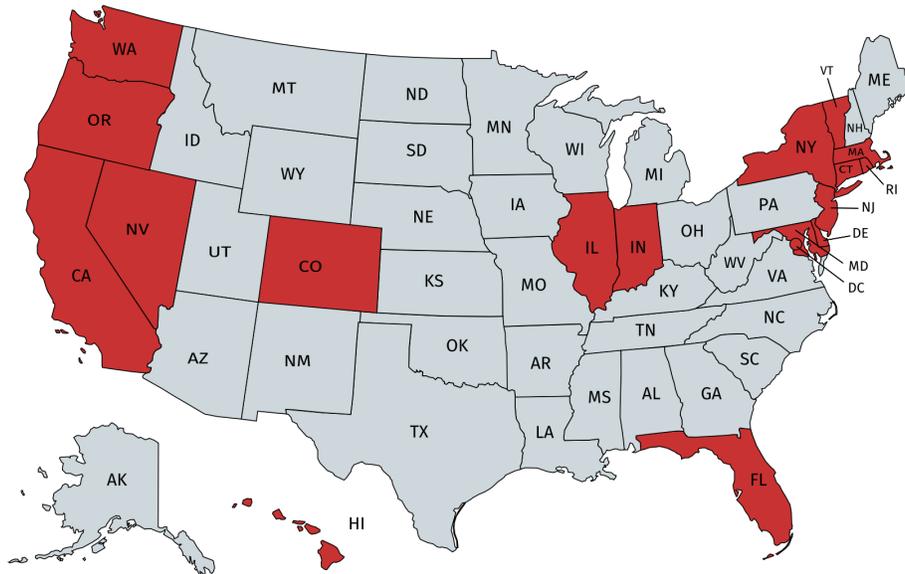




Northeastern University School of Law

Extreme Risk Protection Orders: Implementation in a Social Justice Context



Northeastern University School of Law
Legal Skills in Social Context
In Conjunction with Stop Handgun Violence
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LAW OFFICE 9

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Table of Contents

EXECUTIVE SUMMARY	v
INTRODUCTION	1
THE GUN VIOLENCE LANDSCAPE WITHIN THE UNITED STATES	3
SOCIAL IMPLICATIONS	6
I. Mental Health.....	6
a. Suicide Prevention	6
b. Media Stigmatization	9
II. Marginalized Communities	16
a. Race	16
b. Religion.....	19
c. Sexuality and Gender Identification.....	20
d. Socioeconomic Status	21
III. Intimate Partner Violence	22
IV. Social Implications Conclusion	27
LOGISTICAL IMPLEMENTATION	29
I. Petitions	30
a. Who Can Petition	30
b. Against Whom an ERPO Can Be Filed.....	32
c. Filing an ERPO with the Court	36
d. <i>Ex Parte</i> Orders	38
II. Seizure	40
a. Storage Options / Transfer to Another Party	42
III. Hearings, Final Orders, Renewal, and Termination	44
a. Final Order Hearings.....	45
b. Final Orders.....	47
c. Early Termination.....	48
d. Renewal	49
IV. Return of Firearms	50
V. Legal Consequences	51
a. Law Enforcement Immunities and “Good Faith”.....	51
b. Penalties for ‘Bad Faith’ Petitioners	53
c. Criminal Penalties	53
d. Background Check Systems	54
e. Implementation.....	56
VI. Federal ERPO Bills	65
a. S.506 (H.R. 1236) – Extreme Risk Protection Order Act of 2019.....	67
b. S.7 - Extreme Risk Protection Order and Violence Prevention Act of 2019	68
c. H.R. 744 – Protecting Our Communities and Rights Act of 2019	69
d. H.R. 2786 – Jake Laird Act of 2019	70

LEGAL ISSUES.....	71
I. Procedural and Evidentiary Issues	72
a. Remedies for Procedural Failures	72
II. Right to Bear Arms	74
a. What is Found to Infringe on an Individual’s Rights?	75
III. Unreasonable Search and Seizure	79
a. Search and Seizure in Relation to ERPOs	79
b. Potential Search and Seizure Challenges	81
IV. Due Process	83
a. Procedural Due Process	84
b. Substantive Due Process	86
c. Void for Vagueness.....	87
V. Freedom of Speech	88
VI. Full Faith and Credit	91
BEST PRACTICES	93
I. Reporting	94
a. Reporting to Background Check Databases	94
b. Mandated Reporting of “Lie and Try” Attempts	95
c. Data Collection and Review	95
d. Immediate Recording of ERPOs by Courts and Law Enforcement	96
II. Legal Considerations	97
a. Statutory Renewal Process	97
b. Evidentiary Standard.....	98
c. Remedies for Procedural Failings.....	99
d. Second Amendment Awareness	99
III. Awareness and Training.....	100
a. Community Awareness Campaigns.....	100
b. Law Enforcement Training	102
c. Healthcare Professional Training	104
d. Judicial Personnel Education	104
IV. Statutory and Discursive Language	105
a. Specificity in Statutory Language.....	105
b. No “Red Flag” Language.....	106
c. Mental Health as a Risk Factor	106
V. Accessibility	107
a. Fees	107
b. Forms.....	107
c. Petitioning Locations.....	108
d. Limiting Mandatory Court Visits	108
VI. Collaboration	108
a. Research and Policy Taskforces.....	108

b.	Coordinated Community Response	109
c.	Police Mental Health Collaboration	110
VII.	Respondents and Petitioners	111
a.	Minors as Respondents	111
b.	Prevention of Intimate Partner Violence	112
c.	Distribute Mental Health Resources	112
d.	Petitioner and Family Safety	113
e.	Mental Health Professionals.....	113
CONCLUSION	114

EXECUTIVE SUMMARY

Extreme Risk Protection Orders (ERPOs) are civil orders that allow law enforcement to temporarily remove firearms and ammunition from persons who pose a danger to themselves or others. ERPOs address the critical problem posed when individuals are at risk of harming themselves or others with firearms but have not yet committed an action that warrants law enforcement's involvement. ERPOs are a relatively new legislative tool, with only seventeen states and the District of Columbia having ERPO laws, the majority of which were adopted in 2018. Given that ERPO legislation is relatively new in the majority of jurisdictions, states are still in the process of implementing and developing law enforcement and court protocols to enforce ERPOs. Additionally, there is limited information available about ERPO effectiveness in implementation. This paper collects existing information about ERPO implementation across jurisdictions and uses comparative analysis with the broader gun control landscape to draw inferences about potential legal challenges to ERPOs and social justice implications of the laws. Other resources exist that provide information about ERPOs; however, this paper poses a novel approach in that it is grounded in a social justice lens with the principle that ERPO laws must not only be evaluated in terms of technical execution, but must also be examined closely for potential disparities in utilization and enforcement.

The paper is divided into the following sections: Social Implications, Logistical Implementation, Legal Issues, and Best Practices. Each segment both describes how ERPO laws function and explains how they affect American citizens on the individual and community levels.

First, the Social Implications section elaborates upon how various demographics are affected disproportionately by gun violence. It outlines how current gun laws disparately impact individuals struggling with their mental health, women, LGBTQ individuals, low income

individuals, various religious groups, and people of color. The section finally marks how ERPO laws may potentially bridge detrimental gaps left by modern gun legislation.

The following Logistical Implementation section features a general state-by-state comparison of enacted ERPO statutes, judicial and law enforcement implementation of ERPOs, and a discussion of four existing ERPO bills currently under consideration at the federal level. No federal ERPO laws have been enacted in the United States at the time of the publishing of this paper. The section also elaborates on the ways in which ERPO laws are carried out in practice.

The Legal Issues section outlines existing and potential challenges to ERPO laws, analyzing each through both a constitutional and procedural lens. Considering ERPO laws are relatively new, little case law exists. Because of this scarcity, this section consults comparable gun law challenges at the state level, from which it draws recommendations to then be applied to ERPO laws. The section is structured around grounds on which ERPOs could be—or have already been—challenged, sequenced according to their observed prevalence in existing case law. Such grounds are ordered as follows: procedural and evidentiary issues, the Second Amendment, the Fourth Amendment, the Fourteenth Amendment, the First Amendment, and full faith and credit concerns.

The final section presents potential Best Practices in order to highlight successful approaches and address the potential legislative shortcomings initially raised in the preceding three sections of this paper. This paper has categorized best practices into seven key areas: Reporting, Legal Considerations, Awareness and Training, Statutory and Discursive Language, Accessibility, Collaboration, and Respondents and Petitioners. A short summary of the best practices is listed below. Each item is further expanded upon in the full Best Practices section in the paper. Best Practices include:

I. Reporting

- a. Reporting to Background Check Databases to prevent respondents from purchasing firearms while under an ERPO.
- b. Mandated Reporting of “Lie and Try” attempts to law enforcement when respondents lie about their eligibility to purchase a firearm and are discovered to be ineligible after a seller conducts a background check.
- c. Data Collection and Review, which would require the government to record information about ERPOs, including demographic and contextual information about the circumstances of individual cases. This data must be available to the public so researchers can evaluate the effectiveness of ERPOs and monitor potential disparate impacts among different communities.
- d. Immediate Recording of ERPOs by Courts and Law Enforcement, as ERPOs are emergency orders where immediate action is necessary. Electronic filing, 24/7 availability of court orders, and allowing police officers to appear telephonically for *ex parte* hearings are ways the issue of immediacy could be resolved.

II. Legal Considerations

- a. Statutory Renewal Processes are essential to enable law enforcement and petitioners to act on concerns that a respondent continues to be a danger to themselves or others by possessing a firearm despite the fact that an ERPO may be nearing expiration.
- b. Preponderance of the Evidence as the Evidentiary Standard strikes the right balance between reducing barriers to utilization while protecting the due process concerns of the respondent.

- c. Remedies for Procedural Failings should be explicitly addressed in an ERPO statute to hold law enforcement accountable for procedural errors, such as erroneously serving an ERPO, which would also provide clarity to respondents as to their remedies for violations of their rights under the law.
- d. Second Amendment Restrictions do not pose a threat to ERPOs as they currently exist, but any modifications on the risk-assessment based model must be able to withstand an intermediate scrutiny review.

III. Awareness & Training

- a. Community Awareness Campaigns to spread awareness of ERPOs in order to promote informed use of the orders.
- b. Law Enforcement Training to assure that the laws are put into practice effectively.
- c. Healthcare Professional Training to ensure physicians are properly aware of the risk factors and effects of filing an ERPO.
- d. Judicial Personnel Education to ensure that court clerks provide petitioners with detailed and correct information.

IV. Statutory and Discursive Language

- a. No “Red Flag” Language to prevent stigmatization against people who struggle with their mental health.
- b. Preventing Mental Health Stigmatization by being conscious of syntactical choices when referring to mental health risk indicators.

V. Accessibility

- a. No Fees to be certain that individuals of low socio-economic status are able to file an ERPO.
- b. Easy Access to Forms to reduce the burden on the petitioner and on people who speak different languages and provide education on how to fill out the forms.
- c. Petitioning Locations should be accessible by public transportation so that individuals who do not have access to a car are able to file an ERPO.
- d. Limiting Mandatory Court Visits to reduce barriers for petitioners who may not be able to make frequent trips to a courthouse due to work or other personal commitments.

VI. Collaboration

- a. Research and Policy Task Forces to help close the gap between gun violence research and ERPO legislation.
- b. A Coordinated Community Response approach ensures the most effective implementation of an ERPO because it includes all major stakeholders, such as law enforcement, prosecutors, judges, and advocates, in the process.
- c. Police-Mental Health Collaboration provides a safeguard when seizing firearms, as mental health practitioners are in the best position to deescalate a situation where a respondent is experiencing a mental health crisis.

VII. Respondents & Petitioners

- a. Including explicit statutory protocol for cases with Minors as Respondents avoids confusion and legal challenges if the ERPO imposes an obligation on parents or guardians relating to their legally possessed firearms.
- b. Prevention of Intimate Partner Violence by allowing victims of stalking, domestic abuse, and intimate partners to petition for ERPOs to secure safety for themselves and those around them.
- c. Distribute Mental Health Resources upon delivery of the ERPO notice so that the respondent has access to these necessary resources.
- d. Petitioner and Family Safety should be considered by making family and household members of the respondent aware that an ERPO will be expiring.
- e. Mental Health Professionals, depending on the state, should be able to petition and work with the police department to assist in the information sharing process by completing home visits to advise families on treatment and on whether the individual in question would benefit from treatment.

These best practices are a non-exhaustive list; however, they do present a starting point for improving the effectiveness of ERPO laws. This paper presents both a social justice and legal lens to evaluate ERPO laws and propose ideas for jurisdictions considering adopting an ERPO law, or revising an existing one, in the future.

INTRODUCTION

Confronting the gun violence crisis in the United States demands innovative and effective approaches to drafting and implementing legislation. Gun violence has recently been framed through the lens of the media’s portrayal of mass shootings across the nation. Behind the televised stories of mass shootings, however, lies the ever-growing concern of person-to-person gun violence and self-inflicted harm with firearms stemming from cases of domestic violence, mental health issues, and general instances of intense stress. In response to this underlying concern, several states have responded by passing a novel method of firearm regulation: the Extreme Risk Protection Order (ERPO).¹ Extreme Risk Protection Orders allow petitioners to file for law enforcement to temporarily remove firearms from a respondent who poses a risk to themselves or to others.² Often, people considering causing harm to themselves or to others exhibit warning signs prior to engaging in violent actions.³ It is estimated that 80% of people contemplating suicide give some indication prior to acting.⁴ ERPOs are public safety tools that allow intervention by legally

¹ While such protective orders are often referred to as “red flag laws” in public discourse, this paper will use the terms “Extreme Risk Protection Order” or “ERPO laws.” Although there is no consensus about which term to use, advocates prefer using “ERPO laws,” as “red flag laws” can stigmatize those affected by mental health conditions. *Red Flag Laws: Examining Guidelines for State Action: Hearing Before the S. Judiciary Comm.*, 116th Cong. 1 (2019) (Statement of Ron Honberg, National Alliance on Mental Illness). Notably, states use different terms for what are effectively ERPO laws, including “Gun Violence Restraining Order” in California, and “Lethal Violence Restraining Order” in Delaware. In the interest of consistency, this paper will use “Extreme Risk Protection Order” except when specifically referring to a state’s particular law. Furthermore, ERPO laws may define firearms in a variety of ways. In this paper, firearms and guns are used interchangeably.

² CAL. PENAL CODE § 18100 (2019); COLO. REV. STAT. § 13-14.5-105 (2019); CONN. GEN. STAT. § 29-38(c) (2011); DEL. CODE ANN. tit. 10, § 7701 (2018); D.C. CODE § 7-2510.01 (2019); FLA. STAT. § 790.401 (2019); HAW. REV. STAT. § 134-7 (2020); 430 ILL. COMP. STAT. 67/35 (2019); IND. CODE § 35-47-14 (2019); MD. CODE ANN., PUB. SAFETY § 5-601 (West 2019); MASS. GEN. LAWS ch. 140, § 131R (2018); NEV. REV. STAT. § 33.650 (2020); N.J. STAT. ANN. § 2C:58-20 (West 2019); N.Y. C.P.L.R § 6340 (McKinney 2019); OR. REV. STAT. § 166.525 (2017); R.I. GEN. LAWS § 8-8.3-1 (2018); VT. STAT. ANN. tit. 13, § 4051 (2020); WASH. REV. CODE § 7.94 (2016).

³ *Extreme Risk Protection Orders*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/> (last visited Mar. 1, 2020).

⁴ *Frequently Asked Questions*, CRISIS CTR., <https://crisiscentre.bc.ca/frequently-asked-questions-about-suicide/> (last visited Feb. 27, 2020).

predefined parties who notice such concerning indications. As of March 2020, seventeen states and the District of Columbia have enacted ERPO laws.⁵ Although ERPO laws are a response to the gun violence crisis, they are constrained in scope and thus do not confront and address all aspects of gun violence in the U.S.

The purpose of this paper is to provide an extensive image of the current status of firearm regulation laws and to ultimately contribute recommendations for enactment and enforcement of successful ERPO laws. A successful ERPO law removes firearms from individuals who pose a risk to themselves or others, without undue burden on the individual. This paper views the current laws through a social justice lens, identifying the groups that may benefit from ERPO laws. Identifying groups vulnerable to firearm violence promotes a better understanding of whom current ERPO laws protect, and how they might be changed to better reach more people exposed to firearm violence. No two states have enacted completely identical laws, meaning that there are many examples of how an ERPO law can take shape. This paper's recommendations account for the legal challenges that ERPO laws face, asks if these challenges have been made and met, and note potential future challenges. The best practices outlined may be used to augment current efforts to pass ERPOs that protect the public while also avoiding infringing upon Americans' constitutionally protected Second Amendment rights.

⁵ CAL. PENAL CODE § 18100 (2019); COLO. REV. STAT. § 13-14.5-105 (2019); CONN. GEN. STAT. § 29-38(c) (2011); DEL. CODE ANN. tit. 10, § 7701 (2018); D.C. CODE § 7-2510.01 (2019); FLA. STAT. § 790.401 (2019); HAW. REV. STAT. § 134-7 (2020); 430 ILL. COMP. STAT. 67/35 (2019); IND. CODE § 35-47-14 (2019); MD. CODE ANN., PUB. SAFETY § 5-601 (West 2019); MASS. GEN. LAWS ch. 140, § 131R (2018); NEV. REV. STAT. § 33.650 (2020); N.J. STAT. ANN. § 2C:58-20 (West 2019); N.Y. C.P.L.R. § 6340 (McKinney 2019); OR. REV. STAT. § 166.525 (2017); R.I. GEN. LAWS § 8-8.3-1 (2018); VT. STAT. ANN. tit. 13, § 4051 (2020); WASH. REV. CODE § 7.94 (2016). Note: In addition to the eighteen jurisdictions with ERPO laws, New Mexico enacted an extreme risk law (effective May 20, 2020) authorizing law enforcement to petition a court for a civil order to temporarily remove firearms from a person in crisis.

THE GUN VIOLENCE LANDSCAPE WITHIN THE UNITED STATES

Examining how ERPO laws can combat gun violence in the United States requires first understanding the gun violence context within which they arise, and the problem they aim to address. ERPO laws have largely emerged as states' responses to mass shootings,⁶ which have unfortunately become a part of daily life in America. However—unlike how the media frequently portrays them: large-scale attacks in a public place—a mass shooting is defined as an event in which four or more people are either killed or injured with a firearm.⁷ In 2018 alone, there were 340 mass shootings in the U.S.,⁸ averaging to one mass shooting every single day.⁹ While alone these numbers are disturbing, it is even more alarming that mass shootings are not the most prevalent form of gun violence in the U.S.¹⁰ Estimates show that mass shootings are responsible for less than 1% of all gun deaths.¹¹ For example, the Las Vegas shooting on October 1, 2017, and the Orlando shooting on June 12, 2016, were the two deadliest mass shootings in modern American history, resulting in 107 deaths in total.¹² Conversely, in 2016, 35,476 deaths in the U.S. were caused by firearms, averaging to 97 deaths by firearms per day.¹³ From 2006 to 2016 alone, the death toll of U.S. civilians resulting from gun violence exceeded the total number of American combat fatalities in World War II.¹⁴

⁶ See Garen J. Wintemute et al., *Extreme Risk Protection Orders Intended to Prevent Mass Shootings*, 171 ANNALS INTERNAL MED. 655, 655 (2019).

⁷ *Gun Violence Statistics*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/facts/gun-violence-statistics/> (last visited Jan 19, 2020).

⁸ Caroline Shen, *A Triggered Nation: An Argument for Extreme Risk Protection Orders*, 46 HASTINGS CONST. L.Q. 683, 683 (2019).

⁹ GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 7.

¹⁰ *Id.*

¹¹ *Id.*

¹² Garen J. Wintemute, *What You Can Do to Stop Firearm Violence*, 167 ANNALS INTERNAL MED. 886, 886 (2017).

¹³ *Id.*

¹⁴ *Id.*

Furthermore, the methods and the frequency with which the media covers mass shootings have distorted Americans' understanding of them.¹⁵ A study "The media's coverage of mass public shootings in America: fifty years of newsworthiness" illustrates the disparity between the realities of mass shootings, other types of gun violence, and what the media reports.¹⁶ The study found that while perpetrators of mass shootings are most often middle-aged, white, and non-ideologically motivated, media coverage focused on mass public shootings committed by younger, Middle Eastern, and ideologically-driven shooters.¹⁷ Consequently, this skewed media coverage has led the public to perceive ideologically motivated, large-scale, public mass-shootings as making up a larger portion of American gun violence than they do.¹⁸

After a mass shooting in Kansas resulted in three people dead and fourteen others injured, former President Barack Obama called on the media to cover more shootings.¹⁹ His request was backed by the hope that greater public knowledge of these shootings would lead to action in the form of stricter gun laws.²⁰ The subsequent media coverage of mass shootings—and resulting public outrage—has been a major driving force in the push for gun control legislation, with particularly notable success behind ERPO laws.²¹ Connecticut, Indiana, California, and Florida all enacted their version of an ERPO law after a public mass shooting in their state.²² More recently, the mass shootings in California, Texas, and Ohio during the summer of 2019 "led to a widespread

¹⁵ Jason R. Silva & Joel A. Capellan, *The Media's Coverage of Mass Public Shootings in America: Fifty Years of Newsworthiness*, 43 INT. J. COMP. & APPLIED CRIM. JUST. 77, 95 (2018).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Jordan Fabian, *Obama: Media Should Pay Attention to Gun Violence*, HILL (Feb. 26, 2016, 2:16 PM), <https://thehill.com/homenews/administration/270949-obama-media-should-pay-attention-to-gun-violence>.

²⁰ *Id.*

²¹ See Silva & Capellan, *supra* note 15, at 97. Garen J. Wintemute et al., *Extreme Risk Protection Orders Intended to Prevent Mass Shootings*, 171 ANNALS INTERNAL MED. 655, 655 (2019).

²² See Wintemute et al., *supra* note 21, at 655.

discussion of the potential for ERPOs to prevent such events” and the introduction of federal ERPO legislation.²³

ERPOs have the potential to be an effective method for combating mass shootings, as behavioral indicators are present in the majority of cases.²⁴ In an analysis of mass shootings from 2009 to 2018, gun-control advocates Everytown for Gun Safety found that “in 54% of incidents the shooter exhibited warning signs that they posed a risk to themselves or others before the shooting.”²⁵ Similarly, a study focused on school violence conducted by the United States Secret Service and the United States Department of Education found that in 93% of the cases, there were behavioral warning signs that caused others to be concerned.²⁶ In many of these situations, people around the shooter noticed these signs, but there was no clear legal process, neither at the federal nor state levels, to restrict their access to firearms because the shooter had not yet done anything that would warrant police seizure of their weapons.²⁷ Preliminary research of the use of California’s Gun Violence Restraining order has shown twenty-one cases where mass shooting plans were thwarted by the issuing of an ERPO.²⁸ Such studies illuminate how mass shootings are often preceded by behavioral signals.²⁹ ERPO laws allow for action to be taken to limit the consequences of such concerning behavior by removing firearms before individuals can harm themselves or others. Evidence showing that concerning behavior often precedes mass shootings,

²³ *See id.*

²⁴ EVERYTOWN FOR GUN SAFETY, EXTREME RISK LAWS SAVE LIVES 3 (2020), <https://everytownresearch.org/wp-content/uploads/2019/09/Extreme-Risk-Laws-CDC-Update-021920B.pdf>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Press Release, Giffords Law Ctr. to Prevent Gun Violence, MEMO: Extreme Risk Laws and Their Role in Reducing Gun Violence (Aug. 5, 2019), <https://giffords.org/press-release/2019/08/erpo-memo/>.

²⁸ Shannon Frattaroli & Josh Horwitz, *Five Ways the Federal Government Can Support State ERPO Laws*, HILL (Aug. 23, 2019), <https://thehill.com/opinion/civil-rights/458522-congress-can-prevent-gun-violence-with-protection-laws-and-federal>.

²⁹ *See id.*

and preliminary evidence about ERPO use to prevent mass shootings, suggests that the laws are effective tools to curb the incidence of mass shootings in the U.S. Whether ERPOs are effective in combatting gun violence overall will be further examined throughout this paper.

SOCIAL IMPLICATIONS

The following section examines the varied implications gun violence and ERPO laws have for different populations. As is the case with most laws, firearm regulations disproportionately impact historically marginalized communities. This section will specifically examine how mental health, race, religion, socioeconomic status, sexuality, and experiences with intimate partner violence can lead to asymmetric outcomes from ERPO law implementation. For each topic, this section will discuss the relationship each population has with gun violence broadly, and how each population is affected by, and would likely engage with, ERPO laws—whether as petitioners or respondents.

I. Mental Health

a. Suicide Prevention

Although gun violence is often associated with mass shootings, the majority of gun deaths in the United States each year are suicides.³⁰ As such, ERPO laws have the potential to reduce suicides as they allow for the removal of firearms from individuals facing extreme mental duress. Mental illness significantly affects Americans, as one in five adults struggles with their mental

³⁰ *Red Flag Laws: Examining Guidelines for State Action: Hearing Before the S. Judiciary Comm.*, 116th Cong. 1 (2019) (Statement of Ron Honberg, National Alliance on Mental Illness).

health to some extent each year,³¹ and one in six youths between the ages of six to seventeen also “experience a mental health disorder each year.”³² The Center for Disease Control and Prevention (CDC) has estimated that approximately half of all suicide deaths involve people formally diagnosed with a mental health condition.³³ Each year, suicide is the tenth leading cause of death in the United States.³⁴ Among people between the ages of ten and thirty-four, mental health worsens, with suicide ranking as the second leading cause of death.³⁵ Furthermore, suicide is becoming increasingly common in the United States. In 2016 alone, there were nearly 45,000 deaths by suicide in the United States, a 25% increase from the previous two decades.³⁶ Between 2006 and 2016, the rate of suicide with the use of a firearm rose by 21%, totaling approximately 22,000 total firearm suicides each year.³⁷ Those 22,000 deaths, on average, accounted for two-thirds of gun-related deaths each year.³⁸ Firearms are especially dangerous in terms of suicide considering that 48% of suicides are impulsive acts.³⁹ Therefore, if a person contemplating suicide has a firearm on hand, they are more likely to use it to harm themselves, and approximately 85% of suicide attempts will be fatal if a firearm is used.⁴⁰ On the other hand, fewer than 5% of suicide

³¹ *Mental Health by the Numbers*, NAT’L ALLIANCE ON MENTAL ILLNESS, <https://www.nami.org/Learn-More/Mental-Health-By-the-Numbers> (last updated Sept. 2019).

³² *Id.*

³³ *Red Flag Laws*, *supra* note 30, at 1 (statement of Ron Honberg, National Alliance on Mental Illness).

³⁴ ADAM P. ROMER ET AL., GUN VIOLENCE INVOLVING SEXUAL AND GENDER MINORITIES IN THE UNITED STATES: A REVIEW OF RESEARCH AND FINDINGS 23 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gun-Violence-SGM-April-2019.pdf>.

³⁵ NAT’L ALLIANCE ON MENTAL ILLNESS, *supra* note 31.

³⁶ ROMER ET AL., *supra* note 34, at 23.

³⁷ Hannah S. Szlyk et al., *Firearm Suicide as a Human Rights Priority for Prevention*, 60 WASH. U. J.L. & POL’Y 133, 133 (2019).

³⁸ *Id.*

³⁹ *The Truth About Guns and Suicide*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE (Mar. 2017), <https://lawcenter.giffords.org/wp-content/uploads/2018/05/Suicide-Prevention-Factsheet-Giffords-Law-Center.pdf>.

⁴⁰ *Veterans and America’s Gun Suicide Crisis*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE (Oct. 2018), <https://lawcenter.giffords.org/wp-content/uploads/2018/10/Veterans-and-Suicide-Factsheet.pdf>.

attempts will result in death in the absence of a firearm,⁴¹ and 90% of people who attempt suicide (with or without a firearm) will never try to do so again.⁴²

Certain populations are more at risk of taking their own life than others, and some are more likely to use guns. Men are six times more likely than women to take their own life using a firearm, notably those over the age of sixty-five.⁴³ Of men over sixty-five who die by suicide, 75% use a firearm.⁴⁴ These statistics are also especially high among veterans, both male and female. Of the 45,000 suicide deaths in 2016, 14% were veterans.⁴⁵ Veterans account for one in five adult suicides with the use of a firearm, with nearly 70% of all veteran suicides involving a firearm.⁴⁶ Additionally, among youths (ages ten to twenty-four), firearms have been the most common method of suicide since the 1980s.⁴⁷ The use of firearms to take one's own life among youth up to the age of nineteen grew by 61% from 2007 to 2016.⁴⁸

Furthermore, states with the highest firearm ownership rates also have four times as many firearm suicides and approximately twice as many suicide deaths when compared with states with the lowest firearm ownership rates.⁴⁹ Additionally, states with weaker gun laws and easier access to firearms have higher suicide rates than states with stricter laws.⁵⁰ For example, Massachusetts is the only state in the country in which residents are required to store and lock their firearms away when they are not in use.⁵¹ Firearms are used in only 9% of youth suicides in Massachusetts, starkly

⁴¹ *Id.*

⁴² GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 39.

⁴³ Szlyk et al., *supra* note 37, at 133.

⁴⁴ Tara Sklar, *Elderly Gun Ownership and the Wave of State Red Flag Laws: An Unintended Consequence that Could Help Many*, 27 ELDER L.J. 35, 38 (2019).

⁴⁵ *Red Flag Laws*, *supra* note 30, at 1 (statement of Ron Honberg, National Alliance on Mental Illness).

⁴⁶ GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 40.

⁴⁷ Szlyk et al., *supra* note 37, at 133.

⁴⁸ *Id.*

⁴⁹ ROMER ET AL., *supra* note 34, at 23.

⁵⁰ GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 39.

⁵¹ *Id.*

less than the 39% countrywide average.⁵² Youths in Massachusetts were determined to be 55% less likely than the country's average to die by suicide.⁵³ Each of the four states with the lowest youth suicide rates require that firearms be locked away from children, while also mandating that locks be sold with each gun.⁵⁴ This is just one indication of how firearm regulations laws have lessened suicide rates.

b. Media Stigmatization

While mental health issues can serve as a predictor of firearm violence to oneself or others, it is incorrect—even dangerous—to assume a strong correlation between mental illness and gun violence.

Federal laws prohibit individuals who have been involuntarily committed, who have pled insanity, or who have undergone other formal court proceedings that relate to their mental health from possessing guns.⁵⁵ The criteria for these laws—as seen in the 1968 federal Gun Control Act, which regulates gun ownership,⁵⁶ and as reflected in many states' statutes—often do not reflect actual risk factors for violence and suicide.⁵⁷ Risk factors for suicide, though stereotypically associated with mental illness, actually include both psychosocial stressors, like financial insecurity and housing instability, and physical health concerns, components which are often overlooked in broader conversations about gun violence.⁵⁸ Of the people who die by suicide, only

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Caroline Shen, *A Triggered Nation: An Argument for Extreme Risk Protection Orders*, 46 HASTINGS CONST. L.Q. 683, 683 (2019).

⁵⁶ 18 U.S.C. § 922(d)(4) (2006).

⁵⁷ Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does it Prevent Suicides*, 80 L. & CONTEMP. PROBS. 179, 182 (2017).

⁵⁸ Szlyk et al., *supra* note 37, at 133.

a small portion actually have a record that would meet the federal law criteria for prohibiting gun purchases.⁵⁹

Furthermore, only 4% of violent acts in this country are actually attributable to mental illness.⁶⁰ While it is true that ERPO laws and other gun control measures can help address insufficiencies in federal gun control laws, the media portrayal of these laws also reinforces the dangerous and pervasive narrative that perpetrators of gun violence must have been struggling with their mental health.⁶¹ It is important to consider the stigmatizing assumptions about people with mental health issues that permeate through firearm regulation policy.

A recent study from Ohio State University analyzed coverage of shootings to demonstrate how a shooter's race impacts the American media's coverage and portrayal of mental health.⁶² The study found that on average, coverage of White shooters is nineteen times more likely to discuss the mental health of the person in question than is coverage of Black shooters, and Latino shooters are twelve times more likely to be portrayed as struggling with their mental health.⁶³ Typically, the mental health lens the media apply for White shooters involves describing the shooter as a good person struggling with extreme circumstances, while shooters who are people of color rarely receive any type of testament to their character.⁶⁴

It is important to note that ERPOs are risk-based removal mechanisms, not mental health-based removal mechanisms, and as such, they are meant to be used in response to dangerous

⁵⁹ Swanson et al., *supra* note 57, at 183.

⁶⁰ *Red Flag Laws*, *supra* note 30, at 1 (statement of Ron Honberg, National Alliance on Mental Illness).

⁶¹ See Julie Beck, *Untangling Gun Violence from Mental Illness*, ATLANTIC (Jun. 7, 2016), <https://www.theatlantic.com/health/archive/2016/06/untangling-gun-violence-from-mental-illness/485906/>.

⁶² Scott W. Duxbury et al., *Mental Illness, the Media, and the Moral Politics of Mass Violence: The Role of Race in Mass Shootings Coverage*, 55 J. RES. CRIME & DELINQ. 766, 780 (2018).

⁶³ *Id.*

⁶⁴ *Id.* at 788.

behaviors, not to specific mental health diagnoses.⁶⁵ Examples of behaviors that warrant risk-based removal include acts of domestic violence, histories of substance abuse, past convictions for violent misdemeanors, and a past of general abuse.⁶⁶ For example, Maryland’s ERPO law emphasizes that the petitioner is not required to show that the respondent has a suspected or diagnosed mental health condition; instead, they must show that the respondent has exhibited dangerous behaviors.⁶⁷ As the National Alliance on Mental Illness has expressed, “State ERPO laws should emphasize that determinations of risk should be based on individualized assessments rather than stereotypical assumptions about specific groups of people that are not grounded in evidence. For example, an individual’s history of mental health issues or a specific diagnosis is not a good predictor for violence.”⁶⁸ A person struggling with their mental health is not more likely than others to carry out gun violence, and conflating mental illness with ERPO risk-factors only furthers the stigmatization of those struggling with their mental health.⁶⁹

While they primarily arose in response to mass shootings, ERPOs have recently been increasingly used to address person-to-person or self-inflicted gun violence.⁷⁰ Overall use of the measures is rising, as can be seen in data collected from states that have had ERPO laws for more than two years.⁷¹ For example, between 2016 and 2018, California saw a 330% increase in ERPO

⁶⁵ *Maryland Extreme Risk Protective Order & Involuntary Inpatient Admission How Do They Differ?*, BLOOMBERG AM. HEALTH INITIATIVE 3 (2019), https://americanhealth.jhu.edu/sites/default/files/2019-07/MD_ERPOvIIA_FactSheet_FINAL.pdf.

⁶⁶ Emma E. McGinty et al., *Using Research Evidence to Reframe the Policy Debate Around Mental Illness and Guns: Process and Recommendations*, 104 AM. J. PUB. HEALTH 22, 23 (2014); *Red Flag Laws*, *supra* note 30, at 1 (statement of Ron Honberg, National Alliance on Mental Illness).

⁶⁷ BLOOMBERG AM. HEALTH INITIATIVE, *supra* note 65, at 3.

⁶⁸ *Red Flag Laws*, *supra* note 30, at 1 (statement of Ron Honberg, National Alliance on Mental Illness).

⁶⁹ *Id.*

⁷⁰ Aaron J. Kivisto et al., *Effects of Risk-Based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981-2015*, 69 PSYCHIATRIC SERVICES 855, 861 (2018).

⁷¹ EVERYTOWN FOR GUN SAFETY, *EXTREME RISK LAWS SAVE LIVES 2* (2020), <https://everytownresearch.org/wp-content/uploads/2019/09/Extreme-Risk-Laws-CDC-Update-021920B.pdf>.

use.⁷² Many states have also reported a correlated reduction in their suicide rate, most notably in Connecticut and Indiana. Between 2005 and 2015, Indiana saw a 7.5% decrease in their state's suicide rate, with one suicide being averted for nearly every ten guns removed.⁷³ In Connecticut, the state saw a 1.6% reduction in suicide with firearms following the passage of their ERPO law, and 13.7% decrease following the 2007 Virginia Tech mass shooting.⁷⁴

Although both Connecticut and Indiana's most common use of their respective ERPO laws is suicide prevention, the states have very different landscapes in terms of gun ownership and gun laws.⁷⁵ Indiana houses more gun-owning homes and experiences more gun-related deaths per capita than Connecticut, in addition to having fewer gun control laws and maintaining a more conservative legislature.⁷⁶ Furthermore, Indiana's law allows for warrantless seizures of a person's firearm when a police officer believes that a person has a "mental illness" and is "dangerous," where "dangerous" is defined as an individual being in "imminent or future risk of personal injury' to self or others."⁷⁷ Connecticut does not allow such warrantless seizures.⁷⁸ In both states, however, ERPO petitions are being filed to prevent suicides from taking place.

Some of the most often cited data on the subject comes from a Connecticut study analyzing the 762 gun removal orders in the state between the years of 1999 and 2013.⁷⁹ The circumstances that led to petitions for these orders ranged from "anger and conflict between intimate partners, to emotional distress over financial problems, to the sadness of loss in old age."⁸⁰ Of the petitions,

⁷² *Id.* at 1.

⁷³ *Id.* at 3.

⁷⁴ Kivisto et al., *supra* note 70, at 855.

⁷⁵ Jeffrey W. Swanson et al., *Criminal Justice and Suicide Outcomes with Indiana's Risk-Based Gun Seizure Law*, 47 J. AM. ACAD. PSYCHIATRY & L. 1, 8 (2019).

⁷⁶ *Id.*

⁷⁷ Kivisto et al., *supra* note 70, at 855.

⁷⁸ *Id.*

⁷⁹ Swanson et al., *supra* note 57, at 190.

⁸⁰ *Id.* at 192.

702 were available for viewing by those conducting the study.⁸¹ Suicidal ideation was listed as a concern in 61% of the cases, while risk of harming others was listed for 32% of the cases.⁸² Meanwhile, in Indiana, the most significant data comes from a study that looked at 395 petitions from Marion County between the years of 2006 and 2013.⁸³ Of the petitions reviewed, 68% reported respondents suffering from suicidal ideation.⁸⁴ These studies are just two examples of how ERPO laws are being effectively used to prevent suicide.

While data shows that ERPOs have been effective in preventing suicides, questions remain about how ERPO laws affect those struggling with their mental health. Prominent questions include whether healthcare professionals should be able to petition for ERPOs, how ERPOs affect involuntary inpatient admissions, and how ERPOs impact mental health stigma. The question of whether healthcare professionals should be able to petition for ERPOs is controversial, as people both within and outside the medical community disagree on the effectiveness of such a practice. For example, the National Alliance on Mental Illness believes that healthcare professionals are in the best position to identify risk factors and the potential for violence.⁸⁵ They assert that giving healthcare professionals the authority to petition for an ERPO would create another option for when practitioners need to take action.⁸⁶ On the other hand, opponents of such a measure argue that allowing healthcare professionals to petition can potentially degrade the patient-physician relationship, increase liability and accountability for the professionals and, moreover, that

⁸¹ *Id.*

⁸² *Id.*

⁸³ Swanson et al., *supra* note 75, at 3.

⁸⁴ *Id.*

⁸⁵ *Red Flag Laws*, *supra* note 30, at 1 (statement of Ron Honberg, National Alliance on Mental Illness).

⁸⁶ *Id.*

healthcare practitioners are often unprepared to petition as they receive relatively minimal training on gun violence.⁸⁷

In some states, mental health practitioners are allowed to petition for ERPOs out of concern for their patient. Maryland was the first state to allow health professionals to do so.⁸⁸ From October 1, 2018, when the Maryland ERPO law first went into effect, to December 31, 2018, Maryland health clinicians petitioned for four of the 303 ERPOs filed within the state.⁸⁹ A 2019 study surveyed ninety-two physicians about the impact of this decision, finding that 71.7% of survey participants indicated that they were not familiar with ERPOs, with only one having filed a petition.⁹⁰ After they were given a brief description of an ERPO, 59.8% listed that they would be “very or somewhat likely” to file an ERPO petition if their patient qualified; only six people commented that clinical providers should not be authorized to petition.⁹¹ According to the survey, the largest barriers preventing physicians from using an ERPO were lack of time to complete the paperwork, lack of time to attend a hearing on the petition, and concerns that filing an ERPO would negatively impact their relationship with their patients.⁹² To address these barriers, survey respondents said that it would help for practitioners to have access to a coordinator who managed the process, to be able to participate remotely in hearings, and to have the opportunity to acquire legal counsel.⁹³

⁸⁷ See Suhas Gondi et al., *Extreme Risk Protection Orders: An Opportunity to Improve Gun Violence Prevention Training*, 94 ACAD. MED. 1649, 1649-50 (2019).

⁸⁸ Shannon Frattaroli et al., *Assessment of Physician Self-reported Knowledge and Use of Maryland’s Extreme Risk Protection Order Law*, 2 JAMA NETWORK at 2 (2019).

⁸⁹ *Id.*

⁹⁰ *Id.* at 3.

⁹¹ *Id.* at 4.

⁹² *Id.*

⁹³ *Id.*

There is debate over the extent to which involuntary inpatient admissions should be included in ERPO statutes and the amount of reporting that should be sent to the National Instant Criminal Background Check System (NICS).⁹⁴ NICS is a national database that checks available records on persons who may be disqualified from receiving firearms.⁹⁵ Involuntary inpatient admissions are one form of action that healthcare professionals can currently take when they believe their patient is at risk of harming themselves or others.⁹⁶ An involuntary inpatient admission is a court-ordered mental health evaluation and treatment.⁹⁷ The application must include certifications from two healthcare professionals who have personally examined and diagnosed the individual in question.⁹⁸ Federal gun laws prohibit a person who has been involuntarily committed to a mental institution from purchasing a firearm, unless they are granted relief by the Health Department.⁹⁹

While ERPOs may be an effective tool in addressing possible harm—to oneself or others—resulting from mental health issues, their explicit connection to mental health can also serve to further stigmatize those with mental health issues. Such stigmatization stems not only from ERPO laws’ discussion of related risk factors that courts should consider, but also from the language used in the ERPO statutes themselves. In Washington, for example, the ERPO law is “designed to temporarily prevent individuals who are at high risk of harming themselves or others from accessing firearms . . . when there is demonstrated evidence that the person poses a significant

⁹⁴ See *Mental Health Reporting*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE (2018), <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/mental-health-reporting/> (last visited Mar. 1, 2019). *But see* Telephone Interview with Adelyn Allchin, Senior Dir. of Pub. Health & Policy, Coal. To Stop Gun Violence (Jan. 10, 2020).

⁹⁵ 18 U.S.C § 922 (t)(1) (1993).

⁹⁶ BLOOMBERG AM. HEALTH INITIATIVE, *supra* note 65, at 2.

⁹⁷ *Id.*

⁹⁸ *Id.* at 3.

⁹⁹ GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 94.

danger, including danger as a result of a dangerous mental health crisis or violent behavior.”¹⁰⁰ The National Alliance on Mental Illness chose not to endorse the law because they believed that the ““specific identification of mental illness in the bill”” reinforced ““false public perceptions about the relationship between mental illness and gun violence.””¹⁰¹ Comparably, in Indiana, the law permits warrantless seizure when a police officer believes that a person “has a ‘mental illness’” and is “dangerous,” defining dangerous as posing an imminent or future risk of harm to oneself or others.¹⁰² In both circumstances, the laws inaccurately equate mental illness with violence, which can consequently promote mistaken views about the correlation between mental health and violence.¹⁰³ In examining the type of language used within ERPO statutes, lawmakers can play a significant role in lessening the negative effects to those who struggle with their mental health.

II. Marginalized Communities

a. Race

In the United States, there is a significant disparity between the impact that firearms and firearm violence have on Black and White Americans. The Center for Disease Control and Prevention found that the national homicide rate for Black Americans is eight times higher than the homicide rate of White Americans.¹⁰⁴ Furthermore, between 2012 and 2014, 1,300 children were shot and killed each year in the United States, and Black children were ten times more likely

¹⁰⁰ Brian Bergen-Aurand, *Red Flag Laws Should Not Target Mental Illness*, S. SEATTLE EMERALD (Jul. 5, 2018), <https://southseattleemerald.com/2018/07/05/red-flag-laws-should-not-target-mental-illness/>.

¹⁰¹ *Id.*

¹⁰² Kivisto et al., *supra* note 70, at 861.

¹⁰³ Bergen-Aurand, *supra* note 100.

¹⁰⁴ *Age-Adjusted Homicide Rates, by Race/Ethnicity — National Vital Statistics System, United States, 2015–2016*, 67 MORBIDITY & MORTALITY WKLY. REP. at 462 (2018), <https://www.cdc.gov/mmwr/volumes/67/wr/pdfs/mm6715a8-H.pdf>.

to be killed than White children.¹⁰⁵ While 77% of White gun deaths in the United States are suicides, Black Americans experience a much lower rate of suicides caused by firearms, totaling only 14%.¹⁰⁶ Overall, Black and White Americans experience gun violence differently. An integral part of this disparity is likely attributable to how Black Americans are treated by law enforcement; an unarmed Black American is four and a half times more likely to be shot and killed by the police than an unarmed White American.¹⁰⁷

On August 9, 2014, Michael Brown, an unarmed Black eighteen-year-old, was fatally shot by a White police officer in Ferguson, Missouri.¹⁰⁸ Brown's death, along with Trayvon Martin's death in 2012, were catalysts to the Black Lives Matter (BLM) movement.¹⁰⁹ Martin, an unarmed Black seventeen-year-old, was fatally shot by neighborhood watchman in Sanford, Florida.¹¹⁰ The BLM movement aims to "build local power and to intervene in violence inflicted on Black communities by the state and vigilantes."¹¹¹ Following the growth of BLM and further police shootings of unarmed Black Americans, conversations about Black Americans' experiences with police violence have entered the forefront of public discourse and become increasingly urgent. A 2016 Pew Research study indicates that Black Americans are deeply concerned with an inadequate

¹⁰⁵ Katherine A. Fowler, *Childhood Firearm Injuries in the United States*, PEDIATRICS OFFICIAL J. AM. ACAD. PEDIATRICS at 3 (2017).

¹⁰⁶ Stan Paul, *The Connection Between Poverty, Inequality and Firearm Violence*, UCLA LUSKIN SCH. OF PUB. AFFAIRS (Feb. 1, 2017) <https://luskin.ucla.edu/connection-poverty-inequality-firearm-violence>.

¹⁰⁷ Aldina Mesic, *The Relationship Between Structural Racism and Black-White Disparities in Fatal Police Shootings at the State Level*, J. NAT. MED. ASS'N 106, 106 (2018).

¹⁰⁸ Larry Buchanan, *What Happened in Ferguson?*, N.Y. TIMES, <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html> (last updated Aug. 10, 2015).

¹⁰⁹ See Karen Grigsby Bates, *A Look Back at Trayvon Martin's Death, and the Movement it Inspired*, NPR CODE SWITCH (Jul. 31, 2018, 7:34 AM), <https://www.npr.org/sections/codeswitch/2018/07/31/631897758/a-look-back-at-trayvon-martins-death-and-the-movement-it-inspired>; Buchanan, *supra* note 108.

¹¹⁰ Bates, *supra* note 109.

¹¹¹ *About*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> (last visited Jan. 17, 2020).

application of significant force from law enforcement.¹¹² The study found that Black Americans were much less likely than White Americans to say that "police in their community do an excellent or good job using the right amount of force in each situation (33% vs. 75%), treating racial and ethnic groups equally (35% vs. 75%), and holding officers accountable when misconduct occurs (31% vs. 70%)."¹¹³ Moreover, Black Americans were also nearly five times as likely as White Americans to say they had been unfairly stopped by police officers because of their race or ethnicity (44% vs. 9%), with Black men most likely to say they have been unfairly stopped (59%).¹¹⁴

Police violence against Black people and their resulting distrust of law enforcement suggests that Black Americans may not see ERPOs as an entirely safe option to combatting gun violence in their communities. Even though the filing of an ERPO is not a criminal process, law enforcement is generally responsible for serving the orders and collecting or seizing the weapons. Therefore, filing a petition for an ERPO against a Black family member will likely result in an encounter with the police when their firearms are seized. There are numerous accounts of law enforcement using excessive—even fatal—force against Black people experiencing mental health

¹¹² See John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in their Views of Criminal Justice System*, PEW RESEARCH (May 21, 2019), <https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/>. In an interview conducted in support of this paper's research, Greta Carter-Willis described how she lost her son, Kevin Cooper, when he was fatally shot by a police officer in Carter-Willis's own home after she called the police to help Cooper amidst having a mental health crisis. Carter-Willis's story exemplifies a prominent narrative of the past decade. Carter-Willis's son died on August 12, 2006, six years before Martin's death and the BLM movement took off. In a phone call on January 9, 2020, Carter-Willis highlighted the longevity of the tension between the police and Black Americans. Carter-Willis also categorized her community's relationship with law enforcement as "broken," and remarked that she is not alone in that view. Telephone Interview with Greta Carter-Willis, Founder, Behind the Statistics (Jan. 9, 2020).

¹¹³ Gramlich, *supra* note 112.

¹¹⁴ *Id.*

crises.¹¹⁵ While ERPOs are meant to make communities safer, Black communities may find that asking law enforcement to seize the weapons of their Black family members struggling with their mental health may actually result in more violence. Well-founded distrust of law enforcement in Black communities suggests that Black Americans may be less likely to use ERPOs given the central involvement of law enforcement in the process. At the same time, these very communities often experience higher rates of gun violence. Thus, in order for ERPO laws to be effective and accessible to all Americans, legislators and advocates must centrally consider how Black Americans would engage with the laws.

b. Religion

ERPOs have the potential to prevent religiously-motivated hate crimes, as religiously-intolerant shootings become increasingly frequent. On December 10, 2019, six people were killed in New Jersey when two Anti-Semites opened fire in a Jewish grocery store.¹¹⁶ The shooting was one of the most recent incidents of the rising religion-based hate-crimes. In 2018, there were 1419 hate-crime incidents that were motivated by religion.¹¹⁷ The FBI found that hate crimes committed based on religious identity increased by over 23% from 2017 to 2018.¹¹⁸ ERPOs may be a useful tool in minimizing gun-based hate-crimes. For example, in October 2019, the Seattle City Attorney petitioned for an ERPO against Kaleb Cole, a neo-Nazi who is a suspected leader of the

¹¹⁵ See David Perry, *Police killings: The Price of Being Disabled and Black in America*, GUARDIAN (Jul. 22, 2017, 6:00 AM), <https://www.theguardian.com/us-news/2017/jun/22/police-killings-disabled-black-people-mental-illness>; Shaun King, *If you are Black and in a Mental Health Crisis, 911 Can be a Death Sentence*, INTERCEPT (SEPT. 29, 2019, 8:00 AM), <https://theintercept.com/2019/09/29/police-shootings-mental-health/>.

¹¹⁶ Jason Hannah & Madeline Holcombe, *Jersey City Shooters had Hatred of Jews and Law Enforcement, State Attorney General Says*, CNN, <https://www.cnn.com/2019/12/12/us/jersey-city-new-jersey-shooting-thursday/index.html> (last updated (Dec. 12, 2019, 6:26 PM)).

¹¹⁷ *FBI Releases 2018 Hate Crime Statistics*, FBI, <https://www.justice.gov/hatecrimes/hate-crime-statistics> (last visited Jan. 17, 2020).

¹¹⁸ *Why Hate Crimes Are on the Rise*, HARVARD DIVINITY SCH. (Apr. 23, 2019), <https://hds.harvard.edu/news/2019/04/23/podcast-why-hate-crimes-are-rise>.

Atomwaffen Division in Washington state.¹¹⁹ The Seattle City Attorney’s office argued that Cole was a threat to public safety because of his dangerous views and his access to guns.¹²⁰ Ultimately, an ERPO was granted, and Cole’s guns were removed.¹²¹ Although it is not possible to know definitively what may have happened had Cole kept his weapons, this case illustrates how the ERPO may be a proactive solution to decreasing gun-based hate-crimes motivated by religion.

c. Sexuality and Gender Identification

ERPOs may be able to serve as a solution to the high rates of person-based gun-violence within the LGBTQ community. According to a study by the Williams Institute, the LGBTQ community experiences gun violence at disproportionately high rates.¹²² Members of the LGBTQ community are often targets for violence. Nearly 20% of the 10,300 hate crimes occurring each year involving a firearm are motivated by the victim’s sexual orientation or gender identity.¹²³ Gun violence, however, is not solely limited to hate crimes. Suicide in the LGBTQ community is also considerably prevalent, with between 10 and 20% of LGBTQ people having attempted suicide at least once in their lifetime.¹²⁴ Amongst students, 47.7% of LGBTQ students had seriously considered suicide in the twelve months prior to data collection, whereas only 13.3% of heterosexual students had.¹²⁵ Often, the LGBTQ community falls victim to person-based gun-

¹¹⁹ See *Why Hate Crimes Are on the Rise*, *supra* note 118; WQAD8 Digital Team, *Police Seize Guns from Avowed Neo-Nazi in Washington*, WQAD8 (Oct. 18, 2019), <https://wqad.com/2019/10/18/police-seize-guns-from-avowed-neo-nazi-in-washington/>. Atomwaffen Division is a neo-Nazi group that emerged in 2016. It was originally created by of Iron March, a former white supremacist discussion forum. Atomwaffen is a German phrase that means “atomic weapons,” *Atomwaffen Division*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/references/hate-symbols/atomwaffen-division> (last visited Feb. 25, 2020).

¹²⁰ WQAD8 Digital Team, *supra* note 119.

¹²¹ *Id.*

¹²² ROMER ET AL., *supra* note 34, at 4.

¹²³ *Id.* at 10.

¹²⁴ *Id.* at 28.

¹²⁵ *Id.* at 7.

violence, instead of property-based violence.¹²⁶ According to a study conducted by Everytown for Gun Safety, of seventy-seven transgender individuals killed in the U.S., 74% were killed with guns.¹²⁷ More notably, 82% of the transgender individuals murdered with a firearm were Black trans women.¹²⁸

Whether it be through self-inflicted harm or homophobic attacks, LGBTQ individuals experience a pronounced risk of suffering from gun violence. Considerations must be made in order to ensure that proposed and enacted ERPO legislation accounts for the particular experiences of LGBTQ people.

d. Socioeconomic Status

Low socioeconomic status is empirically correlated with higher rates of gun violence in the United States. The Gini Index is a numerical method of tracking income inequality across communities; represented between zero and one, the higher the Gini “coefficient,” the more impoverished and economically unequal the community is.¹²⁹ A 2019 study found that firearm homicide rates significantly increase as Gini coefficients increase.¹³⁰ Heightened rates of firearm homicides may result in business flight and fewer jobs, which can further entrench poverty in an already depressed community.¹³¹ A study in Minneapolis found that reducing firearm homicides

¹²⁶ *Id.* at 46.

¹²⁷ Erin Donaghue, *Guns are Responsible for Nearly ¾ of the Killings of Transgender People Since 2017, Data Shows*, CBS NEWS (Nov. 20, 2019), <https://www.cbsnews.com/news/transgender-day-of-remembrance-nearly-34-of-transgender-people-slain-since-2017-killed-with-guns-data-shows/>.

¹²⁸ *Id.*

¹²⁹ Evelyn Lamb, *Ask Gini: How to Measure Inequality*, SCI. AM. (Nov. 12, 2012), <https://www.scientificamerican.com/article/ask-gini/>.

¹³⁰ Sheree Bekker, *Income Inequality and Firearm Homicide in the United States*, BMJ PUBL’G GRP. LTD. (Sept. 5, 2019), <https://blogs.bmj.com/injury-prevention/2019/09/05/income-inequality-and-firearm-homicide-in-the-united-states/>.

¹³¹ GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, NEW JERSEY GUN VIOLENCE IMPACT ANALYSIS AND POLICY AUDIT 15 (2018), https://lawcenter.giffords.org/wp-content/uploads/2018/08/NJ-Gun-Violence-Impact-Analysis-and-Policy-Audit_8.27.18.pdf.

by just one created eighty jobs and generated \$9.4 million in sales across all businesses the following year.¹³² Furthermore, individuals of low socioeconomic status are also more susceptible to gun violence.¹³³ This is not because individuals in these communities possess more firearms per capita, but rather because these areas are often underserved by law enforcement, thus leading to many cases of unreported gun violence.¹³⁴ This lack of reporting informally normalizes firearm usage and gradual gun violence in communities of low socioeconomic status.¹³⁵ Unreported, unaddressed gun violence—and the resulting interpersonal complacency—perpetuates the destruction of the economic and social foundations of low income communities.¹³⁶ As a result of this cycle, gun violence becomes normalized in low income communities.¹³⁷ ERPO laws pose a hopeful opportunity through which this repetitive diminishing of low income communities may be eventually remedied.

III. Intimate Partner Violence

For many, gun violence finds its roots within the walls of the home and within the bounds of familial and dating relationships. In over half of the mass shootings in the past decade, the perpetrator targeted a current or former intimate partner or family member, among others.¹³⁸ In many states, ERPO laws have begun addressing gaps in the gun law landscape that have left individuals experiencing violence in the household vulnerable. Still, in many cases, these gaps

¹³² *Id.*

¹³³ See Krishnadev Calamur, *The Normalization of Gun Violence in Poor Communities*, ATLANTIC (Jun. 24, 2018), <https://www.theatlantic.com/health/archive/2018/06/gun-violence/563582/>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *See id.*

¹³⁷ *See id.*

¹³⁸ EVERYTOWN FOR GUN SAFETY, GUNS AND VIOLENCE AGAINST WOMEN: AMERICA'S UNIQUELY LETHAL INTIMATE PARTNER VIOLENCE PROBLEM 4 (Oct. 17, 2019), <https://everytownresearch.org/wp-content/uploads/2019/10/IPV-for-WEB-112519B.pdf>.

persist. By understanding how gun violence affects many American households, particularly in terms of relationships between partners, laws can be better formulated to protect those left vulnerable.

The World Health Organization defines Intimate Partner Violence as “any behavior within an intimate relationship that causes physical, psychological, or sexual harm to those in the relationship.”¹³⁹ Though intimate partner violence can affect any gender, women with male partners are by far the most affected.¹⁴⁰ According to the Center for Disease Control and Prevention, more than one in three women in the United States report experiencing abuse from an intimate partner.¹⁴¹ When firearms are factored in, the results worsen dramatically: 4.5 million U.S. women report being threatened with a firearm by an intimate partner, and each month, an additional fifty-two women on average are shot and killed by an intimate partner.¹⁴² This high rate of gun violence against women is unique to the U.S., as women are twenty-one times more likely to die by homicide with a firearm in the U.S. than women in other nations.¹⁴³

The primary federal law concerned with guns and domestic violence is the Lautenberg Amendment, which was added to the Gun Control Act in 1996.¹⁴⁴ This amendment bans the possession of guns by any person convicted of a domestic violence misdemeanor.¹⁴⁵ The statute

¹³⁹ *Intimate Partner Violence*, WORLD HEALTH ORG. 1 (2012), https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf;jsessionid=AAC7E3CF9945498515D10A6DB74BDCF0?sequence=1 (last visited Jan. 19, 2020).

¹⁴⁰ EVERYTOWN FOR GUN SAFETY, *supra* note 138, at 21.

¹⁴¹ *2015 Data Brief - Updated Release*, NAT’L INTIMATE PARTNER & SEXUAL VIOLENCE SURV. 8 (Nov. 2018), <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf>.

¹⁴² EVERYTOWN FOR GUN SAFETY, *supra* note 138, at 21.

¹⁴³ *Id.*

¹⁴⁴ 18 U.S.C. § 922(g)(9) (1996). Enacted in 1968, the Gun Control Act put prohibitions on the importation of firearms with no sporting purpose. It also established a minimum age for firearm purchasers, the requirement that all firearms have a serial number affixed, and the expansion of the categories for people prohibited from purchasing firearms. *Gun Control Act*, ATF, <https://www.atf.gov/rules-and-regulations/gun-control-act> (last updated Jan. 23, 2020).

¹⁴⁵ 18 U.S.C. § 922(g)(9) (1996).

defines relevant domestic violence misdemeanors as an offense that is “a misdemeanor under Federal, State, or Tribal law ... and has, as an element, the use or the attempted use of physical force, or the threatened use of a deadly weapon.”¹⁴⁶ The statute defining misdemeanor crimes of domestic violence also particularizes who can have their guns taken away as a result of a conviction:

a current or former spouse, parent, or guardian of the victim . . . a person with whom the victim shares a child in common, [] a person who is cohabiting with or who has cohabitated with the victim as a spouse, parent, or guardian, or [] a person similarly situated to a spouse, parent or guardian of the victim.¹⁴⁷

This noticeably leaves out any clear wording about boyfriends or stalkers. Since 1996, there have been several efforts to close this gap, with some success by individual state legislatures that have specifically prohibited those convicted of a stalking misdemeanor and abusive dating partners from purchasing or possessing a firearm.¹⁴⁸ State legislatures have also taken steps to allow police officers to remove firearms from an individual at the scene of a domestic violence incident.¹⁴⁹

There is some effort to close loopholes at the federal level as well. The Violence Against Women Act was due for reauthorization in 2019; however, it is currently facing opposition by House Republicans, the National Rifle Association (NRA), and other lobbyists due to proposed additions regarding gun violence leading to seizures.¹⁵⁰ The new amendments would lower the

¹⁴⁶ 18 U.S.C. § 921(a)(33) (2018).

¹⁴⁷ *Id.*

¹⁴⁸ *Domestic Violence and Firearms*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/> (last visited Jan. 17, 2020).

¹⁴⁹ *Id.*

¹⁵⁰ 42 U.S.C. § 13701 (1994); Susan Davis, *House Passes Bill Protecting Domestic Abuse Victims; GOP Split Over Gun Restrictions*, NPR (Apr. 4, 2019 5:00 AM), <https://www.npr.org/2019/04/04/707685268/violence-against-women-act-gets-tangled-up-in-gun-rights-debate>. Originally passed in 1994, the Violence Against Women Act was the first U.S. legislation to acknowledge domestic violence and sexual assault as crimes. The bill also provides federal resources for community responses to domestic violence. The bill is up for renewal every five years, *Violence Against Women Act*, NAT’L NETWORK TO END DOMESTIC VIOLENCE, <https://nnev.org/content/violence-against-women-act/> (last visited Feb., 22, 2020)

criminal threshold barring gun possession to include stalking charges and would “expand existing firearm prohibitions to include dating partners convicted of abuse or stalking charges.”¹⁵¹ State efforts to close these loopholes have faced similar pushback. In 2019, Oregon joined twenty-two other states in passing a law to bar individuals facing stalking charges and convicted of abuse of a dating partner from possession of guns.¹⁵² The head of the Oregon Firearms Federation commented, “[w]hat this bill does is give people a mighty tool to destroy the life of an innocent person,” referring to a boyfriend who is falsely accused of domestic abuse.¹⁵³

Pushback is not all that stands in the way of reducing gun violence against women. Though federal law bars those convicted of domestic abuse from gun possession, a person is not “convicted” until they are fully tried by a jury if entitled to one, and have received a judgement.¹⁵⁴ Because nearly half of domestic violence is never reported to the police, the likelihood an abuser will be convicted is slim.¹⁵⁵ Additionally, federal law does not require a background check to be performed before the sale of every gun, and there is no federal requirement that states and local governments develop procedures for the surrender of firearms by abusers.¹⁵⁶ The shortcomings of legislation on gun violence against women is especially clear when considering recent mass shootings. Stephen Paddock, who killed fifty-nine people in Las Vegas, was repeatedly sighted berating his girlfriend in public.¹⁵⁷ Omar Mateen, who killed forty-nine people at the Pulse

¹⁵¹ Davis, *supra* note 150.

¹⁵² Melanie Sevcenko, *Boyfriend Loophold Backlash After Oregon Joins 23 States in Curbing Guns*, GUARDIAN (Mar. 21, 2018, 9:17 AM) <https://www.theguardian.com/us-news/2018/mar/21/oregon-boyfriend-loophole-bans-convicted-domestic-abusers-from-buying-guns>.

¹⁵³ *Id.*

¹⁵⁴ GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 148.

¹⁵⁵ See BRIAN A. REEVES, POLICE RESPONSE TO DOMESTIC VIOLENCE 2006-2015, U.S. DEPT. OF J. 1 (May 2017) <https://www.bjs.gov/content/pub/pdf/prdv0615.pdf>.

¹⁵⁶ GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 148.

¹⁵⁷ Max de Haldevang, *Stephen Paddock Shared a Trait with Other Mass Killers: He Abused Women*, QUARTZ (OCT. 4, 2017), <https://qz.com/1094160/las-vegas-shooter-stephen-paddock-abused-women-just-like-other-mass-killers-in-the-us/>.

nightclub, regularly abused his ex-wife.¹⁵⁸ In over half of the mass shootings between 2009 and 2018, the perpetrator shot a current or former intimate partner or family member.¹⁵⁹ Given the correlation between intimate partner violence and gun violence, it is imperative that the United States close these gaps.

ERPO laws are in a position to begin addressing these shortcomings. They were initially based upon civil domestic violence protective orders and draw heavily from the domestic violence protective order systems already existing in their respective states.¹⁶⁰ In some states, ERPOs provide an additional mode of enforcement for removing guns from individuals who should not have initially possessed them. In Oregon, a state that allows intimate partners to petition for an ERPO, thirty-nine of the 166 ERPOs issued were issued due to domestic violence incidents as of December 2019.¹⁶¹ Because Oregon's ERPO law allows an officer serving an ERPO to conduct a search for weapons in the custody, control, or possession of a person if they fail to turn over guns within twenty-four hours of the order, those who lie or conceal weapons after being convicted of a domestic violence crime will be less likely to retain their weapons after an ERPO is filed.¹⁶² These additions to ERPO laws are helpful in addressing the lack of procedures for firearm removal from domestic abusers. Additionally, California's ERPO law prevents purchase or possession of firearms by those convicted of stalking, assault, and battery, requires courts to consider convictions for any crimes that prohibit purchase and possession of firearms, and factors in any violations of

¹⁵⁸ *Id.*

¹⁵⁹ EVERYTOWN FOR GUN SAFETY, *supra* note 138, at 1, 4, 5, 10.

¹⁶⁰ Johnathan Levinson, *Two Years of Oregon's Red Flag Law Paints a Picture of People in Crisis*, GUNS & AM. (Dec. 16, 2019), <https://gunsandamerica.org/story/19/12/16/two-years-of-oregons-red-flag-law-paints-a-picture-of-people-in-crisis/>.

¹⁶¹ *Id.*

¹⁶² See Chris Liedle, *Red Flag Law May Have Prevented Murder of Portland Woman*, KATU NEWS (Aug. 8, 2019), <https://katu.com/news/local/red-flag-law-may-have-prevented-murder-of-portland-woman-mother-says>.

an unexpired domestic violence protective order within the past six months.¹⁶³ ERPOs greatly aid victims of intimate partner violence by providing an alternate avenue by which they may secure safety for themselves and those around them.

IV. Social Implications Conclusion

While ERPOs are poised to reduce gun violence in marginalized communities, a number of factors limit their accessibility. Many marginalized groups report negative experiences with the police or fear of going to the police for help due to police harassment or hostile attitudes. Nevertheless, law enforcement plays a central role in the execution of ERPOs—notably, at a point of possibly significant tension: the removal of weapons. As police more readily respond with force to altercations with marginalized people, marginalized communities may be wary of petitioning for ERPOs against family due to understandable wariness of police involvement.¹⁶⁴ However, the populations suffering from the highest rates of suicide and gun violence are often the very populations with fraught relations with law enforcement. For instance, less than half of LGBTQ homicides were reported to law enforcement,¹⁶⁵ and a 2015 National Center for Transgender Equality survey indicated that approximately half of transgender people report that they are uncomfortable seeking police assistance.¹⁶⁶ Greater than one fifth of transgender Americans who have interacted with law enforcement reported additional police harassment, with 6% reporting

¹⁶³ GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 148; *Extreme Risk Protective Orders*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/> (last visited Jan. 19, 2020).

¹⁶⁴ *See* Perry, *supra* note 115; *see also* King, *supra* note 115 (discussing the ways in which police involvement after 911 calls by Black individuals can be more harmful than helpful).

¹⁶⁵ SOPHIA GEFFEN & ELIZABETH KELMAN, GUN VIOLENCE & LGBT HEALTH 2 (2016), <https://fenwayhealth.org/wp-content/uploads/Gun-Violence-and-LGBT-Health.pdf>.

¹⁶⁶ HARPER JEAN TOBIN ET. AL., A BLUEPRINT FOR EQUALITY A FEDERAL AGENDA FOR TRANSGENDER PEOPLE 24-25 (Jun. 2015) https://transequality.org/sites/default/files/docs/resources/NCTE_Blueprint_June2015.pdf.

experiencing bias-motivated assault by police officers.¹⁶⁷ Among Black transgender individuals, the figures increase further: 38% report police harassment, and 15% have experienced bias-motivated assault by police officers.¹⁶⁸ As such, marginalized people—particularly Black and LGBTQ individuals—may decide not to use ERPOs due to concerns about police treatment of both petitioners and respondents.

Additionally, it is important to consider the unconscious biases of individuals who may be involved in the process of filing an ERPO, such as educators and health professionals. In the classroom, students of color are often penalized at much higher rates than their White peers.¹⁶⁹ In the field of health care, the National Academy of Medicine found that Black Americans do not receive the same quality of health care that their White counterparts receive.¹⁷⁰ Given this disproportionate treatment, it is important to question how implicit bias will manifest in the process of petitioning for an ERPO.

While individuals of marginalized races, sexual orientations, religions, and of low socioeconomic status face gun violence at higher rates than other individuals, these same populations tend to have worse relationships with law enforcement and the judicial system. In order for ERPOs to be more accessible and effective, legislators must centrally consider how specific aspects of ERPO laws will affect marginalized petitioners and respondents. Approaches to render ERPOs more accessible are further discussed in the Best Practices section of this paper.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See German Lopez, *Black Kids are Way More Likely to be Punished in School than White Kids, Study Finds*, VOX (Apr. 5, 2018, 8:00 AM), <https://www.vox.com/identities/2018/4/5/17199810/school-discipline-race-racism-gao/>.

¹⁷⁰ See Khiara M. Bridges, *Implicit Bias and Racial Disparities in Health Care*, AM. BAR ASS'N, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/racial-disparities-in-health-care/ (last visited Mar. 1, 2020).

In order for ERPOs to truly combat gun violence in the United States, they must be workable, safe, and useful for all Americans—particularly those most affected by gun violence.

LOGISTICAL IMPLEMENTATION

While states' ERPO statutes share the same aim of temporarily removing firearms from individuals who pose a risk to themselves or others, their approaches to fulfilling that goal vary greatly. This section of the paper will outline statutory and procedural variations across the seventeen states and District of Columbia that have enacted ERPO laws.¹⁷¹ One of the central differences between states' laws is the level of detail. A lack of clear statutory protocol has presented some difficulties in measuring effective implementation, as law enforcement and judicial actors have had to develop procedures on local and regional levels, leading to a patchwork of ad hoc solutions that vary across jurisdictions. These ad hoc measures will be discussed in this section as well.

This section will first examine the process of filing a petition, which is a request made to the court to order an ERPO against a respondent. Second, this section will outline how seizing and storing firearms and ammunition by law enforcement occurs. Third, it will examine the hearing process for the final order and the judicial procedure of renewing or terminating an ERPO. In addition to analyzing state ERPO laws, this section will review proposed federal ERPO legislation to identify obstacles to the effectiveness of ERPOs.

¹⁷¹ See CAL. PENAL CODE § 18100 (West 2019); COLO. REV. STAT. § 13-14.5-103 (2019); CONN. GEN. STAT. § 29-38C (2011); DEL. CODE ANN. tit. 10, § 7701 (2018); D.C. CODE § 7-2510.02 (2019); FLA. STAT. § 790.401 (2019); HAW. REV. STAT. § 134-61 (2019); 430 ILL. COMP. STAT. 67 (2019); IND. CODE § 35-47-14 (2019); MD. CODE ANN., PUB. SAFETY § 5-601 (West 2019); MASS. GEN. LAWS ch. 140 § 131R (2018); NEV. REV. STAT. § 33.500 (2020); N.J. STAT. ANN. § 2C:58-23 (West 2019); N.Y. C.P.L.R. § 6341 (McKinney 2019); OR. REV. STAT. § 166.525 (2017); 8 R.I. GEN. LAWS § 8-8.3-2 (2018); VT. STAT. ANN. tit. 13, § 4053 (2020); WASH. REV. CODE § 7.94.010 (2016).

I. Petitions

a. Who Can Petition

Most states' ERPO laws allow family and household members, as well as law enforcement officers, to petition.¹⁷²

Family and household members are commonly defined as persons related by blood, marriage (spouse), or adoption to the respondent.¹⁷³ Within the definition of family members, laws also include domestic and dating partners, people who share, or are anticipated to share, a child with the respondent, and legal guardians.¹⁷⁴ Some states also allow individuals currently or formerly residing in the same household as the respondent to petition for an ERPO.¹⁷⁵ The state of Oregon allows a minor to petition as long as there is a guardian ad litem (a guardian appointed by the court to protect the interests of the minor).¹⁷⁶

¹⁷² CAL. PENAL CODE § 18150 (West 2019); COLO. REV. STAT. § 13-14.5-104 (2019); D.C. CODE § 7-2510.01 (2019); DEL. CODE ANN. tit. 10, § 7701 (2018); HAW. REV. STAT. § 134-61 (2019); 430 ILL. COMP. STAT. 67/5 (2019); MD. CODE ANN., PUB. SAFETY § 5-601 (West 2019); MASS. GEN. LAWS ch. 140 § 131R (2018); NEV. REV. STAT. §33.540 (2020); N.J. STAT. ANN. § 2C:58-21 (West 2019); N.Y. C.P.L.R. § 6340 (McKinney 2019); OR. REV. STAT. 166.527 (2017); WASH. REV. CODE §7.94.020 (2016).

¹⁷³ CAL. PENAL CODE § 422.4 (West 2019); COLO. REV. STAT. § 13-14.5-102 (2019); D.C. CODE § 7-2510.01 (2019); DEL. CODE ANN. tit. 10, § 7701 (2018); HAW. REV. STAT. § 134-61 (2019); 430 ILL. COMP. STAT. 67/5 (2019); MD. CODE ANN., PUB. SAFETY § 5-601 (West 2019); MASS. GEN. LAWS ch. 140 § 121 (2018); NEV. REV. STAT. §33.540 (2020); N.J. STAT. ANN. § 2C:58-21 (West 2019); N.Y. C.P.L.R. § 6340 (McKinney 2019); OR. REV. STAT. 166.527 (2017); WASH. REV. CODE §7.94.020 (2016).

¹⁷⁴ CAL. PENAL CODE § 422.4 (West 2019); COLO. REV. STAT. § 13-14.5-102 (2019); D.C. CODE § 7-2510.01 (2019); DEL. CODE ANN. tit. 10, § 7701 (2018); HAW. REV. STAT. § 134-61 (2019); 430 ILL. COMP. STAT. 67/5 (2019); MD. CODE ANN., PUB. SAFETY § 5-601 (West 2019); MASS. GEN. LAWS ch. 140 § 121 (2018); NEV. REV. STAT. §33.540 (2020); N.J. STAT. ANN. § 2C:58-21 (West 2019); N.Y. C.P.L.R. § 6340 (McKinney 2019); OR. REV. STAT. 166.527 (2017); WASH. REV. CODE §7.94.020 (2016).

¹⁷⁵ CAL. PENAL CODE §422.4 (West 2019); COLO. REV. STAT. § 13-14.5-102 (2019); D.C. CODE § 7-2510.01 (2019); DEL. CODE ANN. tit. 10, § 7701 (2018); HAW. REV. STAT. § 134-61 (2019); 430 ILL. COMP. STAT. 67/5 (2019); MD. CODE ANN., PUB. SAFETY § 5-601 (West 2019); MASS. GEN. LAWS ch. 140 § 131R (2018); NEV. REV. STAT. §33.540 (2020); N.J. STAT. ANN. § 2C:58-21 (2019); OR. REV. STAT. 166.525 (2017); WASH. REV. CODE §7.94.020 (2016).

¹⁷⁶ OR. REV. STAT. 166.525 (2017).

By allowing family and household members to petition, individuals close to the respondent are able to convey their concerns to the court without having to directly rely upon law enforcement officers. Similarly, by expanding the category of approved petitioning individuals to include domestic and intimate dating partners, the legislature attempts to close what is commonly referred to in the domestic violence context as the “boyfriend loophole.” The “boyfriend loophole” exists where legal protections are unavailable to an intimate, nonmarried partner.¹⁷⁷ As “abused women are five times more likely to be killed by their abusers if the abuser has a firearm,” expanding ERPO petitioners to include dating and domestic partners allows intimate partners an additional form of protection.¹⁷⁸

Some jurisdictions are more restrictive in whom they allow to petition for an ERPO; in Florida, Rhode Island, Indiana, Connecticut, and Vermont, only law enforcement officers, the state attorney’s office, or the attorney general’s office are allowed to petition.¹⁷⁹ In California and Delaware, only law enforcement can petition for temporary orders.¹⁸⁰ On the other hand, some jurisdictions are more expansive in defining who can petition. In addition to family and household members, the District of Columbia permits mental health professionals to petition.¹⁸¹ Similarly, Maryland allows certain mental health and other health workers who have previously examined the respondent to petition.¹⁸² In Hawaii, medical professionals, educators, and coworkers may also

¹⁷⁷ See *Domestic Violence & Firearms*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/> (last visited Feb. 8, 2020).

¹⁷⁸ *Gun Violence Statistics*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/facts/gun-violence-statistics/> (last visited Feb. 22, 2020).

¹⁷⁹ CONN. GEN. STAT. § 29-38C (2011); FLA. STAT. § 790.401 (2019); IND. CODE § 35-47-14-2 (2019); 8 R.I. GEN. LAWS § 8-8.3-3 (2018); VT. STAT. ANN. TIT. 13, § 4053 (2020).

¹⁸⁰ See CAL. PENAL CODE § 18125 (West 2019); DEL. CODE. ANN. tit. 10, § 7703 (2018).

¹⁸¹ D.C. CODE § 7-2510.01 (2019).

¹⁸² MD. CODE. ANN., PUB. SAFETY § 5-601 (2019).

petition.¹⁸³ The state of New York allows school administrators to petition.¹⁸⁴ Expanding the definition of petitioner to include these various groups creates benefits and obstacles to ERPO usage, as discussed in the Best Practices section.

b. Against Whom an ERPO Can Be Filed

In general, an ERPO can be filed against anyone who poses a risk of physically hurting themselves or others by having firearms in their control.¹⁸⁵ However, states' ERPO laws vary in the level of specificity used to identify the scope of respondents, and to define specific procedure for different respondents. This section will examine ERPO statutes that outline procedures for filing ERPOs against minors and against law enforcement.

Maryland and Washington specifically allow an ERPO to be filed against a minor.¹⁸⁶ In Washington, a person under the age of eighteen is considered a minor.¹⁸⁷ Washington authorizes its courts to enter an ERPO against a minor, and requires notice to the minor's parent or guardian of their legal obligation to safely secure any firearms that are in the home or that the minor can access.¹⁸⁸ The court must also inform the parents that a criminal prosecution is possible if the respondent-minor were to access the firearm.¹⁸⁹ A guardian or guardian ad litem is not required if the minor is sixteen or older.¹⁹⁰ In Washington, when an ERPO is issued against a person under the age of eighteen, a copy of the order must be served to the parent or guardian at any address

¹⁸³ HAW. REV. STAT. § 134-61 (2019).

¹⁸⁴ N.Y. C.P.L.R. § 6340 (McKinney 2019).

¹⁸⁵ See *Extreme Risk Protection Orders*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/> (last visited Mar. 5, 2020).

¹⁸⁶ *Who Is an Extreme Risk Protection Order Filed Against?*, MD. CTS., <https://mdcourts.gov/district/ERPO#respondent> (last visit Mar. 12, 2020); WASH. REV. CODE § 7.94.030 (2016).

¹⁸⁷ Accord WASH. REV. CODE § 7.94.030 (2016).

¹⁸⁸ WASH. REV. CODE § 7.94.060 (2016).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

where the minor resides.¹⁹¹ Notice may be provided at the time the parent or guardian appears in court, or may be served along with a copy of the order.¹⁹² When a respondent-minor is the subject of a dependency or an out-of-home placement, notice must be provided to the Department of Children, Youth, and Families.¹⁹³

Expanding the scope of respondents to include minors can reduce the risk of harm to youth experiencing suicidal ideations. Minors as respondents will be discussed further in both the *Ex Parte* Order and the Best Practices section.

New Jersey is the only state that explicitly defines a process by which petitioners can file an ERPO against a law enforcement officer.¹⁹⁴ Women in families of law enforcement officers experience elevated levels of domestic violence.¹⁹⁵ The ability to file an ERPO against a law enforcement officer is particularly important considering the amount of responsibility law enforcement officers possess, and the degree to which they use and can access firearms and ammunition. Furthermore, it allows petitioners to relay their concerns to the law enforcement agency in which the officer is employed so precautions may be taken for the safety of the officer and others.

A petition for an ERPO against a law enforcement officer in New Jersey must be submitted to the law enforcement agency in which the respondent-officer is employed.¹⁹⁶ A copy of the

¹⁹¹ WASH. REV. CODE § 7.94.030 (2016).

¹⁹² *Id.*

¹⁹³ WASH. REV. CODE § 7.94.060 (2016).

¹⁹⁴ Compare N.J. STAT. ANN. § 2C:58-23 (West 2019), with CAL. PENAL CODE § 18170 (West 2019), COLO. REV. STAT. § 13-14.5-104 (2019), CONN. GEN. STAT. § 29-38C (2011), D.C. CODE § 7-2510.01 (2019), DEL. CODE ANN. tit. 10, § 7701 (2018), FLA. STAT. § 790.401 (2019), HAW. REV. STAT. § 134-61 (2019), 430 ILL. COMP. STAT. 67/5 (2019), MD. CODE ANN., PUB. SAFETY § 5-601 (West 2019), MASS. GEN. LAWS ch. 140 § 131R (2018), NEV. REV. STAT. § 33.540 (2020), N.Y. CPLR § 6340 (McKinney 2019), OR. REV. STAT. 166.527 (2017), 8 R.I. GEN. LAWS § 8-8.3-1 (2018), VT. STAT. ANN. tit. 13 § 4051 (2020), and WASH. REV. CODE § 7.94.020 (2016).

¹⁹⁵ *Accord Officer-Involved Domestic Violence*, THE ADVOCATES FOR HUMAN RIGHTS, (Dec. 26, 2018) http://www.stopvaw.org/officer-involved_domestic_violence#_edn1.

¹⁹⁶ N.J. DEP'T OF LAW AND PUB. SAFETY, OFFICE OF THE ATTORNEY GENERAL, LAW ENFORCEMENT DIRECTIVE NO. 2019-2, DIRECTIVE PURSUANT TO THE EXTREME RISK PROTECTION ORDER ACT OF 2018 (2019).

petition will then be sent to the county prosecutor where the relevant law enforcement agency is located.¹⁹⁷ Upon receipt of the petition for an ERPO, an internal affairs investigation will be initiated by the law enforcement agency in which the respondent-officer is employed, which must be completed within forty-eight hours.¹⁹⁸

The investigation of a law enforcement officer in New Jersey is an expedited process that requires, but is not limited to: a review of the application for the petition, an in-person or telephone interview with the petitioner, a review of any internal agency files on the respondent-officer, and a consideration of the ERPO risk factors mentioned below in the *Ex Parte* Orders section.¹⁹⁹ The investigation can also include actions that are deemed appropriate, such as an interview of the respondent-officer, as long as it is done within the forty-eight hour window.²⁰⁰ If there is a showing of good cause, the law enforcement agency may request additional time to conduct the investigation from the county prosecutor's office or the Division of Criminal Justice.²⁰¹ If the law enforcement officer handling the internal investigation has probable cause to believe that the presence of firearms poses a risk of bodily injury to the respondent-officer or others, the employer-agency shall immediately seize all firearms that the respondent-officer possesses, including department-issued and personal firearms.²⁰²

After the investigation has been completed, the law enforcement agency will forward its findings and conclusions to the county prosecutor's office.²⁰³ After considering said ERPO factors and the findings of the internal investigation, the county prosecutor will determine if there is probable cause to believe that the respondent-officer poses an immediate and present danger to

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

themselves or others.²⁰⁴ Within one business day, the prosecutor must then make a determination about whether or not to file the petition with the Superior Court.²⁰⁵ If the prosecutor decides to file the petition, then the prosecutor becomes the petitioner.²⁰⁶

By having a specific statutory protocol for filing an ERPO against a law enforcement officer, like New Jersey does, agencies are guided on how to conduct internal investigations. Such protocols may help reduce inefficiencies within the agencies that are conducting the investigation by creating a uniform protocol across ERPO jurisdictions, instead of agencies creating their own criteria or standard of review. Furthermore, these statutory protocols provide a timeline for conducting and completing the internal investigation, which is critical due to ERPOs' time-sensitive nature.

In explicitly allowing for petitions against minors and law enforcement, Maryland, Washington, and New Jersey reinforce ERPOs as protective mechanisms for both petitioners and respondents. Minors and law enforcement have unique relationships with firearms. By outlining specific procedures for filing ERPOs against minors and law enforcement, these states prevent courts from having to invent ad hoc mechanisms for managing such particular cases. Considering minors may be especially vulnerable to mental health issues, and law enforcement commit domestic violence at higher rates, outlining a process to manage these particular cases makes ERPOs more effective and accessible.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

c. Filing an ERPO with the Court

A number of states have online forms that petitioners can complete when requesting an ERPO.²⁰⁷ These forms are submitted to the court of the county or district in which the respondent resides.²⁰⁸ Some states, however, such as Washington and New Jersey, allow a petitioner to file in the county in which the petitioner resides.²⁰⁹ The state of New Jersey in particular allows a petitioner to file in the county in which they reside if the respondent is not a New Jersey resident.²¹⁰ Conversely, if filing a petition in New York, a petitioner must file with the Supreme Court of the county in which the respondent resides (if the court is closed, then the petitioner may file an emergency application with the criminal court of the county).²¹¹

The forms require information relevant to the petitioner and respondent, such as contact information, the petitioner's relationship to the respondent, any prior or pending court matters

²⁰⁷ See, e.g., *Application Temporary ERPO*, N.Y. COURTS, [https://www.nycourts.gov/legacypdfs/forms/erpo/Application_Temporary_ERPO_\(UCS-6341\)_fillable.pdf](https://www.nycourts.gov/legacypdfs/forms/erpo/Application_Temporary_ERPO_(UCS-6341)_fillable.pdf) (last visited Mar. 6, 2020); *Filing for an Extreme Risk Protection Order (ERPO)*, OR CTS., <https://www.courts.oregon.gov/forms/Documents/ERPOPacket.pdf> (last visited Mar. 6, 2020); *Petition for Temporary Extreme Risk Protective Order*, N.J. CTS., https://www.njcourts.gov/forms/12430_erpo_petition.pdf (last visited Mar. 6, 2020); *Petition for an Extreme Risk Protection Order (PT)*, WASH. CTS., https://www.courts.wa.gov/forms/documents/XR%20101%20Petition%20for%20an%20Extreme%20Risk%20Protection%20Order_2019%2007.pdf (last visited Mar. 6, 2020); *Petition for Extreme Risk Protection Order*, <https://www.dccourts.gov/sites/default/files/2019-07/Petition%20for%20Extreme%20Risk%20Protection%20Order%20.pdf> (last visited Mar. 6, 2020); *Petition for Order of Protection*, http://www.cookcountyclerkofcourt.org/Forms/pdf_files/OPP403.pdf (last visited Mar. 6, 2020); *Petition for an Extreme Risk Protection Order (Public Safety Title 5, Subtitle 6)*, MD. CTS., <https://mdcourts.gov/sites/default/files/court-forms/dcerpo001.pdf> (last visited Mar. 6, 2020); *Temporary Gun Violence Restraining Order*, CAL. CTS., <https://www.courts.ca.gov/documents/gv110.pdf> (last visited Mar. 6, 2020); *Petition for Extreme Risk Protection Order*, MASS. CTS., <https://www.mass.gov/doc/petition-for-extreme-risk-protection-order-fs-1/download> (last visited Mar. 6, 2020).

²⁰⁸ See CAL. PENAL CODE § 18150 (West 2019); D.C. CODE § 7–2510.02 (2019); 430 ILL. COMP. STAT. 67/10 (2019); MD. CODE ANN., PUB. SAFETY § 5-602 (West 2019); MASS. GEN. LAWS ch. 140, § 131R (2018); N.J. STAT. ANN. § 2C:58-23 (West 2019); N.Y. C.P.L.R. § 6341 (McKinney 2019); OR. REV. STAT. § 166.525 (2017); WASH. REV. CODE § 7.94.030 (2016).

²⁰⁹ Compare N.J. STAT. ANN. § 2C:58-23 (West 2019), and WASH. REV. CODE § 7.94.030 (2016), with CAL. PENAL CODE § 18150 (West 2019), D.C. CODE § 7–2510.02 (2019), 430 ILL. COMP. STAT. 67/10 (2019), MD. CODE ANN., PUB. SAFETY § 5-602 (West 2019), MASS. GEN. LAWS ch. 140 § 131R (2018), N.J. STAT. ANN. § 2C:58-23 (West 2019), N.Y. C.P.L.R. § 6341 (McKinney 2019), and OR. REV. STAT. § 166.525 (2017).

²¹⁰ N.J. STAT. ANN. § 2C:58-23 (West 2019).

²¹¹ Compare N.Y. C.P.L.R. § 6341 (McKinney 2019), with N.J. Stat. Ann. § 2C:58-23 (West 2019).

involving the respondent, a description and location of respondent’s firearms or ammunition, a request for a hearing after issuance of the temporary order, and an affidavit attesting to the grounds for issuance of a temporary order.²¹² Petitioners may find the ERPO forms online, but they must file them in person directly with the court.²¹³ Although many states have forms available online, there may be barriers to accessing the forms. For example, navigating through a judicial website to find the forms may be challenging for some petitioners. In addition, some petitioners may lack internet access, further inhibiting form access.

There are some jurisdictions in which online petition forms are not easily accessible or are entirely unavailable online.²¹⁴ In these situations, petitioners must retrieve the forms from the courthouse. Not having forms readily available online is a potential barrier to ERPOs’ accessibility and effectiveness. As outlined in the Best Practices section of this paper, having online forms available in multiple languages will ensure that ERPOs are accessible to all who need them. In jurisdictions where only law enforcement may petition, online forms are not available.²¹⁵ Instead, individuals must notify law enforcement of their concerns, and law enforcement officers will then follow up with the concerns and decide whether or not to file an ERPO petition.²¹⁶ In some states, such as New Jersey, a law enforcement officer who, in good faith, decides not to file will be

²¹² See CAL. PENAL CODE § 18150 (West 2019); D.C. CODE § 7–2510.02 (2019); 430 ILL. COMP. STAT. 67/35 (2019); MD. CODE ANN., PUB. SAFETY § 5-602 (West 2019); MASS. GEN. LAWS ch. 140 § 131R (2018); N.J. STAT. ANN. § 2C:58-23 (West 2019); N.Y. C.P.L.R. § 6341 (McKinney 2019); OR. REV. STAT. § 166.527 (2017); WASH. REV. CODE § 7.94.030 (2016).

²¹³ See CAL. PENAL CODE § 18150 (West 2019); 430 ILL. COMP. STAT. 67/10 (2019); MD. CODE ANN., PUB. SAFETY § 5-602 (West 2019); MASS. GEN. LAWS ch. 140 § 131R (2018); N.J. STAT. ANN. § 2C:58-23 (West 2019); N.Y. C.P.L.R. § 6341 (McKinney 2019); OR. REV. STAT. § 166.527 (2017); WASH. REV. CODE § 7.94.030 (2016).

²¹⁴ Online ERPO petition forms were difficult to locate on the state’s judicial website in the following jurisdictions: Colorado, Delaware, Hawaii, and Nevada.

²¹⁵ ERPO petition forms are not available publicly as law enforcement officers and/or state officials are the only ones who may petition in the following jurisdictions: Connecticut, Florida, Indiana, Rhode Island, and Vermont.

²¹⁶ See, e.g., CONN. GEN. STAT. § 29-38C (2011); FLA. STAT. § 790.401 (2019); IND. CODE § 35-47-14-2 (2019); 8 R.I. GEN. LAWS § 8-8.3-1 (2018); VT. STAT. ANN. tit. 13, § 4053 (2020).

shielded from civil and/or criminal liability.²¹⁷ Law enforcement immunity will be discussed in greater detail in the Legal Issues section.

No state requires a filing fee except for New York, which requires a \$210 fee.²¹⁸ In New York, law enforcement and public school officials are not required to pay the fee, but school officials from private institutions, and family/household members are required to pay the fee.²¹⁹ However, petitioners in New York may submit a fee waiver with their ERPO application.²²⁰ The fee waiver will be decided upon by the judge separately from the ERPO action.²²¹

d. *Ex Parte* Orders

Temporary or *ex parte* orders are ERPOs that can be executed prior to an initial hearing. They are meant for emergency situations where a potential respondent poses an imminent danger to themselves or others such that any firearms in their possession must be surrendered before a hearing can be conducted. There are different standards of proof in order to determine that the respondent poses a risk of imminent danger: reasonable cause, probable cause, good cause, preponderance of the evidence, and clear and convincing evidence.²²² The different standards of proof will be discussed in more detail in the Legal Issues section.

When determining whether to issue an *ex parte* order, most statutes direct courts to look to whether the respondent has: (1) used, attempted to use, or has threatened physical violence against others and/or themselves; (2) any substance or alcohol abuse; (3) any prior or pending convictions/matters (including violent offenses); (3) violated existing protection orders (including

²¹⁷ N.J. STAT. ANN. § 2C:58-22 (West 2019).

²¹⁸ *Accord Application to Waive Extreme Risk Protection Order Filing Fees*, N.Y. COURTS, [https://www.nycourts.gov/legacypdfs/forms/erpo/Application_Waive_ERPO_Fees_\(UCS-6341W\)_fillable.pdf](https://www.nycourts.gov/legacypdfs/forms/erpo/Application_Waive_ERPO_Fees_(UCS-6341W)_fillable.pdf) (last visited Mar. 6, 2020).

²¹⁹ *See id.*

²²⁰ *See id.*

²²¹ *See id.*

²²² GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 185.

domestic violence, sexual assault, or ERPO); (4) recklessly used, displayed, or brandished firearms; (5) recently acquired firearm(s).²²³ Additionally, some courts consider whether there is witness testimony of particular circumstances.²²⁴ Some states, such as New Jersey and Connecticut, also consider if the respondent has been committed involuntarily to mental health treatment or institutions.²²⁵ Indiana allows evidence of whether the respondent has a mental illness controlled by medication and has not demonstrated consistent consumption of their medication under supervision.²²⁶ Oregon, on the other hand, will factor in the respondent's history of suicide attempts, but the court may not include in its findings any mental health diagnosis or any connection between the risk presented by the respondent and mental illness.²²⁷ Typically, an *ex parte* order lasts anywhere between six to twenty-one days.²²⁸

For ERPOs filed against a minor in the state of Washington, the *ex parte* hearing may be held in a juvenile court.²²⁹ Minors may also petition the court to seal the court records related to ERPO proceedings from public view at the time the order is entered or any time after.²³⁰ The court must seal the records from public view if there are no other protection orders against the

²²³ See, e.g., CAL. PENAL CODE § 18155 (West 2019); COLO. REV. STAT. § 13-14.5-104 (2019); CONN. GEN. STAT. § 29-38C (2011); D.C. CODE § 7-2510.03 (2019); DEL. CODE ANN. tit. 10, § 7702 (2018); FLA. STAT. § 790.401(2) (2019); HAW. REV. STAT. § 134-64 (2019); 430 ILL. COMP. STAT. 67/40 (2019); IND. CODE § 35-47-14-2 (2019); MD. CODE ANN., PUB. SAFETY § 5-602 (West 2019); MASS. GEN. LAWS ch. 140 § 131R (2018); NEV. REV. STAT. § 3370 (2020); N.J. STAT. ANN. § 2C:58-23 (West 2019); N.Y. C.P.L.R. § 6342 (McKinney 2019); OR. REV. STAT. § 166.527 (2017); 8 R.I. GEN. LAWS § 8-8.3-5 (2018); VT. STAT. ANN. tit. 13, § 4053 (2020); WASH. REV. CODE § 7.94.040 (2016).

²²⁴ See FLA. STAT. § 790.401(2) (2019); N.J. STAT. ANN. § 2C:58-23 (West 2019); OR. REV. STAT. § 166.527 (2017).

²²⁵ CONN. GEN. STAT. § 29-38C (2011); N.J. DEP'T OF LAW AND PUB. SAFETY, OFFICE OF THE ATTORNEY GENERAL, LAW ENFORCEMENT DIRECTIVE NO. 2019-2, DIRECTIVE PURSUANT TO THE EXTREME RISK PROTECTION ORDER ACT OF 2018 (2019).

²²⁶ IND. CODE § 35-47-14-1 (2019).

²²⁷ Compare OR. REV. STAT. § 166.527 (2017), with IND. CODE § 35-47-14-1 (2019).

²²⁸ Accord GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 185.

²²⁹ WASH. REV. CODE § 7.94.030 (2016).

²³⁰ *Id.*

respondent-minor, no pending violations of the order, and the respondent-minor has relinquished any firearms as required by the order.²³¹

II. Seizure

Seizure is the process by which law enforcement takes control or custody of the respondent's firearms, as opposed to the respondent's voluntary surrender of the firearms. The process of seizure will vary by state. An *ex parte* order in Illinois can be accompanied by a search warrant so long as there is probable cause.²³² When equipped with a search warrant, law enforcement may seize any firearms found in plain sight. In Hawaii, once an *ex parte* or final order is issued, the respondent has forty-eight hours to surrender their weapons before the chief of police may seize all firearms and ammunition.²³³ In Florida, a law enforcement officer may seek a search warrant if that officer has probable cause to believe some weapons were not surrendered.²³⁴ Missing from most statutes is the explicit protocol to be followed by law enforcement. This gap in information can be partially filled by examining existing state policy, such as Washington's policy regarding firearm surrender.

The Washington Association of Sheriffs and Police Chiefs has created a model ERPO policy for law enforcement agencies in the state of Washington to adopt.²³⁵ The policy provides recommendations for the surrender of firearms by the respondent.²³⁶ The policy describes two methods of surrender by the respondent: surrender by walk-in, or surrender by appointment.²³⁷

²³¹ *Id.*

²³² 430 ILL. COMP. STAT. 67/35 (2019).

²³³ HAW. REV. STAT. § 134-7.3 (2020).

²³⁴ FLA. STAT. ANN. § 790.401 (West 2018).

²³⁵ See *King County Model Policy*, WASHINGTON ASS'N OF SHERIFFS & POLICE CHIEFS (April 2019), <https://www.waspc.org/assets/ProfessionalServices/modelpolicies/king%20county%20model%20policy%20-%20april%202019.pdf>.

²³⁶ See *id.*

²³⁷ See *id.*

Either surrender of firearms is stated to happen at the earliest opportunity.²³⁸ The alternative to a respondent surrendering their firearms is law enforcement locating them through a search warrant. States will again vary on whether or not a search warrant automatically accompanies an ERPO or if a heightened level of evidence is required to get a search warrant.

In Maryland, a court may issue a search warrant for the removal of firearms at any location identified if the state's attorney or a law enforcement officer has probable cause to believe that a respondent subject to an ERPO order has a firearm or ammunition which they have failed to surrender.²³⁹ Illinois permits courts to direct law enforcement to search in places other than the respondent's residence if there is probable cause to believe that the respondent may have firearms there.²⁴⁰ The New York statute provides that if a location searched is jointly occupied, not owned, by two or more parties and a firearm owned by a person other than respondent is seized, the court may, "upon a written finding that there is no impediment to the person other than the respondent's possession of such firearm," order the firearm to be returned to its lawful owner as long as the owner is notified of "the obligation to safely store their firearm."²⁴¹ Once the weapons have been seized, the next step is to record the type and quantity of firearms.

In most states, law enforcement files a receipt describing the weapons and ammunition taken, however, New York requires law enforcement officers to give the respondent the "receipt or voucher for the property taken."²⁴² If the respondent is not present, the officer shall leave the receipt or voucher in a place where the property was found and mail a copy of the receipt/voucher to the respondent's last known address or file a copy of the receipt/voucher with the court.²⁴³ In

²³⁸ *Id.*

²³⁹ MD. CODE ANN., PUB. SAFETY § 5-607 (West 2019).

²⁴⁰ 431 ILL. COMP. STAT. ANN. 67/35 (2019).

²⁴¹ N.Y. C.P.L.R. § 6344 (McKinney 2019).

²⁴² *Id.*

²⁴³ *Id.*

New Jersey, however, the respondent has the burden of filing the receipt with the county prosecutor within forty-eight hours of having the order issued against them or risk being held in contempt of the order.²⁴⁴ It is unclear why New Jersey would place the burden of filing the receipt with the respondent. Once the weapons are seized, the next consideration is how respondent is prevented from acquiring future firearms.

The language in ERPO laws differs in how it restricts the respondent from possessing firearms. Illinois, New Jersey, and Hawaii prohibit the respondent from having “custody or control” of firearms.²⁴⁵ Some states also revoke licenses or firearm identification cards of respondents.²⁴⁶ So long as they are not expired, licenses are usually returned following termination or expiration of the ERPO.²⁴⁷

The moment of service and seizure presents an opportunity to connect the respondent and petitioner with public resources. For example, Massachusetts’s statute includes that, at the time of service, law enforcement provide information on “crisis intervention, mental health, substance use disorders and counseling.”²⁴⁸ The practice of connecting respondents facing a mental health crisis with public health resources can help address underlying causes of the respondent’s potentially dangerous behavior.

a. Storage Options / Transfer to Another Party

i. Storage Fees

Most states do not require that the respondent pay a fee to store the weapons. Hawaii and D.C. are outliers in that they permit law enforcement to charge a fee after seizing the respondent’s

²⁴⁴ Compare N.J. STAT. ANN. § 2C:58-26(B)(4) (West 2019) with N.Y. C.P.L.R. LAW § 6344 (McKinney 2019).

²⁴⁵ 431 ILL. COMP. STAT. ANN. 67/5 (West 2019); N.J. STAT. ANN. § 2C:58-23 (West 2019); HAW. REV. STAT. § 134-61 (2019).

²⁴⁶ See MASS. GEN. LAWS ch. 140 § 131R (2018); D.C. CODE § 7-2510.07 (2019).

²⁴⁷ See MASS. GEN. LAWS ch. 140 § 131R (2018); D.C. CODE § 7-2510.07 (2019).

²⁴⁸ MASS. GEN. LAWS ch. 140 § 131R (2018).

firearms.²⁴⁹ Hawaii’s law allows the respondent to be charged a fee “not to exceed the reasonable and actual costs” incurred by the department for storing a firearm or ammunition surrendered or removed pursuant to an ERPO, while D.C. is limited to the “actual costs.”²⁵⁰ The state of Hawaii can charge a fee once the costs incurred are known (i.e. at the end of the order), which the respondent is then responsible for paying.²⁵¹ It is unclear from the statute’s language if the respondent has to pay the fee in order to have their firearms returned to them.

ii. Transfer to Another Party or a Licensed Dealer

D.C., Connecticut, and Indiana allow the transfer of firearms to another party, so long as that party is not legally prevented from owning a firearm.²⁵² New Jersey, California, Vermont, Massachusetts, and Oregon only allow transfer to a licensed dealer.²⁵³ Hawaii and Washington are more extreme, containing a provision allowing for the firearms to be transferred to someone found to be the lawful owner of the firearm.²⁵⁴ Delaware takes that a step further, not allowing the respondent to “resid[e] with another individual who owns, possesses, or controls firearms or ammunition.”²⁵⁵ States have varying conditions for transfer to third parties. Maryland, Illinois, Nevada, and Rhode Island allow for the transfer of firearms and/or ammunition to another party, with the added condition that the party not reside with the respondent.²⁵⁶ Colorado allows for the transfer to a licensed dealer but with the exception that if the firearm is an antique, it can be

²⁴⁹ HAW. REV. STAT. § 134-67 (2019); D.C. CODE § 7-2510.07 (2019).

²⁵⁰ HAW. REV. STAT. § 134-67 (2019); D.C. CODE § 7-2510.07 (2019).

²⁵¹ See HAW. REV. STAT. § 134-67 (2019).

²⁵² Accord D.C. CODE § 7-2510.09 (2019); CONN. GEN. STAT. § 29-38C (2013); CONN. GEN. STAT. 29-33A (2013); IND. CODE § 35-47-14-10 (2019); IND. CODE § 35-47-14-1.5 (2019).

²⁵³ Accord N.J. STAT. ANN. § 2C:58-27 (West 2019); CAL. PENAL CODE § 18120 (West 2019); MASS. GEN. LAWS ch. 140, § 131S (2018); VT. STAT. ANN. tit. 13, § 4059 (West 2018); OR. REV. STAT. § 166.540 (2018).

²⁵⁴ Compare HAW. REV. STAT. § 134-68 (2020), and WASH. REV. CODE § 7.94.090 (2019), with N.J. STAT. ANN. § 2C:58-27 (West 2019), CAL. PENAL CODE § 18120 (West 2019), MASS. GEN. LAWS ch. 140, § 131S (2018), VT. STAT. ANN. tit. 13, § 4059 (West 2018), and OR. REV. STAT. § 166.540 (2018).

²⁵⁵ DEL. CODE ANN. tit. 10, § 7704 (West 2018).

²⁵⁶ See MD. CODE ANN., PUBLIC SAFETY § 5-608 (West 2019); 8 R.I. GEN. LAWS § 8-8.3-8 (2018); NEV. REV. STAT. § 33.600 (2020); 430 ILL. COMP. STAT. 67/40 (2019).

transferred to a relative after the relative has passed a criminal history record check.²⁵⁷ New York’s statute does not prevent the return of firearms to parties who reside with the respondent.²⁵⁸ States such as Florida that allow transfer must ensure that the new parties are not legally prohibited from owning a firearm.²⁵⁹

When transfer to a licensed dealer is allowed, the licensed dealer must obtain proof that the respondent agrees and the police have checked with respondent to make sure the transfer is legitimate.²⁶⁰ The respondent can order the sale of their firearms and ammunition through the licensed dealer also, with the proceeds of the sale being returned to the respondent.²⁶¹ In the District of Columbia, licensed firearms dealers must display “written proof of the sale or transfer of the firearm or ammunition from the respondent to the dealer.”²⁶²

III. Hearings, Final Orders, Renewal, and Termination

Hearings form the bedrock of the constitutionality of ERPOs. Hearings must comply with the Due Process Clauses of the United States Constitution, ensuring notice to the respondent and an opportunity to be heard. As stated, all state statutes have *ex parte* or emergency temporary ERPOs that can be issued quickly, with a hearing to follow the seizure of firearms or ammunition.²⁶³ Statutes differ on how long such an *ex parte* order can stand before there must be

²⁵⁷ COLO. REV. STAT. § 13-14.5-108 (2019).

²⁵⁸ See N.Y. C.P.L.R. LAW § 6344 (McKinney 2019).

²⁵⁹ FLA. STAT. § 790.401 (2019).

²⁶⁰ 430 ILL. COMP. STAT. 67/35 (2019); MD. CODE ANN., PUBLIC SAFETY § 5-608 (West 2019); N.J. STAT. ANN. § 2C:58-26 (West 2019).

²⁶¹ Accord N.J. STAT. ANN. § 2C:58-26 (West 2019), AND MD. CODE ANN., PUBLIC SAFETY § 5-608 (West 2019).

²⁶² D.C. CODE § 7-2510.09 (2019).

²⁶³ See CAL. PENAL CODE § 18160 (West 2020); COLO. REV. STAT. § 13-14.5-103 (2019); CONN. GEN. STAT. § 29-38C (2011); D.C. CODE § 7-2510.04 (2019); DEL. CODE ANN. tit. 10, § 7703 (West 2018); FLA. STAT. § 790.401 (2018); HAW. REV. STAT. § 134-64 (2020); 430 ILL. COMP. STAT. 67/35 (2019); IND. CODE § 35-47-14-3 (2019); MD. CODE ANN., PUB. SAFETY § 5-604 (West 2019); MASS. GEN. LAWS ch. 140, § 131T (2018); NEV. REV. STAT. § 33.520 (2020); N.J. STAT. ANN. § 2C:58-26 (West 2019); N.J. STAT. ANN. § 2C:58-23 (West 2019); N.Y. C.P.L.R. § 6342

a hearing to determine if the order will become final. No statute requires an emergency order prior to a non-emergency petition, meaning that there does not first have to be an *ex parte* order in place to move to a final order.²⁶⁴

a. Final Order Hearings

At the final order hearings, both the petitioner and respondent are present and the burden of proof is on the petitioner to show that the respondent poses an immediate and present danger of causing physical injury to self or others by controlling, purchasing, owning, possessing, or receiving a firearm.²⁶⁵ The standard of proof differs by jurisdiction, but for most, it is clear and convincing evidence.²⁶⁶ Only five jurisdictions require preponderance of the evidence: the District

(McKinney 2019); OR. REV. STAT. § 166.527 (2018); 8 R.I. GEN. LAWS § 8-8.3-4 (2018); VT. STAT. ANN. tit. 13, § 4054 (West 2018); WASH. REV. CODE § 7.94.050 (2019).

²⁶⁴See CAL. PENAL CODE § 18160 (West 2020); COLO. REV. STAT. § 13-14.5-103 (2019); CONN. GEN. STAT. § 29-38C (2011); D.C. CODE § 7-2510.04 (2019); DEL. CODE ANN. tit. 10, § 7703 (West 2018); FLA. STAT. § 790.401 (2018); HAW. REV. STAT. § 134-64 (2020); 430 ILL. COMP. STAT. 67/35 (2019); IND. CODE § 35-47-14-3 (2019); MD. CODE ANN., PUB. SAFETY § 5-604 (West 2019); MASS. GEN. LAWS ch. 140, § 131T (2018); NEV. REV. STAT. § 33.520 (2020); N.J. STAT. ANN. § 2C:58-26 (West 2019); N.J. STAT. ANN. § 2C:58-23 (West 2019); N.Y. C.P.L.R. § 6342 (McKinney 2019); OR. REV. STAT. § 166.527 (018); 8 R.I. GEN. LAWS § 8-8.3-4 (2018); VT. STAT. ANN. tit. 13, § 4054 (West 2018); WASH. REV. CODE § 7.94.050 (2019).

²⁶⁵See CAL. PENAL CODE § 18160 (West 2020); COLO. REV. STAT. § 13-14.5-103 (2019); CONN. GEN. STAT. § 29-38C (2011); D.C. CODE § 7-2510.04 (2019); DEL. CODE ANN. tit. 10, § 7703 (West 2018); FLA. STAT. § 790.401 (2018); HAW. REV. STAT. § 134-64 (2020); 430 ILL. COMP. STAT. 67/35 (2019); IND. CODE § 35-47-14-3 (2019); MD. CODE ANN., PUB. SAFETY § 5-604 (West 2019); MASS. GEN. LAWS ch. 140, § 131T (2018); NEV. REV. STAT. § 33.520 (2020); N.J. STAT. ANN. § 2C:58-26 (West 2019); N.J. STAT. ANN. § 2C:58-23 (West 2019); N.Y. C.P.L.R. § 6342 (McKinney 2019); OR. REV. STAT. § 166.527 (018); 8 R.I. GEN. LAWS § 8-8.3-4 (2018); VT. STAT. ANN. tit. 13, § 4054 (West 2018); WASH. REV. CODE § 7.94.050 (2019).

²⁶⁶ See CAL. PENAL CODE § 18160 (West 2020); COLO. REV. STAT. § 13-14.5-103 (2019); CONN. GEN. STAT. § 29-38C (2011); DEL. CODE ANN. tit. 10, § 7703 (West 2018); FLA. STAT. § 790.401 (2018); 430 ILL. COMP. STAT. 67/35 (2019); IND. CODE § 35-47-14-3 (2019); MD. CODE ANN., PUB. SAFETY § 5-604 (West 2019); NEV. REV. STAT. § 33.520 (2020); N.Y. C.P.L.R. § 6342 (McKinney 2019); OR. REV. STAT. § 166.527 (018); 8 R.I. GEN. LAWS § 8-8.3-4 (2018); VT. STAT. ANN. tit. 13, § 4054 (West 2018).

of Columbia, Hawaii, New Jersey, Massachusetts, and Washington.²⁶⁷ The evidence presented is the same as that for *ex parte* orders.²⁶⁸

To protect the Due Process rights of the respondent, states give the respondent the right to notice of the hearing and an opportunity to present evidence. Some states heighten respondent's rights. For example, Delaware also allows respondents to cross-examine adverse witnesses.²⁶⁹ Consider also New York and Maryland, which give respondents ten days and seven days respectively from initial notice to prepare for the hearing and also give the respondent more time if they request it, subject to court approval.²⁷⁰

As a protection against false claims, all states require that petitioner testimony be made under oath.²⁷¹ Four states stipulate that lying during the petition process could result in perjury charges.²⁷² Massachusetts asserts that a petitioner who knowingly files a false ERPO can be

²⁶⁷ Compare D.C. CODE § 7-2510.03 (2019), HAW. REV. STAT. § 134-65 (2020), N.J. STAT. ANN. 2C:58-24 (West 2019), MASS. GEN. LAWS ch. 140, § 131 (2018), and WASH. REV. CODE § 7.94.040 (2019); with CAL. PENAL CODE § 18160 (West 2020), COLO. REV. STAT. § 13-14.5-103 (2019), CONN. GEN. STAT. § 29-38C (2011), DEL. CODE ANN. tit. 10, § 7703 (West 2018), FLA. STAT. § 790.401 (2018), 430 ILL. COMP. STAT. 67/35 (2019), IND. CODE § 35-47-14-3 (2019), MD. CODE ANN., PUB. SAFETY § 5-604 (West 2019), NEV. REV. STAT. § 33.520 (2020), N.Y. C.P.L.R. § 6342 (McKinney 2019), OR. REV. STAT. § 166.527 (018), 8 R.I. GEN. LAWS 8-8.3-4 (2018), and VT. STAT. ANN. tit. 13, § 4054 (West 2018).

²⁶⁸ See also CAL. PENAL CODE § 18175 (West 2020); COLO. REV. STAT. § 13-14.5-105 (2019); CONN. GEN. STAT. § 29-38C (2011); D.C. CODE § 7-2510.03 (2019); DEL. CODE ANN. tit. 10, § 7704 (West 2018); FLA. STAT. § 790.401 (2018); HAW. REV. STAT. § 134-65 (2020); 430 ILL. COMP. STAT. 67/40 (2019); IND. CODE § 35-47-14-6 (2019); MD. CODE ANN., PUB. SAFETY § 5-605 (West 2019); MASS. GEN. LAWS ch. 140, § 131S (2018); NEV. REV. STAT. § 33.580 (2020); N.J. STAT. ANN. § 2C:58-24 (West 2019); N.Y. C.P.L.R. § 6343 (McKinney 2019); OR. REV. STAT. § 166.530 (018); 8 R.I. GEN. LAWS § 8-8.3-5 (2018); VT. STAT. ANN. tit. 13, § 4054 (West 2018); WASH. REV. CODE § 7.94.040 (2019).

²⁶⁹ DEL. CODE ANN. tit. 10, § 7704 (2019).

²⁷⁰ See also N.Y. C.P.L.R. § 6343 (McKinney 2019); MD. CODE ANN., PUB. SAFETY § 5-605 (2018).

²⁷¹ CAL. PENAL CODE § 18155 (West 2020); COLO. REV. STAT. § 13-14.5-103 (2019); CONN. GEN. STAT. § 29-38C (2013); D.C. CODE § 7-2510.03 (2019); DEL. CODE ANN. tit. 10, § 7702 (West 2018); FLA. STAT. § 790.401 (2018); HAW. REV. STAT. § 134-64 (West 2020); 430 ILL. COMP. STAT. 67/35 (2019); IND. CODE § 35-47-14-3 (2019); MD. CODE ANN., PUB. SAFETY § 5-602 (West 2019); MASS. GEN. LAWS ch. 140, § 131R (2018); NEV. REV. STAT. § 33.560 (2020); N.J. STAT. ANN. § 2C:58-23 (West 2019); N.Y. C.P.L.R. § 6342 (McKinney 2019); OR. REV. STAT. § 166.527 (2018); 8 R.I. GEN. LAWS § 8-8.3-3 (2018); VT. STAT. ANN. tit. 13, § 4054 (West 2018); WASH. REV. CODE § 7.94.050 (2019).

²⁷² See COLO. REV. STAT. § 13-14.5-103 (2019); DEL. CODE ANN. TIT. 10, § 7708 (West 2018); 430 ILL. COMP. STAT. 67/40 (2019); MD. CODE ANN., PUB. SAFETY § 5-602 (West 2019).

punished with a fine between \$2500 to \$5000, two-and-a-half years in prison, or both.²⁷³ In Rhode Island, filing a false petition is a felony punishable by a five-year prison sentence or a \$5000 fine.²⁷⁴

Some states use the hearing as an opportunity to connect respondents with mental health services. At the final order hearing, Massachusetts provides respondents with informational resources relating to crisis intervention, mental health, substance use disorders, and counseling.²⁷⁵ In Rhode Island, the court may recommend that the respondent seek a mental health or substance abuse evaluation.²⁷⁶ More drastically, in Florida and Colorado, the court may order that the respondent submit to a mental health evaluation, a chemical dependency evaluation, or both.²⁷⁷

b. Final Orders

In fourteen jurisdictions, final orders last one year.²⁷⁸ In Illinois, and Vermont, the final order lasts for six months.²⁷⁹ In New Jersey, a final order is indefinite, and the order will only expire if the respondent petitions for termination.²⁸⁰ In Indiana, there is no definite time period for final orders.²⁸¹ Instead, one year from the date the order is issued, the state must prove by clear and convincing evidence that the individual is still dangerous, and if the court finds so, the order will be continued.²⁸² To ensure that respondents are barred from purchasing a weapon for the

²⁷³ MASS. GEN. LAWS ch. 140, § 131V (2018).

²⁷⁴ 8 R.I. GEN. LAWS § 8-8.3-10 (2018).

²⁷⁵ MASS. GEN. LAWS ch. 140, § 131S (2018).

²⁷⁶ 8 R.I. GEN. LAWS § 8-8.3-5 (2018).

²⁷⁷ Compare FLA. STAT. § 790.401(F) (2018), and COLO. REV. STAT. § 13-14.5-105 (2019), with 8 R.I. GEN. LAWS § 8-8.3-5 (2018).

²⁷⁸ CAL. PENAL CODE §§ 18175 (West 2020); COLO. REV. STAT. § 13-14.5-105 (2019); CONN. GEN. STAT. § 29-38C (2013); D.C. CODE § 7-2510.03 (2019); DEL. CODE ANN. tit. 10, § 7704 (West 2018); FLA. STAT. § 790.401 (2018); HAW. REV. STAT. § 134-65 (2020); MD. CODE ANN., PUB. SAFETY § 5-605 (West 2019); MASS. GEN. LAWS CH. 140, § 131S (2018); NEV. REV. STAT. § 33.640 (2020); N.Y. C.P.L.R. § 6343 (McKinney 2019); OR. REV. STAT. § 166.530 (2018); 8 R.I. GEN. LAWS § 8-8.3-5 (2018); WASH. REV. CODE § 7.94.040 (2019).

²⁷⁹ 431 ILL. COMP. STAT. 67/40 (2019); VT. STAT. ANN. tit. 13, § 4054 (West 2018).

²⁸⁰ See N.J. STAT. ANN. 2C:58-25 (West 2019).

²⁸¹ IND. CODE § 35-47-14-8 (2019).

²⁸² *Id.*

duration of their ERPO, ten jurisdictions require that the court enter the order into a uniform case reporting system, to be used by law enforcement or the courts.²⁸³ A uniform case reporting system allows for quick reference by law enforcement and judicial personnel. Only six jurisdictions require reporting the ERPO to the federal National Instant Criminal Background Check System (NICS).²⁸⁴ The mandatory reporting of ERPOs into law enforcement and court databases is an essential best practice because it provides a record of the ERPO that can be accessed by both courts and law enforcement, and in the case of NICS, by federally licensed gun sellers as well.

c. Early Termination

Early termination is the process by which a respondent can seek to have the ERPO filed against them terminated prior to its expiration date. Fourteen states have an early termination process in which the respondent may submit a single written request within the duration of the final order.²⁸⁵ If an order is renewed, respondents again are allowed a single written request for the duration of the new order.²⁸⁶ Only Delaware and Maryland allow an ERPO to be appealed directly through their courts.²⁸⁷ Connecticut and Indiana do not have an early termination process written

²⁸³ See also COLO. REV. STAT. § 13-14.5-110 (2019); D.C. CODE § 7-2510.10 (2019); HAW. REV. STAT. § 134-69 (2020); 430 ILL. COMP. STAT. 67/55 (2019); MASS. GEN. LAWS ch. 140, § 131U (2018); NEV. REV. STAT. § 33.650 (2020); N.J. STAT. ANN. § 2C:58-30 (West 2019); N.Y. C.P.L.R. § 6343 (McKinney 2019); 8 R.I. GEN. LAWS 8-8.3-9 (2018); WASH. REV. CODE § 7.94.110 (2019).

²⁸⁴ Compare COLO. REV. STAT. § 13-14.5-110 (2019), D.C. CODE § 7-2510.10 (2019), HAW. REV. STAT. § 134-69 (2020), MASS. GEN. LAWS ch. 140, § 131U (2018), 8 R.I. GEN. LAWS 8-8.3-9 (2018), and WASH. REV. CODE § 7.94.110 (2019), with 430 ILL. COMP. STAT. 67/55 (2019), NEV. REV. STAT. § 33.650 (2020), N.J. STAT. ANN. § 2C:58-30 (West 2019), and N.Y. C.P.L.R. § 6343 (McKinney 2019).

²⁸⁵ CAL. PENAL CODE § 18185 (West 2020); COLO. REV. STAT. § 13-14.5-107 (2019); D.C. CODE § 7-2510.08 (2019); DEL. CODE ANN. tit. 10, § 7705 (West 2018); FLA. STAT. § 790.401 (2018); HAW. REV. STAT. § 134-65 (2020); 430 ILL. COMP. STAT. 67/45 (2019); MASS. GEN. LAWS ch. 140, § 131S (2018); N.J. STAT. ANN. § 2C:58-25 (West 2019); N.Y. C.P.L.R. § 6343 (McKinney 2019); OR. REV. STAT. § 166.533 (2018); 8 R.I. GEN. LAWS 8-8.3-7 (2018); VT. STAT. ANN. tit. 13, § 4055 (West 2018); WASH. REV. CODE § 7.94.080 (2019).

²⁸⁶ CAL. PENAL CODE § 18185 (West 2020); COLO. REV. STAT. § 13-14.5-107 (2019); D.C. CODE § 7-2510.08 (2019); DEL. CODE ANN. tit. 10, § 7705 (West 2018); FLA. STAT. § 790.401 (2018); HAW. REV. STAT. § 134-65 (2020); 430 ILL. COMP. STAT. 67/45 (2019); MASS. GEN. LAWS ch. 140, § 131S (2018); N.J. STAT. ANN. § 2C:58-25 (West 2019); N.Y. C.P.L.R. § 6343 (McKinney 2019); OR. REV. STAT. § 166.533 (2018); 8 R.I. GEN. LAWS 8-8.3-7 (2018); VT. STAT. ANN. tit. 13, § 4055 (West 2018); WASH. REV. CODE § 7.94.080 (2019).

²⁸⁷ DEL. CODE ANN. tit. 10, § 7704 (2018); MD. CODE ANN., PUB. SAFETY § 5-606 (2018).

into their statutes.²⁸⁸ In early termination requests, the burden is placed upon respondent to show that they no longer pose a significant danger of causing bodily injury to themselves or others by controlling, purchasing, owning, possessing, having access to, or receiving a firearm.²⁸⁹ In nine states, the burden for the respondent is to provide a clear and convincing standard of evidence.²⁹⁰ The remaining five jurisdictions require a showing of a preponderance of the evidence.²⁹¹ The evidence presented is the same considered in the emergency and nonemergency hearings, but New Jersey also includes evidence regarding if the respondent has received or is receiving mental health treatment.²⁹²

d. Renewal

Renewal allows petitioners, including law enforcement, to extend an ERPO if the respondent continues to pose a danger to themselves or others. Renewal is less complicated than early termination. Generally, a petitioner can request a renewal within three months prior to the termination of the order.²⁹³ The hearing for a renewal follows the same processes and standards as

²⁸⁸ CONN. GEN. STAT. § 29-38C (2011), IND. CODE § 35-47-14 (2019).

²⁸⁹ CAL. PENAL CODE § 18185 (West 2020); COLO. REV. STAT. § 13-14.5-107 (2019); D.C. CODE § 7-2510.08 (2019); DEL. CODE ANN. tit. 10, § 7705 (West 2018); FLA. STAT. § 790.401 (2018); HAW. REV. STAT. § 134-65 (2020); 430 ILL. COMP. STAT. 67/45 (2019); MASS. GEN. LAWS ch. 140, § 131S (2018); N.J. STAT. ANN. § 2C:58-25 (West 2019); N.Y. C.P.L.R. § 6343 (McKinney 2019); OR. REV. STAT. § 166.533 (2018); 8 R.I. GEN. LAWS 8-8.3-7 (2018); VT. STAT. ANN. tit. 13, § 4055 (West 2018); WASH. REV. CODE § 7.94.080 (2019).

²⁹⁰ CAL. PENAL CODE § 18185 (West 2020); COLO. REV. STAT. § 13-14.5-107 (2019); DEL. CODE ANN. tit. 10, § 7705 (West 2018); FLA. STAT. § 790.401 (2018); NEV. REV. STAT. § 33.580 (2020); N.Y. C.P.L.R. § 6343 (McKinney 2019); OR. REV. STAT. § 166.533 (2018); 8 R.I. GEN. LAWS 8-8.3-7 (2018); VT. STAT. ANN. tit. 13, § 4055 (West 2018).

²⁹¹ D.C. CODE § 7-2510.08 (2019); HAW. REV. STAT. § 134-65 (2020); MASS. GEN. LAWS ch. 140, § 131S (2018); N.J. STAT. ANN. § 2C:58-25 (West 2019); WASH. REV. CODE § 7.94.080 (2019).

²⁹² N.J. STAT. ANN. 2C:58-25 (West 2018).

²⁹³ See CAL. PENAL CODE § 18190 (West 2020); COLO. REV. STAT. § 13-14.5-107 (2019); D.C. CODE § 7-2510.06 (2019); DEL. CODE ANN. tit. 10, § 7705 (West 2018); FLA. STAT. § 790.401 (2018); HAW. REV. STAT. § 134-66 (2020); 430 ILL. COMP. STAT. 67/45 (2019); MD. CODE ANN., PUB. SAFETY § 5-606 (West 2019); MASS. GEN. LAWS ch. 140, § 131S (2018); NEV. REV. STAT. § 33.640 (2020); N.Y. C.P.L.R. § 6345 (McKinney 2019); OR. REV. STAT. § 166.535 (West 2018); 8 R.I. GEN. LAWS 8-8.3-7 (2018); VT. STAT. ANN. tit. 13, § 4055 (West 2018); WASH. REV. CODE § 7.94.080 (2019).

a nonemergency final order hearing.²⁹⁴ Indiana, New Jersey, and Connecticut, however, do not have a renewal process.²⁹⁵ The renewal process is an important tool that both allows for an extension of an ERPO and also provides an opportunity to review the petition and circumstances of the respondent to protect the respondent's rights and ensure that an extension is truly warranted.

IV. Return of Firearms

In all states with ERPO laws, respondents are allowed to have their firearms returned after the order expires without renewal or is terminated, so long as they are eligible to possess a firearm, and are the lawful owners of the firearms.²⁹⁶ States differ on what law enforcement can do if firearms are not reclaimed. Indiana allows a five-year period before law enforcement can dispose of the firearms.²⁹⁷ Additionally, the Indiana law allows the firearms to be transferred to a lawful third party or sold at an auction where the proceeds will be given to the rightful owner of the firearm.²⁹⁸ Most commonly, states give law enforcement the right to keep or dispose of the firearms if the respondent fails to retrieve them within six months of the expiration or termination of the

²⁹⁴ See CAL. PENAL CODE § 18190 (West 2020); COLO. REV. STAT. § 13-14.5-107 (2019); D.C. CODE § 7-2510.06 (2019); DEL. CODE ANN. tit. 10, § 7705 (West 2018); FLA. STAT. § 790.401 (2018); HAW. REV. STAT. § 134-66 (2020); 430 ILL. COMP. STAT. 67/45 (2019); MD. CODE ANN., PUB. SAFETY § 5-606 (West 2019); MASS. GEN. LAWS ch. 140, § 131S (2018); NEV. REV. STAT. § 33.640 (2020); N.Y. C.P.L.R. § 6345 (McKinney 2019); OR. REV. STAT. § 166.535 (West 2018); 8 R.I. GEN. LAWS 8-8.3-7 (2018); VT. STAT. ANN. tit. 13, § 4055 (West 2018); WASH. REV. CODE § 7.94.080 (2019).

²⁹⁵ See also IND. CODE § 35-47-14-10 (2019); N.J. STAT. ANN. 2C:58-25 (West 2018); CONN. GEN. STAT. § 29-38C (2013).

²⁹⁶ Accord CAL. PENAL CODE § 18190 (West 2020) (does not mention "return" of firearms); COLO. REV. STAT. § 13-14.5-109 (2019); CONN. GEN. STAT. § 29-38C (2013); D.C. CODE § 7-2510.09 (2019); DEL. CODE ANN. TIT. 10, § 7706 (West 2018); FLA. STAT. § 790.401 (2018); HAW. REV. STAT. § 134-68 (2020); 430 ILL. COMP. STAT. 67/40 (2019); IND. CODE § 35-47-14-8 (2019); MD. CODE ANN., PUBLIC SAFETY § 5-608 (West 2019); MASS. GEN. LAWS ch. 140, § 131S (2018); NEV. REV. STAT. § 33.600 (2020); N.J. STAT. ANN. § 2C:58-26 (West 2019); N.Y. C.P.L.R. § 6346 (McKinney 2019); OR. REV. STAT. § 166.540 (2018); 8 R.I. GEN. LAWS 8-8.3-8 (2018); VT. STAT. ANN. tit. 13, § 4059 (West 2018); WASH. REV. CODE § 7.94.100 (2019).

²⁹⁷ IND. CODE § 35-47-14-9 (2019).

²⁹⁸ IND. CODE § 35-47-14-10 (2019).

order.²⁹⁹ Illinois not only allows law enforcement to destroy firearms, it also permits them to use the firearms for training or any other application they deems appropriate.³⁰⁰ For safety, Florida requires that law enforcement provide notice to any family or household members of the respondent before the return of any surrendered firearm and ammunition owned by the respondent.³⁰¹

V. Legal Consequences

Petitioners face possible penalties for filing petitions under frivolous conditions, mostly with knowingly false information or with an intent to harass the respondent. A variety of sanctions exist for petitioners and respondents when violations of the “legitimacy requirements” of ERPOs occur. This section differs from Legal Issues later discussed because it does not consider challenges to the legality of the statutes; it solely addresses the legal consequences all parties involved may face for violations of “good faith.”

a. Law Enforcement Immunities and “Good Faith”

Some states’ ERPO laws include language explicitly shielding law enforcement agencies and officers from civil and criminal liability for the consequences of their decisions to file or not file an ERPO petition, their actions in enforcing the law, and any damage that firearms may receive as a result of their handling by law enforcement.³⁰² New Jersey provides immunity for law enforcement officers who, in good faith, do not file an ERPO petition.³⁰³ The language used by

²⁹⁹ See MD. CODE ANN., PUBLIC SAFETY § 5-608 (West 2019), D.C. CODE § 7-2510.09 (2019), AND MASS. GEN. LAWS ch. 140, § 131S (2018).

³⁰⁰ 431 ILL. COMP. STAT. 67/35 (2019).

³⁰¹ FLA. STAT. § 790.401 (1) (F) (2018).

³⁰² COLO. REV. STAT. § 13-14.5-113 (2019); DEL. CODE ANN. tit. 10, § 7707 (West 2018); HAW. REV. STAT. § 134-72 (2020); 430 ILL. COMP. STAT. 67/75 (2019); MD. CODE ANN., PUB. SAFETY § 5-602 (West 2019); N.J. STAT. ANN. § 2C:58-22 (West 2019); 8 R.I. GEN. LAWS 8-8.3-11 (2018); WASH. REV. CODE § 7.94.140 (2019).

³⁰³ N.J. STAT. ANN. § 2C:58-22 (West 2019).

the New Jersey statute is similar to the language used by statutes in Illinois, Maryland, Delaware, Washington, and Colorado.³⁰⁴ It is unlikely that law enforcement’s ignorance of the law would be considered a permissible excuse in those states with a “good faith” clause in their ERPO law.³⁰⁵ Rhode Island, Hawaii, and Washington’s statutes do not explicitly include “good faith” clauses, but they nonetheless provide law enforcement with immunity from liability in relation to filing or obtaining a petition.³⁰⁶

States vary in how they define sanctionable behavior from law enforcement. Illinois’s statute provides that “unless the act is willful or wanton misconduct,” any law enforcement officer “acting in good faith in rendering emergency services or otherwise enforcing this Act” shall not have liability imposed.³⁰⁷ Delaware provides immunity for any damage or deterioration to removed firearms unless it is a result of “recklessness, gross negligence, or intentional misconduct” by law enforcement or federally licensed firearm dealers.³⁰⁸ On the other hand, Indiana allows liability for damage resulting from the law enforcement agency’s “negligence” in storing or handling the respondent’s firearm.³⁰⁹ This is a lower standard for allowing damages and could be read to reflect different values relating to the handling of respondents’ property and the potential costs faced by law enforcement in carrying out the ERPO laws.

³⁰⁴ COLO. REV. STAT. ANN. § 13-14.5-113 (West 2019); DEL. CODE ANN. tit. 10, § 7707 (West 2018); 430 ILL. COMP. STAT. 67/75 (2019); MD. CODE ANN., PUB. SAFETY § 5-602 (West 2019); N.J. STAT. ANN. § 2C:58-22 (West 2019).

³⁰⁵ COLO. REV. STAT. § 13-14.5-113 (2019); DEL. CODE ANN. tit. 10, § 7707 (West 2018); 430 ILL. COMP. STAT. 67/75 (2019); MD. CODE ANN., PUB. SAFETY § 5-602 (West 2019); N.J. STAT. ANN. § 2C:58-22 (West 2019).

³⁰⁶ HAW. REV. STAT. § 134-72 (2020); 8 R.I. GEN. LAWS 8-8.3-11 (2018); WASH. REV. CODE § 7.94.140 (2019).

³⁰⁷ 430 ILL. COMP. STAT. 67/75 (2019).

³⁰⁸ DEL. CODE ANN. tit. 10, § 7707 (West 2018).

³⁰⁹ IND. CODE § 35-47-14-12 (2019).

b. Penalties for ‘Bad Faith’ Petitioners

As a protection against false claims, four states stipulate that lying during the petition process could result in perjury charges.³¹⁰ Hawaii and Rhode Island impose penalties for false claims filed by petitioners who know the information they provided to the court is false, or who filed with the intent to harass the respondent.³¹¹ In Hawaii, the penalty is a misdemeanor charge.³¹² In Rhode Island, filing a false petition is a felony.³¹³ Under the Rhode Island statute, a petitioner filing with an intent to harass the respondent may face five years in prison.³¹⁴ Given the lack of data on recently passed ERPO laws, it is unclear if such severe penalties for petitioners will deter petitioners from filing.

c. Criminal Penalties

ERPO laws are meant to respond to an individual who poses a risk of harm either to themselves or to others.³¹⁵ Although an ERPO is a civil order, by violating the ERPO, the respondent can be exposed to other legal consequences or criminal penalties.³¹⁶ Penalties for respondents who violate an order vary by state. An ERPO is violated when a respondent has custody or control of, owns, purchases, possesses, receives, or controls firearms.³¹⁷ New York includes in its law that a respondent violates the order when they “attempt” to purchase a firearm.³¹⁸ Maryland has a two-tiered approach, with the first offense subjecting the respondent to

³¹⁰ COLO. REV. STAT. § 13-14.5-103 (2019); DEL. CODE ANN. tit. 10, § 7708 (West 2018); 430 MD. CODE ANN., PUB. SAFETY § 5-602 (West 2019); ILL. COMP. STAT. 67/40 (2019).

³¹¹ HAW. REV. STAT. § 134-70 (2020); 8 R.I. GEN. LAWS 8-8.3-10 (2018).

³¹² HAW. REV. STAT. § 134-70 (2020).

³¹³ 8 R.I. GEN. LAWS 8-8.3-10 (2018).

³¹⁴ *Id.*

³¹⁵ GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 185.

³¹⁶ *See e.g.*, 8 R.I. GEN. LAWS 8-8.3-9 (2018) (stating that any violation of an extreme risk protection order is a felony); VT. STAT. ANN. tit. 13, § 4053 (2020) (stating that a person who intentionally violates an extreme risk protection order may be subject to up to a year in prison or a fine of \$1,000).

³¹⁷ D.C. CODE § 7-2510.04 (2019); MD. CODE ANN., PUB. SAFETY § 5-604 (West 2019); N.J. STAT. ANN. § 2C:58-23 (West 2019); N.Y. C.P.L.R. § 6342 (McKinney 2019).

³¹⁸ N.Y. C.P.L.R. § 6342 (McKinney 2019).

either a fine of up to \$1000 or ninety days imprisonment, or both.³¹⁹ The second offense or any subsequent offense has a fine of up to \$2500 or a term of imprisonment up to one year, or both.³²⁰ In Rhode Island, a violation of an ERPO is a felony punishable by up to ten years imprisonment or up to \$10,000, or both.³²¹ Penalties for violating an ERPO give law enforcement power to ensure that respondents comply with the order.

d. Background Check Systems

For an ERPO to be successful at achieving its express purpose—temporary removal of an individual’s access to firearms—there needs to be a system of communication in place across state and federal lines, alerting firearms sellers that a potential buyer has an ERPO active against them.³²² State filing systems face a series of logistical problems, though. One concern relates to the question of immediacy: how fast is information from an ERPO being entered into judicial and law enforcement electronic systems.³²³ Illinois, Rhode Island, Washington, and Colorado require same-day entry, or transmission to databases.³²⁴ New York, Hawaii, and Nevada have a “next business day” deadline, and California a next “court day” deadline, for providing a copy of the order to state agencies.³²⁵ The District of Columbia and Oregon have an “immediately” deadline, the highest bar set by an ERPO law.³²⁶ Requiring immediacy is a best practice but can be difficult, as various offices and agencies may have differing technological capabilities.³²⁷ Simply requiring “immediate” entry may not be possible for some offices that are still working with hard paper

³¹⁹ MD. CODE ANN., PUB. SAFETY § 5-610 (West 2019).

³²⁰ *Id.*

³²¹ 8 R.I. GEN. LAWS 8-8.3-10 (2018).

³²² Telephone Interview with Judge Anne Levinson (ret.), Seattle Mun. Court (Jan. 18, 2020).

³²³ *Id.*

³²⁴ COLO. REV. STAT. § 13-14.5-110 (2019); 430 ILL. COMP. STAT. 67/55 (2019); 8 R.I. GEN. LAWS 8-8.3-9 (2018); WASH. REV. CODE § 7.94.110 (2019).

³²⁵ CAL. PENAL CODE § 18115 (West 2019); HAW. REV. STAT. § 134-69 (2020); NEV. REV. STAT. § 33.650 (2020); N.Y. C.P.L.R. § 6346 (McKinney 2019).

³²⁶ D.C. CODE § 7-2510.10 (2019); OR. REV. STAT. § 166.527 (2018).

³²⁷ Judge Anne Levinson (ret.), *supra* note 322.

copies of the ERPO, and that might have to transport that hard copy to another physical location, such as from a court to a law enforcement office.³²⁸ It is crucial that this information be accessible as soon as possible, ideally within the time frame it would take for respondent to go out and attempt to purchase another firearm.³²⁹

Beyond local court and law enforcement databases, entering ERPOs into federal background check databases is a critical best practice in ensuring the effectiveness of ERPOs in preventing respondents' access to firearms. Federally licensed dealers of firearms are required to reference the National Instant Criminal Background Check System (NICS) before a firearm transfer can occur.³³⁰ Importantly, private sellers are not mandated to conduct a background check through NICS before selling a firearm.³³¹ Requiring ERPOs to be entered into NICS is effective because it allows for national recognition that the respondent is not permitted to have firearms. Only six of the eighteen jurisdictions enter information into NICS, while three states require transmitting or entering the ERPO information into the FBI or the National Crime Information Center (NCIC).³³²

The importance of universal background checks highlights how other gun regulations affect the effectiveness of ERPOs. If private sellers are not required to conduct background checks, respondents with active ERPOs can buy a firearm from private sellers.³³³ By submitting data to a national source, the ERPO may be visible and accessible across state lines. In order for it to be

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ 18 U.S.C § 922 (t)(1)(A).

³³¹ 18 U.S.C § 922 (t)(1).

³³² CAL. PENAL CODE § 18115 (West 2019); COLO. REV. STAT. § 13-14.5-110 (2019); FLA. STAT. § 790.401 (2018); D.C. CODE § 7-2510.10 (2019); HAW. REV. STAT. § 134-69 (2020); 430 ILL. COMP. STAT. 67/55 (2019); N.J. STAT. ANN. § 2C:58-30 (West 2019); N.Y. C.P.L.R. § 6346 (McKinney 2019); NEV. REV. STAT. § 33.650 (2020); OR. REV. STAT. § 166.527 (2018); 8 R.I. GEN. LAWS 8-8.3-9 (2018); WASH. REV. CODE § 7.94.110 (2019).

³³³ Judge Anne Levinson (ret.), *supra* note 322.

enforceable, however, ERPOs would need to be given Full Faith and Credit across states, as will be discussed in the Legal Issues section.

e. Implementation

i. Judicial Implementation

As previously discussed, the general statutory process of an ERPO involves the filing of an ERPO with the county clerk, an *ex parte* hearing, granting of the order by the court, service of the order to the respondent, temporary removal of firearms by law enforcement, the final hearing, and the potential renewal or termination of the order. This section will discuss how ERPOs are being implemented by varied levels of the judicial system and note the obstacles to effective ERPO implementation that may arise in the absence of guidance for judicial implementation. In doing so, it looks at what petitioner information is required to file an ERPO, how clerks will be trained to file and work with petitioners, and the consequences of statutes not containing language that requires the entry of ERPO data into a database. As courts are critical to effective implementation of ERPOs, judicial preparedness is essential.

As discussed above, the first step when seeking to obtain an ERPO is to fill out a petition. Among the thirteen jurisdictions that allow petitioners other than law enforcement (including family members, school administrators, medical professionals, mental health professionals, etc.), nine states have online forms available for potential petitioners to fill out before going to the county clerk's office.³³⁴

³³⁴ *Application Temporary ERPO*, SUPREME COURT OF N.Y., Feb. 10, 2020, [https://www.nycourts.gov/legacypdfs/forms/erpo/Application_Temporary_ERPO_\(UCS-6341\)_fillable.pdf](https://www.nycourts.gov/legacypdfs/forms/erpo/Application_Temporary_ERPO_(UCS-6341)_fillable.pdf); *Filing for an Extreme Risk Protection Order (ERPO)*, Circuit Court for the State of Oregon, courts.oregon.gov, Feb. 10, 2020, <https://www.courts.oregon.gov/forms/Documents/ERPOPacket.pdf>; *Petition for an Extreme Risk Protection Order*, WASH. COURTS, Feb. 10, 2020, https://www.courts.wa.gov/forms/documents/XR%20101%20Petition%20for%20an%20Extreme%20Risk%20Protection%20Order_2019%2007.pdf; *Petition for an Extreme Risk Protection Order (Public Safety Title 5, Subtitle 6)*,

In addition to containing questions the petitioner must answer about where the respondent lives and the quantity and type of firearms in their possession, the forms also require the petitioner to explain why they believe the respondent poses an immediate danger of causing bodily injury to themselves or to others by owning, possessing, purchasing, or receiving firearms.³³⁵ This is perhaps the most critical piece of the form, as this segment provides the basis for a judge's decision to grant or deny the *ex parte* order. In most ERPO statutes, the court will consider: the respondent's history of substance abuse; history of or potential for threats of physical force against another person; status of an existing order against them (including domestic violence, sexual assault, or ERPO); previous order violations, and prior arrests; and pending charges or convictions in determining whether a respondent poses a risk to themselves or others.³³⁶ Forms from New Jersey,

DISTRICT COURT OF MD., Feb. 10, 2020, <https://mdcourts.gov/sites/default/files/court-forms/dcerpo001.pdf>; *Petition for Extreme Risk Protection Order*, TRIAL COURTS OF MASS., Feb. 10, 2020, <https://www.mass.gov/doc/petition-for-extreme-risk-protection-order-fs-1/download>; *Petition for Extreme Risk Protective Order*, N.J. COURTS, Feb. 10, 2020, https://www.njcourts.gov/forms/12430_erpo_petition.pdf?c=HEW; *Petition for Order of Protection*, ILL. CIRCUIT COURT, Feb. 10, 2020, http://www.cookcountyclerkofcourt.org/Forms/pdf_files/OPP403.pdf; *Petition for an Extreme Risk Protection Order*, SUPERIOR COURT OF D.C., Feb. 10, 2020, <https://www.dccourts.gov/sites/default/files/2019-07/Petition%20for%20Extreme%20Risk%20Protection%20Order%20.pdf>; *Temporary Gun Violence Restraining Order*, JUDICIAL COUNCIL OF CAL., Feb. 10, 2020, <https://www.courts.ca.gov/documents/gv110.pdf>.

³³⁵ *Application Temporary ERPO*, SUPREME COURT OF N.Y., Feb. 10, 2020; [https://www.nycourts.gov/legacypdfs/forms/erpo/Application_Temporary_ERPO_\(UCS-6341\)_fillable.pdf](https://www.nycourts.gov/legacypdfs/forms/erpo/Application_Temporary_ERPO_(UCS-6341)_fillable.pdf); *Filing for an Extreme Risk Protection Order (ERPO)*, CIRCUIT COURT FOR OR., Feb. 10, 2020, <https://www.courts.oregon.gov/forms/Documents/ERPOPacket.pdf>; *Petition for an Extreme Risk Protection Order (Public Safety Title 5, Subtitle 6)*, DISTRICT COURT OF MD., Feb. 10, 2020, <https://mdcourts.gov/sites/default/files/court-forms/dcerpo001.pdf>; *Petition for an Extreme Risk Protection Order*, WASH. COURTS, Feb. 10, 2020, https://www.courts.wa.gov/forms/documents/XR%20101%20Petition%20for%20an%20Extreme%20Risk%20Protection%20Order_2019%2007.pdf; *Petition for Extreme Risk Protection Order*, TRIAL COURTS OF MASS., Feb. 10, 2020, <https://www.mass.gov/doc/petition-for-extreme-risk-protection-order-fs-1/download>; *Petition for Extreme Risk Protective Order*, N.J. COURTS, Feb. 10, 2020, https://www.njcourts.gov/forms/12430_erpo_petition.pdf?c=HEW; *Petition for Order of Protection*, ILL. CIRCUIT COURT, Feb. 10, 2020, http://www.cookcountyclerkofcourt.org/Forms/pdf_files/OPP403.pdf; *Petition for an Extreme Risk Protection Order*, SUPERIOR COURT OF D.C., Feb. 10, 2020, <https://www.dccourts.gov/sites/default/files/2019-07/Petition%20for%20Extreme%20Risk%20Protection%20Order%20.pdf>; *Temporary Gun Violence Restraining Order*, JUDICIAL COUNCIL OF CAL., Feb. 10, 2020, <https://www.courts.ca.gov/documents/gv110.pdf>.

³³⁶ *Application Temporary ERPO*, SUPREME COURT OF N.Y., Feb. 10, 2020; [https://www.nycourts.gov/legacypdfs/forms/erpo/Application_Temporary_ERPO_\(UCS-6341\)_fillable.pdf](https://www.nycourts.gov/legacypdfs/forms/erpo/Application_Temporary_ERPO_(UCS-6341)_fillable.pdf); *Filing for an Extreme Risk Protection Order (ERPO)*, CIRCUIT COURT FOR OR., courts.oregon.gov, Feb. 10, 2020, <https://www.courts.oregon.gov/forms/Documents/ERPOPacket.pdf>; *Petition for an Extreme Risk Protection Order (Public Safety Title 5, Subtitle 6)*, DISTRICT COURT OF MD., Feb. 10, 2020,

for example, explicitly ask for such information in the text of the petition, which directly informs the petitioner of the kind of information that the court will be looking to in order to issue an order.³³⁷ In some jurisdictions, like the Superior Court of the District of Columbia, the form simply asks the petitioner to explain why the respondent poses a significant danger to themselves or others, without using guiding directions or questions.³³⁸

This lack of explicit instruction in petitioning forms may create problems, as the information a petitioner provides may be insufficient for the court to determine whether to grant the ERPO. The petitioner may not be aware of the factors outlined in the statute that a court considers when granting an order and may consequently miss mentioning critical information. If clerks are permitted to fill in the gaps by providing guidance to petitioners in filling out the affidavit (especially in states where online forms do not provide such instructions), they may play a critical role in influencing whether the court grants an order. Clerical preparedness is thus critical in ensuring an ERPO's effectiveness.

States and their counties vary in how they train their clerks.³³⁹ Generally, the clerk of the court provides information to petitioners on the procedures for filing an application for an order,

<https://mdcourts.gov/sites/default/files/court-forms/dcerpo001.pdf>; *Petition for an Extreme Risk Protection Order*, WASH. COURTS, Feb. 10, 2020, https://www.courts.wa.gov/forms/documents/XR%20101%20Petition%20for%20an%20Extreme%20Risk%20Protection%20Order_2019%2007.pdf; *Petition for Extreme Risk Protection Order*, TRIAL COURTS OF MASS., Feb. 10, 2020, <https://www.mass.gov/doc/petition-for-extreme-risk-protection-order-fs-1/download>; *Petition for Extreme Risk Protective Order*, N.J. COURTS, Feb. 10, 2020, https://www.njcourts.gov/forms/12430_erp_o_petition.pdf?c=HEW; *Petition for Order of Protection*, ILL. CIRCUIT COURT, Feb. 10, 2020, http://www.cookcountyclerkofcourt.org/Forms/pdf_files/OPP403.pdf; *Petition for an Extreme Risk Protection Order*, SUPERIOR COURT OF D.C., Feb. 10, 2020, <https://www.dccourts.gov/sites/default/files/2019-07/Petition%20for%20Extreme%20Risk%20Protection%20Order%20.pdf>; *Temporary Gun Violence Restraining Order*, JUDICIAL COUNCIL OF CAL., Feb. 10, 2020, <https://www.courts.ca.gov/documents/gv110.pdf>.

³³⁷ *Petition for Extreme Risk Protective Order*, N.J. COURTS, Feb. 10, 2020, https://www.njcourts.gov/forms/12430_erp_o_petition.pdf?c=HEW.

³³⁸ *Petition for an Extreme Risk Protection Order*, SUPERIOR COURT OF D.C., Feb. 10, 2020, <https://www.dccourts.gov/sites/default/files/2019-07/Petition%20for%20Extreme%20Risk%20Protection%20Order%20.pdf>.

³³⁹ Judge Anne Levinson (ret.), *supra* note 322.

the availability of *ex parte* or extended orders, and the procedures for modifying, dissolving or renewing such an order.³⁴⁰ The clerk, or other individuals designated by the court, is critical in assisting any person in completing and filing the application, affidavit, and any other necessary pleading material to initiate or to renew the application of the order.³⁴¹ Clerical competence is extremely important for effective ERPO implementation due to the necessity for immediate response, action, and efficiency on account of the potentially dangerous circumstances underlying each order.³⁴² If, for example, petitioners are directed to the wrong jurisdiction to file an ERPO due to clerical misinformation, the petitioning and execution processes may be delayed substantially, thus causing a petitioner to lose vital time when attempting to seek an order.

Furthermore, some statutes do not contain an explicit timeline that clerks must follow throughout the ERPO process, from the first request to the final hearing.³⁴³ Statutes can play a prominent role in promulgating rules and practices for courts to follow. The absence of such language enforcing a timeline for clerks to follow could hinder the swift enforcement of ERPOs. If counties are using antiquated technology such as delivering papers by mail, ERPO processing and execution may be further delayed and made needlessly less effective.³⁴⁴

Some ERPO statutes do not possess language or explicit instructions to the courts and their clerks regarding requirements for training to ensure clerical preparedness.³⁴⁵ As courts can create their own policies and training programs for clerks and court administrators without statutory requirement, clerical preparedness across counties within a state is inconsistent.³⁴⁶ Policy and training programs can provide clerks with the knowledge needed in filing an ERPO and *ex parte*

³⁴⁰ *Id.*

³⁴¹ See NEV. REV. STAT. § 33.050 (2020).

³⁴² Judge Anne Levinson (ret.), *supra* note 322.

³⁴³ *Id.*

³⁴⁴ Timelines and immediacy requirements are discussed further in the Best Practices section.

³⁴⁵ Judge Anne Levinson (ret.), *supra* note 322.

³⁴⁶ *Id.*

petition and provide information about processes used by courts for said petitions.³⁴⁷ Many ERPO statutes do not outline the actual judicial implementation of the ERPO law, and as a result, judicial implementation of ERPOs varies from county to county.³⁴⁸ As discussed above, this can lead to inefficiencies in the clerical process, an important consequence to be considered, as clerks are the first line of defense in the ERPO process.

Another obstacle created by lack of explicit statutory instructions on implementation is the absence of data collection and data recording mechanisms for analyzing the effectiveness of ERPOs. Mandatory data collection and reporting on ERPOs may help states measure the frequency of ERPO usage, the identities of individuals using them, the reasons for which they are used, and the geographic location of their usage.³⁴⁹ Such data can help states allocate resources effectively to jurisdictions in which ERPOs are heavily filed. ERPO data could also track respondents' demographic information, which would then enable policymakers and researchers to track potentially disparate impacts of ERPOs among different populations. Statutory language could foster consistency across states by mandating that all jurisdictions track ERPO-related data. Statutes could also identify the agency that will do such tracking, streamlining the implementation process by stakeholders now being able to identify the agencies responsible for ERPO execution. Lack of statutory language on data collection and recording can leave states with questions about who may access the information gathered (such as distinguishing between the rights of law enforcement agencies and judicial officials across different counties and departments) and the extent of such information's confidentiality.³⁵⁰

³⁴⁷ See NEV. REV. STAT. § 33.050 (2020).

³⁴⁸ Judge Anne Levinson (ret.), *supra* note 322.

³⁴⁹ *Id.*

³⁵⁰ Telephone Interview with Adelyn Allchin, Senior Dir. of Pub. Health & Policy, Coal. to Stop Gun Violence (Jan. 10, 2020).

As will be discussed further in the Best Practices section, ERPOs demand collaboration between jurisdictions, law enforcement, and judicial departments. Technology plays a critical role in establishing an effective standard of emergency orders, as it may streamline the orders' execution by easing communication between different departments across different counties and fostering a more seamless transfer of information. This transfer is particularly enhanced when the order moves from the judicial system into the hands of law enforcement after the order is granted and the service of the order begins. Because protection orders can cross jurisdictional boundaries, lack of uniformity of training, procedural protocol, and information sharing mechanisms can create obstacles for effective implementation of ERPOs.³⁵¹ Collaboration between departments is important in situations where the petitioner and respondent live in different jurisdictions. For instance, data sharing and accumulation is stifled when counties possess different coding methods and language surrounding the ERPO process. This problem is evident when the order is transferred from the judicial system to law enforcement.³⁵² This absence of uniformity in procedural methods hinders immediate information sharing between the courts and law enforcement agencies.³⁵³ Efficiency in communicating and sharing information between departments, as mentioned, is critical to emergency protection orders because of their time-sensitive nature; a failure to quickly respond to an urgent threat may lead to dire consequences when firearms are involved.

King County in Washington state provides an example of a county that is actively confronting this issue. In King County, there are forty different law enforcement agencies alone, along with various levels within their court system.³⁵⁴ To promote a coordinated community response, judicial officers, law enforcement, and advocates united and created the Regional

³⁵¹ Judge Anne Levinson (ret.), *supra* note 322.

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

Domestic Violence Firearms Enforcement Unit, an organization that works across departments to share information and streamline the implementation process directed towards promoting the efficient and rapid execution of the ERPO process. The Unit will be further discussed in detail in the Best Practices section.

Effective ERPO implementation requires immediacy in both the courthouse and in public by law enforcement agencies.³⁵⁵ The defining characteristic of an ERPO is that an individual is believed to be in crisis. Therefore, immediacy and swiftness are critical factors in effective implementation.³⁵⁶ The need for immediacy is most evident in terms of *ex parte* hearings. After filing an ERPO form, a petitioner will meet with a judge to receive judicial approval of an ERPO.³⁵⁷ The process of meeting with a judge after normal business hours in an *ex parte* hearing is similar to the process of obtaining a warrant.³⁵⁸ Most courts are operational at night and have a rotating judicial officer on call at late hours.³⁵⁹ Inaccessibility to a judge after hours and on weekends, however, can slow the process of executing an order. Furthermore, ERPO statutes that do not explicitly require the prioritization of ERPOs when court is in session can also lengthen the process.

Finally, some states only allow law enforcement officers to petition.³⁶⁰ For these states, it is especially critical that law enforcement is thoroughly trained on ERPO protocol. Because many

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ CAL. PENAL CODE § 18175 (West 2020); COLO. REV. STAT. § 13-14.5-103 (2019); CONN. GEN. STAT. § 29-38C (2013); DEL. CODE ANN. tit. 10, § 7703 (West 2018); D.C. CODE § 7-2510.04 (2019); FLA. STAT. § 790.401 (2018); HAW. REV. STAT. § 134-64 (2020); 430 ILL. COMP. STAT. 67/35 (2019); IND. CODE § 35-47-14-3 (2019); MD. CODE ANN., PUB. SAFETY § 5-604 (West 2019); MASS. GEN. LAWS ch. 140, § 131T (2018); NEV. REV. STAT. § 33.520 (2020); N.J. STAT. ANN. § 2C:58-26 (West 2019); N.Y. C.P.L.R. § 6342 (McKinney 2019); OR. REV. STAT. § 166.527 (2018); 8 R.I. GEN. LAWS 8-8.3-4 (2018); VT. STAT. ANN. tit. 13, § 4054 (West 2018); WASH. REV. CODE § 7.94.050 (2019).

³⁵⁸ Judge Anne Levinson (ret.), *supra* note 322.

³⁵⁹ *Id.*

³⁶⁰ *Extreme Risk Protection Orders*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/wp-content/uploads/2018/07/ERPO-One-Page-7.12.18.pdf> (July 12, 2018).

state ERPO statutes do not maintain language that requires law enforcement agencies to provide training on ERPO implementation, it is up to the departments to institute such training and protocols.³⁶¹ Lack of uniformity in training, development of protocols, coding and statutory language, and information-sharing practices can render ERPOs ineffective when law enforcement agencies collaborate across jurisdictional boundaries.³⁶² Furthermore, without statutory language to promulgate rules and specified ERPO policies, law enforcement officers may not be aware of ERPOs as a tool to prevent gun violence.³⁶³

ii. Explicit Incorporation of Law Enforcement

The state of New Jersey provides an excellent example of how states may choose to shape their approaches towards drafting and implementing their own ERPO laws. This section will present and examine the Attorney General Law Enforcement Directive 2019-2 (“Directive”) from the Office of the Attorney General of New Jersey, which details the policies, procedures, standards, and practices that “all [New Jersey] law enforcement and prosecuting agencies” should implement and comply with in dealing with ERPOs.³⁶⁴ The Directive explains that the New Jersey’s ERPO Act is based on the “framework and procedure of domestic-violence protection orders.”³⁶⁵ The Directive differentiates between New Jersey’s ERPO law and its domestic violence law—filed as a temporary restraining order (TRO)—by noting that the ERPO law does not require protection of the petitioner’s wellbeing and also allows law enforcement officers to file a temporary risk protective order (TERPO)³⁶⁶ on behalf of anyone.³⁶⁷

³⁶¹ Judge Anne Levinson (ret.), *supra* note 322.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ N.J. DEP’T OF LAW AND PUB. SAFETY, OFFICE OF THE ATTORNEY GENERAL, LAW ENFORCEMENT DIRECTIVE NO. 2019-2, DIRECTIVE PURSUANT TO THE EXTREME RISK PROTECTION ORDER ACT OF 2018 at 2 (2019).

³⁶⁵ *Id.*

³⁶⁶ A TERPO is the term for an *ex parte* order in New Jersey.

³⁶⁷ N.J. DEP’T OF LAW AND PUB. SAFETY, *supra* note 364.

In scenarios where an individual believes another poses an “immediate and present danger” of harming themselves or others with firearms, the officer shall inform that concerned individual of the ERPO Act and its procedures.³⁶⁸ The Directive, however, provides civilians and law enforcement officers with other non-ERPO options.³⁶⁹ If an individual requests to file an ERPO but would qualify for a restraining or protective order pursuant to the Prevention of Domestic Violence Act or the Sexual Assault Survivor Protection Act, the officer is directed to inform the individual of other options to ensure they are “making an informed decision, where they can be afforded the maximum protection under our laws.”³⁷⁰

When obtaining an ERPO, the Directive denotes what is necessary to ensure the constitutionality of any search warrants issued under the ERPO law. If there is probable cause, a court may issue a search warrant requested by law enforcement and prosecutors.³⁷¹ Under the Prevention of Domestic Violence Act, probable cause requires the court to have a “well-grounded suspicion” that the respondent poses an immediate and present danger to themselves or others.³⁷² The Directive provides that law enforcement officers and prosecutors may still seek a TERPO petition when they only have “good cause,” but a search warrant will not be issued in such a circumstance.³⁷³

The Directive provides that law enforcement officers “shall takeover” the petition when family or household members ask law enforcement to file on their behalf, which means the officer becomes the sole petitioner and designates themselves as such in the electronic system.³⁷⁴ Law

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.*

enforcement officers look to two factors when taking over the petition: (1) if the officer has “probable cause” that the respondent poses an immediate and present danger of bodily harm to self or others by having in their control and possession a firearm, and (2) if the officer believes there is a reason why the petition would best be filed by a law enforcement officer (e.g. the petitioner is “fragile” or unable to proceed and/or the family or the household member would be best served by having law enforcement file the petition).³⁷⁵ Law enforcement officers may take over or join a TERPO petition under “any circumstances in the officers discretion as long as the officer has good cause to believe that the respondent poses an immediate and present danger” to themselves or others.³⁷⁶ If law enforcement is a petitioner, the prosecutor shall appear at the final extreme risk protective order (FERPO) hearing and may appear at the TERPO hearing if necessary.³⁷⁷ These reasons highlight why the New Jersey Directive is an excellent example of how states may choose to shape their approaches towards drafting and implementing their own ERPO laws.

VI. Federal ERPO Bills

A federal ERPO bill is essentially a proposal for a model ERPO, as it operates as a template of minimum standards states should follow in passing their own ERPO laws. Four primary federal ERPO bills are currently under consideration in Congress at the time of the writing of this report: (1) S.506 (H.R. 1236), the Extreme Risk Protection Order Act of 2019,³⁷⁸ (2) S.7, the Extreme Risk Protection Order and Violence Prevention Act of 2019,³⁷⁹ (3) H.R. 744, the Protecting Our

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ S. 506, 116th Cong. (2019).

³⁷⁹ S. 7, 116th Cong. (2019).

Communities and Rights Act of 2019,³⁸⁰ and (4) H.R. 2786, the Jake Laird Act of 2019.³⁸¹ All four bills use federal grant funding as an incentive for jurisdictions to adopt ERPO laws that meet or exceed the minimum standards laid out in each respective bill.³⁸² The funding must be used to implement the law.³⁸³

While the bills are similar in their approach, they are very different in structure. S.506 features minimalistic language and leaves considerable flexibility to the states to determine specific law enforcement or court protocols stipulated in their ERPO laws.³⁸⁴ Given the looseness of ERPO law requirements, all eighteen jurisdictions that have enacted ERPO laws would currently qualify for funding under S.506.³⁸⁵ S.7 is detailed in that it outlines several specific protocols regarding the surrender of firearms and ammunition, as well as the warrant process for seizure.³⁸⁶ S.7 has such specific requirements that Florida would be the only jurisdiction that could meet the standards of the bill.³⁸⁷ The remaining two bills, H.R. 744 and H.R. 2786, are similarly restrictive.³⁸⁸ No state would currently qualify for funding under H.R. 744, and only Indiana would be eligible under H.R. 2786.³⁸⁹ S.7, H.R. 744, and H.R. 2786, in effect, are empty messages as they lend their sponsors the appearance of taking action on gun violence, while in reality they will likely have little impact as they are too restrictive, and hence few states would qualify for funding under them. As previously stated, a federal ERPO bill operates as a proposal for a model ERPO

³⁸⁰ H.R. 744, 116th Cong. (2019).

³⁸¹ H.R. 2786, 116th Cong. (2019).

³⁸² S. 506, 116th Cong. § 3 (2019); S. 7, 116th Cong. § 3043 (2019); H.R. 744, 116th Cong. § 4 (2019); H.R. 2786, 116th Cong. § 3 (2019).

³⁸³ S. 506, 116th Cong. § 3 (2019); S. 7, 116th Cong. § 3043 (2019); H.R. 744, 116th Cong. § 4 (2019); H.R. 2786, 116th Cong. § 3 (2019).

³⁸⁴ *See*, S. 506, 116th Cong. (2019).

³⁸⁵ Email from Nicholas J. Xenakis, Senior Counsel, Office of Senator Dianne Feinstein, S. Comm. on the Judiciary, to Mia Lin (Jan. 18, 2020, 02:15PM EST) (on file with author).

³⁸⁶ *See*, S. 7, 116th Cong. (2019).

³⁸⁷ COAL. TO STOP GUN VIOLENCE, COMPARISON OF FEDERAL EXTREME RISK LAW GRANT BILLS 4 (2019).

³⁸⁸ H.R. 744, 116th Cong. (2019); H.R. 2786, 116th Cong. (2019).

³⁸⁹ COAL. TO STOP GUN VIOLENCE, *supra* note 387, at 4.

bill; however, the best practices presented in each bill differ based on the views of the bill's sponsors. Nonetheless, the existence of such federally-debated ERPO bills indicates that ERPOs in general are receiving greater recognition by members of Congress. Though historically regarded as a statewide method of firearm violence prevention, ERPO laws' emergence on the federal level bodes promisingly for their eventual expansion into additional jurisdictions, even in the case of the federal bills' failure in Congress.

a. S.506 (H.R. 1236) — Extreme Risk Protection Order Act of 2019

As stated above, S.506 is the only bill in which all eighteen jurisdictions with ERPO laws would be eligible for federal grant funding.³⁹⁰ The requirements of S.506 are the least specific and present lower standards of evidence that can be heightened by states if they choose. The minimalistic nature of the bill allows most states to meet its standards and qualify for funding without making changes to their existing ERPO laws. As a result, the bill could make a broad and immediate impact on promoting ERPO effectiveness. Because of its potential for immediate impact, the bill has the support of major gun violence prevention groups.³⁹¹ The bill specifies how the grant money for eligible states and tribes should be used, indicating that it be used to promote effective implementation by furthering the development of court and law enforcement protocols and training.³⁹² The bill maintains flexibility for states to create policies that best suit their needs, which allows states to tailor their laws to meet the demands of locality-specific issues,³⁹³ and to respond to differing political slants.³⁹⁴ For example, rather than stipulate who can petition, the bill

³⁹⁰ Nicholas J. Xenakis, *supra* note 385.

³⁹¹ The bill is supported by Giffords: Courage to Fight Gun Violence, Everytown for Gun Safety, March for Our Lives, the Brady Campaign to Prevent Gun Violence, Sandy Hook Promise and the Coal. Against Gun Violence. Press Release, Office of U.S. Senator Dianne Feinstein, Feinstein Introduces Bill to Keep Guns from Dangerous Individuals (Feb. 14, 2019).

³⁹² S. 506, 116th Cong. § 3(b) (2019).

³⁹³ S. 506, 116th Cong. § 2(6) (2019).

³⁹⁴ S. 506, 116th Cong. § 4(b)(3) (2019).

allows the state or tribe to define petitioners through their own laws.³⁹⁵ The standard of proof for a final order is preponderance of the evidence, but states have the flexibility to institute a higher burden of proof.³⁹⁶ In terms of due process protections, the bill only requires that the respondent receive written notice of the application and an opportunity to be heard on the matter, but it does not bar states from having enhanced due process requirements.³⁹⁷ Per the discussion of the importance of background checks above, the bill requires that ERPOs be entered into the National Instant Criminal Background Check System (NICS).³⁹⁸ The bill also includes a Full Faith and Credit clause, which would require that a state or tribal ERPO law be valid in any other state or tribe and be enforced by the court and law enforcement personnel of other jurisdictions.³⁹⁹ Overall, S.506 presents many best practices to reference when considering a model federal ERPO law appealing to a wider base of interest groups.

b. S.7 - Extreme Risk Protection Order and Violence Prevention Act of 2019

S.7 takes a granular approach and explicitly details what courts may consider as evidence, what information the order forms must include, and what the process for issuance of a warrant actually entails.⁴⁰⁰ The bill allows law enforcement and family and household members to petition, and closes what is commonly known as the “boyfriend loophole” by allowing dating partners to petition as well.⁴⁰¹ The bill includes a Full Faith and Credit provision.⁴⁰² There are some additional statutory elements to the bill that effectively disqualify the majority of states that have ERPO laws from receiving funding, which may lead to a more difficult case for the bill’s adoption on the

³⁹⁵ S. 506, 116th Cong. § 2(6) (2019).

³⁹⁶ S. 506, 116th Cong. § 4(b)(3) (2019).

³⁹⁷ S. 506, 116th Cong. § 4(2) (2019).

³⁹⁸ S. 506, 116th Cong. § 4(6)(B) (2019).

³⁹⁹ S. 506, 116th Cong. § 7 (2019).

⁴⁰⁰ S. 7, 116th Cong. (2019).

⁴⁰¹ S. 7, 116th Cong. § 3041 (2019).

⁴⁰² S. 7, 116th Cong. § 3044 (2019).

federal level. For example, S.7 includes a provision that a court may order a mental health evaluation or chemical dependency evaluation.⁴⁰³ Only five states have such a stipulation in their laws, meaning twelve states and the District of Columbia would be ineligible.⁴⁰⁴ The most stringent provision is a burden on the petitioner to make a good faith effort to notify family or household members of the respondent or any other known third party who may be at risk of violence because of the ERPO petition.⁴⁰⁵ Only Florida has such a provision, meaning that seventeen out of eighteen jurisdictions are ineligible for funding under the bill.⁴⁰⁶ While it may provide for a more comprehensive ERPO, in terms of addressing mental health concerns or bringing about a heightened standard of third party warning of the petition in question, such additional statutory provisions may make federal adoption more challenging.

c. H.R. 744 — Protecting Our Communities and Rights Act of 2019

H.R. 744 is the most demanding in terms of required additions to state ERPO laws.⁴⁰⁷ It also includes elements that limit the effectiveness of ERPOs. For example, it lacks a Full Faith and Credit provision. Additionally, the bill stipulates that an *ex parte* order must only prohibit the respondent from receiving firearms or transporting or carrying firearms.⁴⁰⁸ Notably, this means that respondents to *ex parte* orders would still be able to possess a firearm. While these initial elements may appear to craft a more lenient bill in terms of requirements for removal, the bill also contains provisions that exceed those of any state adopted ERPO laws thus far. Because of this, H.R. 744, if passed, would likely require significant changes in existing state ERPO laws, and setting such a high bar could disincentivize states contemplating ERPO laws from adopting them.

⁴⁰³ S. 7, 116th Cong. § 3042(b)(2)(B)(iii) (2019).

⁴⁰⁴ COAL. TO STOP GUN VIOLENCE, *supra* note 387, at 4.

⁴⁰⁵ S. 7, 116th Cong. § 3042(1)(B) (2019).

⁴⁰⁶ COAL. TO STOP GUN VIOLENCE, *supra* note 387, at 4.

⁴⁰⁷ H.R. 744, 116th Cong. (2019).

⁴⁰⁸ H.R. 744, 116th Cong. § 3(b)(4) (2019).

Furthermore, the bill stipulates that ERPOs may not be renewed more than twice,⁴⁰⁹ a restriction that no state nor D.C. has, leaving not a single jurisdiction eligible for funding under the bill.⁴¹⁰ Such a provision would require existing state ERPO laws to be altered and newly introduced ERPO laws to adhere to a standard not yet met. As a result, the bill may be met with significant concerns in the upcoming months.

d. H.R. 2786 — Jake Laird Act of 2019

H.R. 2786 is not as lengthy nor detailed as S.7 or H.R. 744, yet it still holds elements that hinder its effectiveness.⁴¹¹ The bill does not have a Full Faith and Credit provision, and it requires a court to consider as a risk factor whether a respondent “has a mental illness that may be controlled by medication, but has demonstrated a pattern of not voluntarily and consistently taking such medication, except under supervision.”⁴¹² Additionally, the bill allows a respondent to petition for return of their firearms every 180 days; their petition, however, may be repeatedly denied, and police can retain the firearms indefinitely.⁴¹³ The only state that allows police to hold firearms indefinitely is Indiana, meaning seventeen out of eighteen jurisdictions would be ineligible for grant funding under the bill.⁴¹⁴ As with H.R. 744, this additional provision may lead to hesitancy of adoption at the federal level.

The federal bills present two different approaches to ERPO legislation: one that details explicit statutory requirements and demands additions to existing legislation, and one that promotes minimal requirements to strive for greater social acceptance and appeal, yet is vague enough to allow jurisdictions the flexibility to tailor laws to best suit their needs. This variety of

⁴⁰⁹ H.R. 744, 116th Cong. § 3(b)(10) (2019).

⁴¹⁰ COAL. TO STOP GUN VIOLENCE, *supra* note 387, at 4.

⁴¹¹ H.R. 2786, 116th Cong. (2019).

⁴¹² H.R. 2786, 116th Cong. § 2 (2019).

⁴¹³ *See* H.R. 2786, 116th Cong. § 5(C) (2019); COAL. TO STOP GUN VIOLENCE, *supra* note 387, at 4.

⁴¹⁴ COAL. TO STOP GUN VIOLENCE, *supra* note 387, at 4.

legislative approaches provides valuable information from which the ideal approach towards crafting ERPO laws may be drawn. This paper's Best Practices section notes the most appealing and readily applicable aspects of such existing legislation.

LEGAL ISSUES

Even though ERPO laws enjoy widespread support, they are being challenged in court by gun rights advocates who see them as encroaching on gun owners' constitutionally protected rights. As such, legislators and advocates must ensure that ERPO laws are airtight so that they can withstand court challenges. This section examines the potential challenges to ERPO statutes in order to determine how to strengthen existing and future laws. As there have been few lawsuits that specifically target ERPO laws, the analysis in this section is based in part on challenges against other laws that result in firearm seizure.

The section begins by first examining court challenges to ERPO laws based on procedural and evidentiary grounds and by analyzing cases where the rights provided to respondents and the meeting of evidentiary standards are at issue. Next, this section looks at challenges to ERPO and analogous laws on the basis of the Second Amendment right to bear arms, the Fourth Amendment right against unlawful search and seizure, the Fourteenth Amendment right to due process, and the First Amendment right to freedom of speech, as well as the Full Faith and Credit Clause. The Amendments are addressed in order of relevance, although all are grounds for challenging gun removal legislation.

As the landscape of legal challenges against gun control legislation continues to unfold, this section aims to provide a preliminary survey of the most evident legal issues raised thus far against ERPO laws specifically and to outline the most salient legal issues raised in response to

preceding gun control legislation as a means of understanding how to safeguard ERPO laws from future court challenges.

I. Procedural and Evidentiary Issues

The case law discussed in the following section shows that ERPO statutes often lack sufficient detail, resulting in procedural mistakes and evidentiary concerns that have been used to overturn ERPOs on a case-by-case basis. Procedural issues have arisen specifically from instances of failure to inform respondents of their rights regarding calling witnesses and relinquishing firearms. Furthermore, little direction regarding what is required to meet an evidentiary standard has left judges with significant discretionary power. As statutes provide little direction on how such issues should be handled, judges end up using their discretion to determine remedies. In all the cases discussed below, judges ultimately invalidated the ERPOs. Examining these cases demonstrates that greater specificity in ERPO statutes may allow the laws to be used more effectively and reduce litigation.

a. Remedies for Procedural Failures

Failure to adequately inform respondents of their rights during trial has resulted in the nullification of ERPOs against respondents.⁴¹⁵ In *State v. R. C. S. (In re R. C. S.)*, 415 P.3d 1164 (Or. Ct. App. 2018), the appellant appealed the granting of an order preventing her from purchasing a firearm for a year and her commitment to the Oregon Health Authority, an in-state institution.⁴¹⁶ The appellant argued that the court had failed to inform her of her right to subpoena witnesses.⁴¹⁷ The court therefore nullified the ERPO against the appellant.⁴¹⁸ Similarly, in *People v. Superior*

⁴¹⁵ *State v. R. C. S. (In re R. C. S.)*, 415 P.3d 1164 (Or. Ct. App. 2018).

⁴¹⁶ *Id.* at 1165.

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

Court, 213 Cal. Rptr. 3d 735 (Cal. Ct. App. 2017), a protection order was filed against the respondent by law enforcement.⁴¹⁹ The respondent challenged the validity of the order against him on the grounds that service lacked information regarding the requirement to relieve control of his firearms and the methods of relinquishment.⁴²⁰ Due to these omissions, the court held that the order was invalid and improper, and denied future search warrants intending to further investigate locked safes in the respondent’s home.⁴²¹ Where there is procedural error, states use their own discretion in assessing a remedy.⁴²² As such, this case is indicative of how such discretion may lead to the complete negation of a once properly filed ERPO. Such consequences indicate that special attention ought to be given to incorporating specific notations of how respondents may respond to their served order.⁴²³

i. Unclear Evidentiary Standards

Ambiguity regarding evidentiary standards provides little direction and predictability for petitioners seeking ERPOs and gives judges significant discretion in the matter. For example, in *Redington v. State*, 121 N.E.3d 1053 (Ind. Ct. App. 2019), the appellant sought the return of his firearms that had been previously confiscated by a 2012 ERPO.⁴²⁴ In the appellant’s initial ERPO hearing, the court found that the plaintiff was a “dangerous person” due to his peculiar behavior involving gun possession and a range finder on private property, persistent purchasing of firearms, and diagnosis of personality disorder.⁴²⁵ The plaintiff had been denied the return of his firearms

⁴¹⁹ *People v. Superior Court*, 213 Cal. Rptr. 3d 735, 739 (Ct. App. 2017).

⁴²⁰ *Id.* at 752.

⁴²¹ *Id.* at 752-56.

⁴²² *In re R. C. S.*, 415 P.3d at 1165.

⁴²³ *See Superior Court*, 213 Cal. Rptr. 3d at 755.

⁴²⁴ *Redington v. State*, 121 N.E.3d 1053 (Ind. Ct. App. 2019). The plaintiff had previously challenged the constitutionality of the Indiana ERPO statute unsuccessfully in *Redington v. State*, 992 N.E.2d 823, 828 (Ind. Ct. App. 2013).

⁴²⁵ *See Redington*, 992 N.E.2d at 842.

due to his failure to prove—by a “preponderance of evidence,” as was required under Ind. Code § 35-47-14-8(d)(2)—that he was no longer dangerous.⁴²⁶ The appellant’s new psychiatrist testified that the appellant was not a dangerous person as determined in the first case.⁴²⁷ While the trial court held that the testimony failed to establish by “preponderance of the evidence” that the appellant was not dangerous, the appellate court disagreed, holding that “preponderance of evidence” was met and as such, the appellant’s firearms should be returned.⁴²⁸ Contention over the significance of a psychiatrist's evaluation warranted continued litigation, as the state of Indiana had not yet clearly determined how a plaintiff may properly demonstrate their movement from a condition of concern to a condition in which the return of firearms would be appropriate. Additional procedures requiring further qualification of a plaintiff's improvement in mental condition would prevent challenges to the validity of ERPOs in the future.

II. Right to Bear Arms

Under the Second Amendment, “the right of the people to keep and bear Arms, shall not be infringed.”⁴²⁹ Contemporary judicial interpretation of the Second Amendment allows state regulation of firearms that does not infringe on the rights of an individual to possess weapons intended for use in self-defense.⁴³⁰ Specifically, the court protects the right to bear arms in “the home, where the need for defense of self, family, and property is most acute.”⁴³¹ As such, an ERPO would be able to withstand a constitutional challenge under the Second Amendment so long as it is not seen to infringe on the rights of individuals to possess weapons.

⁴²⁶ IND. CODE § 35-47-14-8(d)(2) (2019); *Redington*, 121 N.E.3d at 1054.

⁴²⁷ *Redington*, 121 N.E.3d at 1060.

⁴²⁸ *Id.* at 1066.

⁴²⁹ U.S. CONST. amend. II.

⁴³⁰ See *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008); *United States v. Miller*, 307 U.S. 174, 177 (1939).

⁴³¹ *Heller*, 554 U.S. at 628.

a. What is Found to Infringe on an Individual’s Rights?

The U.S. Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), held that the Second Amendment protects owner’s rights to own any type of firearm for the purpose of self-defense.⁴³² *McDonald v. Chicago*, 561 U.S. 742, 792 (2010) subsequently held that this interpretation of the Second Amendment was applicable to states via incorporation in the Fourteenth Amendment’s Due Process Clause.⁴³³ Any state or federal legislation that restricts the collective right of the populace to keep guns in households for self-defense, therefore, would be struck down.⁴³⁴

Lower courts have aligned on a methodology for analyzing laws in relation to the Second Amendment in post-*Heller* jurisprudence.⁴³⁵ Most courts employ a two-step analysis that first asks “whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.”⁴³⁶ If the court determines the answer to this first question is negative, the analysis ends.⁴³⁷ If, however, the court finds that the law does restrict conduct falling within the Second Amendment, it applies a means-end scrutiny to determine if the law is too restrictive.⁴³⁸

While many Circuit Courts post-*Heller* have used this method, the Supreme Court has not yet upheld this approach.⁴³⁹ The Court did not lay out an approach in either *Heller* or *McDonald* for lower courts to analyze modern Second Amendment issues and has not yet heard any case that applies the methodology described above.⁴⁴⁰

⁴³² *Id.* at 595.

⁴³³ *McDonald v. Chicago*, 561 U.S. 742, 792 (2010).

⁴³⁴ *See Heller*, 554 U.S. at 595; *McDonald*, 561 U.S. 742.

⁴³⁵ SARAH HERMAN PECK, CONGRESSIONAL RESEARCH SERVICE, POST-HELLER SECOND AMENDMENT JURISPRUDENCE 20 (2019).

⁴³⁶ *Woollard v. Gallagher*, 712 F.3d 865, 875 (4th Cir. 2013).

⁴³⁷ *See id.*

⁴³⁸ *Id.* at 875.

⁴³⁹ *See PECK*, *supra* note 435, at 12.

⁴⁴⁰ *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

i. Step 1: Does the Law Impose a Restriction on Conduct that Falls Within Second Amendment Protections?

The Second Amendment protects the right for citizens to keep guns for the purpose of self-defense.⁴⁴¹ The Supreme Court has held that this right is not unlimited and has specified that self-defense in one's own home is central to the Second Amendment and, therefore, should be analyzed under a higher level of scrutiny.⁴⁴² Courts, however, have repeatedly held that protective orders do not implicate the Second Amendment because they do not restrict the rights of law-abiding, responsible citizens to use arms in defense of their homes.⁴⁴³ Instead, courts have interpreted protective orders as temporarily restricting the rights of only those individuals who the court has judged to pose a risk of imminent physical harm to themselves or others.⁴⁴⁴

Heller provided a non-exhaustive list of instances in which the Second Amendment is not implicated, upon which courts have relied for holding that the Second Amendment is not implicated in laws that allow for protective orders.⁴⁴⁵ Specifically, the court in *Heller* says:

The Court's opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and

The Supreme Court has heard Second Amendment arguments in a new case about a New York City law regulating gun ownership but has not yet released an opinion. *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 139 S. Ct. 939 (2019). It is unclear as to whether this ruling will provide clarity on the applicability of the framework but it is worth noting the Second Circuit's ruling held that the law in question did not burden any rights covered by the Second Amendment (Step 1, below) and that in the case that it did, intermediate scrutiny would be applied (Step 2, below) and the law would pass. *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 86 F. Supp. 3d 249 (S.D.N.Y. 2015); *aff'd sub nom. N.Y. State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45 (2d Cir. 2018).

⁴⁴¹ *Heller*, 554 U.S. at 628.

⁴⁴² *Id.*

⁴⁴³ *See, e.g., Hope v. State*, 133 A.3d 519, 524 (Conn. App. Ct. 2016).

⁴⁴⁴ *See id.* at 524. *See also McDonald*, 561 U.S. at 816 (providing that a variety of state and local laws concerning the regulations of firearms have been upheld); *City of San Diego v. Boggess*, 157 Cal. Rptr. 3d 644, 654 (Ct. App. 2013) (holding a California statute allowing the state to seize firearms from persons detained for examination due to mental illness who are likely to cause danger does not violate the Second Amendment); *Redington v. State*, 992 N.E.2d 823 (Ind. Ct. App. 2013) concurring opinion (providing the Second Amendment is not unlimited and prohibitions against certain classes of persons are constitutional); *People v. Delacy*, 122 Cal. Rptr. 3d 216, 224 (Ct. App. 2011) (holding a California statute restricting persons previously convicted of specified misdemeanors from possessing firearms did not violate any rights granted by the Second Amendment and was thus immune from a means-end scrutiny test).

⁴⁴⁵ *Heller*, 554 U.S. at 627.

government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.⁴⁴⁶

Since ERPO laws are directed specifically towards keeping firearms out of the hands of parties who might do harm to themselves or others, courts can analyze them similarly to other protective order laws, maintaining that they do not infringe upon rights covered by the Second Amendment.

ii. Step 2: Means-End Scrutiny Test

While many courts have held that statutes allowing protective orders to remove guns from a home do not infringe upon Second Amendment rights, a discussion of means-end scrutiny is nonetheless relevant, as the Supreme Court has not held that the two-step approach used by lower courts is appropriate, thus leaving the scrutiny question.⁴⁴⁷ There are three levels of judicial scrutiny which may be applied to determine the constitutionality of a statute: rational basis, intermediate, or strict scrutiny.⁴⁴⁸

For a law to be upheld as constitutional under a rational basis analysis, the court only has to find that the law in question is rationally related to a legitimate government purpose.⁴⁴⁹ To be upheld as constitutional under intermediate scrutiny, a law must further a substantial government interest, and there must be a reasonable fit between the government's asserted interest and the challenged law.⁴⁵⁰ The challenged law must not place a greater restriction than is necessary to further its interest.⁴⁵¹ Finally, to withstand a constitutional challenge when applying a strict scrutiny standard, a government trying to enforce the law must show that the challenged law furthers a compelling governmental standard and is narrowly tailored to address that interest.⁴⁵²

⁴⁴⁶ *Id.*

⁴⁴⁷ *See* PECK, *supra* note 435.

⁴⁴⁸ *See id.*

⁴⁴⁹ *See, e.g.,* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 182 (1980).

⁴⁵⁰ *See* Milavetz, Gallop & Milavetz v. United States, 559 U.S. 229 (2010).

⁴⁵¹ *Id.*

⁴⁵² *See* Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).

The rational basis standard of review is the most deferential to legislative powers in creating laws, while the strict scrutiny standard is the most exacting.

The level of scrutiny applied has an overwhelming effect on the success of challenging a law. The Supreme Court in *Heller* did not come to a conclusion on the level of scrutiny to be applied in Second Amendment analysis, but their opinion has been widely read to have rejected rational basis scrutiny.⁴⁵³ This has left lower courts to decide between intermediate and strict scrutiny.⁴⁵⁴ Courts have drawn analogies to First Amendment analysis, which applies strict scrutiny to restrictions on the “core” purpose of the amendment, while applying intermediate scrutiny to laws that restrict First Amendment rights in some secondary manner.⁴⁵⁵ Lower courts have frequently understood and followed the Supreme Court’s ruling in *Heller* to indicate the “core lawful purpose” of the Second Amendment is to give the right to possess firearms to be used for self-defense.⁴⁵⁶ Due to this generally applied standard, it follows to reason that any law that restricts the right of parties to possess firearms in their home would likely be analyzed under strict scrutiny and all other statutes that restrict conduct falling under the Second Amendment are subject to intermediate scrutiny.

Protective orders have been found by the numerous circuit courts to be restricting activity that is not core to the purpose of the Second Amendment.⁴⁵⁷ These courts have gone on to uphold protective orders as constitutional, finding that: (1) the government entity has a legitimate interest

⁴⁵³ *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008) (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment . . . would have no effect.”).

⁴⁵⁴ *Id.* at 634.

⁴⁵⁵ *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013); *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010) (“Given *Heller*’s focus on “‘core’ Second Amendment conduct and the Court’s frequent references to First Amendment doctrine, we agree with those who advocate looking to the First Amendment as a guide in developing a standard of review for the Second Amendment.”).

⁴⁵⁶ *Heller*, 554 U.S. at 630.

⁴⁵⁷ *See United States v. Chapman*, 666 F.3d 220, 226 (4th Cir. 2012); *United States v. Reese*, 627 F.3d 792, 800-02 (10th Cir. 2010); *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. White*, 593 F.3d 1199, 1205-06 (11th Cir. 2010).

in limiting gun violence in their jurisdiction, (2) a reasonable fit existed between the protective order law in question and the government's objective of reducing gun violence, and (3) the protective order law does not over-restrict the rights granted to citizens by the Second Amendment.⁴⁵⁸

III. Unreasonable Search and Seizure

The Fourth Amendment protects individuals from unreasonable search and seizure.⁴⁵⁹ ERPOs are potentially susceptible to Fourth Amendment challenges, given they run up against Fourth Amendment rights, as carrying out an ERPO (where weapons are not voluntarily surrendered) generally requires that law enforcement enter the respondent's home, search for their firearms, and seize them.⁴⁶⁰ In spite of this, defendants have yet to challenge ERPO laws on Fourth Amendment grounds. Understanding Fourth Amendment-related concerns may help forecast possible challenges and provide guidance about how ERPO statutes can proactively close gaps where challenges could arise. This section first outlines the Fourth Amendment and how it relates to ERPOs and then mounts a defense of ERPOs on Fourth Amendment grounds.

a. Search and Seizure in Relation to ERPOs

The Fourth Amendment states that people have the right against unreasonable search and seizures and that warrants, which describe the place to be searched and the person or things to be seized, are not granted in the absence of probable cause.⁴⁶¹ The Amendment is designed to protect

⁴⁵⁸ See *Chapman*, 666 F.3d at 226; *Reese*, 627 F.3d at 801; *Skoien*, 614 F.3d at 641; *Marzzarella*, 614 F.3d at 97-98; *White*, 593 F.3d at 1205.

⁴⁵⁹ U.S. CONST. amend. IV.

⁴⁶⁰ *Kentucky v. King*, 563 U.S. 452, 459 (2011).

⁴⁶¹ U.S. CONST. amend. IV.

against the intrusive searches conducted by government agents, such as searches for firearms when an ERPO is issued.⁴⁶²

A search without a warrant is presumed to be unreasonable and thus deemed unconstitutional under the protections granted by the Fourth Amendment.⁴⁶³ Under the Fourth Amendment, a warrant is issued upon a showing of probable cause, which is defined as "[a] reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offence with which he is charged."⁴⁶⁴ There is an exception to the need for a warrant when exigent circumstances are found.⁴⁶⁵ If an exigency is shown to exist, no warrant is needed, as such circumstances demand immediate action, and a warrant requires processing time.⁴⁶⁶ Exigent circumstances include "[t]he need to protect or preserve life or avoid serious injury."⁴⁶⁷ Thus, where the risk of harm is urgent, law enforcement may rely on exigent circumstances to carry out an ERPO.

Often, defendants voluntarily surrender their firearms when an ERPO is filed against them.⁴⁶⁸ Voluntary surrender of firearms is preferable, as it ensures the safety of all parties and circumvents questions of constitutional compliance.⁴⁶⁹ If law enforcement officers believe that not all firearms have been surrendered, they may petition the court to issue a warrant for the search

⁴⁶² See *Walter v. United States*, 447 U.S. 649, 656-57 (1980); *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

⁴⁶³ *King*, 563 U.S. at 459.

⁴⁶⁴ *Stacey v. Emery*, 97 U.S. 642, 645 (1878).

⁴⁶⁵ *King*, 563 U.S. at 460.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

⁴⁶⁸ Cameron Dodd, *Eight County Residents Temporarily Surrender Firearms Under First Months of "Red Flag" Law*, THE FREDERICK NEWS-POST (Nov. 23, 2018), https://www.fredericknewspost.com/news/eight-county-residents-temporarily-surrender-firearms-under-first-months-of/article_9fd269e4-a70e-574f-a50f-1f3e40d8f3e5.html; Steve Miletech, *'Extreme Risk': Seattle Police Have Seized 43 Guns from People Deemed to Be a Danger Under Year-Old Law*, THE SEATTLE TIMES (May 24, 2018, 3:34pm), <https://www.seattletimes.com/seattle-news/crime/extreme-risk-seattle-police-have-seized-43-guns-from-people-deemed-to-be-a-danger-under-year-old-law/>.

⁴⁶⁹ *Law Intended to Confiscate Guns from Dangerous Individuals Goes Largely Unused*, D.C. WITNESS (Jan. 15, 2020), <http://dcwitness.org/law-intended-to-confiscate-guns-from-dangerous-individuals-goes-largely-unused/>.

and seizure of the weapons.⁴⁷⁰ As ERPO laws differ from state-to-state, the process for how warrants are issued and how a defendant's firearms are searched and seized varies. In some jurisdictions, such as Florida and Hawaii, ERPO statutes allow for a search warrant only upon a showing of probable cause that not all identified firearms or ammunition have been surrendered; statutes in other jurisdictions, such as California, do not detail the warrant obtaining process.⁴⁷¹ Many states' laws are purposefully crafted to prevent conflicts with the rights of the gun owners. As such, many states allow a search warrant to be granted at the court's discretion and reinforce their cautious approach by using the term "may" throughout the statute.⁴⁷²

Although the Fourth Amendment applies only to the Federal government, as it was incorporated into the Due Process Clause of the Fourteenth Amendment, the protections it affords extend to actions involving states.⁴⁷³ In an ERPO, this seems pertinent, as the type of danger that state law enforcement is trying to prevent by collecting firearms must be in accordance with Fourth Amendment protections against unreasonable searches and seizures.⁴⁷⁴

b. Potential Search and Seizure Challenges

The NRA, the leading gun rights advocacy group in the United States, opposes ERPO laws, arguing "the mere insinuation that gun ownership makes you a danger to yourself or others is

⁴⁷⁰ National Center on Protection Orders and Full Faith & Credit, *Jurisdictions with Extreme Risk Laws*, BATTERED WOMEN'S JUSTICE PROJECT at 8 (Dec. 23, 2019), <https://www.bwjp.org/2019-12-23-extreme-risk-matrix.pdf>.

⁴⁷¹ *Id.* at 51, 64.

⁴⁷² *Id.* at 18.

⁴⁷³ *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

⁴⁷⁴ *Id.*

offensive and insulting.”⁴⁷⁵ This section explores two arguments gun rights advocates have made against ERPOs: first, that they infringe upon an individual’s rights against unreasonable searches, especially in instances of *ex parte* orders or warrantless searches and seizures, and second, that the gathering of evidence to support ERPOs may lead to excessive state surveillance.⁴⁷⁶

Gun rights activists argue that the use of ERPO legislation—especially *ex parte* orders or warrantless search and seizures—deprive individuals of their Fourth Amendment right to be protected against “unreasonable searches and seizures.”⁴⁷⁷ This argument is undermined, though, because although warrantless searches are presumed to be inherently unreasonable, and thus unconstitutional under the Fourth Amendment, *ex parte* orders can find a legal basis in the doctrine of exigent circumstances (protecting the immediate safety of persons), which do not require that a hearing be held prior to the use of a warrantless search.⁴⁷⁸

Gun rights advocates have additionally expressed concerns that ERPO statutes will lead to state-sponsored surveillance in order to gather evidence to support ERPOs petitions.⁴⁷⁹ In most cases, ERPO petitions arise out of private parties’ concern for the respondent or another, not out of state-actor intrusion. Conversely, cases such as *Greco v. Grewal* (a case where the FBI used a respondent’s social media posts, among other things, to obtain an ERPO) could bolster such concerns.⁴⁸⁰ The case, which is discussed in further detail in the First Amendment section, is

⁴⁷⁵ NRA-ILA Staff, *Washington: VOTE NO ON 1491!*, NRA-ILA (Sept. 6, 2016), <https://www.nraila.org/articles/20160906/washington-vote-no-on-1491-ballot-initiative-will-selectively-target-gun-owners>.

⁴⁷⁶ *Extreme Risk Protection Order Use: Lack of Process Leads to Abuse*, NRA-ILA (Feb. 3, 2020), <https://www.nraila.org/articles/20200203/extreme-risk-protection-order-use-lack-of-process-leads-to-abuse>; Charles C.W. Cooke, *Why NRA Is Raising A Red Flag Over "Red Flag" Laws*, AMERICA’S 1ST FREEDOM (May 23, 2019), <https://www.americas1stfreedom.org/articles/2019/5/23/why-nra-is-raising-a-red-flag-over-red-flag-laws/>.

⁴⁷⁷ NRA-ILA, *supra* note 476.

⁴⁷⁸ *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

⁴⁷⁹ Cooke, *supra* note 476.

⁴⁸⁰ Complaint at 19-20, *Greco v. Grewal*, No. 3:19-cv-19145 (D.N.J. filed Oct. 19, 2019).

ongoing.⁴⁸¹ For the purposes of the Fourth Amendment, courts have protected individuals against unreasonable searches where those individuals hold an actual and reasonable expectation of privacy in the thing being searched.⁴⁸² As such, gun rights advocates' concerns about snooping appears legally unsupported as one does not hold an expectation of privacy for information that is provided to a third party or posted publicly, such as on social media.⁴⁸³ Individuals, however, are protected from warrantless cell phone searches, and therefore, gun rights advocates are protected from such cell phone snooping.⁴⁸⁴

IV. Due Process

The Due Process Clause of the Fourteenth Amendment forbids states from “depriv[ing] any person of life, liberty, or property without due process of law.”⁴⁸⁵ This clause is understood to afford certain procedural safeguards to people in the United States facing the court system or law enforcement.⁴⁸⁶ Courts also recognize substantive due process, which is the notion that “the government’s deprivation of a person’s life, liberty or property is justified by a sufficient purpose.”⁴⁸⁷ In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court incorporated the Second Amendment’s right to bear arms into the Fourteenth Amendment, signifying that state laws restricting gun rights can be found to violate the Fourteenth Amendment.⁴⁸⁸ The Court explains that its decision limits, but does not eliminate, states’ ability to pass laws related to gun control.⁴⁸⁹

⁴⁸¹ Law Journal Editorial Board, *Point of Imminent Danger for Gun Seizures Must Be Determined*, N.J.L.J. (Dec. 29, 2019), <https://www.law.com/njlawjournal/2019/12/29/point-of-imminent-danger-for-gun-seizures-must-be-determined/?slreturn=2020012105112>.

⁴⁸² *Katz v. United States*, 389 U.S. 347, 353–54 (1967).

⁴⁸³ *See Chaney v. Fayette Cty. Pub. Sch. Dist.*, 977 F. Supp. 2d 1308, 1315 (N.D. Ga. 2013).

⁴⁸⁴ *Riley v. California*, 573 U.S. 373, 386-87 (2014).

⁴⁸⁵ U.S. CONST. amend. XIV, § 1.

⁴⁸⁶ Erwin Chemerinsky, *Procedural Due Process Claims*, 16 *TOURO L. REV* 871, 871 (2000).

⁴⁸⁷ Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV* 1501, 1501 (1999).

⁴⁸⁸ *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The plurality incorporated the right to bear arms into the Due Process Clause of the Fourteenth Amendment, while Justice Thomas believed it would be better incorporated into the Privileges and Immunities Clause of the same.

⁴⁸⁹ *Id.* at 785.

a. Procedural Due Process

It is vital that ERPO laws comport with procedural due process if advocates and legislators want them to remain effective. Procedures have been instituted in the legal system to ensure that the Due Process Clause's mandates are met, the most basic and necessary being notice and an opportunity to be heard by an impartial decision maker who will decide the case.⁴⁹⁰ Though not binding, an influential list of procedural rights includes: the right to present evidence, the right to call witnesses, the right to know the opposing evidence, the right to cross-examine adverse witnesses, and the right to a decision based only on the evidence presented.⁴⁹¹ When a right is considered to be particularly important or fundamental, like those outlined in the Bill of Rights, the law requires more procedural safeguards before a deprivation can occur.⁴⁹²

While “an opportunity to be heard” does not necessarily need to amount to a formal hearing, it is preferable and even necessary in some situations.⁴⁹³ A pre-deprivation hearing is preferable, but post-deprivation hearings are allowed in exigent circumstances.⁴⁹⁴ The normal process for ERPOs follows these requirements with a pre-deprivation hearing, but *ex parte* orders allow for a post-deprivation hearing, typically within fourteen days, at which point the *ex parte* order expires.⁴⁹⁵ *Ex parte* orders are meant to take guns out of the hands of people who are deemed to be an immediate risk to themselves or others, thus a pre-deprivation hearing would not be practicable.⁴⁹⁶

⁴⁹⁰ Mathews v. Eldridge, 424 U.S. 319, 348-49 (1976).

⁴⁹¹ Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1281-82 (1975).

⁴⁹² See Chemerinsky, *supra* note 486, at 888-89.

⁴⁹³ See *Eldridge*, 424 U.S. at 333.

⁴⁹⁴ See *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988).

⁴⁹⁵ *Extreme Risk Protection Order Table*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, https://lawcenter.giffords.org/wp-content/uploads/2020/02/ERPO_Table_2-26-20.pdf/ (last visited January 14, 2020).

⁴⁹⁶ *Extreme Risk Laws Save Lives*, EVERYTOWN FOR GUN SAFETY (Feb. 20, 2020), <https://everytownresearch.org/extreme-risk-laws-save-lives/>.

The limited case law addressing procedural due process issues with ERPOs suggests that ERPOs do properly comport with procedural due process.⁴⁹⁷ For example, in *Davis v. Gilchrist County Sheriff's Office*, 280 So.3d 524 (Fla. Dist. Ct. App. 2019), the Gilchrist County Sheriff's Office filed a risk protection order against Deputy Davis, who told his coworkers that he wanted to kill his girlfriend's "paramour."⁴⁹⁸ The respondent appealed the order issued by the trial court judge on several due process grounds.⁴⁹⁹ The appellant argued that his expert witness should have been allowed into the courtroom before the expert was called to testify.⁵⁰⁰ The court stated that the trial judge did not abuse her discretion and that the appellant was not harmed by the decision.⁵⁰¹ Appellant also argued that his procedural due process was infringed by limiting his time.⁵⁰² During the trial, the appellant's attorney skipped a witness due to time constraints, apparently believing that the court would grant additional time at a later date.⁵⁰³ The appellate court found "no abuse of discretion or denial of due process," because the appellant's attorney did not request a continuance, as he should have explicitly done if needed.⁵⁰⁴ The outcome in this case indicates that ERPOs are designed to properly grant procedural due process.

Courts may account for the public interest in deciding the constitutionality of ERPO laws.⁵⁰⁵ In a domestic violence case, the court explained that the deprivation at stake for the defendant, who was challenging the constitutionality of the domestic violence law, was not merely a private interest of the petitioner's rights alone.⁵⁰⁶ The court noted that the public has an important

⁴⁹⁷ See, e.g., *Davis v. Gilchrist Cty. Sheriff's Off.*, 280 So.3d 524, 533 (Fla. Dist. Ct. App. 2019).

⁴⁹⁸ *Id.* at 529.

⁴⁹⁹ *Id.* at 530-31.

⁵⁰⁰ *Id.* at 530.

⁵⁰¹ *Id.*

⁵⁰² *Id.* at 531.

⁵⁰³ *Id.*

⁵⁰⁴ *Id.*

⁵⁰⁵ Because domestic violence protection orders tend to be similar to ERPOs, and ERPO case law is sparse, case law concerning domestic violence protection orders can illustrate how courts may respond to procedural due process challenges to ERPOs in the future.

⁵⁰⁶ *State v. Karas*, 32 P.3d 1016, 1020 (Wash. Ct. App. 2001).

interest in preventing domestic violence, which must be weighed.⁵⁰⁷ A similar argument can be made in favor of ERPO laws, which are meant to prevent suicide among other forms of gun violence.⁵⁰⁸

b. Substantive Due Process

Challenges to ERPO laws based on substantive due process may be a concern for advocates of the laws. Due to the fact that ERPO laws have not existed for very long, it is unclear how the Supreme Court will view them if a constitutional challenge occurs. Substantive due process intends to ensure that the government does not infringe on people's right to life, liberty, or property without a good reason.⁵⁰⁹ Substantive due process claims for fundamental rights, like the right to private gun ownership, typically require the government to meet a standard of strict scrutiny to prove that the law is justified by a compelling governmental interest.⁵¹⁰ The appellant in *Davis*, mentioned above, asserted that the statute is written to potentially punish innocent activities such as exhibiting signs of severe mental illness, abusing alcohol, and purchasing firearms or ammunition soon before the ERPO is filed.⁵¹¹ The court determined that because these factors are not alone determinative, due process is not violated by their inclusion in the statute.⁵¹² The court also put forth many of the procedural safeguards, such as requiring a hearing within fourteen days of filing and the heightened "clear and convincing" standard of proof, as evidence that the statute does not violate substantive due process.⁵¹³

⁵⁰⁷ *Id.* at 1020-21.

⁵⁰⁸ *Extreme Risk Protection Orders*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/> (last visited Feb 2, 2020).

⁵⁰⁹ Chemerinsky, *supra* note 487, at 1508-09.

⁵¹⁰ *Id.* at 1510.

⁵¹¹ *Davis*, 280 So.3d at 533.

⁵¹² *Id.*

⁵¹³ *Id.*

c. Void for Vagueness

Advocates and legislators who want to fortify ERPO laws against invalidation should be mindful of the “vagueness doctrine.” The vagueness doctrine invalidates laws that do not “give a person of ordinary intelligence fair notice of what is prohibited,” or that allow arbitrary enforcement because of its lack of standards.⁵¹⁴ Invalidation only occurs when a successful challenge is facial, meaning that the statute itself is unconstitutionally vague.⁵¹⁵

Because the Supreme Court determined that gun ownership is a fundamental right,⁵¹⁶ a more stringent vagueness test may be employed in reviewing ERPO statutes.⁵¹⁷ On the other hand, statutes that serve an important public policy may be reviewed more leniently, passing the vagueness analysis if there is “any reasonable application” of the statute.⁵¹⁸ Statutes that impose civil penalties also tend to be subject to a more relaxed vagueness test compared to statutes imposing criminal penalties.⁵¹⁹

Case law challenging ERPO statutes for vagueness is limited but may be illustrative of how courts may continue to apply the vagueness test to ERPO statutes. The respondent in an Indiana case challenged the state’s law as applied to him, arguing that the “dangerous” person standard may deprive someone of their constitutional right to bear arms based on mere speculation.⁵²⁰ The respondent also compared the ERPO statute to a “neglect of a dependent” statute that had previously been voided for vagueness.⁵²¹ The Court rejected this argument, stating that the

⁵¹⁴ Emily M. Snoddon, Comment, *Clarifying Vagueness: Rethinking the Supreme Court’s Vagueness Doctrine*, 86 U. CHI. L. REV. 2301, 2302 (2019).

⁵¹⁵ *Id.* at 2304-05.

⁵¹⁶ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁵¹⁷ NORMAN SINGER & SHAMBIE SINGER, 1A SUTHERLAND STATUTORY CONSTRUCTION § 21:16 DEFINITENESS, at 4 (7th ed. 2019).

⁵¹⁸ *Id.* at 3.

⁵¹⁹ *Id.* at 4.

⁵²⁰ *Redington v. State*, 992 NE.2d 823, 838 (Ind. Ct. App. 2013).

⁵²¹ *Id.* at 838-39.

legislature in this case had been sufficiently specific, providing more guidance to law enforcement and the courts than the aforementioned “neglect of a dependent” statute.⁵²² The Court thus determined that the statute was not void for vagueness as applied.⁵²³

Davis, mentioned above, also challenged the statute’s facial constitutionality based on the void for vagueness doctrine because it allowed the court and law enforcement too much discretion in interpreting terms like “mental illness” and “significant danger” found in the statute.⁵²⁴ The court found this argument unpersuasive and stated that the ERPO statute’s language is not “inherently vague,” comparing it to terms used in Florida’s domestic violence statute.⁵²⁵

V. Freedom of Speech

Although typically argued from a procedural standpoint in which constitutional violations arise, challenges to ERPOs have emerged in which a freedom of expression argument was made in order to question the evidence submitted supporting the ERPO petition.⁵²⁶ In *Greco v. Grewal*, No. 3:19-cv-19145 (D. N.J. filed Oct. 19, 2019), the plaintiffs challenged the state’s Extreme Risk Protective Order Act of 2018 on First Amendment and other grounds.⁵²⁷ The case, which was brought as a class action, is still making its way through the courts.⁵²⁸ The plaintiff had an ERPO filed against him based upon FBI monitoring, which demonstrated that he posted extensively online promoting violence against Jewish people, had been in contact with a recent mass shooter,

⁵²² *Id.* at 839.

⁵²³ *Id.*

⁵²⁴ *Davis*, 280 So.3d at 532.

⁵²⁵ *Id.*

⁵²⁶ *Greco v. Grewal*, No. 3:19-cv-19145 (D.N.J. filed Oct. 19, 2019).

⁵²⁷ *Id.*; Complaint at 25, *Greco v. Grewal*, No. 3:19-cv-19145 (D.N.J. filed Oct. 19, 2019).

⁵²⁸ *Greco v. Grewal*, No. 3:19-cv-19145 (D.N.J. filed Oct. 19, 2019).

and had a prior conviction for unlawful possession of a weapon.⁵²⁹ The Act states that, when deciding whether to issue a Temporary Extreme Risk Protective Order (TERPO), the court may consider “any history of threats or acts of violence by the respondent directed toward self or others.”⁵³⁰

The plaintiff argues that the ERPO violates his First Amendment right to political expression.⁵³¹ *Brandenburg v. Ohio*, 395 U.S. 444 (1969), determined the constitutional protections the First Amendment provides in cases of advocacy for the use of violence.⁵³² In *Brandenburg*, the appellant, a member of the Ku Klux Klan, challenged the constitutionality of an Ohio statute that criminalized advocating the use of violence.⁵³³ The Court found the statute unconstitutional, holding that free speech and free press protections prohibit a state from forbidding advocacy of the use of force “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁵³⁴ As such, the New Jersey District Court, in assessing the First Amendment challenge in *Greco*, will likely ask if *Greco*’s advocacy intended to or likely would “[incite] or [produce] imminent lawless action.”⁵³⁵ In the New Jersey Law Review, the Law Journal Editorial Board writes, about *Greco*, “we do not believe that *Brandenburg* allows the prediction to be made simply based on the expression of opinion that illegal political violence against Jews, unbelievers, homosexuals or any other hated group ought to be committed.”⁵³⁶ The state will likely argue that the judge had “good cause” to believe that the plaintiff intended to, or was likely to, “[incite] or [produce] imminent lawless

⁵²⁹ Complaint at 19-20, *Greco v. Grewal*, No. 3:19-cv-19145 (D.N.J. filed Oct. 19, 2019).

⁵³⁰ N.J. STAT. ANN. § 2C:58-23 (West 2019).

⁵³¹ Complaint at 25, *Greco v. Grewal*, No. 3:19-cv-19145 (D.N.J. filed Oct. 19, 2019).

⁵³² *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁵³³ *Id.* at 444-45.

⁵³⁴ *Id.* at 447.

⁵³⁵ *Id.*

⁵³⁶ Law Journal Editorial Board, *supra* note 481.

action” based on the materials provided that demonstrate a “history of threats or acts of violence.”⁵³⁷

In determining the consequences New Jersey’s ERPO statute has on the plaintiffs’ First Amendment rights, the District Court will likely consider the standard the petitioner must meet in order for a judge to issue a TERPO or an ERPO. The standard for a judge to issue an ERPO in New Jersey is probable cause.⁵³⁸ A judge, however, may issue a TERPO based on a finding of “good cause.”⁵³⁹ Notably, a search warrant cannot be issued where the judge finds only good, but not probable, cause.⁵⁴⁰ It is possible that raising the standard needed to provide a TERPO would allay concerns about potentially breaching First Amendment rights.

The forthcoming *Greco* decision will provide insight into how courts understand the interaction between ERPO laws and respondents’ First Amendment protections. In *Greco*, the judge relied heavily on the plaintiff’s online promotion of violence against Jewish people—“history of threats or acts of violence by the respondent directed toward self or others”⁵⁴¹—as well as his prior conviction for unlawful possession of a weapon.⁵⁴² Most state ERPO laws specifically include threatened violence as evidence the judge should consider.⁵⁴³ State laws qualify the evidence of threats differently, with some requiring that the threats of violence be credible,⁵⁴⁴ fall

⁵³⁷ N.J. STAT. ANN. § 2C:58-23 (West 2019); *Brandenburg*, 395 U.S. at 447.

⁵³⁸ N.J. DEP’T OF LAW AND PUB. SAFETY, OFFICE OF THE ATTORNEY GENERAL, LAW ENFORCEMENT DIRECTIVE NO. 2019-2, DIRECTIVE PURSUANT TO THE EXTREME RISK PROTECTION ORDER ACT OF 2018 at 2 (2019).

⁵³⁹ *Id.*

⁵⁴⁰ *Id.*

⁵⁴¹ N.J. STAT. ANN. § 2C:58-23 (West 2019).

⁵⁴² Complaint at 19-20, *Greco v. Grewal*, No. 3:19-cv-19145 (D. N.J. filed Oct. 19, 2019).

⁵⁴³ COLO. REV. STAT. § 13-14.5-105 (2019); CONN. GEN. STAT. § 29-38c (2013); D.C. CODE § 7-2510.03 (2019); FLA. STAT. § 790.401 (2018); 30 ILL. COMP. STAT. 67/40 (2019); MD. CODE ANN., PUB. SAFETY § 5-605 (West 2019); NEV. REV. STAT. § 33.580 (2020); N.J. STAT. ANN. § 2C:58-24 (West 2019); N.Y. CIVIL PRACTICE LAW § 6342 (McKinney 2019); OR. REV. STAT. § 166.527 (2018); 8 R.I. GEN LAWS 8-8.3-4 (2018); VT. STAT. ANN. tit. 13, § 4054 (West 2018); WASH. REV. CODE § 7.94.040 (2019).

⁵⁴⁴ *See, e.g.* COLO. REV. STAT. 13-14.5-105(3)(a) (2019).

within a certain time period,⁵⁴⁵ or establish a history or pattern.⁵⁴⁶ The standard of proof required fluctuates among states as well.⁵⁴⁷

The *Greco* decision may affect the viability of relying on simply threats as a basis for granting an ERPO where those threats do not pass the *Brandenburg* test. If the court in *Greco* finds that the defendant’s online promotion of violence is protected by the First Amendment, the judge may then further decide that either the plaintiff’s promotion of violence does not constitute a threat within the meaning of the New Jersey statute or is a threat, but that relying on threats to grant an ERPO is unconstitutional. States writing or revisiting their ERPO laws should give significance to the level of credence threats are given in a judge’s decision to grant an ERPO. Limiting what threats shall be considered, requiring that they be recent, credible or establish a pattern, or establishing a higher standard of proof may provide the constitutional safeguards necessary. Such changes, however, will limit judge’s ability to grant ERPOs as, in certain instances, they may only have evidence of online threats on which to rely. The court’s decision in *Greco* must be closely watched, as it will likely provide the parameters states can rely on to ensure that their ERPO laws are constitutional and effective.

VI. Full Faith and Credit

The Full Faith and Credit Clause of the U.S. Constitution requires that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”⁵⁴⁸ Full faith and credit would require that a state or tribal ERPO be valid in any other state or tribe and be enforced by the court and law enforcement personnel of the other jurisdiction

⁵⁴⁵ See, e.g. 8 R.I. GEN LAWS § 8-8.3-5(b)(2) (2018).

⁵⁴⁶ See, e.g. D.C. CODE §7-2510.03(e)(1) (2019).

⁵⁴⁷ GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 508.

⁵⁴⁸ U.S. CONST. art. IV, § 1.

as if it were the law of that jurisdiction.⁵⁴⁹ Even if another state does not itself have an ERPO statute, it is nonetheless required to respect an ERPO from the originating state. This would prevent a scenario in which a respondent, who in one state is prohibited from owning, purchasing, possessing or receiving a firearm, simply travels to another state and obtains a firearm where the ERPO against them may not be valid.

There are exceptions to the application of the Full Faith and Credit Clause. Where according full faith and credit to “acts” and “records” of another state would violate a state’s “legitimate public policy,” the state is not required to apply full faith and credit to those acts or records.⁵⁵⁰ This exception does not affect the full faith and credit given to ERPOs, however, as ERPOs involve court judgement and thus are considered “judicial proceedings,” for which no public policy exception exists.⁵⁵¹

Considering that there have been no court challenges to how states enforce ERPOs, it is difficult to discern whether states are, in practice, according full faith and credit to the orders. Where states do not accord full faith and credit, those subject to an ERPO could simply travel to a neighboring state to purchase a gun. Notably, practical impediments may make this scenario possible regardless of whether full faith and credit is followed. In order for gun dealers in a state to comply with another state’s ERPO, the gun dealers must be aware the ERPO exists to begin with. This information is generally available through the National Instant Criminal Background Check System (NICS), which tracks state-level convictions and mental health adjudications, among other data.⁵⁵² Licensed dealers consult NICS as part of the background checks they are

⁵⁴⁹ *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943).

⁵⁵⁰ *Nevada v. Hall*, 440 U.S. 410, 422 (1979) (citing *Pac. Emp’r’s Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493 (1939)).

⁵⁵¹ *Thomas ex rel Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998).

⁵⁵² *NICS & Reporting Procedures*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/nics-reporting-procedures/> (last visited January 14, 2020).

required to perform.⁵⁵³ Unlicensed dealers are not required to check NICS.⁵⁵⁴ Only six of the eighteen jurisdictions enter information into NICS, while three states require transmitting or entering the ERPO information into the FBI or the National Crime Information Center (NCIC).⁵⁵⁵ Generally, states are not required to submit their records to the NICS database.⁵⁵⁶ This creates a potentially large loophole in enforcement of ERPOs, considering respondents may be able to easily travel to a neighboring state to purchase a firearm where their ERPO is not entered into NICS.

⁵⁵³ *Id.*

⁵⁵⁴ *Id.*

⁵⁵⁵ CAL. PENAL CODE § 18115 (West 2019); COLO. REV. STAT. § 13-14.5-110 (2019); D.C. CODE § 7-2510.10 (2019); FLA. STAT. § 790.401 (2018); HAW. REV. STAT. § 134-69 (2020); 430 ILL. COMP. STAT. 67/55 (2019); NEV. REV. STAT. § 33.650 (2020); N.J. STAT. ANN. § 2C:58-30 (West 2019); N.Y. CIVIL PRACTICE LAW § 6346 (McKinney 2019); OR. REV. STAT. § 166.527 (2018); 8 R.I. GEN LAWS 8-8.3-9 (2018); WASH. REV. CODE § 7.94.110 (2019).

⁵⁵⁶ GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 552.

BEST PRACTICES

The following best practices have been compiled and synthesized from the research above. These practices are recommendations for implementation strategies as well as ideas about how statutory requirements could promote ERPO effectiveness.

I. Reporting

a. Reporting to Background Check Databases

In order to make ERPOs effective within and across states, ERPO statutes should mandate the reporting of an ERPO into the National Instant Criminal Background Check System (NICS). This would ensure the order is followed, prohibiting the respondent from purchasing other weapons for the duration of the order, and allowing for a historical record of the order in NICS.⁵⁵⁷ Additionally, ERPOs should be recorded in the National Crime Information Center (NCIC) database, as well as any other relevant state-level databases. Furthermore, ERPO statutes should be entered into the appropriate databases within twenty-four hours of issuance. This would ensure the centralized formation of a database from which various jurisdictions would be able to remain informed of the status of their ERPO laws being used by their own people.

There is discussion as to whether the firearms seized should be analyzed and have their ballistics information entered into the National Integrated Ballistic Information Network (NIBIN). NIBIN is the national network that collects and compares ballistic evidence to aid in solving and

⁵⁵⁷ Telephone Interview with Judge Anne Levinson (ret.), Seattle Mun. Court (Jan. 18, 2020).

preventing violent crimes involving firearms.⁵⁵⁸ We do not recommend requiring that firearms surrendered as a result of an ERPO be entered into NIBIN. One of the defining attributes of ERPO laws is that the order initiates a noncriminal, civil process. Investigating the temporarily surrendered firearms of people not suspected of a crime criminalizes respondents in a way that could deter use of the law and increase stigmatization of people struggling with their mental health.

b. Mandated Reporting of “Lie and Try” Attempts

Mandated reporting of “lie and try” attempts to purchase a firearm has been raised in the context of gun control legislation generally.⁵⁵⁹ Extending the proposal to ERPOs could provide an important safeguard to ensure that respondents do not illegally gain access to firearms. A “lie and try” occurs when a person with an ERPO against them lies about their eligibility when purchasing a firearm from a licensed seller. Where a background check reveals them to be prohibited from purchasing a firearm, mandated reporting would require the seller to report the attempted purchase to law enforcement. A “lie and try” attempt should trigger an investigation or, at minimum, a welfare check of the respondent to ensure that they are complying with the ERPO.

c. Data Collection and Review

Detailed and specific data is needed in order to evaluate how ERPO laws are actually being used and to measure their effectiveness. Specifically, as firearms prosecutor Kimberly Wyatt has suggested, two types of data are needed: evaluation-related data and operational/implementation-

⁵⁵⁸ *National Integrated Ballistic Information Network (NIBIN)*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/firearms/national-integrated-ballistic-information-network-nibin> (last visited Feb. 5, 2020).

⁵⁵⁹ NICS Denial Notification Act of 2019, S. 875, 116th Cong. (2019); *See also Red Flag Laws: Examining Guidelines for State Action: Hearing Before the S. Judiciary Comm.*, 116th Cong. 1 (2019) (statement of Ron Honberg, National Alliance on Mental Illness).

related data.⁵⁶⁰ Evaluation-related data involves academic access to the actual ERPO cases, including the contextual information of the cases, such as the reason for the ERPO (for example, the threat of suicide).⁵⁶¹ Operational/Implementation-related data concerns more of the analytical aspects of the day-to-day implementation of ERPOs.⁵⁶² Operational/Implementation-related data would include overall numbers of orders filed, the nature of the risk, the names of those who have petitioned, demographic information of respondents, and the total count of ERPOs issued *ex parte*.⁵⁶³ Additionally, demographic data should be collected at all levels and include data such as the respondent's race, gender, age, and ethnicity. This will aid in monitoring the social impact and use of ERPOs to determine if they are being used disproportionately against any communities, as well as to determine if ERPOs are potentially being underutilized by any community. The government is in the best position to collect and make that data available to researchers and the public, and such data collection and reporting should be mandated by statute.

d. Immediate Recording of ERPOs by Courts and Law Enforcement

ERPOs are emergency orders where immediacy of the threat is a primary concern. Judicial processes should be efficient and, whenever possible, immediate to best address the threat posed by a respondent's access to firearms. Electronic filing, 24/7 availability of court orders, and allowing police officers to appear telephonically for *ex parte* hearings are all ways to promote such immediacy.⁵⁶⁴ Upon issuing an ERPO, the court should electronically enter the order into the appropriate databases so that law enforcement has it on file immediately. Unfortunately, many

⁵⁶⁰ *Red Flag Laws*, *supra* note 559, at 4-5 (statement of Kimberly Wyatt, Senior Deputy Prosecuting Attorney, King County Prosecuting Attorney's Office).

⁵⁶¹ *Id.*

⁵⁶² *Id.* at 4.

⁵⁶³ *Id.*

⁵⁶⁴ Telephone Interview with Judge Anne Levinson (ret.), Seattle Mun. Court (Jan. 18, 2020).

courts across the country lack the resources to digitize their records keeping processes and urgent court orders like ERPOs must be transferred, stored, and entered into databases manually, which slows down the process.⁵⁶⁵ Ideally, an ERPO law would include grant funding for technical updates to improve the system. Similarly to how most domestic violence protection orders are issued, a judge should be available 24/7 to review and issue *ex parte* orders.⁵⁶⁶ Additionally, rather than require that officers appear before the judge in person, officers should be allowed to appear via telephone for the *ex parte* hearing.⁵⁶⁷ Officers would still be required to submit affidavits and appear in person at final order hearings, but the priority must be for *ex parte* orders to be expeditiously exercised and for allowing officers to call in orders to reduce the delay between police contact and the surrender of firearms by the respondent.

II. Legal Considerations

a. Statutory Renewal Process

Every state should have an explicitly outlined renewal process for ERPOs in their statute. As discussed in the Logistical Implementation section, there are currently three ERPO jurisdictions that do not have a statutorily defined process for renewing an ERPO.⁵⁶⁸ The ability to renew an ERPO is essential in ensuring that the law is flexible and effective. Petitioners and law enforcement should be able to act when a respondent continues to exhibit concerning behavior despite the fact that an ERPO may be nearing expiration. The renewal process is nearly identical to the final order

⁵⁶⁵ *Id.*

⁵⁶⁶ *Id.*

⁵⁶⁷ FLA. STAT. § 790.401 (2018). For example, Florida allows a hearing by telephone to reasonably accommodate a disability or exceptional circumstances. The court must receive assurances of the petitioner's identity before conducting a telephonic hearing.

⁵⁶⁸ See CONN. GEN. STAT. § 29-38c (2013); IND. CODE § 35-47-14-10 (2019); N.J. STAT. ANN. 2C:58-25 (West 2018).

hearing process, so respondent's due process rights are equally protected as respondents are once again given notice of the ERPO and an opportunity to be heard on the matter. Taking this additional step of informing respondents of the renewal process would both reduce litigation frequency in the future and also promote institutional transparency and thorough consideration of the respondent's rights throughout an inherently strenuous process.

b. Evidentiary Standard

The evidentiary standard for ERPOs should require petitioners to show, through a preponderance of the evidence, that a gun owner is a potential threat to themselves or others. Preponderance of the evidence is a low enough standard to permit petitioners to file expediently while balancing the due process concerns of the gun owner.

Furthermore, ERPO laws should require the same standard—preponderance of the evidence—to have a protective order overturned by a respondent. Once the court finds a respondent should have firearms removed from their homes, the respondent can petition that circumstances have changed enough for their firearms to be returned. The movant, the gun owner, should face a high enough burden to convince the court that firearms should, in fact, be returned to them. Where no explicit burden is laid out in the statute, a court may apply a lower threshold, which runs the risk of returning firearms to a household prematurely.⁵⁶⁹

The evidence required to show that a respondent is a danger to themselves or others should also be explicitly detailed within the language of the statute. Hawaii's ERPO bill, for example, explains that a respondent's proclivity for violent threats or actions, or history of substance abuse issues, may be introduced as evidence showing the respondent's potential danger.⁵⁷⁰

⁵⁶⁹ See generally *Redington v. State*, 992 N.E.2d 823 (Ind. Ct. App. 2013).

⁵⁷⁰ HAW. REV. STAT. § 134-64(d) (2020).

c. Remedies for Procedural Failings

ERPO laws should contain explicit and robust procedural considerations that hold law enforcement accountable for any procedural failings and quell any potential challenges from a respondent. If law enforcement fails to notify respondents of their rights and the ERPO statute does not provide explicitly for procedural failings, an ERPO order may not be upheld in court. Because existing ERPO statutes fail to address the ramifications for law enforcement erroneously carrying out the orders, courts are able to use their own discretion in remedying mistakes. Such shortcomings leave respondents with very little (if any) guidance regarding what remedies are available where their ERPO's procedure is carried out inappropriately.

Although existing ERPO statutes do note the steps an ERPO must follow in order to be successfully carried out, taking the additional legislative step of outlining the remedies a respondent may seek for procedural failures would provide additional clarity and guidance when procedures are not followed. Consistency concerning remedies for procedural failures would hold law enforcement accountable. Furthermore, it would enable respondents to understand the service process as a whole and prevent a needless variability in judicial rulings where law enforcement makes errors in the ERPO process.

d. Second Amendment Awareness

The Supreme Court's interpretation of the Second Amendment in *Heller* and *McDonald* allows statutes to remove guns from individuals who are felons or suffer from mental illness without implicating a Second Amendment analysis.⁵⁷¹ ERPO laws enacted across the country withstand Second Amendment challenges because they do not reach beyond those bounds. Where laws do implicate the Second Amendment, they will often be analyzed under intermediate scrutiny

⁵⁷¹ See *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

which requires: (1) an important government interest be shown and (2) the statute at issue (the ERPO statute) is substantially related to the government interest. ERPO laws drafted in the future should respect these boundaries as a more expansive statute that allows for the confiscation of firearms for reasons which directly implicate the Second Amendment may be challenged on Second Amendment grounds. Where ERPOs are used to confiscate guns for reasons other than mental illness or prior felonies—which have been held to not implicate the Second Amendment—the state will need to show the ERPO law serves an important government interest and confiscating guns from an individual is substantially related to that interest.

III. Awareness and Training

a. Community Awareness Campaigns

Public awareness is a critical component in the success of any campaign or new law. In order for ERPOs to be effective in combatting gun violence, the public needs to know that they exist, as well as to know what they are, when to use them, and how to use them. According to the Brady Campaign, dedicating funding for public education and outreach efforts to increase the awareness of ERPOs will improve the effectiveness of the extreme risk laws.⁵⁷² Effective plans would strategically target health professionals, law enforcement and government employees, civilians, and other community stakeholders.⁵⁷³ Promoting public awareness and outreach efforts throughout the state and federal government, community groups, and public health forums could result in higher utilization and more effective ERPO outcomes.

⁵⁷² *What are Extreme Risk Laws?*, BRADY UNITED AGAINST GUN VIOLENCE, <https://www.bradyunited.org/factsheets/what-are-extreme-risk-laws> (last visited Jan. 20, 2020).

⁵⁷³ Shannon Frattaroli & Josh Horwitz, *Five Ways the Federal Government Can Support State ERPO Laws*, HILL (Aug. 23, 2019), <https://thehill.com/opinion/civil-rights/458522-congress-can-prevent-gun-violence-with-protection-laws-and-federal>.

States such as New York and California have funded outreach efforts for their ERPO laws.⁵⁷⁴ In California, many people were unaware of the law when it was added to the list of already thorough gun control laws of the state.⁵⁷⁵ Only approximately ten ERPO petitions were filed each month throughout 2016 and most of 2017.⁵⁷⁶ By the end of 2017, however, after the state increased outreach efforts and publicity surrounding the new law, the number of petitions grew to about forty per month.⁵⁷⁷

Furthermore, the public overwhelmingly supports ERPO laws. An American Public Media Research Lab report found that 77% of Americans support family-initiated ERPOs and more than 40% “strongly support” ERPO laws.⁵⁷⁸ There is broad political support for enacting laws that give family or law enforcement the means to remove guns from someone who poses a threat; 94% of Democrats support the measure, as well as 77% of Republicans, 78% of gun owners, and 91% of suburban women.⁵⁷⁹

Given the ample support for the law, the lack of public awareness may cause the underutilization of ERPOs. When asked if the ERPO law has been effective, judges have suggested that the law’s benefit has been hindered “mainly because key legal actors in the process (e.g.,

⁵⁷⁴ Chad Arnold, *New York’s Red Flag Gun Law: Here’s How to File a Complaint*, DEMOCRAT & CHRONICLE (Sept. 19, 2019, 12:26 PM), <https://www.democratandchronicle.com/story/news/politics/albany/2019/09/19/new-yorks-red-flag-gun-law-heres-how-file-complaint/2372994001/>; Peter Jamison & Peter Hermann, *Some U.S. Lawmakers Want a ‘Red Flag’ Law. But States Have Had Mixed Results.*, WASH. POST (Aug. 8, 2019, 7:47 PM), https://www.washingtonpost.com/local/public-safety/some-us-lawmakers-want-a-red-flag-law-but-states-have-had-mixed-results/2019/08/08/acdc6914-b3be-11e9-8f6c-7828e68cb15f_story.html.

⁵⁷⁵ Jamison & Hermann, *supra* note 574.

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.*

⁵⁷⁸ WHAT DO AMERICAN’S THINK OF “RED FLAG” OR ERPO LAWS?, AMERICAN PUBLIC MEDIA RESEARCH LAB 1, 4 (2019), <https://www.americanpublicmedia.org/wp-content/uploads/2019/08/apm-survey-aug-2019-gun-ERPO-final.pdf>.

⁵⁷⁹ *Voters Call for Background Checks, Strong Red Flag Bill*, EVERYTOWN FOR GUN SAFETY (Sept. 6, 2019), <https://everytown.org/documents/2019/09/global-strategy-group-and-everytown-for-gun-safety.pdf/>.

police, prosecutors, public defenders, and judges) have little awareness of the law.”⁵⁸⁰ In order for ERPOs to effectively combat gun violence, the public needs to be aware of their existence.

b. Law Enforcement Training

Given that law enforcement plays such a prominent role in issuing and enforcing ERPO laws, it is imperative that officers know about the mechanics of putting the laws into practice. In most states, police academies train incoming officers while a state agency is responsible for implementing in-service training of current officers. Consider the Municipal Police Training Committee (MPTC) in Massachusetts, which is responsible for the development, delivery, and enforcement of police training throughout the Commonwealth.⁵⁸¹ The Massachusetts law requires forty hours annually of in-service police training.⁵⁸² An ERPO statute could require that a certain number of hours be dedicated to ERPO training, with curriculum to be designed by a state agency such as the MPTC. Alternatively, curricula could also be developed by an outside research or advocacy group, then implemented by a state agency.⁵⁸³

Trainings could also be coordinated and facilitated by organizations outside of law enforcement and prosecutors’ offices. The Alliance for Gun Responsibility, a Washington-based non-profit, has sponsored and organized summits with an emphasis on ERPOs, inviting law enforcement, court personnel, and advocates for peer-to-peer education on firearms laws.⁵⁸⁴ The summit seminars are led primarily by law enforcement and prosecutors who are advocates of and

⁵⁸⁰ Jeffrey W. Swanson et al., *Criminal Justice and Suicide Outcomes with Indiana’s Risk-Based Gun Seizure Law*, 47 J. AM. ACAD. PSYCHIATRY & L. 1, 4 (2019).

⁵⁸¹ Press Release, Office of the State Auditor, *Auditor Bump Calls for Expanded Resources and Accountability for Municipal Police Training in the Commonwealth* (Nov. 18, 2019), <https://www.mass.gov/news/auditor-bump-calls-for-expanded-resources-and-accountability-for-municipal-police-training-in>.

⁵⁸² *Id.*

⁵⁸³ Telephone Interview with Renee Hopkins, CEO, Alliance for Gun Responsibility (Feb. 5, 2020).

⁵⁸⁴ *Id.*

experts on ERPOs for an audience of their peers.⁵⁸⁵ The peer-to-peer element promotes the credibility of ERPOs in the eyes of those charged with implementing them and provides an opportunity to enhance ERPO effectiveness through education and awareness.⁵⁸⁶ Such summits allow advocacy organizations to use their expertise in the subject and provide an alternative funding stream for education efforts.

Law enforcement should highlight training on crisis de-escalation and intervention, particularly with ERPO petition delivery and gun removal. Training in this area should also seek to address community distrust of law enforcement, which might discourage marginalized communities from using ERPOs. The Crisis Intervention Team model has been nationally recognized and is known for its training on connecting people struggling with their mental health to services and support.⁵⁸⁷

With any statutory stipulation of protocol for law enforcement, availability of resources must be a foremost concern. Inability to comply with protocol requirements due to a lack of resources may lead law enforcement officers to forgo using ERPOs at all, rather than face reprimand or censure from courts for improperly utilizing the law. Connecticut provides a model example of such a scenario. In a 2017 study on the effectiveness of Connecticut's ERPO law, researcher Jeffrey W. Swanson found that low utilization of the law in the years after it first passed was partially due to a "mismatch between available police staffing resources in most departments and the statutory requirement that two officers appear as co-affiants before a judge to obtain the risk warrant."⁵⁸⁸ Due to other public safety obligations, police departments with limited numbers

⁵⁸⁵ *Id.*

⁵⁸⁶ *Id.*

⁵⁸⁷ *Red Flag Laws*, *supra* note 559, at 6 (statement of Ron Honberg, National Alliance on Mental Illness).

⁵⁸⁸ Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does it Prevent Suicides*, 80 L. & CONTEMP. PROBS. 179, 196 (2017).

of officers could not, in some situations, produce the two officers needed as co-affiants, and might not pursue an ERPO when one could be appropriate.⁵⁸⁹ Without proper funding provided by either the state or the federal governments, any stipulations relating to law enforcement personnel response may be ineffective or could even hinder the effectiveness of an ERPO law.

c. Healthcare Professional Training

Regardless of whether or not healthcare professionals can directly file petitions, they can still act as an important resource for patients, family members, and communities at large by providing counseling on gun safety, raising awareness of the ERPO option, and educating others on how to identify risk factors.⁵⁹⁰ This, however, depends on the health professionals' proficiency in identifying and understanding the risk factors themselves, and in educating the public on these matters as well. A lack of proficiency is most often connected to a lack of training.⁵⁹¹ Given the integral role that medical practitioners can play in evaluating the mental health conditions of potential ERPO respondents, these professionals should know enough about ERPOs to advise patients or their family members about the law where it could be useful. The Massachusetts Medical Society provides just one example of a comprehensive online course on clinically relevant firearm violence prevention.⁵⁹²

d. Judicial Personnel Education

Education is the key to effective implementation of ERPOs in the courts. Court clerks may be the first person a petitioner interacts with in the ERPO process and it is imperative that they understand the law and can provide petitioners with detailed and correct information about it.

⁵⁸⁹ *Id.*

⁵⁹⁰ Suhas Gondi et al., *Extreme Risk Protection Orders: An Opportunity to Improve Gun Violence Prevention Training*, 94 ACAD. MED. 1649, 1649 (2019).

⁵⁹¹ *Id.*

⁵⁹² *Id.* at 1652.

Training for court personnel and judges varies greatly across counties and, due to the differences in the laws, it is difficult to design a single comprehensive protocol for all courts in jurisdictions with ERPOs to follow. One promising model exists in California, where San Diego City Attorney Mara Elliott has essentially become a specialist and champion of the ERPO law. She receives funding from the state to work full time to train law enforcement, judicial officials, and certain health officials across the state on implementing the state's ERPO law.⁵⁹³ As discussed below, the most effective education on the law is multidisciplinary in nature because it requires that all stakeholders in the ERPO process collaborate on implementation.

IV. Statutory and Discursive Language

a. Specificity in Statutory Language

The language of an ERPO law should specifically outline the risks that support filing an ERPO, the procedure around the ERPO, and any remedial procedures necessary. Any vague language may lead to challenges by a respondent and may invalidate what would otherwise be a legitimate seizure of firearms. Such specificity may include: a more thorough outline of potential risk factors to which petitioners may look when considering filing an ERPO; procedural guidelines for petitioners and respondents to follow; rules to be followed at hearings; timelines concerning ERPO service, hearings, and termination; and additional resources to aid parties in receiving support by counsel or third parties throughout the process.

⁵⁹³ Pauline Repard, *Gun Restraining Orders Paying Off for City Attorney's Office*, SAN DIEGO UNION-TRIBUNE (Jul. 8, 2019), <https://www.sandiegouniontribune.com/news/courts/story/2019-07-08/gun-restraining-orders-paying-off>.

b. No “Red Flag” Language

State legislators and community organizers should avoid using the term “red flag” when describing ERPOs in order to prevent stigmatization of people who struggle with their mental health.⁵⁹⁴ The term Extreme Risk Protection Order is less stigmatizing and more accurately describes the purpose of the order.

c. Mental Health as a Risk Factor

In order to counter mental health stigmatization, statutes and proponents of ERPOs should avoid using stigmatizing language.⁵⁹⁵ For example, many mental health advocates believe it is unnecessary to specifically identify a mental health diagnosis as a risk factor.⁵⁹⁶ This reinforces an institutionally recognized form of disparagement directed towards individuals suffering from mental health issues without providing concrete ways of assessing physically manifested risks.⁵⁹⁷ To avoid stigmatizing language, statutes—and those who carry them out—should employ people-first language. People-first language requires avoiding identifying people by their disability or diagnosis, and instead describes a person by what they “have” rather than by what they “are.” For example, instead of saying, “a mentally ill person,” a people-first approach would use “a person struggling with their mental health.”

Contemporary Second Amendment jurisprudence has specifically labeled “mental illness” as a risk factor that can prevent Second Amendment challenges because the Second Amendment is not found to grant the right to firearms to individuals with mental health conditions.⁵⁹⁸ A respondent’s mental state, however, does not need to be called into question using such

⁵⁹⁴ *Red Flag Laws*, *supra* note 559, at 6 (statement of Ron Honberg, National Alliance on Mental Illness).

⁵⁹⁵ *Id.*

⁵⁹⁶ *Id.* at 5.

⁵⁹⁷ *Id.* at 5-6.

⁵⁹⁸ *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

stigmatizing language in order to show Second Amendment rights have not attached. More research should be done to find the best way to balance the use of the term “mental health” in ERPO statutes. Using “people-first” language is preferable when discussing the mental health status of ERPO respondents. Describing an individual as a “person with a mental health condition” carries less caustic weight than being “mentally ill.” Simple syntax choices would greatly destigmatize individuals within this demographic.

V. Accessibility

As previously noted, a potential reason for individuals failing to use ERPOs is a lack of awareness that the protective measure exists. In cases of public awareness, however, it is very likely that additional factors restrict individuals’ actual willingness and ability to access ERPOs in times of need.

a. Fees

Fees for filing an ERPO may prevent individuals, especially those of low-income status, from filing a petition for an ERPO. To avoid deterrence, ERPOs should not have filing fees.

b. Forms

ERPO filing forms should be easily discoverable and available online. This reduces the burden on petitioners of having to go to a courthouse to obtain the petition forms. Forms should also be available in languages other than English. Similarly, informational guides like a one-pager or a brochure educating possible petitioners about ERPOs should be available online in multiple languages to promote ease of access and utilization across different populations.

c. Petitioning Locations

ERPO filing locations should be accessible by public transportation. Additionally, as an alternative to requiring petitioners to submit petitions to the county where the respondent resides, petitioners should be able to submit their petitions in the county where they themselves reside. This would limit the burden of traveling inconveniences that may inhibit petitioners from using ERPOs.

d. Limiting Mandatory Court Visits

Policy makers should limit mandatory courthouse visits for petitioners, as they could pose an obstacle that would prevent people from petitioning. Petitioning individuals, especially those of lower socio-economic status, may have to miss work, find a caretaker for their children, or face other obstacles in order to visit court for an ERPO in progress. This places an undue burden on petitioners and could even dissuade them from pursuing the ERPO.

VI. Collaboration

a. Research and Policy Taskforces

A gap exists between gun violence research and ERPO legislation for two primary reasons: federally funded research by the CDC on the public health ramifications of gun violence has been consistently withheld by the government for twenty years,⁵⁹⁹ and policy makers do not always have access to researchers.⁶⁰⁰ ERPO laws would be able to address more precise socioeconomic

⁵⁹⁹ Nicole Wetsman, *After a 20-Year Drought, US Lawmakers Fund Gun Violence Research*, VERGE (Dec. 19 2019), <https://www.theverge.com/2019/12/19/21028779/gun-violence-research-funding-20-year-freeze-congress-bill-cdc-nih-dickey>.

⁶⁰⁰ Joshua Horwitz et al., *Beyond the Academic Journal: Unfreezing Misconceptions About Mental Illness and Gun Violence Through Knowledge Translation to Decision-Makers*, 33 BEHAV. SCI. AND L. 356, 358 (2015).

concerns and target jurisdiction-specific gun violence issues if policymakers had access to research concerning both national and local trends in firearm violence prevention.⁶⁰¹ For example, as mentioned earlier, mental health conditions account for only 4% of violent acts in the United States and, therefore, “policy change focused on mental illness alone is not likely to significantly reduce interpersonal violence in society.”⁶⁰² Organizing taskforces to connect new research with ERPO stakeholders will allow for improvements to existing statutes and more informed approaches to the drafting of future legislation.

b. Coordinated Community Response

King County, Washington is frequently cited as a jurisdiction with extremely effective implementation protocols. Leaders in the field include Judge Anne Levinson (ret.), who spearheaded the development of the Regional Domestic Violence Firearms Enforcement Unit in Washington State, and Kimberly Wyatt, the Senior Deputy Prosecuting Attorney with the King County Prosecutor's Office, who currently serves as firearms prosecutor for that unit.⁶⁰³ The unit is multidisciplinary and interjurisdictional in nature and focuses on collaborative and proactive enforcement of the Washington ERPO law.⁶⁰⁴ The Unit incorporates law enforcement, judicial officers, advocates, and administrators from King County and Seattle to coordinate an effective joint response to firearm threats while minimizing any gaps that could arise in the system.⁶⁰⁵ Each member of the Unit serves a distinct purpose. For example, a “Firearms Advocate” assists families and victims, a “Court Orders Problem-Solver” helps law enforcement quickly resolve any issues in orders so that they can be quickly served and enforced, and a “Firearms Court Coordinator”

⁶⁰¹ *Id.* at 356.

⁶⁰² *Id.* at 358-59.

⁶⁰³ *Regional Domestic Violence Firearms Enforcement Unit*, KING CTY., <https://www.kingcounty.gov/depts/prosecutor/ellies-place/rdvfeu.aspx> (last visited Jan. 19, 2020).

⁶⁰⁴ *Id.*

⁶⁰⁵ *Id.*

provides comprehensive information to the judges in civil proceedings and coordinates with law enforcement to ensure swift follow-up on non-compliance.⁶⁰⁶ A comprehensive and collaborative approach like that of the Regional Domestic Violence Firearms Enforcement Unit helps to ensure effectiveness of ERPOs because such a model best covers potential gaps across departments, disciplines, and jurisdictions.

c. Police Mental Health Collaboration

Mental health practitioners should be a part of the team of law enforcement officers actually participating in the execution of the surrender or seizure of firearms. Mental health practitioners may be in the best position to ensure that a behavioral health crisis does not escalate and lead to someone getting injured during a police encounter with a respondent. Mental health practitioners can also connect respondents with behavioral health services and resources to assist them in persevering through their crisis.

The Behavioral Services Risk and Threat Assessment Division (BSD) in the Palm Beach County Sheriff's Office in West Palm Beach, Florida presents a model partnership between mental health professionals and police.⁶⁰⁷ The BSD is a 24/7 crisis response team composed of law enforcement investigators, case managers, and licensed mental health professionals, including a therapist and substance abuse specialist.⁶⁰⁸ Ric Bradshaw, the Palm Beach County Sheriff explains the role of the therapist in BSD as a mental health professional on the front line of the crisis response team:

The mental health therapist will respond immediately and assess the crisis state of the individual using specialized professional judgment and risk/threat assessment instruments in the field. . . . The therapist develops a relationship with the

⁶⁰⁶ *Id.*

⁶⁰⁷ *Red Flag Laws, supra* note 559, at 3 (statement of Sheriff Ric L. Bradshaw, Sheriff, Palm Beach County, West Palm Beach, FL).

⁶⁰⁸ *Id.*

individual, provides crisis intervention services and offers services to the individual. The goal is to reduce the crisis level and to link the individual to appropriate services in the community via established partnerships.⁶⁰⁹

Units like BDS provide an opportunity for respondents facing a mental health crisis to be connected with professional treatment and resources upon contact with police. Such measures can deescalate tensions between police and respondents that may lead to further violence and, furthermore, assist respondents in addressing the underlying mental health issues that led to the ERPO.

VII. Respondents and Petitioners

a. Minors as Respondents

ERPO statutes should specify how to file an ERPO against a minor. While minors may not themselves be legally able to own or possess firearms, they can gain access to their parents' legally-owned firearms within their household. As in the state of Washington, a provision regarding minor respondents should require notice to a minor's parent or guardian of their legal obligation to safely secure any firearms in the home or to which a minor may have access.⁶¹⁰ The court must also inform guardians of the possibility of criminal prosecution if the respondent-minor were to obtain access to the firearm.⁶¹¹ Specifically allowing for minors as respondents is essential when working with youth experiencing suicidal ideation. Requiring statutes to provide guidance on protocol when minors are respondents can avoid confusion and legal challenges if the ERPO imposes an obligation on parents or guardians relating to their legally possessed firearms.

⁶⁰⁹ *Id.*

⁶¹⁰ WASH. REV. CODE § 7.94.060(7)(a) (2016).

⁶¹¹ WASH. REV. CODE § 7.94.060(7)(b) (2016).

b. Prevention of Intimate Partner Violence

When implemented correctly, ERPOs provide crucial assistance to individuals threatened by gun violence. Everytown for Gun Safety has compiled a list of gun control measures that can help prevent intimate partner gun violence.⁶¹² They state that the most important and impactful approaches involve strengthening state laws that prohibit domestic abusers from possessing guns and requiring abusers to relinquish the guns they already have.⁶¹³ There are multiple ways in which this may be achieved. Jurisdictions may choose to focus on the implementation and enforcement of existing state firearm relinquishment laws by state and local courts and law enforcement agencies. Closing the “boyfriend loophole,” which allows abusers to purchase and possess guns even if they have been convicted of abuse or are under a restraining order for abusing a dating partner, would expand the base of individuals eligible for relinquishment, thus enabling a more widespread and inclusive law.⁶¹⁴ Similarly, allowing intimate partners and victims of stalking to petition for ERPOs would reinforce protections for especially vulnerable populations. ERPOs should provide victims of domestic abuse with an alternate avenue to establish safe environments for themselves and those around them.

c. Distribute Mental Health Resources

Mental health resources should be attached to the notice left with the respondent upon delivery of the ERPO notice and seizure of firearms. Additionally, resources should be provided at court hearings.

⁶¹² EVERYTOWN FOR GUN SAFETY, GUNS AND VIOLENCE AGAINST WOMEN: AMERICA’S UNIQUELY LETHAL INTIMATE PARTNER VIOLENCE PROBLEM (Oct. 17, 2019), <https://everytownresearch.org/wp-content/uploads/2019/10/IPV-for-WEB-112519B.pdf>.

⁶¹³ *Id.*

⁶¹⁴ *Id.*

d. Petitioner and Family Safety

ERPO statutes should include a provision requiring law enforcement or the court to notify the petitioner, as well as family and household members of the respondent, that an ERPO will be expiring at least thirty days prior to its expiration.

e. Mental Health Professionals

States are divided on whether mental health practitioners should be allowed to petition for an ERPO. Because this question can affect the political support for a bill, especially among a key stakeholder like mental health practitioners, it is best left to each state to determine their own petitioner policies relating to mental health practitioners.

Regardless of if they can file petitions, healthcare professionals may still play a critical role in providing counsel on gun safety, as well as in educating both patients and families about the existence of ERPOs.⁶¹⁵ Additionally, the medical community can help by increasing and improving the gun violence training they provide to healthcare practitioners, both in how to make risk assessments and in how to advise others.⁶¹⁶ Furthermore, healthcare professionals can play an important role as liaisons and in helping police with appropriate intervention.⁶¹⁷ Some police stations in ERPO states have specifically hired mental health professionals to assist in the information sharing process by completing home visits to advise families on treatment or to determine if the individual in question is experiencing a crisis or could benefit from treatment.⁶¹⁸

⁶¹⁵ Suhas Gondi et al., *supra* note 590, at 1649.

⁶¹⁶ *Id.* at 1650-52.

⁶¹⁷ Swanson et al., *supra* note 580, at 1, 8.

⁶¹⁸ *Id.*

CONCLUSION

In this paper, we have argued that ERPO laws must be analyzed from a holistic perspective. The issue of gun violence will not wholly be resolved through ERPO laws, but it is a novel method of firearm regulation that represents a promising step towards making the United States a safer place. A thorough review of existing ERPO laws indicates that more comprehensive measures must be taken in order to account for demographic differences between communities. Given the limited amount of publicly available information concerning ERPO laws, making data available to researchers and practitioners will allow stakeholders to analyze, improve, and demonstrate ERPOs' effectiveness, thus incentivizing states to adopt them. This discussion of ERPO laws presents an initial lens through which future research on this topic may be conducted. With each newly introduced piece of legislation, a notable variety of social, logistical, and legal issues must preemptively be addressed. We hope that this paper may serve as an introductory framework upon which future ERPO laws may be crafted.