

Red Flag Laws: Popularity, Effectiveness, and Why Arizona Should Set Its Sights on Enacting One

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I. INTRODUCTION

Aurora. Newtown. San Bernardino. Orlando. Las Vegas. Parkland. Pittsburgh. Thousand Oaks. Virginia Beach. El Paso. Dayton. Boulder. The grim commonality that links these cities needs no explanation, yet the ease with which it comes to mind demonstrates the gravity of America's problem with gun violence. Still, deaths due to mass shootings represent only a miniscule percentage of all gun deaths in the United States.¹ An average of 39,000 Americans are killed by guns every year, a figure that translates to about 100 fatalities per day.² In the last decade alone, over one million Americans have been shot, guaranteeing that all Americans will likely know at least one victim of gun violence in their lifetime.³

The gun violence epidemic is uniquely American. Among developed countries, the United States is a flagrant outlier in terms of both gun presence and gun violence; there are more than 100 guns for every 100 people (i.e., there are more guns than people in America), and there are about twelve gun-related deaths for every 100,000 people.⁴ Other developed countries have fewer than forty guns per 100 people and less than four gun-deaths for each 100,000 individuals.⁵ Studies have tied reduced gun violence to stricter gun control laws, but the United States has the weakest gun control laws in the entire developed world.⁶

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1. German Lopez & Kavya Sukumar, *Mass Shootings Since Sandy Hook, in One Map*, VOX, <https://www.vox.com/a/mass-shootings-america-sandy-hook-gun-violence> [https://perma.cc/8KC5-YQEX].

2. *Statistics*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/facts/gun-violence-statistics/> [https://perma.cc/4NDJ-RV33].

3. *Id.*

4. Lopez & Sukumar, *supra* note 1.

5. *Id.*

6. Brian Klass, *The World Thinks America's Gun Laws Are Crazy—and They're Right*, WASH. POST (Aug. 5, 2019), <https://www.washingtonpost.com/opinions/2019/08/05/world-thinks-americas-gun-laws-are-crazy-theyre-right/> [https://perma.cc/CA5Y-P7FJ] (“There are also several more hurdles to clear before buying a gun in every other developed country compared to the United States.”); Lopez & Sukumar, *supra* note 1; see Kara Fox, *How US Gun Culture*

To make matters worse, American gun violence is on the rise: the national rate of gun deaths increased by roughly 18% from 2014 to 2017.⁷ The United States' constitutional protection of the right to bear arms has hindered efforts to reduce gun violence. Nonetheless, the recent uptick in gun-related fatalities, paired with the increased incidence of mass shootings and subsequent media coverage, has pushed gun control to the forefront of the national conversation.

Notably, the majority of Americans supports increased gun control measures.⁸ According to a 2019 Pew Research Center study, 60% of Americans would prefer stricter gun laws, a percentage that has increased from 57% in 2018 and 52% in 2017.⁹ The solid majority that favors stricter gun laws, however, remains split down party lines: 86% of Democratic-leaning Americans prefer stricter gun laws, while only 31% of Republican-leaning Americans do.¹⁰ However, one specific type of gun control measure has attracted significant bipartisan support: red flag laws.¹¹

Red flag laws allow family members or law enforcement officers to petition a court for a civil order mandating the removal of an individual's firearms.¹² If the court finds that the individual poses an imminent danger to himself, herself, or others, it will issue an extreme risk protection order (ERPO), which temporarily restricts that person's access to firearms.¹³ Over the past three years, the popularity of red flag laws has increased markedly. Prior to the 2018 school shooting in Parkland, Florida, only five states had red flag laws.¹⁴ By August of 2019, eighteen jurisdictions, including Washington D.C., had adopted them.¹⁵ By April of 2020, New Mexico and

Compares with the World, CNN (Aug. 6, 2019, 10:18 AM), <https://www.cnn.com/2017/10/03/americas/us-gun-statistics/index.html> [<https://perma.cc/5X7Q-VLY4>] (characterizing the Second Amendment as “[t]wenty-seven words that give [the United States’] citizens the right to own guns and also . . . helped usher in a culture that sees more of its own people killed by fellow citizens armed with guns than any other high-income nation in the world”).

7. *Statistics*, *supra* note 2.

8. Rachel Treisman, *Poll: Number of Americans Who Favor Stricter Gun Laws Continues To Grow*, NPR (Oct. 20, 2019, 7:01 AM), <https://www.npr.org/2019/10/20/771278167/poll-number-of-americans-who-favor-stricter-gun-laws-continues-to-grow> [<https://perma.cc/V32Y-QEUE7>].

9. *Id.*

10. *Id.*

11. *Id.*

12. *Extreme Risk Protection Orders*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/> [<https://perma.cc/SV6D-6TPR>].

13. *Id.*

14. Treisman, *supra* note 8.

15. *Id.*

Virginia had become the eighteenth and nineteenth states to enact red flag laws.¹⁶

This Comment argues that Arizona should adopt red flag legislation because such laws enjoy considerable national support, serve the compelling public safety interest of curbing gun violence, and do not violate the Second Amendment. Part II discusses the variation between the key features of existing states' red flag laws, as well as the laws' popularity, implementation, effects, and constitutional considerations. Part II also summarizes the development of Arizona's gun control legislation. Part III argues that Arizona should enact a red flag law, despite legislative resistance, and proposes specific statutory provisions that would safeguard critical public safety interests. Part IV briefly concludes.

II. BACKGROUND

In Section A, this Comment first identifies the states that have enacted red flag statutes and discusses the ways in which such laws vary. Section B briefly details the national popularity of red flag laws. Section C provides an account of the extent to which states have implemented their red flag laws as well as the documented effectiveness of the statutes. Section D traces the evolution of Second Amendment jurisprudence and discusses the constitutional issues that red flag laws implicate. Finally, Section E provides a historical overview of Arizona's legislation pertaining to gun control generally and red flag legislation specifically.

A. Variation Across Existing Red Flag Laws

To date, nineteen states and Washington D.C. have red flag protective orders—often referred to as extreme risk protection orders or ERPOs—that permit judges to restrict certain individuals from possessing firearms.¹⁷ These 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

16. See Morgan Lee, *New Mexico Governor to Sheriffs: Enforce Gun Law or Resign*, U.S. NEWS (Feb. 25, 2020, 8:05 PM), <https://www.usnews.com/news/us/articles/2020-02-25/new-mexico-governor-to-sheriffs-enforce-gun-law-or-resign?context=amp> [https://perma.cc/4A7D-WNPV]; Veronica Stracqualursi, *Virginia Governor Signs Background Checks, 'Red Flag' and Other Gun Control Bills into Law*, CNN (Apr. 10, 2020, 7:32 PM), <https://www.cnn.com/2020/04/10/politics/ralph-northam-signs-gun-bills/index.html> [https://perma.cc/7RPS-YG25]; *Extreme Risk Protection Orders*, *supra* note 12.

17. *Extreme Risk Protection Orders*, *supra* note 12.

Washington, in addition to the District of Columbia.¹⁸ At least ten other states considered red flag bills throughout 2020.¹⁹

Connecticut enacted the pioneering red flag law in 1999, following a mass shooting at the state's lottery headquarters.²⁰ Next, Indiana adopted a similar statute in 2005 in the aftermath of a fatal police officer shooting in Indianapolis.²¹ The remaining seventeen states and D.C. followed suit, with just under half enacting or strengthening their respective red flag laws in the 2019 legislative cycle.²²

The components of the existing red flag laws vary across states with regard to what constitutes a "red flag," the process for firearm removal, and the duration of the seizure order.²³ The following analysis outlines the key differences between current red flag laws and highlights the statutes with the most notable provisions.

1. Petitioner Requirements

The majority of states with red flag laws permit law enforcement officers, as well as family or household members, to petition a court to order the removal of an individual's firearms.²⁴ However, Florida, New Mexico, Rhode Island, Vermont, and Virginia only permit law enforcement or other state officials to petition.²⁵ Conversely, the statutes in D.C., Hawaii, Maryland, and New York are more expansive in that they permit individuals other than family members or law enforcement to petition.²⁶ Specifically, D.C. allows mental health professionals to petition, Maryland allows certain categories of mental and other health workers to petition, New York permits school

18. *Id.*

19. See Sean Campbell, Alex Yablon, & Jennifer Mascia, *Red Flag Laws: Where the Bills Stand in Each State*, TRACE (Dec. 22, 2020), <https://www.thetrace.org/2018/03/red-flag-laws-pending-bills-tracker-nra/> [<https://perma.cc/T8FB-P6RF>].

20. Aaron J. Kivisto & Peter L. Phalen, *Effects of Risk-Based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981–2015*, 69 PSYCHIATRIC SERVS. 855, 855 (2018).

21. *Id.*

22. Matt Vasilogambros, *Red Flag Laws Spur Debate over Due Process*, PEW (Sept. 4, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/09/04/red-flag-laws-spur-debate-over-due-process> [<https://perma.cc/67BQ-NCCE>].

23. *Extreme Risk Protection Orders*, *supra* note 12.

24. *Id.*

25. FLA. STAT. ANN. § 790.401(2)(A) (West 2021); N.M. STAT. ANN. § 40-17-5(A) (2020); 8 R.I. GEN. LAWS ANN. §§ 8-8.3-1, -8.3-3 (West 2021); VT. STAT. ANN. tit. 13, § 4053(a) (West 2021); VA. CODE ANN. § 19.2-152.13 (West 2021); *Extreme Risk Protection Orders*, *supra* note 12.

26. D.C. CODE ANN. § 7-2510.01 (West 2021); HAW. REV. STAT. ANN. § 134-61 (West 2021); MD. CODE ANN., PUB. SAFETY § 5-601(e) (West 2021); N.Y. C.P.L.R. 6340(2) (MCKINNEY 2021); *Extreme Risk Protection Orders*, *supra* note 12.

administrators to petition, and Hawaii authorizes petitions by medical professionals, educators, and coworkers.²⁷ In September of 2020, California joined these states and amended its red flag law to allow employers, coworkers, and certain school personnel to petition.²⁸

2. Types of Orders

In most states, courts can issue either emergency or non-emergency protection orders.²⁹ Emergency orders, often referred to as *ex parte* orders, are only issued when an individual poses an immediate threat and typically require a lower standard of proof.³⁰ Because *ex parte* orders do not require the respondent to receive notice that the order has been issued, they generally only last for a few days and mandate that the respondent be served with a notice to appear at a subsequent hearing to determine whether a final order should be issued.³¹

Courts issue final orders—the non-emergency type of order—only after the respondent has received notice of the order and has been provided the opportunity to contest the order at a formal hearing.³² Because final orders typically last up to one year, they tend to require a heightened standard of proof.³³ The majority of states' red flag laws may be issued against individuals who possess firearms as well as those who do not own firearms to prevent those individuals from obtaining weapons in the future.³⁴ However, a few states have enacted a type of red flag law called a firearm removal law.³⁵ These laws are unique in that they can only be requested if the respondent already possesses firearms.³⁶

27. D.C. CODE ANN. § 7-2510.01 (West 2021); HAW. REV. STAT. ANN. § 134-61 (West 2021); MD. CODE ANN., PUB. SAFETY § 5-601(e) (West 2021); N.Y. C.P.L.R. 6340(2) (MCKINNEY 2021); *Extreme Risk Protection Orders*, *supra* note 12.

28. CAL. PENAL CODE § 18150 (West 2021); *Extreme Risk Protection Orders*, *supra* note 12.

29. *Extreme Risk Protection Orders*, *supra* note 12.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. CONN. GEN. STAT. ANN. § 29-38c (West 2021); 725 ILL. COMP. STAT. ANN. 165/0.01 (West 2021); IND. CODE ANN. § 35-47-14-2 (West 2021); *Extreme Risk Protection Orders*, *supra* note 12.

36. *Extreme Risk Protection Orders*, *supra* note 12.

a. Ex Parte Orders

For ex parte orders, twelve states and D.C. require the petitioner to introduce evidence to establish a probable, reasonable, or good cause belief that the respondent is dangerous.³⁷ California requires certain petitioners to present evidence establishing that there is a substantial likelihood that the respondent poses a danger.³⁸ Four states—Colorado, Delaware, Nevada, and Vermont—require petitioners to demonstrate by a preponderance of the evidence that the respondent is dangerous before obtaining an ex parte order.³⁹ Oregon is unique in that the state requires clear and convincing evidence of the respondent’s dangerousness for an ex parte order.⁴⁰ However, the unusually high standard of proof is justified because Oregon’s ex parte orders automatically become final if respondents do not challenge them.⁴¹ The majority of states that permit ex parte orders also require petitioners to establish that the alleged danger is imminent.⁴² Depending on the state, ex parte orders last anywhere from one day to twenty-one days, but most states issue ex parte orders that last roughly two weeks.⁴³

b. Final Orders

Final orders almost always require a higher standard of proof than ex parte orders because final orders restrain respondents’ rights for longer periods of time.⁴⁴ Five states—Hawaii, Massachusetts, New Jersey, New Mexico, and Washington—along with D.C. require petitioners to show that the respondent poses a danger by a preponderance of the evidence in order to obtain a final

37. CAL. PENAL CODE § 18125(a) (West 2021); D.C. CODE ANN. § 7-2510.04(e) (West 2021); FLA. STAT. ANN. § 790.401(4)(c) (West 2021); HAW. REV. STAT. ANN. § 134-64(f) (West 2021); 430 ILL. COMP. STAT. ANN. 67/35(f) (West 2021); MD. CODE ANN., PUB. SAFETY § 5-603(a)(4) (West 2021); MASS. GEN. LAWS ANN. ch. 140, § 131T(a) (West 2021); N.J. STAT. ANN. § 2C:58-23(e) (West 2021); N.M. STAT. ANN. § 40-17-5(D) (2020); N.Y. C.P.L.R. 6342(1) (MCKINNEY 2021); 8 R.I. GEN. LAWS ANN. § 8-8.3-4(a) (West 2021); VA. CODE ANN. § 19.2-152.13(A) (West 2021); WASH. REV. CODE ANN. § 7.94.050(3) (West 2021); *Extreme Risk Protection Orders*, *supra* note 12.

38. CAL. PENAL CODE § 18150(b) (West 2021). As detailed in section 18125 of the California Penal Code, California requires reasonable cause for temporary emergency ex parte orders that only law enforcement officers can petition for. *Id.* § 18125. However, California requires a substantial likelihood for ex parte orders in which family members, employers, coworkers, and teachers are the petitioners. *Id.* § 18150(b).

39. COLO. REV. STAT. ANN. § 13-14.5-103(3) (West 2021); DEL. CODE ANN. tit. 10, § 7703(d) (2020); NEV. REV. STAT. ANN. § 33.570(1) (West 2021); VT. STAT. ANN. tit. 13, § 4054(b)(1) (West 2021).

40. OR. REV. STAT. ANN. § 166.527(6)(a) (West 2021).

41. *See id.* § 166.533.

42. *Extreme Risk Protection Orders*, *supra* note 12.

43. *Id.*

44. *Id.*

order;⁴⁵ twelve other states require clear and convincing evidence.⁴⁶ The imminence requirement that is central to ex parte orders is typically more relaxed for final orders.⁴⁷ In most states, final orders expire after one year.⁴⁸ Final orders in Illinois, Vermont, and Virginia however, only last six months, and in New Jersey, a final order lasts until the respondent proves by a preponderance of the evidence that he or she no longer poses a risk.⁴⁹

When a final order is set to expire, petitioners usually have the opportunity to request that the order be renewed.⁵⁰ To obtain a renewal, petitioners must request a hearing and generally are required to meet the same burden of proof as they did in the initial hearing in demonstrating that the respondent still poses a safety risk.⁵¹ When a final order is in effect, the respondent subject to the order also typically has an opportunity to prove that he or she no longer poses a risk and that, therefore, the order should be terminated.⁵² To do so, the respondent must request a hearing and demonstrate by the same standard of proof used to obtain the order that he or she is no longer dangerous.⁵³ Some states, however, put the burden on the petitioner to show that the respondent still poses a risk in termination hearings,⁵⁴ and in Nevada, only the petitioner can request a hearing for the dissolution of the order.⁵⁵

45. D.C. CODE ANN. § 7-2510.03(g) (West 2021); HAW. REV. STAT. ANN. § 134-65(c) (West 2021); MASS. GEN. LAWS ANN. ch. 140, § 131S(c) (West 2021); N.J. STAT. ANN. § 2C:58-24(b) (West 2021); N.M. STAT. ANN. § 40-17-8(A) (2020); WASH. REV. CODE ANN. § 7.94.040(2) (West 2021); *Extreme Risk Protection Orders*, *supra* note 12.

46. CAL. PENAL CODE § 18175(b) (West 2021); COLO. REV. STAT. ANN. § 13-14.5-105(2) (West 2021); DEL. CODE ANN. tit. 10 § 7704(d) (2020); FLA. STAT. ANN. § 790.401(3)(b) (West 2021); 430 ILL. COMP. STAT. ANN. 67/40(f) (West 2021); MD. CODE ANN., PUB. SAFETY § 5-605(c)(1)(ii) (West 2021); NEV. REV. STAT. ANN. § 33.580(1) (West 2020); N.Y. C.P.L.R. 6343(2) (MCKINNEY 2021); OR. REV. STAT. ANN. § 166.530(3)(b) (West 2021); 8 R.I. GEN. LAWS ANN. § 8-8.3-5(a) (West 2021); VT. STAT. ANN. tit. 13, § 4053(b) (West 2021); VA. CODE ANN. § 19.2-152.14(A) (West 2021); *Extreme Risk Protection Orders*, *supra* note 12.

47. *Extreme Risk Protection Orders*, *supra* note 12.

48. *Id.*

49. 430 ILL. COMP. STAT. ANN. 67/40(g) (West 2021); N.J. STAT. ANN. § 2C:58-25 (West 2021); VT. STAT. ANN. tit. 13, § 4053(e)(2) (West 2021); VA. CODE ANN. § 19.2-152.14(C) (West 2021); *Extreme Risk Protection Orders*, *supra* note 12.

50. *Extreme Risk Protection Orders*, *supra* note 12.

51. *Id.*

52. *Id.*

53. *Id.*

54. See, e.g., IND. CODE ANN. § 35-47-14-6(b), (f)(2) (West 2021); VT. STAT. ANN. tit. 13, § 4055(a)(1) (West 2021).

55. NEV. REV. STAT. ANN. § 33.640(3) (West 2021).

3. Relinquishment Procedures

The states typically provide various processes for the relinquishment of the respondent's firearms.⁵⁶ Most often, if law enforcement directly serves the order on the respondent, he or she is required to immediately relinquish all firearms to the police.⁵⁷ Alternatively, if someone other than a police officer serves the respondent, then the respondent is usually required to surrender his or her firearms to the local law enforcement agency or a licensed gun dealer within twenty-four to forty-eight hours of being served.⁵⁸ Some states also require that the respondent surrender his or her license to possess or carry firearms.⁵⁹

In the case that the respondent does not cooperate with the firearm removal order, most states allow law enforcement to obtain a warrant to seize the firearms.⁶⁰ Some states permit such warrants to be issued concurrently with the protection order, while others only allow seizure warrants upon a showing that the respondent has not surrendered all firearms or has since obtained a weapon after being served the initial protection order.⁶¹

B. Support for Red Flag Laws

The proliferation of red flag laws is likely due to their bipartisan appeal: a recent poll found that 77% of Americans supported family-initiated firearm removal orders, while 70% supported law enforcement-initiated orders.⁶² The poll also revealed “widespread” support among Republicans and gun owners.⁶³ According to NPR, red flag laws are palatable for those who may be traditionally opposed to gun control because they are inherently temporary and are targeted at specific, at-risk individuals and thus do not apply equally

56. *Extreme Risk Protection Orders*, *supra* note 12.

57. *ERPO Procedures by State PDF*, GIFFORDS L. CTR., https://giffords.org/wp-content/uploads/2020/02/ERPO_Table_2-26-20.pdf [<https://perma.cc/7L3S-GQ3D>]; *Extreme Risk Protection Orders*, *supra* note 12.

58. *ERPO Procedures by State PDF*, *supra* note 57; *Extreme Risk Protection Orders*, *supra* note 12.

59. *ERPO Procedures by State PDF*, *supra* note 57; *Extreme Risk Protection Orders*, *supra* note 12. *E.g.*, MASS. GEN. LAWS ANN. ch. 140, § 131T(c) (West 2021).

60. *Extreme Risk Protection Orders*, *supra* note 12.

61. *ERPO Procedures by State PDF*, *supra* note 57; *Extreme Risk Protection Orders*, *supra* note 12. Compare CONN. GEN. STATE. ANN. § 29-38c(a) (West 2021), and DEL. CODE ANN. tit. 10 § 7703(d)(2) (2020), with CAL. PENAL CODE § 1524(a)(14) (West 2021), and COLO. REV. STAT. ANN. § 16-3-301.5 (West 2021).

62. *APM Survey: Americans' Views on Key Gun Policies*, APMRSCH. LAB (Aug. 20, 2019), <https://www.apmresearchlab.org/gun-survey-red-flag> [<https://perma.cc/AAE2-UELV>].

63. *Id.*

to all gun owners.⁶⁴ In essence, because the laws aim to restrict dangerous individuals rather than dangerous guns, gun rights advocates have expressed more support for red flag laws than they have for other gun control proposals.⁶⁵

For example, in the aftermath of the mass shootings in El Paso and Dayton in August of 2019, then-President Trump, a strong Second Amendment supporter, publicly backed red flag laws.⁶⁶ In a televised speech, he reportedly remarked: “We must make sure that those judged to pose a grave risk to public safety do not have access to firearms and that if they do, those firearms can be taken through rapid due process That is why I have called for red flag laws”⁶⁷ Shortly after Trump’s statement, key Republican federal legislators also signaled support for red flag laws. Senator Lindsey Graham, a leading conservative and Trump ally, announced that he had reached an understanding with Democratic Senator Richard Blumenthal on a federal grant program that would both enforce existing red flag laws and incentivize other states to adopt them.⁶⁸ Although legislators introduced legislation that would establish the grant program in the 116th Congress, unfortunately, the bills never passed.⁶⁹

Most recently, in June of 2021, at the direction of President Biden, the Justice Department issued model legislation from which states could draw in crafting their own red flag laws.⁷⁰ The federal model includes various approaches that the Justice Department adopted from states where red flag laws are already on the books.⁷¹ Likewise, the Biden Administration has urged Congress to encourage states to enact red flag laws through

64. Treisman, *supra* note 8.

65. Timothy Williams, *What Are ‘Red Flag’ Gun Laws, and How Do They Work?*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/us/red-flag-laws.html?login=smartlock&auth=login-smartlock> [<https://perma.cc/X8AX-A24P>].

66. Anita Kumar, *Trump Confuses Public on Gun Control Stance, but Keeps Private Discussions Alive*, POLITICO (Aug. 20, 2019, 10:42 PM), <https://www.politico.com/story/2019/08/20/trump-gun-control-1470362> [<https://perma.cc/J5NV-VGYW>].

67. Lauren Dezenski, *Trump Backs ‘Red Flag’ Gun Laws. What Do They Actually Do?*, CNN (Aug. 5, 2019, 10:29 PM), <https://www.cnn.com/2019/08/05/politics/red-flag-gun-law-explainer-donald-trump/index.html> [<https://perma.cc/4XFF-4R4H>].

68. *Id.*

69. MICHAEL A. FOSTER, CONG. RSCH. SERV., IF11205, FIREARM “RED FLAG” LAWS IN THE 116TH CONGRESS (2019).

70. Alana Wise, *States Get a Blueprint from the Justice Department for ‘Red Flag’ Gun-Removal Laws*, NPR (June 7, 2021, 5:19 PM), <https://www.npr.org/2021/06/07/1004088968/states-get-a-blueprint-for-red-flag-gun-removal-laws-from-the-justice-department> [<https://perma.cc/XL9G-GCJH>].

71. *Id.*

conditioning states' receipt of federal funding on their adoption of such laws.⁷²

As evidenced by the various proposals, red flag laws currently enjoy nationwide momentum at both the federal and state level. Stakeholders across the country have increasingly recognized that the laws provide a means to take preventative action against gun violence without encroaching on constitutional rights. In the last two and half years alone, fourteen states have adopted red flag legislation, indicating that urgent public policy needs and sound legal rationale underlie the laws.⁷³ Florida's adoption of a red flag law further demonstrates that the statutes satisfy traditionally gun-friendly states.⁷⁴

C. *Effects and Implementation of Red Flag Laws*

Since Connecticut first adopted its innovative firearm seizure statute, relatively little research has evaluated the efficacy and long-term outcomes associated with red flag laws. Nonetheless, three empirical studies support the notion that red flag laws can be effective in curbing gun violence. Importantly, while the impetus for enacting red flag legislation has often been to combat mass shootings or homicides, in practice, these laws have operated largely to seize guns from individuals at risk of suicide.⁷⁵ Consequently, the empirical research has primarily focused on the effects of red flag legislation on suicide rates. The research ultimately suggests that gun seizure laws may be more effective in preventing suicide than in preventing mass shootings, yet there is some indication that the statutes may operate to avert such shootings nonetheless.

72. Ryan J. Foley, *Biden Faces Long Odds in Push for More State 'Red Flag' Laws*, ASSOCIATED PRESS (Apr. 14, 2021), <https://apnews.com/article/joe-biden-donald-trump-shootings-iowa-violence-341c9ecb7287a259e7c7ef67242fa77f> [https://perma.cc/3PLC-WGVT].

73. See Lee, *supra* note 16; Scott Pelley, *A Look at Red Flag Laws and the Battle over One in Colorado*, CBS NEWS: 60 MINUTES (Nov. 17, 2019), <https://www.cbsnews.com/news/red-flag-gun-laws-a-standoff-in-colorado-60-minutes-2019-11-17/> [https://perma.cc/MV6J-2FLM]; Stracqualursi, *supra* note 16.

74. Patricia Mazzei, *Florida Governor Signs Gun Limits into Law, Breaking with the N.R.A.*, N.Y. TIMES (Mar. 9, 2018), <https://www.nytimes.com/2018/03/09/us/florida-governor-gun-limits.html>. Even so, one state—Oklahoma—has enacted an “anti-red flag” law, which prevents the state’s local governments from passing red flag legislation. Rachel Harrison, *Study Examines “Red Flag” Gun Laws and State Efforts To Block Local Legislation*, N.Y.U. (June 24, 2021), <https://www.nyu.edu/about/news-publications/news/2021/june/red-flag-gun-laws.html> [https://perma.cc/GTF9-W3CK].

75. See Kivisto & Phalen, *supra* note 20, at 861.

1. Effects of Red Flag Laws

In 2017, Jeffery Swanson and colleagues published the first empirical evaluation of a red flag law.⁷⁶ The researchers endeavored to inform other states considering adopting gun-seizure legislation by evaluating the implementation and outcomes of the gun removals ordered under Connecticut's pioneering gun removal statute.⁷⁷ Using data gathered from court records, arrest records, public health records, and death records, along with descriptive statistical analyses of all gun removal cases from the law's inception in 1999 through 2013, the researchers conducted a quasi-experimental analysis of the effect of the gun removal policy on suicide rates.⁷⁸

The researchers first created a gun seizure database that recorded various characteristics of all individuals whose firearms were seized during the study period.⁷⁹ Analyses of the database revealed that twenty-one individuals subject to a gun-seizure order had subsequently died from suicide, and that guns were responsible for six of these suicides.⁸⁰ The remaining fifteen were attributed to other means.⁸¹ Drawing from Connecticut's population data regarding the fatality rate associated with various suicide methods, the researchers estimated that these twenty-one completed suicides represented a total of 142 suicide attempts.⁸²

The researchers used this figure to generate a counterfactual model that estimated the number of suicide fatalities that could have been expected had the individuals been able to keep their firearms and use a firearm to attempt suicide.⁸³ Accordingly, pursuant to population trends, Swanson and colleagues expected a total of ninety-three suicides among the population of individuals subjected to firearm removal orders from 1999 to 2013.⁸⁴ Only twenty-one suicides actually occurred.⁸⁵ Thus, the researchers estimated that roughly one suicide was averted for every ten to twenty gun removal cases.⁸⁶ In assessing their results, Swanson et al. concluded that "risk-based removal

76. See Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does It Prevent Suicides?*, 80 *LAW & CONTEMP. PROBS.* 179, 180 (2017).

77. *Id.* at 180.

78. *Id.* at 190.

79. *Id.*

80. *Id.* at 206.

81. *Id.*

82. *Id.* at 201.

83. *Id.* at 206.

84. *Id.* at 203.

85. *Id.*

86. *Id.* at 206.

laws . . . can be at least modestly effective in preventing suicide,” and that “enacting and implementing laws like Connecticut’s civil risk warrant statute in other states could significantly mitigate the risk posed by that small proportion of legal gun owners who, at times, may pose a significant danger to themselves or others.”⁸⁷

Shortly after Swanson and colleagues published their foundational study, Kivisto and Phalen conducted a similar statistical analysis that largely corroborated the initial study’s findings.⁸⁸ In expanding the scope of Swanson et al.’s research, Kivisto and Phalen evaluated the extent to which firearm seizure laws in Connecticut and Indiana affected state-level suicide rates.⁸⁹ Kivisto and Phalen examined the firearm and non-firearm suicide rates in Connecticut and Indiana beginning in 1981 and continuing for ten-year periods after each state enacted its respective gun removal law.⁹⁰

Relying on panel data gathered from all fifty states, the researchers found an association between firearm seizure legislation and a subsequent reduction in firearm suicide rates in both states.⁹¹ In the first decade after Indiana enacted its red flag law, analyses showed a 7.5% decrease in firearm suicides.⁹² Kivisto and Phalen estimated that the law may have prevented 383 firearm suicides, while potentially contributing to forty-four non-firearm suicides.⁹³

In Connecticut, the analyses demonstrated only a modest decrease in firearm suicides (1.6%) in the first decade of the red flag law’s existence, but this reduction increased dramatically to 13.7% after the state ramped up enforcement of the law following the 2007 Virginia Tech shooting.⁹⁴ Kivisto and Phalen estimated that between 2007 and 2015, increased enforcement of the law may have prevented 128 firearm suicides but contributed to 140 non-firearm suicides, as the state experienced an aggregate increase in non-firearm suicides.⁹⁵ Kivisto and Phalen’s findings “suggest that firearm seizure legislation is associated with meaningful reductions in population-level firearm suicide rates, with mixed evidence for a replacement effect.”⁹⁶

87. *Id.* at 208.

88. Kivisto & Phalen, *supra* note 20, at 855.

89. *Id.* at 856.

90. *Id.* Kivisto and Phalen note that Connecticut significantly increased the enforcement of its firearm seizure law after the Virginia Tech shooting in April of 2007. *Id.* Accordingly, the researchers also included a pre-enactment period of Connecticut’s increased enforcement, which lasted from 1981 through 2006, and a post-enforcement period from 2007 to 2015. *Id.*

91. *Id.* at 856–57.

92. *Id.* at 857.

93. *Id.* at 858.

94. *Id.*

95. *Id.*

96. *Id.* at 861.

Most recently, researchers from the University of California Davis School of Medicine switched the empirical focus on red flag laws from suicide prevention to mass shooting prevention.⁹⁷ In their preliminary case study, Wintemute and colleagues gauged the implementation and effectiveness of California's red flag law through describing the circumstances surrounding several cases in which ERPOs—locally referred to as gun violence restraining orders (GVROs)—were issued to prevent mass shootings.⁹⁸ The researchers requested the county court records for all 414 GVRO cases initiated in the first two years of the statute's existence (2016–2018).⁹⁹ At the time of publication, the courts had provided only 159 of these records.¹⁰⁰

Nonetheless, Wintemute and colleagues extracted all cases in which “(1) a judicial officer issued a GVRO after the subject of the order had made a clear declaration of intent to commit a mass shooting or had exhibited behavior suggesting such an intent, and 2) the subject had or would soon have access to firearms,” resulting in a sample of twenty-one GVRO cases.¹⁰¹ Most of the individuals had made explicit threats and owned their own firearms.¹⁰² Notably, as of August of 2019 (when the study was published), Wintemute and colleagues reported that no post-GVRO violent event had occurred—be it a mass shooting, homicide, or suicide—among the twenty-one subjects in their case study.¹⁰³ The researchers concluded that while “it is impossible to know whether violence would have occurred had GVROs not been issued . . . these cases suggest that this urgent, individualized intervention can play a role in efforts to prevent mass shootings.”¹⁰⁴

2. Implementation of Red Flag Laws

The following provides a brief account of the extent to which a few key states have enforced their respective red flag laws. While the figures demonstrate that the degree of ERPO enforcement varies across states, they suggest a trend towards more vigorous initial enforcement of ERPO legislation among states who have just recently enacted red flag legislation when compared with states whose laws have been in existence for several years.

97. Garen J. Wintemute et al., *Extreme Risk Protection Orders Intended To Prevent Mass Shootings: A Case Series*, 171 ANNALS INTERNAL MED. 655, 655 (2019).

98. *Id.*

99. *Id.* at 656.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 655.

104. *Id.* at 657.

The states whose red flag statutes have been on the books longer have demonstrated a more gradual approach to implementation. Connecticut, for instance, the first state to adopt red flag legislation in 1999, seized very few guns during the first eight years of the law's enactment.¹⁰⁵ Enforcement of the law increased dramatically, however, following the mass shooting at Virginia Tech on April 16, 2007.¹⁰⁶ Even so, Connecticut only issued 762 firearm seizures between 1999 and 2013.¹⁰⁷ Additionally, Indiana, whose red flag law went into effect in 2005, issued 404 firearm seizures between 2006 and 2013 in Marion County (which contains Indianapolis and is responsible for the majority of the state's ERPO cases).¹⁰⁸ During this period, Indiana judges dismissed 29% of cases at the initial hearing stage but retained the seized firearms in 63% of cases.¹⁰⁹

By contrast, other states have been very aggressive in executing red flag order legislation. In Florida, between the law's enactment in March 2018 and July 2019, courts granted a total of 2,227 ERPOs.¹¹⁰ Florida judges granted petitions for ex parte orders 97% of the time and granted petitions for final orders 99% of the time.¹¹¹ These cases include multiple instances in which judges invoked orders to combat possible threats of school violence, including a potential school shooter who said killing people would be "addicting."¹¹²

Similarly, in Maryland, in the first three months of the statute's enactment in 2018, the state received 302 petitions for gun seizure.¹¹³ Family or household members filed roughly 60% of these petitions, while law enforcement filed the remaining 40%, save one filed by a healthcare

105. Kivisto & Phalen, *supra* note 20, at 855.

106. *Id.*

107. *Id.*

108. *Id.*; See George F. Parker, *Circumstances and Outcomes of a Firearm Seizure Law: Marion County, Indiana, 2006-2013*, 33 BEHAV. SCIS. & L. 308, 312 (2015).

109. Parker, *supra* note 108, at 308.

110. Rafael Olmeda, *Thousands of Guns Taken Under Red Flag Law, but South Florida Lags in Applying It*, S. FLA. SUN SENTINEL (Sept. 21, 2019, 12:54 PM), <https://www.sun-sentinel.com/news/crime/fl-ne-red-flag-law-review-20190921-ygedayoyybaczmpzrrsy7kssdu-story.html> [<https://perma.cc/N5J6-5RRY>].

111. *Id.*

112. *Extreme Risk Laws Save Lives*, EVERYTOWN FOR GUN SAFETY (July 8, 2021), https://everytownresearch.org/extreme-risk-laws-save-lives/#foot_note_33 [<https://perma.cc/YNH9-35FB>].

113. Ovetta Wiggins, *Red-Flag Law in Maryland Led to Gun Seizures from 148 People in First Three Months*, WASH. POST (Jan. 15, 2019), https://www.washingtonpost.com/local/md-politics/red-flag-law-in-maryland-led-to-148-gun-seizures-in-first-three-months/2019/01/15/cfb3676c-1904-11e9-9ebf-c5fed1b7a081_story.html [<https://perma.cc/44Q4-7AVH>].

worker.¹¹⁴ Maryland judges granted approximately half of the petitions,¹¹⁵ including at least four cases involving “significant threats” against schools.¹¹⁶ Ultimately, these results suggest that the increased enforcement of gun seizure orders may be a product of the elevated attention that public discourse has afforded gun violence in recent years.

D. Red Flag Law Due Process Considerations

The controversy surrounding red flag laws extends from the charged debate concerning the Second Amendment itself. Doctrinally, the Second Amendment is unique in that it was largely inert as a matter of public significance for the first 200 years of its existence.¹¹⁷ In fact, the societal fixation on the individual right to own a gun simply did not exist for the majority of our nation’s history.¹¹⁸ Throughout the twentieth century, the legal community generally accepted the Amendment as an “antiquated” and “outdated” regulation involving militias, and it was one of the least discussed, least debated, and least litigated constitutional amendments.¹¹⁹ Remarkably, however, in a short period of time, the Amendment completely transformed into being an explosive subject of public controversy.¹²⁰

1. The State of the Second Amendment

While “the right of the people to keep and bear arms” has been preserved in the Second Amendment to the Constitution since 1792,¹²¹ prior to 2008, there was no federal constitutional right to keep and bear arms for private purposes.¹²² When the Amendment was enacted, the ability of individuals—specifically adult white males—to keep and bear arms in their homes was

114. *Id.*

115. *Id.*

116. *Extreme Risk Laws Save Lives*, *supra* note 112.

117. JOSEPH BLOCHER & DARRELL A. H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* 13 (2018); More Perfect, *The Gun Show*, WNYC STUDIOS (Oct. 12, 2017), <https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/gun-show> [<https://perma.cc/9JSN-9UEU>].

118. More Perfect, *supra* note 117.

119. *Id.*

120. *Id.*

121. Craig R. Whitney, *Arms and the Men*, N.Y. TIMES (June 19, 2014), <https://www.nytimes.com/2014/06/22/books/review/the-second-amendment-and-this-nonviolent-stuffll-get-you-killed.html> [<https://perma.cc/R42H-MZEL>].

122. BLOCHER & MILLER, *supra* note 117, at 13.

virtually a given.¹²³ The common law had always provided individuals with the right to own firearms, and in many places men were required to keep arms if they were ever to be called to serve in local militias.¹²⁴

Notably, during the framing of the Constitution, the Founders proposed the Second Amendment as a mechanism to alleviate anti-federalist fears that the new centralized government could easily become tyrannical if it had complete control over a national standing army.¹²⁵ As a deterrent against such tyranny, each of the thirteen states would be allowed a state militia comprised of an armed citizenry.¹²⁶ The full text of the ratified Amendment, and specifically its initial clause, implies this purpose: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹²⁷

For the next two centuries, the militia-based interpretation of the Amendment—holding that the constitutional right to keep and bear arms was limited to activities having some relation to state militias—largely prevailed.¹²⁸ As state militias gradually dissipated, the Second Amendment survived, but it was seldom used to prohibit state-imposed gun regulations.¹²⁹ Firearms were not illegal and actually enjoyed some constitutional protection, as the vast majority of state constitutions included a right to keep and bear arms.¹³⁰ Firearm regulations were thus litigated in state courts with challengers invoking state constitutional provisions, but the Second Amendment was left to the wayside.¹³¹ During this period, the Supreme Court rarely heard cases implicating the Second Amendment, and not one federal case invalidated a law on Second Amendment grounds.¹³²

Nonetheless, as society and technology changed throughout the nineteenth and twentieth centuries, and handguns became increasingly available, popular attitudes regarding firearms as a means of self-defense and self-empowerment began to take hold.¹³³ During the peak of racial and political

123. Whitney, *supra* note 121.

124. *Id.*; Adam Winkler, *The Secret History of Guns*, ATLANTIC (Sept. 2011), <https://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/> [<https://perma.cc/8XT9-EGRM>].

125. Whitney, *supra* note 121.

126. *Id.*

127. U.S. CONST. amend. II.

128. BLOCHER & MILLER, *supra* note 117, at 59.

129. Whitney, *supra* note 121.

130. BLOCHER & MILLER, *supra* note 117, at 59.

131. *Id.*

132. *Id.* at 13.

133. *See* Whitney, *supra* note 121.

turbulence in the late 1960s, a new individual-rights reading of the Amendment gained prominence.¹³⁴

In 1967, the Black Panthers acquired national recognition as one of the first groups to claim an individual right to carry guns.¹³⁵ The Panthers came to value guns for the purposes of liberation and self-protection, namely protection from the police.¹³⁶ Pursuant to existing California law, members carried guns openly in public and would observe from a distance and shout legal advice while police stopped black individuals.¹³⁷ On May 2, 1967, thirty armed Black Panthers attempted to enter the California state capitol in an effort to protest a bill that would effectively disarm the Panthers by proscribing the carrying of a loaded weapon in any California city.¹³⁸

The Panthers' strategies provoked immediate backlash in the form of increased support for both state and national gun regulation.¹³⁹ In addition, the devastating assassinations of John F. Kennedy, Martin Luther King, Jr., and Robert F. Kennedy, paired with the ensuing violent riots and political unrest of the late 1960s, spurred Congress's enactment of the Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act of 1968, which were the first federal gun-control laws to be passed in three decades.¹⁴⁰

While the National Rifle Association (NRA) today operates as one of the fiercest gun-rights advocacy groups, the organization was not founded on political grounds.¹⁴¹ In fact, it was initially designed to increase civilian marksmanship training and was moderately political, if at all.¹⁴² Historically, the association actually supported legislative efforts to enact gun control and even backed the Gun Control Act of 1968.¹⁴³ Over the next several years however, more and more individuals sympathetic to gun rights as a means to self-protection in a time of starkly rising crime rates joined the organization, which culminated in an intra-organization fission.¹⁴⁴ In 1977, a group of gun-rights hardliners staged a coup of the NRA's annual membership meeting that ultimately placed gun-rights advocates in NRA leadership

134. See More Perfect, *supra* note 117; Whitney, *supra* note 121.

135. See, e.g., Winkler, *supra* note 124; More Perfect, *supra* note 117.

136. Winkler, *supra* note 124; More Perfect, *supra* note 117.

137. Winkler, *supra* note 124.

138. *Id.*

139. See *id.*

140. See *id.* These laws limited which individuals could own guns and expanded the federal licensing system for firearm dealers. *Id.*

141. More Perfect, *supra* note 117.

142. *Id.*

143. Winkler, *supra* note 124.

144. More Perfect, *supra* note 117.

positions and jumpstarted the organization's transformation into the aggressive lobbying powerhouse that it is today.¹⁴⁵

Interestingly, the new NRA's and the Black Panthers' views of the right to keep firearms were somewhat analogous.¹⁴⁶ The two groups coveted firearms for self-defense purposes and shared a similar distrust of law enforcement and governmental agencies.¹⁴⁷ Somewhat ironically, while the new federal regulations initially aimed to disarm African American left-leaning radicals, many white rural conservatives in the NRA suspected the government of targeting their guns next.¹⁴⁸ The initial advocacy by the Panthers, followed by the insistent lobbying of the NRA, drew popular attention to the concept of the individual right to carry, an argument that garnered momentum within American society throughout the subsequent decades and ultimately prevailed in 2008 with the Supreme Court's landmark holding in *District of Columbia v. Heller*.¹⁴⁹

In *Heller*, the Supreme Court considered a challenge to a D.C. gun-control statute that effectively banned the possession of handguns.¹⁵⁰ The statute specifically prohibited the registration of handguns, criminalized the carrying of an unlicensed firearm in the home, and required citizens to keep lawfully owned firearms unloaded and disassembled or bound by a trigger lock.¹⁵¹ Heller, a D.C. special police officer, applied to register a handgun he wished to keep at home, was denied, and then filed a lawsuit seeking to enjoin D.C. from enforcing the aforementioned provisions.¹⁵² Writing for the five-Justice majority, Justice Scalia held that the Second Amendment protected an individual's right to possess a firearm and to use that firearm for traditionally lawful purposes, such as self-defense within the home.¹⁵³ Accordingly, the Court struck down the D.C. provisions as unconstitutional.¹⁵⁴

In the opinion, Scalia reasoned that the prefatory "militia" clause announced the Amendment's purpose but did not limit or expand the second "operative" clause, which connotes an individual right to keep and bear arms.¹⁵⁵ Scalia relied on the text and history of the operative clause in reaching his decision, specifically asserting that the Amendment's reference

145. Winkler, *supra* note 124.

146. *Id.*

147. *See id.*

148. *See* More Perfect, *supra* note 117.

149. 554 U.S. 570, 635 (2008); *see* More Perfect, *supra* note 117.

150. *Heller*, 554 U.S. at 573.

151. *Id.* at 574–75.

152. *Id.* at 575–76.

153. *See id.* at 625.

154. *Id.* at 635.

155. *Id.* at 577, 592.

to a “right of the people” codified an individual right because the same language as used in both the unamended Constitution and Bill of Rights “unambiguously refer[s] to individual rights, not ‘collective’ rights, or rights that may be exercised only through participation in some corporate body.”¹⁵⁶

Importantly, Scalia clarified that the individual right to bear arms is not unlimited.¹⁵⁷ He noted that “the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,” and he confirmed the validity of laws prohibiting “the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”¹⁵⁸

Ultimately, the Court found the D.C. provisions to be unconstitutional.¹⁵⁹ Scalia reasoned that the total ban on handgun possession, especially as it applied to guns kept in the home, “where the need for defense of self, family, and property is most acute,” “amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense].”¹⁶⁰ Similarly, the Court found the requirement that all firearms in the home be disassembled or bound by a trigger lock to be unconstitutional because it would make it impossible for citizens to use their guns for the “core lawful purpose” of self-defense.¹⁶¹

Two years following *Heller*, the Supreme Court heard arguments in *McDonald v. Chicago*, a case involving a Chicago handgun ban that challengers asserted violated the Second and Fourteenth Amendments.¹⁶² In its decision, the Court held that because self-defense is “deeply rooted in this Nation’s history and tradition,” and thus a fundamental right,¹⁶³ the Second Amendment’s protections of the right to keep and bear arms for the purpose of self-defense are incorporated by the Due Process Clause of the Fourteenth Amendment against the states.¹⁶⁴ While it effectively invalidated the Chicago statutes, the Court nonetheless reaffirmed the permissible limitations on the right to keep and bear arms that *Heller* previously carved out (e.g., possession by felons or the mentally ill).¹⁶⁵

156. *Id.* at 579.

157. *Id.* at 626.

158. *Id.* at 626–27.

159. *Id.* at 635.

160. *Id.* at 628.

161. *Id.* at 630.

162. 561 U.S. 742, 752 (2010).

163. *Id.* at 767 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

164. *Id.* at 784–85.

165. *Id.* at 786.

In both *Heller* and *McDonald*, the Court ascribed particular importance to the “core” of the Second Amendment.¹⁶⁶ However, throughout the majority of our nation’s history, the so-called “core,” or central purpose, of the Amendment was largely a subject of speculation.¹⁶⁷ In contrast to other amendments, and in large part due to its lack of litigation throughout the preceding two centuries, the Second Amendment has a “surprisingly thin theoretical foundation.”¹⁶⁸ Courts and scholars have nonetheless attempted to identify the central values that the Framers intended the Amendment to protect.

While *Heller* and *McDonald* held that self-defense is a central component of the Amendment, Blocher and Miller argue that the concept of self-defense alone is too vague and capacious to function as the sole constitutional theory underlying the Amendment.¹⁶⁹ Alternatively, Blocher and Miller offer safety, autonomy, and anti-tyranny as additional rationales that elucidate the purpose of the Amendment.¹⁷⁰ To the extent that one of these values takes precedence, safety is the likely frontrunner: “[Safety] seems to best capture the popular understanding of the Amendment as a provision dedicated to personal self-defense against private violence and it best unifies the various strands of the *Heller* opinions.”¹⁷¹

Nevertheless, Second Amendment jurisprudence is, and will continue to be, shaped by a plurality of values because the Amendment itself is complicated and nuanced, as is public discussion of it.¹⁷² While some believe that the right to keep and bear arms is clear, absolute, and should be exempt from all regulation, others consider the Second Amendment to be anachronistic at best, nefarious at worst, and ripe for repeal.¹⁷³ If there are any certainties, however, one is that the Amendment protects the right to keep and bear arms for some individual purposes, but that it “is and has always been subject to regulation.”¹⁷⁴

166. *Heller*, 554 U.S. at 630; *McDonald*, 561 U.S. at 767–68.

167. See BLOCHER & MILLER, *supra* note 117, at 150–51.

168. See *id.* at 150 (noting that in contrast to the Second Amendment, “[t]he First Amendment’s free speech guarantee and the Fourteenth Amendment’s guarantee of equal protection have been subject to a century’s worth of debate involving courts, scholars, and the public”).

169. *Id.* at 152; see also *Heller*, 554 U.S. at 687 (Breyer, J., dissenting) (“[S]elf-defense . . . is the *beginning*, rather than the *end*, of any constitutional inquiry.”).

170. BLOCHER & MILLER, *supra* note 117, at 154–65.

171. *Id.* at 170.

172. *Id.* at 4, 170.

173. *Id.* at 4.

174. *Id.*

2. Framework for Analyzing Second Amendment Challenges

In the years since the Supreme Court's decision in *Heller*, courts have grappled with developing a consistent framework for determining whether certain gun regulations unconstitutionally infringe on the Second Amendment.¹⁷⁵ One leading appellate case, *United States v. Marzzarella*, implemented a two-pronged approach to Second Amendment challenges that has been widely adopted.¹⁷⁶ Accordingly, courts should first ask "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee," that is, determine whether the case implicates the Second Amendment at all.¹⁷⁷ If it does, courts should then "evaluate the law under some form of means-end scrutiny," and thus assess whether the restrictions on the Second Amendment are justified.¹⁷⁸

With regard to the threshold inquiry, courts usually rely on the specific categories identified in *Heller* or a mix of precedent, history, and tradition to determine whether the restricted conduct is covered by the Second Amendment.¹⁷⁹ If the court finds the conduct to be outside of the Amendment's ambit, then the case is over.¹⁸⁰ If not, the inquiry then proceeds to the more nuanced second stage, wherein the court will apply the appropriate standard of scrutiny to determine whether the restriction is sufficiently tailored to meet the applicable state interest.¹⁸¹

Courts have applied varying levels of scrutiny to Second Amendment challenges.¹⁸² In *United States v. Masciandaro*, the Fourth Circuit held that the proper standard depends on how much the regulation burdens the "core" of the Second Amendment according to *Heller*: "[the] right of self-defense in the home by a law-abiding citizen."¹⁸³ If a law burdens this right, it is subject

175. *See id.* at 101–02.

176. 614 F.3d 85, 89 (3d Cir. 2010); BLOCHER & MILLER, *supra* note 117, at 110; *see also* *United States v. Masciandaro*, 638 F.3d 458, 460 (4th Cir. 2011) (utilizing a similar two-pronged analysis as *Marzzarella*).

177. *Marzzarella*, 614 F.3d at 89.

178. *Id.*

179. *NRA v. ATF*, 700 F.3d 185, 194 (5th Cir. 2012) ("To determine whether a law impinges on the Second Amendment right, we look to whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee."); BLOCHER & MILLER, *supra* note 117, at 106, 110 (referring to the categories labeled in *Heller* as being categorically excluded from Second Amendment coverage, e.g., felons and the mentally ill).

180. *Marzzarella*, 614 F.3d at 89.

181. *Id.*

182. *See* *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011) (applying intermediate scrutiny and defining it as requiring the government to show that the law is "reasonably adapted to a substantial governmental interest"); *NRA*, 700 F.3d at 205 (applying intermediate scrutiny and defining it as a "reasonable fit between the law and an important government objective"); BLOCHER & MILLER, *supra* note 117, at 109, 111–12.

183. *Masciandaro*, 638 F.3d at 470.

to strict scrutiny and must be “narrowly tailored to advance a compelling government interest.”¹⁸⁴

If, however, the regulation does not burden the “core,” courts often apply a lower level of scrutiny.¹⁸⁵ As stated in *Masciandaro*, “as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.”¹⁸⁶ In *Masciandaro*, because the challenged regulation involved self-defense *outside* the home and was thus at the “periphery” of the Second Amendment right, the court applied intermediate scrutiny and required the government to demonstrate that the regulation was “reasonably adapted to a substantial governmental interest.”¹⁸⁷ Importantly, however, the Court in *Heller*—albeit in dicta—asserted that the lowest level of scrutiny, rational basis review, was inappropriate for Second Amendment challenges and “could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right” such as “the right to keep and bear arms.”¹⁸⁸

3. Red Flag Law Challenges Across the Country

Given the controversy surrounding the gun-control debate, due process challenges to existing red flag laws have inevitably infiltrated the courts. The proliferation of red flag laws, however, is very recent, and therefore litigation challenging the laws is only in its infancy. Thus far, only three state appellate courts have entertained red flag law challenges, and each court has upheld the law despite the challengers’ due process concerns. Though this may indicate a nationwide trend towards finding the laws constitutional, the dearth of litigation and variation between the laws themselves leaves ample room for courts to arrive at alternate conclusions. After all, plenty of public discourse asserts that the laws are unconstitutional; it is all too likely that a judicial body might decide to follow suit.

As Indiana was one of the first states to adopt a red flag law, it follows logically that one of the three formal red flag law challenges arose out of Indiana in 2013.¹⁸⁹ After encountering Robert Redington overlooking a nearby bar from a third-floor parking garage with a range finder and three firearms, and subsequently observing extremely bizarre and alarming statements from him, law enforcement obtained a warrant to seize

184. *Id.* at 469, 470.

185. *Id.* at 471; BLOCHER & MILLER, *supra* note 117, at 109.

186. *Masciandaro*, 638 F.3d at 470.

187. *Id.* at 471; BLOCHER & MILLER, *supra* note 117, at 109.

188. *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

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

Redington's guns.¹⁹⁰ Upon execution of the warrant, police recovered forty-eight firearms and enough ammunition to "fill up the back of a pickup truck" from Redington's home.¹⁹¹ After an evidentiary hearing wherein a psychiatrist testified that Redington suffered from a personality disorder, the court issued an order to retain Redington's firearms, acknowledging that the State had proved by clear and convincing evidence that Redington was dangerous.¹⁹²

On appeal, Redington brought an as-applied challenge to the constitutionality of Indiana's red flag law.¹⁹³ Applying rational basis review, "which requires that the legislation bear a rational relation to a legitimate governmental purpose," the Indiana Court of Appeals upheld the law as a valid exercise of the state's police power.¹⁹⁴ Notably, the court "accord[ed] considerable deference to the judgment of the legislature" because "the decision as to what constitutes a public purpose is first and foremost a legislative one."¹⁹⁵ The court likewise cited *Heller* and *McDonald* as justification for the idea that "prohibiting the mentally ill from possessing firearms" is a "legitimate governmental purpose."¹⁹⁶

Finally, the court decided that even if the law implicated the constitutional "core value" of the "right for law-abiding citizens to bear arms for self defense," it nonetheless did not "materially burden[]" that value.¹⁹⁷ In reaching its decision, the court noted that the law provided a mechanism whereby Redington could recover his firearms and also did not preclude him from possessing other weapons for self-defense.¹⁹⁸ Accordingly, the court ruled that the law was not unconstitutional as applied to Redington.¹⁹⁹

190. *Id.* at 825–27.

191. *Id.* at 827.

192. *Id.* at 828.

193. *Id.* at 830.

194. *Id.* at 832–33. As noted *supra* note 188 and accompanying text, *Heller* indicated in a footnote that rational basis review is inappropriate for Second Amendment challenges. However, the Indiana appellate court was able to apply this lower standard of review because the Supreme Court's assertion was dicta, and therefore not controlling, and the challenge was brought against the state's constitution, not the Second Amendment. Even so, there has been a lot of debate over the appropriate level of scrutiny to apply in gun rights cases and lower courts (including state courts) have not applied a consistent standard. See *Appendix B: Lower Court Approvals of Gun Regulations Post Heller*, N.Y.U. J. LEGIS. & PUB. POL'Y, <https://nyujlpp.org/appendix-b-lower-court-approvals-of-gun-regulations-post-heller/> [https://perma.cc/DG88-882C].

195. *Redington*, 992 N.E.2d at 832 (quoting *Whittington v. State*, 669 N.E.2d 1363, 1369 (Ind. 1996)).

196. *Id.* at 832–33.

197. *Id.* at 833 (quoting *Lacy v. State*, 903 N.E.2d 486, 490 (Ind. Ct. App. 2009)).

198. *Id.* at 834.

199. *Id.* at 834–35.

Connecticut's pioneering red flag law has also been subject to legal scrutiny.²⁰⁰ In 2016, the Connecticut Appellate Court upheld an order seizing Donald Hope's firearms for one year on the grounds that he posed an "imminent risk of physical harm to himself or others."²⁰¹ Hope had previously exhibited increasingly delusional and erratic behavior, had drawn a firearm in the presence of his wife, and had called the police to report a fabricated burglary on two different occasions.²⁰²

When Hope challenged the constitutionality of the red flag law under the Second Amendment, the court applied the two-pronged approach outlined in *Marzzarella* and concluded that the red flag law "does not implicate the second amendment, as it does not restrict the right of *law-abiding, responsible* citizens to use arms in defense of their homes."²⁰³ Instead, the court reasoned that the law "restricts for up to one year the rights of only those whom a court has adjudged to pose a risk of imminent physical harm to themselves or others after affording due process protection to challenge the seizure of the firearms."²⁰⁴ Further, the court determined that the law was "an example of the longstanding 'presumptively lawful regulatory measures' articulated in *District of Columbia v. Heller*."²⁰⁵

A Florida appellate court was the third and most recent court to consider a red flag law challenge.²⁰⁶ In the fall of 2019, the District Court of Appeal of Florida upheld a risk protection order issued against Jefferson Eugene Davis, a deputy sheriff.²⁰⁷ Davis, who was suspicious of his girlfriend's infidelity with another officer, confronted his girlfriend, became belligerent, hostile, and threatening, and made problematic statements to the Sheriff in a private interview.²⁰⁸

On appeal, Davis challenged the facial constitutionality of the red flag law.²⁰⁹ In assessing the claim, the court acknowledged that the statute "impair[ed] the exercise of a fundamental right" and thus applied strict scrutiny.²¹⁰ Notably, however, the court found the statute to pass muster under

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

201. *Id.* at 525.

202. *Id.*

203. *Id.* at 524 (emphasis added); see *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

204. *Hope*, 133 A.3d at 524.

205. *Id.* at 524–25 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 n.26 (2008)).

206. *Davis v. Gilchrist Cnty. Sheriff's Off.*, 280 So.3d 524, 528 (Fla. Dist. Ct. App. 2019).

207. *Id.* at 533.

208. *Id.* at 528–29. Davis told the Sheriff that he "wanted to kill his girlfriend's paramour" and "want[ed] to shoot him in the face, eat his food, and wait for [law enforcement] to pick [him] up." *Id.* at 529.

209. *Id.* at 531.

210. *Id.*

heightened scrutiny: “[T]he prevalence of public shootings, and the need to thwart the mayhem and carnage contemplated by would-be perpetrators does represent an urgent and compelling state interest.”²¹¹ The court also accorded a significant degree of deference to the legislature, noting that “legislative acts are afforded a presumption of constitutionality and we will construe the challenged legislation to effect a constitutional outcome when possible.”²¹²

Finally, the court noted several due process safeguards in the statute that bolstered its constitutionality, such as the requirement of a hearing within fourteen days of the filing of a Risk Protection Order (which affords the respondent a prompt opportunity to resist a final order), the requirement that proponents meet the heightened “clear and convincing” burden of proof standard, and the statute’s twelve-month cap on the duration of an order and mechanism allowing for the respondent to request early termination of the order.²¹³

As is clear from the Indiana, Connecticut, and Florida appellate courts’ inconsistent approaches towards analyzing red flag law challenges, courts across the country can adopt different methods of reasoning yet still arrive at similar end results. While the Indiana court applied rational basis review, the Florida court applied strict scrutiny, and the Connecticut court did not engage in means-ends scrutiny because it found no burdening of a fundamental right. It is important to note that the inconsistency in judicial reasoning likely results from the unique factual circumstances giving rise to each challenge as well as the variance across the provisions of the red flag laws themselves.

E. Gun Control Developments in Arizona

Arizonans are free to carry concealed, high-capacity firearms in public spaces without a permit,²¹⁴ thus making Arizona one of the—if not *the*—most

211. *Id.* at 532. This case arose roughly a year and a half after the school shooting in Parkland, Florida. The Florida court’s passionate opinion was likely, in part, a reaction to the tragedy.

212. *Id.* (citing Fraternal Ord. of Police, Mia. Lodge 20 v. City of Miami, 243 So. 3d 894, 897 (Fla. 2018)).

213. *Id.* at 533.

214. Shawn E. Fields, *Guns, Knives, and Swords: Policing a Heavily Armed Arizona*, 51 ARIZ. ST. L.J. 505, 508–09 (2019); see ARIZ. REV. STAT. ANN. § 13-3102 (2021) (lifting the concealed carry ban and eliminating concealed carry permitting requirement); S.B. 1108, 49th Leg., 2d Reg. Sess. (Ariz. 2010); S.B. 1113, 49th Leg., 1st Reg. Sess. (Ariz. 2009) (permitting people in Arizona to carry concealed firearms in bars or restaurants); *Arizona’s Magazine Capacity Restriction*, GUNLAWS101, <https://www.gunlaws101.com/state/law/arizona/magazine-capacity-restriction> [<https://perma.cc/FPY5-W99T>] (“There are no magazine capacity restrictions in Arizona.”).

firearm-friendly states in the nation.²¹⁵ However, the state has not always been so lenient on gun control, and it was not until roughly a decade ago that Arizona's gun control regulations drastically relaxed. Arizona's constitution explicitly protects the individual right to bear arms—"The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired"²¹⁶—but this right is by no means absolute.²¹⁷ In fact, for nearly a century prior to 2010, Arizona heavily constrained individuals' rights to carry weapons in public.²¹⁸ In 1910, when Congress first approved Arizona's constitution, "carrying concealed weapons was prohibited" in the state.²¹⁹ The strict ban on concealed firearm possession remained in force until 2010, when its abrupt suspension transformed Arizona into one of the most permissive states for gun regulation.²²⁰

Arizona's concealed carry ban enjoyed statewide judicial support as late as 1994, when the state's appellate court issued a vehement defense of the prohibition in *State v. Moerman*.²²¹ However, over the ensuing decade and a half, a combination of shifting public attitudes about gun control, the Supreme Court's landmark decision in *Heller*, and President Obama's appointment of Arizona Governor Janet Napolitano to be Secretary of Homeland Security laid the groundwork for the demise of the ban on concealed carry.²²²

Napolitano's departure allowed Jan Brewer, Arizona Secretary of State and first in the line of succession, to assume the governorship.²²³ Brewer, a devoted member of the NRA, immediately pushed several bills that aimed to relax Arizona's gun laws.²²⁴ On April 16, 2010, Governor Brewer signed

215. See *Annual Gun Law Scorecard*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/scorecard/#AZ> [<https://perma.cc/4C4S-4AH8>]; Keith Wood, *Best States for Gun Owners (2020)*, GUNS & AMMO (Feb. 02, 2021), <https://www.gunsandammo.com/editorial/best-states-for-gun-owners/369075> [<https://perma.cc/ZD3G-VGRG>].

216. ARIZ. CONST. art. II, § 26.

217. *State v. Moerman*, 895 P.2d 1018, 1022 (Ariz. Ct. App. 1994) ("First, we note that Article II, section 26 itself provides not an absolute right, but instead a qualified one in which '[t]he right of the individual citizen to bear arms in defense of himself or the State shall not be impaired.'" (alteration in original) (citing U.S. CONST. amend. II).

218. Fields, *supra* note 214, at 513.

219. See *Moerman*, 895 P.2d at 1022 ("Immediately before and after the adoption of Arizona's Constitution, carrying concealed weapons was prohibited.").

220. Fields, *supra* note 214, at 518.

221. *Moerman*, 895 P.2d at 1022.

222. Fields, *supra* note 214, at 520–21.

223. *Id.*

224. S.B. 1113, 49th Leg., 1st Reg. Sess. (Ariz. 2009) (permitting Arizonans to carry concealed firearms in bars and restaurants); S.B. 1168, 49th Leg., 1st Reg. Sess. (Ariz. 2009)

Senate Bill 1108, which lifted the state’s prior ban on concealed carry and made it legal for anyone over the age of twenty-one to carry a concealed firearm without a permit.²²⁵ The signing of the bill solidified Arizona as the third “constitutional carry” state in the country and fueled statewide promotion of pro-gun culture.²²⁶ Since 2013, Arizona has consecutively occupied the top spot on Guns & Ammo’s annual ranking of the “Best States for Gun Owners.”²²⁷

Arizona’s newfound exaltation of virtually unlimited gun rights has not, however, been universally shared throughout the state. Most notably, in 2018 Governor Ducey presented Arizona lawmakers with Senate Bill 1519, a gun safety bill that contained a proposal for Severe Threat Orders of Protection (STOP orders).²²⁸ Ducey developed the bill in coordination with representatives from the education community, law enforcement, and pro-Second Amendment advocacy groups (including the NRA).²²⁹ The Governor announced the plan just weeks after the school shooting in Parkland, Florida, and promoted it as a measure that would facilitate the prophylactic disarmament of individuals known to have behavioral or mental health

(prohibiting property owners from banning the storage of firearms in locked vehicles parked on their lots); Fields, *supra* note 214, at 521.

225. S.B. 1108, 49th Leg., 2d Reg. Sess. (Ariz. 2010); Fields, *supra* note 214, at 521.

226. Fields, *supra* note 214, at 521–22.

227. Wood, *supra* note 215; Keith Wood, *Best States for Gun Owners (2019)*, GUNS & AMMO (Oct. 23, 2019), <https://www.gunsandammo.com/editorial/best-states-for-gun-owners-2019/388346> [<https://perma.cc/C2AJ-EDXG>]; Keith Wood, *Best States for Gun Owners (2018)*, GUNS & AMMO (Oct. 31, 2018), <https://www.gunsandammo.com/editorial/best-states-gun-owners-2018/369076> [<https://perma.cc/7C29-CCWE>]; Keith Wood, *Best States for Gun Owners (2017)*, GUNS & AMMO (Nov. 3, 2017), <https://www.gunsandammo.com/editorial/best-states-for-gun-owners-2017/247983> [<https://perma.cc/J6TK-F253>]; Keith Wood, *Best States for Gun Owners (2015)*, GUNS & AMMO (July 21, 2015), <https://www.gunsandammo.com/editorial/best-states-for-gun-owners-2015/249293> [<https://perma.cc/Q3XZ-35ZA>]; Guns & Ammo Staff, *Best States for Gun Owners (2014)*, GUNS & AMMO (May 22, 2014), <https://www.gunsandammo.com/editorial/best-states-for-gun-owners-2014/249668> [<https://perma.cc/UJH2-SH3H>]; James Tarr, *Best States for Gun Owners (2013)*, GUNS & AMMO (Mar. 14, 2013), <https://www.gunsandammo.com/editorial/ga-ranks-the-best-states-for-gun-owners-in-2013/249968> [<https://perma.cc/N9M7-KTWD>]. Guns & Ammo’s 2016 ranking could not be located.

228. Howard Fischer, *Ducey Agrees to Modified School Safety Bill*, PINAL CENT. (Apr. 11, 2018), https://www.pinalcentral.com/arizona_news/ducey-agrees-to-modified-school-safety-bill/article_3e1fa4d6-1e73-5188-89c5-6151ad6df1a6.html [<https://perma.cc/H73L-KDDR>]; S.B. 1519, 53d Leg., 2d Reg. Sess. (as introduced by Senate, Ariz. 2018) <https://www.azleg.gov/legtext/53leg/2r/bills/sb1519p.htm> [<https://perma.cc/HT3W-EWH6>].

229. Fisher, *supra* note 228; Dustin Gardiner, *NRA Endorses Arizona Gov. Ducey’s Plan To Prevent School Shootings; Bill Passes Committee*, AZ CENT. (Apr. 19, 2018, 7:21 PM), <https://www.azcentral.com/story/news/politics/legislature/2018/04/19/nra-endorses-arizona-gov-duceys-plan-prevent-school-shootings-passes-committee/534553002/> [<https://perma.cc/5ATE-7R2D>].

issues.²³⁰ Ducey alleged that his proposed ERPO “balance[d] the Second Amendment right to bear arms while taking ‘common sense’ steps to prevent a similar mass killing in Arizona.”²³¹

When compared with other states’ ERPOs, Ducey’s original STOP order blueprint contained provisions that expanded the due process protections for respondents yet also imposed dramatic consequences.²³² For example, petitioners would be required to show clear and convincing evidence of the respondent’s risk in order to obtain both an ex parte and a final order.²³³ In addition, final STOP orders, which would be statutorily codified as extended ex parte orders, would only last up to 180 days—a duration markedly shorter than other states’ final orders, which typically last around one year.²³⁴

However, Ducey’s proposal would permit petitions from school administrators, probation officers, behavioral health professionals, roommates, and significant others, in addition to those from law enforcement and family members.²³⁵ The pool of permissible petitioners in Arizona would thus be broader than that of any other state.²³⁶ Ducey’s STOP order proposal also contained a provision requiring that all individuals subject to a STOP order submit to a mandatory mental health and substance abuse evaluation, a requirement absent in all other states’ ERPOs.²³⁷ Finally, Ducey’s bill would allow the imposition of felony charges against any individual who left a gun somewhere accessible to a minor.²³⁸

Senate Bill 1519 met considerable resistance in the Senate, and as it advanced through the legislature, senators drastically scaled back its key

230. Fischer, *supra* note 228; Dustin Gardiner, *Arizona Senate Passes Gov. Ducey’s National Rifle Association-Backed Gun Plan*, AZ CENT. (May 3, 2018, 7:24 AM), <https://www.azcentral.com/story/news/politics/arizona/2018/05/01/arizona-senate-passes-gov-duceys-national-rifle-association-backed-gun-plan/569863002/> [https://perma.cc/HHV8-XW5T].

231. Gardiner, *supra* note 230.

232. See Ariz. S.B. 1519 (introduced version).

233. *Id.* §§ 12-1882(D)–(F), 12-1884(A). Most states require only probable, reasonable, or good cause for ex parte orders. See *supra* note 37 and accompanying text.

234. Ariz. S.B. 1519 § 12-1884(A) (introduced version).

235. *Id.* §§ 12-1881(5), 12-1883(A).

236. See HAW. REV. STAT. ANN. § 134-61 (West 2021); MD. CODE ANN., PUB. SAFETY § 5-601(e) (West 2021). While Hawaii and Maryland permit many different types of individuals to petition, these states do not permit probation officers to petition, as would Arizona under Ducey’s bill. *Extreme Risk Protection Orders*, *supra* note 12.

237. Ariz. S.B. 1519 § 12-1882(A) (introduced version); See *Extreme Risk Protection Orders*, *supra* note 12.

238. Howard Fischer, *Senate Approves Watered Down Gun Bill*, ARIZ. CAPITOL TIMES (May 1, 2018), <https://azcapitoltimes.com/news/2018/05/01/senate-gives-tentative-approval-to-watered-down-gun-bill/> [https://perma.cc/5393-T44J].

provisions.²³⁹ Republican lawmakers opted to remove the language permitting anyone besides law enforcement to petition, effectively “gut[ting]” the bill, according to one senator.²⁴⁰ The provision permitting an extension of an ex parte order to up to 180 days (the final order provision) was also stripped from the bill.²⁴¹ Republicans also rejected the part of the plan that made it a felony to leave a firearm somewhere a minor could access it.²⁴²

Ultimately, Senate Bill 1519 passed the Senate on a 17–13 party-line vote, but lawmakers voted to adjourn before it even came up in the House of Representatives.²⁴³ There was considerable skepticism from both sides of the aisle; Democrats argued that the plan failed to go far enough, and Republicans expressed concern over its possible constitutional violations.²⁴⁴

According to some lawmakers, the bill’s failure could have just been a matter of poor timing.²⁴⁵ Senator Smith, a Republican from Maricopa who sponsored the bill, attributed its failure to the fact that “it was just very late in the year and just happened to be in the middle of a very large budget discussion.”²⁴⁶ Senator Mesnard, a Republican from Chandler and House Speaker at the time, also reported that discussion over #RedforED took priority in the session and that “the gun-safety bill was ‘swallowed up’ in the debate over teacher pay.”²⁴⁷ After the end of the regular session, Ducey vowed that he “hadn’t given up on STOP orders,” yet he failed to push the bill at all in the 2019 session.²⁴⁸ In 2020, Ducey’s support for red flag laws wavered when he stated publicly that as long as he is governor, “there will be no red flag law in the State of Arizona.”²⁴⁹

239. Dustin Gardiner, *Why Did Republican Bills Die in the Arizona Legislature? GOP Goals Shelved Amid #RedForEd*, AZ CENT. (May 15, 2018, 8:02 AM), <https://www.azcentral.com/story/news/politics/legislature/2018/05/15/redford-dashed-some-major-goals-gop-gov-doug-ducey-legislature/588887002/> [<https://perma.cc/9UDJ-2MDR>].

240. Fischer, *supra* note 238.

241. S.B. 1519, 53d Leg., 2d Reg. Sess. § 12-1884 (passed by Senate with amendments, Ariz. 2018), <https://www.azleg.gov/legtext/53leg/2R/bills/SB1519S.pdf> [<https://perma.cc/P32G-B4RH>].

242. Fischer, *supra* note 238.

243. Gardiner, *supra* note 239.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. Ben Giles, *Lawmakers: Ducey Silent on Pushing Gun Control Measure*, ARIZ. CAPITOL TIMES (Aug. 6, 2019), <https://azcapitoltimes.com/news/2019/08/06/lawmakers-ducey-silent-on-pushing-gun-control-measure/> [<https://perma.cc/5BNU-2VYC>].

249. Jim Small, *Ducey Flip-Flops on Red Flag Laws, Says They Won’t Happen on His Watch*, AZ MIRROR (Feb. 13, 2020, 11:41 AM), <https://www.azmirror.com/2020/02/13/ducey->

III. ANALYSIS

Arizona legislators should pass a red flag gun law to address both the amplified concern over deadly gun violence in the United States and the particularly high gun-death rate in Arizona.²⁵⁰ While Ducey's STOP order bill failed in the legislature, the writing is not on the wall for a second red-flag-law attempt in Arizona. As noted above, Senate Bill 1519 passed one congressional body. Its demise in the House may have merely been a product of poor timing. Given sufficient support and advocacy, the passage of a similar ERPO bill is not far-fetched, despite Arizona's current pro-gun culture. Two potential avenues exist for an Arizona red flag law: the practical Arizona ERPO, summarized in Part A, and the necessary Arizona ERPO, described in Part B.

A. *The Practical Arizona ERPO*

The practical Arizona ERPO proposed by this Comment consists of a more lenient version of the STOP order proposed in Senate Bill 1519. This ERPO concedes all of the provisions that the Senate struck from the initial bill in 2018 and would therefore be well-positioned to pass at least one congressional body. For instance, the statute would only permit law enforcement to petition for protection orders. The statute would also only recognize emergency protection orders, and thus would not permit an individual's weapons to be confiscated for a significant period of time, as is the case in a typical final order. That said, the ERPO would last for a period of fourteen days, at most. In addition, police officers would need to show that they have probable cause to believe that the respondent poses a significant danger of imminently causing death or serious injury to him- or herself or others in order to bring the respondent into custody. The officer would need to establish these factors by clear and convincing evidence in order for the court to issue a protection order. Finally, since the provision of Senate Bill 1519 requiring respondents to undergo a mental and behavioral health evaluation passed the Senate, it is reasonable to anticipate that a similar requirement would survive both houses in a future red flag law bill.

flip-flops-on-red-flag-laws-says-they-wont-happen-on-his-watch/ [https://perma.cc/N77L-5ABB].

250. See John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (Aug. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/08/16/what-the-data-says-about-gun-deaths-in-the-u-s/> [https://perma.cc/MF7A-7RB9].

The Practical Arizona ERPO	Petitioners	Duration	Standard of Proof	Health Component
	Law enforcement only	Emergency (ex parte): 14 days	Probable cause (to bring respondent into custody) Clear and convincing evidence (to issue order)	Required initial mental and behavioral health evaluation

B. The Necessary Arizona ERPO

The above description outlines a red flag law that may have a practical chance of surviving Arizona's gun-friendly legislature. However, this arguably more practical solution takes all of the teeth out of the original STOP order and sets the bar extremely high for communities to protect themselves from potentially dangerous individuals. Politics aside, the necessary red flag law that Arizona *should* adopt is one that has more teeth than the STOP order that passed Arizona's Senate in 2018. This law, as described below, would resemble the laws already on the books in the nineteen states that have existing red flag laws. While such a law might intrude more on Second Amendment rights, it is nonetheless justified in the interests of public safety and school security.

The Necessary Arizona ERPO	Petitioners	Duration	Standard of Proof	Health Component
	Law enforcement, immediate family members, and school administrators	Emergency (ex parte): 14 days Final: 1 year	Emergency (ex parte): probable cause Final: clear and convincing evidence (with an opportunity for early termination)	Required initial mental and behavioral health evaluation (for both types of orders) Final: individualized health plan

1. Petitioners

Because red flag laws principally serve to address problematic behavior before it escalates into a tragedy, such laws should be accessible by those best equipped to observe the “red flags.” In many—if not most—cases, family members and/or school administrators are the first to witness initial indicators of violence. For example, the family members, friends, and teachers of the Parkland shooter were extremely concerned about his behavior well before the Marjory Stoneman Douglas High School shooting.²⁵¹

Law enforcement had previously responded to over twenty calls to the shooter’s residence, but took no formal action because none of the incidents “appeared arrestable under Florida Law.”²⁵² Family friends had voiced concerns to authorities about his violent behavior, the Florida Department of Children and Families had become involved with the shooter due to instances of self-harm, and the shooter was previously expelled from the high school for “disciplinary reasons.”²⁵³ While it is insensitive to presume that the shooting could have been avoided had there been a red flag law in place permitting these concerned individuals to petition for a protection order, the Parkland case study nonetheless demonstrates the importance of ensuring that those best positioned to observe red flags should be able to take legal action.

In addition to law enforcement, Arizona’s red flag law should allow immediate family members and school administrators to petition courts for ERPOs. These individuals live and work in close proximity to those who might display problematic behavior. They will often be better situated than law enforcement to observe, report, and address any concerns. While law enforcement will undoubtedly respond when certain at-risk individuals act out, it is evident from the frequency of mass shootings that formal responses have often come too late. In order for Arizona’s red flag law to effectively prevent tragic incidents, common sense dictates that the law must provide recourse to those who most immediately and intimately observe potential “red flags.”

251. Joel Rose & Brakkton Booker, *Parkland Shooting Suspect: A Story of Red Flags, Ignored*, NPR: ALL THINGS CONSIDERED (Mar. 1, 2018, 7:03 AM), <https://www.npr.org/2018/02/28/589502906/a-clearer-picture-of-parkland-shooting-suspect-comes-into-focus> [<https://perma.cc/L9VL-35C9>].

252. *Id.*

253. *Id.*

2. Distinction Between Emergency (Ex Parte) and Final Orders

The version of Ducey's STOP order that passed the Arizona Senate did not distinguish between ex parte and final orders.²⁵⁴ In fact, the amended STOP order provision would only allow for so-called emergency protection orders that last a maximum of fourteen days.²⁵⁵ Such a limited order is insufficient. While a fourteen-day gun seizure would succeed in preventing imminent danger, it would do nothing to ensure that troubled individuals secure access to the help and support they need. Moreover, as many states have recognized, extended gun seizures—usually codified in final orders—act as mechanisms to facilitate long-term stabilization through conditioning the termination of the order on a demonstration that the respondent no longer poses a danger.²⁵⁶

Arizona's red flag law should therefore retain the fourteen-day emergency order provision from Ducey's amended STOP order bill and supplement it by adding a provision recognizing the possibility of a final order, which should last up to one year. More specifically, Arizona should follow the lead of jurisdictions such as Colorado, D.C., Florida, Hawaii, Rhode Island, and Washington, whose red flag laws recognize ex parte orders lasting up to fourteen days and final orders lasting up to one year.²⁵⁷ These states also permit respondents to petition once during the final order's duration for early termination of the order that will be granted if the respondent shows that he or she no longer poses a risk.²⁵⁸ The opportunity for the respondent to petition for early termination appropriately balances the conflicting interests at stake by providing respondents a path to order relinquishment while ensuring that an order will not be terminated unless specific standards of safety are met. Arizona's red flag law should therefore explicitly distinguish between emergency (or ex parte) and final orders and should codify a means by which respondents can reclaim their firearms so long as they demonstrate that they no longer pose a danger to themselves or the public.

254. S.B. 1519, 53d Leg., 2d Reg. Sess. (passed by Senate with amendments, Ariz. 2018), <https://www.azleg.gov/legtext/53leg/2R/bills/SB1519S.pdf> [<https://perma.cc/P32G-B4RH>].

255. *Id.* § 12-1882(F), (I).

256. See *ERPO Procedures by State PDF*, *supra* note 57; Michelle Faust Raghavan, *Why a California Gun Seizure Law Could Be a Model for National Legislation*, 89.3KPCC (Mar. 2, 2018), <https://www.scpr.org/news/2018/03/02/81286/calif-courts-have-issued-190-gun-restraining-order/> [<https://perma.cc/5RTM-3LNM>].

257. *ERPO Procedures by State PDF*, *supra* note 57; see *supra* notes 38–48 and accompanying text.

258. *ERPO Procedures by State PDF*, *supra* note 57; *Extreme Risk Protection Orders*, *supra* note 12. The majority of states' red flag laws actually recognize long-term final orders and give respondents an opportunity to petition for early termination of the order.

3. Standards of Proof

Arizona's red flag law should maintain different standards of proof for emergency (or ex parte) orders and final orders. Ducey's amended STOP order proposal would only grant an emergency order of protection if law enforcement established by clear and convincing evidence that the respondent posed a significant danger of imminently causing death or serious injury to him- or herself or others.²⁵⁹ This standard is unusually high and should be relaxed. Of all the states that have operational red flag laws, only Oregon requires petitioners to meet the clear and convincing standard for ex parte orders.²⁶⁰ However, Oregon's orders automatically become final if the respondent does not challenge them, thereby justifying the unusually high standard.²⁶¹

Arizona should adopt a more lenient standard of proof for emergency orders, such as probable cause or a preponderance of the evidence, and reserve the heightened clear-and-convincing standard of proof for final orders. The imminent public safety threat and shorter seizure duration inherent to ex parte orders justify the lower burden and follow the logic of the majority of other states' existing red flag laws. In the same vein, since a final order would intrude on respondents' rights for a longer period of time, the standard of proof should be elevated.

4. Mental Health/Substance Use Evaluation

SB 1519 contained a provision requiring all STOP order respondents to submit to a behavioral health examination, the results of which would assist courts in determining whether or not a given respondent poses a significant danger of imminently causing death or serious physical injury to himself, herself, or others.²⁶² Notably, the provision survived the Senate and was included in the amended bill.²⁶³ To date, no other state's red flag law requires respondents to submit to such an evaluation; Arizona's would be the first.²⁶⁴

259. Ariz. S.B. 1519 § 12-1882(F) (amended version).

260. *Extreme Risk Protection Orders*, *supra* note 12.

261. *Id.*

262. S.B. 1519, 53d Leg., 2d Reg. Sess. § 12-1882(A), (D)–(F) (as introduced by Senate, Ariz. 2018), <https://www.azleg.gov/legtext/53leg/2r/bills/sb1519p.htm> [<https://perma.cc/HT3W-EWH6>].

263. Ariz. S.B. 1519 § 12-1882(D)–(F) (amended version).

264. See D.J. Jaffe, *Red-Flag Laws Should Trigger Treatment, Not Just Gun Confiscation*, NAT'L REV. (Sept. 6, 2019, 5:01 PM), <https://www.nationalreview.com/2019/09/red-flag-laws-should-mandate-treatment-not-just-gun-confiscation/> [<https://perma.cc/S8XG-FZU7>]; Benjamin Mueller, *Limiting Access to Guns for Mentally Ill Is Complicated*, N.Y. TIMES (Feb. 15, 2018),

While the requirement indeed intrudes on respondents' liberty, the foreseeable benefits of the requirement likely outweigh its costs. A medical report detailing a respondent's mental and behavioral health is just the sort of evidence that would facilitate an accurate judicial decision regarding whether that individual actually poses a risk. Additionally, if the respondent is in need of professional help, the evaluator would be equipped to connect the respondent with the resources he or she may need.

Arizona's red flag law should further include a mental and behavioral health component in its final order provision. In particular, the statute should require those subjected to final orders to access mental and behavioral health services as recommended by the initial evaluation. In addition, as a prerequisite to the eventual termination of any final order, the statute should require all respondents to develop individualized mental and/or behavioral health plans. Such plans would help demonstrate to the court that respondents are sufficiently rehabilitated or otherwise appropriately prepared to safely regain access to their weapons. The federal government similarly supports these plans; the Department of Justice has encouraged court-ordered mental health treatment for individuals prohibited from possessing firearms for mental health reasons.²⁶⁵

Conditioning both the initial commencement and eventual relinquishment of firearm protective orders on evidence concerning mental and behavioral health would be an unprecedented yet innovative move in the realm of red flag laws. It might be argued that requiring mental health treatment would financially burden either respondents or the financially strapped state government. However, given the federal government's public support for court-ordered treatment, Arizona could apply for federal funding to facilitate respondents' access to the necessary treatment.²⁶⁶ Moreover, placing mental and behavioral health at the forefront of the firearm removal issue would ensure that the removal orders serve their ultimate objective of both reducing gun violence and promoting a happy and healthy citizenry.

<https://www.nytimes.com/2018/02/15/us/gun-access-mentally-ill.html> [https://perma.cc/429R-GXLW]; Christine Vestal, *Success of Red Flag Laws Might Depend on Mental Health Teams*, PEW TRS. (Aug. 26, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/08/26/success-of-red-flag-laws-might-depend-on-mental-health-teams> [https://perma.cc/85HX-7S9V].

265. Press Release, U.S. Dep't of Just., U.S. Att'y's Off., Dist. of Ariz., Attorney General Announces Launch of Project Guardian – A Nationwide Strategic Plan To Reduce Gun Violence (Nov. 13, 2019), <https://www.justice.gov/usao-az/pr/attorney-general-announces-launch-project-guardian-nationwide-strategic-plan-reduce-gun> [https://perma.cc/LZ6V-YMJB].

266. For instance, Arizona could apply for an Edward Byrne Justice Assistance Grant. *Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, U.S. DEP'T JUST.: BUREAU JUST. ASSISTANCE, <https://bja.ojp.gov/program/jag/overview> [https://perma.cc/SRN3-XHFA]. See *supra* notes 67–72 and accompanying text for additional sources of potential federal funding.

Finally, if Arizona enacted a red flag law requiring mental health evaluations and rehabilitation plans, the eventual results of the law's application would provide invaluable evidence for those continuing to study the effects of different types of red flag laws on overall gun violence and mental health. In this respect, Arizona would act as a laboratory of democracy, wherein the state's innovative red flag law could be implemented and, if successful, potentially replicated across the nation.²⁶⁷

5. Summary of the Proposed Law

This Comment ultimately proposes a red flag law that is largely similar to many other states' operational red flag laws, with a few key differences. For example, the proposed Arizona red flag law would permit law enforcement, family members, and school administrators to petition. This particular provision goes slightly beyond the reach of most other states' laws, as eight of the nineteen existing red flag statutes allow only law enforcement and family members to petition, while five jurisdictions also permit other categories of individuals to petition (such as school administrators or certain health providers).²⁶⁸ Six states currently only allow law enforcement (or other state officials) to petition.²⁶⁹

The proposed red flag law tracks the majority of the other states' laws with regard to distinguishing between *ex parte* and final orders and the requisite standard of proof and duration required for each. The majority of states' laws require either probable cause or a preponderance of the evidence for *ex parte* orders, and only allow *ex parte* orders to last fourteen days, as is consistent with the proposed Arizona red flag law.²⁷⁰ Similarly, the proposed law also suggests requiring clear and convincing evidence to secure a final order lasting up to one year. This type of final order also tracks the specifics of other states' final orders.²⁷¹

As mentioned above, the key difference between this Comment's proposed red flag law and other states' laws is the mental health evaluation and rehabilitation plan requirement. Under this Comment's recommendation,

267. See Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 397–400 (1997), for a discussion of the ways in which state innovation is one of the many benefits of federalism.

268. *ERPO Procedures by State PDF*, *supra* note 57; *Extreme Risk Protection Orders*, *supra* note 12.

269. *ERPO Procedures by State PDF*, *supra* note 57; *Extreme Risk Protection Orders*, *supra* note 12.

270. *ERPO Procedures by State PDF*, *supra* note 57; *Extreme Risk Protection Orders*, *supra* note 12.

271. See *ERPO Procedures by State PDF*, *supra* note 57; *Extreme Risk Protection Orders*, *supra* note 12.

Arizona's red flag law would lead the nation in placing an emphasis on mental health testing and treatment. This emphasis is imperative, as the prioritization of mental health squarely addresses the public health concerns at the root of most incidents of gun violence.

IV. CONCLUSION

Gun violence has wreaked havoc on this country and continues to terrorize local families and communities at an alarming rate. States across America have grappled with this harsh reality and have attempted to combat gun violence by enacting red flag laws designed to prophylactically prevent tragic incidents. While such laws, by definition, restrict gun rights and therefore implicate the Second Amendment, they nonetheless do not violate the Constitution and have been shown to reduce gun violence and thereby improve general public health. In order to support and cultivate the overall well-being of its citizenry, Arizona should follow the lead of D.C. and the nineteen states that have thus far enacted extreme risk protection order statutes and enact a red flag law.