

**SEEING RED: HOW EXTREME RISK
PROTECTION ORDERS COULD SURVIVE DUE
PROCESS CHALLENGES IN THE STATE OF
TEXAS**

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I. INTRODUCTION

In 2019, twenty-three people were killed, and many more were left injured at an El Paso Walmart after a gunman opened fire.¹ The following day, nine people were killed in Dayton, Ohio by a mass shooter.² These “mass shootings,” as they have come to be known, are an increasingly prevalent

1. Angela Kocherga, *Two Years After Walmart Mass Shooting, El Paso Leaders See Inaction and Betrayal by Texas Officials*, TEX. TRIB. (Aug. 3, 2021, 6:00 AM), <https://www.texastribune.org/2021/08/03/el-paso-walmart-mass-shooting-legislature/>.

2. Paul P. Murphy et al., *Dayton Shooter Had an Obsession with Violence and Mass Shootings, Police Say*, CNN (Aug. 7, 2019, 5:27 PM), <https://www.cnn.com/2019/08/05/us/connor-betts-dayton-shooting-profile/index.html>.

occurrence in our society.³ In fact, in the past five years, there have been a shockingly high number of forty-six mass shootings in the United States.⁴

One of the proposed solutions to stop these national tragedies is the enactment of red flag laws.⁵ The idea behind red flag laws is that mass shooters present “red flags” before they commit violent acts and by identifying the red flags, courts can seize their weapons and stop the attacks before they happen.⁶ Take for example the mass shooting in Dayton; the shooter had a history of threatening violence against his girlfriends and according to former classmates, had compiled a “hit list” of potential victims.⁷ A red flag law allowing those individuals to contact law enforcement and the court to seize their weapons based on those red flags could have prevented tragedy.⁸

While red flag laws seem to be a great tool in preventing gun violence, they also present important issues regarding individual liberties and Due Process.⁹ Especially in Texas, where both individual rights and gun rights are highly protected, whether these laws are constitutional is open for debate.¹⁰ Texas is also unique because the constitutionality of red flag laws has not been analyzed in the context of Texas law.¹¹ The underlying problem for any Texas red flag law is that the core framework of the law may be challenged as a violation of procedural Due Process because it allows for a person’s guns to be seized before they are afforded the opportunity to be heard.¹²

Red flag laws, which the Texas Legislature has proposed, are open to constitutional challenges stemming from the Due Process Clause; while the core red flag framework is constitutional under Texas law, the most recently proposed red flag bill does not adequately protect Due Process.¹³ In order for a red flag law to be passed in Texas and withstand constitutional muster, it should require a clear and convincing standard for ex parte hearings and early termination hearings, allow respondents to cross-examine witnesses, require

3. *Number of Mass Shootings in the United States Between 1982 and February 2022*, STATISTA (Mar. 2, 2022), <https://www.statista.com/statistics/811487/number-of-mass-shootings-in-the-us/>.

4. *Id.*

5. *How ‘Red Flag’ Laws Could Have Made a Difference in Mass Shootings in El Paso and Dayton*, USA TODAY (Aug. 8, 2019, 8:51 PM), <https://www.usatoday.com/story/opinion/2019/08/08/el-paso-dayton-red-flag-laws-mass-shootings-editorials-debates/1952669001/>.

6. *Id.*

7. *Id.*

8. *See id.*

9. Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: “Red Flag” Laws and Due Process*, 106 VA. L. REV. 1285 *passim* (2020).

10. Jolie McCullough, *Will Texas Pass a “Red Flag” Law to Remove Guns from People Who Are Deemed Dangerous?*, TEX. TRIB. (June 18, 2018, 12:00 AM), <https://www.texastribune.org/2018/06/18/texas-gun-red-flag-laws-santa-fe-greg-abbott/>.

11. *See id.*

12. *See infra* notes 38–44 and accompanying text (discussing the constitutional issue of ex parte protection orders).

13. *See infra* Parts III, IV (discussing constitutional challenges to a Texas red flag law).

that law enforcement officers petition the court, and include an adequate punishment for bringing false claims.¹⁴

A Texas red flag law with these provisions would not only meet constitutional muster but, more importantly, would pass a legislature committed to protecting gun rights.¹⁵ Accordingly, if a red flag law could pass in a state like Texas, it would provide a framework for a nationwide adoption of similar laws by other conservative and gun right advocate states.¹⁶

II. BACKGROUND OF RED FLAG LAWS AND THEIR CONSTITUTIONAL CONSIDERATIONS

Red flag laws have become one of the most highly debated topics and popular forms of gun control in the United States in the last few years.¹⁷ These laws have received a surprising level of bipartisan support and have even received some conditional support from the National Rifle Association (NRA).¹⁸ Even the Governor of Texas, Greg Abbott, tasked the Texas Legislature with determining whether Texas could benefit from one of these laws following the tragic shooting in El Paso in 2019.¹⁹ These laws, which are referred to by many names such as extreme risk protection order (ERPO) and gun violence restraining order (GVRO) laws, vary in different jurisdictions but have the same core framework and concept.²⁰

Red flag laws allow an individual to petition a court for a protection order against the respondent when they believe that the respondent poses a significant risk of harming themselves or others.²¹ If the order is granted, it allows the court to seize the respondent's firearms and stop the respondent from purchasing any additional firearms.²² The core framework of a red flag law—an *ex parte* hearing—permits weapon seizure before the gun owner is heard by a judge.²³

14. See *infra* Section IV.B (discussing the necessary provisions of a constitutional red flag law).

15. See *infra* Section IV.B (discussing the necessary provisions of a constitutional red flag law); *Governor Abbott Signs Second Amendment Legislation Into Law*, OFF. OF THE TEX. GOVERNOR (June 17, 2021), <https://gov.texas.gov/news/post/governor-abbott-signs-second-amendment-legislation-into-law-2021>.

16. OFF. OF THE TEX. GOVERNOR, *supra* note 15.

17. Blocher & Charles, *supra* note 9, at 1293.

18. McCullough, *supra* note 10.

19. *Id.*

20. *Red Flag Laws States 2022*, WORLD POP. REV., <https://worldpopulationreview.com/state-rankings/red-flag-laws-states> (last visited Mar. 29, 2022); Matt Vasilogambros, *Red Flag Laws Spur Debate Over Due Process*, PEW (Sept. 4, 2019), <https://www.pewtrusts.org/en/research-and-analysis/Blogs/stateline/2019/09/04/red-flag-laws-spur-debate-over-due-process>.

21. Blocher & Charles, *supra* note 9, at 1294–95.

22. Caroline Shen, *A Triggered Nation: An Argument for Extreme Risk Protection Orders*, 46 HASTINGS CONST. L.Q. 683, 691 (2019).

23. *Id.*

The ex parte and full hearings included in red flag laws raise several constitutional issues with procedural Due Process.²⁴ These provisions of red flag laws have also developed in many different states in the past twenty-two years.²⁵ Texas specifically has proposed a red flag law that includes the core ex parte framework and is subject to both U.S. and Texas constitutional requirements for procedural Due Process.²⁶

A. *Ex Parte, Full Hearings, and Procedural Due Process*

Ex parte hearings allow a judge to rule on a motion without waiting for a response from the other side or even giving them notice that the hearings are taking place.²⁷ In the context of red flag laws, these hearings allow the petitioner, who can range from concerned family members to law enforcement officers, to appear before a judge without notice to the gun owner or respondent.²⁸ If a judge issues a protective order, the result is a temporary deprivation of the gun owner's weapons until the judge can hear the gun owner at the full hearing.²⁹ While the specifics vary in different states, the full hearing is generally held within ten to fourteen days of the ex parte hearing and order.³⁰ Ex parte hearings, which are not unique to red flag laws, require the petitioner to present evidence and meet a certain burden of proof that varies from state to state.³¹ If a judge rules that the petitioner has met the burden of proof, an ex parte protection order is issued, the respondent's guns are seized, and the respondent is barred from purchasing additional firearms.³²

The full hearing has its own procedural requirements.³³ Similar to the ex parte hearing, the petitioner must meet a certain burden of proof (again varying among states) in order for the full order to be issued.³⁴ However, in this hearing, the respondent has the opportunity to be heard and present evidence to refute the order and have the firearms returned.³⁵ The specific rights of the respondent at this hearing vary in different states, especially

24. David B. Kopel, *Red Flag Laws: Proceed with Caution*, 45 LAW & PSYCH. REV. 39, 59–60 (2020–2021).

25. Blocher & Charles, *supra* note 9, at 1294–97.

26. Tex. S.B. 110, 87th Leg., R.S. (2021).

27. See Blocher & Charles, *supra* note 9, at 1294–95; *Ex Parte*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/ex_parte (last visited Mar. 29, 2021).

28. Blocher & Charles, *supra* note 9, at 1288–89.

29. *Id.*

30. *Id.* at 1335.

31. *Id.* at 1294.

32. Shen, *supra* note 22, at 691.

33. See Blocher & Charles, *supra* note 9, at 1342.

34. *Id.*

35. *Id.* at 1319–20; Timothy Williams, *What Are 'Red Flag' Gun Laws, and How Do They Work?*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/us/red-flag-laws.html>.

regarding the respondent's right to cross-examine the petitioner.³⁶ In the end, these hearings conclude in two ways: the judge either (1) overturns the order and returns the weapons, or (2) issues a protection order that can last up to one year before it expires or is renewed.³⁷

While these laws have garnered bipartisan support, the *ex parte* hearing framework raises procedural Due Process issues because the respondent is being deprived of their firearms before they have the opportunity to be heard by a judge.³⁸ Procedural Due Process rules are meant to protect citizens from mistaken or erroneous deprivation of "life, liberty, or property."³⁹ Procedural Due Process rules in both the United States as a whole and Texas specifically are flexible.⁴⁰ These flexible rules allow the court to balance the interests of the private citizen and the government while also analyzing the risk of erroneous deprivation.⁴¹

The *ex parte* framework at issue here can be classified under the terms used by the Supreme Court as a "postdeprivation hearing."⁴² The respondent is not afforded the right to be heard or put on notice until *after* the *ex parte* hearing and *after* the deprivation.⁴³ The deprivation of an enumerated fundamental right demands the strongest procedural Due Process protections.⁴⁴

B. Red Flag Laws at the State Level

To adequately understand red flag laws on the state level and to understand what a Texas red flag law could look like, it is important to look at the original laws and how they have developed since their inception. Nineteen states and the District of Columbia have enacted some version of a red flag law.⁴⁵ The specifics of these laws vary, raising different constitutional concerns in different jurisdictions.⁴⁶ One thing, however, is very common: enactment of these laws is generally preceded by a mass shooting or similar gun-related tragedy.⁴⁷

36. Kopel, *supra* note 24, at 70–71.

37. Shen, *supra* note 22, at 691; Blocher & Charles, *supra* note 9, at 1289.

38. Blocher & Charles, *supra* note 9, at 1290–91.

39. *Id.* at 1319 (internal quotation marks omitted) (quoting *Carey v. Phipus*, 435 U.S. 247, 259 (1978)).

40. *Id.*; *Mosley v. Tex. Health & Hum. Servs. Comm'n*, 593 S.W.3d 250, 265 (Tex. 2019).

41. Blocher & Charles, *supra* note 9, at 1331–32.

42. *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976).

43. Blocher & Charles, *supra* note 9, at 1331.

44. Kopel, *supra* note 24, at 59.

45. WORLD POP. REV., *supra* note 20.

46. *See, e.g.*, Kopel, *supra* note 24, at 70–71.

47. *See* David Nielsen, *Disarming Dangerous Persons: How Connecticut's Red Flag Law Saves Lives Without Jeopardizing Constitutional Protections*, 23 QUINNIPIAC HEALTH L.J. 253, 278 (2020); Jonathan Rabinovitz, *Rampage in Connecticut: The Overview; Connecticut Lottery Worker Kills 4 Bosses, Then Himself*, N.Y. TIMES (Mar. 7, 1998), <https://www.nytimes.com/1998/03/07/nyregion/rampage-connecticut-overview-connecticut-lottery-worker-kills-4-bosses-then.html>; Greg Allen, *Florida*

1. Connecticut: The Pioneer of the Red Flag Law

It is essential to begin the overview of codified state red flag laws with Connecticut not only because it was the first of its kind but also because it is often seen as a template for other states to follow.⁴⁸ In 1999, Connecticut became the first state to enact a red flag law after a mentally ill employee killed five people, including himself, at the state's lottery headquarters in 1998.⁴⁹ The Connecticut model has the core *ex parte* framework that is commonly seen in red flag laws, but it is also distinct in a significant way.⁵⁰

A key element of the Connecticut law is that only law enforcement officers, a state's attorney, or an assistant state's attorney are empowered to bring a complaint and petition to a judge requesting that a protection order be issued.⁵¹ However, even these law enforcement officers, who are trained professionals, are required to conduct an independent investigation.⁵² If, through this investigation, the officers or attorneys determine that probable cause exists and find there is no reasonable alternative available to prevent the individual from causing harm, they can petition the court for a protection order.⁵³

Connecticut's requirement for law enforcement to bring the petitions has not impeded the law's effectiveness.⁵⁴ In fact, Connecticut has a high per capita rate of confiscation even with the petition requirements in place.⁵⁵ Connecticut actually has a much higher per capita confiscation rate than other states, reflecting the modern wave of red flag laws that have broader and more lenient requirements for who can bring a petition.⁵⁶ This data also shows that in cases where outcomes were reported, 32% of *ex parte* protection orders were overturned at the full hearing.⁵⁷

This original model was updated on June 1, 2022, to allow "[a]ny family or household member or medical professional" to make a good faith application for a risk protection order investigation.⁵⁸ This amendment reflects the modern approach that allows family members to act but does not

Could Serve as Example for Lawmakers Considering Red Flag Laws, NPR (Aug. 21, 2019, 5:00 AM), <https://www.npr.org/2019/08/21/752815318/florida-could-serve-as-example-for-lawmakers-considering-red-flag-laws>.

48. Blocher & Charles, *supra* note 9, at 1295.

49. Nielsen, *supra* note 47, at 278; Rabinovitz, *supra* note 47.

50. See CONN. GEN. STAT. § 29-38c (2019).

51. *Id.*

52. *Id.* § 29-38c(a).

53. *Id.*

54. See Kopel, *supra* note 24, at 62 n.128.

55. *Id.* The calculations for the per capita confiscation rates were based on petitions per 100,000 people in the state population. *Id.* Connecticut's per capita confiscation rate was 7.47. *Id.*

56. *Id.*

57. See Michael A. Norko & Madelon Baranoski, *Gun Control Legislation in Connecticut: Effects on Persons with Mental Illness*, 46 CONN. L. REV. 1609, 1619 (2014).

58. 2021 Conn. Pub. Acts 21–67.

go as far as many states in allowing family members and others to petition the court directly with no separate investigation.⁵⁹

2. *Development of Red Flag Laws to Present*

In the twenty-two years since Connecticut codified its first red flag law, many states have enacted laws that follow the original model or substantially deviate from it.⁶⁰

Florida, which enacted its red flag law in 2018, is one of the more recent states to enact red flag law legislation, and is an excellent example of a state that has successfully followed the Connecticut model.⁶¹ Florida enacted its law in response to the tragic events that occurred in Parkland, Florida, where seventeen people were killed in a mass shooting at Marjory Stoneman Douglas High School.⁶² Florida closely follows the Connecticut model by requiring a law enforcement officer or a law enforcement agency to petition the court for a risk protection order.⁶³ Florida also requires the petitioner to meet a clear and convincing standard at the full protection hearing.⁶⁴ That same standard must also be met by the gun owner if they file a motion for early termination.⁶⁵

Florida's law has achieved great success, and by using key provisions from Connecticut's law, it has also been seen as a potential model for a new wave of state red flag laws.⁶⁶ Since the enactment of the law in 2018 to August 2019, Florida courts approved approximately 2,500 risk protection orders.⁶⁷ Additionally, the law has received support from both Florida Republicans and Democrats.⁶⁸

Not all states have followed Florida's lead in sticking closely to the original Connecticut model.⁶⁹ States have made many key deviations from the original model in their red flag laws, including who is able to petition the court, the standard of evidence, the ability to cross-examine witnesses and the original petitioner, and the length of the deprivation.⁷⁰ California, for example, which enacted its law in 2014, was the first to allow family members to petition the court directly.⁷¹ However, despite this broad rule, California has a much lower per capita rate of confiscation than

59. See Blocher & Charles, *supra* note 9, at 1295.

60. See *id.* at 1295–96.

61. See FLA. STAT. § 790.401 (2018); Allen, *supra* note 47.

62. McCullough, *supra* note 10; FLA. STAT. § 790.401 (2018).

63. FLA. STAT. § 790.401 (2018).

64. *Id.*

65. *Id.* § 790.401(6).

66. See Allen, *supra* note 47.

67. *Id.*

68. *Id.*

69. Blocher & Charles, *supra* note 9, at 1295–96.

70. See *id.* at 1340; Kopel, *supra* note 24, at 70.

71. See CAL. PENAL CODE § 18150 (West 2020).

Connecticut.⁷² More recently, states such as New York and Colorado have enacted laws that broaden who can petition the court to include teachers, family members, household members, and those who share a child with the respondent.⁷³

Colorado's law, which is the most recent red flag law to be enacted, deviates significantly from the original model and focuses more on the petitioner and less on the rights of the respondent.⁷⁴ The Colorado law allows for a telephone hearing in exceptional circumstances "to protect [the] petitioner from potential harm."⁷⁵ The law also allows for the petitioner to present a sworn affidavit instead of actually appearing in court.⁷⁶ By including these provisions, the law essentially deprives the respondent of the ability to confront the petitioner and have counsel cross-examine them at the full protection hearing.⁷⁷

C. U.S. Constitutional Law Regarding Red Flag Laws

The Supreme Court of the United States has established a test for whether a deprivation of an individual's interest before a hearing is constitutional or not and has outlined several requirements for Due Process.⁷⁸ Additionally, other constitutional rights, such as the Second and Fourth Amendments are applicable to red flag laws.⁷⁹ Finally, while the Court has yet to hear any challenges to red flag laws, the limited case law available sets the stage for how courts will review constitutional challenges to red flag laws.⁸⁰

1. U.S. Constitutional Requirements for Due Process

Procedural Due Process imposes limitations on government actions that deprive citizens "of 'liberty' or 'property' interests within . . . the Due Process Clause of the Fifth or Fourteenth Amendment."⁸¹ The Court "has held that some form of hearing is required" before the *final* deprivation of a property

72. Kopel, *supra* note 24, at 62 n.128.

73. N.Y. C.P.L.R. § 6340 (McKinney 2019); COLO. REV. STAT. ANN. § 13-14.5-104(1) (2019).

74. Hayley Sanchez, *Colorado's Red Flag Law Goes into Effect Jan. 1. This Is What People Are Watching for*, CPR NEWS (Dec. 27, 2019), <https://www.cpr.org/2019/12/27/colorados-red-flag-law-goes-into-effect-jan-1-this-is-what-people-are-watching-for/>.

75. COLO. REV. STAT. § 13-14.5-105(1)(a) (2019).

76. *Id.* § 13-14.5-105(4)(a).

77. Kopel, *supra* note 24, at 70–71.

78. *Mathews v. Eldridge*, 424 U.S. 319, 333–35 (1976).

79. *Caniglia v. Strom*, 141 S. Ct. 1596, 1601 (2021) (Alito, J., concurring); see Coleman Gay, "Red Flag" Laws: How Law Enforcement's Controversial New Tool to Reduce Mass Shootings Fits Within Current Second Amendment Jurisprudence, 61 B.C. L. REV. 1491, 1512 (2020).

80. See *Caniglia*, 141 S. Ct. at 1601.

81. *Mathews*, 424 U.S. at 332.

interest.⁸² The requirements for a final deprivation hearing are somewhat broad, as the Court stated that “[t]he fundamental requirement of [D]ue [P]rocess is . . . to be heard ‘at a meaningful time and in a meaningful manner.’”⁸³ When faced with decisions regarding the constitutional requirements for prehearing deprivations, like those in the red flag law framework, the Court balanced the deprivation of the right with the government’s interests while also considering the risk that the deprivation was erroneous.⁸⁴

In *Mathews v. Eldridge*, the Court solidified the test for determining the constitutionality of prehearing deprivations.⁸⁵ The Court used a three-factor test to determine the amount of process needed for a given situation.⁸⁶ Those factors are:

[T]he private interest that will be affected by the official action; . . . 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 . . . the Government’s interest, including the function involved and the fiscal administrative burdens that the additional or substitute procedural requirement would entail.⁸⁷

Ultimately, the Court in *Mathews* held that under the Due Process Clause a predeprivation hearing was not required before the termination of the plaintiff’s disability benefits.⁸⁸

In following the *Mathews* test, the Court has allowed the deprivation of an individual’s interests without a predeprivation hearing in multiple scenarios including terminating disability benefits, suspending a driver’s license due to multiple infractions or refusal to consent to a breathalyzer, and many more.⁸⁹ In these situations, it is evident that the Court found that the government’s interest outweighed the private interests enough to deprive the individuals of their rights before they had the opportunity to be heard.⁹⁰

The Supreme Court’s jurisprudence upholding the deprivation of property prior to a hearing has a common principle—the need for swift government action to protect public safety.⁹¹ This can be seen in *Hodel v. Virginia Surface Mining & Reclamation Association*, a Supreme Court case

82. *Id.* at 333.

83. *Id.* (first quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); and then citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

84. Blocher & Charles, *supra* note 9, at 1321–23.

85. *Mathews*, 424 U.S. at 334–35.

86. *Id.*

87. *Id.*

88. *Id.* at 349.

89. Blocher & Charles, *supra* note 9, at 1322–23.

90. *Id.* at 1323.

91. *See id.* at 1323–24.

decided five years after *Mathews*.⁹² This case included a Due Process challenge to an act authorizing the Secretary of the Interior to order the cessation of mining operations before the mine operator could be heard or challenge it if the Secretary found that mining “creat[ed] an [imminent] danger to the health or safety of the public.”⁹³ The Court upheld the act, stating “that summary administrative action may be justified in emergency situations” including in furtherance of the government’s interest in protecting public health and safety.⁹⁴ The Court acknowledged that the act was passed soon after a mining accident that killed 124 people and left thousands more homeless, and being so, the immediate cessation of the mining operations was justified as a response to an emergency situation.⁹⁵

It is evident that the Court analyzes the government’s interests and the individual’s interests, as well as the risk of erroneous deprivation when analyzing the need for predeprivation hearings.⁹⁶ The case law also shows that the Court has deprived citizens of their rights when the government’s interest substantially outweighs the individual’s, especially when the government’s interest is protecting the public from emergency situations.⁹⁷

2. Other Constitutional Considerations Concerning Red Flag Laws

Red flag laws raise Second Amendment and possible Fourth Amendment constitutional concerns.⁹⁸ However, to adequately address those concerns would require an in-depth analysis that is beyond the scope of this Comment. Being so, they are only briefly discussed below.

Any law that results in the deprivation of an individual’s firearms is likely to raise Second Amendment concerns.⁹⁹ While the right to bear arms has been highly protected, the Supreme Court in *District of Columbia v. Heller* explained that the right is not absolute and “do[es] not guarantee a right to keep or bear arms in any manner and for any purpose.”¹⁰⁰ Justice Scalia also stated in a footnote to the *Heller* opinion that laws prohibiting “the possession of firearms [both] by felons and the mentally ill are ‘presumptively lawful.’”¹⁰¹ Additionally, both Indiana and Connecticut state

92. *Id.*; see *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 264 (1981).

93. Blocher & Charles, *supra* note 9, at 1324 (quoting *Hodel*, 452 U.S. at 298–301).

94. *Hodel*, 452 U.S. at 299–301.

95. *Id.* at 300 n.44.

96. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

97. *Hodel*, 452 U.S. at 300–01.

98. See *Caniglia v. Strom*, 141 S. Ct. 1596, 1601 (2021) (Alito, J., concurring); Gay, *supra* note 79, at 1512.

99. See generally Gay, *supra* note 79, at 1491.

100. *Id.* at 1512 (citing *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)).

101. *Id.* (citing *Heller*, 554 U.S. at 626–27 n.26).

courts have upheld their respective red flag laws after being challenged on Second Amendment grounds.¹⁰²

Red flag laws may also raise Fourth Amendment concerns.¹⁰³ Justice Alito, in his concurring opinion of *Caniglia v. Strom*, stated that “[p]rovisions of red flag laws may be challenged under the Fourth Amendment.”¹⁰⁴ However, whether red flag laws can constitute an unreasonable search and seizure by the government is not within the scope of this Comment.

3. Red Flag Case Law

At this point in time, the Supreme Court has not heard a case regarding red flag laws.¹⁰⁵ However, the Court’s recent holding in *Caniglia* raises questions about the future challenges to red flag laws.¹⁰⁶ In *Caniglia*, the Court held that the plaintiff’s Fourth Amendment rights were violated when the police seized his weapons from his home without a warrant after his wife had called for a welfare check.¹⁰⁷ While again, this does not specifically address red flag laws, which Justice Alito pointed out in his concurring opinion, it does show that weapons cannot be seized simply based on the call of a concerned family member and provides insight into how the Supreme Court may evaluate red flag laws in the future.¹⁰⁸

While the case law for procedural Due Process challenges to red flag laws is limited, looking to the existing state case law can give insight into how red flag laws can pass constitutional muster.¹⁰⁹ One of the most recent red flag law cases comes from the Florida First District Court of Appeals.¹¹⁰ That case, *Davis v. Gilchrist County Sheriff’s Office*, resulted in the court upholding the red flag law after a deputy sheriff claimed it was unconstitutional.¹¹¹ In *Gilchrist*, a deputy sheriff sent hostile and graphic threats toward his ex-girlfriend and told his supervisor that “he wanted to kill his girlfriend’s paramour.”¹¹² The court upheld the issuance of the protection order and stated that the law did not violate the Due Process Clause because the statute required a hearing within fourteen days of the protection order in which the respondent could be heard, had a clear and convincing burden of

102. *Id.* at 1524–26.

103. *Caniglia*, 141 S. Ct. at 1601.

104. *Id.*

105. *See id.*

106. *See id.*

107. *Id.* at 1598–1600.

108. *See id.* at 1601.

109. *See id.*

110. *See generally* *Davis v. Gilchrist Cnty. Sheriff’s Off.*, 280 So. 3d 524 (Fla. Dist. Ct. App. 2019).

111. *Id.* at 533.

112. *Id.* at 529.

proof, required that the protection order not exceed twelve months, and allowed the respondent to request early termination.¹¹³

The cases above give valuable insight on how red flag laws could fit into the U.S. procedural Due Process framework and show how red flag laws can pass constitutional muster.¹¹⁴

D. Texas's Proposed Red Flag Law and Requirements for Procedural Due Process

Texas legislators have proposed a recent red flag law bill that will have to conform with Texas constitutional law.¹¹⁵ Texas procedural Due Process law is similar to U.S. constitutional law but is also somewhat unique.¹¹⁶ Additionally, how ex parte hearings fit within Texas procedural Due Process law can be seen in several other Texas statutes.¹¹⁷

1. Texas Red Flag Legislation and Senate Bill 110

The proposal of red flag legislation is not something new to Texas legislators.¹¹⁸ In both the 2017 and 2019 legislative sessions, red flag legislation was proposed but never made it out of committee.¹¹⁹ The 2021 Texas legislative session featured both a new red flag law proposal, as well as a bill seeking to prohibit the state and other government bodies from adopting or enforcing red flag laws.¹²⁰

Senate Bill 110 is the most recent proposed Texas red flag law.¹²¹ The bill was introduced on November 9, 2020, and is currently pending in the Senate State of Affairs Committee.¹²² This bill follows the core red flag framework by allowing a judge to issue a temporary ex parte protection order that is then followed by the full hearing no more than fourteen days later.¹²³

113. *Id.* at 533.

114. *See supra* notes 107–12 and accompanying text (discussing how red flag laws have been and could be treated by the courts).

115. Tex. S.B. 110, 87th Leg., R.S. (2021).

116. *See Mosley v. Tex. Health & Hum. Servs. Comm'n*, 593 S.W.3d 250, 265 (Tex. 2019); *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001); *Davidson v. Great Nat'l Life Ins. Co.*, 737 S.W.2d 312, 314 (Tex. 1987).

117. *See infra* notes 122–127 and accompanying text (discussing ex parte orders in other areas of Texas law).

118. *See Emily Taylor & Richard Hayes, Update: Red Flag Laws ... Who Has The Right to Take Away Your Guns? / Texas*, U.S. L. SHIELD (Mar. 31, 2021), <https://www.uslawshield.com/update-red-flag-laws-tx/>.

119. *Id.*

120. *Id.*

121. Tex. S.B. 110, 87th Leg., R.S. (2021).

122. TEX. LEGIS. ONLINE HIST., <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB110> (last visited Mar. 29, 2022).

123. Tex. S.B. 110 Art. 7B.155(a).

In addition to the core framework, it also contains specific provisions that are both similar to and differ from other state red flag laws.¹²⁴

The proposed law follows the more recent trend in state red flag laws by allowing family and household members to petition a court directly for a protection order.¹²⁵ It uses the definition of family or household member from the Texas Family Code, which includes “individuals who are former spouses of each other, individuals who are the parents of the same child, without regard to marriage . . . [and] persons living together in the same dwelling.”¹²⁶

Additionally, the standard of proof required at *ex parte* hearings is similar to many red flag laws.¹²⁷ The bill allows for a temporary *ex parte* order to be granted under the standard that “there is reasonable cause to believe that the respondent poses an immediate and present danger of causing bodily injury, serious bodily injury, or death to any person, including the respondent as a result of the respondent’s serious mental illness and access to firearms.”¹²⁸

However, the full protection hearing requires the petitioner to meet a higher standard of clear and convincing evidence.¹²⁹ If the petitioner does not meet this standard, then a full protection order is denied and the temporary protection order, if any was issued, is rescinded.¹³⁰ The bill does not specifically address the respondent’s rights at this hearing.¹³¹ The statutory language is not clear as to whether the respondent has the right to cross-examine witnesses such as the original petitioner or, like in the recent Colorado law, whether the petitioner can present an affidavit in lieu of appearing at the hearing.¹³²

The proposed bill also allows the respondent to petition the court ninety-one days after issuance of the protection order to have it lifted.¹³³ After a hearing on the issue, the court can determine whether there is a continuing need for the order.¹³⁴ The court has the power to either terminate the order early or allow it to remain in effect until the date the order is set to expire.¹³⁵

Finally, the bill concludes by making it a misdemeanor to knowingly make a false request for a protection order if the petitioner had the “intent to deceive.”¹³⁶

124. *Cf. id.* Arts.152(a)(1)–(3); CONN. GEN. STAT. § 29-38c (2019); N.Y. C.P.L.R. § 6340 (McKinney 2019); COLO. REV. STAT. § 13-14.5-104(1) (2019).

125. Tex. S.B. 110 Art. 7B.152(a).

126. TEX. FAM. CODE ANN. §§ 71.003, .005.

127. Tex. S.B. 110 art. 7B.154(a); Blocher & Charles, *supra* note 9, at 1340.

128. Tex. S.B. 110 art. 7B.154(a), 87th Leg., R.S. (2021).

129. *Id.* art. 7B.155(d).

130. *Id.* art. 7B.155(e).

131. Tex. S.B. 110.

132. Tex. S.B. 110 art. 7B.155; COLO. REV. STAT. § 13-14.5-105(4)(a) (2019).

133. Tex. S.B. 110 art. 7B.157(c).

134. *Id.*

135. *Id.*

136. Tex. S.B. 110 § 37.083(b).

2. Texas Requirements for Procedural Due Process

The Texas Due Process Clause states: “No citizens of this [s]tate shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.”¹³⁷

The Texas Constitution has similar requirements for procedural Due Process as the U.S. Constitution.¹³⁸ Being so, the Supreme Court of Texas follows the same three-factor test for predeprivation of rights established by the Supreme Court of the United States in *Mathews*.¹³⁹ In following the *Mathews* test, Texas courts measure what process is due under a flexible standard that depends on “the practical requirements of the circumstances.”¹⁴⁰ For the most part, the Texas requirements for procedural Due Process are similar to those of the United States; the courts balance the private interest affected by the deprivation, the risk of erroneous deprivation, and the government’s interests to determine what process is necessary.¹⁴¹

However, some unique Texas constitutional requirements for procedural Due Process raise issues with red flag laws enacted in other jurisdictions and demonstrate what provisions would be necessary for Texas red flag law legislation.¹⁴² The Texas Supreme Court has stated that Due Process under the Texas Constitution:

[At] a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. And, under certain circumstances, the right to be heard assures a full hearing before a court . . . the right to introduce evidence at a meaningful time and in a meaningful manner, and the right to judicial findings based upon that evidence . . . [and] an opportunity to cross-examine witnesses, to produce witnesses, and to be heard on questions of law.¹⁴³

3. Texas Procedural Due Process Applied to Other Areas of Law

Texas allows for ex parte hearings in other areas of the law such as Child Protective Services (CPS) and domestic violence restraining orders, and because Texas courts have yet to hear red flag case law, these laws can show how ex parte hearings fit within the Texas procedural Due Process framework.¹⁴⁴

137. TEX. CONST. art. I § 19.

138. See *Mosley v. Tex. Health & Hum. Servs. Comm’n*, 593 S.W.3d 250, 265 (Tex. 2019).

139. *Id.*

140. *Id.*

141. *Id.*

142. See *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001); Tex. S.B. 110, 87th Leg., R.S. (2021); COLO. REV. STAT. § 13-14.5-105(4)(a) (2019).

143. *Perry*, 67 S.W.3d at 92 (citations omitted).

144. See TEX. FAM. CODE ANN. §§ 83.001, 262.101; McCullough, *supra* note 10.

The Texas Family Code allows Texas CPS to impact parental rights after ex parte hearings similar to those found in red flag laws.¹⁴⁵ CPS can also remove a child without a court order in some emergency circumstances and request an initial hearing no later than the next business day.¹⁴⁶ More similar to red flag laws, Texas CPS can obtain a removal order after an ex parte hearing without the parents being present.¹⁴⁷ These practices are legal in Texas and generally require that a full hearing be set within fourteen days of the emergency removal.¹⁴⁸ In the ex parte hearing, the burden of proof for the CPS is a person of “ordinary prudence and caution.”¹⁴⁹ The ex parte hearings and removal affect the parent’s fundamental right to parent but are still legally practiced in Texas.¹⁵⁰

Texas also allows for ex parte domestic violence and family violence restraining orders that affect constitutional rights.¹⁵¹ These orders can also be issued after an ex parte hearing and can result in a person being barred from occupying their home or seeing certain individuals listed on the protection order for up to twenty days before they are heard by a judge.¹⁵² Also, Texas currently prohibits anyone under a family violence or domestic violence protection order from possessing firearms.¹⁵³ So, these orders can potentially affect an individual’s right to be secure in their home and right to bear arms, which are both constitutionally enumerated rights.¹⁵⁴ Enforcing the surrender of firearms has been an issue in the past; however, Judge Denton in Austin enforced these orders by requiring surrender within a certain timeframe and seized approximately forty-five to sixty guns a year through family violence protection orders before he retired.¹⁵⁵

Both of these practices allow for ex parte hearings and postdeprivation hearings.¹⁵⁶ More importantly, both of these practices fit within the Texas procedural Due Process framework.¹⁵⁷

145. TEX. FAM. CODE ANN. § 262.101.

146. *Id.* § 262.104.

147. *See id.* § 262.101.

148. *Id.*

149. *Id.*

150. *See id.*; *In re R.M.T.*, 352 S.W.3d 12, 17–18 (Tex. App.—Texarkana 2011, no pet.). A fundamental right is an individual right that is not expressly enumerated in the Constitution but that the Court incorporated as a right under the Fourteenth Amendment because of its importance and deep roots in the nation’s history. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997); *Constitutional Right*, BLACK’S LAW DICTIONARY (11th ed. 2019).

151. TEX. FAM. CODE ANN. § 81.0015.

152. *Id.* § 83.001.

153. *Id.* § 85.022(b)(6).

154. *See id.* §§ 83.001, 85.022(b)(6). A constitutionally enumerated right is one which is expressly stated in the constitution. *Constitutional Right*, BLACK’S LAW DICTIONARY (11th ed. 2019).

155. McCullough, *supra* note 10.

156. *See supra* notes 145–54 and accompanying text (discussing the ex parte framework of CPS and domestic violence restraining orders).

157. *See supra* notes 145–54 and accompanying text (discussing the ex parte framework of CPS and domestic violence restraining orders).

III. THE CORE RED FLAG FRAMEWORK WOULD PASS TEXAS CONSTITUTIONAL MUSTER

Just as the core framework of a red flag law is constitutional under the U.S. Constitution, it would also be constitutional under the Texas Constitution due to the low risk of erroneous deprivations.¹⁵⁸ This is apparent through other areas of Texas law that allow ex parte hearings to impact constitutional rights, just as the core red flag framework does.¹⁵⁹

A. The Core Due Process Requirements in the Texas Constitution Mirror Those in the U.S. Constitution and Will Allow for Ex Parte Deprivation Hearings

The constitutionality of the core red flag framework can be analyzed under Texas and U.S. law concurrently because the Supreme Court of Texas applies the same test as the Supreme Court of the United States did in *Mathews v. Eldridge* when analyzing procedural Due Process challenges to ex parte hearings under the Texas Constitution.¹⁶⁰ When analyzing red flag laws under the *Mathews* test, the core ex parte framework is constitutional because the deprivation is temporary and there are many safeguards that Texas can adopt in order to minimize the risk of erroneous deprivation.¹⁶¹ Red flag laws are a response to emergency situations and Texas's interest in public safety and stopping mass shootings (like the El Paso shooting in 2019); together, with the reduced risk of erroneous deprivation, this will justify the temporary deprivation.¹⁶²

The government's interest in preventing gun violence, suicide, and the mass shootings that generally precede red flag laws is extremely important; however, the private interest affected by red flag laws is also at the highest level of importance because it is a constitutionally enumerated right.¹⁶³ Because the government interest and the private interest affected are on equal planes, the analysis should come down to the second factor in the *Mathews* test—the risk of the erroneous deprivation through the procedures used and the probable value, if any, of additional or substitute procedural

158. See Blocher & Charles, *supra* note 9, at 1331–35; *Mathews v. Eldridge*, 424 U.S. 319, 345–46 (1976) (discussing the procedural safeguards already in place for the termination of disability benefits).

159. See *supra* notes 145–155 and accompanying text (discussing the ex parte framework of CPS and domestic violence restraining orders).

160. *Mathews*, 424 U.S. at 331; *Mosley v. Tex. Health & Human Servs. Comm'n*, 593 S.W.3d 250, 265 (Tex. 2019).

161. See *Mathews*, 424 U.S. at 331.

162. See *Mosley*, 593 S.W.3d at 265; *supra* notes 80–86 and accompanying text (discussing how the Supreme Court of the United States has upheld the use of postdeprivation hearings in emergency situations to protect public safety).

163. Kopel, *supra* note 24, at 59.

safeguards.¹⁶⁴ Due to the temporary nature of the red flag ex parte protection orders and the plethora of possible additional safeguards, the risk of erroneous deprivation under the core red flag law framework is low, allowing the core red flag law to pass the test used by the Supreme Court and the State of Texas.¹⁶⁵

The temporary deprivation of an individual's rights is a small price to pay for increased protection against possible gun violence.¹⁶⁶ The full hearing where a respondent is heard and afforded full protection under the Due Process Clause is generally held no later than fourteen days after the temporary ex parte order.¹⁶⁷ This means that even if the order is reversed, the deprivation that occurred was only for a short amount of time.¹⁶⁸ While any deprivation—even a fourteen-day temporary deprivation—of an enumerated right, such as the right to bear arms, should not be taken lightly, the risk of an erroneous, temporary deprivation is addressed in the core red flag framework and can be curbed by additional safeguards and standards—such as heightened standards of evidence, preprotection order investigations, etc.¹⁶⁹

Even though the respondent is not present at the ex parte hearing, they are not entirely deprived of Due Process.¹⁷⁰ At its core, the ex parte red flag framework requires a hearing where the petitioner must make their case and meet a certain burden of proof before a judge.¹⁷¹ While this burden varies and the respondent is not given notice of this hearing, it ensures that a certain level of process is required, which protects the respondent and reduces the risk of erroneous deprivation.¹⁷²

Texas, like the United States, requires a hearing within a meaningful time and manner.¹⁷³ However, uncertainty exists as to what constitutes a meaningful time and a meaningful manner.¹⁷⁴ What is clear though is that the amount of process required is set to a flexible standard and the opportunity to be heard depends on the nature of the case.¹⁷⁵ While a red flag case has not been decided in Texas, because Texas mirrors United States law it is possible to look to other jurisdictions for the answer.¹⁷⁶

164. See *Mathews*, 424 U.S. at 333–35.

165. See Blocher & Charles, *supra* note 9, at 1331–35; *Mathews*, 424 U.S. at 345–46 (discussing the procedural safeguards already in place for the termination of disability benefits).

166. See Shen, *supra* note 22, at 684.

167. See *supra* notes 22–32 and accompanying text (discussing ex parte hearings and full hearings).

168. See *supra* notes 22–32 and accompanying text (discussing ex parte hearings and full hearings).

169. See *supra* notes 54–70 and accompanying text (discussing the specific provisions enacted by Connecticut and Florida).

170. See *supra* notes 22–32 and accompanying text (discussing ex parte hearings and full hearings).

171. See *supra* notes 22–32 and accompanying text (discussing ex parte hearings and full hearings).

172. See *supra* notes 22–32 and accompanying text (discussing ex parte hearings and full hearings).

173. *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001).

174. See *id.*

175. *Mosley v. Tex. Health & Hum. Servs. Comm'n*, 593 S.W.3d 250, 265 (Tex. 2019).

176. See McCullough, *supra* note 10; *Davis v. Gilchrist Cnty. Sheriff's Off.*, 280 So. 3d 524 (Fla.

Other state court rulings on red flag laws can show how red flag laws fit within U.S. constitutional law and thus, could fit within Texas Constitutional law.¹⁷⁷ In *Gilchrist*, the Florida District Court of Appeals found that a hearing within fourteen days of the petition afforded the respondents adequate Due Process rights.¹⁷⁸ This case, because there are few cases challenging red flag laws in general let alone on Due Process grounds, serves as a signal as to whether these laws fit within the procedural Due Process framework of the U.S. Constitution.¹⁷⁹ Accordingly, it is logical to conclude that the hearing within fourteen days affords the respondent the opportunity to be heard in a meaningful time and manner.¹⁸⁰

B. Texas Already Employs Similar Practices that Allow for Ex Parte Hearings Affecting the Highest Degree of Constitutionally Protected Rights

While a procedural Due Process challenge to red flag laws has not been brought in Texas courts, and therefore their specific ruling is uncertain, we can look to other areas of Texas law to demonstrate how Texas has accepted the ex parte hearing found in the red flag framework.¹⁸¹ Texas courts already use ex parte hearings in other areas of the law that impact significant individual rights.¹⁸² The presence of these practices supports the assertion that the red flag core framework will fit within the procedural framework of Texas's Due Process.¹⁸³

1. Ex Parte Hearings Are Constitutional When Used by Child Protective Services to Affect the Fundamental Right to Parent

The practices used by CPS are an example of ex parte hearings already utilized in Texas and show that the ex parte hearings used in red flag laws are constitutional in Texas.¹⁸⁴ The right to parent, raise, and have physical possession of one's child is held in high regard similar to one's right to bear arms.¹⁸⁵ And while this right may not be enumerated in the United States Constitution or Texas Constitution, it is stated in the Texas Family Code¹⁸⁶ and is a fundamental right incorporated under the Due Process Clause.¹⁸⁷ The

Dist. Ct. App. 2019).

177. See McCullough, *supra* note 10; *Gilchrist*, 280 So. 3d at 524.

178. *Gilchrist*, 280 So. 3d at 533.

179. See Blocher & Charles, *supra* note 9, at 1344.

180. See *id.*

181. TEX. FAM. CODE ANN. §§ 83.001, 151.001(a)(1).

182. *Id.*

183. See *id.*

184. See *supra* notes 146–151 and accompanying text (discussing CPS ex parte hearings affecting the fundamental right to parent).

185. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

186. TEX. FAM. CODE ANN. § 151.001(a)(1).

187. *In re R.M.T.*, 352 S.W.3d 12, 17–18 (Tex. App.—Texarkana 2011, no pet.).

Supreme Court of the United States has even stated that “the interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by [the] Court.”¹⁸⁸ Because the right to bear arms and the right to make decisions regarding the care and possession of one’s child are treated and protected similarly by the Texas courts, the fact that ex parte hearings are a codified practice in the Texas Family Code supports the contention that these practices would be constitutional in the red flag context.¹⁸⁹

The difference between enumerated rights in the Bill of Rights and fundamental rights created by the Supreme Court does not significantly differentiate the ex parte hearings in CPS practices and the ex parte hearings in red flag laws.¹⁹⁰ The rights enumerated in the U.S. Constitution are not meant to be an exhaustive list.¹⁹¹ Additionally, the fundamental right to parent, which is affected by these CPS practices, is deeply rooted in our nation’s history, just as the right to bear arms.¹⁹² However, while fundamental rights and enumerated rights are both protected to the highest degree, they are not absolute.¹⁹³

Consequently, the CPS practices already used in Texas are an adequate example of how the red flag law ex parte hearings would be constitutional in Texas.¹⁹⁴ However, even if a Texas court concludes that enumerated rights are due stronger protections than fundamental rights, the issue would be moot because the core framework used in red flag laws already requires more process than the CPS practices established in the Texas Family Code.¹⁹⁵

Texas allows a child to be removed from a home without notice and under some circumstances without any hearing; this is an even more flexible practice than the red flag framework, which at the minimum requires the petitioner to present evidence to a judge before deprivation can occur.¹⁹⁶ The only reasonable conclusion from this evidence is that red flag ex parte hearings—a stricter framework that affects a right treated similarly—would be constitutional just as the CPS practices are.¹⁹⁷

188. *Troxel*, 530 U.S. at 65.

189. *See In re R.M.T.*, 352 S.W.3d at 17–18.

190. *See supra* notes 184–88 and accompanying text (illustrating that enumerated rights and fundamental rights do not distinguish ex parte red flag hearings and ex parte CPS hearings).

191. U.S. CONST. amend. IX.

192. *Troxel*, 530 U.S. at 65; *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

193. *See* TEX. FAM. CODE ANN. § 262.104; *Gay, supra* note 79, at 1512.

194. *See supra* notes 190–92 and accompanying text (showing how red flag ex parte hearings would be constitutional).

195. *See* TEX. FAM. CODE ANN. § 262.104; *Blocher & Charles, supra* note 9, at 1289.

196. TEX. FAM. CODE ANN. § 262.104; *Blocher & Charles, supra* note 9, at 1289.

197. *See supra* notes 184–95 and accompanying text (explaining how red flag ex parte hearings would be constitutional).

2. Domestic Violence Protection Orders Are Constitutional Even Though They Affect the Immensely Protected Interest to be Secure in One's Home

Domestic or family violence protection orders are another example of codified Texas law that allow for ex parte deprivation hearings that affect highly protected constitutional rights.¹⁹⁸ In the instance of family protection orders, Texas allows for ex parte orders that can deprive an individual of the right to be in their home for up to twenty days before they can be heard by a judge.¹⁹⁹ A person's right to be secure in one's home is an enumerated constitutional right.²⁰⁰ However, these orders show that interests of the highest sanctity are not absolute and are constitutionally limited by Texas law.²⁰¹

Additionally, a person's home and right to be in his home are held in high regard by the Texas courts.²⁰² This is commonly displayed by the phrase "a man's home is his castle."²⁰³ However, even the right to occupy one's home or "castle" is not absolute because Texas legislators have codified a law that allows a judge to issue ex parte protection orders temporarily removing someone from their home without affording that individual the opportunity to be heard by a judge.²⁰⁴

While the specifics of these protection orders and red flag protection orders may be different, the core framework is not.²⁰⁵ These laws allow for ex parte deprivation hearings in circumstances where the respondent is a possible danger to others.²⁰⁶ The extensive use of these orders shows that the ex parte framework has already been accepted by Texas courts; in fact, longtime Travis County Court at Law Judge Mike Denton, who presided over family violence cases, saw up to 1,000 protective orders filed annually before he retired in 2019.²⁰⁷

In addition to utilizing ex parte hearings, family violence protection orders are similar to red flag laws in another way.²⁰⁸ Issuance of family violence protection orders can result in the confiscation of firearms.²⁰⁹ While this deprivation does occur after a full hearing, not an ex parte hearing, the law serves as a signal that not only has Texas already accepted the ex parte

198. TEX. FAM. CODE ANN. § 83.001.

199. *Id.*

200. U.S. CONST. amend. IV.

201. *See* TEX. FAM. CODE ANN. § 83.001.

202. TEX. PENAL CODE ANN. §§ 9.01–.61; *see also* TEX. CONST. art. 16, § 50.

203. *Sir Edward Coke Declares that Your House Is Your "Castle and Fortress" (1604)*, OLL, <https://oll.libertyfund.org/quote/sir-edward-coke-declares-that-your-house-is-your-castle-and-fortress-1604> (last visited Mar. 29, 2022).

204. *See* TEX. FAM. CODE ANN. § 83.001.

205. *See id.*; Blocher & Charles, *supra* note 9, at 1294–95.

206. TEX. FAM. CODE ANN. § 83.001; Blocher & Charles, *supra* note 9, at 1294–95.

207. McCullough, *supra* note 10.

208. TEX. FAM. CODE ANN. § 85.022.

209. *Id.*

framework in order to protect society, but that it also has practices in place in which a judge's ruling can result in the deprivation of an individual's right to bear arms.²¹⁰

These examples show that, at the very least, the core red flag framework that is found in almost every red flag law across the country is already constitutionally practiced in Texas.²¹¹ Without analyzing what specific provisions are necessary to adequately protect Due Process and should be incorporated in any Texas red flag law, it is clear that the core framework is already practiced in Texas and would pass constitutional muster.²¹²

IV. TEXAS MUST ADOPT SPECIFIC PROVISIONS IN ORDER FOR A RED FLAG LAW TO PASS CONSTITUTIONAL MUSTER AND ADEQUATELY PROTECT THE RIGHT TO DUE PROCESS

While the core framework of red flag laws is constitutional under the U.S. and Texas Constitutions, that does not mean that any red flag law can be successfully passed in Texas.²¹³ The current proposed legislation does not sufficiently protect Due Process and must include certain provisions and standards in order to do so.²¹⁴ Without these protections, this bill is unlikely to pass the legislature or survive challenges in the courts.²¹⁵

A. Current Proposed Legislation, Senate Bill 110, Does Not Adequately Protect Due Process and Leaves Itself Open to Constitutional Challenges

Texas Senate Bill 110 is currently in the State Affairs Committee and will likely not proceed any further.²¹⁶ The last two proposed red flag laws in Texas both died in committee, and this bill will likely suffer the same fate.²¹⁷ It is common knowledge that Texas is committed to protecting gun rights and

210. *See id.* §§ 83.001, 85.022.

211. *Id.* §§ 83.001, 151.001(a)(1).

212. *See id.*

213. *See supra* notes 109–111 and accompanying text (discussing how the past two proposed red flag bills have died in committee, and legislators are even trying to pass a law to prevent any red flag law from being enacted).

214. *See supra* notes 109–111 and accompanying text (discussing how the past two proposed red flag bills have died in committee, and legislators are even trying to pass a law to prevent any red flag law from being enacted).

215. *See supra* notes 109–111 and accompanying text (discussing how the past two proposed red flag bills have died in committee, and legislators are even trying to pass a law to prevent any red flag law from being enacted).

216. *See supra* notes 109–111 and accompanying text (discussing how the past two proposed red flag bills have died in committee, and legislators are even trying to pass a law to prevent any red flag law from being enacted).

217. *See supra* notes 109–111 and accompanying text (discussing how the past two proposed red flag bills have died in committee, and legislators are even trying to pass a law to prevent any red flag law from being enacted).

the people's right to bear arms.²¹⁸ So, even though Governor Abbott himself has considered red flag law legislation in Texas,²¹⁹ in order for a red flag bill to actually pass it must adequately protect the Due Process rights of the gun owner.²²⁰ Senate Bill 110 does not and because of this the chance of it passing is extremely low.²²¹

1. The "Reasonable Cause to Believe" Standard Is Ambiguous and Inadequate to Protect Due Process

A controversial law regarding a hot-button issue such as this one must be completely unambiguous and not leave anything up for interpretation.²²² Senate Bill 110 states in Article 7B.155(d) that the standard of proof for the full protection hearing is clear and convincing evidence.²²³ However, it allows for a temporary ex parte order to be issued when "there is reasonable cause to believe that the respondent poses an immediate and present danger."²²⁴ The "reasonable cause to believe" standard is far too ambiguous and leaves far too much room for interpretation by the courts, which could result in different standards being applied by different judges.²²⁵ This language will almost certainly bring constitutional challenges that it violates procedural Due Process. In comparing this language to other state's red flag laws, the reasonable cause to believe standard is similar to Connecticut's "probable cause" standard for ex parte orders, which results in an error rate of 32%.²²⁶ Being so, it is not a justifiable standard for depriving someone of a property interest and enumerated fundamental right without notice or the opportunity to be heard by a judge.²²⁷

2. The Process and Standard for Early Termination Hearings Are Not Expressed in the Proposed Statute

Additionally, Senate Bill 110 does not expressly state the process for early termination of a protection order, which allows for both broad and contradicting judicial interpretation.²²⁸ The bill does allow the respondent to "file a motion no earlier than the 91st day after the date on which the order

218. See OFF. OF THE TEX. GOVERNOR, *supra* note 15; *Gun Laws*, TEX. STATE L. LIBR., <https://guides.sll.texas.gov/gun-laws> (last visited Mar. 29, 2022).

219. McCullough, *supra* note 10.

220. See TEX. CONST. art. I, § 19.

221. McCullough, *supra* note 10.

222. See Blocher & Charles, *supra* note 9.

223. Tex. S.B. 110 art. 7B.155(d), 87th Leg., R.S. (2021).

224. *Id.* art. 7B 154(a).

225. See *Coates v. City of Cincinnati*, 402 U.S. 611, 612 (1971).

226. Norko & Baranoski, *supra* note 57.

227. See Kopel, *supra* note 24, at 68.

228. Tex. S.B. 110, 87th Leg., R.S. (2021).

was initially issued or renewed” requesting that the court determine whether the order is still necessary.²²⁹ This essentially is an early termination clause, which is found in other states’ red flag legislation.²³⁰

What this language does not do is state what the respondent must show or what factors and evidence the court may consider when determining whether the order is still necessary or should be terminated.²³¹ Perhaps the court will consider the same factors expressly listed in the bill sections pertaining to the issuance of the original order;²³² however, because this law will likely result in high levels of scrutiny due to its controversial subject matter, the legislators should expressly state the process for early termination in order to avoid confusion.²³³ The current ambiguous language can lead to both protection orders being terminated before they should be and protection orders lasting long after they should.²³⁴

3. The Individuals Empowered to Bring a Petition Under Senate Bill 110 Are Overly Broad

Another area where this proposed bill is vulnerable to legal challenge is its language regarding who can file an application for a protection order.²³⁵ The bill states that an application can be filed by “a member of the respondent’s family or household.”²³⁶ This definition of family or household is the same definition used in the Texas Family Code, which includes “individuals who are former spouses of each other, individuals who are the parents of the same child, without regard to marriage . . . [and] persons living together in the same dwelling.”²³⁷

This definition is far too broad and allows too many parties with an unlimited number of motives to petition a court and have an individual’s weapons temporarily seized without being heard.²³⁸ This language opens the door for a major concern of those who oppose red flag legislation—allowing vindictive family members or ex-spouses to bring fraudulent claims.²³⁹ Additionally, this language deviates from the widely accepted Connecticut model that requires a law enforcement officer or district attorney to apply for the order after conducting a separate investigation.²⁴⁰

229. *Id.* art. 7B.157(c).

230. *See* FLA. STAT. § 790.401(6) (2018).

231. *Tex. S.B. 110* art. 7B.157(c).

232. *See id.* art. 7B.154(b)(3).

233. *See* Blocher & Charles, *supra* note 9, at 1294–95.

234. *See id.* at 1340–41.

235. *Tex. 110 S.B. art. 7B.152.*

236. *Id.*

237. *TEX. FAM. CODE ANN.* §§ 71.003, .005.

238. *See id.*; Sanchez, *supra* note 74.

239. Sanchez, *supra* note 74.

240. *CONN. GEN. STAT.* § 29-38c (2019).

Deviating from this model increases the likelihood of erroneous deprivation and leaves the law vulnerable to procedural Due Process challenges.²⁴¹ And while it is true that some states are moving away from this requirement, the data shows that it does not increase the per capita confiscation rate.²⁴² Additionally, a more lenient requirement would not likely be accepted in Texas, where gun rights and individual liberties are vigorously protected.²⁴³

4. The Rights of the Respondent Are Not Sufficiently Expressed in the Statutory Language

Texas Senate Bill 110 does not adequately address the rights of the respondent at the full protection hearing; in fact, it is almost silent on the subject.²⁴⁴ Because the rights of the respondent at a protection hearing, including the right to cross-examine the petitioner, vary from jurisdiction to jurisdiction, it is necessary for Texas legislators to address what rights the respondent is entitled to.²⁴⁵ A red flag law is a balancing act between the rights of the respondent and the government's interest in public safety.²⁴⁶ Being so, any red flag law enacted in Texas must adequately protect and promote both interests.²⁴⁷

The current proposed law fails to promote the respondent's interests because it does not state what the respondent is entitled to at the hearing.²⁴⁸ This is inadequate, especially because the Supreme Court of Texas has already established that the Due Process clause in the Texas Constitution includes the respondent's right to cross-examine witnesses.²⁴⁹ Not specifically addressing the rights of the respondent in the statute not only disregards the respondent's private interest at stake but again leaves the law itself vulnerable to constitutional challenges.²⁵⁰

241. See Kopel, *supra* note 24, at 68.

242. *Id.* at 62 n.128.

243. See OFF. OF THE TEX. GOVERNOR, *supra* note 15; TEX. STATE L. LIBR., *supra* note 218.

244. See Tex. S.B. 110, 87th Leg., R.S. (2021).

245. See *supra* notes 66–67 and accompanying text (discussing Colorado's red flag law regarding the respondent's right to cross-examination).

246. See *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

247. See *id.*

248. Tex. S.B. 110.

249. *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001).

250. See *id.*

5. The Criminal Penalty for Bringing a False Claim Under the Proposed Statute Is Insufficient to Adequately Deter the Action and Protect the Law's Integrity

The language included in Senate Bill 110 provides a deterrent for bringing false claims and includes a substantial punishment, but it does not address the other significant consequences of making a false claim for a protection order.²⁵¹ Texas legislators have already included language making it a Class A misdemeanor to, “with [an] intent to deceive,” knowingly make false claims to a prosecuting attorney or peace officer relating to the request of an extreme risk protection order.²⁵² This is not adequate because executing protection orders, like anytime the police serve a warrant, is dangerous and can lead to deadly consequences.²⁵³ Not including language that expressly addresses these consequences and only having a broad penalty for bringing a false claim fails to reflect the reality of serving protection orders and the multitude of unforeseen consequences that can occur.²⁵⁴

B. Texas Should Adopt the Following Provisions in Order to Address the Numerous Problems in Its Current Proposed Legislation and Adequately Protect Due Process

To address the shortcomings in the Texas Senate Bill 110 listed above, Texas legislators must adopt certain key provisions focused on the rights of the respondent and reducing the risk of erroneous deprivations.²⁵⁵ These provisions address several of the key concerns over red flag laws and their potential violation of procedural Due Process.²⁵⁶

1. Clear and Convincing Standard for Ex Parte Hearings

A clear and convincing standard of proof placed on the petitioner would significantly decrease the risk of an erroneous deprivation of the respondent's firearms and would not interfere with the law's purpose to promote public safety.²⁵⁷ Clear and convincing evidence is the highest standard applied in civil trials and should be the standard of proof for ex parte hearings in any

251. *Id.*; see Tex. S.B. 110.

252. Tex. S.B. 110 § 37.083.

253. Colin Campbell, *Anne Arundel Police Say Officers Fatally Shot Armed Man While Serving Protective Order to Remove Guns*, BALTIMORE SUN (Nov. 05, 2018, 12:30 PM), <https://www.baltimoresun.com/news/crime/bs-md-aa-shooting-20181105-story.html>.

254. See Tex. S.B. 110.

255. See generally *id.*

256. See generally *id.*

257. See *Davis v. Gilchrist Cnty. Sheriff's Off.*, 280 So. 3d 524, 533 (Fla. Dist. Ct. App. 2019); Kopel, *supra* note 24, at 67.

Texas red flag law.²⁵⁸ As stated above, the current proposed law and its reasonable cause to believe standard of proof does not adequately protect Due Process, but the clear and convincing standard does.²⁵⁹

Applying a stricter standard to the ex parte hearings would decrease the risk of erroneous deprivations by requiring the petitioner not only to show that “there is a reasonable cause to believe” that the respondent is a significant danger but also that the evidence presented by the petitioner is highly and substantially more likely to be true than untrue.²⁶⁰ By applying a heightened standard and decreasing the risk of erroneous deprivations, a Texas red flag law would be less vulnerable to Due Process challenges and would be more likely to be found constitutional under the *Mathews* test.²⁶¹

Additionally, implementing a clear and convincing standard would not substantially interfere with the government’s interest in preventing mass shootings and promoting public safety.²⁶² In an ex parte hearing, the petitioner is not facing any contradictory evidence or arguments from the respondent because the respondent is not present at the hearing.²⁶³ If Texas follows the original Connecticut model, as suggested in this Comment, the law enforcement officers bringing the petition would have already conducted a separate investigation prior to the ex parte hearing.²⁶⁴ This means that the petitioner has factual evidence resulting from the investigation and faces no contrary arguments.

Being so, in the event that an individual poses a significant danger, the petitioner should easily be able to meet the clear and convincing standard.²⁶⁵ If the petitioner cannot meet this standard while unopposed to contradiction, then it is evident that a protection order may be unnecessary.²⁶⁶ Thus, the government’s interest in reducing danger is not impaired and the heightened standard serves the sole purpose of decreasing the risk of erroneous deprivations and ensuring that protection orders are only issued when actually necessary.²⁶⁷

An example of the clear and convincing standard being met can be seen in the *Gilchrist* case in which a protection order was issued and a deputy sheriff’s firearms were seized.²⁶⁸ While the *Gilchrist* analysis was made

258. See PRACTICAL LAW GLOSSARY (2022), Westlaw 3-501-6612.

259. See *supra* notes 193–198 and accompanying text (discussing how the current standard does not sufficiently protect Due Process).

260. Tex. S.B. 110 art. 17B.154(a); see *Colorado v. New Mexico*, 467 U.S. 310, 315–16 (1984).

261. See *Colorado*, 467 U.S. at 315–16; *Mathews v. Eldridge*, 424 U.S. 319, 333–35 (1976).

262. See Kopel, *supra* note 24, at 67.

263. See *supra* notes 27–32 and accompanying text (discussing the specifics of ex parte hearings and how the respondent is not present).

264. See *supra* notes 48–53 and accompanying text (discussing Connecticut’s requirements for who can petition for a protection order).

265. Kopel, *supra* note 24, at 67.

266. See *id.*

267. See *id.*

268. *Davis v. Gilchrist Cnty. Sheriff’s Off.*, 280 So. 3d 524, 528 (Fla. Dist. Ct. App. 2019).

regarding the full protection order and not the temporary protection order, it still provides valuable insight into how the clear and convincing standard can be met in the red flag law context.²⁶⁹ In that case, the court held that the clear and convincing standard had been met due to the respondent's *specific and graphic* threats towards his ex-girlfriend that involved the use of firearms coupled with the fact that the respondent had "ready access to firearm" and "the hostile words were preceded by loss of self-control, open aggression and property damage."²⁷⁰ Accordingly, the petitioner was able to show that the respondent was "at risk for committing a violent crime of passion and posed a significant danger."²⁷¹

The petitioner met the clear and convincing standard in *Gilchrist* even when the respondent was able to present contrary evidence including expert testimony that stated the respondent's actions were "probably relatively normal" given the circumstances.²⁷² Accordingly, in situations where an individual poses a significant danger, the clear and convincing standard can withstand challenge in the full protection hearing and should easily be met in the ex parte hearing where the respondent is not present.²⁷³

Applying the clear and convincing evidence standard to ex parte hearings reduces the risk of erroneous deprivations and would not interfere with the overall purpose of red flag laws—to reduce gun violence and promote public safety.²⁷⁴ While this standard does place a larger burden of proof on the petitioner, in an ex parte hearing, the petitioner is not facing any contradicting evidence or arguments.²⁷⁵ Being so, in the event that that an individual poses a significant and real danger, the petitioner should have no issue meeting this standard.²⁷⁶

2. Clear and Convincing Standard for Early Termination Hearings

If a respondent believes that their firearms were wrongly seized and they should not have been put under a protection order or that they are no longer a danger to themselves or others, they should be able to submit a motion to the court to have the order terminated before its natural termination date.²⁷⁷ Texas Senate Bill 110 has a provision that allows for this to take place

269. *Id.* at 529–30.

270. *Id.* at 530.

271. *Id.*

272. *Id.* at 529.

273. *See id.* at 529–30; Kopel, *supra* note 24, at 67.

274. *See supra* notes 261–63 and accompanying text (discussing how the clear and convincing standard would not interfere with public safety).

275. *See supra* notes 261–63 and accompanying text (discussing how clear and convincing is a heightened standard and ex parte hearings are held without the respondent present); Kopel, *supra* note 24, at 67.

276. Kopel, *supra* note 24, at 67.

277. *See* FLA. STAT. § 790.401(6) (2018).

ninety-one days after the protection order was issued or extended.²⁷⁸ The bill does not state the burden of proof for the hearing resulting from this motion, which poses several issues.²⁷⁹

To resolve any issues and create unambiguous statutory language, Texas should require that the respondent have the burden of proving by clear and convincing evidence that they no longer pose a danger to themselves or others.²⁸⁰ The court should look to the same factors it did in the full protection hearing and any relevant evidence to determine if the respondent has met this burden.²⁸¹ This provision is different than the Connecticut model, simply because Connecticut does not allow early termination but closely follows the Florida red flag legislation.²⁸²

By including this provision and following Florida's lead, the law would add an extra safeguard for the respondent's Due Process rights, as well as protect the government's interest in public safety.²⁸³ It allows the respondent another chance to present evidence, show that they do not pose a significant danger, and have the opportunity to reclaim their weapons.²⁸⁴ However, by holding them to the same heightened clear and convincing standard as the petitioner in the full protection hearing, it substantially decreases the chance that an order is terminated erroneously.²⁸⁵

3. Requirement for Law Enforcement to Bring Petitions for Protection Orders

Texas should follow the Connecticut model and require that law enforcement officers petition the court for protection orders after conducting a separate investigation but also allow family members to request protection order investigations when they believe an individual poses a risk to themselves or others.²⁸⁶

By following the Connecticut model, a Texas red flag law would decrease the risk of erroneous deprivation and provide a crucial safeguard for the Due Process rights of the respondent.²⁸⁷ The trend in the more recent state red flag laws is to expand who can petition the court for protection orders; however, this practice only increases the risk of erroneous deprivation and

278. Tex. S.B. 110 Art. 7B.157(c), 87th Leg., R.S. (2021).

279. *Id.*

280. *See generally* FLA. STAT. § 790.401(6)(a)(2) (2018).

281. *See generally id.*

282. *Id.* § 790.401(6).

283. *See generally id.*

284. *Id.*

285. *See supra* notes 259–61 and accompanying text (discussing how clear and convincing evidence is a heightened standard).

286. *See* CONN. GEN. STAT. § 29-38c (2019).

287. *See supra* notes 48–55, 205–213 and accompanying text (discussing the effectiveness of the Connecticut model and the shortcomings of the current Texas proposed law in regard to who can petition the court).

jeopardizes the laws' effectiveness by leaving them open to constitutional challenges.²⁸⁸ Requiring law enforcement to petition the court after a separate investigation, yet still allowing family members to apply for investigations, sufficiently protects the government's interests and the purpose of the law while also adequately protecting the rights of the respondent—reducing erroneous deprivation and preventing harmful consequences.²⁸⁹

The consequences of allowing family members to petition the court directly would be, at a minimum, an increase in erroneous deprivations and could result in much worse.²⁹⁰ Even with the protections stated above in place, in Connecticut, for the cases where outcomes were reported, 32% of ex parte protection orders are overturned.²⁹¹ This means that law enforcement officers, who are professionally trained, after conducting a complete investigation and finding probable cause still got it wrong almost a third of the time.²⁹² Allowing more leniency to who can petition the court for a protection order could only result in an increase in the numbers of cases being overturned and orders being wrongly issued.²⁹³ Additionally, this new trend of leniency has in the past and could continue to result in far worse consequences—including death.²⁹⁴

By not requiring law enforcement to investigate and determine if a protection order is necessary, red flag laws could lead to tragic consequences.²⁹⁵ In Maryland, police fatally shot a man while serving a protection order after officers physically struggled over the respondent's weapon and it discharged without harming anyone.²⁹⁶ The police arrived at the man's home at 5:15 in the morning to serve the protection order, and upon learning that his weapons were being seized, the man became angry.²⁹⁷ While the police did not release the name of the petitioner, the decedent's niece stated that one of her aunts filed for the order and that her "uncle wouldn't hurt anybody."²⁹⁸

By requiring police to investigate before requesting the order, this could have been prevented.²⁹⁹ Either the police could have found that he was not a significant danger and an ex parte order was not proper, or through their

288. See *supra* notes 205–213 and accompanying text (discussing how expanding who can petition the court for an order is insufficient to adequately protect Due Process).

289. See FLA. STAT. § 790.401 (2018); CONN. GEN. STAT. § 29-38c (2019); Kopel, *supra* note 24, at 62 n.128.

290. See Norko & Baranoski, *supra* note 57; Campbell, *supra* note 253.

291. See Norko & Baranoski, *supra* note 57.

292. See *id.*

293. See *id.* Even with the more stringent requirements, almost one-third of temporary orders were overturned in Connecticut. *Id.*

294. Campbell, *supra* note 253.

295. See *id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. See *id.*

investigation, they could have already had prior knowledge of the respondent and could have served the order safely without the tragic end.³⁰⁰ In either scenario, it is evident that for a red flag law to protect Due Process and be applied safely, law enforcement should be required to petition the court for orders.³⁰¹

Requiring a police investigation prior to a hearing would not substantially decrease the law's effectiveness, even though it may increase the time it takes to receive a protection order.³⁰² The speed at which the protection orders are issued can be important because the core reason for enacting red flag laws is to stop violence and potential mass shooters.³⁰³ However, the data shows that states with this provision, such as Connecticut and Florida, can have a higher per capita confiscation rate than a state, such as California, which does not require this provision.³⁰⁴ This shows that this provision would not substantially inhibit the effectiveness and underlying purpose of the law.³⁰⁵

Texas should learn from the consequences and the data available that the need for prior law enforcement investigation is of the utmost importance to an effective and constitutional red flag law.³⁰⁶ Without this provision, any Texas red flag law could be met with both constitutional challenges in the courtroom and dire consequences in society.³⁰⁷

4. Opportunity to Cross-Examine Witnesses

To survive a constitutional challenge under the Texas Constitution, any Texas red flag law must expressly state that the respondent has the right to cross-examine the petitioner.³⁰⁸ The Supreme Court of Texas stated that under certain circumstances, the right to be heard includes "an opportunity to cross-examine witnesses . . . and to be heard on questions of law."³⁰⁹ It is evident that the deprivation of an enumerated right in a hearing to decide the mental state and danger the respondent poses is one of those circumstances.³¹⁰ Whether the petitioner is a family member or, if Texas adopts the Connecticut model, a law enforcement officer, he should be required to be present at the hearing and cross-examined by the respondent's counsel.³¹¹ Allowing a judge

300. *See id.*

301. Kopel, *supra* note 24, at 60–62.

302. *Id.* at 62 n.128.

303. *See supra* notes 1–4 and accompanying text (discussing mass shootings and the enactment of red flag laws to stop them).

304. Kopel, *supra* note 24, at 62 n.128.

305. *See id.*

306. *See id.* at 61–62.

307. *See id.*

308. *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001).

309. *Id.* (citation omitted).

310. *See* Kopel, *supra* note 24, at 59–60, 70–71.

311. *See id.*; *Davidson v. Great Nat. Life Ins. Co.*, 737 S.W.2d 312, 314 (Tex. 1987).

to deprive an individual of a fundamental right based on the allegations of family members or a preliminary investigation conducted by police officers and not allowing the respondent to refute those allegations through cross-examination is a violation of the respondent's Due Process rights.³¹²

The Court should allow a right of confrontation generally permitted in criminal proceedings under the Sixth Amendment in red flag law protection hearings.³¹³ The right to cross-examination generally stems from the Sixth Amendment's Confrontation Clause in the United States Constitution.³¹⁴ The Confrontation Clause expressly states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."³¹⁵

While some Texas courts have refused to apply the Confrontation Clause in civil proceedings—most commonly in trials regarding parental rights—others have recognized the importance of the right to cross-examination in the meaningful hearing requirement of Due Process.³¹⁶ Additionally, the Texas Supreme Court has stated that "[c]ross-examination is a safeguard essential to a fair trial and a cornerstone in the quest for truth. Longstanding principles of our jurisprudence recognize the right and necessity of full and complete cross-examination."³¹⁷ Following this rule and longstanding principle, cross-examination is necessary in a red flag protection hearing to obtain the truth, and the respondent should not be deprived of that right in Texas courts.³¹⁸

Additionally, as stated by David Kopel, red flag protection order cases "may have a civil form, [but have] criminal consequences: a [protection] order results in the execution of a criminal-style search and seizure warrant against the defendant. Accordingly, the Confrontation Clause should apply."³¹⁹ Also shown by David Kopel in his written testimony for a Senate Judiciary Committee Hearing in 2019, there are numerous civil cases from other jurisdictions holding that cross-examination is still a right.³²⁰

Texas should follow its longstanding principles and expressly state this right in its red flag legislation in order to comply with constitutional requirements and to avoid uncertainty in what is required for the protection hearings.³²¹ Because some states' red flag laws do not require that the respondent be able to cross-examine the petitioner or that the petitioner even be present at the hearing, it is essential that Texas expressly outline this

312. See *Perry*, 67 S.W.3d at 92; Kopel, *supra* note 24, at 70–71.

313. See Kopel, *supra* note 24, at 71 n.174.

314. U.S. CONST. amend. VI.

315. *Id.*

316. *In re S.P.*, 168 S.W.3d 197, 206–07 (Tex. App.—Dallas 2005, no pet.).

317. *Davidson v. Great Nat. Life Ins. Co.*, 737 S.W.2d 312, 314 (Tex. 1987).

318. See *id.*

319. Kopel, *supra* note 24, at 71 n.174.

320. See generally *id.*

321. See *Davidson*, 737 S.W.2d at 314.

right.³²² This will ensure that any judicial interpretation does not lead to practices in violation of the Texas constitution.³²³

5. Criminalizing Knowingly Bringing False Claims and Petitions for Protection Orders

Texas should criminalize false claims and petitions for protection orders in order to deter erroneous deprivations and unnecessary proceedings.³²⁴ This is one provision that is actually included in Texas Senate Bill 110—which makes the action a Class A Misdemeanor—and should be included in any Texas red flag legislation.³²⁵ Bringing false claims for protection orders should be criminalized similar to other instances of making false claims to the police such as “swatting” because both can lead to death and are extremely dangerous.³²⁶

Swatting is the common term used to describe false reporting of criminal activity at an individual’s home so that a police SWAT team will respond.³²⁷ Bringing a false claim for a protection order is analogous to swatting because the underlying crime is making a false statement to police.³²⁸ This has often been used as a method of targeted harassment of certain individuals and has resulted in severe consequences for both the targeted individuals and the instigators.³²⁹ Bringing a false claim for a protection order can, like swatting, result in death or serious injury.³³⁰ Police believe that they are entering a dangerous and possible emergency situation and have no way of knowing that the claim was false.³³¹ Because the crimes are so similar and can have the same consequences, their punishments should be similar.³³²

Texas should follow the language in Senate Bill 1056 regarding punishment for swatting as a model for its provision that criminalizes bringing false claims for protection orders.³³³ This bill, like Senate Bill 110, makes the crime a Class A misdemeanor; however, it increases the punishment to a state jail felony if the defendant has been convicted of the crime twice before.³³⁴ The bill again increases the punishment to a third-

322. See *supra* notes 70–71 (discussing states deviating from the original Connecticut model).

323. COLO. REV. STAT. § 13-14.5-105(4)(a) (2019); *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001).

324. See Tex. S.B. 110 § 37.083, 87th Leg., R.S. (2021).

325. *Id.*

326. Loureen Ayyoub & Lauren Bothan, *Texas Family Targeted in ‘Swatting’ Prank*, ABC NEWS (May 16, 2018, 2:57 PM), <https://abcnews.go.com/US/News/texas-family-targeted-swatting-prank/story?id=55206749>; Campbell, *supra* note 253.

327. Ayyoub & Bothan, *supra* note 326; Campbell, *supra* note 253.

328. See Tex. S.B. 1056, 87th Leg., R.S. (2021); Tex. S.B. 110 § 37.083.

329. Tex. S.B. 1056; Tex. S.B. 110 § 37.083.

330. Tex. S.B. 1056; Tex. S.B. 110 § 37.083; Campbell, *supra* note 253.

331. See generally Campbell, *supra* note 253.

332. See TEX. PENAL CODE ANN. § 42.0601; Tex. S.B. 110 § 37.083.

333. TEX. PENAL CODE ANN. § 42.0601.

334. *Id.* § 42.0601(b)(1).

degree felony if a person suffers death or serious injury as a proximate result of the response to the false report made to the police.³³⁵

By adopting this language in its red flag law, Texas could adequately deter false claims, as well as account for the more serious consequences that can occur from the crime.³³⁶ Additionally, by using the same language already proposed in Texas Senate Bill 110, the risk of an individual erroneously being charged with this penalty is low because it is a specific intent crime that requires the showing of the “intent to deceive.”³³⁷ Therefore, only individuals who know that the protection order is not needed will be prosecuted—not those who believed the respondent may pose a significant risk or danger but were found to be incorrect by the court.³³⁸

Lastly, including a provision criminalizing this behavior in the law would also address the concerns of many that this law can be easily exploited by vindictive family members or ex-partners and could lead to a broader acceptance of red flag laws in Texas.³³⁹

V. PROPOSED STATUTORY LANGUAGE (AMENDMENTS TO TEXAS S.B. 110)

Any Texas red flag law legislation requires the language below in order to be constitutional and receive bipartisan support.³⁴⁰ This proposed language pulls statutory language from the recently proposed Texas Senate Bill 110, as well as Florida and Connecticut’s red flag statutes.³⁴¹

An application for a protective order under this subchapter may be filed by:

- 1) A State’s attorney or assistant State’s attorney; or
- 2) Any two police officers

Such individuals authorized to file for a petition under this act may not do so unless they have conducted an independent investigation and determined that there is probable cause that an individual poses an immediate and present danger of causing bodily injury, serious bodily injury, or death to any person including themselves.

Any family or household member who, in good faith, believes that an individual poses an immediate and present danger of causing bodily injury,

335. *Id.* § 42.0601(b)(2).

336. *See generally* Ayyoub & Bothan, *supra* note 326; Campbell, *supra* note 253.

337. Tex. S.B. 110 § 37.083(b).

338. *See id.*

339. *See* Sanchez, *supra* note 74.

340. *See supra* Part III (discussing the constitutional issue of ex parte protection orders).

341. *See, e.g.*, Tex. S.B. 110; CONN. GEN. STAT. § 29-38c (2019); FLA. STAT. § 790.401 (2018).

serious bodily injury, or death to any person, including themselves, may make an application for a risk protection order investigation.

Temporary Ex Parte Order:

If the court finds from the information presented at the ex parte hearing for a protective order that, by clear and convincing evidence, the respondent poses an immediate and present danger of causing bodily injury, serious bodily injury, or death to any person, including the respondent, the court, without further notice to the respondent, may order the respondent to relinquish all firearms owned or in possession of the respondent to a law enforcement agency.

Hearing; Issuance of Protective Order:

The respondent is afforded the opportunity to cross-examine witnesses including: the state attorney, assistant state attorney, or police officer that filed for the petition, and, if applicable, the family or household member who applied for the protection order investigation.

False Report Regarding Request for Extreme Risk Protection Order:

A person commits an offense if, with intent to deceive, the person knowingly makes a false statement to a prosecuting attorney or peace officer relating to a request for an extreme risk protection order or application for a risk protection order investigation.

An offense under this section is a Class A misdemeanor, except that:

The offense is a state jail felony if it is shown at the trial of the offense that the defendant was previously convicted on two or more occasions of an offense under this section; or

The offense is a felony of the third degree if the false statement or application results in an issuance of a protection order and a person is killed or suffers serious bodily injury as a proximate result of lawful conduct arising out of the serving of the protection order.

VI. CONCLUSION

The rise in the popularity of red flag laws since the original Connecticut law over twenty years ago is important to understand regardless of an individual's stance on gun control. These laws have gained bipartisan support in several states, including Texas, and if states continue to follow the current

trend in deviating from the original law, they could have real consequences for individual liberties. This is evident in Texas's most recent proposed bill currently in committee.

Red flag laws raise procedural Due Process concerns, especially in states like Texas where gun rights and individual liberties are held in high regard. While the core *ex parte* framework is constitutional, certain provisions and safeguards are needed to decrease the risk of erroneous deprivation and adequately protect Due Process rights. Texas must adopt the provisions stated in this Comment in order to protect the rights of the respondent and to have a genuine chance of passing a red flag law. While red flag laws have been analyzed in other contexts and in other jurisdictions, Texas has yet to do so. The analysis and solution proposed in this Comment, while specific to Texas, can serve as a model for similar states that prioritize individual liberties and gun rights.

Regardless of one's views on gun control or red flag laws in general, it is evident that legislators must do something about gun violence and mass shootings that generally precede red flag legislation. However, red flag laws cannot solely focus on the government's interest in public safety and stopping these tragedies. In order for red flags law to be effective and constitutional, legislators must focus on protecting the rights of the respondent. With this balance, states can continue to enact red flag laws, protect their citizens, and reduce gun violence while still protecting the individual rights ingrained in this country's history.