



# Extreme Risk Protection Order or “Red Flag” Laws

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Several states have enacted laws authorizing courts to enter an “extreme risk protection order” (ERPO), sometimes referred to as “red flag” laws. While each state’s legislation differs, ERPO laws generally allow courts to temporarily prohibit a person from possessing a firearm based on a showing that the person constitutes an imminent danger. To date, ERPO laws have largely withstood constitutional challenges on various grounds. In Wisconsin, ERPO legislation has been introduced, but remains a topic of debate.

## GENERAL FEATURES OF ERPO LAWS

The U.S. Department of Justice reports that 21 states have passed a version of an ERPO law. While each jurisdiction’s approach may vary, ERPO laws typically contain the following features:

- **Specified petitioners.** Only certain individuals are allowed to petition a court for an order prohibiting an individual from possessing firearms. In some states, only law enforcement may petition, while others allow petitions by health professionals and household members, among others.
- **Ex parte and final orders.** A court typically issues a preliminary, or “ex parte,” order without notice or a hearing. Ex parte orders are in effect for a brief period, typically ranging from two to 21 days, depending on the state. After the respondent is given notice of, and an opportunity for, a hearing, the court may enter a final order if the specified legal standard has been met, resulting in a prohibition on firearm possession for a longer period of time.
- **Legal standard and burden of proof.** The court must make certain findings of fact prior to entering ex parte or final orders. A common legal standard is that an individual poses a significant risk or danger. Some states require that this standard be shown by a preponderance of evidence, generally meaning “more likely than not.” Other states require that it be shown by “clear and convincing evidence,” a higher burden of proof. In some states, the same legal standard and burden of proof apply to both ex parte and final orders, while other states apply a different standard or burden to each type of order.
- **Relinquishment process.** Upon entry of an ex parte order, an individual may be required to surrender firearms and ammunition to law enforcement either immediately or within a particular timeline. Additionally, the court may issue a search warrant authorizing seizure by law enforcement.
- **Duration and renewal of order.** In many states, the final order is effective for one year, though some states provide a shorter duration or a petition process for terminating the order. Many states also allow for renewal of the final order before it terminates, by using a similar process.

## CONSTITUTIONAL ISSUES

Questions regarding the legality of ERPO laws have primarily focused on two constitutional provisions: (1) the right to bear arms under the Second Amendment; and (2) the right to due process of law when the government deprives a person of life, liberty, or property under the Fifth and Fourteenth Amendments.

### Second Amendment

Both the U.S. and Wisconsin Constitutions protect the right of people to keep and bear arms.<sup>1</sup> In *D.C. v. Heller*, the U.S. Supreme Court held that the Second Amendment protects an individual’s right to possess a firearm and to use that firearm for lawful purposes such as self-defense, but also identified certain presumptively lawful regulatory measures, such as “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places.” More recently, in *New York State Rifle & Pistol Association v. Bruen*, the U.S. Supreme Court held that

when the Second Amendment’s plain text covers an individual’s conduct, whether publicly or in the home, such conduct is presumptively protected, unless the government demonstrates that its regulation is consistent with the nation’s historical tradition of firearm regulation. In 2024, the Court applied this “history and tradition” standard in *U.S. v. Rahimi*, finding that a federal prohibition against firearm possession by an individual subject to a domestic violence restraining order did not violate the Second Amendment if a court finds that the individual poses a credible threat to the physical safety of another.<sup>2</sup>

State appellate courts have generally upheld ERPO laws when challenged on Second Amendment grounds, both under *Heller* and in at least one appellate case under *Bruen*’s new “history and tradition” test.<sup>3</sup> In light of the Court’s recent *Rahimi* decision, proponents of ERPO laws will likely argue that ERPO laws require specific judicial findings as to an individual’s risk of harm or danger, and thus comport with the Second Amendment, drawing on similar historical provisions that the Court addressed in that case.

## Due Process

Both the U.S. and Wisconsin Constitutions provide a right to due process of law when the government deprives a person of life, liberty, or property. Very generally, when a person has a protected interest in property, due process requires a person have an “opportunity to be heard at a meaningful time and in a meaningful manner.” When determining whether a particular law affords those opportunities to an individual, courts analyze: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government’s interest, including the fiscal and administrative burdens that additional or substitute procedural safeguards would entail. Procedural due process requirements are generally met if the state provides adequate post-deprivation remedies.<sup>4</sup>

Few published appellate court decisions have addressed due process challenges to ERPO laws. In 2019, a state appellate court concluded that Florida’s ERPO law did not violate due process. Within its reasoning, the court cited the specific aspects of the law, including that it affords a respondent a prompt opportunity to be heard prior to the entry of a final order and incorporates other adequate safeguards.<sup>5</sup>

## LEGISLATIVE EFFORTS

Wisconsin has not adopted an ERPO law, though legislation has been introduced in recent legislative sessions.<sup>6</sup> Wisconsin law does, however, require firearm surrender as a consequence upon conclusion of certain proceedings, such as mental health commitments and various restraining orders. In 2022, federal legislation was enacted that, in part, allows states to use certain federal grant funds for ERPO “programs,” provided such programs meet specified minimum requirements, including certain pre- and post-deprivation procedural rights, the right to be represented by counsel at no expense to the government, and certain heightened evidentiary standards.<sup>7</sup>

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<sup>1</sup> U.S. Const. amend. 2; Wis. Const. art. I, s. 25.

<sup>2</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008); *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022); *U.S. v. Rahimi*, 602 U.S. \_\_\_, 144 S. Ct. 1889 (2024). For more information on Second Amendment jurisprudence, see Legislative Council, [Developments in Constitutional Law: The Second Amendment](#), Issue Brief (November 2022).

<sup>3</sup> See, *Redington v. State*, 992 N.E.2d 823 (Ind. Ct. App. 2013) (finding the law did not burden the right to bear arms for self-defense, because it had a process for regaining the right, allowed possession of other weapons, and used a heightened burden of proof); *Hope v. State*, 133 A.3d 519 (Conn. App. Ct. 2016) (holding that the law did not restrict the right to use arms in defense of the home, and fell within the “longstanding presumptively lawful regulatory measures” contemplated by *Heller*); and *Matter of R.M. v. C.M.*, 207 N.Y.S.3d 634 (N.Y. App. Div. 2024) (concluding that, because the law’s restriction applies when probable cause exists to believe a person is likely to engage in conduct that would result in serious harm to him self, herself, or others, it is consistent with the nation’s historical tradition of firearm regulation in keeping dangerous individuals from carrying guns).

<sup>4</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Thorp v. Town of Lebanon*, 2000 WI 60 ¶ 53. See also, *Blazel v. Bradley*, 698 F. Supp. 756 (W.D. Wis. 1988) (holding that risk of immediate harm justifies the issuance of an ex parte temporary domestic violence restraining order consistent with due process).

<sup>5</sup> *Davis v. Gilchrist Cty. Sheriff’s Office*, No. 1D18-3938 (Fla. Dist. Ct. App. Sept. 25, 2019).

<sup>6</sup> See, e.g., 2023 Assembly Bill 350, 2021 Assembly Bill 638, and 2019 Assembly Bill 573.

<sup>7</sup> Pub. Law No. 117-159 (expanding the Edward Byrne Memorial Justice Assistance Grant Program).