing their rights if they seek help by talking with friends, family, or psychologists. Rights should never be taken from people without due process first. Mental health experts should absolutely be involved in that due process.

Under red flag laws, the burden of hiring an attorney and paying thousands of dollars for representation would be on the person flagged. Who knows how long it could take in court and how much money it would cost to regain my safety? The process is unfair and burdensome.

It is not only victims who can be impacted by these laws. Anyone who has dealt with traumatic events can be affected—police, first responders, nurses, doctors, military, et cetera. Research varies. There are indications that red flag laws range from having no significant effect on homicides and suicides to an increase.

I learned, during the murder trial, that there were signs my stalker was a danger to others years before he crossed our path. His co-workers, friends, and family knew of these signs. I do not know if those in my stalker's life ever reported him to police, but if they did, just as with Nikolas Cruz, who did the Parkland attack, they did not act.

Ben's murderer threatened to kill his own secretary at his job in Florida. My stalker's father said at trial that it "scared the stew" out of her. He fired a shotgun out of anger at innocent hunters who were near his property. At this point, he should have been arrested, charged, and convicted. That, alone, would have prohibited him from possessing and purchasing firearms. But for some reason, that never happened. These are just a few examples of many. He had no criminal record and no mental illness on record, but he certainly should have. Somehow he fell through the cracks.

The people in his life back then could have "Baker Acted" him. That is where they put you on a 72-hour hold; you have a mental evaluation; the judge looks at evidence; and there is a whole range

of options. They can, you know, do the outpatient treatment, removal of guns, or involuntary commitment.

I just feel that if someone is, indeed, a real danger to themselves or others, simply taking away their guns is not a serious response. Red flag laws are overwhelmingly used because of fears of suicide. There are other ways to commit suicide that have similar high success rates.

In conclusion, I believe the focus should be on mental health services and facilities in this country. Focus on education for the public, training for law enforcement, judges, and prosecutors on enforcement of existing laws like the Baker Act and those similar laws across the Nation already. And please, do not forget compassion for good people going through a difficult time.

Thank you so much.

[The prepared statement of Ms. Goeser appears as a submission for the record.]

Chair BLUMENTHAL. Thank you, Ms. Goeser. Mr. Horwitz.

**STATEMENT OF JOSHUA HORWITZ,
EXECUTIVE DIRECTOR, COALITION TO
STOP GUN VIOLENCE, WASHINGTON, DC.**

Mr. HORWITZ. Good afternoon, Chairman Blumenthal, Ranking Member Cruz, and distinguished Members of the Committee. Thank you for giving me the opportunity to testify on the importance of extreme risk laws, and their value in preventing gun violence. My name is Josh Horwitz, and I am the executive director at the Coalition to Stop Gun Violence. We develop and advocate for evidence-based solutions to reduce gun injury and death in all of its forms.

Ms. Goeser, I am so sorry for your loss. Like you and like so many others, I came to the gun violence prevention movement because of my own personal loss. Thirty-two years ago, a dear friend of mine took her own life using a newly purchased firearm in a moment of hopelessness. Back then, I did not have the knowledge or the tools to intervene effectively. I desperately wish that I could go back in time. But I can't, and I can't bring my friend back. What I can do is what I am doing right now: encouraging policymakers like you to use your power to support life-saving policies like extreme risk laws so that no other families or friends have to experience this type of heartbreak.

Gun violence in our country remains persistently high, taking nearly 40,000 lives each year. Sixty percent of those deaths are suicide. Although no single intervention will serve as a panacea to the epidemic of gun violence, extreme risk laws, which help prevent lethal violence before it occurs, have the potential to save many lives and are gaining traction throughout the country. Enacted in blue and red States alike, and endorsed by both the Trump and Biden administrations, this policy provides a clear opportunity to find common ground in stemming this ongoing nationwide tragedy.

In the months that followed the Sandy Hook shooting, the national dialogue around preventing gun violence was focused on mental illness. To determine whether this approach would be effective, I convened a group of the Nation's leading researchers to identify risk factors for violence, and to formulate evidence-based policy

recommendations. When reviewing this research, this group, who became known as the Consortium for Risk-Based Firearm Policy, concluded that firearm prohibitions based only on mental illness diagnosis are not supported by research evidence and are harmfully stigmatizing.

Instead, we identified behavioral risk factors for violence that are supported by research, including violent behavior, threats of violence, and risky alcohol use.

We know that in many high-profile shootings and firearm suicides, family members were often the first to know their loved ones were in crisis. Unfortunately, there were few tools for family members and law enforcement to use during these moments.

To address this gap, the consortium developed the modern-day extreme risk protection order, based on long-standing domestic violence restraining orders found in every State as well as the established risk-based firearm removal laws in Connecticut and Indiana. Today a total of 19 States and DC have extreme risk laws on the books.

There are usually two types of extreme risk protection orders: temporary ex parte orders and final orders. These processes have been found to be constitutional by courts across the country. In some cases, the temporary order, which typically lasts 14 days, provides enough time to mitigate risk, and it becomes unnecessary to go for a final order. Importantly, both temporary and final orders, which typically last up to 1 year, are civil and not criminal. They are time-limited and ensure processes are in place for returning the respondent's firearms at the conclusion of the orders.

Multiple studies of extreme risk laws have found that they are especially effective in preventing suicides, and new research suggests that they may help prevent mass violence as well, including school violence.

However, extreme risk laws can reach their full potential only if they are implemented effectively and fairly. I have met with people around the country, hosting forums about extreme risk laws and learning from stakeholders putting them into practice. The use of those laws vary not only between States, but between cities and counties, too. These variations are typically a function of training and staff.

Although extreme risk laws are a State-level policy, the Federal Government can play an important role by supplying resources to advance State implementation efforts. By supporting local jurisdictions to train law enforcement officers, judges, and clerks, the Federal Government can help to assure safe and equitable application of extreme risk laws, access to services for respondents, and proper reporting of records to the NICS system.

Unfortunately, this month's mass shooting at the Indianapolis FedEx warehouse highlights the devastating effect of a failure to implement an extreme risk statute. Had an extreme risk order been obtained, eight families might not be grieving right now. We cannot allow these cases to fall through the cracks for lack of resources and training. Too many lives are at stake.

Gun violence is preventable. While I am sure that every Member of this Committee does not agree with every nuance of every extreme risk law, I hope that we can agree that temporarily removing

firearms from a person at high risk of violence is the right thing to do, and that we can do it in a way that enhances community safety while respecting constitutional rights.

Thank you for this opportunity to testify. I look forward to your questions.

[The prepared statement of Mr. Horwitz appears as a submission for the record.]

Chair BLUMENTHAL. Thank you very much, Mr. Horwitz.

I am going to begin with some questions. We are actually, I believe, in the middle of a vote, and so we may kind of tag-team. We may have to take a recess briefly. But I will begin the questioning.

Let me ask you, Mr. Horwitz, I don't know of any red flag or extreme risk law that has been struck down by any court across the country.

Mr. HORWITZ. You are correct.

Chair BLUMENTHAL. Why would you say that is, given all of the hullabaloo that we have heard about due process and constitutional rights?

Mr. HORWITZ. I would say that is because it is built on the same process as a domestic violence restraining order, which has been found again to be constitutional. It's a very similar situation. Instead of, for instance, you know, a spouse worried about the risk to them from another spouse, for instance, what happens in the situation where the spouse is a danger to themselves, right? It's the same risk, the firearm is in play, the same risk factors, the threats of violence. Judges have a good sense of how that works, and it is the same standard from State to State. I really think we built it on this domestic violence restraining order process, well established, all 50 States, courts know how to use it. I think that is why they have been found to be constitutional.

Chair BLUMENTHAL. I have heard the argument made that red flag laws are unnecessary because we have domestic violence protections. Is that true?

Mr. HORWITZ. I think, you know, especially in the case of risk to self, I mean, that is a big issue where, you know, a domestic violence restraining order, you cannot—it's not available for someone who is at suicide—risk of suicide.

Additionally, when your there—think about it is broader—you know, here law enforcement can go and use a civil order in many situations. It is broader than a DV law, but built on the same process with the same protections.

Chair BLUMENTHAL. In fact, the target of a shooter may not be somebody at home. It could be a school. It could be someone at work. It could be a stranger who is stalked. It could be anyone.

Mr. HORWITZ. Right. When you look at the examples, you often see that the person who is at risk may not be in any relationship at all to the shooter. This gives that opportunity for law enforcement to intervene, and it gives them clear legal authority to intervene, which is very important.

Chair BLUMENTHAL. The claim has been made that the process for regaining a firearm is costly, it's burdensome. Is that customarily—

Mr. HORWITZ. When the order expires, the firearms get returned. The same this works—this is, again, a civil not criminal process.

These are quick processes. Typically in the United States, we do not—you know, lawyers are not provided for protective orders, the same as DV laws.

Chair BLUMENTHAL. If the firearm is retained, the burden is on the prosecutor, or the official who wants it to be retained, to prove that there is some danger, some severe risk, and it is called “extreme risk” for a reason. There is extreme risk, and the burden is to present evidence, not just make the claim, correct?

Mr. HORWITZ. It is two stages. You have temporary, where you have to make the claim, and what we call “permanent,” although it is for a year, where you have to make that claim and you have to prove it twice in most cases. Oftentimes the burden of proof is higher the second time around.

Chair BLUMENTHAL. In fact, the burden is always on the prosecutor, and it often is—

Mr. HORWITZ. So just—

Chair BLUMENTHAL [continuing]. Higher.

Mr. HORWITZ. I am sorry.

Chair BLUMENTHAL. Let me just ask Ms. Wyatt, because you have a unit consisting of law enforcement, prosecutors, a court advocate, a problem solver, a court coordinator, a paralegal, a data technician, and a program manager who all assess the danger before you even go to get a warrant that separates someone from a firearm. You are extremely cautious and demanding of yourselves before you exercise that power. Is that correct?

Ms. WYATT. That is correct, and we are carefully vetting those cases, typically with law enforcement as well. And so, we are going through to make sure, one, ethically, legally it meets the standard for an extreme risk protection order in our State, so we are going to have to petition the court to be able to prove that that individual is a significant danger to themselves or others. Then there is a series of factors that we are basing that off of, and that typically involves a threat of self-harm or threats to others. You are absolutely right that there are many different layers built into the process, and as you can see, we have a population of 2.2 million people, and we filed last year—or assisted filing with law enforcement and families—79 ERPOs. I believe that is less than 0.002 percent of the population. We are very specific and targeted about our program.

Chair BLUMENTHAL. It takes resources to run that kind of unit, and that is exactly the kind of resources and support we would try to provide through this legislation for State statutes. Again, we are not talking about a Federal mandate. It is State statutes that would be supported and encouraged and incentivized.

Mr. Bencomo, let me just finish with a quick question to you. In your experience, I think that a very substantial proportion of victims of suicide are, in fact, veterans. Why is that?

Mr. BENCOMO. There is—this is a personal thought, that there is a stigma within the veterans community to seek mental health. We are trained warriors for this country. We are strong, we are patriotic, we have a job to do. At times, we cannot allow some of our personal emotions to get in the way, and that carries on once we leave service. It is a very strong and power defense for us, and that is probably one of the reasons why many of us will not seek mental health when we are asked to or need to.

Chair BLUMENTHAL. Often the effect of going to court in a red flag case has the effect of persuading a veteran to seek help. Is that correct?

Mr. BENCOMO. I would say if they were required by the court, then, yes, they would have to—by the nature of the case, would have to then seek some type of mental counseling.

Chair BLUMENTHAL. Thank you. Senator Cruz.

Senator CRUZ. Thank you, Mr. Chairman, and I will note, Mr. Chairman, I was remiss at the outset of this hearing in not congratulating you on being Chairman of this Committee. I had the pleasure of being Chairman of this Committee—Subcommittee for the past couple of Congresses, and it is a terrific Committee with, I think, the best jurisdiction in the entire Senate. I look forward to serving with you as Ranking Member on the Committee.

Chair BLUMENTHAL. Thank you.

Senator CRUZ. Mr. Kopel, the last time you and I spoke, I asked you what the minimum protections that an extreme risk law should have to ensure that it comports with due process. You responded that laws should not allow ex parte proceedings except on a finding of necessity, that laws should use a clear and convincing standard throughout, and that respondents should have a right to counsel and the right to cross-examination.

Do any of the laws currently on the books meet all of these criteria?

Mr. KOPEL. Not in—there is no one State that has all of—State that has all of them. In several States, you can pick things from several States that are good on a particular item, but no State law has the full scope of what I would say is fair for due process. As Senator Blumenthal and Mr. Horwitz discussed, there have not been very many constitutional challenges on this, but the ones that have, have been not very successful, have failed, and partly because they were very broad kind of facial attacks.

The bigger picture is courts are not always our leaders in protecting due process. Civil asset forfeiture, I think, is now something that people say went way too far and has been performed by statute. But judicially, there was very little that ever got done about that, and most of the challenges failed. There is the, kind of, most minimal level of due process the courts will enforce, and then there can be higher, better standards that legislatures insist on.

Senator CRUZ. President Biden instructed the Department of Justice to develop a model red flag law for the States. The last time you were here, we discussed the fact that Giffords, a progressive gun control organization, blocked the drafting of a model red flag law by the Uniform Law Commission because they insisted on their own more extreme model. I am concerned that the Department of Justice will put out a model law that is, more or less, the same as Giffords' extreme model.

Can you tell us, in your judgment, what that model looks like, and why it is so extreme?

Mr. KOPEL. It is a model that, on the one hand, doesn't view the temporary, whether for 2 weeks or even a mistaken thing for much longer, deprivation of the right to arms as a significant harm. Its premise is somewhat unbalanced in how it weighs things. It is—ultimately it's something that is based on one side of the issue, you

know, which is understandable. You know, that is the faction that won the election and controls the Presidency. What was going on in the Uniform Law Commission was to take into account both points of view. For example, one group in the Commission was the International Association of Chiefs of Police, which is a very—has been for decades a very pro-gun control organization. On the other hand was the National Sheriffs Association, which is definitely not absolutist against gun control but is more typically skeptical.

If you had both of those perspectives, I think that would lead to a more balanced, fair, and accurate process, because I think we—there is agreement that there are some people from whom guns should be taken away for public safety, and also there has to be recognition that sometimes mistakes happen and people are improperly deprived, and we want to get a process that has the highest possible feasible level of accuracy.

Senator CRUZ. President Biden has nominated David Chipman, who is a senior policy adviser for Giffords, to be the Director of the ATF. I understand that you have a bit of history with Mr. Chipman regarding red flag laws and that he seemed not to have great concern about law-abiding citizens having their right to self-defense stripped away. Could you give us some background on what happened with Mr. Chipman?

Mr. KOPEL. Sure. He was on the Commission, a member of the study—Uniform Law Commissioners' study committee with me. As you mentioned, I brought up the problem of we want to make sure we do not disarm innocent people, even on a temporary basis, because that creates danger for them, and then his response was, "Well, people can just buy a replica gun," and maybe if they are a great actor they can scare people away with a replica gun, but that is not really an effective alternative to an actual firearm for lawful self-defense.

In another part of the discussion, I said—I brought up the point about no-knocks, and in general, we—of course, no-knocks are necessary in some situations, but we want to have them used when they are necessary, and not just routinely. We have seen lots of situations, outside of red flags, where no-knocks just get carried out kind of in a reckless way because the local SWAT team does not have anything else to do that day.

Mr. Chipman's response was, "Do not tell the police how to do their job." I guess as a constitutional law professor—and my dad was in the State legislature as a Democratic liberal representative from northeast Denver for 22 years—we tell police how to do their jobs all the time. That is what the Fourth Amendment to the Constitution does, the Fifth Amendment does that, and so do all kinds of statutes we have in this country.

Senator CRUZ. Thank you, Mr. Kopel.

A final question, Ms. Goesser. Thank you for appearing today. Thank you for telling the story of the horrific murder of your husband, and thank you for using the pain and horror of that crime, using it to try to protect others who might be victims of violent crime in the future. Your husband was murdered in a gun-free zone, and you followed the law. You did not have your firearm. You were not able to protect yourself or protect him. That is a familiar

pattern with gun control efforts, and many of the mass murders we have seen have occurred, similarly, in so-called gun-free zones.

Are you concerned that the same will be true with red flag laws, that law-abiding citizens could have their firearms confiscated, particularly when they are vulnerable to criminals, but the criminals will refuse to turn over their weapons, and the result will be other potential victims of crime being left vulnerable to violence?

Ms. GOESER. Yes, absolutely. I am very concerned about that. Of course, there are people who can abuse red flag laws. You know, there are people that can abuse existing laws, too, but, you know, at least with the Baker Act—different States call it different things, but we pretty much have an option that is the Baker Act. They call it different things in different States, but it exists all over the Nation. Every State has a similar law to the Baker Act, and they offer protections. You know, I don't have \$10,000 in my savings account to cover legal fees if someone flagged me for some reason. You know, it is pretty scary that someone could knock on your door, law enforcement knock on your door at 5 a.m. and say, "Hey, we are taking your guns," and you have no idea why. You don't know why, what is going on. I need to be able to protect myself. I just think due process is so important. Mental health experts should always be involved. That should be mandatory. If we are talking about mental health, mental health experts should absolutely be involved in that due process. And I believe due process needs to come first.

Look, if someone is truly dangerous, if they are truly dangerous, they need to be confined to a mental health facility. I mean, so you take someone's gun away. They are still dangerous. That is how I feel.

Senator CRUZ. Thank you.

Chair BLUMENTHAL. Thanks, Senator Cruz. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Senator Blumenthal, for this hearing and for your long-long-time passion and leadership for protecting our people from the scourge of gun violence.

Mr. Horwitz, we passed a red flag law in Rhode Island. It went into effect in June of 2018, and the last report I have ends with that as of November 2019. In that period, State and local police in Rhode Island invoked that law 33 times. In one of our municipalities, Cranston, police petitioned for red flag orders eight times, just in one city. In one case, police seized weapons and obtained an order to help a worker who had made comments he had a desire to kill certain coworkers and had boasted about his firearms.

Is that experience in Rhode Island consistent with what you see around the country in terms of the laws being made effective?

Mr. HORWITZ. I think it is. I mean, I think we are seeing it used very judiciously. I think we are not seeing, you know, millions of these being done. I think, you know, in Virginia, where I am very familiar, I think there is under 70 or so in the first year. I think it's very consistent with what we are seeing around the country.

You know, California, in the first couple years, saw under 400 in such a big State, but they are very important. They are based on someone's—you know, on the risk of individuals, and I think that is why you don't—they are not used for mass—like for lots of people across a wide spectrum. They are individualized attempts to

identify people who are at a risk, an elevated risk of violence, and I think that is why they are important, that is why they are constitutional, and that is why they are effective.

Senator WHITEHOUSE. Ms. Wyatt, those of us who have sat in a prosecutor's chair and had to make the decisions that you have to make are familiar with a whole variety of legal procedures that help protect people from threats of violence, whether it is restraining orders, protective orders. They are particularly common in the domestic violence arena. In your view, are the protections involved in the red flag laws consistent with those for other types of safety orders that law enforcement commonly obtains?

Ms. WYATT. Thank you for the question. Yes, you are exactly correct in that extreme risk protection orders follow the process similar to domestic violence protection orders or sexual assault or anti-harassment orders, meaning that each phase comes before a judicial officer. A family member cannot walk down the street and get an ERPO on their own, nor can law enforcement. They have to sign and fill out a detailed petition, sign under penalty of perjury, and then it is submitted to the court, just like any other civil order would be, and the court is making a determination if there—in our State if there is reasonable cause that the individual is a significant danger to themselves or others. There is a similar process with other civil protection orders as well, and then the individual subject to the order has to be served, because that individual needs a chance to be able to come to court, to have their own witnesses, to be able to tell the court either they are in favor of the order or they are going to challenge that order. Each phase and each step involves judicial oversight.

Senator WHITEHOUSE. In particular, Ms. Wyatt, do you think just as a matter of good practice it would be advisable to have domestic violence victims or those who have a restraining order protecting them from another individual be advised when that individual, their assailant or the threat to them, acquires or tries to acquire a weapon, a firearm specifically?

Ms. WYATT. Yes, and our unit specifically addresses not only extreme risk protection orders, but, of course, also domestic violence protection orders. Because the lethality is so high at the moment that those victims are petitioning for separation or petitioning the court for a domestic violence protection order, it is critically important that we follow up and enforce court orders when they are ordered to surrender weapons, like in our domestic violence cases or ERPO. Our own State has a system set up to notify if somebody is subject to an order and somebody attempts to purchase or we get notification from our State patrol, and it goes to local law enforcement as well as our unit, and then we have victim advocates that are reaching out to the victims as well, to make sure that they know that there was either an attempted purchase or if a firearm was actually delivered, then we are going to be following up with local and Federal authorities if we believe that firearm was given to somebody who should not have it.

Senator WHITEHOUSE. If I could ask one more question of Mr. Bencomo.

Chair BLUMENTHAL. Sure.

Senator WHITEHOUSE. I think it's human experience that powerful emotions can pass through human beings—anger, rage, jealousy—and that the decision-making during that period, when you are in the grip of a fierce emotion, can be compromised, and that people act out in unfortunate ways in that moment, and make decisions, sometimes, that have irrevocable consequences for the rest of their lives.

Given that aspect of human nature, is it conceivable that the subject of a restraining order, the person who is told they have to take a pause on having their firearm, is actually the real beneficiary of that restraint?

Mr. BENCOMO. A simple response would be yes.

Senator WHITEHOUSE. Yes. It just seems that way. You lose your access to your firearm for a week or two, and you are spared a lifetime of guilt and remorse, and the horrible memory of having acted on something when you were in a fit of emotion. It seems that way to me, anyway. Thank you.

Mr. BENCOMO. Thank you.

Chair BLUMENTHAL. Thanks, Senator Whitehouse.

I am going to call on Senator Lee. I am going to vote. If I am not back by the time he is finished with his questioning, he is going to call a brief recess. I will be back, and we can resume then. Thanks, Senator Lee.

Senator LEE [presiding]. Thanks so much, Mr. Chairman. I really appreciate you accommodating me in that regard.

Thanks to each of you for being here today. You know, the Second Amendment guarantees our right to keep and bear arms. This was a right that our Founding Fathers deemed fundamental, so much so that they added it to the text of the original Constitution, and it's not only the Second Amendment that is at stake when we talk about things like this. There is also the concept of due process.

The Fifth Amendment's Due Process Clause, of course, provides that no person shall be deprived of life, liberty, or property without due process of law. That requirement is, of course, made applicable to the States through the 14th Amendment.

You see, our freedom isn't free. Whenever Government acts, it does so, inevitably, at the expense of individual liberty. That is where Government has to get its power. We need Government, and just the same we need Government to respect boundaries on its own authority.

I certainly agree that we should take steps, wherever possible, to make sure that people who shouldn't have guns don't have them, in particular, those who are legally prohibited from having them, because they were adjudicated as mentally unfit to do so, or they have been convicted of a crime. These restrictions are consistent with our system of laws, and they can be applied in a manner that does not offend our constitutional rights.

Ms. Goeser, I am very touched by your testimony. As I read through your written testimony, I could not help but notice that, as you were talking about difficult things and the difficult circumstance in which you had to witness your own husband's murder, even while you had a firearm and had access to it, but you chose to comply with the law, your assailant did not. I think you

summarized it extremely well with just a few words: "I obeyed that gun control law; my stalker did not."

I do not think I have found any one sentence that better summarizes the need to respect the Second Amendment, the need to protect due process, and also the dilemma that we face and that we have to take into account whenever we choose to enact laws infringing upon those rights.

It sounds to me like you would likely agree with the proposition that it is not a cost-free action for the Government to take, that in the name of protecting people from the horrors of gun violence, Government can also inflict violence. Would you care to elaborate on that based on your experience?

Ms. GOESER. I think that there are some laws that are created that just—they have unintended consequences. I think some of these gun control laws were created thinking that, you know, we are going to protect people. Unfortunately, it can make some people out there vulnerable, so that they cannot protect themselves and their loved ones. You know, I do not want dangerous people to have access to guns, but you know what? I do not want them to have access to a vehicle or a knife or a baseball bat or a pressure cooker. I mean, if they are truly dangerous—of course, I want everyone to have due process. I believe murderers deserve due process, and victims as well. That is what is so great about our country, that we do have due process and we do have a Constitution. I do not want to live anywhere else. I love America, and I love that about America.

Senator LEE. Yet it is sometimes suggested, and we have heard it suggested even just in the last few moments, that the worst that can happen if you take somebody's gun away without due process is that they have to go without it for a few days, or for a couple of weeks. Yet your circumstances would seem to suggest that that is not true, that that is not the full extent of the downside of that, that there is more cost. Sometimes, that cost is borne not just in an inconvenience, but in someone being left vulnerable.

Ms. GOESER. Yes, absolutely. In my case it would have compounded the problem. Of course, I was depressed. Who wouldn't be? Of course, I had nightmares. Who wouldn't after going through that? To take away my basic human right of self-defense on top of all of that would just be devastating for someone like me.

Senator LEE. Sometimes people will argue due process is great and everything, but with respect to the bad folks, we cannot give them due process. Isn't that the problem with due process itself? I mean, if we are going to respect due process, aren't we agreeing, up front, that due process needs to be up front? It is not really due process if it is only after the fact. Is that right?

Ms. GOESER. That is right. I understand it can be very scary. I mean, I get it. I get it. I am a victim of a violent crime. But like I said, if you truly believe that someone is a danger, they should be confined to a mental facility. They should have due process, and that is why I support the Baker Act and similar laws that already exist all across the Nation. Every State has a similar law to that, because it includes due process. Your legal fees are covered. They are not under red flag laws. You know, I do not have \$10,000 to cover legal fees. It can be very, very expensive. With the Baker Act

and similar laws, mental health experts are involved. That is not always the case with red flag laws, and I think that is very important that mental health experts be involved in that due process.

Senator LEE. Mr. Kopel, does lack of notice and due process that sometimes might go along with gun confiscation orders, doesn't this have some potential to increase the risk of harm, both to law enforcement officers executing the orders and to those who are subject to those orders?

Mr. KOPEL. Sure. I mean, imagine a situation where officers—there is an ex parte order that has been issued, and, you know, maybe it is on weak evidence and the guy is really not dangerous, but the confiscation order is served by the police showing up at somebody's house at 5 o'clock in the morning. You know, normally a homeowner might think it was a burglary and—because he has no idea that anybody is coming to take his guns. There is also a broader problem in the—how it erodes trust between law enforcement and the public, and this was talked about in one of the Connecticut studies that is quoted in my written testimony.

When you have somebody whose guns are taken away and confiscated, the police show up, you know, never heard of anything going on against me, but now here is a cop coming to take my guns, as the—some Connecticut State Police officers have reported, these are often the guys who think of themselves as the most pro-cop. You know, they are the ones who were on "Back the Blue," on the side of law enforcement, understand it is a tough job. Then all of a sudden the guys they thought were their friends are there to take away their property, when it is a complete surprise to the person, and then maybe a few weeks later the person hires a lawyer, goes into court, they get their guns back. But in the meantime, it has been a very humiliating process for the wrongly accused individual. Law enforcement, whom I have often represented in amicus briefs in courts and elsewhere, are so dependent on the cooperation and good will of the public. You know, that is the American model. We are not policing from above like in some other less free countries.

When these are done wrongfully, they really break that relationship and bond between the public and law enforcement that is necessary to successful law enforcement and public safety.

Senator LEE. Mr. Kopel, there are a number of us, myself included, who have formed sort of a bipartisan coalition raising concerns in a related area of civil asset forfeiture, where in areas outside of firearms, we have raised concerns with law enforcement being able to take people's property first and then ask questions later, to take first and then provide some sort of process later.

Due process, of course, has a higher expectation than that, does it not? Do you see the—tell me what you think about the parallel between this and that. In other words, if one is concerned about the potential for abuse, and the actuality of abuse, in the civil asset forfeiture arena, how could one not see something similar when it extends to the Second Amendment?

Mr. KOPEL. It is the same kind—a similar kind of situation, and both have good intentions of trying to deal with a serious problem. Here gun crime and civil asset forfeiture, it had always existed in kind of a minor way, but it really got ramped up in a huge way

in the 1970s and 1980s because of the drug war. Of course, drug abuse can be very harmful not only to an individual but to society more broadly, and so the idea was, well, we need these tools to fight the drug lords and all this. What happened was there were a lot of people whose property got taken who were not Colombian drug lords or anything like that, and it was widely abused, and, sadly, the courts in their view of what the minimum—what the Constitution requires as a minimum for due process generally said that is fine. I would urge especially this Committee, of all Committees in the United States, which is charged with defending the Constitution, that one of the reasons courts often defer to legislative judgments is they presume, just like Chief Justice Marshall said in *McCulloch v. Maryland*, that the legislature itself already seriously thought about constitutional rights and values. I think legislators can and should go above whatever minimal level the judiciary will enforce in terms of the protection of people's procedural rights.

Senator LEE. Insofar as we are talking about due process that is freestanding here, which I think we have agreed that there is, certainly a right does not lose protection by becoming a hybrid right. In other words, if you already have a freestanding, independent due process right protected by the Fifth Amendment or the 14th Amendment's Due Process Clause, you certainly do not see that, any justification for diluting that right, merely because you have added the Second Amendment into the equation by virtue of its involvement in the firearms arena.

Mr. KOPEL. Right. Yes, at least as a policy matter, you would think due process would be all the stronger there. Of course, the analogy is, I am sure you know, in the first Supreme Court's free exercise of religion jurisprudence, sometimes that free exercise of religion gets stronger protection when it is a hybrid in conjunction with the exercise of some other right.

Senator LEE. Right, right. I have never quite understood the hybrid rights doctrine in the First Amendment context beyond what you just described, which is that it certainly does not get weaker when you compound one right with another. I would maintain that is no less true here.

Consistent with the directive I was given from the Chairman when he left to go vote, I hereby recess this hearing of the Subcommittee subject to the call of the Chair, who will be back momentarily. Thank you.

[Whereupon the hearing was recessed and reconvened.]

Chair BLUMENTHAL. We are back. We are going to be joined shortly by Senator Graham and Senator Cruz at least, and perhaps others. I will yield to Senator Graham when he arrives, but I have a few questions in the meantime.

First, let me ask the panel, because I was not here, whether everyone got a chance to respond to Senator Lee's questions or if there is anything else you would like to say while we are waiting for others to come back. Mr. Horwitz?

Mr. HORWITZ. If I were available, I think it is important to make the case that in these situations I am—we were talking about a lot about civil asset forfeiture. I am not an expert in that law at all, so I cannot claim to that. I do know that the due process protec-

tions in ERPO laws are very similar to other civil orders, especially domestic violence orders, but also in cases—some cases of civil commitment, as well as in child endangerment situations where there is an urgency to act. So, I don't know that the analogy is exactly perfect for civil asset forfeiture, because so I think what we are talking about here is danger to persons. I think the analogy is a little different. When you think about due process protections that have been upheld, you can see that in numerous—numerous other fields, the type of arrangement that is built here is available in other fields, and so I think we tried to build this with that in mind.

I—one of the things you think about Indiana's original law, you know, in that law, firearm removal has been upheld even without a hearing, a temporary hearing to begin with. When we built sort of what we see—Indiana and Connecticut were the first, and as we built the laws moving forward, we wanted to add that hearing at the beginning, so that no firearm was ever removed without a judge looking at least as the *ex parte*—looking at the evidence.

I think there is more protection here than people—than some folks have looked at through this, and I think it is in line with what we have seen in long-standing domestic violence protection orders.

Chair BLUMENTHAL. As I mentioned, I will yield to Senator Graham whenever he is ready to go.

Senator GRAHAM. Thank you, Mr. Chairman. Yes, thank you very much. Very good hearing. Appreciate it.

Mr. KOPEL, is that right? Are you still with us?

Mr. KOPEL. Yes, I hope so.

Senator GRAHAM. Okay. I enjoyed our last engagement where we were trying to find a way, on the front end and the back end to give adequate due process, but also address the problem. I think Indiana's situation is a good one. Ms.—Goeser? Is that right?

Ms. GOESER. Goeser.

Senator GRAHAM. Your story made me think about, you know, we want to make sure we are thinking this thing through and not go too far with it. But I have just come to believe, Mr. Chairman, like you have, that States who have adopted these laws probably are on the right track. The Cruz situation in Parkland, 30 visits by the police, every warning sign known to mankind, and they were powerless. Governor Scott, working with the State House, passed a Florida version of the red flag laws. Indiana was one of the first ones to do this, and the situation for the young man who had the shotgun taken because of his mental health status, but there was no implementation, is something that I am sure we do not want to have happen again.

Mr. KOPEL, when it comes time to write a grant program, let's say, incentivizing States to go down this road on the due process front, you are advocating that there be a civil cause of action, in case somebody is accused wrongfully or maliciously, that they can actually have recourse against their accuser. Is that right?

Mr. KOPEL. Yes. Not a mistaken accusation because everybody makes mistakes, including me, as we discussed earlier in this hearing, but a knowing false and malicious accusation.

Senator GRAHAM. Got you. I talked with the Chairman about that. That makes sense to me that if somebody is trying to ruin

your life and accuse you of something you are not, then you will have redress. I like that. The ex parte nature of the hearing, the initial determination by the judge to act, what kind of standard would you suggest we create there?

Mr. KOPEL. I would say start with the Federal Rules of Civil Procedure, which generally disfavor ex parte decisions but allow a judge to issue orders ex parte on a guided set of facts and findings about necessity. Particularly, why is the other person not here in court? Why didn't this person have notice? Sometimes, the person seeking a temporary restraining order can give a good answer to that, and sometimes not. I am sure——

Senator GRAHAM. The preference would be in live testimony so the judge could ask questions, but what standard would you impose?

Mr. KOPEL. The same as Federal Rule of Civil Procedure 59.

Senator GRAHAM. Okay. All right.

Mr. KOPEL. On which I am not an expert.

Senator GRAHAM. No, I got you, but you have got to pick a standard. That seems to be a good one to me. The time period between the initial determination and a full-blown hearing, what would you recommend?

Mr. KOPEL. I would suggest we talk to prosecutors, including some of the witnesses here who have experience with this, and say, What is a realistic time period? On the one hand, we want to be expeditious. On the other hand, maybe there is some time needed to get evidence.

Senator GRAHAM. Okay. All right. Based on your research, of the existing State laws, which one do you think has done the best job of threading this needle, and why? Which ones do you have the most concern about, and why?

Mr. KOPEL. Vermont may be best overall, although Connecticut has some good features in it, too, especially the requirement that law enforcement investigate the situation on their own before filing a request for a petition.

Colorado, with its providing for defenders, defense lawyers in this case, I think is a very strong model and not only helps the individual but I think also may function as a deterrent to potential abuses. On the other side, I would say Massachusetts has some of the weakest standards for due process.

In New Jersey, actually once you have got—the person actually gets an in-person hearing and there is a confiscation order, it has the effect of being permanent, preventing the person from ever owning a gun again unless they come back into court and prove that they are not a danger. I think the model Mr. Horwitz's organization has talked about where the order automatically terminates after a certain period of time—it can be renewed upon further proof about the individual at that new time—is the better way to go.

Senator GRAHAM. Okay. We will just sum it up here. I do not want to go over. Basically you believe the most constitutionally sound way to do this would be not a Federal law, but some grant program that would emphasize adequate and robust due process. Is that fair to say?

Mr. KOPEL. Yes, and I think that the States and localities have the resources to do this in a way that the Federal Marshals and others just do not have the manpower for, among other reasons.

Senator GRAHAM. Thank you.

Chair BLUMENTHAL. Thanks, Senator Graham.

Senator Cruz, did you have other questions?

Senator CRUZ. No.

Chair BLUMENTHAL. Mr. Bencomo, you are a gun owner yourself. I am going to assume you are a law-abiding one. Has Colorado's law been tied to mass confiscation of firearms from gun owners like yourself?

Mr. BENCOMO. First of all, I am definitely a responsible gun owner, so thank you. From what we know from today, obviously I am not a scholar or a lawyer or an attorney, we have not seen mass confiscations.

One area that we could do an improvement, I was glad to hear that we hit the high marks on a good—that we are a good role model. Not only do we have defense lawyers, I would love to see Federal funding so that we can assure that there are PSAs, public safety announcements, and education for additional responsible gun owners of Colorado.

Chair BLUMENTHAL. Are you familiar with instances where it has been used to retaliate against people or, vindictively, by family members or business associates against each other?

Mr. BENCOMO. I am not.

Chair BLUMENTHAL. It has been about a year since Colorado's law has been in effect, correct?

Mr. BENCOMO. That is correct.

Chair BLUMENTHAL. Notwithstanding that some counties have declared themselves to be Second Amendment sanctuaries and some sheriffs have announced plans to block the law from being used, I understand quite a few have reversed their opposition after seeing how the law is actually put into effect. Is that correct?

Mr. BENCOMO. That is correct, and those citations are listed in my written testimony. I would not be able to speak to them today, but they are listed.

Chair BLUMENTHAL. I thank you for coming here and talking about how it has saved veterans' lives, because they are at risk of suicide, and this law obviously has worked effectively to protect them.

Mr. Horwitz, Mr. Kopel referred to your statute as one that seems to have been framed to meet the due process standard, and that it is based on the best examples of laws throughout the country. He alluded to the resources necessary to implement such a law. Would a law from Congress that provided those resources and training encourage States to adopt the best kind of standards as you have advocated?

Mr. HORWITZ. I think the Federal Government could do a lot to encourage the proper standards for these laws. I do think we have seen—and Kim Wyatt is the best example of what her unit does, but where there is robust funding, you will see all sorts of services for getting these done—but also for the respondents and the petitioners. What you do not see is that, for instance, outside of King County where Ms. Wyatt works, the implementation is really dif-

ferent. What we are seeking is those Federal resources to make sure that the same processes that we have seen work in Washington—King County—can go in every county that needs this.

I will say that suicide—and, you know, from my testimony you know that I care a lot about this. Some of the highest suicide rates are in rural counties who are least able to afford the types of training, the types of investments that other counties have done. I think as a suicide prevention tool, I think the Federal Government has a big role to play in providing that technical assistance, that training, and the resources to really develop a process so things do not fall through the cracks. There are also the types of services that would make this really work.

Chair BLUMENTHAL. We have been talking a little bit about the protective orders, domestic violence protective orders. They impose restraints on constitutional rights, do they not?

Mr. HORWITZ. They certainly do, well beyond what an extreme risk protection order does. Domestic violence restraining orders can often keep you from your bank account, from your kids, from your home, and in some States even on a temporary basis your firearm. What we are talking about here is just one slice of that, but based on the same standard, it is a very surgical type of tool here, and that is the point of this. I was glad to see Mr. Kopel talking about ways that we could agree on this, because I do think we can do that. I think we can get there, I think we can make this tool safe to use around the country. I think we can meet, come to the middle, and find agreement and make sure that we are saving lives.

Chair BLUMENTHAL. I was encouraged as well, quite honestly, by his statement to that effect, and I thank him for his testimony today but also his candor in describing what he knows and what he does not know, because not all of us are experts on all the facets of these laws. But just from a constitutional standpoint, the restraints on liberty involved in domestic violence orders, in fact, they are called “restraining orders” because they restrict liberty. The civil commitment statute, which takes away—

Mr. HORWITZ. Right.

Chair BLUMENTHAL [continuing]. Somebody’s liberty, there are all kinds of ways in which those fundamental liberties are impinged to keep society safe, and they establish procedures to do it so that those orders are fact-based, and a burden of showing those facts are put on the person who would seek to take away that liberty or any other rights. That basic concept is what we have here, and the idea that an order expires if it is unchallenged or unverified within a period of time and a firearm is then returned certainly is a source of protection, is it not?

Mr. HORWITZ. It is. As Mr. Kopel said, we really believe that at the end of the order, the firearm should be returned. It should not be a complicated process. There are options to renew, but at the same burden as the original. It doesn’t—the burden should not shift from the petitioner in those circumstances. If there is a renewal petition made, it should again be on the petitioner to plead the elements of the statute.

Chair BLUMENTHAL. In a certain sense, we can actually not only encourage States to adopt these kinds of statutes, but also elevate

the level, the quality of those statutes, if we offer incentives for them to do it in the form of grants and other support.

Mr. HORWITZ. Right. I mean, as Senator Cruz said, the States are all over—you know, are the laboratories of democracy, and there are different processes in different States, and I think you are starting to see some, you know, coalescing around some of the best practices there, and hopefully, the Federal funding can really improve that and make that—continue to make that process, that coalescing develop so that the law—we learn from what the best practices are, we learn from people like Kim Wyatt what really works, and that we end up developing a program that saves lives across the country.

Chair BLUMENTHAL. I think, Ms. Wyatt, I asked you earlier about the importance of resources to your unit, and you have a very well-staffed unit with experts and prosecutors and so forth, which has costs. Could you talk a little bit about the value that Federal resources would have to help you implement the best practices of that unit?

Ms. WYATT. Sure. Just to give a little context, you know, we are evolving as our unit has grown since January 2018. Last year, in 2020, we had 73 law enforcement petitions, ERPOs, and 6 were from families. We realize on a daily basis the need to educate the public and educate the community, from faith leaders to school officials, therapists, medical providers, law enforcement throughout the whole State, and Federal authorities or Federal law enforcement as well. There is a need overall to educate the public because if you have a law and nobody knows about it, then it's not doing any of us any good. That would be the number one thing, is to get public education out. Then the second thing that I think is really critically important is to have funding for individuals who are implementing ERPO laws in their State, or to be able to create a model policy for law enforcement so law enforcement understands how we are supposed to serve these orders, which are very similar to other civil protection orders. Once we created a model policy and assisted law enforcement in our county, we had much more buy-in from our local law enforcement because it was this tangible, attainable task.

I would suggest doing some of those things, but education is the number one thing. Then the second is to bring all the system players together, so that folks from the clerk's office where the orders will be filed to victim advocates who may be reaching out to families to also guide their loved one who is in crisis to get some resources, I think that is critically important. One area where we lack in our State is the need to have some money for individuals that are subject to the ERPO who need a behavioral health evaluation. Funding is needed to be able to guide those individuals to get that evaluation if it is court-ordered and to be able to get them some help once they have been subject to one of these orders. I think that is critically important.

Chair BLUMENTHAL. Thank you very much.

I am going to yield to Senator Cruz. I have a few final questions, but in case he has to leave, I will yield.

Senator CRUZ. Thank you, Mr. Chairman. I have got a couple of questions. Let me start with Mr. Kopel.

Mr. Kopel, since you testified 2 years ago, additional States have enacted red flag laws, and multiple States have amended their laws, and it seems that they have all amended them in the direction of providing less protection of due process and less protection of Second Amendment rights. For example, California amended its law to allow a disgruntled coworker to initiate the process for confiscating a fellow coworker's firearm.

Do you agree that the trend is for these laws to get broader and broader and less and less protective of fundamental rights? If so, why do you think this is happening?

Mr. KOPEL. Because maybe it is the slippery slope that always happens on all kinds of laws. As people get it enacted in one way and say look at how narrow it is, and then when it is there, then they start thinking of ways how to broaden it further and further. Again, I think Connecticut has the right approach on saying anybody who has got a concern about someone else can come to a law enforcement officer, a peace officer, or a State's attorney and bring that problem forward. But they cannot—just because you had a fight with a guy at work, you cannot file a petition yourself against that individual. Law enforcement is supposed to do its own independent investigation, and that seems the best way to start off the process at the beginning with the higher quality of information to give to the judge.

Senator CRUZ. Thank you for that, and I think that is a very good point. As we discussed earlier, I am a strong believer in federalism, and right now 19 States and the District of Columbia have red flag laws, and there is not much quality evidence about their effectiveness or lack thereof, although there is some good evidence demonstrating that they have a very high error rate. Could you give a bit more color on what the evidence and the data shows about these laws?

Mr. KOPEL. For a lot of folks, the RAND Corporation's continuing project on assessing—doing a meta-study of all the social science on the gun issue has found some things, particular gun controls to be effective, and in their evaluation of this, their view was none of the studies that exist so far meet our standards for data quality and persuasiveness, so there is nothing there from RAND's point of view. But even beyond that, I do not know of any study that has ever said there is a statistically noticeable change in crime or mass shootings, along with other crimes.

But I would also say that you do not have to—a law does not have to be proven to have a statistically significant effect to be beneficial. If you reduce homicide by half of a percent in a State, that may be, statisticians may not be able to see that and know that there is a cause and effect. But that is still a beneficial thing to do.

The suicide data is mixed. One study said that it went down—firearm suicide declined in Indiana and was replaced by other methods. Another study found in Connecticut, actually, firearm suicide did decline, but deaths by other methods went up.

On that, it is really important to know that there are lots of nearly as lethal substitutes for firearms, such as hanging, that have very high mortality rates as well. The theory that for every 10 or 20 of these confiscation orders that gets issued, 1 suicide was

prevented, is really just a hypothetical extrapolation, and it makes the mistake of saying that every form of self-harm was a suicide attempt. You know, a teenage girl who cuts her arm is not trying to commit suicide. She is certainly indicating she has got a serious problem. That 10- or 20-to-1 figure is not supportable because it assumes that every form of self-harm is an intentional suicide, which is definitely not true.

Senator CRUZ. Thank you.

Ms. Goeser, in your opening testimony, you testified that red flag laws can have a chilling effect that can cause victims to fear losing their rights if they seek help by talking with friends or family or psychologists. Can you elaborate on that concern, please?

Ms. GOESER. Sure. I think that when people fear that—you know, someone may be very, very, very depressed and still be concerned for their own safety, which I am sure to some people that does not make sense. But when people are concerned that they are going to lose their rights, they bottle up, like they are not going to want to share their feelings. I just think it's best that these people be able to get, you know, mental health help, and if they feel intimidated, if they feel like they might lose their rights, it can actually have the opposite effect from what you want.

Senator CRUZ. Advocates for red flag laws often focus on the benefit of removing a firearm from a potentially dangerous person, and there is no doubt that with someone with serious mental illness or an intent to do real harm, that that can be a very real benefit. But they also diminish the harm of removing a firearm from someone who might be a victim of violence, for whom that firearm might be the difference between surviving a violent attack and not surviving a violent attack. Do you agree with that?

Ms. GOESER. Yes, I have got to tell you this: I think—and I have gotten to know a lot of victims. I actually brought my friend Amanda Collins-Johnson with me. She is sitting just behind me here. She was brutally raped on her college campus. It was, of course, a gun-free zone, and it was in the student parking garage. She had her permit to carry, but because she was obeying that gun control law, she left her gun at home. She wasn't allowed to have it on campus. That is where a serial rapist found her on her way to her car in the student parking garage, and he brutally raped her, right there in the garage. I have gotten to know a lot of other victims, and they all want the ability to protect themselves. We also fear that—you know, some of our attackers are going to be released. You know, people seem to think that if you do a horrible violent crime, that you are just going to be in prison forever. That is not true. Murderers, really horrible people that do very violent things, they are let out of prison every day in this country, unfortunately. That is very scary for us, and victims want to be able to protect themselves.

Here is a scenario perhaps you have not thought of, which absolutely terrifies me. When my stalker, my husband's murderer, is released one day, what would prevent him from taking out a red flag on me to purposefully disarm me, so that he can harm me? That is terrifying. That is just something to think about.

Senator CRUZ. Thank you, Ms. Collins-Johnson, for having the courage to be here and allowing your story to be told. Ms. Goeser,

thank you for speaking on her behalf, and on behalf of so many victims of violence.

Ms. GOESER. Thank you.

Chair BLUMENTHAL. Thank you. Thank you, Senator Cruz.

You know, I am struck, as we come to the end of this hearing, by the points of agreement, perhaps unintentional. Ms. Goeser, your point about people who have mental illness perhaps being reluctant to talk to friends or professionals is exactly the point that Senator Durbin made. I do not know whether you recall, but he said people should not be separated from firearms simply because they have a mental illness. It is dangerousness, it is risk, it is potential harm to others. That murderer would have no basis, none, for going to a judge and saying Nikki Goeser is dangerous, a risk of harm to anyone. On the contrary.

Likewise, Senator Cruz and I are both federalists. I was a State attorney general for way longer than I have been a United States Senator. I believe in States' rights to enforce their own laws, indeed, to make their own laws, and that is the whole purpose of our proposed red flag statute, not only to encourage States to make their own laws, but to make them better, so when they do pass their laws, they look—thanks to Mr. Kopel for his compliment to Connecticut—more like Connecticut than, say, one of the other States that he found less protective of constitutional rights. If they are going to be laboratories of democracy, better to elevate the results of those laboratories than let them, kind of, muddle along and fail to protect the rights of American citizens.

I think there is a lot here where we have common ground, as long as we do not become distracted. I understand your point about gun-free zones, about permitting the most heinous kind of law breakers, perhaps, to go free and threaten others. We ought to prevent that. But we are talking here about a more narrowly crafted law with a more narrow purpose that can be surrounded by all kinds of protections relating to what has to be proved in the way of factual evidence, the standard that has to be met, not just probable cause, the protections for individuals—you know, you could say that someone who is unable to afford an attorney has to be provided with one. I am just thinking out loud here. But my hope is that we can go forward and, sort of, focus on the common ground because if we do want States to be the laboratories of democracy, better to make them good laboratories and protective of constitutional rights than allow them to just go forward without encouragement to adopt higher standards.

You know, I think Mr. Kopel has been very frank on the issue of whether there are authoritative studies. A lot of the evidence here is anecdotal. It relies on common sense, that if somebody says, "I am going to shoot people in Parkland, I am going to kill students," and as Senator Graham has said, the shooter practically took out an ad in the newspaper and said, "I am dangerous," that it makes sense to give the police—and I take his point about the police, which is in the Connecticut statute—the authority to make their case, maybe screened by a prosecutor, as happens in the State of Washington. We have heard Ms. Wyatt describe that procedure, with all kinds of protections and bells and whistles, rather than allowing that shooter to just go ahead. I think I am determined to

try to seize that common ground and make the case that we can work together on these kinds of statutes.

I am willing to hear from any of the witnesses who want to make any sort of final remarks, or Senator Cruz if he has anything. Mr. Horwitz?

Mr. HORWITZ. I just want to thank everybody from the Committee, Mr. Chairman, the Ranking Member, for giving us a fair undertaking. I really believe that we can reach an agreement here. I think it is important to save lives. I think we can protect due process, we can protect constitutional rights, and save lives. For everybody on this panel, I think we want to come together, and that is what we want to do, is save lives. I hope the Members of this Committee can hear what we have taken today, craft something that really works, and save lives. Thank you for this time. I'm deeply appreciative of being here today, and, for this very serious consideration.

Chair BLUMENTHAL. Thank you. Thank you to all the witnesses. Thanks to Senator Cruz and all the colleagues who appeared here.

The record will remain open for 1 week, and anyone with questions can submit them. We appreciate your being here today. Thank you very much. Hearing is closed.

[Gavel is tapped.]

[Whereupon, at 5:04 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

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United States Senate Subcommittee on the
Constitution

Stop Gun Violence:
Extreme Risk Order / “Red Flag” Laws

April 28, 2021
226 Dirksen Senate Office Building
2:30 P.M.

Written Testimony of David B. Kopel

Adjunct Scholar, Cato Institute, Washington, D.C.
Research Director, Independence Institute, Denver, Colorado.
Adjunct Professor of Constitutional Law, Denver University, Sturm College of Law.
www.davekopel.org.

Revised May 2, 2021

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Introduction

The United States Senate Subcommittee on the Constitution has jurisdiction over “Enforcement and protection of constitutional rights” and “Statutory guarantees of civil rights and civil liberties.” The Subcommittee does not have jurisdiction over general crime control matters or law enforcement grants, which are instead in the jurisdiction of the Subcommittee on Criminal Justice and Counterterrorism.¹ As the jurisdictional statement of the Subcommittee on the Constitution affirms, Congress has the duty to enforce and protect the people’s rights, rather than passively relying only on the judicial branch to do so. This Subcommittee is therefore a good forum for the examination of state laws that allow a person to be stripped of Second Amendment rights and of analogous rights under state constitutions, and to be subject to the uncompensated confiscation of property.

So-called “red flag” laws, or “extreme risk protection orders”, have been enacted in 19 States and the District of Columbia.²

¹ United States Senate, Committee on the Judiciary, *Subcommittees*, <https://www.judiciary.senate.gov/about/subcommittees>.

² CAL. PENAL CODE §§ 18125, 18150; COLO. REV. STAT. § 13-14.5-103; CONN. GEN. STAT. § 29-38C; 10 DEL. CODE ANN., §§ 7703-7704; D.C. CODE ANN. §§ 7-2510.02-04; FLA. STAT. § 790.401; HAW. REV. STAT. ANN. § 134-64(f); 430 ILL. COMP. STAT. ANN. 67/35(c), 67/40(c); IND. CODE ANN. § 35-47-14-2; MD. CODE ANN. PUB. SAFETY § 5-602; MASS. ANN. LAW. ch. 140 § 131R; NEV. REV. STATS. § 33.500 et seq.; N.J. STAT. ANN. §§ 2C:58-23-24; N.M. STAT. ANN. § 40-17-2; N.Y.C.P.L.R. LAW §§ 6340-47; OR. REV. STAT. ANN. § 166.527; R.I. GEN. LAWS §§ 8-8.3-1 et. seq.; VT. STAT. ANN. tit. 13 §§ 4053-4054; VA. CODE ANN. § 19.2-152.13, et seq.; WASH. REV. CODE ANN. § 7.94.030.

Such orders can be legitimate when fair procedures accurately identify imminently dangerous individuals. There are no states that have sufficient due process from start to finish. A proper red flag statute would incorporate the best practices found among the various state laws. These include:

- Confiscation petitions only from law enforcement officers or prosecutors (e.g., Connecticut).
- Ex parte confiscation petitions may be granted only by clear and convincing evidence (Oregon).
- Ex parte petitions should be allowed only when the petitioner provides specific evidence that an ex parte proceeding is necessary (partially so in Vermont).
- Confiscation orders may be issued only if the court finds there is no reasonable alternative (e.g., Connecticut, Nevada).
- Respondents may have the benefit of state-paid counsel (Colorado).
- A confiscation order issued after an adversarial hearing must be based on clear and convincing evidence (most modern statutes).
- Accusers must appear in court, testify under oath, and be subject to cross-examination (the opposite of the model currently being pushed by the gun control organizations, and adopted in some states).
- Automatic termination of orders after the time limit expires (most modern statutes).
- Orders may be renewed only by presentation of proof to the same standards as was needed for the original order (same).
- A respondent may have a short period of time to peaceably surrender the firearms, unless the court finds based on specific facts of the case that immediate confiscation is necessary (Vermont, Oregon, Washington).
- The respondent's firearms may be directly given to and stored by any third party who can lawfully possess firearms (above, plus Connecticut, Florida, but there with the flaw that police must confiscate the guns first).
- Government agencies that store confiscated arms must exercise care so that the arms are not damaged or stolen (most modern laws).
- Government agencies may not charge storage fees (no protections in current laws; exorbitant fees are common in California).
- Upon the termination of an order, the arms must be promptly returned to the owner, without the owner needing to file court petition or other paperwork (some modern statutes).
- Innocent victims of knowingly false accusations should have a civil remedy (included in the Colorado bill that passed the House but deleted in the Senate).

When Confucius was asked what would be the first step if a government sought his advice, he answered, "It would certainly be to rectify the names. . . . If the names

are not correct, language is without an object.”³ Many bills that claim to be about “Extreme Risk Protection Orders” actually cover much lower-level risks, or just “a danger.”

The term “red flag” is notable. In modern automobile racing, a red flag signals that everyone must cease activity. A red flag is not waved at a dangerous driver; rather, a red flag shuts down everyone.⁴ The first “red-flag law” was enacted in the United Kingdom in 1865. The purpose was to stifle the use of automobiles, because autos competed with railroads and horse-drawn carriages, and reduced the demand for buggy manufacturers and horse breeders. According to the 1865 statute, every “road locomotive”—what we today call an “automobile”—had to have a three-person crew. One of the crew shall “precede such Locomotive on Foot by not less than Sixty Yards, and shall carry a Red Flag constantly displayed” to “warn the Riders and Drivers of Horses of the Approach of such Locomotives.” The effect was to render the automobile nearly useless, since it could not travel faster than the walking speed of the red flagman. For good measure, the statute limited automobile speed to 2 miles per hour in towns, and 4 M.P.H. elsewhere. The law did succeed in repressing the use of automobiles until Parliament reformed it in 1896, removed the red flag requirement, and substantially raised speed limits.⁵

Some people are concerned that today’s “red flag” gun laws are meant in the same broadly repressive spirit as the “red flag” automobile rules and laws from which they take their name. Presuming that at least some of modern proponents do not so intend, this written testimony will not use the term “red flag.” Nor will it use the term “extreme risk protection orders,” which are deliberately misleading description of laws that are not limited to “extreme” risks.

Instead, the testimony will generally use the term “gun confiscation order” (GCO). The term is accurate, since every so-called “red flag” law creates a process for the confiscation of firearms.

Persons who favor firearms confiscation with little due process should remember that the system they are creating will eventually be extended to other topics. That has long been the pattern for gun control legislation. For example, the Marihuana Tax Act of 1938 was directly patterned on the National Firearms Act of 1934, using the congressional tax power to exercise what amounted to a national police power, even though the Constitution refused to grant Congress that general power. Likewise, the current federal prohibition on the personal possession of marijuana comes from the Controlled Substances Act of 1971, which used the Gun Control Act of 1968 as a model for the notion that the constitutional grant of congressional power “To regulate Commerce...among the several States” was actually a grant of power to criminalize the mere noncommercial, intrastate possession of an item. Extreme measures for property confiscation, warrantless searches and seizures, forfeitures, and other

³ CONFUCIUS, THE ANALECTS OF CONFUCIUS 13:3, at 60 (Simon Leys trans., W. W. Norton 1997).

⁴ For example, because lightning or a crash has made it too dangerous for anyone to drive.

⁵ British Locomotive Act of 1865, 28-29 Victoria ch. 83; John Scott-Montagu, *Automobile Legislation: A Criticism and Review*, 179 NORTH AMERICAN REVIEW 168 (No. 573, Aug. 1904), https://www.jstor.org/stable/25119591?seq=1#metadata_info_tab_contents.

abuses that were created for one controversial item or activity eventually become generally applied.⁶

I. Problems with some statutes

A. Too many gun confiscation orders are wrongly issued.

Any procedure that allows a judge to hear only one side of a case necessarily will produce a high error rate. The data from the two states with the oldest laws indicate diverse problems.

In Indiana, firearms may be sued to a court-issued warrant issued by a judge based on certain conditions. Thereafter, a prosecutor may file a petition for the government to retain the firearm, and the respondent has notice and an opportunity to appear. A study of Marion County, Indiana, from 2006 to 2013, found that prosecutors took an average of 144 days to file the petition, and courts then took an average of 140 days to hear the case—in other words, 284 days from the seizure of the firearm until the gunowner's opportunity to be heard.

"Court retention of the seized firearms closely tracked the gun owner's failure to appear in court for the retention hearing; indeed, after the first year..., the frequency of failure to appear was very close, if not identical, to the frequency of court retention of the weapons." "The court dismissed of cases at the initial hearing, closely linked to the defendant's presence at the hearing."⁷

In the confiscations where the firearms possessor did not contest the confiscation, there were likely many who should not have firearms, due to danger to others. There

⁶ See David B. Kopel & Trevor Burrus, *Sex, Drugs, Alcohol, Gambling, and Guns: The Synergistic Constitutional Effects*, 6 ALBANY GOVERNMENT LAW REVIEW 306 (2013), <https://ssrn.com/abstract=2232257>.

⁷ George F. Parker, *Circumstances and Outcomes of a Firearm Seizure Law: Marion County, Indiana, 2006-2013*, 33 BEHAVIORAL SCIENCE & THE LAW 308 (2015). According to the article, the Indiana GCO law is not much used outside of Indianapolis (Marion County).

Besides the problem of orders that are later overturned, some orders that are not overturned may be inappropriate. Case reports of particular confiscations are not widely available. But the Uniform Law Commission obtained an annual report from the Santa Barbara County, California, Sheriff's Office describing gun confiscations in 2016. There were eight confiscations, and most of them seem appropriate, at least as described by the Sheriff's Office. But in another case:

June of 2016, a 57-year-old Santa Maria woman was involved in a domestic disturbance with her husband. The woman struck her husband in the leg and poured soda on his head after discovering text message and a partially nude photograph a woman had sent to her husband's phone. The suspect began carrying her Glock handgun within her residence. The woman was arrested for cohabitant battery and a GVRO was obtained to confiscate the Glock handgun.

Office of the Sheriff, Santa Barbara County, *Santa Barbara Sheriff's GVRO (Firearms Emergency Protective Orders)*, Sept. 29, 2016.

were also probably some who were inaccurately targeted, but who lacked the resources to contest a confiscation. They might not have been able to take off work. Or they might not have been able to afford an attorney.

A Connecticut study revealed what may be a different set of problems. Researchers examined 764 gun confiscation warrants. They found that mandatory data were missing most of the time: “Another reporting gap in the law and associated policies is that the outcome of the mandatory hearing after the seizure (where judges decide whether the firearms can be returned) is not reported to DMHAS. In over 70% of the cases, the outcome of the hearings was unknown.”⁸ One possibility is that Connecticut courts are extremely sloppy in filing mandatory reports. Another possibility is that, at least sometimes, the mandatory hearing never takes place, and the police just keep the guns without a hearing.

If for simplicity we say that exactly 70 percent (not “over 70%”) of cases lacked full records, then there were 229 out of the 764 cases in which there was a report of the mandatory hearing. Of these, the guns were returned to their owner in 20 cases (9%). This would indicate that the ex parte process in Connecticut has an error rate of 9%.

As detailed in Part II.H, below, there has been a problem in Connecticut of respondents being pressured by government not to retain counsel to contest seizures. The reversals of ex parte confiscation orders might have been higher than 9% if some respondents not been discouraged from exercising their right to counsel. The missing 70% of the mandatory reports do not inspire confidence in the system’s transparency or conscientiousness.

Error rates for newer laws based on the GLCPGV/Bloomberg model are likely to be even higher. Connecticut requires that a petition be filed by two law enforcement officers only after they have conducted an independent investigation. Indiana also requires that petitions be filed by law enforcement. The GLCPGV/Bloomberg system, though, allows petitions to be filed by a very wide variety of people, including ex-girlfriends or ex-boyfriends. The GLCPGV/Bloomberg system does not require any corroborating evidence. Indeed, as Colorado’s bill moved through the legislature, legislators removed a requirement that evidence be “corroborated.”⁹

B. A gun control organization blocked a model law from the Conference of Chief Justices and the Uniform Law Commission.

In 2018, the Conference of Chief Justices asked the Uniform Law Commission (ULC) to draft a model law for “extreme risk protection orders.” The ULC convened a Study Committee representing diverse perspectives and expertise, such as the

⁸ Michael A. Norko & Madelon Baranoski, *Gun Control Legislation in Connecticut: Effects on Persons with Mental Illness*, 46 CONNECTICUT LAW REVIEW 1609, 1619 (2014). DMHAS is the Connecticut Department of Mental Health and Addiction Services.

⁹ Colo. Senate State, Veterans, & Military Affairs Comm., amendment L.064, Mar. 15, 2019, https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2019A/amendments/HB1177_L.064.pdf

National Sheriffs Association, International Association of Chiefs of Police, psychiatric experts, state courts, pro-gun and anti-gun advocates, pro-gun and anti-gun state legislators, and others.¹⁰ I was a member of the ULC Study Committee. The Committee overwhelmingly voted to recommend that the ULC move forward with drafting a model law. Support for a model law came from across the political spectrum, including all the state legislators, law enforcement, and the courts. Overt opposition to the model law was expressed only by the GLCPGV, which preferred that legislators use only the GLCPGV/Bloomberg model, and not the more careful and balanced approach that would likely be produced by the Uniform Law Commission. Perhaps, as a result of lobbying from GLCPGV and Bloomberg, the Uniform Law Commissioners later voted not to draft a model law.

C. Extreme laws will not be enforced in many jurisdictions.

The confiscation bill passed by the Colorado General Assembly had an effective date of January 1, 2020. But in some counties, the date might as well be “never,” since many counties and sheriffs’ offices have announced that they will not enforce the bill.¹¹

Throughout the United States, elected sheriffs have been declaring that they will adhere to their oaths to enforce the U.S. and state constitutions—which means that they will not enforce extreme laws that trample civil rights.¹²

Such local resistance is as old as James Madison’s Virginia Resolution and Thomas Jefferson’s Kentucky Resolution against the unconstitutional Sedition Act of 1798.¹³ The tradition has continued ever since, including in state and local refusal to

¹⁰ Uniform Law Commission, Study Committee on Extreme Risk Protection Orders, Nov. 30, 2018, Washington, D.C. Attendees from the Uniform Law Commission were Barry Hawkins, Co-Chair, Connecticut; Cam Ward, Co-Chair, Alabama; Steve Wilborn, Vice President, Kentucky; James Bopp, Jr., Commissioner, Indiana; Raymond Pepe, Commissioner, Pennsylvania; Steve Willborn, Interim Executive Director; Cam Pestinger, ULC Fellow (recorder). Stakeholder attendees were American Psychiatric Association, Colleen Coyle; Brady Foundation, Josh Scharff & Kelsey Rogers; Coalition to Stop Gun Violence, Kelly Roskam; Conference of Chief Justices/National Center for State Courts, Blake Kavanaugh; Giffords Law Center, Nico Bocour & David Chipman; International Association of Chiefs of Police, David Thomas; National District Attorneys Association, Cari Steele; National Rifle Association, Josh Savani; National Sheriffs’ Association, Jonathan Thompson; Senate Judiciary Committee, Aaron Cummings; University of Denver, David Kopel. Two subsequent telephonic Study Committee meetings in December included additional attendees.

¹¹ Sherrie Peif, *More counties join Second Amendment Sanctuary movement; recall efforts beginning to take shape*, COMPLETE COLORADO, Mar. 14, 2019, <https://pagetwo.completecolorado.com/2019/03/14/more-counties-join-second-amendment-sanctuary-movement-recall-efforts-beginning-to-take-shape/>. Complete Colorado is one of the largest daily newspapers in Colorado, based on online readership. It is affiliated with the Independence Institute.

¹² Dan Frosch & Jacob Gershman, *Rural Sheriffs Defy New Gun Measures*, WALL STREET JOURNAL, Mar. 10, 2019; Mary Hudetz *New Mexico Sheriffs’ Gun Laws Protest Follows Other States*, Associated Press, Mar. 1, 2019.

¹³ Virginia Resolution of Dec. 24, 1798, § 3; Kentucky Resolution of Nov. 10, 1798, §§ 1, 8, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 540,

assist enforcement of the Fugitive Slave Act of 1850.¹⁴ More recently, many states, counties, and cities have adopted “sanctuary” status against assisting enforcement of laws against illegal aliens,¹⁵ marijuana users, or gun owners.¹⁶

Sheriffs, county commissioners, and other elected officials always take oaths to uphold the United States Constitution and their state Constitution. The duty to uphold the federal and state constitutions necessarily requires not enforcing statutes that are contrary to the constitutions.

In New Mexico, many sheriffs stated that they would not enforce confiscation orders. So the legislative majority retaliated by authorizing lawsuits against law enforcement officers for injuries resulting from *any* decision not to enforce a statute or ordinance.¹⁷

Consider the practical effect of the new personal liability. A county ordinance sets a speed limit of 45 M.P.H. on a certain county road. A deputy working a speed trap uses a radar gun to identify vehicles traveling 47, 45, 49, 46, 45, 44, 48, and 61 M.P.H. The deputy ignores the three cars that were speeding less than 5 M.P.H. The deputy

543 (Jonathan Elliot ed., 1891). Elliot’s Debates is a five-volume collection of materials on Founding Era. It is available on-line at <https://memory.loc.gov/ammem/amlaw/twed.html>.

¹⁴ *E.g.*, *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859) (Wisconsin obstruction of federal slave catchers); James H. Read & Neal Allen, *Living Dead, and Undead: Nullification Past and Present*, in Sanford Levinson ed., *NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT* 111 (2016).

¹⁵ Immigration Legal Resource Center, *Growing the Resistance: How Sanctuary Laws and Policies Have Flourished During the Trump Administration* (2019), <https://www.ilrc.org/growing-resistance-how-sanctuary-laws-and-policies-have-flourished-during-trump-administration>.

¹⁶ See Tenth Amendment Center, *State of the Nullification Movement: 2019-20 Tenth Amendment Center Annual Report* (2020), <https://s3.amazonaws.com/TACHandbooks/2019-20-state-of-the-nullification-movement-report.pdf>

¹⁷ The statute orders law enforcement officers to file a petition, without taking time for further investigation: “A law enforcement officer shall file a petition for an extreme risk firearm protection order upon receipt of credible information from a reporting party that gives the agency or officer probable cause to believe that a respondent poses a significant danger of causing imminent personal injury to self or others by having in the respondent’s custody or control or by purchasing, possessing or receiving a firearm.” N.M. STAT. ANN., § 40-17-5(D).

The new statute authorizing lawsuits states that governmental immunity

does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights, failure to comply with duties established pursuant to statute or law or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties. For purposes of this section, “law enforcement officer” means a public officer vested by law with the power to maintain order, to make arrests for crime or to detain persons suspected of committing a crime, whether that duty extends to all crimes or is limited to specific crimes.

Id., at § 41-4-12.

pursues the 61 M.P.H. car and issues a ticket. Because the deputy ignored a legal obligation to enforce the county ordinance against the 47 M.P.H. car, three minutes after the car passed the deputy, the car hit a child who suddenly ran into the road. If the deputy had stopped the 47 M.P.H. vehicle to ticket it, the child would not have been injured. Under New Mexico's new statute, the child (or the child's parents) may sue the deputy personally.

Discretion is essential to law enforcement work. There are many situations in which law enforcement officers use discretion and choose not to investigate certain illegal acts, even when a complainant comes forward. If officers are worried about being personally sued whenever they decide not to investigate a violation of the law, officers will be much less effective, on the whole. Officers may divert their attention towards enforcement of less serious violations.

Depending on the situation and local mores, an officer might choose not to enforce violations of laws about: ticket scalping (such as when officers at a public event do not enforce against every instance of ticket scalping they observe);¹⁸ marijuana, indecent dancing,¹⁹ indecent waitering,²⁰ prostitution,²¹ bigamy,²² a minor misrepresenting his age in order to obtain an obscene (as to minors) book or magazine,²³ interference with communications²⁴ (such as listening to someone else's phone call without permission, as some parents of teenagers have been known to do), falsely representing oneself as incapacitated,²⁵ personal gambling,²⁶ and commercial gambling²⁷ (with certain exceptions, such as bingo and lotteries).

Can nonenforcement of any of these provisions cause "personal injury, bodily injury, wrongful death or property damage," for which an officer could be personally sued? People under the influence of marijuana sometimes perpetrate violent or property crimes against third persons. Failure to enforce sexual regulation laws in the early evening can lead to the transmission of a STD by midnight. When an officer decides not to investigate a citizen complaint that an individual is engaged in social gambling, the individual's gambling problem could soon result in health problems and property damage for others.

How often could law enforcement officers be sued for "failure to comply with duties established pursuant to statute or law"? No one can say for certain.

The New Mexico liability statute is an example of how some GCO advocates are willing to tear down established legal structures that stand in the way of confiscation. As discussed in Part III.A, Colorado created a special exemption from its rules

¹⁸ *Id.*, at § 30-46-1.

¹⁹ *Id.*, at § 30-9-14.1.

²⁰ *Id.*, at § 30-9-14.2.

²¹ *Id.*, at § 30-9-2.

²² *Id.*, at § 30-10-1.

²³ *Id.*, at § 30-37-6.

²⁴ *Id.*, at § 30-12-1.

²⁵ *Id.*, at § 30-16-12.

²⁶ *Id.*, at § 30-19-2.

²⁷ *Id.*, at § 30-19-3.

limiting no-knock raids, in order to allow confiscations to *always* be carried out by no-knock.

D. Social science studies

The Rand Corporation’s Gun Policy in America project has examined social science research on many different gun control laws. Rand “found no qualifying studies showing that extreme risk protection orders” decreased or increased “any of the eight outcomes we investigated,” such as violent crime, suicide, or mass shootings.²⁸

This should not be surprising. Gun confiscation laws are new, and few states have much experience; the oldest are Connecticut (1999), Indiana (2005), Washington (2016), and California (2016).

One study looked at suicide in Connecticut and Indiana. “Whereas Indiana demonstrated an aggregate decrease in suicides, Connecticut’s estimated reduction in firearm suicides was offset by increased nonfirearm suicides.”²⁹

The theory of confiscation laws is that if potentially suicidal persons are deprived of firearms, they will be much less likely to complete suicide because firearms are so much more lethal than other means. This is incorrect. Some other methods of suicide are nearly as likely as firearms to result in death. The figures are shooting 83.7%, hanging 76.7%, and drowning 67.2%.³⁰

Gun confiscation advocates, however, cite an article claiming that for every twenty gun confiscation orders, one suicide is prevented.³¹ The figure seems overstated for several reasons. First, in 55% of the confiscations, the respondent was taken to a hospital because of a mental health crisis. This indicates that many of the respondents could have been suicidal. If in the future they were less likely to commit suicide, the main reason might not have been that their gun was transported to a police station; rather, the life-saver was transporting the person in crisis to a place where treatment was provided.

²⁸ The eight outcomes studied by Rand were: Defensive Gun Use, Gun Industry Outcomes, Hunting and Recreation, Mass Shootings, Officer-Involved Shootings, Suicide, Unintentional Injuries and Deaths, and Violent Crime. Rand Corporation, *The Effects of Extreme Risk Protection Orders*, in Gun Policy in America (Apr. 22, 2020), <https://www.rand.org/research/gun-policy/analysis/extreme-risk-protection-orders.html>.

²⁹ Aaron J. Kivisto & Peter Lee Phalen, *Effects of Risk-Based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981–2015*, 69 PSYCHIATRIC SERV. 855 (2018), <https://ps.psychiatryonline.org/doi/10.1176/appi.ps.201700250>.

³⁰ Gary Kleck, *The effect of firearms on suicide*, in GUN STUDIES: INTERDISCIPLINARY APPROACHES TO POLITICS, POLICY, AND PRACTICE 319, table 17.3 (Jennifer Carlson et al. eds. 2019) (using “the largest set of suicides and suicide attempts ever employed in the computation of method-specific suicide fatality rates”). The low rates for some methods (e.g., cutting, drugs) indicate that these forms of self-inflicted injury are often a cry for help, and not an earnest attempt at fatality. *Id.* at 321–23.

³¹ Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut’s Risk-Based Gun Removal Law: Does It Prevent Suicides?* 80 LAW & CONTEMPORARY PROBLEMS 179, 206 (2017), <https://scholarship.law.duke.edu/lcp/vol80/iss2/8/> (“we estimated that approximately ten to twenty gun seizures were carried out for every averted suicide”).

The study categorizes every instance of self-inflicted injury that led to hospitalization as a suicide attempt.³² This is common practice in epidemiological articles, but it seems contrary to common sense. Deliberately shooting oneself in the foot is not the same as deliberately shooting oneself in the head. An intentional shot to the foot is a self-inflicted injury that would likely result in hospitalization, and it is a sign of a severe mental problem, but it is not a suicide attempt.

Shooting oneself in the head is not an act that allows for gradations. It is not possible for the head-shooter to attempt “just to wound.” Nor is gradation very easy for hanging and drowning. Self-poisoning is much easier to gradate. If the fatal dose of a particular prescription drug is twenty pills, taking eight pills may be a hospitalizable cry for help in the form of a suicidal gesture; taking eighty pills evinces a strong determination to end life.³³ Some items used in hospitalizable self-harm can be used in precise amounts, such as pills. Other items in self-harm are closer to all-or-nothing, like shooting or hanging. People who the most earnest intentions choose the means most likely to cause death, and people who have ambiguous intentions can choose means that are much less likely to result in death.

An article in the *Annals of Internal Medicine* described 21 cases of gun confiscation under California’s law.³⁴ The article did not conduct statistical analysis. Instead, the authors examined records of 159 gun confiscation orders in California. Of the 159 confiscations for which the authors obtained information, there were “21 cases in which ERPOs were used in efforts to prevent mass shootings.” The 21 cases are described in the article’s appendix, and not all of them support the utility or need for gun confiscation orders. In some cases, the court denied a confiscation order. In others, confiscation orders were issued, but were superfluous, since the respondents had been arrested for various crimes, and the firearms were seized pursuant to the arrest.

However, some of the cases did involve individuals who had spoken or written about shooting other people. Many of these individuals exhibited symptoms of mental illness. From a public safety viewpoint, the confiscation of their firearms was appropriate. Unfortunately, the appendix does not indicate that any of these individuals were given additional mental health treatment, although it is possible that treatment was provided in some instances not recorded in court or police records.

³² *Id.* at 201, n.86 (“Case fatality rates for specific suicide methods in the Connecticut population are calculated by combining data on suicide deaths with data on hospital discharges for intentional self-inflicted injuries, using 2012 as the index year.”).

³³ Pills can be taken with exact dosages. As for knives, the Romans and the Japanese samurai carried out suicide in absolute earnest by slicing their intestines. Other people put themselves in the hospital with lesser, survivable knife injuries not inflicted in a manner to cause almost immediate death.

³⁴ Garen J. Wintemute, Veronica A. Pear, Julia P. Schleimer, Rocco Pallin, Sydney Sohl, Nicole Kravitz-Wirtz, & Elizabeth A. Tomsich, *Extreme Risk Protection Orders Intended to Prevent Mass Shootings: A Case Series*, *ANNALS OF INTERNAL MED.* (2019), <https://annals.org/aim/fullarticle/2748711/extreme-risk-protection-orders-intended-prevent-mass-shootings-case-series?searchresult=1>.

Because mass shootings are a small percentage of total homicide, it is unlikely that preventing even several mass shootings would result in a statistically significant effect on homicide rates. That said, because mass shootings are so traumatic to the American public in general, by causing widespread fear, a law that stops some mass shootings is very beneficial—provided that the law is fair and does not harm innocents.

There are no data on how many people who make threats to shoot people carry out such threats. It is possible that the vast majority of such threats are just idle words. Even so, it is prudent to disarm individuals who make specific, credible threats. It is possible for a law to be beneficial in certain cases, even if the number of such cases is too low to have a statistically significant impact.

Another study examined crime and suicide in Connecticut, Indiana, Washington, and California. It found no statistically significant changes in “murder, suicide, the number of people killed in mass public shootings, robbery, aggravated assault, or burglary.”³⁵

E. Badly written laws endanger public safety

The GLCPGV/Bloomberg model, with its flimsy and unreliable procedures for ex parte orders, ensure that orders will be issued against innocent and peaceable individuals. The problem is aggravated by the GLCPGV/Bloomberg mandates for automatic, no-notice, surprise confiscation.

One person, Gary J. Willis, a 61-year-old black man, has been killed by the GLCPGV/Bloomberg system. In November 2018, a month after Maryland’s new GCO law went into effect, police in Ferndale, Maryland, showed up at Mr. Willis’s house at 5:17 A.M., announcing that they had come to take his guns. They talked for a while, then argued, and then the police shot him to death.³⁶ The victim’s niece said that her late uncle, “likes to speak his mind,” but “wouldn’t hurt anybody.” “I’m just dumbfounded right now,” she continued. “They didn’t need to do what they did.”

In the GLCPGV/Bloomberg model, a respondent never receives notice of anything until the police show up to confiscate his or her firearms. This creates an inherently volatile and dangerous situation for law enforcement and the public. The safer approach is to authorize no-notice confiscation only when a court has made specific factual findings about why such an approach is needed. *See* Part III.B, below.

³⁵ John R. Lott & Carlisle E. Moody, *Do Red Flag Laws Save Lives or Reduce Crime?* (Dec. 28, 2018), <https://ssrn.com/abstract=3316573>. I have co-authored an article with Professor Moody: David B. Kopel, Carlisle E. Moody & Howard Nemerov, *Is There a Relationship between Guns and Freedom? Comparative Results from 59 Nations*, 13 TEXAS REVIEW OF LAW & POLITICS 1 (2008), <https://ssrn.com/abstract=1090441>.

³⁶ *Maryland officers serving “red flag” gun removal order fatally shoot armed man*, CBS/AP, Nov. 6, 2018, <https://www.cbsnews.com/news/maryland-officers-serving-red-flag-gun-removal-order-fatally-shoot-armed-man/>; Colin Campbell, *Anne Arundel police say officers fatally shot armed man while serving protective order to remove guns*, BALTIMORE SUN, Nov. 5, 2018, <https://www.baltimoresun.com/news/maryland/crime/bs-md-aa-shooting-20181105-story.html>.

Given the dangers imposed by the GLCPGV/Bloomberg model, it is no wonder that so many sheriffs are refusing to put their deputies and the public in harm's way to enforce a confiscation order that has a significant possibility of being wrong, and that can easily be obtained by a spurned dating partner.

A second danger of the GLCPGV/Bloomberg system is the disarmament of innocent victims. In St. Cloud, Florida, a drifter named Jon Carpenter (110 pounds, brown eyes, black hair) threatened an elderly couple. A confiscation order was issued against a different Jon Carpenter (200 pounds, hazel eyes, bald).³⁷

In another Florida case, an ex parte confiscation order was issued against a man because of a pair of social media posts. The first was a photo of an AR-15 that he had built at home (a perfectly legal act), along with the caption "It's done. Hooray." The second post criticized teenage anti-gun activists for trying to take away people's rights.³⁸

Eighty-four-year-old Stephen Nichols had served in the Korean War and for six decades as a police officer in Tisbury, Massachusetts. In retirement, he worked as a school crossing guard. One day at a diner, he complained that the school's assigned police officer was often "leaving his post" to buy coffee. Nichols worried that a criminal might exploit the officer's frequent absences and "shoot up the school." As a result, a Massachusetts "red flag" order was issued against Nichols; his firearms license, which had first been issued in 1958, was confiscated, as were all his guns and ammunition. It took nearly half a year before his firearms license was restored, after Nichols filed suit.³⁹

After surveying other cases in which gun were confiscated because of lawful First Amendment activity, and describing how some GCO statutes encourage such abuse, two scholars recommended the following reforms:

- "First, and perhaps most obvious, speech that is protected by the First Amendment should be eliminated from judicial consideration of whether an ERPO is warranted."
- Second, statutory "language should make it clear that a threat of violence means a true threat of violence not sheltered by the First Amendment."

³⁷ Craig Patrick, *Red flag laws: Mistaken identity leads to revocation of veteran's firearms license*, Fox 13 News (Tampa Bay), Feb. 4, 2020, <https://www.fox13news.com/news/red-flag-laws-mistaken-identity-leads-to-revocation-of-veterans-firearms-license>.

³⁸ Jacob Sullum, *States Are Depriving Innocent People of the Their Second Amendment Rights*, REASON, Nov. 2019, at 49.

³⁹ Rich Saltzberg, *Stephen Nichols reinstated as crossing guard*, MARTHA'S VINEYARD TIMES, Oct. 14, 2019, <https://www.mvtimes.com/2019/10/14/stephen-nichols-reinstated-crossing-guard/>; Rich Saltzberg, *Nichols remains without guns or license*, MARTHA'S VINEYARD TIMES, Dec. 11, 2019, <https://www.mvtimes.com/2019/12/11/nichols-remains-without-guns-license/>; Rich Saltzberg, *Nichols sues to get back gun license*, MARTHA'S VINEYARD TIMES, Dec. 20, 2019, <https://www.mvtimes.com/2019/12/20/nichols-sues-get-back-gun-license/>; Rich Saltzberg, *Nichols' license to carry restored*, MARTHA'S VINEYARD TIMES, Feb. 12, 2020, <https://www.mvtimes.com/2020/02/12/nichols-license-carry-restored/>. See also Charles C.W. Cooke, A "Red Flag Law" Horror Story, AMERICA'S 1ST FREEDOM 56 (Jan. 2020).

- “Third, if statutes continue to permit the use of protected speech to determine whether an ERPO should be granted, then those statutes should be amended to specify that protected speech be given less weight than an individual’s prior conduct, which generally does not trigger any First Amendment issues.”
- “Fourth, once again assuming that statutes continue to permit the use of protected speech in ERPO determinations, then not only should such speech weigh less than a person’s conduct, but statutes should impose clear temporal-recency requirements and quantity mandates....[T]he older the statement, the less that speech should factor into the ERPO equation....[S]tatutes should specify that there must be at least more than one instance of disturbing, but protected, speech within the temporal-recency time period in order for the speech to be considered.”
- “Fifth, and at a macro level beyond individual red flag laws, the Supreme Court must clarify what constitutes a true threat of violence.”⁴⁰

Even when respondents finally get a hearing, innocent people may still be wrongfully disarmed if they are denied basic due process rights at the hearing—such as the right to counsel or the right to cross-examine the accuser.

At the Uniform Law Commission meeting, I raised the problem of disarming the innocent. GLCPGV representative David Chipman retorted that disarmed victims could just buy a replica gun and scare the criminals away.

Many “gun control” advocates oppose gun ownership and Second Amendment rights. For example, in *District of Columbia v. Heller* an amicus brief of New York City Mayor Michael Bloomberg and the Legal Coalition Against Violence (which is now part of the GLCPGV) contended that the Founders had not “intended the Amendment to protect the right to possess guns for self-defense and hunting.”⁴¹ They concluded: the Second Amendment “does not constrain firearms regulations in the District of Columbia or in the States or their political subdivisions.”⁴² The same groups that today are writing extreme confiscation laws are the same groups that have opposed any right to gun ownership. No wonder that they are blasé about depriving innocent citizens of their right of self-defense.

Some people argue that ex parte confiscation orders based on low standards are acceptable because the harm inflicted will last only a few weeks, until the respondent receives a hearing and can present her side of the story. Sometimes, little harm will

⁴⁰ Clay Calvert & Ashton Hampton, *Raising First Amendment Red Flags About Red Flag Laws Safety, Speech and the Second Amendment*, 30 GEORGE MASON UNIVERSITY CIVIL RIGHTS LAW JOURNAL 351 (2020), https://crljdotorg.files.wordpress.com/2021/04/gmc305_crop.pdf.

⁴¹ Brief of Amici Curiae Major American Cities, The United States Conference of Mayors, and Legal Community Against Violence in Support of Petitioners, *District of Columbia v. Heller*, No. 07-290, at 18 n.3 (Jan. 11, 2008), https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs.pdf%2007-08-07-290-PetitionerAmCuMajorAmerCities.pdf.

⁴² *Id.* at 25.

be done. If hearings are prompt, an individual might miss a few weekends of target practice. But there may be more substantial harms as well.

It is well-known in family and domestic law that ex parte procedures with low standards of evidence are often abused by angry spouses in a divorce, jilted lovers, and so on.⁴³ The GLCPGV system is well-adapted for abusers to disarm their victims—and if the abusers so choose, to attack a victim who has been rendered defenseless.

Of course, the risk of criminal prosecution deters some attacks—but some attacks are perpetrated by irrational people who are consumed by rage or who don't plan on living much longer. A good law includes fair procedures to ensure that arms are confiscated only from dangerous people, not from innocent people who are targeted by domestic abusers.

Further, “These laws may also overstate the relationship between gun violence and mental illness, which propagates stigma and may discourage people from seeking mental health treatment.”⁴⁴

New York's 2013 SAFE Act is not formally a “red flag” law, but it has the same effect. A health professional may send a county a notice that the professional believes the individual to be a danger to self or others. The notice automatically prohibits the individual from possessing arms for five years. There is no requirement that the individual be notified that her continuing possession of firearms has just become illegal. There are no procedures for the individual to contest the decision of the health professional. The New York system has been criticized for being stigmatizing, for deterring people from seeking mental health care, for being grossly overbroad, and for its absence of due process.⁴⁵

II. Fair procedures for petitions and hearings

According to the American Civil Liberties Union, gun confiscation laws may “be a reasonable way to further public safety. To be constitutional, however, they must at a minimum have clear, nondiscriminatory criteria for defining persons as dangerous and a fair process for those affected to object and be heard by a court.”⁴⁶

⁴³ *E.g.*, Stop Abusive and Violent Environments, The Use and Abuse of Domestic Restraining Orders (Feb. 2011), www.saveservices.org/downloads/VAWA-Restraining-Orders; Monit Cheung, *False Allegations on Child Sexual Abuse: Annotated Bibliography*, <https://www.uh.edu/socialwork/docs/cwep/bib%20False%20Sexual%20Abuse%20Allegations%20and%20Children.pdf>.

⁴⁴ Shelby Arnold, Alisha Desai, & David DeMatteo, *Keeping Guns Away from Potentially Dangerous People*, 49 *Am. Psychol. Ass'n* 27 (no. 8, 2018).

⁴⁵ See James B. Jacobs & Zoe Fuhr, *Preventing Dangerous Mentally Ill Individuals from Obtaining and Retaining Guns: New York's SAFE Act*, 14 *GEORGETOWN JOURNAL OF LAW & PUBLIC POLICY* 77 (2016).

⁴⁶ Louise Melling, Deputy Legal Director ACLU, Director of ACLU its Center for Liberty, *The ACLU's Position on Gun Control*, Mar. 26, 2018), <https://www.aclu.org/blog/mobilization/aclus-position-gun-control>.

A. Procedural due process standards

Constitutional requirements of procedural due process are at their height when an individual is deprived of a “fundamental” enumerated right. The right to keep and bear arms is such a right.⁴⁷

Courts have identified seven key elements in procedural due process:

1. Notice
2. A neutral decision-maker
3. An opportunity to make an oral presentation
4. The opportunity to present evidence
5. The opportunity to cross-examine witnesses and respond to evidence
6. Right to representation by counsel
7. A decision based on the record, and reasoning for the result.⁴⁸

As will be detailed in this Part II, an *ex parte* system deprives individuals of five of the seven elements of due process: notice, opportunity make an oral presentation, opportunity to present evidence, cross-examination and response to evidence, and the right to counsel.

As will also be detailed, even at a subsequent hearing, the GLCPGV/Bloomberg system continues to deprive the individual of due process, because the individual is not allowed to cross-examine adverse witnesses. Indeed, the adverse witnesses, including the accuser, never have to appear in court; they can submit affidavits instead.

B. Petitions should be filed after an investigation by law enforcement

In Connecticut, a confiscation petition may be filed only by law enforcement officers or a state’s attorney. Any person—including family members, former dating partners, neighbors, co-workers, and so on—can meet with law enforcement or a state’s attorney and request a petition. Then, officers or a state attorney must conduct their own investigation, moving forward with a petition if they find it warranted.⁴⁹ In

⁴⁷ McDonald v. City of Chicago, 561 U.S. 742, 778 (2010).

⁴⁸ Rogin v. Bensalem Township, 616 F.2d 680, 694 (3d Cir. 2010). The Third Circuit’s list is drawn from Morrissey v. Brewer, 408 U.S. 471 (1972). *See also* Vitek v. Jones, 445 U.S. 480 (1980); Pierce v. Thaler, 604 F.3d 197 (5th Cir. 2010); McQuillion v. Duncan, 306 F.3d 895 (9th Cir. 2002); United States v. Davila, 573 F.2d 986 (7th Cir. 1978); McGhee V. Draper, 564 F.2d 902 (10th Cir. 1977); Childs v. United States Board of Parole, 511 F.2d 1270 (D.C. Cir. 1974).

⁴⁹ CONN. GEN. STATS. § 29-38c:

Seizure of firearms and ammunition from person posing risk of imminent personal injury to self or others. (a) Upon complaint on oath by any state’s attorney or assistant state’s attorney or by any two police officers, to any judge of the Superior Court, that

Indiana, only law enforcement may seek a confiscation order.⁵⁰ Similarly, Vermont requires that petitions must come from a state's attorney or the office of the attorney general.⁵¹ Florida and Rhode Island likewise require that petitions come from law enforcement.⁵² Indeed, if an individual is too dangerous to possess a gun, law enforcement should always be notified as soon as possible. Depending on the circumstances, law enforcement may be able to arrest and detain the dangerous individual—a better outcome for public safety, since a dangerous individual who is at large can still perpetrate violent crimes with other weapons, or bare hands.

Gun control advocates argue that a very wide range of private persons should be allowed to file confiscation petitions. In the media, the advocates describe their position as favoring petitions by a “family or household member.” But their statutes define “household” and “family” so broadly that they include “dating partners.”⁵³ They also cover any “blood” relative—apparently including cousins of any degree.⁵⁴ A few jurisdictions go even further, allowing petitions from educators, school administrators, former roommates, mental health professionals, and co-workers.⁵⁵

such state's attorney or police officers have probable cause to believe that (1) a person poses a risk of imminent personal injury to himself or herself or to other individuals, (2) such person possesses one or more firearms, and (3) such firearm or firearms are within or upon any place, thing or person, such judge may issue a warrant commanding a proper officer to enter into or upon such place or thing, search the same or the person and take into such officer's custody any and all firearms and ammunition. Such state's attorney or police officers shall not make such complaint unless such state's attorney or police officers have conducted an independent investigation and have determined that such probable cause exists and that there is no reasonable alternative available to prevent such person from causing imminent personal injury to himself or herself or to others with such firearm.

⁵⁰ IND. CODE § 35-47-14-2.

⁵¹ VT. STATS. tit. 13 § 4053(a).

⁵² FLA. STAT. § 790.401; R.I. GEN. LAWS § 8-8.3-1 (“Petitioner means a law enforcement agency...”).

⁵³ E.g. WASH. REV. CODE ANN., § 7.94.020(2) (“Family or household member” means, with respect to a respondent, any: (a) Person related by blood, marriage, or adoption to the respondent; (b) dating partners of the respondent;...”).

⁵⁴ *Id.* Compare the (relatively) narrower definition in California law: “any spouse, whether by marriage or not, domestic partner, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household.” CAL. PENAL CODE §§ 422.4(b)(3), 18150(a)(2).

One new article presents a variant on expanding who can initiate the petitions. The article touts the new statute in New Mexico, whereby a wide range of people can ask law enforcement to file a petition. Gabriel A. Delaney & Jacob D. Charles, *A Double-Filter Provision for Expanded Red Flag Laws: A Proposal for Balancing Rights and Risks in Preventing Gun Violence*, 48 JOURNAL OF LAW, MEDICINE & ETHICS 126 (2021). In the authors' view, the New Mexico system is balanced, because law enforcement can serve as a check on malicious or factually weak petitions. But the New Mexico statute converts law enforcement into a purely ministerial function, subject to personal liability if they decided not to file a confiscation petition requested by anyone. See Part I.C. So the New Mexico law provides little quality control against improper petitions.

⁵⁵ D.C. STAT. § 7-2510.01 (“mental health professional”), HAW. STATS. § 134-61 (“medical professional, educator, or colleague”); Md. Code Ann., Pub. Safety § 5-601 (“physician, psychologist, clinical social worker, licensed clinical professional counselor, clinical nurse specialist in psychiatric and mental health nursing, psychiatric nurse practitioner, licensed clinical marriage or family

The wider the set of people who can petition, the greater the risk of malicious petitions. The best practice is to allow anyone to ask that law enforcement professionals file the petition; this provides the widest source of potential information, and can deter or filter out at least some frivolous or malicious petitions.

Some persons worry that if law enforcement officers are in charge of petitions, the officers will make up excuses not to follow up on a citizen's request. The Connecticut experience indicates otherwise. Connecticut has a very high per capita rate of confiscation, even with the requirement that confiscation petitions must come from two law enforcement officers or state's attorneys who have conducted an independent investigation.⁵⁶

C. Ex parte orders should be allowed only when there is a showing of good cause.

Ex parte orders are disfavored in law. Normally, when a petitioner seeks a temporary restraining order on an ex parte basis, the plaintiff must explain why the defendant was not notified of the hearing and must prove that there will be "immediate" injury if the order is not granted.⁵⁷ If the court grants the order, the court must explain why it was necessary to issue the order ex parte.⁵⁸

therapist, or health officer or designee of a health officer who has examined the individual..."), N.Y. C.P.L.R. § 6340 ("a school administrator" or designee of the administrator, including a "school teacher, school guidance counselor, school psychologist, school social worker, school nurse, or other school personnel required to hold a teaching or administrative license or certificate, and full or part-time compensated school employee required to hold a temporary coaching license or professional coaching certificate.").

⁵⁶ As of early 2019, the following states had reported data for at least one year, allowing calculation of petitions per 100,000 state population: Maryland 20.0, Connecticut 7.47, Florida 6.35, Vermont 4.33, Oregon 1.96, Washington 1.25, California 1.07. Colorado Legislative Council, *Revised Fiscal Note HV 18-1177*, Mar. 1, 2019, https://leg.colorado.gov/sites/default/files/documents/2019A/bills/fn/2019a_hb1177_r2.pdf.

⁵⁷ Fed. Rules of Civil Procedure 65(b):

(b) Temporary Restraining Order.

(1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

⁵⁸ Fed. Rules of Civil Procedure 65(b)(2):

Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

Vermont has a better system: an ex parte confiscation order may be issued when “specific facts” show that “the respondent poses an imminent and extreme risk of causing harm.”⁵⁹ This is superior to a system in which confiscation orders must always be issued ex parte, regardless of circumstances and facts.

When hearing motions for temporary restraining orders, judges sometimes decide that the most prudent course is to neither grant nor deny the order. Instead, a judge schedules a further hearing, perhaps one at which the defendant will have notice and the opportunity to be heard. Gun confiscation order statutes should give the judge a similar option to order a continuance after an ex parte hearing.

The usual purpose of temporary restraining orders is to preserve the status quo. But the GLCPGV/Bloomberg confiscation program is the opposite: it automatically sends law enforcement officers to a persons’ homes to confiscate their guns. When the facts of the particular case indicate a need for confiscation before the respondent can appear in court, the judge should be allowed to so order, based on specific findings.⁶⁰

D. An “extreme risk protection order” should be about “extreme risks.”

Mislabeling has long been a problem in the gun control debate. For example, various bills about “assault weapons” have targeted BB guns, paintball guns, most handguns, almost all shotguns, and century-old low-power rifles.⁶¹ Today, the public is being told about “extreme risk protection orders.” But bills with this name are not limited to “extreme” risks.

While the bill titles say “extreme risk,” the text of the bills says the opposite. Rather than addressing “extreme risk,” Colorado’s law mandates confiscation based on a finding of a “significant risk.”⁶² Maybe a law about “significant” risk would be a good idea. But it would garner less public support than a bill about “extreme risk.” Similarly, in the 2019-20 Congress, S. 506 was titled the “Extreme Risk Protection Order Act of 2019.”⁶³ But it allowed confiscations based on “a danger.”⁶⁴

In some states, such bills may violate the state constitution’s requirement that bills have a Clear Title—rather than a misleading title.⁶⁵ Persons who believe in

⁵⁹ VT. STATS. tit. 13 § 4054.

⁶⁰ *Id.* at § 4054(a)(2).

⁶¹ David B. Kopel, *Defining “Assault Weapons,”* THE REGULATORY REVIEW (Univ. of Pennsylvania), Nov. 14, 2018, <https://www.theregreview.org/2018/11/14/kopel-defining-assault-weapons/>.

⁶² *E.g.*, Colo. HB 19-1177, https://leg.colorado.gov/sites/default/files/documents/2019A/bills/2019a_1177_rn2.pdf.

⁶³ S. 506, § 1.

⁶⁴ *Id.*, § 4 (a)(3)(A)(ii), § 5 (1)(C). Likewise, the 2019 bill S. 7 was titled the “Extreme Risk Protection Order and Violence Prevention Act of 2019.” § 1. But it allowed confiscation for “a significant danger.” *Id.* at iii.

⁶⁵ “No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title;...” COLO. CONST., art. V, § 21. As the text indicates, the subject must be “clearly” expressed in the title. *In re Breene*, 14 Colo. 401, 406, 24 P. 3, 4 (1890).

confiscating guns based on “a significant risk”, or “a danger,” or some other standard should forthrightly say so, including in bill titles.

E. Telephonic testimony should be allowed only when there is a showing of good cause.

Under some confiscation laws, a petitioner does not need to show up in court, ever. Instead, he or she can testify by telephone. Thus, the judge is deprived of the ability to observe the petitioner’s demeanor, which is essential for a court to be able to make credibility judgments.⁶⁶

As in other judicial proceedings, telephonic testimony should be allowed only when there is a specific showing of good cause in the individual case.⁶⁷ There should be rigorous procedures to verify the identity of the person on the telephone who is claiming to be the petitioner or a witness for the petitioner.

When telephonic testimony is allowed, the respondent should promptly be provided with a copy and transcript of the recording, so that the respondent can prepare his own case for the imminent court hearing.

F. Petition forms should not treat the exercise of constitutional rights as inherently suspicious.

Recently enacted confiscation laws contain a lengthy list of specific risk factors for courts evaluating confiscation orders. Such laws also direct the state court system to create standard forms for gun confiscation petitions. The listed risk factors are a

⁶⁶ See, e.g., NEV. REV. STAT. § 33.570(4) (if the petition is “filed by a law enforcement officer, the court may hold the hearing on the ex parte order by telephone, which must be recorded in the presence of the magistrate . . . by a certified court reporter or by electronic means.”); N.J. ADMIN. DIRECTIVE 19-19, GUIDELINE 3(c) (allowing petitioners to submit sworn oral testimony by “telephone, radio, or other means of electronic communication”); OR. REV. STAT. § 166.527(5)(b) (allowing the petitioner to appear by “electronic video transmission”).

“All of us know that, in every-day life, the way a man behaves when he tells a story—his intonations, his fidgetings or composure, his yawns, the use of his eyes, his air of candor or evasiveness—may furnish valuable clues to his reliability So the courts have concluded.” JEROME FRANK, COURTS ON TRIAL 21 (1950). Jerome Frank served on the Second Circuit Court of Appeals (1941-57), as Commissioner and then Chairman of the Securities and Exchange Commission (1935-41), and before that was a leading scholar, favoring legal pragmatism. See generally Charles L. Barzun, *Jerome Frank, Lon Fuller, and a Romantic Pragmatism*, 29 YALE JOURNAL OF LAW & THE HUMANITIES 129 (2017).

⁶⁷ See, e.g., Fed. R. Civ. Pro. 43(a) (“For good cause in compelling circumstances and with appropriate safeguards...); Colo. Rev. Stats. § 13-14.5-103(4) (“The court may schedule a hearing by telephone pursuant to local court rule to reasonably accommodate a disability or, in exceptional circumstances, to protect a petitioner from potential harm. The court shall require assurances of the petitioner’s identity before conducting a telephonic hearing. A copy of the telephone hearing must be provided to the respondent prior to the hearing for an extreme risk protection order.”).

litany of trouble: recent acts or threats of violence, violation of a civil protection order, violation of previously-issued gun confiscation order (or sometimes, the mere existence of a terminated order), conviction of a domestic violence crime, reckless or unlawful use of firearms, history of unlawful violence, stalking, prior arrests, and drug or alcohol abuse.⁶⁸ Mixed into the list of stigmatizers is the lawful exercise of constitutional rights: owning or acquiring firearms or ammunition.⁶⁹ The fact that someone owns or recently acquired constitutionally-guaranteed items is of zero probative value in the assertion that the person is too dangerous to possess those items.

Thus, court forms tell the public and the courts that “ownership” of “a firearm” is in the same presumptively suspicious list of activities such as “stalking,” “credible threats of violence,” or conviction of “domestic violence.” Law-abiding gun owners understandably resent their activities being included in this litany.

Of course, gun confiscation orders should only be issued against persons who are reasonably believed to be in possession of guns, or about to acquire a gun. The bills can separately require a petitioner to identify, to the extent possible, the arms possessed by the respondent.⁷⁰

G. Standards of proof, continuances, and reasonable alternatives.

1. Standard of proof

Requiring “clear and convincing evidence” at an ex parte hearing is fair to petitioners. After all, the petitioner at an ex parte hearing enjoys the advantage of being able to present one-sided evidence to the court, with no opportunity for the court to consider contrary evidence. A petitioner with a solid case, and facing no contradiction, ought to be able to meet the clear and convincing standard. It is likewise fair that at an ex parte confiscation hearing, the petitioner should have to prove imminence, just as petitioners have to do for other temporary civil protection orders.⁷¹

⁶⁸ WASH. REV. CODE ANN. §§ 7.94.050, 7.94.040(3)(b) (“Any prior arrest of the respondent for a felony offense or violent crime”). Colorado goes even further, including arrest for some nonviolent misdemeanors. COLO. REV. STATS. § 13-14.5-105(3)(i). Washington lists a violation of a prior confiscation order. WASH. REV. CODE ANN. § 7.94.040(3)(f). Colorado lists the mere existence any prior order, even a terminated one. COLO. REV. STATS. § 13-14.5-105(3)(d).

⁶⁹ *Id.* § 105(3)(f) & (b).

⁷⁰ *E.g.*, CAL. PENAL CODE § 18107 (“A petition for a gun violence restraining order shall describe the number, types, and locations of any firearms and ammunition presently believed by the petitioner to be possessed or controlled by the subject of the petition.”).

⁷¹ *E.g.*, COLO. REV. STATS. § 13-14-104.5(7)(a) (“imminent danger exists”).

Connecticut's confiscation law does require a finding of "probable cause" of "imminent" danger.⁷² Indiana and California do the same.⁷³ The imminence requirement is appropriate, but the "probable cause" standard is too low.

Many other confiscation laws have an even lower standard. Washington requires the judge to issue an ex parte confiscation order based on "reasonable cause to believe that the respondent poses a significant danger of causing personal injury to self or others in the near future."⁷⁴ Some states even allow an ex parte decision based on a preponderance of the evidence. This is an extremely low bar when only one side of a case is present in court and can present evidence.

2. Imminence

Massachusetts allows "reasonable cause" confiscation for alleged threats that are neither imminent nor in the near future.⁷⁵ New York and the District of Columbia are the same.⁷⁶ Proponents of gun confiscation orders say that their bills are modeled after domestic civil protection orders. But the norm is for civil protection orders to require proof of imminence.⁷⁷

3. Stronger standards at the two-party phase?

Some people favor low standards for ex parte orders, and a higher standard at a later hearing.⁷⁸ This causes much trouble for innocent people. Errors are an inevitable consequence of a judge hearing only one side of the case and being forced to rule based on a too-low standard of evidence.

4. Let ex parte judges judge

Ex parte judges should have the option not to issue a confiscation order immediately, but instead to order a full hearing, with evidence from both sides. A judge might think that the evidence for a temporary confiscation order was borderline. Rather than having to grant or deny the petition immediately, the court could schedule a full hearing within a short time.

⁷² CONN. GEN. STATS. § 29-38(a) ("probable cause to believe...a person poses a risk of imminent personal injury to himself or herself or to other individuals").

⁷³ CAL. PENAL CODE §§ 18125, 18150; IND. CODE §§ 35-47-14-2(a)(1) & 35-47-14-2(3)(C).

⁷⁴ WASH. REV. CODE § 7.94.050(3) (2018). Other statutes with standards of "probable," "good," or "reasonable" cause are: D.C. CODE ANN. §§ 7-2510.02-04; FLA. STAT. § 790.401; HAW. REV. STAT. ANN. § 134-64(f); 430 ILL. COMP. STAT. ANN. 67/35(c), 67/40(c); MD. CODE ANN. PUB. SAFETY § 5-602; MASS. ANN. LAW. ch. 140 § 131R; N.J. STAT. ANN. §§ 2C:58-23-24; N.M. STAT. ANN. § 40-17-2; N.Y.C.P.L.R. §§ 6340 et seq.; R.I. GEN. LAWS §§ 8-8.3-1 et seq.; VA. CODE ANN. § 19.2-152.13, et seq.).

⁷⁵ MASS. GEN. L. ch. 140, § 131T(a) ("finds reasonable cause to conclude that the respondent poses a risk of bodily injury to self or others").

⁷⁶ N.Y.C.P.L.R. § 6342(a); D.C. CODE ANN. §§ 7-2510.02-04).

⁷⁷ American Bar Association, *Domestic Violence Civil Protection Orders (CPO): Statutory Summary Chart*, Mar. 2014, <https://bit.ly/2My6zLl>.

⁷⁸ E.g., FLA. STAT. ANN. § 790.401(3)(b) (2018) ("reasonable cause" at ex parte hearing; "clear and convincing" at contested hearing).

5. No reasonable alternative

At any hearing, Connecticut requires a determination that there is “no reasonable alternative” to the confiscation order.⁷⁹ California does the same.⁸⁰ So does Nevada.⁸¹ This is fair, since a prohibition on the exercise of constitutional rights should not be imposed when there are effective alternatives.

H. Right to counsel.

Sometimes government attorneys discourage people from having counsel, even at their own expense. A former Connecticut prosecutor explained how he talked respondents out of using lawyers:

It’s not a criminal matter; it is a civil matter. ... You [as a subject of gun removal] have an option. One, you can roll your dice with the hearing. Two, you can say to me [as the State’s lawyer] right now, “I am not comfortable going forward without an attorney.” And I will go up and tell the judge you would like counsel. And [you] would be told, “We are not going to have the hearing [now] and you’re not going to get the guns back.” And then [people think.] “Oh, I’m going to have to pay for an attorney now to get my guns back?” [So the hearing goes forward.] That happens most of the time ... I would then go into chambers and lay it out for the judge exactly what we talked about. I would say, “Look, I think this guy is a good guy,” or “I think this guy is a borderline guy.”⁸²

⁷⁹ CONN. GEN. STATS. § 29-38c(a) (“Such state’s attorney or police officers shall not make such complaint unless such state’s attorney or police officers have conducted an independent investigation and have determined that such probable cause exists and that there is no reasonable alternative available to prevent such person from causing imminent personal injury to himself or herself or to others with such firearm.”)

⁸⁰ CAL. PENAL CODE § 18175(b):

(b) At the hearing, the petitioner shall have the burden of proving, by clear and convincing evidence, that both of the following are true:

(1) The subject of the petition, or a person subject to an ex parte gun violence restraining order, as applicable, poses a significant danger of causing personal injury to himself, herself, or another by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition.

(2) A gun violence restraining order is necessary to prevent personal injury to the subject of the petition, or the person subject to an ex parte gun violence restraining order, as applicable, or another because less restrictive alternatives either have been tried and found to be ineffective, or are inadequate or inappropriate for the circumstances of the subject of the petition, or the person subject to an ex parte gun violence restraining order, as applicable.

⁸¹ NEV. REV. STATS. § 33.500 et seq.

⁸² Quoted in Swanson et al., *supra* note 31, at 196.

Colorado has taken steps to prevent such abuse, by making court-appointed counsel available to all respondents.⁸³

As Colorado recognizes, having to suddenly find a lawyer and pay the fees for an imminent court hearing can be very difficult for many people, including people who are not legally indigent but who do not have several thousand dollars available to pay attorneys' fees. Of course the respondent can choose a different lawyer instead, at his own expense.

A good system of court-appointed counsel will encourage some attorneys to develop expertise in gun confiscation cases. Such attorneys will provide useful knowledge for future improvements to confiscation systems.

Statutes should clearly specify how respondents are to be given clear written notice of their right to counsel, as well their procedural and property rights. Federal funding can encourage states to broaden the availability of court-appointed counsel.

I. Right of cross-examination.

According to the Supreme Court, cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth."⁸⁴ But some statutes eradicate the right of cross-examination. The accuser and witnesses supporting the accuser never need to testify in court, where they would be subject to cross-examination. Instead, persons can simply submit an affidavit.⁸⁵

In the GLCPGV/Bloomberg model, the petitioner need never be seen by a judge or opposing counsel. The petitioner can make a telephone call in an ex parte hearing. At the later hearing, where the respondent can present his or her side of the story, the petitioner can send a written document, instead of testifying. This makes a sham of due process. An attorney who cannot cross-examine adverse witnesses cannot function effectively.⁸⁶

⁸³ COLO. REV. STATS. § 13-14.5-104(1)/

⁸⁴ *Ford v. Wainwright*, 477 U.S. 399, 415 (1986); *Watkins v. Sowders*, 449 U.S. 341, 349 n.4 (1981). The Court was quoting John Henry Wigmore, the pre-eminent expert on the rules of evidence. He called cross-examination "the great and permanent contribution of the Anglo-American system of law to improved methods of trial-procedure." JOHN HENRY WIGMORE, *TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* (1904-05). The treatise is usually known as *Wigmore on Evidence* or just *Wigmore*. Over a century later, successor *Wigmore* editions are still being published.

⁸⁵ *E.g.*, COLO. REV. STATS. § 13-14.5-105(4) "(The court may: (a) examine under oath the petitioner, the respondent, and any witnesses they may produce, or, in lieu of examination, consider sworn affidavits of the petitioner, the respondent, and any witnesses they may produce;").

⁸⁶ Gun confiscation hearings are styled as civil processes, not criminal ones, so some persons may believe that the Sixth Amendment's Confrontation Clause does not apply. The Sixth Amendment guarantees: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. CONST., amend. VI.

J. Venue should be where the respondent lives

Some statutes allow venue where the respondent resides *or* where the resident has a firearm.⁸⁷ The latter is inappropriate. Consider a respondent who lives in Denver and stores a gun there; he also stores two deer rifles at a friend's hunting cabin in Moffat County, 200 miles west in the mountains. He should be allowed to present his legal defense in Denver, where he lives—and not forced into a far-away venue.⁸⁸

K. Concealed carry restoration for the falsely accused

Confiscation laws sometimes require that a concealed carry permit be revoked immediately when a temporary order is entered.⁸⁹ If the court terminates a temporary order after the court hears the respondent's side of the story, the concealed carry permit should be promptly reissued.

In many jurisdictions, carry permits are expensive and time-consuming.⁹⁰ Innocent people who have been vindicated in court should not have to spend several months and pay high fees to re-apply for a carry permit all over again. Without

But although a confiscation case may have a civil form, it is criminal consequences: a confiscation order results in the execution of a criminal-style search and seizure warrant against the defendant. Accordingly, the Confrontation Clause should apply.

Even in civil cases, cross-examination has sometimes been held to be a right. *E.g.*, *Pazienza v. Pazienza*, 595 A.2d 235, 240 (R.I. 1991) ("The importance of cross-examination extends to civil cases as well."); *Town of Geneva v. Tills*, 129 Wis.2d 167, 178, 384 N.W.2d 701, 706 (in civil cases "meaningful cross-examination" is a common-law right); *Neider v. Spoehr*, 41 Wis. 2d 610, 617-18, 165 N.W.2d 171, 175 (1969) (In civil case, "It is fundamental that a party has a right to cross-examine another party who is adverse to him," but trial judge has the discretion to restrict cross-examination by multiple lawyers so as to keep trial proceedings orderly).

⁸⁷ See, e.g., VT. STAT. ANN. TIT. 13, § 4052(c) (allowing a petition in the "the county where the events giving rise to the petition occur"); VA. CODE ANN. § 19.2-152.13(H) (allowing commencement of proceedings where "the person who is subject to the order . . . has engaged in any conduct upon which the petition for the [order] is based"); WASH. REV. CODE § 7.94 (allowing action to be filed in the county where the *petitioner* resides).

⁸⁸ Colorado's HB 19-1197 was amended to remove this problem.

⁸⁹ See, e.g., OR. REV. STAT. § 166.527(f) (upon issuance of a temporary order, respondent "must, within 24 hours, surrender . . . any concealed handgun license"; 430 ILL. COMP. STAT. § 67/35(g)(2) ("An emergency firearms restraining order shall require "the respondent to turn over to the local law enforcement agency any . . . concealed carry license in his or her possession"); Va. Code Ann. § 19.2-152.13(A) (the order "shall contain a statement . . . that such person is required to surrender his concealed handgun permit if he possesses such permit"). See also FLA. STAT. § 790.401(4)(e)(6); MASS. GEN. LAWS ch. 14, § 131t(c); R.I. GEN. LAWS § 8-8.3-4(6); WASH. REV. CODE § 7.94.050(6)(g); N.C. GEN. STAT. § 50B-3.1 ("Upon issuance of an emergency or ex parte order . . . the court shall order the defendant to surrender . . . permits to carry concealed firearms")

⁹⁰ See, e.g., 430 ILL. COMP. STAT. ANN. § 66/60(b) (\$150 for initial license or renewal); MASS. GEN. LAWS ch. 140, § 131(i) (\$100); N.M. STAT. § 29-19-5(B)(2) (\$100).

prompt reissuance of permits, innocent persons are denied their right to bear arms for an extended period of time.

Similar procedures should be followed in the few states where a license is required to possess a firearm or a handgun in the home.⁹¹

L. Civil remedy for malicious and false petitions.

Laws about child abuse, sexual assault, and domestic violence are sometimes used as weapons by spurned lovers and by people seeking revenge for various motives. There is no reason to believe people who pervert the law by making false reports will somehow be more scrupulous regarding the new confiscation tool.

Many confiscation laws specifically declare that malicious or false petitions may be subject to prosecution.⁹² This is appropriate. But the odds of criminal prosecution are minuscule, even if an affidavit is sworn under penalty of perjury. Perjury prosecutions are rare, and rarer still from civil cases.⁹³

Victims of abusive claims should be entitled to attorney's fees, and they should have a cause of action of civil damages. Without a strong civil remedy, there is little practical deterrent to malicious reports.

M. Case law supports the principle that manifestly dangerous persons may be disarmed.

A thoughtful article in the *Virginia Law Review* by Joseph Blocher and Jacob Charles argues in favor of the constitutionality of gun confiscation orders.⁹⁴ First, as the article points out, the Supreme Court's *Heller* precedent, like many precedents involving state constitution rights to arms, allow for the disarming of people who are not the "law-abiding, responsible citizens" extolled in *Heller*.

In analyzing original public meaning, several historical practices are precedents for the practice. Some American colonies had laws prohibiting gun possession by

⁹¹ See N.Y. PENAL CODE § 400.00(2) ("A license for a pistol or revolver, other than an assault weapon or a disguised gun, shall be issued to . . . have and possess [a handgun] in his dwelling by a householder").

⁹² E.g., MD. PUB. SAFETY § 5-609.

⁹³ Only 16 criminal perjury cases were commenced in all federal district courts in 2019. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, TABLE D-2, available at <https://www.uscourts.gov/statistics/table/d-2/federal-judicial-caseload-statistics/2019/03/31>. See also *Is Civil Perjury Punishable?*, SLATE (Aug. 19, 1998) (discussing low prosecution rate of civil perjury), <https://slate.com/news-and-politics/1998/08/is-civil-perjury-punishable.html>; Linda Harrison, *The Law of Lying: The Difficulty of Pursuing Perjury Under the Federal Perjury Statutes*, 35 U. Tol. L. Rev. 397 (2003).

⁹⁴ Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: "Red Flag" Laws and Due Process*, 106 VA. L. REV. 1285 (2020).

slaves, or only allowing possession while under the master's supervision.⁹⁵ The first gun licensing laws in the United States were those imposed on enslaved persons or on free persons of color.⁹⁶

Second, almost every colony had laws that attempted (usually with little success) to prohibit arms trade to hostile Indian nations.⁹⁷ At the time, the various Indian tribes were recognized as genuinely separate nations; a Seneca Indian, for example, had no more duty of allegiance to the British colonies or to the United States than did a French citizen who lived in Paris.⁹⁸ All nations attempt to restrict arms provision to hostile foreign nations.

As for Indians who did accept living in the Anglo-American polity, some state or colonial laws did attempt to limit arms possession; these restrictions were loosened or removed in the various colonies or states as the threat of Indian warfare diminished.⁹⁹

Finally, during the Revolution several states confiscated for public use the firearms of people who would not swear loyalty to the United States.¹⁰⁰

Blocher and Charles, however, do not rely on the above precedents, some of which bear the taint of racial animus.

Arguing for the constitutionality of pre-hearing deprivations of rights, Blocher and Charles point to a litany of cases allowing ex parte seizure of commercial property or revocation of commercial licenses.¹⁰¹ These examples, however, are not on point. None of them involve deprivations based on predictions of future danger growing out of lawful conduct. Rather, all of them demonstrated illegality before the order is issued. For example, a vendor has chickens that *are presently* contaminated are therefore

⁹⁵ 1 THE LAWS OF MARYLAND 117-18 (Virgil Maxcy ed., 1811) (enacted 1715) ("[N]o negro or other slave, within this province, shall be permitted to carry any gun or any other offensive Weapon, from off their master's Land, without licence from their said Master."); 19 (pt. 1) THE COLONIAL RECORDS OF THE STATE OF GEORGIA 76-78, 117-18 (Allen D. Candler ed., 1904) (1755 statute, and 1768 revision) (forbidding slave possession or carrying of "Fire Arms or any Offensive Weapon whatsoever," unless the slave had written permission from his or her master, mistress, or overseer to hunt; also allowing slaves to carry guns without written permission when accompanied by a white of at least 16 years old, or when hunting destructive birds on their master's plantation during daytime; no slaves could have arms between sunset Saturday and sunrise Monday).

⁹⁶ See, e.g., *State v. Newsom*, 27 N.C. (5 Ired.) 250 (1844) (gun licensing statute for free blacks); *Aldridge v. Commonwealth*, 4 Va. 447, 449 (Va. Gen. Ct. 1824) (the "numerous restrictions imposed upon this class of people"—free blacks—such as the limits "upon their right to bear arms," are "inconsistent with the letter and the spirit of the Constitution, both of this state and of the United States." Accordingly, the state and federal constitutions do not apply to them); Robert J. Cottrol & Raymond T. Diamond, "Never Intended to Be Applied to the White Population": *Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?* 70 Chi.-Kent L. Rev. 1307, 1318-23 (1995).

⁹⁷ See NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE MOCSARY, & NICHOLAS J. JOHNSON, GEORGE A. MOCSARY & MICHAEL P. O'SHEA, *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY* 187-92 (Wolters Kluwer, 2d ed. 2017).

⁹⁸ See FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* (1994).

⁹⁹ JOHNSON et al., *supra*.

¹⁰⁰ JOHNSON et al., *supra*, at 279-80.

¹⁰¹ See Blocher & Charles, *supra* note 94.

illegal *at present* to sell; the chickens may be seized *ex parte*.¹⁰² Or a mine *is currently being operated* in violation of safety laws; an *ex parte* order may suspend operation of the mine.¹⁰³ A commercial truck *has repeatedly been found guilty* of violating driving laws; his license may be suspended *ex parte*.¹⁰⁴ Notably, none of the *ex parte* cases cited by Blocher and Charles involve enumerated constitutional rights.

Challenges to state confiscation laws have been rejected by three intermediate courts of appeals. None of the cases involved the procedural due process questions discussed in this testimony.

1. *State v. Hope* (Conn. App.)

The first case came from the Appellate Court of Connecticut.¹⁰⁵ On appeal, the respondent had no attorney.¹⁰⁶ He was obviously mentally ill; “the plaintiff had brought to the hearing two electronic devices wrapped in tin foil.”¹⁰⁷

He raised no constitutional claims other than the Second Amendment.¹⁰⁸ The court speedily rejected the Second Amendment argument. The law “does not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes. It restricts for up to one year the rights of only those whom a court has adjudged to pose a risk of imminent physical harm to themselves or others after affording due process protection to challenge the seizure of the firearms.”¹⁰⁹

Since the plaintiff in *Hope* raised only the Second Amendment, *Hope* offers no precedent on constitutional due process. Cases with *pro se* mentally ill plaintiffs do not benefit from well-presented adversarial argument, and therefore offer limited guidance to future courts.

2. *Redington v. State* (Ind. App.)

An Indiana case involved a plaintiff who was at least represented by counsel.¹¹⁰ The court rejected the plaintiff’s argument that the Indiana confiscation statute violated the Indiana constitutional right to arms. Indiana precedent allowed prohibiting “dangerous” persons from having arms.¹¹¹

Secondly, the plaintiff argued that the seizure of his guns was a “taking” of his property, for which compensation is required by the Fifth Amendment of the Constitution of the United States and the Indiana Constitution. The court responded that the taking of dangerous property does not require compensation; for example, forfeiture laws allow uncompensated takings.¹¹²

¹⁰² See *N. Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 315 (1908).

¹⁰³ See *Hodel v. Virginia Surface Min. & Reclamation Ass’n, Inc.*, 452 U.S. 264, 298 (1981).

¹⁰⁴ See *Dixon v. Love*, 431 U.S. 105, 114 (1977).

¹⁰⁵ *Hope v. Connecticut*, 163 Conn. App. 36 (2016).

¹⁰⁶ *Id.* at 36 (“Donald Hope, self-represented, West Hartford, the appellant (plaintiff).”).

¹⁰⁷ *Id.* at 40.

¹⁰⁸ *Id.* at 38 n.1.

¹⁰⁹ *Id.* at 43.

¹¹⁰ *Redington v. State*, 992 N.E.2d 823 (Ind. App. 2013).

¹¹¹ *Id.* at 834-35.

¹¹² *Id.* at 836-37.

Third, the plaintiff argued that a particular phrase in the statute was void for vagueness. The court held that the phrase was not vague, because it was qualified by another phrase.¹¹³

Redington's 51 guns were confiscated in 2012, and the confiscation upheld in 2013. In 2015 he filed a petition for their return. There was no hearing on the petition until 2018. Under the Indiana statute, he faced the burden of proof by a preponderance of evidence to show that he "is not dangerous."¹¹⁴ At the hearing, Redington presented uncontradicted testimony from a psychiatrist, a counselor, and his wife that Redington was nonviolent and nondangerous, as of 2018. The state presented no evidence. Relying solely on the 2012 confiscation order, the trial court denied Redington's petition. The Indiana Court of Appeals reversed, because the issue in 2018 was whether Redington was potentially dangerous in 2018, rather than in 2012. Indeed, "If the State's position were correct, the statute would be unconstitutional as applied to Redington because the *Redington I* decision that the statute passed constitutional muster would have been based on the false promise that he could someday regain possession of his firearms."¹¹⁵

3. *Davis v. Gilchrest County Sheriff's Office* (Fla. App.)

A county sheriff's office filed a confiscation petition against one of its deputies. The trial court issued the order based on evidence that Davis had expressed homicidal ideation and had threatened to shoot another deputy.¹¹⁶ The appellate court rejected Davis's claims that the trial court had improperly sequestered a witness,¹¹⁷ and rejected Davis's claim that his trial presentation had been cut short, as Davis's attorney had not asked for a continuance.¹¹⁸ Constitutional vagueness challenges to the statutory terms "significant danger," "relevant evidence," and "mental illness" were rejected.¹¹⁹

Finally, the court considered Gilchrest's facial challenge that the law violated substantive due process because it allowed confiscation for "entirely innocent" activity. As the court noted, being seriously mentally ill, abusing alcohol, or recently acquiring firearms and ammunition may be entirely innocent.¹²⁰ "Importantly, these

¹¹³ The phrase was "may present a risk of personal injury to the individual or to another individual in the future." That phrase was qualified by the requirement that the petitioner prove by clear and convincing evidence that the individual either "(A) has a mental illness (as defined in IC 12-7-2-130) that may be controlled by medication, and has not demonstrated a pattern of voluntarily and consistently taking the individual's medication while not under supervision; or (B) is the subject of documented evidence that would give rise to a reasonable belief that the individual has a propensity for violent or emotionally unstable conduct." *Id.* at 839.

¹¹⁴ IND. CODE § 35-47-14-8(d)(2).

¹¹⁵ *Redington v. State*, 121 N.E.3d 1053, 1064 (Ind. App. 2019).

¹¹⁶ *Davis v. Gilchrest County Sheriff's Office*, 280 So.3d 524, 528-29 (Fla. App. 2019).

¹¹⁷ *Id.* at 530.

¹¹⁸ *Id.* at 531.

¹¹⁹ *Id.* at 531-32.

¹²⁰ *Id.* at 532-33.

are simply factors, among many a court may consider (none of which were relied upon in this case) before issuing an RPO.”¹²¹

III. Enforcement issues

A. Safe and orderly relinquishment of firearms.

In Vermont, a person served with a confiscation order must immediately relinquish his or her firearms to law enforcement *or* to a Federal Firearms Licensee (FFL, a licensed gun business, such as a retail store).¹²² Alternatively, the court may order the firearms be given to a third person. The third person must be someone who is lawfully allowed to own guns, must not allow respondent access to the guns, and may not return the guns to respondent until the order is terminated.¹²³

Oregon requires that the respondent “Within 24 hours surrender all deadly weapons in the respondent’s custody, control or possession to a law enforcement agency, a gun dealer or a third party who may lawfully possess the deadly weapons.”¹²⁴ In Washington, if the respondent was present at the hearing, he or she has 48 hours to surrender all firearms.¹²⁵

But other statutes automatically force law enforcement to show up at someone’s home and take their guns. The first notice that a person will receive is when the police arrive at a person’s home and announce: “We’re from the government and we’re here to confiscate your guns.”

This creates an inflammatory situation, endangering both law enforcement and the public. Undoubtedly there are situations where instant confiscation without notice is necessary; laws can so provide, based on specific judicial findings about an individual case.

Since about 30 percent of temporary orders turn out to be incorrect, mandatory instant police confiscation puts many innocent people through a humiliating experience for no good reason. It evokes a police state.¹²⁶

¹²¹ *Id.* at 533.

¹²² VT. STAT. tit. 13 § 4059(b)(1).

¹²³ VT. STAT. tit. 13 § 4059(b)(2).

¹²⁴ OR. STATS. § 166.537(1). “If the respondent indicates an intention to surrender the deadly weapons to a gun dealer or a third party, the law enforcement officer shall request that the respondent identify the gun dealer or third party.” *Id.* § 166.537(3)(a).

¹²⁵ “Alternatively, if personal service by a law enforcement officer is not possible, or not required because the respondent was present at the extreme risk protection order hearing, the respondent shall surrender the firearms in a safe manner to the control of the local law enforcement agency within forty-eight hours of being served with the order by alternate service or within forty-eight hours of the hearing at which the respondent was present.” WASH. STATS. § 7.94.090.

¹²⁶ Discussing a case in which a Connecticut judge improperly retained firearms that had been unlawfully seized, a police officer explained: “Firearms owners especially feel put-upon. I don’t think the legislature, I don’t think the judiciary realizes how, how strongly offended people are by that These are people that have trust in the system These are people that support the police, were in the military...I mean, that’s who these people are. And then they come up with stuff like this, their

B. No-Knock Raids

No-knock raids must be the exception and not the norm. The Supreme Court has rejected the notion that an entire class of cases can automatically be no-knock at unfettered law enforcement discretion.¹²⁷ Although no-knock raids may be necessary in unusual circumstances, their routine use to execute search warrants endangers the public and law enforcement.¹²⁸ They are characteristic of a militarized police state, not a civil republic.

States regulate no-knocks in various ways. For example, in Colorado, no-knocks require a judicial warrant issued at the request of a district attorney.¹²⁹ But Colorado's new confiscation law was written to negate this requirement for GCOs.¹³⁰

Confiscation statutes should specify that no-knock GCO must comply with all of the state's rules for no-knocks. Any law that directly or indirectly makes no-knocks easier for gun searches and seizures than for other searches and seizures is discriminatory.

States should not exempt GCO confiscations from the ordinary limits on no-knock raids. Laws should allow respondents to peaceably surrender their arms within a certain period, unless the court makes a finding of the necessity of immediate forcible confiscation. Violent seizures should be allowed only in cases of necessity when specifically authorized by a court, or in exigent circumstances that could not have been presented to the court.

More broadly, law enforcement officers should not be put in the position of having to forcibly confiscate firearms based on a court order for which the petitioner never even appeared in court, which can be obtained by a jilted dating partner, and for which the accuser's claims were never verified or investigated by law enforcement. Forcing law enforcement officers to enter someone's house based on potentially dubious and low credibility claims recklessly endangers officers and the public. Yet this dangerous system is exactly what the new Colorado statute mandates, following the model created by gun control lobbies.

At the Uniform Law Commission study group meeting, discussed in Part 1.B, I suggested that no-knock raids should be allowed when needed, but should not be authorized as routine. Mr. Chipman, representing the GLCPGV, answered that we should not tell law enforcement officers how to do their jobs. However, the Fourth

whole universe is shaken, you know, and that's very distressful for people. Nobody recognizes that." Swanson, *supra* note 31, at 197.

¹²⁷ See *Richards v. Wisconsin*, 520 U.S. 385 (1997) (drugs).

¹²⁸ See Brian Dolan, Note, *To Knock or Not To Knock? No-Knock Warrants and Confrontational Policing*, 93 ST. JOHN'S L. REV. 201 (2019); Chase Patterson, Note, *Don't Forget to Knock: Eliminating the Tension Between Indiana's Self Defense Statute and No-Knock Warrants*, 47 IND. L. REV. 621 (2014); Amanda M. Yeaples-Coleman, Comment, *Reviving The Knock And Announce Rule And Constructively Abolishing No-Knock Entries By Giving The People A Ground They Can Stand On*, 37 U. DAYTON L. REV. 381 (2012); Dimitri Epstein, Note, *Cops or Robbers? How Georgia's Defense of Habitation Statute Applies to No-Knock Raids by Police*, 26 GA. ST. U. L. REV. 585 (2010).

¹²⁹ COLO. REV. STAT. § 20-1-1061. There is an exception for exigent circumstances. *Id.*

¹³⁰ COLO. REV. STAT. § 13-14.5-106.

and Fifth Amendments, judicial precedents thereunder, and many statutes do in fact control how law enforcement officers do their jobs, especially in situations where law enforcement officers may use violence.¹³¹

C. Custody of seized firearms

In Connecticut and Florida, where the police must always personally confiscate guns, guns may then be transferred to an appropriate third person.¹³² As the statutes specify, custodians must themselves be lawfully allowed to own guns, must not allow respondent access to the guns, and may not return the guns to respondent until the order is terminated.

Other states, though, allow the guns to be transferred only to a Federal Firearms Licensee.¹³³ Colorado in general allows transfers only to FFLs, but allows “curios and relics” to be transferred to a relative who does not live with respondent.¹³⁴

To reduce the risk that stored firearms will be ruined by neglect, and to reduce the humiliation of innocent people, statutes should allow firearms to be stored by any responsible lawful adult who will not allow access to the arms while an order is in effect.

When firearms are in law enforcement custody, the custodians should have the obligation to store them properly, and to pay damages for improper storage.¹³⁵

As California firearms attorney Don Kilmer writes, “Local governments are now charging people thousands of dollars to store guns that are confiscated, and they tack on a charge for inventory and processing fees. In one case in Southern California, a

¹³¹ Mr. Chipman was a SWAT agent for the Bureau of Alcohol, Tobacco, and Firearms involved in the attack on the Branch Davidian home in Waco, Texas, in February 1993. As congressional hearings and other evidence later demonstrated, the reckless violent attack on the home led to the deaths of six Branch Davidians and four BATF agents. The attack was completely unnecessary. It was well-known that the subject of arrest warrant, Vernon Wayne Howell, often went jogging, and he could have been arrested while doing so. BATF’s choice to launch the violent assault seemed to be an attempt to create publicity for itself to distract from accusations of sexual harassment against female agents. DAVID B. KOPEL & PAUL BLACKMAN, *NO MORE WACOS: WHAT’S WRONG WITH FEDERAL LAW ENFORCEMENT, AND HOW TO FIX IT* (Buffalo: Prometheus Books, 1997).

¹³² CONN. GEN. STATS. § 29-38c(e) (“Any person whose firearm or firearms and ammunition have been ordered seized pursuant to subsection (d) of this section, or such person’s legal representative, may transfer such firearm or firearms and ammunition in accordance with the provisions of section 29-33 or other applicable state or federal law, to any person eligible to possess such firearm or firearms and ammunition.”).

¹³³ This is a deviation from normal Colorado law. Ordinary restraining orders that involve firearms allow a transfer to a private party. COLO. REV. STATS. § 13-14-105.5.

¹³⁴ “Curios and relics” are certain historic firearms, defined in 27 C.F.R. § 478.11. The curios statute is COLO. REV. STATS., § 13-14.5-108(III).

¹³⁵ For problems caused by improper storage by law enforcement in other contexts, see, e.g., *Wright v. Beck*, 723 Fed. App’x 391 (9th Cir. 2017) (city seized hundreds of plaintiff’s lawfully-owned firearms, eventually returned 26, and destroyed the rest); *Wright v. Beck*, No. 2:15-cv-05805-R-PJW, 2019 WL 404417 (C.D. Cal. Jan. 30, 2019); Emily Miller, *D.C. police damage soldier’s guns*, WASH. TIMES, June 17, 2012.

client had to pay a \$1,000 ransom, that was reduced from an initial “offer” of \$4,000, to get his 50-gun collection back.”¹³⁶

D. Duration of orders

An ex parte order should be valid for no more than one week. A longer order should be allowed only after a full hearing with the petitioner having the burden of proof by clear and convincing evidence. Respondent should be represented by counsel, able to present evidence, and able to cross-examine.

Longer orders should extend no more than 180 days. Six months is sufficient for alternative proceedings, such as mental health commitments, or criminal prosecution. During the term of an order, the respondent should have the opportunity to petition for lifting of the order.

IV. Termination of Orders

Orders should expire on a specific date. Renewal of the order should be allowed if the petitioner proves the case for a renewal by clear and convincing evidence at a hearing with notice and due process.¹³⁷

Except for Connecticut, state laws allow the restricted party to request a hearing to terminate the order. Most states allow the petitioner to request that the order be extended once the initial period has concluded.¹³⁸

A. Preventing federal lifetime bans.

Upon termination of an order, information in databases should be revised to so indicate. In particular, the order should be removed from the National Instant Check System, where it is used as a firearms prohibitor. Unless the terminated order is removed from NICS, then an expired six-month or one-year order could function as a lifetime prohibition.

Federal agents should not be allowed to bootstrap expired orders into lifetime bans. Confiscation hearings are not criminal trials. A confiscation order is not based on the criminal standard of proof beyond a reasonable doubt. Unlike involuntary commitment hearings, confiscation hearings are not a mental health adjudication.

¹³⁶ Donald Kilmer, *The enforcement problems with gun-grabbing ‘red flag’ laws are even worse than you think*, WASH. EXAMINER, Aug. 17, 2019.

¹³⁷ *E.g.*, CAL PENAL CODE § 18190.

¹³⁸ Except for Indiana and New Jersey, where confiscation orders are permanent until lifted at the request of a petition from the respondent, who must affirmatively prove that he is not dangerous.

However, aggressive federal officials might scour state confiscation records, and declare that certain respondents are federally prohibited persons. For example, if a confiscation case record shows that the respondent was having mental health problems, a federal official could declare that the respondent has been “adjudicated as a mental defective.”¹³⁹ Therefore, the respondent is banned by federal law for life from possessing firearms. Similar issues arise under the drug use prohibitor in federal firearms law, which has been applied even to medical use in compliance with state law.¹⁴⁰

Federal laws and state laws should prohibit terminated confiscation orders from being used as a basis for federal gun bans.

B. Return procedures.

There should be specific rules for mandatory return of arms that have been seized, once the order expires or is overturned. Law enforcement agencies sometimes refuse to return firearms to lawful owners, and courts sometimes allow it—typically under the theory that people’s rights are not violated if they can legally acquire new firearms.¹⁴¹ A strict deadline and a civil cause of action, including attorney’s fees and punitive damages for failure to return lawful arms, should be part of a fair statute. Governments should not be allowed to charge the owners storage “fees” for temporarily confiscated guns—a common abuse in California, where fees can be exorbitant.

V. Conclusion

Gun confiscation orders are legitimate tools for public safety when they are applied to persons who pose an extreme, imminent risk of misusing a firearm. Lawmakers should aim to reduce the high error rate of ex parte orders, and to ensure protection of due process at every step. States should provide careful controls on ex parte proceedings and appointed counsel for all respondents. States should not forbid cross-examination, promote unnecessary no-knock raids, leave innocent victims without a civil remedy for false or malicious petitions, or deny any of the seven core elements of due process.

¹³⁹ 18 U.S.C. § 922(g)(4).

¹⁴⁰ 18 U.S.C. § 922(g)(3). For application to medical marijuana, see Arthur Herbert, Asst. Dir., Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms & Explosives, *Open Letter to All Federal Firearms Licensees*, Sept. 21, 2011, <https://www.atf.gov/file/60211/download>.

¹⁴¹ See *City of San Jose v. Rodriguez*, No. H040317, 2015 WL 1541988 (Cal. Ct. App. Apr. 2, 2015) (no constitutional violation when innocent spouse’s arms seized and not returned); *Rodriguez v. City of San Jose*, 930 F.3d 1123 (9th Cir., 2019) (rejecting § 1983 lawsuit based on arms seizure); *Walters v. Wolf*, 660 F.3d 307 (8th Cir. 2011) (due process violation but no Second Amendment violation).

The U.S. Senate Subcommittee on the Constitution can properly exercise its jurisdiction by encouraging states to enact or revise GCO statutes to adhere to best practices.

Testimony of Vic Bencomo
President, Giffords Gun Owners for Safety, CO Chapter

U.S. Senate Judiciary Subcommittee on the Constitution
Stop Gun Violence: Extreme Risk Order / “Red Flag” Laws
April 28, 2021

Good afternoon. Thank you, Chairman Blumenthal and members of the committee, for the opportunity to testify today. My name is Vic Bencomo. I am a father, husband, gun owner, hunter, and a proud Colorado resident of over 30 years.

As a veteran who served 21 years in the US Navy, I know what it means to be a patriot. I supported and defended the Constitution and the laws of the United States of America against all enemies, foreign and domestic. But today, I'm here with you as the president of the Colorado chapter of Giffords Gun Owners for Safety. We are a group of thousands of hunters, sport shooters, concealed carriers, and collectors who support responsible gun ownership and common-sense gun laws. We proudly support the Second Amendment, but we cannot ignore that our country is in the midst of a crisis.

Each year, nearly 40,000 Americans die from gun violence, and tens of thousands more are shot and injured. I've seen violence: in Iraq, we understood that serving our country came with an inherent risk. We put our lives on the line knowing that we may never come home. But that's not a risk that should extend to our neighborhoods, schools, and places of worship. We are just four months into the year, and already we've seen devastating tragedies in Atlanta; Indianapolis; Orange, California; Rock Hill, South Carolina; and Boulder in my home state of Colorado—and the list keeps growing. The daily threat of gun violence is a shocking reality in countless communities across the country. As a veteran, I'm witnessing my fellow servicemen and women take their lives at a catastrophic rate. More than 17 veterans die by suicide daily nationwide. That is over 6,400 veteran suicides a year.¹ Firearms are used in nearly 70% of these deaths. Our veterans answered the call, served their country, and have lost so much on the battlefields already. It's unacceptable to let them lose their lives at home.

Tragically, Colorado's veteran suicide rate is above the national average. Out of the 173 veterans who died by suicide in our state in 2018, 112 of them used a firearm.² But these are more than just staggering statistics to me. More than once, my phone rang and on the other end was a veteran asking for help. I have personally taken their firearms when no one else would.

¹ "2020 National Veteran Suicide Prevention Annual Report," US Department of Veterans Affairs, Office of Mental Health and Suicide Prevention, <https://www.mentalhealth.va.gov/docs/data-sheets/2020/2020-National-Veteran-Suicide-Prevention-Annual-Report-11-2020-508.pdf>. See also, "National Suicide Data Report Appendix," US Department of Veterans Affairs, Office of Mental Health and Suicide Prevention,

² "Colorado Veteran Suicide Data Sheet, 2018," US Department of Veterans Affairs, Office of Mental Health and Suicide Prevention, <https://www.mentalhealth.va.gov/docs/data-sheets/2018/2018-State-Data-Sheet-Colorado-508.pdf>.

It was I who answered the call that night, I was the one who drove to his house, I was the one who convinced him to seek help, I was the one who took him to the hospital, I was the one who took possession of his firearms. I was the one who agreed to take custody of him once released from the hospital. But 6,400 veterans that committed suicide last year did not have an “I” to help them.

Temporarily keeping guns out of the hands of people who have been found by a court to pose a significant risk to themselves or others is not an infringement on their Second Amendment rights—it could be what saves their lives, and the lives of others. In 2019, I testified in front of the Colorado legislature in support of HB 1177, the Deputy Zackari Parrish III Violence Prevention Act, to help protect our veterans, their families, and our communities. That bill was passed into law, making Colorado the 17th state with an extreme risk law. As of April 2020, 19 states and the District of Columbia have enacted these laws.

The path to passing an extreme risk law in Colorado was not as easy one. Many opponents of gun safety raised unfounded fears that such a law would lead to mass confiscation of weapons from law-abiding gun owners, or that the law could be weaponized and used to retaliate against others. Several counties throughout the state declared themselves so-called “Second Amendment sanctuaries,” and sheriffs announced plans to block the law from being used.³ After the law passed, gun safety opponents mounted an unsuccessful attempt to recall the sponsor of HB 1177 and remove him from office.⁴ But after a year of the extreme risk law being in place, it’s clear that it has been a useful tool to save lives without infringing on the Second Amendment rights of Coloradans.

In 2020, at least 112 petitions were filed by law enforcement and family members.⁵ Colorado’s extreme risk law was used to disarm a 47-year-old veteran who threatened to shoot himself and police officers, a 20-year-old man who posted online that he wanted to buy an AR-15 and kill women at a sorority house, a 37-year-old man who expressed suicidal intent, a woman who said she would kill herself and kill law enforcement, and dozens of others at risk of harming themselves or others.⁶ It’s important to note that not all of the petitions filed resulted in extreme risk protection orders issued and guns removed. But that’s just further evidence that this law not only works, but also protects individual rights and doesn’t allow a person’s guns to be removed without real evidence that the person is a danger to themselves or others. And significantly,

³ James West, “Inside Colorado’s Epic Battle Over a Popular Gun Safety Law,” *Mother Jones*, October 23, 2020, <https://www.motherjones.com/politics/2020/10/film-documentary-colorado-red-flag-law-opposition-sanctuary-second-amendment/>.

⁴ Anna Staver, “Gun control groups nationwide declare victory over scrapped recall of Colorado Rep. Tom Sullivan,” *The Denver Post*, June 11, 2019, <https://www.denverpost.com/2019/06/11/colorado-recall-tom-sullivan-gun-control/>.

⁵ Elise Schmeizler and Shelly Bradbury, “Colorado’s red flag law is one year old. Here’s who’s using the law to confiscate guns — and why,” *The Denver Post*, January 10, 2021, <https://www.denverpost.com/2021/01/10/red-flag-law-colorado-first-year-2020-stats/>.

⁶ *Ibid.*

many law enforcement officials who opposed the law later ended up using the law and found it to be an effective tool to prevent violence.⁷

If this law were available in more states, I have no doubt that it could be a very effective tool to save lives, especially for our veterans who are at a high risk of suicide.

Congress should support states' efforts to pass and implement extreme risk legislation. Several of the examples I mentioned about how Colorado's law was used involve people with suicidal intentions. Extreme risk protection orders are a critical tool in helping to prevent gun suicides, which represent 60 percent of gun deaths. Guns are used in only five percent of suicide attempts, but are responsible for over 50 percent of all suicide deaths, because suicides attempted with guns are fatal 85 percent of the time, far more often than suicides attempted by other means.⁸ Put simply, people are more likely to die by suicide if they have easy access to firearms, and far less likely to die by suicide if they do not. For many individuals, this may mean the difference between life and death: nine out of 10 people who survive a suicide attempt do not die by suicide at a later date.⁹

In the last two Congresses, there has been bipartisan support for legislation that would give grants to states that have enacted such legislation or provide a procedure to seek an extreme risk order from a federal court. Saving the lives of veterans and others at risk of suicide shouldn't be a partisan issue. I urge this Congress to prioritize similar legislation, and I thank Senator Feinstein and Senator Blumenthal for their leadership on this issue.

Now more than ever, it's clear that we need to strengthen our gun laws at the federal level in order to reduce gun violence. As a gun owner, veteran, and father, I have one message for the Senate: please do everything in your power to save lives from gun violence and save veterans from suicide, including supporting states in their efforts to pass and implement extreme risk laws.

Thank you.

⁷ *Ibid.*

⁸ Giffords Law Center to Prevent Gun Violence, "Confronting the Inevitability Myth: How Data-Driven Gun Policies Save Lives from Suicide," September 2018: 8, 25, https://giffords.org/wp-content/uploads/2018/09/Giffords-Law-Center-Confronting-The-Inevitability-Myth_9.3.18.pdf.

⁹ David Owens, Judith Horrocks, and Allan House, "Fatal and Non-fatal Repetition of Self-harm: Systematic Review," *The British Journal of Psychiatry* 181, no. 3 (2002): 193–199.

Thank you, Mr. Chairman and members of the Committee. I am here speaking as a victim of a violent crime. I'd like to share some insight on how red flag laws can have devastating, unintended consequences for many Americans.

In 2009, my husband Ben was shot seven times and killed in front of me by a man who until that night, I didn't know was stalking me. We were in a gun-free zone.

Realizing that night that I was being stalked, but not knowing this man was dangerous, I asked management to please remove the man from the establishment. There was no confrontation between us and no words were exchanged with my stalker. When management approached and asked him to leave, he pulled a .45 handgun, came up behind my husband, shot him in the head, he then stood over Ben and continued to fire six more rounds into him. I witnessed this in horror along with 50 other people. My stalker was in complete control. He was the only one with a gun. Because of the law, I had to leave my legal, permitted firearm that I normally carried for self-defense, locked inside my vehicle that night. I obeyed that gun control law, my stalker did not.

When police searched his vehicle at the crime scene, they found two more guns, ammunition, a baseball bat, binoculars, gloves, rope and a knife. Ben's murderer has been sending me twisted love letters for years from prison, to traumatize and terrorize me even further. Much to my dismay, he is set to be released early for "good behavior" in just 7 more years. I have real fears about what he will do once released. This horrifying experience will be with me for the rest of my life.

The days, months and years that followed were very difficult for me. Depression, nightmares, grief, trauma, loss and concern for my safety, were all things I dealt with and had to work through. Every emotion I have experienced is a normal human reaction to something this horrific. Put yourself in my shoes, how would you feel?

I remember thinking during this time that if I just happened to pass away in my sleep, I would be okay with that, because I didn't know how I could face another day. I was never suicidal, but you can see where someone may misinterpret that. If red flag laws had been in place in my state, even those with the best intentions could have an exaggerated concern and assume they were acting in my best interest, by having my guns taken from me. It would be devastating for a victim like me, to be unable to protect myself after this stalker violated me in such a horrific and life altering way. If he comes for me someday, my gun may be the only thing that could save my life.

Red flag laws can have a real chilling effect and can cause victims to fear losing their rights if they seek help by talking with friends, family or psychologists. Talking through these emotions is very important for mental health, and not doing so can compound the problem. Do we really want to live in a world where victims fear getting help for fear of losing their rights? Rights

should not be taken from people without due process first. Certainly, if we are talking about mental health, then mental health experts should absolutely be involved in that due process.

The person who is subject to having their firearms taken due to red flag laws is solely responsible for getting them back. The burden of hiring an attorney and paying thousands of dollars for representation would be on me. Who knows how long it could take in court and how much money it would cost to regain my safety? The process is unfair and burdensome.

It's not only victims who can be impacted by red flag laws. Anyone who has dealt with traumatic events could be affected and choose not to seek help. Police, first responders, nurses, doctors, military etc...

Research varies, there are indications that red flag laws range from having no significant effect on homicides and suicides to an increase.¹ Academics as a whole are also very skeptical of the benefits of Red Flag Laws. In the largest survey of academics who have published empirical work on guns, neither criminologists, economists, nor public health researchers believed Red Flag laws effectively reduced murder rates or mass public shootings.²

There are already laws that, had they actually been enforced, could have changed the outcome with my stalker. But no one enforced those existing laws.

I learned during the murder trial that there were signs my stalker was a danger to others years before we ever met him. His coworkers, friends and family knew of these signs. I don't know if those in my stalker's life ever reported him to police, but if they did, just as with Nicholas Cruz, who did the Parkland attack, they didn't act.

Ben's murderer threatened to kill his own secretary at his job in Florida. My stalker's father said at trial that it "scared the stew" out of her. He fired a shotgun at innocent hunters near his property out of anger. At this point, he should have been arrested, charged with a crime and convicted. That alone would have prohibited him from possessing and purchasing firearms. But for some reason, that never happened. These are just a few examples of what he did before he became a murderer. He had no criminal record and no mental illness on record, but he certainly should have. How did he fall through the cracks?

The people in his life could have "Baker Acted" him, where he would have been put on a 72-hour hold, and a mental evaluation would have been done.³ He would have then gone before a judge, evidence would be presented, and a Judge has a whole range of options including giving the person a chance with voluntary out-patient treatment, removal of guns and involuntary commitment. All states already have similar options to the Baker Act. It is an existing option that includes due process, mental health experts and if you cannot afford an attorney, one will be provided for you.

If someone is indeed a real danger to themselves or others, simply taking away their guns is not a serious response. Red flag laws are overwhelmingly used because of fears of suicide. There are other ways to commit suicide that have similar high success rates.⁴

In conclusion, I believe the focus should be on mental health services and facilities in this country. The focus should also be on education for the public, along with training for law enforcement, judges and prosecutors regarding existing laws such as the Baker Act. There should also be a coordinated effort to enforce the Baker Act and related laws. And please don't ever forget compassion for good people going through a difficult time.

Thank you.

¹ John R. Lott, Jr. and Carlisle E. Moody, "Do Red Flag Laws Save Lives?" Social Science Research Network, November 12, 2019 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3492120) and John R. Lott, Jr. and Carlisle E. Moody, "Do Red Flag Laws Reduce Crime?," Social Science Research Network, January 27, 2019 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3316573).

² Arthur Berg, John Lott, Gary Mauser, "Expert Views on Gun Laws," Regulation, Winter 2019-2020, pp. 40-47 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3507975)

³ http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0300-0399/0394/0394.html
An Excel file with the similar laws from all fifty states is available here https://crimeresearch.org/wp-content/uploads/2021/04/Involuntary-Commitment-Laws_revised.xlsx

⁴ CE Rhyne, DI Templer, LG Brown and NB Peters, "Dimensions of Suicide: Perceptions of Lethality, Time and Agony", in Suicide and Life-Threatening Behavior, Vol. 25(3), 1995 (<https://pubmed.ncbi.nlm.nih.gov/8553417/>).



Written Testimony of Joshua Horwitz
Executive Director, Coalition to Stop Gun Violence

Before the Subcommittee on The Constitution of the United States
Senate Committee on The Judiciary

Stop Gun Violence: Extreme Risk Order / “Red Flag” Laws Hearing

April 28, 2021

Good afternoon Chairman Blumenthal, Ranking Member Cruz, and distinguished members of the Senate Judiciary Subcommittee on The Constitution. Thank you for giving me the opportunity to testify on the importance of extreme risk laws and their value in preventing gun violence. My name is Josh Horwitz, and I am the Executive Director at the Coalition to Stop Gun Violence (CSGV). CSGV is the nation's oldest gun violence prevention organization, founded in 1974. Along with our affiliate organization, the Educational Fund to Stop Gun Violence, we develop and advocate for evidence-based solutions to reduce gun injury and death in all its forms.

Like so many others, I came to the gun violence prevention movement because of personal loss. Thirty-two years ago, a dear friend of mine took her own life using a newly purchased firearm in a moment of overwhelming hopelessness. Back then, I did not have the knowledge or the tools to intervene effectively. I desperately wish that I could go back in time. I wish an extreme risk law would have been available to help. But I can't go back in time, and I can't bring my friend back. What I can do is what I am doing right now: encouraging policy makers like you to use your power to support these life-saving laws so that no other families or friends have to experience this type of heartbreak.

Gun violence in our country remains persistently high, taking nearly 40,000 lives each year - an average of 106 people every day.¹ This is a serious yet preventable public health crisis. Firearms are the method used in half of all suicides and three-quarters of all homicides.² The high lethality of firearms makes risky situations fatal, as they do not allow for a second chance or a change of mind. Research has identified behavioral risk factors that can serve as warning signs for future violence as well as provide opportunities to intervene, but ultimately, easy access to guns in such high-risk circumstances significantly increases risk of both firearm suicide and homicide.³

The fact is, lives will continue to be needlessly lost without meaningful national leadership. Although no single intervention will serve as a panacea to the epidemic of gun violence, extreme risk laws have the power to save lives and are gaining traction across the country. Enacted in blue and red states alike and endorsed by both the Trump and Biden administrations,^{4,5} this

¹ Educational Fund to Stop Gun Violence and Coalition to Stop Gun Violence. (2021). A Public Health Crisis Decades in the Making: A Review of 2019 CDC Gun Mortality Data. Available: <http://efsgv.org/2019CDCdata>

² Ibid.

³ Anglemeyer, A., Horvath, T., & Rutherford, G. (2014). The accessibility of firearms and risk for suicide and homicide victimization among household members: a systematic review and meta-analysis. *Annals of internal medicine*, 160(2), 101-110.

⁴ DeVos, B., Nielsen, K. M., & Azar, A. M. (2018). Final Report of the Federal Commission on School Safety. Presented to the President of the United States. US Department of Education.

⁵ The White House, Office of the Press Secretary. (2021, April 7). *Biden Harris administration announces initial actions to address the gun violence public health epidemic*. [Press release]. Retrieved from

policy provides a clear opportunity to find common ground in stemming this ongoing nationwide tragedy.

Extreme risk laws authorize a targeted and temporary intervention that reaches high risk people in high risk situations. The modern extreme risk order was developed in response to the horrific school shooting at Sandy Hook Elementary School in Newtown, Connecticut. In the months that followed, the national dialogue around preventing gun violence was focused on mental illness. To determine whether this approach would truly be effective, in March of 2013 I convened a group of some of the nation's leading public health, behavioral health, and legal researchers to identify true risk factors for violence and to formulate evidence-based policy recommendations. When reviewing the research evidence, this group, who became known as the Consortium for Risk-Based Firearm Policy, concluded that mental illness alone is related to only a small portion of violence and that firearm prohibitions based only on mental illness are not supported by research evidence and are harmfully stigmatizing.⁶

Still, we knew that evidence-based policies to prevent the harrowing toll of gun violence were greatly needed. This is how the modern Extreme Risk Protection Order policy came to be.

We discovered there are *behavioral* risk factors for violence that are supported by evidence and research, including but not limited to past violent behavior,⁷ threats of violence,⁸ and risky alcohol use.⁹ We knew that in many high-profile shootings and firearm suicides, family members saw their loved ones engage in risky behaviors and grew concerned about their risk of harming themselves or others—even before any violence occurred. Indeed, family members are often the first to know when loved ones are in a suicidal crisis or threatening interpersonal violence. Unfortunately, there were few tools for family members and law enforcement to use to intervene during these periods of crisis.

To address this gap in state laws, the Consortium developed a new legal mechanism to temporarily remove firearms from individuals posing an demonstrable danger to themselves or others. This concept, now known as an Extreme Risk Protection Order, was based on the long-

<https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/07/fact-sheet-biden-harris-administration-announces-initial-actions-to-address-the-gun-violence-public-health-epidemic/>

⁶ Ibid.

⁷ Cook, P. J., Ludwig, J., & Braga, A. A. (2005). Criminal records of homicide offenders. *JAMA*, 294(5), 598-601.

⁸ Chaiken, J., Chaiken, M., & Rhodes, W. (1994). Predicting violent behavior and classifying violent offenders. *Understanding and preventing violence*, 4, 217-295.

⁹ Elbogen, E. B., & Johnson, S. C. (2009). The intricate link between violence and mental disorder: results from the National Epidemiologic Survey on Alcohol and Related Conditions. *Archives of general Psychiatry*, 66(2), 152-161.

standing domestic violence restraining orders found in every state as well as the established risk-based firearm removal laws in Connecticut and Indiana.¹⁰

Since the Consortium's initial convening eight years ago, seventeen additional states and the District of Columbia have enacted these extreme risk protection order laws so that today, a total of nineteen states and D.C. have extreme risk laws on the books.¹¹

Extreme risk laws are a precise, evidence-based legal tool to help prevent acts of lethal violence *before* they occur. The process may look somewhat different across states, but it most often involves civil court orders issued by a judge upon consideration of the evidence presented by a family member or law enforcement officer and a judicial finding that the respondent poses a danger to themselves or others. The order temporarily prohibits them from possessing or purchasing firearms and provides a process for the removal of firearms already in their possession.

There are usually two types of extreme risk protection orders: Temporary ex parte orders and final orders. Judges will typically issue a temporary ex parte order when the petitioner proves that the respondent poses an imminent risk of harming themselves or someone else by having access to a firearm. The duration of an temporary order and standard of proof that petitioners must meet varies from state to state, though they generally last up to 14 days and require at least probable cause or a preponderance of the evidence. Due to their emergency nature, temporary ex parte orders can be issued by a court without notice to the respondent or an opportunity to be heard at the first hearing.

In contrast, a final order may be issued *only* after a noticed hearing at which the respondent has the opportunity to appear and be heard. Final orders are typically issued only when the petitioner proves by clear and convincing evidence or preponderance of the evidence (depending on the state statute) that the respondent poses a risk of harming themselves or someone else by having access to a firearm. In a majority of states, these final orders last up to one year. Importantly, both temporary ex parte and final orders are *civil, not criminal*, orders.¹²

In addition to potentially preventing an act of gun violence by removing firearms from the high-risk situation, extreme risk orders also create safer circumstances for the at-risk individual to seek resources and services to address the underlying causes of their dangerous behaviors.

¹⁰ The Consortium for Risk-Based Firearm Policy. Guns, Public Health, and Mental Illness: An Evidence-Based Approach for State Policy. December 2013.

¹¹ See: Consortium for Risk-Based Firearm Policy. (2020). Extreme Risk Protection Orders: New Recommendations for Policy and Implementation. Available: www.efsgv.org/ERPO2020

¹² *Ibid.* Appendix 2.

Importantly, these orders accomplish this while also ensuring critical due process protections for respondents. Because temporary orders are addressing imminent risk of harm, hearings are often held ex parte without notice to respondents but respondents have a timely opportunity to participate in a hearing after having their firearms removed by law enforcement through the final order process. Known as post-deprivation due process, this approach is modeled after well-established domestic violence restraining orders as a measure to both ensure immediate safety when the evidence indicates imminent risk and provide an opportunity to be heard shortly thereafter. Further, extreme risk orders are time-limited and ensure processes are in place for returning the respondent's firearms at the conclusion of the orders.

Multiple studies of extreme risk laws have found that they are especially effective in preventing suicides, and new research suggests that they may help prevent mass violence as well, including school violence. Analyses of Connecticut and Indiana's laws found that for every 10-20 orders issued, one suicide was prevented.^{13,14} Research on California's law found 21 cases between 2016 and 2018 wherein law enforcement used an extreme risk protection order in response to objective evidence indicating that individuals were planning or threatening a mass shooting.¹⁵ We continue to hear of cases in which extreme risk laws have been used to intervene in cases of hate crimes,¹⁶ domestic violence,¹⁷ workplace violence,¹⁸ school shootings,¹⁹ situations involving dementia,²⁰ and suicides.²¹ Additionally, we are learning that in certain cases the duration of the temporary order is enough time to mitigate risk and it is not necessary in every instance to go to a final order. As most extreme risk laws are relatively recent, continued study is essential to further elucidate their impacts and outcomes. We are committed to helping researchers and

¹³ Swanson, J. W., Norko, M. A., Lin, H. J., Alanis-Hirsch, K., Frisman, L. K., Baranoski, M. V., ... & Bonnie, R. J. (2017). Implementation and effectiveness of Connecticut's risk-based gun removal law: does it prevent suicides. *Law & Contemp. Probs.*, 80, 179.

¹⁴ Swanson, J. W., Easter, M. M., Alanis-Hirsch, K., Belden, C. M., Norko, M. A., Robertson, A. G., ... & Parker, G. F. (2019). Criminal justice and suicide outcomes with Indiana's risk-based gun seizure law.

¹⁵ Wintemute, G. J., Pear, V. A., Schleimer, J. P., Pallin, R., Sohl, S., Kravitz-Wirtz, N., & Tomsich, E. A. (2019). Extreme risk protection orders intended to prevent mass shootings: a case series. *Annals of internal medicine*, 171(9), 655-658.

¹⁶ See: Foley, R. J., & Mattise, J. (2019, August 24). 'Red flag laws' offer tool for preventing some gun violence. PBS News. <https://www.pbs.org/newshour/nation/red-flag-laws-offer-tool-for-preventing-some-gun-violence>

¹⁷ See: Boone, M. & Saunders, M. (2018, February 16). *San Diego city attorney issues restraining orders against 10 gun owners*. ABC 10 News.

¹⁸ See: Wintemute, G. J., Pear, V. A., Schleimer, J. P., Pallin, R., Sohl, S., Kravitz-Wirtz, N., & Tomsich, E. A. (2019). Extreme risk protection orders intended to prevent mass shootings: a case series. *Annals of internal medicine*, 171(9), 655-658.

¹⁹ See: Ferraro N. (2018, December 18). *Student helps police foil alleged Middlebury school shooting plot*. WCAX-TV.

²⁰ See: San Diego City Attorney Mara W. Elliott. (2018, February 16). *San Diego police working to protect the public from gun violence*. [Press release]. Retrieved from <https://www.sandiego.gov/sites/default/files/nr180216a.pdf>.

²¹ See: Shedlock J. (2019, April 9). *Gun seizures in Clark County surge in law's 2nd year*. The Columbian.

policy makers gain access to de-identified data so that these new laws can be assessed and to ensure that they are being designed and implemented in an equitable and fair manner.²²

While researchers continue to study their outcomes, we already know that extreme risk laws can reach their full potential only if they are implemented vigorously and fairly. Since the Consortium introduced the modern extreme risk order concept in 2013, I have met with people around the country, hosting forums about extreme risk laws and hearing from stakeholders about their experiences implementing them. Implementation and use of these laws vary not only between states, but between cities and counties within states. These variations in implementation are typically a function of training and resources.

In speaking with stakeholders across the country, we have found that extreme risk law implementation has been most effective when collaborative, multi-agency teams are in place. For example, in King County, Washington, the unit dedicated to extreme risk protection orders includes law enforcement officers, prosecutors, a court advocate, a problem-solver, a court coordinator, a paralegal, a data technician, and a program manager. These multidisciplinary teams work together to ensure the entire extreme risk order process is effective, timely, and just. The whole country deserves access to effective implementation systems like these.

Unfortunately, many jurisdictions have struggled with limited funding for extreme risk law implementation, resulting in uneven implementation and limited data about their use. It is especially critical that less populous, more rural counties are able to implement them given the evidence supporting extreme risk laws for suicide prevention. In 2019, the most rural counties had the highest rate of firearm suicide, nearly twice as high as the national average.²³ Resources and training can help. For example, in Maryland, state-wide law enforcement training took place prior to the law taking effect and as a result, petitions have been filed in nearly every part of the state, including its most rural counties. Resources for extreme risk law implementation need to be accessible throughout the country, in cities and rural communities alike.

Although extreme risk laws are a state-level policy, the federal government can play an important role in helping states and localities implement these life-saving laws. Federal funding would advance implementation efforts and create an incentive for additional states to enact these laws.²⁴

²² For more on racial equity and extreme risk laws, see: Educational Fund to Stop Gun Violence. (2021). A Working Guide Towards More Racially Equitable Extreme Risk Laws. Available at: <https://www.csgv.org/wp-content/uploads/2021/04/Working-Guide-Towards-More-Racially-Equitable-Extreme-Risk-Laws.pdf>

²³ Educational Fund to Stop Gun Violence and Coalition to Stop Gun Violence. (2021). A Public Health Crisis Decades in the Making: A Review of 2019 CDC Gun Mortality Data. Available: <http://efsgv.org/2019CDCdata>

²⁴ Consortium for Risk-Based Firearm Policy. (2020). Extreme Risk Protection Orders: New Recommendations for Policy and Implementation. Available: www.efsgv.org/ERPO2020

Federal funding would also help local jurisdictions train law enforcement officers, judges, and court clerks to assure safe and equitable application of extreme risk laws and proper reporting of records to the National Instant Criminal Background Check System (NICS). In all jurisdictions, to mitigate potentially harmful outcomes, we encourage implementers to invest in crisis intervention and de-escalation training for law enforcement.

Extreme risk laws cannot be effective if they are not utilized. Raising awareness of these laws should be a major priority, especially when family members are authorized to file petitions. Healthcare providers, community leaders, domestic violence and suicide prevention advocates, and social services providers who may be working with potential petitioners and respondents should be provided tailored guidance and resources.

Unfortunately, this month's mass shooting at the Indianapolis FedEx warehouse highlights the devastating effect of a failure to implement an extreme risk statute. When the eventual shooter was identified by law enforcement as behaving dangerously in March 2020, Indiana's extreme risk law was an available resource that I believe could have prevented this tragedy. Instead, prosecutors in the case declined to pursue an extreme risk order, relying instead on the removal of the shotgun the shooter then possessed. If the police had successfully filed for an extreme risk order, the shooter could have been prohibited from purchasing the rifles he used in the shooting. Had an extreme risk order been obtained, eight families likely wouldn't be grieving right now. We cannot allow these cases to fall through the cracks for lack of resources and training. Too many lives are on the line.

In 2019, 109 Americans died from gun violence every day.²⁵ But it doesn't have to be this way. Gun violence is preventable. And while I am sure that every member of this Committee does not agree with every nuance of every extreme risk law, I hope that we can agree that temporarily removing firearms from a person at high risk of violence is the right thing to do, and that we can do it in a way that enhances community safety while respecting constitutional rights.

Thank you for this opportunity to testify. I look forward to your questions.

²⁵ Educational Fund to Stop Gun Violence and Coalition to Stop Gun Violence. (2021). A Public Health Crisis Decades in the Making: A Review of 2019 CDC Gun Mortality Data. Available: <http://efsgv.org/2019CDCdata>

KING COUNTY PROSECUTING ATTORNEY'S OFFICE



DANIEL T. SATTERBERG
PROSECUTING ATTORNEY

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HEARING BEFORE THE UNITED STATES SENATE COMMITTEE ON THE
JUDICIARY

“Stop Gun Violence: Extreme Risk Orders/Red Flag Laws”

April 28, 2021

Written Testimony of Kimberly Wyatt

Senior Deputy Prosecuting Attorney, King County Prosecuting Attorney's Office

Good Afternoon Chairman Blumenthal, Ranking Member Cruz and distinguished members of the Senate Judiciary Committee.

My name is Kimberly Wyatt and I am a Senior Deputy Prosecuting Attorney from King County, Washington. I am grateful for the opportunity to testify and share with you the importance of having an Extreme Risk Protection Order law and how it has worked in our state over the past four and a half years. You will hear about the need for ERPO implementation, the benefits of increased coordination with local and federal law enforcement and real-life applications of how ERPO has been used to save lives.

As our nation faces the most recent tragedies and senseless losses of life in Indianapolis, Boulder and Atlanta, our nation grieves, as it all too frequently does in the aftermath of mass shootings. I am here today, speaking from experience, to say that we have an opportunity to get ahead of this and create a viable path forward. It is time for us to systematically act and lean into the tools that can make a difference in curbing firearm violence, including suicide. One of those tools is the Extreme Risk Protection Order.

Extreme Risk Protection Orders are a critical tool to intervene to prevent a firearm-related tragedy from occurring. Countless reports published by the US Secret Service and others have found that most people who intend to do harm to themselves or others share that information in one form or another. Being alert to that information, being primed to competently intervene and having the legal tools to do so during those brief windows of opportunity are the key to saving lives. Extreme Risk Protections Orders and engaging in efforts to effectively implement them, are how our Unit, the Regional Domestic Violence Firearms Enforcement Unit (RDVFEU), has helped intervene and disrupt several potential suicides, mass shootings, and other threats to community safety since our Unit was formed in January 2018.

CRIMINAL DIVISION • KING COUNTY COURTHOUSE W554
516 THIRD AVENUE • SEATTLE, WASHINGTON 98104
Tel: (206) 296-9000 • www.kingcounty.gov/prosecutor

Using a harm-reduction model and triaging risk, our Unit assists law enforcement and family or household members to file ERPOs in cases where there is a credible threat of self-harm or harm to others. Extreme Risk Protection Orders allow family members and law enforcement (who have seen warning signs), to immediately (at the time of crisis) come before a court and petition for a temporary order that prevents the at-risk individual from purchasing and possessing firearms. Intervening at the time of warning signs and threats can make the difference between life and death. Contrary to some of the unfortunate rhetoric around ERPOs, due process is built into every step, as judicial officers oversee each phase.

Implementation of ERPO Laws

As we have learned locally, and in collaboration with partners across the nation, ERPO laws do not implement themselves. As our Unit formed in January of 2018, we quickly realized the need for robust ERPO education. Having a law alone is insufficient. It is critically important that law enforcement and other system partners and community members are aware of ERPO as a tool to intervene to prevent suicides and threats to others—including threats of mass violence. Equally essential is the need for the public to know that ERPOs are a tool of intervention for a loved one in crisis. Having a designated ERPO prosecutor and advocate to help educate the community and law enforcement has proven to be a successful model. We have increased our outreach to the community by providing ERPO training. To name a few examples, we have trained those most in a position to learn of risks and threats, such as local crisis line workers, Veterans Affairs social workers, county-designated crisis responders, medical providers, various community groups, judicial officers, local and state-wide law enforcement, our local United States Attorney's Office and federal law enforcement.

Need for Federal Funding

Although ERPO education is one of the foundations for the successful implementation of ERPO laws, it is also essential to have subject matter experts on ERPOs to assist families and law enforcement with the ERPO process in **real time**. When the crisis is occurring, families and law enforcement need the ability to move quickly to intervene to prevent gun violence. Federal funding is needed to provide states a model policy to adopt ERPO implementation and to have an ERPO commission, or something similar, to study the effectiveness of ERPO laws in each state. Collecting, analyzing and researching ERPO data is critical for transparency, better implementation and learning about outcomes that can inform other life-saving interventions.

Case Examples of ERPO in King County, Washington

For context, King County Washington has a population of approximately 2.2 million people and is comprised of more than 30 different law enforcement agencies. The county has densely populated urban areas like Seattle but also contains many suburban and rural areas. In 2020, our Unit assisted with 79 ERPO petitions. The number of petitions filed each year has been at, or around, that rate since we began 2018. ERPOs are a specific intervention, not a blanket response, as some try to argue. What you will see from the case examples below is that these targeted interventions were successful in putting space and distance between someone threatening harm to self or others and their access to firearms.

ERPOs are singularly focused on temporarily restricting access to firearms only **for those who pose a danger of harm to self or others**. Firearm owners in general need not fear and should support the use of ERPOs in these narrow and high-risk situations. As a distraught father below mentioned, this is “just common sense.”

Suicide Prevention:

A father reached out to our ERPO email, expressing concern that his son was actively suicidal, had access to firearms, was emotionally unstable and had a significant substance abuse issue. An ERPO was filed to temporarily remove the firearms from the home. The father testified at the hearing and told the court that he “believes in the law of common sense” and that the ERPO was needed to protect his son and family. Because of the ERPO, his son is still alive today. As many experts in suicide prevention share, suicidal thoughts are often temporary and attempts impulsive, but having access to a firearm during that period of crisis, however fleeting, is often fatal (compared to other means).

Crisis Behaviors:

Law enforcement responded to a crisis call of an individual who had displayed over 20 firearms with loaded magazine clips on his front lawn. Most troubling to law enforcement was the fact that the firearms were within reach of a well populated residential street where children were playing. The individual was experiencing delusions and believed that he was 700 billion years old. An ERPO was obtained and the firearms were secured by law enforcement while the individual was evaluated for a mental health hold.

Coordination with Federal Partners

Over the past several years, our Unit has built and increased cooperation with federal law enforcement partners to include multiple federal law enforcement agencies petitioning for an ERPO. Federal law enforcement has praised the use of ERPOs as a tool that allows them to intervene in real time to disrupt and deescalate individuals who are exhibiting warning signs that include violent behaviors and threats.

Threats to Others- Preventing Workplace Violence:

A federal employee made threats of mass violence towards his employer after he was placed on leave. The employee made threats that included a reference to a “massive massacre in the federal workplace” and stated that he had nothing to live for and that it was going to be “a blood bath.” He also explicitly named his former managers in several of the threats. Our Unit was contacted to assist with the filing of an ERPO. While federal law enforcement was investigating the threats, the employee traveled out of state. A temporary ERPO was obtained. With the cooperation of law enforcement in a multi-state and multi-jurisdictional investigation, the respondent was served with the temporary ERPO and the firearm parts that the respondent had

purchased were intercepted by law enforcement before he could carry out his plot. The ERPO also prevented the future purchase of other firearms while the order was in place.

Threats of Ideologically Motivated Violence:

In cooperation with federal and local law enforcement, an ERPO was filed against a self-admitted member of a Neo-Nazi group known for promoting and advancing a violent ideology. The respondent was organizing hate camps, that included firearm training, access to firearms while promoting threats of mass violence—including threats to kill members of the Jewish community. A temporary ERPO was served and numerous firearms were recovered, including ghost guns.

Every example above illustrates the importance of acting when there are words, actions or behaviors that suggest that someone may be a danger to themselves or others. In so many situations, we do not get a second chance to intervene. Extreme Risk Protection Orders save lives. I know firsthand. Every state in the nation deserves to have this lifesaving legislation. Thank you.



**Statement on Behalf of the National Coalition Against Domestic Violence
Submitted for the hearing on**

Stop Gun Violence: Extreme Risk Order / “Red Flag” Laws

Senate Committee on the Judiciary, Subcommittee on The Constitution

April 28, 2021

The National Coalition Against Domestic Violence (NCADV) applauds the Senate Judiciary Committee for holding a hearing on extreme risk protective orders (ERPOs). NCADV supports the passage of ERPOs, which are a vital tool to protect people experiencing crises that make it temporarily unsafe for them to possess firearms. In the domestic violence context, it is important to consider ERPOs as only one in a toolbox of remedies. ERPOs do not provide the comprehensive protections that domestic violence protection orders (DVPOs) do for survivors. ERPOs should be seen as a supplement to, rather than a replacement for, DVPOs.

Confusion abounds about the difference between ERPOs and laws governing firearm possession by adjudicated domestic abusers and stalkers. Reporting by both Politico¹ and Roll Call², in addition to other news outlets, incorrectly referred to ‘red flag’ provisions in the House Violence Against Women Act (VAWA) reauthorization bills in both the 115th and 116th Congresses. In the 117th Congress, a Member of the House of Representatives said on the House floor that H.R.1620, the *Violence Against Women Reauthorization Act of 2021*, contains ‘red flag’ laws.³ None of these bills contains ERPOs, for which VAWA is not an appropriate vehicle. Instead, all three of the bills in question build on existing federal laws that make certain adjudicated abusers ineligible to possess firearms – based on their status as adjudicated abusers. VAWA addresses gender-based violence, while ERPOs can be used to address a broader array of contexts.

ERPOs and DVPOs have different purposes. ERPOs are designed primarily to address firearms access by individuals experiencing a temporary crisis during which they may be a danger to themselves or others or who may pose a danger for other reasons (ex. a Washington court used the state’s ERPO law to disarm a Neo-Nazi preparing to start a race war⁴). They are a particularly powerful tool to temporarily limit firearms access for individuals experiencing suicidal ideation; research has shown that for every ten ERPOs

issued as a suicide prevention measure, one life is saved.⁵ Although ERPOs can be issued to respond to specific, individualized threats toward another person, they are typically used to intervene to protect entire communities or to protect the respondent themselves. Depending on the state, the petitioner (person seeking the protective order) is typically a law enforcement officer or, in some states, a family member or other party.

In contrast, DVPOs holistically address the safety concerns of a survivor who has experienced violence or threats of violence perpetrated by the respondent (person subject to the protective order). While it is critical to disarm adjudicated domestic abusers, the dynamics of domestic violence, the nature of intimate partner relationships, the history of targeted violence, and other factors necessitate much broader relief to protect the survivor. Depending on the needs of the survivor, a DVPO order can require the respondent to stay away from the survivor, their workplace, their family, and other places they are likely to be. The DVPO can also award the survivor temporary custody of children, temporary control of a residence, and include a variety of other forms of relief. Federal⁶ and many state⁷ laws automatically prohibit certain respondents to DVPOs from having firearms, and courts can include specific firearm-related relief in DVPOs. The survivor of domestic violence is typically the petitioner.

ERPOs are not accorded full faith and credit across state lines unless the states in question have entered into a reciprocity agreement. DVPOs issued by a state, territorial, or tribal court are given full faith and credit by other states, territories, and tribes.⁸ Thus, DVPOs protect survivors from armed abusers in two ways if they leave the state in which the DVPO is issued: in addition to triggering federal laws prohibiting certain respondents to DVPOs from possessing firearms, firearm-related relief written directly into the terms of the order is also accorded full faith and credit across state lines.

Clearly, ERPOs and DVPOs are conceptually different with different purposes; they are also complementary in some cases. However, the conflation of ERPOs and intimate partner violence prohibitors is concerning for multiple reasons, not the least of which is that ERPOs are often identified as a panacea for protecting survivors of domestic violence from armed abusers, when in reality, DVPOs are almost always more appropriate.

Survivors are the foremost experts about the protections they need to be safe, and survivors must be at the helm when seeking civil remedies. Under ERPOs, the person who is seeking an ERPO is not typically doing so to protect their own safety – as previously noted, they are typically law enforcement or other eligible third parties under state law. In cases where the respondent is experiencing a temporary crisis and the intent is to protect the respondent or their community, this is entirely appropriate. However, in domestic violence situations, this process can increase the risk of harm to the victim if the victim is not consulted.

Abusers often escalate when a survivor takes steps to leave, and the removal of firearms pursuant to an ERPO may be perceived as a step the survivor is taking to protect themselves, whether or not the survivor is involved in the decision to petition for an

ERPO. In DVPOs, this risk of escalation can be addressed through relief written into the DVPO itself, and victim advocates work with survivors to develop a safety plan in advance. If law enforcement or other parties seek an ERPO as a measure to remove firearms from a domestic abuser without the knowledge of the survivor, survivors do not have the opportunity to prepare for potential escalation, and removing the firearms may have the opposite of the intended effect. If the removal of the firearm is not accompanied by extensive safety planning and by other forms of court-ordered relief, removing the firearm may result in greater harm to the survivor than if the firearm was not removed.

ERPOs can, when used appropriately, provide a pathway to safety for some survivors. Every domestic violence situation is different, as are the needs of every survivor. In some cases, the only remedy the survivor might want is for the abuser's firearms to be removed. For instance, an individual may threaten an intimate partner with firearms or use firearms recklessly when intoxicated but engage in other abusive behaviors when intoxicated or when sober. In such a case, the survivor may not want a DVPO with a stay away order; the only issue might be firearm access. Also, in some cases, survivors may be afraid of potential escalation of abuse with a firearm if they petition a court for a DVPO. In such a case, it might be safer if law enforcement or another party interfaces with the court, so the abuser does not blame the survivor for the removal of the firearms.

ERPOs can also be used if a domestic abuser is making threats toward the survivor's friends, family, or other individuals who do not have standing to petition for a DVPO but are being threatened as part of a pattern of coercive control that may not include physical violence or threats toward the survivor, themselves. Similarly, an intimate partner may use threats of suicide as a tool to exert power and coercive control without directly harming or threatening the survivor. In these instances, the survivor might not be eligible for a DVPO, but an ERPO would remove a tool of power and coercive control from the abuser. Survivors need as many options as possible, and ERPOs can provide an important potential avenue to safety for themselves and their loved ones. Ultimately, it is up to the survivor, who is the expert in their own situation, to determine whether an ERPO or a DVPO is more appropriate.

Additionally, ERPOs can be used to protect survivors from armed abusers when a court issuing a DVPO fails to provide the firearms relief necessary to protect survivors. While in some states, all respondents to DVPOs are required to relinquish their contraband firearms, in most states, courts are authorized (either explicitly or implicitly) but not required to order respondents to relinquish their firearms. Unfortunately, there are judges who refuse to require relinquishment of contraband firearms, regardless of the danger the survivor faces. In such a case, a survivor could petition separately for an ERPO, which case may be heard by a different judge.

Moreover, federal law does not prohibit respondents to DVPOs in a dating relationship from possessing firearms, nor do all state laws. Also, not all states allow courts to restrict dating partners from possessing firearms, even implicitly. In cases in which

survivors of dating violence are not able to access firearm relief through a DVPO, an ERPO can provide additional protection. However, in such a case, an ERPO is merely a stop-gap measure. While in this situation, ERPOs may help in a case-by-case basis, Congress must act swiftly to close the 'boyfriend loophole' to restrict firearm access by dating abusers subject to DVPOs. ERPOs cannot be used as an excuse to allow Congress to abdicate its duty to protect all victims of domestic violence, including dating partners.

When developing and implementing laws, policies, and practices governing the use of ERPOs, it is critical to ensure survivors, courts, law enforcement, and the general public understand the difference between ERPOs and DVPOs. Survivors in crisis must be easily able to differentiate between the two to ensure they seek the relief that is most appropriate for their situations. Before seeking an ERPO to address a domestic violence situation, law enforcement and other eligible petitioners should consult with the survivor, and survivors should always be connected with an advocate to safety plan before a third party seeks an ERPO. Furthermore, courts must have sufficient training to ensure judges and magistrates understand the difference between DVPOs and ERPOs, particularly as it pertains to the evidence required to issue each and to the available relief. For example, judges may need to be reminded that DVPOs can – and should, with the consent of the survivor – include firearms-related relief; that is not solely in the purview of an ERPO. Likewise, while an assessment of an individual's mental state may be necessary to issue an ERPO, it is not necessary to issue a DVPO, nor is it necessary in order to include firearms-specific relief in a DVPO.

ERPOs are a powerful protective tool to address safety concerns when the respondent is experiencing a crisis. NCADV strongly supports states across the country passing ERPO laws. In some cases, they can be used to address firearm possession by domestic abusers, although in most cases, DVPOs are more appropriate. In addition to supporting ERPOs across the country, we urge Congress to address the intersection between domestic violence and firearms directly by closing loopholes in federal law based on outdated definitions and outdated cultural views that allow adjudicated dating abusers and stalkers to access firearms. Congress should also take measures to improve enforcement of domestic violence court orders requiring the relinquishment of firearms to law enforcement, which may run parallel to the enforcement of ERPOs; improve communication between law enforcement and prosecutors at different levels of the government; and make a technical fix to ensure the existing misdemeanor crime of domestic violence prohibitor is applied uniformly across the country.⁹

¹ Ferris, S. & Bresnahan, J. (2019, March 2). Dispute over Violence Against Women Act roils budget talks. *Politico*. <https://www.politico.com/story/2019/02/13/violence-against-women-act-budget-talks-1168924>

² Shutt, J. & Tully-McManus, K. (2018, December 3). Violence Against Women Act extension included in latest spending proposal. *Roll Call*. <https://www.rollcall.com/news/politics/violence-women-act-lapse-latest-spending-proposal>

³ C-SPAN. *House passes Violence Against Women Act (VAWA) reauthorization, 244-172* [Video file]. Retrieved from <https://www.c-span.org/video/?c4952428/house-passes-violence-women-act-reauthorization-244-172>

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- ⁴ Baker, M. (2019, October 18). Police seize guns from man thought to be neo-Nazi leader. *New York Times*. <https://www.nytimes.com/2019/10/17/us/atomwaffen-caleb-cole.html>
- ⁵ Swanson, J. W., Easter, M. M., Alanis-Hirsch, K., Belden, C. M., Norko, M. A., Robertson, A. G., Frisman, L. K., Lin, H., Swartz, M. S., & Parker, G. F. (2019). Criminal justice and suicide outcomes with Indiana's risk-based gun seizure law. *Journal of the American Academy of Psychiatry and the Law Online*, 47(2), 188-197. <https://doi.org/10.29158/JAAPL.003835-19>
- ⁶ 18 United States Code § 922(g)(8)
- ⁷ See <https://www.disarmdv.org> for more information about state laws pertaining DVPOs and firearms
- ⁸ 18 United States Code § 2265
- ⁹ Violence Against Women Reauthorization Act of 2021, H.R.1620, 117th Cong. (2021). <https://www.congress.gov/bill/117th-congress/house-bill/1620/text?q=%7B%22search%22%3A%5B%22hr1620%22%5D%7D&r=1&s=1>



Testimony of Nicole Hockley, Managing Director, Sandy Hook Promise

Stop Gun Violence: Extreme Risk Order/ “Red Flag” Laws
Senate Committee on the Judiciary, Subcommittee on The Constitution

April 28, 2021

I would like to begin by thanking Chairman Blumenthal, Ranking Member Cruz, and the members of the Subcommittee on the Constitution for holding this important hearing today. Chairman Blumenthal, we are proud to have you representing us in Connecticut, and we are deeply grateful for your tireless work to prevent gun violence.

My name is Nicole Hockley, and I am one of the founders and Managing Directors of Sandy Hook Promise. My son Dylan, my beautiful butterfly, was one of 20 first-graders killed, alongside six adults, at Sandy Hook Elementary School.

In the weeks and months following the shooting, I began working to find a way to prevent other parents from experiencing the senseless, horrific death of their child to gun violence. The result was Sandy Hook Promise, an organization committed to ending school shootings and creating a culture change that prevents violence. We are dedicated to ensuring the safety of students in their schools, homes, and communities.

A large part of our work is teaching youth that violence is preventable. Through our *Know the Signs* programs, middle and high school students learn the warning signs of potential violence and self-harm and how to seek help from a trusted adult. To date, we have trained more than 12 million youth and adults nationwide.

We created these programs because people who hurt themselves or others often show warning signs prior to carrying out an act of violence. Research has shown that 70% of those who die by suicide tell someone of their plans or give some other type of warning sign, and in 4 out of 5 school shootings, at least one other person had knowledge of the attacker’s plan but failed to report it.

Like *Know the Signs* for students, Extreme Risk Protection Order (ERPO) laws give family members and law enforcement a way to seek help if they observe warning signs of violence and believe a person is at risk of hurting themselves or someone else.

Since 1999, 19 states and the District of Columbia have passed versions of ERPO laws. The majority of these allow family and household members to file petitions for orders to temporarily separate an individual from a firearm—often the most lethal option for harming oneself or someone else. These key individuals, in addition to law enforcement, are best positioned to prevent tragedies from happening; they observe the warning signs that a loved one may be in crisis and are best equipped to provide the information needed to intervene and get help.



It is critical that law enforcement and the public understand these laws and how to utilize them. I am devastated to hear so many reports following shootings where family members observed warning signs and did not know where to turn, including in the recent shooting in Boulder, Colorado. ERPO laws can only work if people are aware of them and law enforcement is properly trained in how to use them.

Congress can help make this happen by creating funding opportunities to support state implementation of their ERPO laws. This would include training local law enforcement, judges and court clerks in the safe and equitable application of ERPOs; supporting the education of health and social service professionals, diverse community stakeholders, and the public; and the reporting of ERPO records to the National Instant Criminal Background Checks System (NICS).

ERPOs are a critical violence prevention tool that have the power to save lives, but we need to ensure they are implemented to their fullest extent in order to do so. By passing legislation to create new ERPO grants and prioritizing existing funds to support state implementation, Congress can help save lives.