



## Extreme Risk Laws and Due Process

### ERPO Overview

Extreme Risk Protection Orders (ERPOs)<sup>1</sup> are civil court orders that allow petitioners, usually law enforcement or family members, to petition a court to temporarily prohibit the possession and purchase of firearms by persons a court finds pose a significant danger of causing injury to themselves or others with a firearm. ERPOs are modeled after Domestic Violence Protection Orders (DVPOs), but are designed to address the risk of gun violence as opposed to domestic violence. DVPOs exist in all 50 states and the District of Columbia.<sup>2</sup>

Most ERPOs have an “ex parte” component, which allows a court to issue an ERPO without notice to the subject of the order (“respondent”) if it finds that the person poses an “immediate” risk of danger with firearms.<sup>3</sup> The respondent is entitled to a full court hearing to present their case before a final<sup>4</sup> ERPO is issued, 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.**

### Due Process

The U.S. Constitution guarantees due process of law.<sup>5</sup> Generally, due process requires that notice and an opportunity to be heard are given before the government deprives someone of constitutionally protected liberties or property. However, the Supreme Court has long identified situations where valid governmental interests, such as urgent matters of public health and safety, can justify the delay of notice and the opportunity to be heard on issues implicating even the most sacrosanct of rights until after the deprivation occurs.<sup>6</sup> Examples include removing children from the custody of their parents “to avoid imminent danger to the child’s life or health,”<sup>7</sup> involuntary commitment for mental health treatment,<sup>8</sup> and the no-contact and firearm surrender provisions of DVPOs.<sup>9</sup>

To determine if there is adequate due process, the Supreme Court instructs lower courts to consider three factors: (1) the interest of the individual who will be deprived, (2) the risk that the individual will be erroneously deprived of the right under existing procedures, and (3) the interests of the government and other impacted individuals.<sup>10</sup>

### Applying the Due Process Factors to ERPO

#### *Interest of the Individual*

In a series of cases, the Supreme Court recognized that the Second Amendment protects an individual’s right to keep and bear arms for the purpose of self-defense.<sup>11</sup> Respondents therefore have an interest in possessing firearms.



### *Risk of Erroneous Deprivation*

The risk that an ERPO respondent will be erroneously deprived of their firearms is substantially mitigated by the existence of procedural safeguards. For example, ERPOs may only be issued by judicial officers.<sup>12</sup> An ERPO petitioner must provide information under oath that satisfies a set burden of proof to get an order issued.<sup>13</sup> Many ERPO laws make it a crime for an individual to file a petition knowing the information to be false or with the intent to harass.<sup>14</sup> The ex parte orders last a short time, typically no more than 14 days, until a hearing at which the respondent has the right to be heard may be held.<sup>15</sup>

### *Interest of the Government and Other Private Persons*

Regardless of whether they are private persons or government actors, ERPO petitioners have a compelling interest in protecting themselves and others from those likely to commit violence with firearms. Prior notice of a hearing for an ERPO gives a respondent opportunity to harm themselves or others with firearms before they can be separated from their weapons.

While upholding its state's ERPO law against a due process challenge, the Florida Court of Appeals held that the burden of proof, temporary nature of the order, opportunities for early termination, and specific factors considered while issuing an order were all meaningful due process protections.<sup>16</sup> Additionally, research from Colorado shows that ERPOs were almost never filed inappropriately in the first year of the law's implementation, and frivolous petitions are dismissed by courts on the rare occasions they have occurred.<sup>17</sup> Reliability and accountability are paramount in the ERPO process.<sup>18</sup>

## Conclusion

**ERPOs balance robust procedural safeguards with the need for timely judgments and do not violate the due process rights of respondents.** A short, ex parte firearm prohibition with substantial procedural safeguards places minimal burdens on ERPO respondents that are outweighed by the valid governmental interest of protecting public health and safety from foreseeable gun violence. Extreme risk laws are comprehensive tools that states across the country are embracing to reduce gun violence while respecting the rights of all parties involved.

<sup>1</sup> Also called extreme risk laws, among other names.

<sup>2</sup> See generally *Disarm Domestic Violence* (2023), <https://www.disarmdv.org/> (last visited Jan. 3, 2023) to learn about the domestic violence laws, including DVPOs, of all 50 states and the District of Columbia.

<sup>3</sup> See Johns Hopkins Center for Gun Violence Solutions, *Firearm Removal Laws* (Apr. 2022), <https://publichealth.jhu.edu/departments/health-policy-and-management/research-and-practice/center-for-gun-violence-solutions/solutions/firearm-removal-laws> (last visited Aug. 26, 2022).

<sup>4</sup> Note that despite the definitive sound of the name, "final ERPOs" typically last one year or less and are always temporary.

<sup>5</sup> U.S. CONST. AMEND. XIV, § 1.

<sup>6</sup> See *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988).

<sup>7</sup> *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).

<sup>8</sup> See *State ex rel. Doe v. Madonna*, 295 N.W.2d 356, 365 (Minn. 1980).

<sup>9</sup> See *Blazel v. Bradley*, 698 F.Supp. 756, 765 (W.D.Wis.1988).

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<sup>10</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Connecticut v. Doebr*, U.S. 1, 11 (1991).

<sup>11</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

<sup>12</sup> See Fla. Stat. Ann. § 790.401(3); 430 Ill. Comp. Stat. Ann. 67/35-67/40; Colo. Rev. Stat. Ann. §§ 13-14.5-103–13-14.5-105.

<sup>13</sup> See 430 Ill. Comp. Stat. Ann. 67/35-40; Md. Code Ann., Pub. Safety §§ 5-601–5-603; V. Code Ann. §§ 19.2-152.13–19.2-152.14.

<sup>14</sup> See Fla. Stat. Ann. § 790.401(11)(a); Haw. Rev. Stat. Ann. § 134-70; Va. Code Ann. § 19.2-152.16.

<sup>15</sup> See Fla. Stat. Ann. § 790.401(3)(a); 430 Ill. Comp. Stat. Ann. 67/35(i); Md. Code Ann., Pub. Safety §§ 5-604(c)(1).

<sup>16</sup> *Davis v. Gilchrist County Sheriff's Office*, 280 So. 3d 524, 533 (Fla. Dist. Ct. App. 2019).

<sup>17</sup> Barnard LM, McCarthy M, Knoepke CE, Kaplan S, Engeln J, Betz ME. Colorado's first year of extreme risk protection orders. *Inj Epidemiol.* 2021 Oct 20;8(1):59. doi: 10.1186/s40621-021-00353-7. PMID: 34670617; PMCID: PMC8527814.

<sup>18</sup> 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>].