

Extreme Risk Laws and Due Process

Reducing Risk of Death while Respecting Rights

ERPO Overview

Extreme Risk laws are a legal tool that a growing number of states are adopting to address significant or immediate risks of gun violence.¹ Extreme Risk Protection Orders (“ERPOs”) are used to temporarily prohibit the possession and purchasing of firearms by persons deemed by a court to pose a significant danger of causing injury to himself, herself, or another by possessing a firearm.² All ERPOs are temporary in nature, with the exact length of firearm prohibitions varying by state. ERPOs are modeled after Domestic Violence Protection Orders (“DVPOs”), which exist in all 50 states and the District of Columbia, but are tailored to address the risk of violence by firearms as opposed to domestic violence specifically.³

Most Extreme Risk laws have an “ex parte” ERPO component, where individuals such as law enforcement or family members can request the court to temporarily prohibit a person from possessing firearms by presenting evidence that the person poses an “immediate” risk of danger by possessing firearms.⁴ The person barred from possessing firearms is entitled to a full court hearing to plead their case before a final ERPO is initiated, but the ex parte ERPO is to ensure that no one is hurt in the week or two before then. Ex parte ERPOs incorporate the same due process protections of ex parte DVPOs, which states have been implementing for decades.

¹ Currently, 19 states and the District of Columbia have ratified Extreme Risk laws.

² The specific language varies by state, with ex parte orders having the additional criteria of the risk being immediate or in the near future.

³ See generally *Disarm Domestic Violence* (May 21, 2020), <https://www.disarmdv.org/> (last visited Jan. 26, 2021) to learn about the domestic violence laws, including DVPOs, of all fifty states and the District of Columbia.

⁴ See The Educational Fund to Stop Gun Violence, *Extreme Risk Laws*, The Educational Fund to Stop Gun Violence (Oct. 2020), <https://efsgv.org/learn/policies/extreme-risk-laws/> (last visited Jan. 27, 2021).

Due Process

The Due Process Clause of the 14th Amendment to the US Constitution states that “No state shall...deprive any person of life, liberty, or property, without due process of law.”⁵ The Supreme Court of the United States (“SCOTUS”) has further held that “[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”⁶ The question of what due process looks like with ERPOs is not whether the government can constitutionally disarm someone, because SCOTUS has already held that they can, but rather what procedures the government should follow to constitutionally deprive someone of access to their firearms.⁷

Ex Parte ERPO Due Process Analysis

Generally, due process requires that notice and an opportunity to be heard are given before the government deprives someone of constitutionally protected liberties or properties.⁸ However, SCOTUS and lower courts have long identified situations where valid governmental interests, such as urgent matters of public health and safety, can justify the delay of a hearing implicating even the most sacred of rights until after the deprivation occurs.⁹ Some poignant examples include removing children from the custody of their parents “to avoid imminent danger to the child’s life or health,”¹⁰ involuntary commitment for mental health treatment,¹¹ and the no contact and firearm surrender provisions of DVPOs.¹²

⁵ U.S. CONST. AMEND. XIV, § 1.

⁶ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

⁷ See *District of Columbia v. Heller*, 554 U.S. 570, 626-277 (2008), “Like most rights, the right secured by the Second Amendment is not unlimited... nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.”

⁸ *Eldridge*, 424 U.S. at 319.

⁹ See *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988), stating that “[a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.”

¹⁰ *F.K. v. Iowa Dist. Ct. for Polk County*, 630 N.W.2d 801, 804 (Iowa 2001); see also *In re Carmelo G.*, 896 N.W.2d 902, 907-08 (Neb. 2017), where the court observed that “[t]he interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court. [However, the] ex parte order authorizing temporary custody with [the State] is permitted because of its short duration and the requirement of further action by the State before custody can be continued.”

¹¹ See *State ex rel. Doe v. Madonna*, 295 N.W.2d 356, 365 (Minn. 1980), where the state Supreme Court held that “[a]lthough the state may have a compelling interest in temporary ex parte detention of persons dangerous to themselves or others, such detention is justified only for the amount of time necessary to prepare for a probable cause hearing before a neutral judge;” see also Leslie C. Hedman et al., *State Laws on Emergency Holds for Mental Health Stabilization*, 67 *Psychiatric Servs.* 529 (2016).

¹² See *Blazel v. Bradley*, 698 F.Supp. 756, 765 (W.D.Wis.1988), which states that ex parte restraining orders comply with due process if it can be shown that an immediate risk of harm necessitates quick action.

Due process analyses are fact-specific inquiries that vary from case to case, but SCOTUS has devised several factors to consider when determining whether a limit on due process is constitutional. In *Mathews v. Eldridge*, SCOTUS held that courts must consider three main factors when evaluating due process concerns: (1) the private interest that will be impacted, (2) the risk presented by an erroneous deprivation of that interest under existing procedures and the probable value of additional procedures, and (3) the government's interests at stake, including burdens imposed by additional procedural requirements.¹³ The third *Eldridge* factor was modified in the later SCOTUS case *Connecticut v. Doehr* to include the interests of private parties, as opposed to only the government, in the due process analysis.¹⁴ Utilizing the *Eldridge/Doehr* factors, the North Carolina Court of Appeals found that a defendant was not denied due process when an ex parte DVPO required him to temporarily surrender his firearms.¹⁵ Even though the court recognized that the right to bear arms is a fundamental right, the defendant was not denied due process from an ex parte DVPO because the risk of erroneous deprivation was reduced by the short duration of the ex parte order, the risk of domestic violence and the State's interest in preventing domestic violence were "clear," and the State's goals could not be effectively achieved without ex parte hearings.¹⁶

Ex Parte ERPOs Satisfy the Eldridge/Doehr Factors of Due Process

1. IS THERE A PRIVATE INTEREST THAT WILL BE IMPACTED BY THE POLICY?

Yes. ERPOs impact the right to bear arms, a fundamental right according to the United States Constitution, by temporarily prohibiting the possession of firearms.^{17, 18}

2. ARE THERE SAFEGUARDS TO PREVENT THE RISK OF AN ERRONEOUS DEPRIVATION OF THAT INTEREST?

Yes. The risk of erroneous deprivation of the right to bear arms is significantly mitigated by procedural safeguards built into ex parte ERPOs. The district court case *Blazel v. Bradley* analyzed SCOTUS cases to determine a minimum of four procedural safeguards that can guarantee due

¹³ *Eldridge*, 424 US at 335.

¹⁴ *Connecticut v. Doehr*, U.S. 1, 11 (1991).

¹⁵ *State v. Poole*, 745 S.E.2d 26 (N.C. C.T. App. 2013).

¹⁶ *Id.* at 36.

¹⁷ See U.S. CONST. AMEND. II.

¹⁸ *Heller* 554 U.S. at 570 and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), which held that the Second Amendment applicable to the states via the Fourteenth Amendment of the U.S. Constitution.

process without a pre-deprivation hearing.¹⁹ These safeguards are: (1) participation by a judicial officer, (2) a prompt post-deprivation hearing, (3) verified petitions or affidavits containing detailed allegations based on personal knowledge, and (4) risk of irreparable harm in the near future.²⁰

Ex parte ERPOs satisfy all four of the *Blazel* criteria. First, an ex parte ERPO can only be issued by judicial officers, such as judges and magistrates. Second, ex parte orders are short in duration and quickly followed by a hearing that the subject of the order may participate in. Ex parte ERPOs last up to two weeks or less in the majority of states that use them.²¹ Third, anyone requesting an ex parte ERPO must establish their case by providing a signed affidavit in writing under oath or an oral statement made under oath. Fourth, the person requesting the ex parte ERPO must prove to the judge, by a set burden of proof, that the subject of the order is substantially likely to kill or injure themselves or others in the near future by possessing firearms.²²

3. ARE THERE GOVERNMENTAL OR PERSONAL INTERESTS AT STAKE? WOULD ADDITIONAL PROCEDURAL REQUIREMENTS IMPOSE BURDENS ON THE GOVERNMENT'S ATTEMPT TO PROTECT THOSE INTERESTS?

Yes and Yes. The potential harm brought about by a short deprivation of firearms from an ex parte ERPO is vastly outweighed by the interest of the State and private parties in preventing likely death or injury from firearms.^{23,24,25} Further, waiting until a full contesting hearing can occur before disarming someone in crisis would defeat the entire purpose of an ERPO. Prior notice of a hearing may give an opportunity for the subject of an ERPO to harm themselves or others if they still have access to firearms. Most personal crises resulting in serious threats of violence against themselves or others are both intense and immediate in nature, necessitating quick action from the State.²⁶

¹⁹ *Blazel*, 698 F.Supp. at 756.

²⁰ *Id.* at 763-64.

²¹ See The Educational Fund to Stop Gun Violence, *supra* note 4.

²² Note that the exact wording of what must be proven and the standard of proof vary from state to state.

²³ See Centers for Disease Control and Prevention, National Center for Health Statistics. *About Underlying Cause of Death, 1999-2019* (2020), reporting that more than 38,000 Americans are killed by guns each year, with over 60% of these deaths by suicide.

²⁴ See David Owens, et al., *Fatal and non-fatal repetition of self-harm. Systematic review*, British Journal of Psychiatry (2002), finding that research has shown 90% individuals who survive a suicide attempt do not later die from suicide. This evidence suggests that temporarily removing firearms from individuals in crisis could save tens of thousands of lives a year from suicide prevention alone.

²⁵ See Deborah Azrael & Matthew Miller, *Reducing suicide without affecting underlying mental health: Theoretical underpinnings and a review of the evidence base linking the availability of lethal means and suicide*, The International Handbook of Suicide Prevention (2016), noting that firearms are the most lethal means of attempting suicide, with 90% of firearm suicide attempts resulting in death.

²⁶ See The Educational Fund to Stop Gun Violence, *Firearm Suicide*, The Educational Fund to Stop Gun Violence (Jul. 2020), <https://efsgv.org/firearm-suicide/> (last visited Jan. 28, 2021).

That being said, the person requesting that an ex parte ERPO be issued must still present their case to a judicial officer and satisfy a required standard of proof before it is approved. No decisions are made frivolously, and it is a crime in most jurisdictions for ERPO petitions to be brought in bad faith.²⁷ To date, no court has found ERPOs or ex parte ERPOs to violate any aspect of the United States or State constitutions.²⁸

Conclusion

Extreme risk laws, including their ex parte components, do not violate the due process rights of gun owners or those who wish to acquire guns. A short, temporary prohibition on the possession of firearms from an ex parte order places minimal burdens on the subject of the ERPO that are handily outweighed by the valid governmental interest of protecting public health and safety from foreseeable gun violence. Ex parte ERPOs also include numerous procedural safeguards to protect against the erroneous deprivation of rights. During ex parte ERPO hearings, the person requesting the ERPO has the burden of proof to demonstrate why the gun owner is an immediate or significant danger to themselves or others by possessing firearms. A judge or magistrate must approve both ex parte and final ERPOs, and persons subject to ERPOs have ample opportunity to expediently challenge the restriction placed on their liberties. Filing baseless ERPO petitions to harass others is also a crime in most states that have them. Extreme risk laws are comprehensive tools that states are embracing across the country to reduce gun violence while respecting the rights of the parties involved.

²⁷ See The Educational Fund to Stop Gun Violence, *supra* note 4.

²⁸ See Michael A. Foster, *Firearm “Red Flag” Laws in the 116th Congress*, Congressional Research Service (Aug. 17, 2019), <https://fas.org/sgp/crs/misc/IF11205.pdf> [<https://perma.cc/G5KW-Y9SA>].