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John R. Richardson

S.J. Quinney College of Law, University of Utah, John.richardson@law.utah.edu

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RED FLAG LAWS AND PROCEDURAL DUE PROCESS: ANALYZING PROPOSED UTAH LEGISLATION

John R. Richardson*

INTRODUCTION

In April 2020, Virginia became the most recent state to enact a so-called “red flag law,” which will permit law enforcement to seize firearms from those deemed to pose a threat to themselves or others.¹ Laws like these have generated controversy.² When a red flag law was passed in Colorado in 2019, many counties across the state formally opposed it, and several sheriffs stated they would not enforce it.³ Despite their controversial nature, red flag laws have experienced a recent surge in popularity,⁴ and, to some extent, are even receiving bipartisan

* © 2021 John R. Richardson. John Richardson graduated from the S.J. Quinney College of Law at the University of Utah in 2021. He previously graduated Phi Beta Kappa with Bachelor of Science and Bachelor of Arts degrees from the University of Utah. John wishes to thank Professors Daniel Levin, Robert B. Keiter, and Clifford Rosky for their valuable mentorship and for inspiring an interest in constitutional law.

¹ Veronica Stracqualursi, *Virginia Governor Signs Background Checks, ‘Red Flag’ and Other Gun Control Bills into Law*, CNN (Apr. 10, 2020), <https://www.cnn.com/2020/04/10/politics/ralph-northam-signs-gun-bills/index.html> [<https://perma.cc/5GVX-HRJ2>]; Ryan W. Miller, *Virginia Lawmakers Advance Gun Control Bills, Including ‘Red Flag’ Law, Month After Pro-Gun Rally*, USA TODAY (Feb. 27, 2020), <https://www.usatoday.com/story/news/nation/2020/02/27/virginia-lawmakers-pass-gun-control-bills-red-flag-law/4854818002/> [<https://perma.cc/SL2A-LTCX>].

² See Miller, *supra* note 1.

³ Gregg Re, *Colorado Enacts ‘Red Flag’ Law to Seize Guns from Those Deemed Dangerous, Prompting Backlash*, FOX NEWS (Apr. 14, 2019), [foxnews.com/politics/sheriff-fires-back-after-enacts-to-seize-guns-from-individuals-deemed-dangerous](https://www.foxnews.com/politics/sheriff-fires-back-after-enacts-to-seize-guns-from-individuals-deemed-dangerous) [<https://perma.cc/5M WG-N5KW>].

⁴ Ryan J. Foley, *Nine States Have Passed ‘Red Flag’ Gun Seizure Laws in Year Since Parkland Shooting*, CLAIMS J. (Feb. 14, 2019), <https://www.claimsjournal.com/news/national/2019/02/14/289277.htm> [<https://perma.cc/4QMA-KHJ3>].

support.⁵ While advocacy groups have raised questions about their constitutionality,⁶ there have been remarkably few constitutional challenges to these statutes.⁷

In this Note, I analyze the validity of criticism against red flag laws based on procedural due process. I proceed as follows: In Part I, I discuss the background of red flag laws, the different versions passed among states, and the few constitutional challenges brought thus far. In Part II, I analyze the statutes' validity under federal due process standards. I then specifically examine proposed Utah bills that failed to pass in previous legislative sessions. While providing recommendations, I argue that the legislation would likely pass constitutional muster. In Part III, I conclude that red flag laws are generally constitutional under a procedural due process theory but review the key characteristics that make some versions more or less constitutionally problematic.

I. BACKGROUND

A. History and Differences Among the States

The nation's oldest red flag law went into effect in 1999 after a mass shooting in Connecticut's state lottery office.⁸ By February 2018, just before the Stoneman Douglas High School shooting in which a mentally troubled teenager killed seventeen people in Parkland, Florida, only four more states had passed similar laws.⁹ As of June 2021, nineteen states and the District of Columbia have passed red flag laws.¹⁰

⁵ Margaret Hartmann, *Why 'Red Flag Laws' Are Gaining Bipartisan Support After Parkland*, N.Y. MAG.: INTELLIGENCER (Feb. 21, 2018), <http://nymag.com/intelligencer/2018/02/red-flag-laws-draw-more-bipartisan-support-after-parkland.html> [<https://perma.cc/3T45-4CKL>] (naming "a handful of Republicans . . . pointing to red flag laws as the type of gun control they could support").

⁶ See, e.g., Benjamin Mueller, *Limiting Access to Guns for Mentally Ill Is Complicated*, N.Y. TIMES (Feb. 15, 2018), <https://www.nytimes.com/2018/02/15/us/gun-access-mentally-ill.html> [<https://perma.cc/8NFR-J7ZX>] (noting that both the NRA and ACLU opposed efforts to expand the list of those who could petition for restraining orders under California red flag law).

⁷ Meagan Flynn, *A Colorado Sheriff Would Rather Go to Jail than Seize Firearms Under State's Red-Flag Law, He Says*, WASH. POST (Apr. 2, 2019), https://www.washingtonpost.com/nation/2019/04/02/colorado-sheriff-would-rather-go-jail-than-seize-firearms-under-states-red-flag-law-he-says/?utm_term=.08931f2d1ca2 [<https://perma.cc/JD47-U2HX>] (stating that none of the jurisdictions that have passed red-flag laws "have run into serious legal challenges").

⁸ Foley, *supra* note 4.

⁹ *Id.*

¹⁰ The states are California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington. *Extreme Risk Protection Orders*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a->

Each red flag law allows a specified group of individuals to petition a court for an Extreme Risk Protection Order.¹¹ This protection order is then used to confiscate any firearm in the respondent's possession and, in most cases, to prevent him or her from purchasing firearms throughout the duration of the order.¹² Differences among state red flag laws include the scope of who may petition for an order, the standard of proof required for such an order to be issued, and the duration of the order.¹³ Some states only allow law enforcement or other state officers to petition the court for a protection order.¹⁴ Most states also allow family or household members to petition,¹⁵ and a few allow other individuals—like mental or medical health professionals,¹⁶ school teachers and administrators,¹⁷ and employers and coworkers,¹⁸—to do so. Illinois also has a law that allows anybody to complain to a circuit court that a person who possesses a firearm has threatened to use it illegally.¹⁹ Then, if the court is satisfied that there is “any danger of such illegal use of firearms,” it issues a warrant requiring that person's arrest and the seizure of any firearm in her possession.²⁰

In each state with a red flag law, protection orders may be issued in two ways: 1) *ex parte* without notice to the respondent, or 2) after notice and a hearing.²¹ When orders are issued *ex parte*, respondents are entitled to a subsequent hearing to determine whether the order should be extended or the weapons returned.²² For *ex parte* orders, most states require the petitioner to meet a probable, reasonable, or

gun/extreme-risk-protection-orders/#state [https://perma.cc/8B55-8XBK] (last visited Sept. 22, 2020).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ See CONN. GEN. STAT. § 29-38c(a) (2019); FLA. STAT. ANN. § 790.401(2)(a) (LexisNexis 2019); IND. CODE ANN. § 35-47-14-2(1) (LexisNexis 2019); N.M. STAT. ANN. § 40-17-5(a) (LexisNexis 2020); 8 R.I. GEN. LAWS § 8-8.3-3(a) (2019); VT. STAT. ANN. tit. 13 § 4053(a) (2019); VA. CODE ANN. § 19.2-152.13(a) (2020).

¹⁵ See CAL. PENAL CODE §§ 18150(a), 18170 (Deering 2019); COLO. REV. STAT. § 13-14.5-104 (2019); DEL. CODE ANN. tit. 10, §§ 7701(4), 7704(a) (2019); HAW. REV. STAT. ANN. §§ 134-61, -64(a), -65(a) (LexisNexis 2019) (effective Jan. 1, 2020); 430 ILL. COMP. STAT. ANN. 67/5, /35(a), /40(a) (LexisNexis 2019); MD. CODE ANN., PUB. SAFETY §§ 5-601(e), -603(a), -604(a) (LexisNexis 2018); MASS. GEN. LAWS ch. 140, §§ 121, 131R(a) (2018); NEV. REV. STAT. § 33.560(2) (2019) (effective Jan. 1, 2020); N.J. STAT. ANN. §§ 2C:58-21, -23(a) (West 2019); N.Y. C.P.L.R. §§ 6340(2), 6341 (Consol. 2019); OR. REV. STAT. § 166.527(1) (2019); WASH. REV. CODE ANN. § 7.94.030(1) (LexisNexis 2019).

¹⁶ See HAW. REV. STAT. ANN. §§ 134-61, -64(a), -65(a); MD. CODE ANN., PUB. SAFETY §§ 5-601(e), -603(a), -604(a).

¹⁷ See CAL. PENAL CODE § 18170(a) (effective Jan. 1, 2020); N.Y. C.P.L.R. §§ 6340(2), 6341.

¹⁸ See CAL. PENAL CODE § 18170(a) (effective Jan. 1, 2020); HAW. REV. STAT. ANN. §§ 134-61, -64(a), -65(a).

¹⁹ See 725 ILL. COMP. STAT. ANN. 165/1 (LexisNexis 2019).

²⁰ *Id.*

²¹ *Extreme Risk Protection Orders*, *supra* note 10.

²² *Id.*

good cause standard of proof to show that the respondent is dangerous.²³ California requires substantial likelihood,²⁴ and four states use a preponderance of the evidence standard.²⁵ Oregon requires clear and convincing evidence, the highest standard for *ex parte* orders.²⁶

Probable, Reasonable, or Good Cause	Substantial Likelihood	Preponderance of the Evidence	Clear and Convincing Evidence
Connecticut	California	Colorado	Oregon
Florida		Delaware	
Hawaii		Nevada	
Illinois		Vermont	
Indiana			
Maryland			
Massachusetts			
New Mexico			
New Jersey			
New York			
Rhode Island			
Virginia			
Washington			

The standard of proof required for obtaining a final order is either preponderance of the evidence²⁷ or, in most states, clear and convincing evidence.²⁸

²³ See CONN. GEN. STAT. § 29-38c(b) (2019); FLA. STAT. ANN. § 790.401(4)(c) (LexisNexis 2019); HAW. REV. STAT. ANN. § 134-64(f) (LexisNexis 2019); 430 ILL. COMP. STAT. ANN. 67/35(f) (LexisNexis 2019); IND. CODE ANN. § 35-47-14-2(3) (West 2019); MD. CODE ANN., PUB. SAFETY § 5-604(a)(1) (West 2018); MASS. GEN. LAWS ch. 140, § 131T(a) (2018); N.M. STAT. ANN. § 40-17-5(D) (West 2020); N.J. STAT. ANN. § 2C:58-23(e) (West 2018); N.Y. C.P.L.R. LAW § 6342(1) (McKinney 2020); 8 R.I. GEN. LAWS § 8-8.3-4(a) (2019); VA. CODE ANN. § 19.2-152.13(A) (2020); WASH. REV. CODE § 7.94.050(3) (2019).

²⁴ See CAL. PENAL CODE § 18150(b)(1)-(2) (Deering 2019).

²⁵ See COLO. REV. STAT. § 13-14.5-103(3) (2019); DEL. CODE ANN. tit. 10 § 7703(b)(2) (2019); NEV. REV. STAT. ANN. § 33.570(1) (LexisNexis 2020); VT. STAT. ANN. tit. 13 § 4054(b)(1) (2019); see also *supra* note 3.

²⁶ See OR. REV. STAT. § 166.527(6)(a) (2019).

²⁷ See HAW. REV. STAT. ANN. § 134-65(c); MASS. ANN. LAWS ch. 140, § 131S(c); N.J. STAT. ANN. § 2C:58-24(b); N.M. STAT. ANN. § 40-17-8(a); WASH. REV. CODE ANN. § 7.94.040(2).

²⁸ See CAL. PENAL CODE § 18175(b); COLO. REV. STAT. § 13-14.5-105(2); CONN. GEN. STAT. § 29-38c(d); DEL. CODE ANN. tit. 10 § 7704(d); FLA. STAT. ANN. § 790.401(3)(b); 430 ILL. COMP. STAT. ANN. 67/40(f) (2019); IND. CODE ANN. § 35-47-14-6(b) (2020); MD. CODE ANN. § 5-605(c)(1)(ii) (2018); NEV. REV. STAT. ANN. § 33.580(1) (LexisNexis 2020); N.Y.

A final protection order lasts for up to one year in most states, at which point it expires unless the petitioner renews the order by proving at a hearing that the respondent is still dangerous.²⁹ California recently expanded its law to allow a final protection order to last up to five years.³⁰ In a couple of states, a protection order only lasts for six months,³¹ and in others, they last indefinitely.³² While an order is in effect, the states allow respondents to request a hearing to prove, by the same standard of proof required to obtain the order, that they are no longer dangerous.³³ If successful, the order ends before its default expiration date.³⁴ Colorado's law is unique in that it provides legal representation for gun owners throughout this process.³⁵

B. Utah's Failed Attempts to Pass Red Flag Gun Control Legislation

In the wake of the Stoneman Douglas High School shooting in Parkland, Florida, Utah was one of the many states that considered various forms of gun control legislation.³⁶ One version of a red flag law was sponsored in the 2018 legislative session by Republican Representative Steve Handy of Layton, Utah, which failed in committee and never made it to a vote on the floor.³⁷ Lawmakers did, however, create the Utah Safe Schools Commission to study and propose

C.P.L.R. § 6343(2) (2019); OR. REV. STAT. § 166.530(3)(b) (2018); 8 R.I. GEN. LAWS § 8-8.3-5(a) (2018); VT. STAT. ANN. tit. 13, § 4053(e)(1) (2018); VA. CODE ANN. § 19.2-152.14(a).

²⁹ *Extreme Risk Protection Orders*, *supra* note 10.

³⁰ *See* CAL. PENAL CODE § 18175(e) (Deering 2019).

³¹ *See* 430 ILL. COMP. STAT. ANN. 67/40(g) (2019); VT. STAT. ANN. tit. 13, § 4053(e)(2) (2018); VA. CODE ANN. § 19.2-152.14(C.) (2020).

³² *See* IND. CODE ANN. § 35-47-14-6(c) (West 2020); N.J. STAT. ANN. § 2C:58-24(d) (2019).

³³ *Extreme Risk Protection Orders*, *supra* note 10.

³⁴ *Id.*

³⁵ *Re*, *supra* note 3.

³⁶ Bethany Rodgers, *A Year After Parkland Shooting, Stand-Your-Ground Bill Moves Forward in Utah Legislature While Gun Control Measures Wait for Hearing*, SALT LAKE TRIB. (Feb. 13, 2019), <https://www.sltrib.com/news/politics/2019/02/13/year-after-parkland/> [<https://perma.cc/RAN9-C4T5>].

³⁷ Taylor W. Anderson, *Utah House Committee Rejects Bill that Would Restrict Gun Access for People at Risk of Shooting Themselves or Others*, SALT LAKE TRIB. (Mar. 5, 2018), <https://www.sltrib.com/news/politics/2018/03/05/utah-house-panel-quickly-kills-main-effort-to-reduce-gun-violence-rejecting-plan-to-create-a-restraining-order-to-seize-a-dangerous-persons-weapons/> [<https://perma.cc/EC9B-9SRM>].

options to enhance gun safety at school campuses across the state.³⁸ Surprising to some,³⁹ one of the committee's top proposals was red flag legislation.⁴⁰

In addition to recent shootings on school campuses and elsewhere, advocates of the measure say the legislation is also critical in addressing Utah's high suicide rate,⁴¹ which is fifth in the nation.⁴² The vast majority of firearm deaths in Utah are suicides,⁴³ and most suicides, by far, are carried out with a firearm.⁴⁴

In October of 2018, several months after the Utah Safe Schools Commission published its recommendations, Utah experienced its own tragedy when University of Utah student-athlete Lauren McCluskey was shot and killed on campus by a man she had previously dated, a felon and registered sex offender who had lied about his criminal history.⁴⁵ This event renewed the call for the Utah legislature to take up

³⁸ Robert Gehrke, *If We Want to Reduce Suicide in Utah, This Red Flag Bill Is a Good Place to Start*, SALT LAKE TRIB. (Feb. 4, 2019), <https://www.sltrib.com/news/2019/02/04/gehrke-if-we-want-reduce/> [<https://perma.cc/56CF-KXYC>].

³⁹ See, e.g., Robert Gehrke, *Utah's School Safety Commission Surprised Me—By Coming Up with Real Gun-Related Recommendations*, SALT LAKE TRIB. (June 25, 2018), <https://www.sltrib.com/news/politics/2018/06/22/gehrke-utahs-school-safety-commission-surprised-me-by-coming-up-with-real-gun-related-recommendations/> [<https://perma.cc/JU7V-V9E3>] (admitting that writer was wrong about the Commission, which he thought would “meet simply to create the illusion of action while the issue fades from headlines,” but instead provided recommendations that “were remarkably thorough and striking in the degree to which they were able to reach consensus on sensible steps that could prevent gun violence,” including a red flag law).

⁴⁰ Gehrke, *supra* note 38. The group also advised “making it a possible misdemeanor to keep unsecured firearms where youth could access them”; allocating more money for gun safes and public awareness of proper gun storage; universal background checks; and waiting periods to buy a firearm. Rodgers, *supra* note 36.

⁴¹ See, e.g., Gehrke, *supra* note 38.

⁴² UTAH DEP'T OF HEALTH, SUICIDE REPORT 2 (2018), <https://health.utah.gov/vipp/pdf/Suicide/SuicideInUtah2018.pdf> [<https://perma.cc/L6AQ-HY36>] [hereinafter SUICIDE REPORT].

⁴³ HARV. T. H. CHAN SCH. OF PUB. HEALTH, SUICIDE AND FIREARM INJURY IN UTAH: LINKING DATA TO SAVE LIVES 10 (2018), <https://dsamh.utah.gov/pdf/suicide/Suicide%20and%20Firearm%20Injury%20in%20Utah%20-%20Final%20Report.pdf> [<https://perma.cc/6JTQ-FS7A>]; see also Bethany Rodgers, *How Do You Fight Utah's Suicide Problem? Utah Lawmakers to Consider Bills Focused on Gun Safety*, SALT LAKE TRIB. (Jan. 7, 2019), <https://www.sltrib.com/news/politics/2019/01/07/combat-an-epidemic/> [<https://perma.cc/RA4N-5S6P>].

⁴⁴ SUICIDE REPORT, *supra* note 42, at 4 (reporting that 49.7 percent of suicide deaths are carried out by firearm, which is almost double the rate of the second method, suffocation, at 25 percent).

⁴⁵ Artemis Moshtaghian, Chris Boyette & Darran Simon, *College Track Star Once Dated Her Killer and Had Reported Him to Police, Authorities Say*, CNN (Oct. 25, 2018, 4:51 PM), <https://www.cnn.com/2018/10/24/us/lauren-mccluskey-university-of-utah-fatal-shooting/index.html> [<https://perma.cc/DHH9-5Q7Y>].

some sort of serious gun control legislation.⁴⁶ The 2019 legislative session began just a few months after the McCluskey murder, and Rep. Handy once again introduced a version of the red flag law that stalled a year earlier.⁴⁷ The bill did not fare much better the second time around and never got a public hearing.⁴⁸

Although Governor Herbert signaled measured openness to such legislation, he, like the legislature, was concerned about the bill's due process implications.⁴⁹ He stated that red flag laws are "good in concept" because nobody wants "to have guns and weapons in the hands of somebody who is mentally unstable."⁵⁰ But he also warned that the law must not employ a "haphazard approach of taking away somebody's guns because of some accusation."⁵¹ In the end, the Utah legislature's position seemed to be that it would be more effective to improve enforcement of gun laws already on the books rather than pass new ones.⁵² Finally, in the 2020 legislative session, three separate red flag bills were introduced but, once again, were not enacted.⁵³ These will be discussed in Part III.

⁴⁶ Julia Ritchey, *Utah Democrats Prepare Slate of Gun Reform Bills, with One Backed by Mother of Slain Ute Athlete*, KUER (Dec. 24, 2018, 6:00 AM), <https://www.kuer.org/post/utah-democrats-prepare-slate-gun-reform-bills-one-backed-mother-slain-ute-athlete#stream/0> [<https://perma.cc/D9XB-EEH8>].

⁴⁷ Gehrke, *supra* note 38. The proposed red flag law is not to be confused with "Lauren's Law," so named in honor of McCluskey. That bill would have created a cause of action against gun owners who lend a firearm to another person who in turn uses it to commit a violent felony. That law never received committee approval. Emily Ashcraft, *Second Utah House Committee Rejects 'Lauren's Law,'* DESERET NEWS (Mar. 11, 2019, 7:35 PM), <https://www.deseret.com/2019/3/11/20668065/second-utah-house-committee-rejects-lauren-s-law> [<https://perma.cc/9KUL-CL8Q>].

⁴⁸ Nicole Nixon, *Gov. Herbert Calls for 'Open and Frank' Discussion on Gun Control Measures*, KUER (Aug. 21, 2019, 5:09 AM), <https://www.kuer.org/post/gov-herbert-calls-open-and-frank-discussion-gun-control-measures#stream/0> [<https://perma.cc/SE6V-UFZF>].

⁴⁹ Katie McKellar, *House OKs Resolution Saying Utah's Gun Laws Are Enough*, DESERET NEWS (Feb. 14, 2019, 5:59 PM), <https://www.deseret.com/2019/2/14/20665872/house-oks-resolution-saying-utah-s-gun-laws-are-enough> [<https://perma.cc/MZN5-XP5F>].

⁵⁰ *Id.*

⁵¹ *Id.* Further explaining his due process concerns, Governor Herbert stated that "[w]e could certainly have safer streets if we took away people's freedoms and liberties. I don't know that we want to do that." *Id.*

⁵² *Id.* (reporting that the Utah House of Representatives had approved a nonbinding resolution recognizing "that the best manner to protect the vulnerable without infringing on the right of the people to bear arms is to enforce the laws already found in Utah code"). Rep. Handy was the only Republican to vote against the resolution, arguing that it sent the wrong message. *Id.*

⁵³ H.B. 229; H.B. 460; S.B. 246. H.B. 229; H.B. 460; S.B. 246. H.B. 229; H.B. 460; S.B. 246. Extreme Risk Protection Order, H.B. 229, 63rd Leg., 2020 Gen. Sess. (Utah 2020), <https://le.utah.gov/~2020/bills/static/HB0229.html> [<https://perma.cc/TVZ4-DZD6>]; Firearm Removal Amendments, H.B. 460, 63rd Leg., 2020 Gen. Sess. (Utah 2020), <https://le.utah.gov/~2020/bills/static/HB0460.html> [<https://perma.cc/2B3Q-KVT2>]; Extreme Risk Protection Order Requirements, S.B. 246, 63rd Leg., 2020 Gen. Sess. (Utah 2020), <https://le.utah.gov/~2020/bills/static/SB0246.html> [<https://perma.cc/DUH4-U3YZ>].

C. Constitutional Challenges

Three jurisdictions—Indiana, Connecticut, and Florida—have heard challenges to red flag laws on constitutional grounds. Decisions have been issued in those states’ intermediate courts, each finding the red flag law constitutional.⁵⁴ Each case is discussed below in the order in which it was decided.

1. *Indiana Challenge*: Redington v. State

In the first case, police in Indiana seized forty-eight firearms from the home of the plaintiff, Redington, who had exhibited suspicious behavior and, in the opinion of a doctor who testified in the case, suffered from schizotypal, a personality disorder with “a flavor of schizophrenia.”⁵⁵ The court found that the State had proved by clear and convincing evidence that Redington was dangerous under the red flag statute and ordered the police to retain his firearms.⁵⁶ Redington challenged the validity of the statute under Article 1, Section 32 of the Indiana Constitution, which guarantees the right to bear arms for purposes of defense.⁵⁷ He also challenged the application of the statute as an unlawful taking of his property without just compensation⁵⁸ and on vagueness grounds.⁵⁹ Although the court recognized that the right to bear arms for self-defense was a core value,⁶⁰ that right was not materially burdened because the statute provided Redington with a mechanism to potentially recover his firearms and, alternatively, because Redington’s possession of the weapons threatened particularized harm.⁶¹ Further, the court did not recognize the application of the statute to Redington as a taking, but instead found it to be a valid exercise of the police power.⁶² The court also found that the statute was not void for vagueness.⁶³

2. *Connecticut Challenge*: Hope v. State

In the Connecticut case, the plaintiff, Donald Hope, had, according to his wife, become “increasingly delusional.”⁶⁴ At Hope’s hearing, the trial court found that “the evidence clearly showed that the plaintiff posed an imminent risk of physical

⁵⁴ See *Davis v. Gilchrist Cty. Sheriff’s Office*, 280 So. 3d 524 (Fla. Dist. Ct. App. 2019); *Hope v. State*, 133 A.3d 519 (Conn. App. Ct. 2016); *Redington v. State*, 992 N.E.2d 823 (Ind. Ct. App. 2013).

⁵⁵ *Redington*, 992 N.E.2d at 823, 825–28.

⁵⁶ *Id.* at 828.

⁵⁷ *Id.* at 830.

⁵⁸ *Id.* at 835.

⁵⁹ *Id.* at 838.

⁶⁰ *Id.* at 833.

⁶¹ *Id.* at 834.

⁶² *Id.* at 836.

⁶³ *Id.* at 839.

⁶⁴ *Hope v. State*, 133 A.3d 519, 523 (Conn. App. Ct. 2016).

harm to himself or others” and ordered his weapons to remain seized for one year.⁶⁵ Hope challenged the Connecticut red flag law under the Second Amendment to the U.S. Constitution.⁶⁶ The court held that the statute “does not implicate the Second Amendment [because] it does not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes,”⁶⁷ as guaranteed by *District of Columbia v. Heller*.⁶⁸ Instead, the statute, which only restricted the rights of those who posed a risk of imminent physical harm, was an example of a “longstanding ‘presumptively lawful regulatory measure.’”⁶⁹

3. *Florida Challenge: Davis v. Gilchrist County Sheriff’s Office*

In the Florida case, the trial court granted a risk protection order against a police officer, Davis, who had confessed to his supervisor and a couple of other officers that he desired to use his police-issued gun to shoot another police officer.⁷⁰ Believing that his girlfriend had been having an affair with the target officer, Davis stated that he wanted to “shoot him in the face, eat his food, and wait for [law enforcement] to pick [him] up.”⁷¹ On appeal, Davis argued that the red flag law was facially unconstitutional because it was vague, overbroad, and because it violated substantive due process.⁷² He also argued that the law was unconstitutional as applied to him, but the court determined that he had waived an as-applied challenge by not preserving it at the trial level.⁷³

According to Davis, the red flag law was unconstitutionally vague because it left “too much to the discretion of the trial court and law enforcement in determining,” among other things, when a person poses a “significant danger” to himself or others.⁷⁴ The court rejected the idea that the term was vague, interpreting the word “significant” consistently “with standard dictionary synonyms,” and arguing that it is no more vague than the word “imminent” as used in other statutes.⁷⁵

Davis also argued that the law was unconstitutionally vague and overbroad because it was “untethered to any central idea, subject, or danger,” citing the broad list of evidence that courts are permitted to consider when making risk protection order determinations.⁷⁶ The court disagreed, pointing to the state legislature’s

⁶⁵ *Id.*

⁶⁶ *Id.* at 521–22.

⁶⁷ *Id.* at 524.

⁶⁸ 554 U.S. 570, 635 (2008).

⁶⁹ *Hope*, 133 A.3d at 524 (quoting *Heller*, 554 U.S. at 627 n.26).

⁷⁰ *Davis v. Gilchrist Cty. Sheriff’s Office*, 280 So. 3d 524, 528–29 (Fla. Dist. Ct. App. 2019).

⁷¹ *Id.* at 529.

⁷² *Id.* at 531.

⁷³ *Id.*

⁷⁴ *Id.* at 532.

⁷⁵ *Id.*

⁷⁶ *Davis*, 280 So. 3d at 532.

explanation for the law: “to comprehensively address the crisis of gun violence, including but not limited to, gun violence on school campuses.”⁷⁷

Finally, Davis argued that the law violated substantive due process by punishing “entirely innocent activity.”⁷⁸ According to the court, however, the statute’s purpose was not punitive but preventative.⁷⁹ It also noted that of the fifteen nonexclusive “activities” courts could consider, only three could be considered innocent: being seriously mentally ill, abusing alcohol, and recently acquiring firearms or ammunition.⁸⁰ Those activities, moreover, were mere factors that courts were to consider—within the specific context of the threat of gun violence—before issuing a risk protection order.⁸¹

In the end, Davis failed to meet his “high burden” of proving that “no set of circumstances exists in which the statute can be considered constitutionally valid.”⁸²

II. ANALYSIS

As previously shown, due process is one potential ground for challenging red flag laws. In the Indiana and Florida cases described above, the respective red flag laws were challenged on such grounds. The challengers specifically argued that they were unconstitutionally vague and violative of *substantive* due process.⁸³ Additionally, the procedural safeguards guaranteed (or not) by the various red flag laws are one concern among advocacy groups. Although the National Rifle Association (NRA) gained attention when it signaled some degree of openness to red flag laws,⁸⁴ the organization has yet to support any specific measure and has

⁷⁷ *Id.*

⁷⁸ *Id.* at 532–33.

⁷⁹ *Id.* at 533. Although the purpose of the statute may certainly be considered preventative, that does not mean it is not punitive as well, especially from the respondent’s point of view. In fact, earlier in its opinion, the court seemed to acknowledge that the red flag law impairs the exercise of a fundamental right. *Id.* at 531–32. In the immediate case, it is easy to understand that Davis likely felt that he was being punished for the threats, serious or not, that he uttered against his fellow police officer.

⁸⁰ *Id.* at 533.

⁸¹ *Id.*

⁸² *Davis*, 280 So. 3d at 532–33.

⁸³ *Supra* Sections I.B.1, I.B.3.

⁸⁴ See Nicole Gaudiano, *Under Pressure, NRA Voices Support for Gun Violence Restraining Orders*, USA TODAY (Mar. 19, 2018, 3:25 PM), <https://www.usatoday.com/story/news/politics/2018/03/19/under-pressure-nra-voices-support-gun-violence-restraining-orders/433716002/> [<https://perma.cc/JGJ7-VTEQ>] (quoting an NRA spokeswoman who, unable to point to any specific bill the organization supports, nevertheless expressed confidence that “there will be a bill introduced that provides adequate due process while ensuring that people who are a danger to themselves or others don’t have access to firearms.”). Some have questioned the NRA’s sincerity in suggesting it is open to any sort of red flag gun legislation. Connecticut Democratic Senator Richard Blumenthal commented on the NRA’s opposition to his proposed federal red flag law, saying, “[t]he NRA wants a

worked to defeat them in multiple states⁸⁵ One of the NRA’s principal arguments against most red flag laws is that they lack “basic due process protections” and are “ripe for abuse.”⁸⁶ The NRA is not alone. The American Civil Liberties Union (ACLU) of Rhode Island published an analysis criticizing the lack of due process protections provided in Rhode Island’s red flag legislation before it was passed.⁸⁷ Given these concerns, red flag laws might further be challenged on *procedural* due process grounds. This Note will discuss the validity of these groups’ due process concerns by addressing potential problems with postdeprivation hearings and the meaningfulness of hearings under current red flag laws.

A. Postdeprivation Hearings

The Supreme Court has stated that “[t]he fundamental requirement of due process is the opportunity to be heard . . . ‘at a meaningful time and in a meaningful manner.’”⁸⁸ As to meaningful time, critics of red flag laws argue that “[t]he major due process concern . . . is that they allow a person to be deprived of property (a gun) and liberty (their Second Amendment right) *before* they are granted an opportunity to be heard.”⁸⁹ From this point of view, red flag laws implicate both property and liberty interests. In both instances, the law prefers that a hearing take place before a deprivation occurs.⁹⁰ But the Supreme Court has been forgiving of deprivations of property without a predeprivation hearing so long as an adequate postdeprivation remedy is available that “provide[s] either the property’s prompt return or an equivalent compensation.”⁹¹ Viewed as depriving respondents of a property interest, then, *ex parte* protection orders that are followed quickly by a hearing to determine whether the order should be continued are likely constitutionally sound.

Catch-22: oppose a federal statute, supposedly relying on the states, and then oppose state laws, as it has consistently done.” *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See AM. CIV. LIBERTIES UNION OF R.I., AN ANALYSIS OF 18-H 7688 AND 18-S 2492, RELATING TO EXTREME RISK PROTECTIVE ORDERS (Mar. 2018), riaclu.org/images/uploads/180302_analysis_RedFlagsLegislation.pdf [<https://perma.cc/5E42-745B>].

⁸⁸ *Parratt v. Taylor*, 451 U.S. 527, 540 (1981) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

⁸⁹ Travis Dunn, *Red Flag Laws and the Consequences of Good Intentions*, WHO.WHAT.WHY. (Mar. 18, 2019), <https://whowhatwhy.org/2019/03/18/laws-and-the-consequences-of-good-intentions/> [<https://perma.cc/2FTB-ULV4>] (emphasis added) (quoting John W. Whitehead, president of The Rutherford Institute).

⁹⁰ *Parratt*, 451 U.S. at 540.

⁹¹ *Albright v. Oliver*, 510 U.S. 266, 315 (1994) (Stevens, J., dissenting); see also *Parratt*, 451 U.S. at 540 (“[Where] only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.” (quoting *Phillips v. Commissioner*, 283 U.S. 589, 596–97 (1931)) (internal quotation marks omitted)).

The more difficult question arises if protection orders are considered deprivations of liberty. At least one Supreme Court justice has suggested that where a loss of liberty occurs, “any postdeprivation state procedure is merely a remedy; because it does not provide the predeprivation process that is ‘due,’ it does not avoid the constitutional violation.”⁹² Additionally, the Court has purported to uphold the adequacy of postdeprivation hearings “[w]here *only property rights* are involved. . . .”⁹³ On the other hand, the Court has in other instances rejected the notion that postdeprivation hearings are categorically inadequate for deprivations of liberty interests.⁹⁴

One situation in which postdeprivation remedies might satisfy procedural due process requirements is where a predeprivation hearing “is unduly burdensome in proportion to the liberty interest at stake.”⁹⁵ This, of course, depends upon the nature of the liberty interest, to be discussed below. More directly relevant is the rule that, “[i]n an *emergency situation*, the government may take away property or liberty, so long as postdeprivation notice and a hearing are provided.”⁹⁶ Given these rules, red flag laws that require the petitioner to show that an individual is *imminently* dangerous before a court may grant an *ex parte* protection order are more likely to pass constitutional muster than those that do not. At least two states, Massachusetts and New York, have no such requirement.⁹⁷

⁹² *Albright*, 510 U.S. at 315–16 (Stevens, J., dissenting).

⁹³ *Parratt*, 451 U.S. at 540 (emphasis added) (citing *Phillips v. Commissioner*, 283 U.S. 589, 596–97 (1931)).

⁹⁴ *See, e.g., Zinermon v. Burch*, 494 U.S. 113, 132 (1990) (“We . . . do not find support in precedent for a categorial distinction between a deprivation of liberty and one of property.”); *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) (“The dichotomy between personal liberties and property rights is a false one.”).

⁹⁵ *Zinermon*, 494 U.S. at 132.

⁹⁶ *Donald v. Polk County*, 836 F.2d 376, 380 (7th Cir. 1988) (emphasis added).

⁹⁷ *See* MASS. ANN. LAWS ch. 140, § 131T(a) (LexisNexis 2019); N.Y. C.P.L.R. § 6342(1) (Consol. 2019). The states that do require some level of imminence before issuing an *ex parte* order apply slightly different standards and employ varied terminology. Some explicitly require imminent danger, while others employ what seem to be looser standards, like danger “in the near future,” which might be more problematic. CAL. PENAL CODE § 18150(b) (Deering 2019) (substantial likelihood of significant danger in the near future); COLO. REV. STAT. § 13-14.5-103(3) (2019) (significant risk of injury in the near future by preponderance of the evidence); CONN. GEN. STAT. § 29-38c(a) (2019) (risk of imminent personal injury by probable cause and no reasonable alternative to prevent such injury); DEL. CODE ANN. tit. 10, § 7703(d) (2019) (immediate and present danger by preponderance of the evidence); FLA. STAT. ANN. § 790.401(4)(c) (LexisNexis 2019) (significant danger in the near future by reasonable cause); HAW. REV. STAT. ANN. § 134-64(ccf) (LexisNexis 2019) (effective Jan. 1, 2020) (imminent danger by probable cause); 430 ILL. COMP. STAT. ANN. 67/35(ggf) (LexisNexis 2019) (immediate and present danger by probable cause); IND. CODE ANN. §§ 35-47-14-1(a), 35-47-14-2(a) (LexisNexis 2019) (imminent risk of injury by probable cause); MD. CODE ANN., PUB. SAFETY § 5-601(e) (LexisNexis 2019) (immediate and present danger on reasonable grounds); NEV. REV. STAT. ANN. § 33.570(1)(a)

B. Meaningful Hearings

To satisfy due process, states must provide the opportunity not only to be heard at a meaningful time, but also in a meaningful manner.⁹⁸

[G]enerally[, this] requires consideration of three distinct factors: First, the private interest that will be affected . . . ; second, the risk of an erroneous deprivation . . . through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government’s interest [in enforcing the deprivation].⁹⁹

Because it is clear that the government has “an unqualified interest in the preservation of human life,”¹⁰⁰ the remainder of this section will examine more closely the first and second factors.

1. Affected Private Interest

In *District of Columbia v. Heller*,¹⁰¹ the Court found that the Second Amendment to the Constitution preserves “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”¹⁰² That case did not purport to interfere with, among other gun control laws, “longstanding prohibitions on the possession of firearms by felons and the mentally ill”¹⁰³ However, red flag laws are not limited in application to the mentally ill,¹⁰⁴ and they “allow[] a court to intervene in potentially major and intrusive ways on a person’s liberty and property interests without any indication . . . that the person has engaged in any criminal conduct”¹⁰⁵

(LexisNexis 2020) (imminent risk of personal injury by preponderance of the evidence and no less restrictive options available); N.J. STAT. ANN. § 2C:58-23(e) (West 2019) (immediate and present danger by good cause); N.M. STAT. ANN. § 40-17-6(a) (LexisNexis 2020) (imminent danger by probable cause); OR. REV. STAT. § 166.527(6) (2019) (clear and convincing evidence of risk in near future); R.I. GEN. LAWS § 8-8.3-4(a) (2019) (significant danger of imminent personal injury by probable cause); VT. STAT. ANN. tit. 13 § 4054(b)(1) (2019) (imminent and extreme risk of harm by preponderance of the evidence); VA. CODE ANN. § 19.2-152.13(a) (substantial risk of personal injury in the near future by probable cause); WASH. REV. CODE ANN. § 7.94.050 (LexisNexis 2019) (significant danger in near future by reasonable cause).

⁹⁸ *Parratt v. Taylor*, 451 U.S. 527, 540 (1981).

⁹⁹ *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

¹⁰⁰ *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 282 (1990).

¹⁰¹ 554 U.S. 570 (2008).

¹⁰² *Id.* at 635.

¹⁰³ *Id.* at 626.

¹⁰⁴ *Extreme Risk Protection Orders*, *supra* note 10 (providing examples of evidence courts use in determining whether a person is dangerous).

¹⁰⁵ AM. CIV. LIBERTIES UNION OF R.I., *supra* note 87, at 3–4.

Assuming, then, that red flag laws do not fall within the category of presumptively valid gun control laws, it is still unclear what level of importance attaches to Second Amendment rights for purposes of weighing the private interest at stake. One indicator may be the level of scrutiny federal courts apply in Second Amendment cases.¹⁰⁶ Because *Heller* provides little guidance, federal courts have varied in the level of scrutiny they apply to legislation facing legal challenge under the Second Amendment.¹⁰⁷ The majority of courts have applied intermediate scrutiny, but others have applied strict scrutiny.¹⁰⁸ Brown argues that intermediate scrutiny should apply.¹⁰⁹ If intermediate scrutiny applies, it is more likely that the government's interest will outweigh the private interest at stake, and Brown therefore concludes that red flag laws meet due process standards.¹¹⁰ That conclusion would be harder to reach in jurisdictions which apply strict scrutiny in Second Amendment cases. Brown's conclusion also applies only to *ex parte* protection orders, which, he points out, "[are] of extremely short duration."¹¹¹ Final protection orders, of course, last much longer—indefinitely in some cases—thus magnifying the liberty interest at stake.¹¹²

2. Additional Procedural Safeguards

The second factor in determining whether a hearing is meaningful is the probable value of additional safeguards.¹¹³ One proposal that may serve as an additional procedural safeguard is to provide counsel to respondents.¹¹⁴ Colorado's red flag law does this,¹¹⁵ recognizing that "having to suddenly find a lawyer and pay the fees for an imminent court hearing can be very difficult for many people."¹¹⁶ While this may be sound policy, it is likely not necessary to satisfy due process requirements because the right to counsel exists principally in criminal cases and applies in civil cases "only where the litigant may lose his physical liberty if he loses the litigation."¹¹⁷ But because courts will look to whether procedural safeguards are

¹⁰⁶ Aaron Edward Brown, *This Time I'll Be Bulletproof: Using Ex Parte Firearm Prohibitions to Combat Intimate-Partner Violence*, 50 COLUM. HUM. RTS. L. REV. 159, 194 (2019).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 196–98.

¹¹¹ *Id.* at 196.

¹¹² See *supra* Section I.A.

¹¹³ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹¹⁴ *Red Flag Laws: Examining Guidelines for State Action: Hearing Before the S. Judiciary Comm.*, 116th Cong. 19 (2019) (written testimony of David B. Kopel), <https://www.judiciary.senate.gov/imo/media/doc/Kopel%20Testimony1> [<https://perma.cc/9SP3-KE3M>] [hereinafter *Red Flag Laws*] ("Statutes should clearly specify how respondents are to be given clear written notice of their right to counsel.").

¹¹⁵ See *supra* Section I.A.

¹¹⁶ *Red Flag Laws*, *supra* note 114, at 19.

¹¹⁷ *Lassiter v. Dep't of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 18, 25 (1981).

lacking in any procedural due process challenge, providing counsel to respondents can only increase a red flag law's probability of surviving such a challenge. Further, as one might suspect, a respondent represented by counsel may be more likely to prevail in protection order proceedings than one who is not.¹¹⁸

A simpler procedural safeguard to reduce the risk of erroneous deprivations is higher standard of proof at *ex parte* hearings, final hearings, or both.¹¹⁹ Although the respondent in *Davis* did not bring a procedural due process claim, the court viewed favorably certain procedural safeguards within Florida's red flag law—its heightened “clear and convincing” standard for the issuance of final orders was among them.¹²⁰ The court contrasted Florida's standard with the State of Washington's, which requires a “less stringent ‘preponderance of the evidence’ standard.”¹²¹

Statutes requiring a petitioner to prove only that the respondent is dangerous by a preponderance of the evidence in order to obtain a final protection order seem highly susceptible to a due process challenge. As one critic put it, “[i]n other words, there is just over a 50/50 chance of accuracy. Like the flip of a coin.”¹²² Whether the right to bear arms is deemed important or fundamental, the safer route is for states to do what the majority have done and require clear and convincing evidence from a petitioner before issuing a final order.¹²³ New Jersey's statute seems particularly problematic, as it requires only a preponderance of the evidence to burden the respondent's Second Amendment right for an indefinite period of time.¹²⁴

Next, states can limit the categories of people who are eligible to petition the courts for protection orders. As mentioned previously, the majority of states only

¹¹⁸ Matt Vasilogambros, *Red Flag Laws Spur Debate over Due Process*, PEW: STATELINE (Sept. 24, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/09/04/red-flag-laws-spur-debate-over-due-process> [https://perma.cc/LY3F-T2JD]. As of September 2019, Florida courts had approved approximately 2,500 risk protection orders since the law took effect in early 2018. *Id.* According to one Florida defense attorney, Kendra Parris, who represents both clients subject to the state's involuntary mental health treatment law and now the red flag gun law, the protection orders have become a “shiny new toy for law enforcement . . . filing them left and right.” *Id.* In discussing the value of legal representation in protection order proceedings, Parris argues that rather than actually finding “clear and convincing evidence” that respondents are dangerous, courts are essentially saying “[b]etter safe than sorry.” *Id.* (internal quotation marks omitted).

¹¹⁹ *Red Flag Laws*, *supra* note 114, at 17–18.

¹²⁰ *Davis v. Gilchrist Cty. Sheriff's Office*, 280 So. 3d 524, 533 (Fla. Dist. Ct. App. 2019).

¹²¹ *Id.* The other safeguards the court found significant were common among red flag laws, including a hearing within a short timeframe after an *ex parte* protection order has issued and a mechanism whereby a subject of an order may request early termination of that order. *Id.* The court also pointed to the limited duration of a final protection order (one year), which is most commonly the case among existing red flag laws. *See supra* Section I.A. and notes 28–31.

¹²² *Re, supra* note 3.

¹²³ *See supra* Section I.A.

¹²⁴ N.J. STAT. ANN. § 2C:58-24(d) (2019).

allow law enforcement officials and family members to petition.¹²⁵ California has moved in the opposite direction, recently expanding its red flag law to allow teachers, school administrators, employers, and coworkers to do so.¹²⁶ Signed into law in October 2019 by Governor Gavin Newsom,¹²⁷ this expansion raises its own due process concerns, as it potentially subjects individuals to a deprivation of property and liberty through court proceedings initiated by those with whom they may be less intimately associated. This is, at least in part, why former Governor Jerry Brown vetoed such an expansion while in office.¹²⁸

The expanded group of eligible petitioners may be justified, however, because it still seems limited to persons who would know the respondent well. After all, Americans spend a significant portion of their time at their workplace.¹²⁹ And, of course, not every potential violent criminal lives with or near family,¹³⁰ so behavior tending to manifest a threat of violence might, without the expansion, go unnoticed and unreported. The concerns about an expanded group of eligible petitioners may also be mitigated by the fact that, regardless of who files a petition, all petitioners have to meet the same evidentiary burden that a close family member would have to meet in order to secure a protection order.¹³¹ But that burden may not be high at the initial stage or even a later stage,¹³² and it might be especially difficult for *pro se*

¹²⁵ See *supra* notes 13–17 and accompanying text.

¹²⁶ Patrick McGreevy, *After Mass Shootings, California Sets New Limits on Gun Buyers and Expands Firearm Seizure*, L.A. TIMES (Oct. 11, 2019), <https://www.latimes.com/california/story/2019-10-11/california-approves-gun-control-red-flag-laws> [<https://perma.cc/375C-ADX7>]. This bill also increased the duration of final protection orders from one year to a maximum of five. *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* Governor Brown argued that school employees and coworkers should work through a respondent's family members if they believe a restraining order is necessary and that "law enforcement professionals and those closest to a family member are best situated to make these especially consequential decisions." *Id.*

¹²⁹ See News Release, Bureau of Labor Statistics, American Time Use Survey—2018 Results 2 (June 19, 2019) (reporting that, among full-time workers, men worked an average of 8.2 hours per day while women worked an average of 7.9).

¹³⁰ *How Are Mass Killings and Domestic Violence Linked?*, PBS (Nov. 6, 2017), <https://www.pbs.org/newshour/show/how-are-mass-killings-and-domestic-violence-linked> [<https://perma.cc/PD67-BSU7>] (exploring the correlation between domestic violence and mass killings but noting that "there is not always a presence of domestic violence," partly because many mass killers live alone).

¹³¹ See, e.g., CAL. PENAL CODE § 18150(a), (b) (Deering 2019) (listing categories of individuals allowed to file a petition and stating that such petition must show a substantial likelihood that subject of petition poses a significant danger and that a protection order is necessary).

¹³² See *supra* Section I.A.

respondents to rebut evidence that they are dangerous, even if such rebuttal evidence might exist.¹³³

Finally, states can add criminal penalties to help protect against false or frivolous petitions. Even in states where only family members and law enforcement may file petitions for protection orders, there are concerns that the system might be abused. For example, “[s]purned former partners or family members seeking revenge might ‘weaponize’ this tool.”¹³⁴ Creating criminal penalties would be one of the more effective ways of deterring such conduct.

C. Procedural Due Process in Utah’s Proposed Red Flag Laws

I conclude by reviewing the provisions of three red flag bills introduced in Utah’s 2020 general legislative session and applying the procedural due process analysis discussed in Parts A and B of this section. The three bills are H.B. 229 (sponsored by Rep. Handy), H.B. 460 (sponsored by Rep. Briscoe), and S.B. 246 (sponsored by Sen. Weiler). I suggest that Rep. Briscoe’s version is more problematic than the others but that, despite the concerns of many legislators and the governor, these bills are likely constitutionally sound.

1. Postdeprivation Hearings

Like the red flag laws that have been enacted in other states, two of the three most recent versions of Utah’s proposed law provide a mechanism whereby a respondent’s firearms may be seized through an *ex parte* protection order before any hearing has taken place.¹³⁵ Senator Weiler’s bill, however, provides no such procedure.¹³⁶ Instead, any confiscation of firearms must take place after a hearing.¹³⁷ This virtually eliminates the procedural due process concerns present in the other versions of the bill and in the red flag laws of every other state. As far as the other bills are concerned, in Section II.A., I argued that, because postdeprivation hearings are constitutionally disfavored, a petitioner should have to show that the respondent

¹³³ See *Lassiter v. Dep’t of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 18, 51 (1981), (Blackmun J., dissenting) (explaining pro se litigants are “more likely to be unaware of controlling legal standards and practices, and unskilled in garnering relevant facts, it is difficult, if not impossible, to conclude that the typical case has been adequately presented.”).

¹³⁴ Vasilogambros, *supra* note 118 (quoting Dave Kopel). The Giffords Law Center, which promotes the adoption of red flag gun laws, recommends a penalty for false petitions as a key legislative element. *Extreme Risk Protection Orders*, *supra* note 10.

¹³⁵ See Extreme Risk Protection Order, H.B. 229, 63rd Leg., 2020 Gen. § 4 (Utah 2020), <https://le.utah.gov/~2020/bills/static/HB0229.html> [<https://perma.cc/TVZ4-DZD6>]; Firearm Removal Amendments, H.B. 460, 63rd Leg., 2020 Gen. Sess. § 4 (Utah 2020), <https://le.utah.gov/~2020/bills/static/HB0460.html> [<https://perma.cc/4ZRY-YKPU>].

¹³⁶ See S.B. 246, 63rd § 4, 2020 Leg., 2020 Gen. Sess. § 4 (Utah 2020), <https://le.utah.gov/~2020/bills/static/SB0246.html> [<https://perma.cc/DUH4-U3YZ>].

¹³⁷ See *id.*

poses some level of *imminent* danger. In this regard, the bills proposed in the 2020 legislative session improve upon Rep. Handy's 2019 bill.

In 2019, H.B. 209 did not explicitly require a petitioner to demonstrate that a respondent was imminently dangerous, or even dangerous in the near future, in order for a court to issue an *ex parte* protection order.¹³⁸ Instead, all the court had to find, by a preponderance of the evidence, was that the respondent posed "a serious risk of harm to himself, herself, or others."¹³⁹ But the bill did require that a court consider at least five factors before issuing the *ex parte* order, four of which were at least somewhat associated with the imminence of the threat.¹⁴⁰ Those factors were: (1) whether "there has been a *recent* threat of violence, or act of violence, by the respondent toward himself, herself, or others, including the transmission of threats through electronic or digital means"¹⁴¹; (2) whether "the respondent is dangerous"¹⁴²; (3) whether the respondent *recently* violated a protective order issued separately;¹⁴³ and (4) whether "there has been a *recent* pattern of violent acts or threats by the respondent and other less restrictive alternatives either have been tried and found to be ineffective or are inadequate or inappropriate for the circumstances of the respondent."¹⁴⁴

Unlike the 2019 bill, the 2020 bills require a court to make a specific determination that an individual either poses an imminent threat or a threat in the near future before it may issue an *ex parte* protection order. They do this by requiring the court to determine not that a respondent poses a serious risk of harm but that she is "dangerous."¹⁴⁵ And the bills define "dangerous" as presenting an "imminent" risk of injury or risk of injury in the near future.¹⁴⁶ In making that determination, the new bills also require the court to consider the same five factors that the 2019 bill did.¹⁴⁷

¹³⁸ See H.B. 209, 2019 Leg., Gen. Sess. (Utah 2019), <https://le.utah.gov/~2019/bills/static/HB0209.html> [<https://perma.cc/NK2C-QXNA>].

¹³⁹ See *id.* § 5.

¹⁴⁰ *Id.* § 4.

¹⁴¹ *Id.* (emphasis added).

¹⁴² *Id.* In the bill, a respondent may be found "dangerous" in one of two ways: first, if he or she "presents an *imminent* risk of personal injury to himself, herself, or to others," or, second, if he or she presents "a risk of personal injury to him or herself or to another individual *in the near future* and is the subject of relevant personal knowledge that would give rise to a reasonable belief that the respondent has a propensity for violent conduct." *Id.* § 3. (emphasis added).

¹⁴³ *Id.* § 4.

¹⁴⁴ *Id.* (emphasis added). The other factor that must be considered is whether the respondent is otherwise restricted from possessing firearms. *Id.*

¹⁴⁵ H.B. 229, 63rd Leg., 2020 Gen. Sess. § 5 (Utah 2020), <https://le.utah.gov/~2020/bills/static/HB0229.html> [<https://perma.cc/TVZ4-DZD6>]; H.B. 460, 63rd Leg., 2020 Gen. Sess. § 5 (Utah 2020), <https://le.utah.gov/~2020/bills/static/HB0460.html> [<https://perma.cc/4ZRY-YKPU>].

¹⁴⁶ H.B. 229 § 3; H.B. 460 § 3.

¹⁴⁷ H.B. 220, § 4; H.B. 460 § 4. Though not constitutionally relevant, this leads to the circular result that, to determine whether an individual is dangerous, the court must consider, among other things, whether the individual is dangerous.

Given those factors, making explicit the requirement that a respondent pose an imminent threat of harm might make only a marginal difference constitutionally. But because postdeprivation hearings should be reserved for emergency situations,¹⁴⁸ making this requirement explicit may secure the constitutionality of the bills' *ex parte* order procedures and assuage the concerns of some of those who have expressed reservations about the previous bill's due process protections.¹⁴⁹

The procedural due process concerns associated with *ex parte* protection orders are further diminished by the Utah bills' heightened standard of proof a petitioner must meet to obtain an order. While most states require a petitioner to show probable, reasonable, or good cause that the respondent poses a threat,¹⁵⁰ Rep. Handy's and Rep. Briscoe's bills require the petitioner to make her showing by a preponderance of the evidence.¹⁵¹ This is generally considered a higher standard than probable cause.¹⁵²

2. Meaningful Hearings

As previously explained, to determine whether a hearing is meaningful for purposes of procedural due process, courts must weigh the three *Eldridge* factors: (1) the private interest that will be affected; (2) the risk of an erroneous deprivation through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest in enforcing the deprivation.¹⁵³ Once again, because the state has an "unqualified interest in the preservation of human life,"¹⁵⁴ the remainder of this section will evaluate the affected private interest and the additional safeguards that the most recent bills have included to protect against erroneous deprivations.

¹⁴⁸ See *Donald v. Polk County*, 836 F.2d 376, 380 (7th Cir. 1988).

¹⁴⁹ Further, although the court was required to consider the five factors outlined here, it was not limited by those factors. In both 2019 and 2020, the bills also state that a court may also consider other evidence, providing a second nonexhaustive list of factors. See H.B. 209 § 4; H.B. 229 § 4; H.B. 460 § 4. Given those additional considerations, not all of which are tied to imminence, it was conceivable under the 2019 version of the bill that a court could issue an *ex parte* protection order without making an explicit finding that the respondent was imminently dangerous.

¹⁵⁰ See CONN. GEN. STAT. § 29-38c(b) (2019); FLA. STAT. ANN. § 790.401(4)(c) (LexisNexis 2019); HAW. REV. STAT. ANN. § 134-64(f) (LexisNexis 2019); 430 ILL. COMP. STAT. ANN. 67/35(f) (LexisNexis 2019); IND. CODE ANN. § 35-47-14-2(3) (West 2019); MD. CODE ANN., PUB. SAFETY § 5-604(a)(1) (West 2018); MASS. GEN. LAWS ch. 140, § 131T(a) (2018); N.M. STAT. ANN. § 40-17-5(D) (West 2020); N.J. STAT. ANN. § 2C:58-23(e) (West 2018); N.Y. C.P.L.R. LAW § 6342(1) (McKinney 2020); 8 R.I. GEN. LAWS § 8-8.3-4(a) (2019); VA. CODE ANN. § 19.2-152.13(A) (2020); WASH. REV. CODE § 7.94.050(3) (2019).

¹⁵¹ H.B. 229 § 5; H.B. 460 § 5.

¹⁵² *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975) (explaining that a probable cause determination "does not require the fine resolution of conflicting evidence that . . . a preponderance standard demands").

¹⁵³ See *Mathews*, 424 U.S. at 334–35.

¹⁵⁴ See *Cruzan*, 497 U.S. at 282.

(a) *Affected Private Interest*

A search of Second Amendment cases reveals that the 10th Circuit Court of Appeals has yet to apply strict scrutiny to any challenged gun law. It has, instead, acknowledged that *Heller* did not specify “precisely what level of scrutiny a reviewing court must apply to a challenged law,” and has thus chosen to apply intermediate scrutiny.¹⁵⁵ This suggests that, if a procedural due process challenge were to be brought against a potential red flag law in Utah, the private interest factor would not outweigh the government’s unqualified interest in the preservation of human life that it would use to justify a deprivation.

(b) *Additional Procedural Safeguards*

Section II.B.2, *supra*, identified four additional procedural safeguards that might tip the scale in favor of red flag laws’ constitutionality when courts weigh the interests at stake. These were (1) providing counsel to respondents; (2) requiring higher standards for *ex parte* protection orders, final protection orders, or both; (3) limiting the categories of people who may petition for a protection order; and (4) implementing criminal penalties for petitions based on erroneous facts.¹⁵⁶ Judging by these safeguards, Rep. Handy’s and Sen. Weiler’s are the stronger bills.

First, none of the bills guarantee counsel to respondents.¹⁵⁷

Second, although each bill would implement the same standard for *ex parte* protective orders, they differ in the standard for issuing a final order.¹⁵⁸ The Handy and Weiler bills both join the majority of states¹⁵⁹ in requiring clear and convincing

¹⁵⁵ See *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010). In *Reese*, a criminal defendant argued that 18 U.S.C. § 922(g)(8), which prohibited him from possessing a firearm while subject to a domestic protection order, violated his Second Amendment right to bear arms. *Id.* at 794. The court chose to apply intermediate scrutiny to the statute, comparing it to other statutes that had been evaluated under intermediate scrutiny in other circuits. *Id.* at 801–02. One of those was the Third Circuit, which had concluded that “the Second Amendment can trigger more than one particular standard of scrutiny, depending, at least in part, upon the type of law challenged and the type of [Second Amendment restriction] at issue.” *Id.* at 801 (citing *United States v. Marzzarella*, 614 F.3d 85, 97 (3rd Cir. 2010)) (internal quotation marks omitted) (alteration in original).

¹⁵⁶ See *supra* Section II.B.2.

¹⁵⁷ See H.B. 229, 63rd Leg., 2020 Gen. Sess. (Utah 2020), <https://le.utah.gov/~2020/bills/static/HB0229.html> [<https://perma.cc/TVZ4-DZD6>]; H.B. 460, 63rd Leg., 2020 Gen. Sess. (Utah 2020), <https://le.utah.gov/~2020/bills/static/HB0460.html> [<https://perma.cc/4ZRY-YKPU>]; S.B. 246, 63rd Leg., 2020 Gen. Sess. (Utah 2020), <https://le.utah.gov/~2020/bills/static/SB0246.html> [<https://perma.cc/DUH4-U3YZ>].

¹⁵⁸ See H.B. 229 § 4; H.B. 460 §4, S.B. 246 § 4.

¹⁵⁹ See CAL. PENAL CODE § 18175(b); COLO. REV. STAT. § 13-14.5-105(2); CONN. GEN. STAT. § 29-38c(d); DEL. CODE ANN. tit. 10 § 7704(d); FLA. STAT. ANN. § 790.401(3)(b); 430 ILL. COMP. STAT. ANN. 67/40(f) (2019); IND. CODE ANN. § 35-47-14-6(b) (2020); MD. CODE ANN. § 5-605(c)(1)(ii) (2018); NEV. REV. STAT. ANN. § 33.580(1) (LexisNexis 2020); N.Y.

evidence that the respondent is dangerous.¹⁶⁰ The Briscoe bill, on the other hand, maintains the preponderance of the evidence standard for both *ex parte* and final protective orders.¹⁶¹ This affects the meaningfulness of the hearing by increasing the chance that firearms are taken from an individual who is not in fact dangerous.¹⁶²

Third, the bills also differ in the categories of people that may petition the courts for a protection order. Again, Rep. Briscoe's bill offers fewer protections than the other bills do. It is unique among the three bills in allowing any medical professional who has treated the respondent, in addition to law enforcement officials and family and household members, to seek a protection order.¹⁶³ It also defines "family or household member" more broadly than the other bills to include persons "with one or more children in common with the respondent" as well as grandparents and persons who are or have acted as the respondent's legal guardian.¹⁶⁴ Because all petitioners must meet the same standard of proof regardless of their relationship with the respondent,¹⁶⁵ a more expansive group of potential petitioners may not on its own present significant due process concerns—as long as the standard of proof is sufficient to mitigate the possibility of erroneous deprivation. But as previously discussed, Rep. Briscoe's bill proposes a lower standard of proof for final orders than the other bills do, which would make it easier for individuals further removed from the respondent—and with less evidence—to successfully secure firearm removal.

Fourth, two of the red flag bills carry certain penalties for providing false information in a petition: The Handy bill provides that "[a] petitioner who knowingly provides false information for the purpose of obtaining an *ex parte* extreme risk protective order or extreme risk protective order is guilty of a third degree felony."¹⁶⁶ This is a stringent penalty that may likely deter frivolous and malicious petitions, a key safeguard for potential respondents. The deterrent effect is enhanced by the requirement that "[f]orms provided by the court to file for an extreme risk protective order shall include a statement informing the petitioner that knowing falsification of any statement or information provided for the purpose of obtaining an *ex parte* order is a third degree felony."¹⁶⁷ In other words, petitioners will be aware of the consequences of filing a frivolous petition beforehand.

The penalty associated with providing false information in Rep. Briscoe's bill is less clear due to a contradiction in the bill's text. The bill contains the same

C.P.L.R. § 6343(2) (2019); OR. REV. STAT. § 166.530(3)(b) (2018); 8 R.I. GEN. LAWS § 8-8.3-5(a) (2018); VT. STAT. ANN. tit. 13, § 4053(e)(1) (2018); VA. CODE ANN. § 19.2-152.14(a).

¹⁶⁰ H.B. 229 § 5; S.B. 246 § 5.

¹⁶¹ H.B. 460 § 5.

¹⁶² The tradeoff, of course, is that a higher standard of proof increases the chance that a dangerous individual remains in possession of firearms.

¹⁶³ H.B. 460 § 4.

¹⁶⁴ *Id.* § 3.

¹⁶⁵ *See id.* § 4.

¹⁶⁶ H.B. 229 § 11.

¹⁶⁷ *Id.* § 4.

provision as Rep. Handy's bill requiring forms to include a statement informing petitioners that providing false information is a third degree felony.¹⁶⁸ But the section on penalties states that providing false information for the purpose of obtaining an order is only a misdemeanor.¹⁶⁹ Interestingly, Sen. Weiler's bill, which otherwise contains the strongest due process protections, provides no penalty for filing false information in a petition.¹⁷⁰

Each red flag bill introduced in the 2020 legislative session offers some procedural safeguards, and each could go further in some way. Overall, none of the bills differ greatly in this regard from those that have been passed in other states—except for the lack of an *ex parte* confiscation mechanism in Sen. Weiler's bill.¹⁷¹

III. CONCLUSION

Critics of red flag laws say that they “place[] judges in the unenviable—indeed, impossible—position of trying to predict who may and may not become a mass murderer.”¹⁷² Despite these concerns, red flag laws can be written in a way that is likely to satisfy due process requirements. To do so, states should require a showing of imminent danger before granting an *ex parte* protection order. Further, the simplest and perhaps most effective procedural safeguard is to require a heightened standard of proof by which a petitioner must show that a respondent is dangerous. Low standards of proof are especially problematic in states where protection orders do not have to be renewed periodically by the petitioner. Written carefully, red flag laws can simultaneously further society's interest in preserving human life and safeguard an important liberty interest.

The most recent versions of proposed red flag legislation in Utah appear to meet these procedural due process requirements. Although the practice of holding a hearing after a deprivation of liberty or property has already occurred is disfavored under the procedural due process requirement that hearings be held at a meaningful time, each bill at least requires a court to find that a respondent is imminently dangerous or could be in the near future before issuing *ex parte* protection orders. Senator Weiler's bill simply does not allow postdeprivation hearings, which would likely protect it from any procedural due process challenge.

As for the meaningfulness of the hearing itself, courts will weigh the interests at stake and consider any additional safeguards that have been included to prevent an erroneous deprivation. Because most courts apply intermediate scrutiny to Second Amendment claims, the individual liberty interest at stake is likely to be outweighed by the government's interest in protecting human life. The resulting likelihood of constitutionality will be bolstered by the bills' multiple additional

¹⁶⁸ H.B. 460 § 4.

¹⁶⁹ *Id.* § 11.

¹⁷⁰ See S.B. 246, 63rd Leg., 2020 Gen. Sess. §11 (Utah 2020), <https://le.utah.gov/~2020/bills/static/SB0246.html> [<https://perma.cc/DUH4-U3YZ>].

¹⁷¹ See S.B. 246 § 4.

¹⁷² AM. CIV. LIBERTIES UNION OF R.I., *supra* note 87, at 4.

safeguards. The safeguards included in the three bills examined in this Note vary. The clearest improvement would be raising the standard of proof for issuing a final order in Rep. Briscoe's bill.

Overall, it appears that the Utah legislators who have sponsored red flag bills have taken due process concerns seriously. Policymakers and the public should rest assured that there is a way to enact this potentially lifesaving legislation while protecting the rights of all involved.