



North Dakota Legislative Council

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September 3, 2024

Honorable Karla Rose Hanson
State Representative
1114 Fifth Street North
Fargo, ND 58102-3713

Dear Representative Hanson:

This is in response to your request for an update on case law relating to public safety regulations, commonly referred to as "red flag" laws, and whether those regulations may conflict with the United States Constitution.

Public safety regulations are gun violence prevention laws that allow law enforcement officers or family members to petition a state court to order the temporary removal of firearms from an individual who may present a danger to others or themselves. The orders issued by the court prohibiting an individual from possessing a firearm are known as "extreme risk protection orders" in Oregon, Washington, Maryland, Colorado, and Vermont; as "risk protection orders" in Florida; as "extreme risk firearm protection orders" in New Mexico; as "gun violence restraining orders" in California; as "risk warrants" in Connecticut; and as "proceedings for the seizure and retention of a firearm" in Indiana. As of January 2024, 21 states¹ and the District of Columbia have passed some form of a "red flag" law. The specifics of the laws, and the degree to which the laws are used, vary from state to state.

Fifteen of the 21 states and the District of Columbia allow family or household members as well as law enforcement to submit a petition for an extreme risk protection order, including Maryland and the District of Columbia, which also allow mental health providers to petition; Michigan, which also allows certain health care providers to petition; Massachusetts, which allows gun licensing authorities to petition; New York, which also allows school administrators to petition; and Hawaii, which allows medical professionals, coworkers, and educators to petition. Three states² limit the category of petitioners to law enforcement only. Indiana has a risk-based firearm removal law that is similar to law enforcement-only extreme risk protection orders.

For a court to issue an extreme risk protection order, the petitioner must prove there is enough credible evidence to believe the respondent poses a danger to self or others. This is known as the "standard of proof." In criminal proceedings, the standard of proof is guilty "beyond a reasonable doubt." Extreme risk protection orders are civil proceedings; however, and the standards of proof are "clear and convincing" (highest and hardest to meet), "preponderance" (meaning more likely than not), and reasonable, probable, or good cause (a reasonable person would believe the respondent poses a danger). Fourteen states³ and the District of Columbia set the standard of proof as probable, reasonable, or good cause; California sets

¹ California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington.

² Florida, New Mexico, and Rhode Island.

³ Connecticut, Florida, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Rhode Island, Virginia, and Washington.

the standard of proof as substantial likelihood; four states⁴ set the standard of proof as preponderance of the evidence; and Oregon sets the standard of proof as clear and convincing evidence.

In May 2020, Oklahoma passed the nation's first law⁵ preempting or blocking local governments from enacting red flag laws. The state's "anti-red-flag" bill was one of several proposed across the country based on arguments that red flag laws are unconstitutional. Legal scholars have evaluated constitutional arguments supporting and opposing red flag laws and, while most lower courts have upheld the laws, there is limited case law on the constitutionality of red flag laws.

In March 2024, Wyoming passed Senate File No. 109 (2024), known as the "Prohibit Red Flag Gun Seizure Act." The bill prohibits a political subdivision, state agency, or a police department from implementing or enforcing a rule prohibiting a Wyoming resident from possessing a firearm or ammunition unless the individual meets certain criteria. The bill also bans using funds from Wyoming or the federal government to implement red flag gun seizures. The bill was signed into law by Governor Mark Gordon on March 22, 2024.

Missouri's Senate Bill No. 998 (2024), known as the "Anti-Red Flag Gun Seizure Act" was introduced January 2024. The bill bans a police officer or a public agency from enforcing a federal order to confiscate a firearm from an individual believed to be a danger to others or themselves. In addition, the bill provides any federal order of protection or other court order to confiscate a firearm, gun accessory or ammunition from a "law-abiding" citizen is a violation of the individual's Second Amendment rights. As of March 2024, the bill received a "Do Pass" recommendation from Missouri's Senate Transportation, Infrastructure and Public Safety Committee.

The Second Amendment provides "[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." The United States Supreme Court, in *District of Columbia v. Heller*, 554 U.S. 570, 635, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), recognized the Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." The Second Amendment applies to the states through the due process clause of the 14th Amendment to the United States Constitution. In *Heller*, the Supreme Court held the Second Amendment does not confer the right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose and legislatures may use a variety of "presumptively lawful regulatory measures" to prevent the violence associated with firearms, including "longstanding prohibitions on the possession of firearms by felons and the mentally ill, 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." In *Heller*, the Supreme Court adopted a two-pronged approach to Second Amendment challenges. First, the court must consider whether the challenged law imposes a burden on conduct that falls within the scope of the Second Amendment's guarantee. If the law does not, the inquiry is complete. If the law falls within the scope, the court must evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is deemed constitutional. If the law fails, it is invalid.

"Red flag" laws have been challenged primarily on three grounds. First, the laws have been challenged as violating the Second Amendment's right to bear arms for self-defense. Second, it has been argued "red flag" laws violate the Fourth Amendment, which protects against unreasonable searches and seizures and requires probable cause to issue a warrant. Lastly, "red flag" laws may violate the Fifth Amendment right to due process, which requires procedures that provide notice, an opportunity to be heard, and an appeal.

Courts in California, Connecticut, Florida, and Indiana have held the "red flag" laws or firearm seizure laws in those states do not violate the challenged state or federal constitutional provisions. In 2022, the United States Supreme Court ruled a New York law requiring applicants for unrestricted concealed-carry licenses demonstrate a special need for self-defense violated the Second Amendment.⁶ Since the Supreme Court's ruling, two New York courts have used the ruling to declare New York's red flag law unconstitutional because New York's red flag law did not adequately provide due process and it lacked sufficient statutory

⁴ Colorado, Delaware, Nevada, and Vermont.

⁵ Oklahoma Senate Bill No. 1081 (2020).

⁶ *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022).

guardrails to protect a citizen's Second Amendment constitutional right to bear arms.⁷ The New York Appeals Court reversed the two lower court rulings and upheld the state's red flag law declaring the law consistent with the nation's historical tradition of firearm regulation in keeping dangerous individuals from carrying firearms.⁸

In *U.S. v Rahimi*, 144 S. Ct. 1889 (2024), the United States Supreme Court held 18 U.S.C. § 922(g)(8), (prohibiting the possession of a firearm by an individual subject to a domestic violence restraining order) did not implicate the Second Amendment, because the law is consistent with historic principles and firearm regulations aimed at preventing violence, specifically historic surety and "going armed" laws allowing a magistrate to require bond for an individual suspected of future misbehavior and prohibiting access to firearms by a dangerous individual. *Rahimi* is the first case in which the United States Supreme Court applied its new "history-and-tradition" constitutional threshold from *Bruen* for laws prohibiting or restricting the possession of a firearm.

In *Hope v. State*, 133 A.3d 519, 523 (Conn. App. Ct. 2016), the Appellate Court of Connecticut held Connecticut General Statute § 29-38c (seizure of firearms and ammunition from a person posing risk of imminent personal injury to self or others) did not implicate the Second Amendment, because the law does not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes. The law restricts for up to 1 year the rights of only those individuals 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. The statute is an example of the longstanding "presumptively lawful regulatory measures" articulated in *Heller*.

In *San Diego v. Boggess*, 157 Cal. Rptr. 3d 644, 647 (Ct. App. 2013), the Court of Appeal for the Fourth District, Division 1, of California, held California Statute § 8102 (confiscation and custody of firearms or other deadly weapons; procedure for return of weapon; notice; destruction of weapon), which allows the state to seize firearms from persons detained for examination due to mental illness and who are likely to cause a danger, did not violate the Second Amendment. The court ruled Ms. Esther Boggess had not demonstrated California's statute to be facially unconstitutional, and California therefore could continue to enforce the law to protect the health, safety, and welfare of its citizens.

In *Redington v. State*, 992 N.E.2d 823, (Ind. Ct. App. 2013), the Court of Appeals of Indiana concluded Indiana's red flag statute did not violate the right to keep and bear arms, was not an unconstitutional taking, and was not unconstitutionally vague. In *Redington*, Mr. Robert Redington's 51 guns and ammunition were seized after authorities became alarmed by his behavior near the site where missing Indiana University student Lauren Spierer was last seen. Mr. Redington was never charged, but police detained him and he was held for observation by mental health professionals. Mr. Redington's guns were confiscated by police under Jake Laird's Law, enacted after Laird, an Indianapolis police officer, was shot and killed by a mentally ill man wielding a gun. More commonly known as the "red flag law," I.C. § 35-47-14-1(a)(2)(8) enables law enforcement to take possession of firearms, pending formal hearings, from people who are found to be statutorily "dangerous." The Court of Appeals of Indiana found "[R]edington continuing to own firearms threatens to inflict 'particularized harm' analogous to tortious injury on readily identifiable private interests."

In *Davis v. Gilchrist Cty. Sheriff's Office*, No. 1D18-3938, 2019 WL 4656070 (Fla. Dist. Ct. App. 2019), the First District Court of Appeal of Florida rejected a constitutional challenge to Florida's "red flag" law. The appeals court rejected the arguments, including the arguments that the red flag law was vague, overly broad, and violated due-process rights. The court opined "when reviewing a statute or ordinance that impairs the exercise of a fundamental right, the court must apply a strict scrutiny test to determine whether the legislation is written to address a specific and compelling state interest ... [H]ere, the 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." The court ruled the "red flag" law was not vague

⁷ *G.W. v C.N.* 2022 NY Slip Op 22392 Decided on December 22, 2022, Supreme Court, Monroe County and *R.M. v C.M.* 2023 NY Slip Op 23088 Decided on April 4, 2023, Supreme Court, Orange County.

⁸ *Matter of R.M. v C.M.* 2024 NY Slip Op 01545 Decided on March 20, 2024, Appellate Division, Second Department.

or overly broad and quoted a legislative explanation that found a "need to comprehensively address the crisis of gun violence, including but not limited to, gun violence on school campuses."

In conclusion, courts ultimately have upheld "red flag" laws against constitutional challenges in every state wherein such laws have been enacted.

We hope this updated information is helpful. If you would like additional information or have any other questions, please contact us.

Sincerely,

A handwritten signature in red ink that reads "Austin Gunderson". The signature is written in a cursive style with a large initial "A".

Austin Gunderson
Counsel

AG/HD