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## SHOOTING FOR CHANGE: RED FLAG LAWS

*Ashley Toledo*

## **SHOOTING FOR CHANGE: RED FLAG LAWS**

Ashley Toledo\*

*“What we must do now is enact change because that is what we do to things that fail:  
We change them.”<sup>1</sup>*

February 14, 2018, what was supposed to be a day filled with love and peace, ended in horrible tragedy as a gunman opened fire on Marjory Stoneman Douglas High School in Parkland, Florida.<sup>2</sup> The gunman was 19-year-old, Nikolas Cruz, a former student of the school and troubled teen who enjoyed torturing animals, killing squirrels with his pellet gun, and had been expelled from school for disciplinary reasons.<sup>3</sup> Cruz owned several guns, and would express his fascination of guns and death by posting on social media his desire to kill both people and animals.<sup>4</sup> Many members of the community, including neighbors, teachers, and other students, noticed his disturbed behavior but no one did anything to potentially stop him from taking the lives of seventeen people.<sup>5</sup> For example, they did not try to take away his weapons or advise him to seek counseling.<sup>6</sup> As a result of this unfortunate incident, the pleas for new gun law reformation ensued and a red flag statute (“Red Flag Law”) was ultimately created and adopted in Florida.<sup>7</sup>

Red Flag Laws are gun control laws that allow a family member or a police officer to petition a state court to issue a special type of protection order, which authorizes the temporary confiscation of firearms of individuals who may be a danger to themselves or others, and the law also prohibits the individuals from purchasing firearms.<sup>8</sup> Red Flag Laws can also be recognized as (1) Extreme Risk Protection “ERPOs” as described in Oregon, Maryland, Washington, and

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<sup>1</sup>A.J. Willingham, *Some of the most powerful quotes from the #NeverAgain rallies*, CNN (Feb. 21, 2018), <https://www.cnn.com/2018/02/21/us/neveragain-parkland-shooting-rallies-quotes-trnd/index.html>.

<sup>2</sup> Michell Mark, David Choice & Kieran Corcoran, *This timeline shows exactly how the Parkland shooting unfolded*, BUSINESS INSIDER (Feb. 14, 2019, 1:19 PM), <https://www.businessinsider.com/timeline-shows-how-the-parkland-florida-school-shooting-unfolded-2018-2> (describing the events that occurred during the 2018 Parkland Shooting in Florida).

<sup>3</sup> William Wan, Kevin Sullivan, David Weingrad & Mark Berman, *Florida shooting suspect Nikolas Cruz: Guns, depression and a life of trouble*, THE WASHINGTON POST (Feb. 15, 2018, 4:00 PM), <https://www.washingtonpost.com/news/morning-mix/wp/2018/02/15/florida-shooting-suspect-nikolas-cruz-guns-depression-and-a-life-in-free-fall> (explaining how the Parkland school shooter was in fact a troubled teenager that demonstrated mental illness and disturbing behavior).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Dakin Andone, *The warning signs almost everyone missed*, CNN (Feb. 26, 2018, 9:56 AM), <https://www.cnn.com/2018/02/25/us/nikolas-cruz-warning-signs/index.html> (pointing out that many people around the Parkland shooter recognized his odd behavior in person and online but did not do enough to help him).

<sup>7</sup> Erin Donaghue, *Florida’s “red flag” law, passed after Parkland shooting, is thwarting “bad acts,” sheriff says*, CBS NEWS (Aug. 9, 2019, 12:55 PM), <https://www.cbsnews.com/news/florida-red-flag-law-passed-after-parkland-has-saved-lives-advocates-say> (explaining that Red Flag Laws have positively impacted society because they have helped with further prevention of possible mass shootings).

<sup>8</sup> Timothy Williams, *What Are ‘Red Flag’ Gun Laws, and How Do They Work?*, THE NEW YORK TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/us/red-flag-laws.html> (describing Red Flag Laws and how they have been implemented differently among different states.).

Vermont; (2) Risk Protection Order in Florida; (3) Risk Warrants in Connecticut; (4) Proceedings for the Seizure and Retention of a Firearm in Indiana; and (5) Gun Violence Restraining Orders “GRVOs” in California.<sup>9</sup>

The order requires the person filing the petition for the seizure to provide notice to the individual’s relatives, family, friends, or third parties that may be at risk of violence.<sup>10</sup> The confiscation period of an individual’s firearms under the risk protection orders is circumstantial and can only be extended after court hearings.<sup>11</sup> This order addresses dangerous individuals, therefore, the definition for a dangerous individual includes persons who are suspected of domestic terrorism or might commit a hate crime.<sup>12</sup>

Red Flag Laws can be utilized as a tool for the reduction of mass shootings or killings.<sup>13</sup> Mass killings are “[a] shooting of two or more people in a single incident, in a public place. This definition excludes crimes of armed robbery, gang violence, or domestic violence, rather it focuses on cases in which the motive appears to be indiscriminate mass murder.”<sup>14</sup> These laws have the potential to target individuals that show the signs of extreme violence as well as give an opportunity to prevent an unfortunate event from occurring.<sup>15</sup> Many of these mass shooters have mental health issues as well as behavioral issues raising concerns as to whom firearms are being sold, and who is allowed to purchase them.<sup>16</sup> Furthermore, many of the mass shooters end up killing themselves during the incident.<sup>17</sup>

One of the problems with this type of law is that they are temporary orders, meaning there is no permanent confiscation of firearms from potentially dangerous individuals.<sup>18</sup> These types of laws depend on the enforcement from the authorities once there has been a petition; therefore, it varies among the states as to whether there is proactive training or no such enforcement.<sup>19</sup> As a result of all of these factors that influence the effectiveness of a Red Flag Law, it is crucial that each state address in its own variation of a Red Flag Law their state’s individual concerns.<sup>20</sup>

This note will discuss the following: (1) the background and history of Red Flag Laws; (2) the constitutional issues regarding the implementation of Red Flag Laws; (3) the opposition’s

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<sup>9</sup> *Data behind Extreme Risk Protective Order Policies: A Look at Connecticut’s Risk-Warrant Law*, EDUCATIONAL FUND TO STOP GUN VIOLENCE (May 2018), <http://efsgv.org/wp-content/uploads/2018/05/Data-behind-Extreme-Risk-Laws-FINAL-2.pdf>.

<sup>10</sup> See Fla. Stat. § 790.401 (2020).

<sup>11</sup> Williams, *supra* note 8.

<sup>12</sup> Matt Cohen, *Kamala Harris’ New Gun Control Proposal Takes on Domestic Terrorists and White Nationalists*, MOTHER JONES (Aug. 14, 2019), <https://www.motherjones.com/politics/2019/08/kamala-harris-new-gun-control-proposal-takes-on-domestic-terrorists-and-white-nationalists> (explaining that ERPOs are a new form of gun control and how it can help prevent domestic terrorists).

<sup>13</sup> Jonathan Levinson & Lisa Dunn, *What Is A Red Flag Law?*, WAMU 88.5 AMERICAN UNIVERSITY RADIO: GUNS & AMERICA (Aug. 5, 2019), <https://wamu.org/story/19/08/05/what-is-a-red-flag-law/>.

<sup>14</sup> Emily Johnson, *What Is A Mass Shooting? Why We Struggle To Agree On How Many There Were This Year*, GUNS & AMERICA (Aug. 4, 2019), <https://gunsandamerica.org/story/19/08/04/what-is-a-mass-shooting-why-we-struggle-to-agree-on-how-many-there-were-this-year> (explaining the definition of mass shooting and how Red Flag Laws are being implemented after such occurrences).

<sup>15</sup> *Id.*

<sup>16</sup> Jessica McDonald, *The Facts on Mental Illness and Mass Shootings*, FACTCHECK.ORG (Oct. 18, 2019), <https://www.factcheck.org/2019/10/the-facts-on-mental-illness-and-mass-shootings> (describing the connection between mental illness and mass shootings).

<sup>17</sup> Levinson & Dunn, *supra* note 13.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

viewpoints for Red Flag Laws; and, (4), it will conclude by suggesting what provisions a state should include in their Red Flag Law and how beneficial it can be to pass a Red Flag Law.

## I. Background and History of Red Flag Laws

The first state to pass a Red Flag Law was Connecticut in 1999.<sup>21</sup> The Red Flag Law was passed in response to a fatal stabbing and shooting that occurred in the state's lottery headquarters by an accountant, Matthew Beck, who, prior to the incident, had demonstrated signs of emotional instability and was receiving treatment for stress.<sup>22</sup> The shooting resulted in the deaths of four of his supervisors and subsequently his own suicide.<sup>23</sup> After the passage of the state's Red Flag Law, five other states passed similar laws allowing family members, guardians, or police to petition for the confiscation of guns from individuals who showed signs of violence.<sup>24</sup> However, the adoption of Red Flag Legislation remained stagnant for some time, with most states only approving Red Flag Laws after experiencing a high-profile shooting within its state; these incidents included the Virginia Tech shooting in 2007, the Sandy Hook shooting in 2012, and the Stoneman Douglas shooting in 2018.<sup>25</sup>

Connecticut's 1999 version of the Red Flag Law,<sup>26</sup> was a risk warrant law that enforced the legal authority to remove firearms from individuals where probable cause is present and the belief that the individual may cause harm to themselves or others.<sup>27</sup> Extreme Risk Laws, used interchangeably with the Red Flag Laws, allow both law enforcement and family members to petition for the confiscation of firearms.<sup>28</sup> California was the first state to implement a Red Flag Law<sup>29</sup> as a result of a campus shooting which occurred in 2014, where the gunman had previously demonstrated violent behavior.<sup>30</sup> Specifically in this case, the shooter's parents had informed his therapist, who then notified the police, but since there was no law in place, the parents had no legal authority to confiscate the shooter's firearms.<sup>31</sup>

Moreover, New York is one of the most recent states to adopt its version of the Red Flag Law,<sup>32</sup> in which it includes a provision that allows teachers and family members to petition for the protective orders.<sup>33</sup> Washington has also implemented a version of an Extreme Risk Protection

<sup>21</sup> Williams, *supra* note 8.

<sup>22</sup> Jonathan Rabinovitz, *Rampage In Connecticut: The Overview: Connecticut Lottery Worker Kills 4 Bosses, Then Himself*, THE NEW YORK TIMES (Mar. 7, 1998), <https://www.nytimes.com/1998/03/07/nyregion/rampage-connecticut-overview-connecticut-lottery-worker-kills-4-bosses-then.html> (describing the Connecticut lottery worker her suffered from mental illness, that killed himself and four of his bosses).

<sup>23</sup> Williams, *supra* note 8.

<sup>24</sup> Ryan J. Foley & Don Thompson, *Few states let courts take guns from people deemed a threat*, AP NEWS (Feb. 18, 2018), <https://www.apnews.com/d1bcb2afb9e24df8bdacf3eacde95352>.

<sup>25</sup> *Id.*

<sup>26</sup> CONN. GEN. STAT. § 29-38c (1999).

<sup>27</sup> *The Educational Fund to Stop Gun Violence*, DATA BEHIND EXTREME RISK LAWS, EFSGV (2018), [http://efsgv.org/wp-content/uploads/2018/07/Data-behind-Extreme-Risk-Laws\\_July-2018-5.pdf](http://efsgv.org/wp-content/uploads/2018/07/Data-behind-Extreme-Risk-Laws_July-2018-5.pdf) (illustrating studies on gun laws, mass shooting, mental health, and how they are connected when it comes to gun violence).

<sup>28</sup> *Id.*

<sup>29</sup> Cal. Penal Code § 18125 - *Temporary emergency gun violence restraining order; ex parte order; conditions.*

<sup>30</sup> *Extreme Risk Laws Save Lives*, EVERYTOWN FOR GUN SAFETY (APR. 17, 2020), <https://everytownresearch.org/extreme-risk-laws-save-lives/>.

<sup>31</sup> *Id.*

<sup>32</sup> N.Y. C.P.L.R. 6344 (McKinney).

<sup>33</sup> Williams, *supra* note 8.

Order.<sup>34</sup> Currently, there are seventeen (17) states, including the District of Columbia, with some variation of a Red Flag Law, and four (4) states with a bill proposed in their legislatures.<sup>35</sup> However, national red flag bills have not been successful in Congress, which will be discussed later in this comment.<sup>36</sup>

After the Parkland shooting, Florida adopted its own version of the Red Flag Law.<sup>37 38</sup> Law enforcement and FBI officials admitted that they had failed to follow up on Cruz, the shooter, after the sheriff's department and school personnel made disturbing reports on his behavior.<sup>39</sup> In 2018, more than 1,700 orders, allowing the seizing of guns for up to a year, took place after the courts determined the individuals were a threat to themselves or others in the State of Florida.<sup>40</sup> Right after Florida passed its red flag, it granted more than 1,000 orders within the first nine months.<sup>41</sup>

## II. The Laws at Issue: Are Liberty Interests Shot Down?

The several issues that gun rights advocates raise is that Red Flag Laws “could violate the Fourth Amendment’s prohibition of unreasonable searches and seizures, the Fourteenth Amendment’s due process clause and even the First Amendment.”<sup>42</sup> Moreover, the more common concerns are the complaints of depriving innocent people of their Second Amendment Rights.<sup>43</sup> Red Flag Laws face further critiques, such as, the laws leading to the confiscation of firearms based on political speech, angry relatives with ulterior motives for obtaining a court order, and the possibility the police could endanger the gun owners when trying to confiscate the firearms.<sup>44</sup> These matters are a cause for concern because respondents are not always guaranteed representation in court, which may lead to respondents representing in court, which nonetheless presents a whole other issue.<sup>45</sup>

### a. **Second Amendment: The Right to Bear Arms**

Although many states and citizens across the United States have shown support for Red Flag Laws, the possibility of infringing on an individual’s Second Amendment right to bear arms

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<sup>34</sup> Extreme Risk Protection Orders, SEATTLE.GOV (Nov. 22, 2019), <https://www.seattle.gov/police/need-help/erpo>; see also Wash. Rev. Code § 7.94.010 - *Extreme Risk Protection Order Act* (Effective July 28, 2019).

<sup>35</sup> Levinson & Dunn, *supra* note 13.

<sup>36</sup> *Id.*

<sup>37</sup> See generally Fla. Stat. § 790.401 (Effective Mar. 9, 2018).

<sup>38</sup> Donaghue, *supra* note 7.

<sup>39</sup> *Id.*

<sup>40</sup> Ryan J. Foley, *Gun-Seizure Laws Grow in Popularity Since Parkland Shooting*, U.S. NEWS & WORLD REPORT (Feb. 10, 2019), <https://www.usnews.com/news/us/articles/2019-02-09/more-states-adopting-gun-seizure-laws-after-parkland-tragedy> (including several state data on mass shootings but in reality, the number is much higher since it did not include the state of California).

<sup>41</sup> *Id.*

<sup>42</sup> Kathryn Watson, *Second Amendment advocates warn Trump over support for “red flag” laws*, CBS NEWS (Aug. 15, 2019, 10:40 AM), <https://www.cbsnews.com/news/red-flag-laws-second-amendment-advocates-warn-trump-about-support-for-gun-reform-measure/>.

<sup>43</sup> Jacob Sullum, *States Are Depriving Innocent People of Their Second Amendment Rights*, REASON (Nov. 2019), <https://reason.com/2019/10/06/states-are-depriving-innocent-people-of-their-second-amendment-rights/>.

<sup>44</sup> Watson, *supra* note 42.

<sup>45</sup> Matt Vasilogambro, *Red Flag Laws Spur Debate Over Due Process*, PEW (Sep. 4, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/09/04/red-flag-laws-spur-debate-over-due-process>.

remains a prominent concern.<sup>46</sup> The Second Amendment states, “[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.”<sup>47</sup> However, the United States Supreme Court<sup>48</sup> has reasoned that it is presumptively lawful for certain prohibitions on possessing firearms.<sup>49</sup>

Currently, the Gun Control Act<sup>50 51</sup> prohibits certain individuals from possessing a firearm, including those who have prior convictions of a felony or domestic violence misdemeanor; those who have been committed to a mental institution; and those with an active restraining order against them.<sup>52</sup> Similar to other enumerated rights, the right to bear arms is not unlimited as there are certain circumstances that give rise to potential dangers to society.<sup>53</sup>

In a recent Connecticut Appellate Court case, *Hope v. State*,<sup>54</sup> the court found that the Red Flag Law “does not implicate the [S]econd [A]mendment, as it does not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes.”<sup>55</sup> Despite the issue with Red Flag Laws and the Second Amendment, it is crucial for society to understand that the rationale for Red Flag Laws is to protect communities from people who can cause mass destruction and affect the lives of people around them.<sup>56</sup> If the confiscation were to involve someone that may not be a danger, or falsely accused, then the firearm will be returned as long as the individual goes through the judicial process and provides sufficient evidence to contradict the allegations.<sup>57</sup> Red Flag Laws and their variations are appropriate laws that prevent those who do possess them, and have a history of mental health issues from potentially endangering themselves or those that surround them.

#### **b. Fourteenth Amendment: Due Process**

Due process rights, provided in the Fifth<sup>58</sup> and Fourteenth<sup>59</sup> Amendments of the United States Constitution, are another major concern in the issue of confiscating firearms from potentially dangerous people. It is important to recognize that:

The Constitution states only one command twice. The Fifth Amendment says to the federal government that no one shall be “deprived of life, liberty or property without due process of law.” The Fourteenth Amendment, ratified in 1868, uses the

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<sup>46</sup> The Red Flag Law and the Rise of the Second Amendment Sanctuary City, AMERICAN POLICE OFFICERS ALLIANCE (June 25, 2020), <https://americanpoliceofficersalliance.com/the-red-flag-law-and-the-rise-of-the-second-amendment-sanctuary-city/>.

<sup>47</sup> See generally U.S. CONST. amend. II.

<sup>48</sup> *About the Court*, SUPREME COURT OF THE UNITED STATES (last visited Oct. 30, 2019), <https://www.supremecourt.gov/about/about.aspx> (describing what the Supreme Court does and who it consists of).

<sup>49</sup> Amy Swearer, ‘Red Flag’ Fun Laws: Everything You Need To Know, THE NATIONAL INTEREST (Aug. 17, 2019), <https://nationalinterest.org/blog/buzz/red-flag-gun-laws-everything-you-need-know-74451>.

<sup>50</sup> 18 U.S.C. § 922(g) (2019).

<sup>51</sup> Bureau of Alcohol, Tobacco, Firearms and Explosives, *Identify Prohibited Persons*, ATF (Jan. 9, 2020), <https://www.atf.gov/firearms/identify-prohibited-persons>.

<sup>52</sup> Swearer, *supra* note 49.

<sup>53</sup> *Id.*

<sup>54</sup> *Hope v. State*, 133 A.3d 519, 163 (Conn. App. Ct. 2016).

<sup>55</sup> Vasilogambros, *supra* note 45.

<sup>56</sup> Rabinovitz, *supra* note 22.

<sup>57</sup> Vasilogambros, *supra* note 45.

<sup>58</sup> See U.S. CONST. amend. V.

<sup>59</sup> See U.S. CONST. amend. XIV.

same eleven words, called the Due Process Clause, to describe a legal obligation of all states. These words have as their central promise an assurance that all levels of American government must operate within the law... and provide fair procedures.<sup>60</sup>

Primarily, Red Flag Laws are concerned specifically with the due process language that states, “nor shall any state deprive any person of life, liberty, or property, without due process of law.”<sup>61</sup> With that in mind, here, the principal issue is that Red Flag Laws authorize an *ex parte* processing in which it allows a petition to be ordered without the involvement of the person for whom it is against.<sup>62</sup> The judicial system in the United States operates in a way where one is presumed innocent until proven guilty, but the concern with the Red Flag Law is that an individual is disarmed first, the guns are seized, and then they appear in court to defend themselves.<sup>63</sup>

For example, in New York<sup>64</sup> it is a requirement to have a prompt evidentiary hearing with the burden on the petitioner to meet.<sup>65</sup> In other words, the burden of proving that the individual is dangerous is placed on the person filing the petition. Furthermore, the United States Supreme Court has recognized that there is due process because some of the Red Flag Laws require a pre-hearing deprivation followed by a full hearing within a reasonable time frame for defendants to recover their weapons.<sup>66</sup> This framework, established by the Supreme Court, has been further extended into multiple state and federal courts which have ruled in favor of upholding Red Flag Laws when challenged on the grounds of due process.<sup>67</sup>

Rhode Island’s legislature made the standard for granting the extreme risk petitions more rigid by (1) creating penalties for providing false evidence of a threat; (2) allowing only law enforcement to file the petitions; (3) requiring specific evidence from the petitioners; and (4) encouraging individuals who are considered dangerous to seek counsel for their hearings.<sup>68</sup> This can be found specifically in the penalties provision in the state’s Red Flag Law in which an individual may be punished, imprisoned, or be subject to paying fines.<sup>69</sup>

### c. First Amendment: Free Speech and Social Media

Additionally, Red Flag Laws could provoke gun owners who engage in extremism on social media.<sup>70</sup> The First Amendment<sup>71</sup> allows free speech, including hate speech, unless it is seen through context that there is a threat of violence.<sup>72</sup> The Executive Director of the Coalition to Stop

<sup>60</sup> *Due Process*, CORNELL LAW SCHOOL, [https://www.law.cornell.edu/wex/due\\_process](https://www.law.cornell.edu/wex/due_process) (last visited Oct. 30, 2019), (expanding on the definition of due process).

<sup>61</sup> See U.S. CONST. amend. XIV.

<sup>62</sup> Alana Wise, *Red Flag Laws Seek To Balance Gun Safety With Due Process*, KBIA (Feb. 12, 2019), <https://www.kbia.org/post/red-flag-laws-seek-balance-gun-safety-due-process#stream/0>.

<sup>63</sup> Watson, *supra* note 42.

<sup>64</sup> N.Y. C.P.L.R. 6344 (McKinney).

<sup>65</sup> Vasilogambros, *supra* note 45.

<sup>66</sup> *Extreme Risk Laws Saves Lives*, *supra* note 30.

<sup>67</sup> *Id.*

<sup>68</sup> Vasilogambros, *supra* note 45.

<sup>69</sup> Gen. Laws Ann. § 8-8.3-10 (West).

<sup>70</sup> Matt Cohen & Kara Voght, *Could Red Flag Laws Prevent the Next Massacre?*, MOTHER JONES (Aug. 6, 2019), <https://www.motherjones.com/politics/2019/08/red-flag-laws-trump-shootings> (discussing how Red Flag Laws could help prevent another massacre and how President Trump supports the idea of a federal Red Flag Law).

<sup>71</sup> See U.S. CONST. amend. I.

<sup>72</sup> Cohen & Voght, *supra* note 67.

Gun Violence, Josh Horwitz,<sup>73</sup> explains that threats and hate speech are ways of determining whether someone is violent and presenting a threat to themselves or others around them.<sup>74</sup> Horowitz further notes that looking into shooters' online activities have led to concerns about not evaluating their social media posts before it is too late.<sup>75</sup> For example, the Parkland Shooter, Nikolas Cruz, conveyed his desire to be a "professional school shooter" on his social media profiles, which included posting disturbing photos, captions, and status updates in line with this desire of his.<sup>76</sup>

Furthermore, the Vice President for programs at the Brady Campaign, Kyleeane Hunter,<sup>77</sup> suggests that if someone feels threatened by suspicious online activity or social media post, they should report it to the police so authorities can open an investigation; this could only be a benefit to society rather than a hindrance, because it acts as a preventative tactic.<sup>78</sup>

#### **d. Tenth Amendment: Anti-Commandeering**

Today, the debate for the implementation of Red Flag Laws among the states is a hot topic because the federal government cannot force the states to adopt such laws.<sup>79</sup> When interpreting the Tenth Amendment,<sup>80</sup> the United States Supreme Court determined that Congress cannot "commandeer" state legislatures by commanding them to enact specific legislation or enforce a federal regulatory program, and it may not circumvent that restriction by conscripting a state executive officer directly.<sup>81</sup> This rule was created so that the government could not require states to enforce or adopt federal law.<sup>82</sup> Ultimately, Congress is precluded from issuing direct orders to state legislatures.<sup>83</sup>

Although the federal government cannot require state governments to implement laws, there are ways that the federal government can encourage states to implement particular laws.<sup>84</sup> Presently, Republicans in legislation have encouraged and supported states in passing Red Flag Laws by providing them grants.<sup>85</sup> Senator Lindsey Graham of South Carolina, and Chairman of

<sup>73</sup> *About Josh Horwitz*, CSGV, <https://www.csgv.org/about-us/staff/about-josh-horwitz-executive-director> (last visited Nov. 22, 2019) (detailing the biography of Josh Horowitz and his role in the Coalition to Stop Gun Violence).

<sup>74</sup> Cohen & Voght, *supra* note 67.

<sup>75</sup> *Id.*

<sup>76</sup> Elliott C. McLaughlin & Madison Park, *Social media paints picture of racist 'professional school shooter'*, CNN (Feb. 15, 2018, 9:59 PM), <https://www.cnn.com/2018/02/14/us/nikolas-cruz-florida-shooting-suspect/index.html> (explaining how school shooter, Nikolas Cruz, emphasized his desire to kill and violence on his social media pages).

<sup>77</sup> Kyleeane Hunter, BRADY, <https://www.bradyunited.org/team/kyleeane-hunter> (last visited Nov. 22, 2019). (detailing the biography of Kyleeane Hunter and her role in the Brady Project).

<sup>78</sup> Cohen & Voght, *supra* note 67; *see also The Brady Plan*, BRADY, <https://www.bradyunited.org/the-brady-plan> (last visited Feb. 23, 2020).

<sup>79</sup> Sheryl Gay Stolberg, *Democrats Warn That Federal 'Red Flag' Law Would Not Be Enough*, THE NEW YORK TIMES (Aug. 7, 2019), <https://www.nytimes.com/2019/08/07/us/politics/democrats-red-flag-law.html> (discussing the flaws the Democratic Party sees in implementing a federal Red Flag Law).

<sup>80</sup> *See* U.S. Const. amend. X.

<sup>81</sup> *Printz v. United States*, 521 U.S. 898,900 (1997).

<sup>82</sup> *See* *New York v. United States*, 505 U.S. 144 (1992); *see generally* Steven Schwinn, *Symposium: It's time to abandon anti-commandeering (but don't count on this Supreme Court to do it)*, SCOTUSBLOG (Aug. 17, 2017, 10:44 AM) <https://www.scotusblog.com/2017/08/symposium-time-abandon-anti-commandeering-dont-count-supreme-court/> (describing the anti-commandeering doctrine and the key cases that established the doctrine).

<sup>83</sup> *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

<sup>84</sup> Foley, *supra* note 24.

<sup>85</sup> *Id.*



the Senate Judiciary Committee, has been working on a bill that will encourage states to pass and carry out laws with the funding of a federal grant program.<sup>86</sup> Furthermore, President Donald J. Trump has expressed his support for the implementation of red flag laws as a result of those affected by the mass shootings in Dayton, Ohio and El Paso, Texas, in 2019.<sup>87</sup>

Unlike the Republican Party, the Democratic Party aims to require gun-related legislation that may move through the Senate to be accompanied by a House bill that requires background checks on all gun purchasers.<sup>88</sup> Senator Chuck Schumer, the Senate minority leader of the Democratic Party, expressed his thoughts on the Republican's support for Red Flag Laws:<sup>89</sup>

We Democrats are not going to settle for half measures so Republicans can feel better and try to push the issue of gun violence off to the side. Democrats in the Senate will seek to require that any E.R.P.O. bill that comes to the floor is accompanied by a vote on the House-passed universal background checks legislation.<sup>90</sup>

Evidently, there is a clear divide within the political parties when addressing the implementation of Red Flag Laws: either encouraging the states to enforce and regulate their own gun policies or creating a federal regulation that would include background checks.<sup>91</sup>

### **III. The Opposing Viewpoints**

Over the years, the Red Flag Laws have continued to develop into laws amongst various states.<sup>92</sup> Like other laws passing through legislation, there are constant contradicting viewpoints.<sup>93</sup> The acceptance and support of the Red Flags has grown since its initial inception in Connecticut, after a mass shooting.<sup>94</sup> The public have continued to show support as a result of the mass shooting that continue to affect different communities.<sup>95</sup> Although support is continuously increasing amongst the states, and therefore different Red Flag Laws are being implemented, there are many arguments in regard to the violation of individual rights.<sup>96</sup> This section will provide further insight from different state and organization leaders and analyze the opposing views.

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<sup>86</sup> Stolberg, *supra* note 79.

<sup>87</sup> See generally Lauren Dezenski, *Trump backs 'red flag' gun laws. What do they actually do?*, CNN POLITICS (Aug. 5, 2019), <https://www.cnn.com/2019/08/05/politics/red-flag-gun-law-explainer-donald-trump/index.html> (describing President Trump's support for Red Flag Laws).

<sup>88</sup> Stolberg, *supra* note 79.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Leigh Paterson, *Poll: Americans, Including Republicans And Gun Owners, Broadly Support Red Flag Laws*, NPR (Aug. 20, 2019) <https://www.npr.org/2019/08/20/752427922/poll-americans-including-republicans-and-gun-owners-broadly-support-red-flag-law>.

<sup>93</sup> *Id.*

<sup>94</sup> Williams, *supra* note 8.

<sup>95</sup> Paterson, *supra* note 92.

<sup>96</sup> *Id.*

**a. Supporters of the Red Flags Laws**

Supporters of Red Flag Laws argue that including individuals who are “potentially dangerous” and “imminent harm to society,” are simply adding another exception to the laundry list of exceptions within the Gun Control Act.<sup>97</sup> Their view is that implementing such laws should not be a problem since the main reason for these laws is to protect society from persons that could potentially be dangerous since they are more likely to carry out acts, such as mass shootings or firearm suicides which cause harm to others.<sup>98</sup> The states that currently have these laws in place have seen reductions in state suicide rates.<sup>99</sup> In 54% of mass shootings, the shooters have, prior to acting out the mass shooting, exhibited warning signs of dangerousness.<sup>100</sup> Ultimately, taking away potentially dangerous people’s firearms through Red Flag Laws creates an exception to the Second Amendment.<sup>101</sup>

Moreover, supporters of Red Flag Laws find that the laws are designed to stop dangerous situations and that there is no violation of a person’s due process rights because individuals still have an opportunity to defend themselves in court to get their firearms back, however there are certain people who can approve these orders.<sup>102</sup> For example, in Broward County, Florida, cases that require an extreme protection order must be approved by higher-ups in the Sheriff’s office and then reviewed by attorneys before such a case is filed in court.<sup>103</sup> The different states that have Red Flag Laws simply place a limitation on the groups of people that are seeking the court orders.<sup>104</sup>

The reason for Red Flag Laws, as previously discussed, is to seize weapons from those who may be a danger to society. Republicans have shown their support for efforts to push a federal plan through Congress.<sup>105</sup> President Trump, as well as the state of New Hampshire, have endorsed and expressed their interests in such a proposal which makes Red Flag Laws a federal provision.<sup>106</sup>

**b. Opposers of the Red Flag Laws**

Those against Red Flag Laws see that the laws altogether infringe on an individual’s constitutional rights. For example, Patrick Neville,<sup>107</sup> Colorado’s house minority leader,

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<sup>97</sup> Watson, *supra* note 42.

<sup>98</sup> *Extreme Risk Laws Save Lives*, *supra* note 30.

<sup>99</sup> *See id.*

<sup>100</sup> *Ten Years of Mass Shootings in the United States*, EVERYTOWN FOR GUN SAFETY (Nov. 21, 2019), <https://maps.everytownresearch.org/massshootingsreports/mass-shootings-in-america-2009-2019/#:~:text=Mass%20shootings%20result%20in%20an,not%20yet%20available%20for%202018.>

<sup>101</sup> Watson, *supra* note 42.

<sup>102</sup> *See Extreme Risk Laws Save Lives*, *supra* note 30.

<sup>103</sup> Amy Sherman, *How Florida’s red lag gun law works*, POLITIFACT FLORIDA (Sep. 3, 2019, 10:26 AM), [https://www.politifact.com/florida/statements/2019/sep/03/dave-aronberg/explaining-how-floridas-red-flag-gun-law-works/?fbclid=IwAR000PeKKjbytLEa76\\_JXsDhBRnG\\_tEgO6BkDyz-5T3j0xk8HBA6BZycHSw](https://www.politifact.com/florida/statements/2019/sep/03/dave-aronberg/explaining-how-floridas-red-flag-gun-law-works/?fbclid=IwAR000PeKKjbytLEa76_JXsDhBRnG_tEgO6BkDyz-5T3j0xk8HBA6BZycHSw) (describing how the red flag gun laws work in the state of Florida).

<sup>104</sup> *See Extreme Risk Laws Save Lives*, *supra* note 30.

<sup>105</sup> Mike Baker, *He Wrote ‘Kill All Women,’ but a judge Returned His Guns*, THE NEW YORK TIMES (Nov. 18, 2019), <https://www.nytimes.com/2019/11/18/us/gun-seizures.html> (describing an incident in which a man tweeted about shooting women and how the enforcement of Red Flag Laws could be a solution).

<sup>106</sup> *Id.*

<sup>107</sup> Patrick Neville, COLORADO GENERAL ASSEMBLY, <https://leg.colorado.gov/legislators/patrick-neville> (last visited Nov. 22, 2019).

predominately supports the Second Amendment, and he explains that the state's Red Flag Law does not address the problem of assessing potentially dangerous individuals.<sup>108</sup> On the contrary, the law simply seizes the gun, and informs the potentially dangerous individual where mental healthcare can be sought, but in actuality it does nothing to enforce these individuals to seek the psychological help they may need.<sup>109</sup>

Additionally, a spokeswoman for the National Rifle Association detailed a solution for a change in Red Flag Laws in which any Red Flag Law that includes a risk protection order “at a minimum must include strong due process protections, require treatment and include penalties against those who make frivolous claims.”<sup>110</sup> However, this would require compromise from both sides of the argument but the ultimate goal would nevertheless be to implement restrictions that would not infringe upon people.

#### **IV. The Solution**

The best overall solution for Red Flag Laws would include provisions that: (1) allow health care professionals, counselors, therapists, social workers, and educators to petition for extreme protection orders; (2) include a due process protection such as holding a hearing within forty-eight hours of weapon seizure; (3) provide a definitive amount of time for the confiscation of guns; (4) require mental health treatment; and (5) establish penalties for frivolous claims.

In order to incentivize the states, the government could provide additional funding for mental health treatments for the dangerous individuals. However, if the provisions are not implemented, then a tax, such as cutting funding from school districts and social work programs, should be added. Consequently, this would allow states to adopt their own version of Red Flag Laws and ultimately protect its citizens from potential risk of harm or threat.

##### **a. Allow Others to Petition for Extreme Protection Orders**

As discussed above, the states vary as to who can call the police when there is a dangerous individual. Allowing health care professionals, counselors, therapists, social workers, and educators to petition for extreme protection orders would serve as a preventative measure for possible future tragedy. For example, health care professionals see the patients and address their mental health concerns. If health care providers see an individual as a “dangerous patient” who could potentially harm themselves or others, the health care provider would be able to call the authorities so that the patient's weapons could be seized. This would be similar for counselors, therapists, and social workers who see these individuals and may be aware of the danger that the individual could present to themselves and others.

As another example, a counselor that sees a patient who may be suicidal can call the authorities because that patient is a danger to themselves. Educators are important to include in this class of people because teachers and professors connect with their students on a different and more personal level. If the majority of a student's teachers agree that the student has behavior that includes a significant threat and students have noticed the same, it would be considered reasonable

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<sup>108</sup> Marianne Goodland, *Colorado House passes ‘red flag’ gun bill, moving it to Senate*, COLORADO POLITICS (Mar. 4, 2019), [https://www.coloradopolitics.com/news/colorado-house-passes-red-flag-gun-bill-moving-it-to-senate/article\\_bfecbf90-3ebb-11e9-b8d4-9f075b83b830.html](https://www.coloradopolitics.com/news/colorado-house-passes-red-flag-gun-bill-moving-it-to-senate/article_bfecbf90-3ebb-11e9-b8d4-9f075b83b830.html).

<sup>109</sup> *Id.*

<sup>110</sup> Stolberg, *supra* note 79.

that the educator call for a risk protection order. It would be hard to imagine that anyone would disagree with this provision in a Red Flag Law unless there are frivolous claims made, which will later be discussed. This provision gives others the opportunity to potentially save several lives in the community. As the saying goes, it is better to be safe than sorry.

**b. Include Due Process Protection of a Speedy Trial**

Since Red Flag Laws raise due process concerns, one way to give individuals who have had their guns seized their due process would be improve the speediness of their trial. Here, the best solution would be to have a preliminary hearing after forty-eight (48) hours from the time the guns were seized. This would allow the individual to cool off and explain to the judge whether a mistake has been made. In the same forty-eight (48) hours, the individual must also comply with the mental health treatments mandated as a result of the issuance of an ERPO

Although, this may be considered an exception to the generalization “innocent until proven guilty” method the overall goal for Red Flag Laws is to avoid dangers to communities and individuals from harming themselves. Here, an individual would be found dangerous which creates the argument of being found guilty before having hearings and trials. However, due process would come into play in which the laws would mandate that these hearings and trials occur quickly, essentially providing the due process these individuals deserve. The law simply is protecting the community and the individual. Individuals deemed dangerous will be given the opportunity, after a preliminary hearing, to have a trial and explain whether they present a danger. They will also have time to find attorneys and eventually put on their case. This also gives the opportunity for the petitioners to provide substantial evidence as to why the individual may be a danger to themselves or others.

**c. Definitive Time for Confiscation of Guns**

Once the seizure of the firearms occurs, a definitive time for confiscating weapons would be until an individual is found to be or not to be inherently dangerous. This would be done in an attempt to give petitioners peace of mind, similar to the effect of a temporary restraining order in a domestic violence case. If the individual is found to be dangerous at the trial, the weapon(s) will be confiscated for a two-year period as the minimum. After the two years, if the person’s mental health has improved, the individual may go back to court and ask for the confiscation order to be removed. Two years gives the offender adequate time to take any required classes or go through mental health evaluations, such as a physical and mental examinations or anger management classes, that a judge may recommend. Ideally, these plans would be designated for each individual based on their personal situation.

If there is substantial evidence that the individual’s mental health is deteriorating or that there are increased behavior issues, the petitioner can ask for an indefinite order. This decision would be at the discretion of the trier of fact at trial. Creating the temporary order and then giving an answer to the individual and petitioner once evidence has been reviewed would satisfy due process altogether.

**d. Mental Health Treatment for Dangerous Individuals**

The ultimate goal for Red Flag Laws is to diminish fatalities, whether it be by suicide or mass shootings. Since these issues have raised concerns, Red Flag Laws should mandate individuals who have had their guns seized to receive mental health treatment. If individuals receive treatment, it would be seen as cooperation in taking a step to recover their weapons. This would address the concern of the effects of having mental health issues while possessing a firearm.

An example of a treatment program would include attending therapy or counseling for suicidal thoughts, depression, and manic behavior for a suggested ten-week period. By requiring these individuals to seek treatment it will mitigate their potential dangerousness to themselves and society, therefore increasing the potential prevention of a mass shooting and suicide. A potential method of payment for this type of program would be one funded by the Federal government to the states by creating an incentive to the states that do abide with this goal, which would not violate the Tenth Amendment because Congress has the power to tax and spend for the general welfare.<sup>111</sup>

**e. Penalty for Frivolous Claims**

In a Red Flag Law, it is important to add a provision that elaborates on the consequences may be given to petitioners who are making false accusations. For instance, if someone is merely trying to get an individual into legal trouble or if there was a big fight that possibly lead to certain fear and this leads to a false accusation, this would warrant a consequence. Although, the law is drafted for an honest petitioner, expanding the law to add a consequence for frivolous claims will provide boundaries as well as demonstrate the seriousness of the law; after all the law is designed to protect society in general.

If a petitioner provides testimony and it later becomes known that it is false, or in a similar instance in which a person creates a false claim solely based on the fact they do not like this particular individual, there should be serious consequences. Lying under oath is considered perjury, and that alone could lead to jail time, probation, fines, or community service,<sup>112</sup> and the same consequences should be enforced for those that bring false claims. With such a provision it would likely limit people from taking advantage of this law.

**V. Conclusion: Guilty Until Proven Innocent**

All things considered, Red Flag Laws may infringe upon certain people's constitutional rights, however, Red Flag Laws can be viewed as an exception to the First, Second, and Fourteenth Amendments. This analysis provides an in-depth solution in regard to the important provisions necessary to have a well drafted Red Flag Law that each state should consider implementing. All in all, this type of gun reform law is to keep people safe from dangerous individuals that may cause imminent harm to themselves or the community around them. In addition, this gun reform law would also provide due process protections for people who get their weapons confiscated, such as providing a timely hearing and trial. As the saying goes, "guns don't kill people, people kill

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<sup>111</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>112</sup> *What Can You Do When Someone Commits Perjury?*, HG.ORG, <https://www.hg.org/legal-articles/what-can-you-do-when-someone-commits-perjury-30944> (last visited Nov. 22, 2019).

people.” Therefore, implementing Red Flag Laws can only help the situations that result in mass shootings, not hinder it.