A Triggered Nation: An Argument for Extreme Risk Protection Orders

by CAROLINE SHEN*

Introduction

In 2017, 15,577 people were killed by guns in the United States, 31,170 people were injured, and 346 mass shootings[1] took place.[2] Of those killed or injured, 732 were children eleven years of age or younger and 3,235 were teens between the ages of 12 and 17. By the end of 2018, there were 56,868 incidents involving guns, leading to 14,618 deaths and 28,156 injuries.[3] There were 340 mass shootings in total, and 665 children and 2,827 teens were killed or injured by gun violence.

While it is easy to read these statistics as mere numbers, the true gravity of this toll on American lives is more apparent when compared to the statistics of gun violence in other first-world countries. Nearly half of the number of civilian-owned guns in the world can be found in the U.S., even though the U.S. only makes up 4.4 percent of the world's population.[4] As a result of this pervasiveness of gun ownership, the U.S. has had six times as

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1. While there is no precise legal definition for what constitutes a mass shooting, the term has been previously defined by the Congressional Research Service as "a multiple homicide incident in which four or more victims are murdered with firearms, within one event, and in one or more locations in close proximity." WILLIAM J. KROUSE ET AL., CONG. RESEARCH SERV., R44126, MASS MURDER WITH FIREARMS: INCIDENTS AND VICTIMS, 1999–2013 2 (2015), https://fas.org/sgp/crs/misc/R44126.pdf.

2. *Past Summary Ledgers*, GUN VIOLENCE ARCHIVE (Mar. 8, 2018), http://www.gunviolencearchive.org/past-tolls.

3. *Id.*

4. *Id.*

many gun-related deaths as Canada and nearly 16 times as many as Germany, both of which have restrictions on gun ownership.[5]

The American Medical Association has characterized gun violence in the United States as "a public health crisis."[6] Yet, Congress has prohibited the Center for Disease Control and Prevention ("CDC") from conducting further research into the extent of the effects of gun violence in the United States.[7] Through the tireless efforts of the National Rifles Association ("NRA"), a provision known as the "Dickey Amendment"—named after a Republican representative from Arkansas who proclaimed himself a "point man for the NRA"—was snuck into an appropriations bill and first signed into law by President Clinton.[8] The provision stipulated that "none of the funds made available for injury prevention and control at the [CDC] may be used to advocate or promote gun control."[9]

Meanwhile, the seminal Supreme Court decision, *District of Columbia v. Heller*,[10] remains the utmost authority on the interpretation of the Second Amendment today. The decision was a dramatic departure from the Court's previous interpretation of the Second Amendment in *United States v. Miller*. In *Miller*, the Court unanimously ruled that the "obvious purpose" of the Second Amendment was not to ensure the rights of everyday citizens to own guns, but rather to "assure the continuation and render possible the effectiveness of [the state militia]."[11]

In 2008, the Court made a complete turnaround in *Heller*. Though Justice Scalia began his interpretation of the Second Amendment by acknowledging that the prefatory clause states and clarifies the purpose of the Amendment,[12] he then went on to disregard it entirely. Despite clear language in the prefatory clause indicating its application to "[a] well regulated militia," Scalia quickly moved his opinion to a more in depth reading of the operative clause regarding "the right of the people to keep and bear Arms." Using a unique concoction of textual and purposive statutory

5. German Lopez, *America's unique gun violence problem, explained in 17 maps and charts*, VOX (Nov. 8, 2018), https://www.vox.com/policy-and-politics/2017/10/2/16399418/us-gun-violence-statistics-maps-charts.

6. *AMA calls gun violence "a public health crisis,"* AMERICAN MEDICAL ASS'N (June 14, 2016), https://www.ama-assn.org/ama-calls-gun-violence-public-health-crisis.

7. *Id.*

8. *See,* Erin Dooley, *Here's why the federal government can't study gun violence*, ABC NEWS (Oct. 6, 2017), http://abcnews.go.com/US/federal-government-study-gun-violence/story?id=50300379.

9. *Id.*

10. District of Columbia v. Heller, 554 U.S. 570 (2008).

11. United States v. Miller, 307 U.S. 174, 178 (1939).

12. *Heller*, 554 U.S. at 577.

interpretation, combined with what can be characterized as original intent (even though he specifically advocates against such interpretation), he arrived at the conclusion that the use of the words "the people" in the operative clause of the Amendment reflects a "strong presumption"[13] that the Amendment protects the right of individual citizens to bear arms.

Since *Heller*, the NRA has latched onto the decision as proof that the Constitution guarantees the individual's right to gun ownership and that this right cannot be infringed upon in any capacity. Gun control advocates, on the other hand, continue to criticize the decision for "def[ying] constitutional text and history to create a new private right to be armed."[14] More optimistic gun control advocates, however, emphasize certain holes in the decision as avenues through which to continue the fight for common sense gun laws. One such avenue which remains to be definitively addressed by the Supreme Court is what it considers a "presumptively lawful" regulation. While the Court offered examples—including prohibiting firearm possession by felons and the mentally ill, forbidding firearm possession in sensitive places such as schools and government buildings, and imposing conditions on the commercial sale of firearms[15]—it set no boundaries within which to consider such regulations in practice and merely notes that this list is not exhaustive.[16]

This Note focuses on a new type of law which utilizes these gaps in the *Heller* decision, capitalizing on the Supreme Court's allowance of prohibiting firearm possession by felons and the mentally ill. The purpose of this Note is to argue for the crucial need for Extreme Risk Protection Orders and the feasibility of passing such laws in each of the twelve federal circuits. This involves an analysis of possible issues and/or constitutional questions that may arise or be used to argue against the implementation of such laws in a given jurisdiction.

13. *Heller*, 554 U.S. at 581.

14. Dennis A. Henigan, *Symposium: The Second Amendment and the Right to Bear Arms After D.C. v. Heller: The Heller Paradox*, 56 UCLA L. REV. 1171, 1209 (2009).

15. *Heller*, 554 U.S at 626–27.

16. *Id.* at 627 n.26.

I. The United States is Unique in its Lack of Common Sense Gun Control

Studies have substantially demonstrated that more gun control correlates with fewer firearm deaths.[17] For instance, one study done for the American Public Health Association revealed that each percentage point increase in gun ownership correlated with a nearly equal percentage increase in the firearm homicide rate.[18] The NRA and its supporters often counter this clear correlation by arguing that there is simply more crime in the U.S. than in other countries, and that therefore it is inaccurate to tie higher death rates to the prevalence of guns. However, a number of studies have shown otherwise. For example, the research illustrated in the book *Crime is Not the Problem* by Berkeley's Franklin Zimring and Gordon Hawkins, shows that other crimes, such as robbery and assault, occur at equivalent rates, if not higher, in several Western nations.[19]

The effects of the lack of stricter regulations on gun ownership in the U.S. are perhaps clearest when compared to countries with such stricter regulations. One go-to example is Japan. Out of its population of 127 million people, Japan suffers about 10 or less gun deaths per year.[20] This is a shockingly small number when compared to the roughly 37,200 gun deaths in the U.S. each year[21] out of a population of roughly 328 million.[22] Japan achieves this low number at least in part through its notably strict regulations on the ownership of firearms by the general population, as well as limited possession among its police force.[23] In order to own a gun in Japan, one must attend an all-day class, pass a written test, pass a shooting-range test

17. *See e.g.,* John W. Schoen, *States with strict gun laws have fewer firearm deaths. Here's how your state stacks up*, CNBC (Feb. 27, 2018), https://www.cnbc.com/2018/02/27/states-with-strict-gun-laws-have-fewer-firearms-deaths-heres-how-your-state-stacks-up.html (analyzing the results of a study conducted by the CDC tracking firearm deaths in each state, and a study conducted by Boston University's School of Public Health tracking different provisions of gun laws in each state, and combining this data to show the number of gun deaths versus gun laws in each state).

18. Michael Siegel et al., *The Relationship Between Gun Ownership and Firearm Homicide Rates in the United States, 1981-2010*, AJPH (Oct. 9, 2013), http://ajph.aphapublications.org/doi/full/10.2105/AJPH.2013.301409.

19. FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM (1997).

20. Chris Weller, *Japan has almost completely eliminated gun deaths—here's how*, BUSINESS INSIDER (Feb. 15, 2018), https://www.businessinsider.com/gun-control-how-japan-has-almost-completely-eliminated-gun-deaths-2017-10.

21. Laura Santhanam, *There's a new global ranking of gun deaths. Here's where the U.S. stands*, KQED (Aug. 28, 2018), https://www.pbs.org/newshour/health/theres-a-new-global-ranking-of-gun-deaths-heres-where-the-u-s-stands.

22. *U.S. and World Population Clock*, U.S. CENSUS BUREAU (last visited Jan. 6, 2019), https://www.census.gov/popclock.

23. Weller, *supra* note 20.

with a score of at least 95 percent, pass a mental-health evaluation, and pass an extensive background check.[24] Even after this extensive application process, individuals are only allowed to purchase shotguns and air rifles.[25] They are further required to retake both the initial class and the initial written exam every three years if they wish to maintain their license.[26]

Australia is another example of the results that can be achieved even when less restrictions are placed on gun ownership. After a mass shooting at a cafe in 1996, which led to the deaths of 35 people and the injury of 23, the country enacted a slew of laws to ensure such a massacre never occurred again.[27] These included "uniform gun registration, repudiation of self-defense as a legitimate reason to hold a firearm license, locked storage, a ban on private gun sales and civilian ownership of semiautomatic rifles and pump-action shotguns, and standardized penalties."[28] Since the enactment of these laws, no mass shooting has occurred in Australia.[29] In comparison, before 1996, approximately three mass shootings occurred every year.[30] By projecting this rate forward, the Australian Coalition for Gun Control concluded that approximately 16 mass shootings have been avoided in Australia as of February 2018.[31] Despite the difference in the level of restrictive gun legislation in comparison to that in Japan, the increase of ownership and purchase restrictions in Australia similarly correlated with a drastic decrease in the gun-related deaths that occur in the country each year.

Perhaps even more persuasive is what has been shown *within* the U.S., in states that have the most gun laws. In a study conducted by Dr. Eric W. Fleegler and his colleagues at Boston Children's Hospital, researchers found that states with more restrictive gun laws collectively have a 42 percent lower rate of gun-related deaths when compared to states with the fewest number of gun laws.[32] They further noted that states with the lowest gun-ownership rates also have the lowest gun-mortality rates.[33]

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24. Weller, *supra* note 20.

25. *Id.*

26. *Id*.

27. Maggie Fox, *Australian gun laws stopped 16 mass shootings, new calculations show*, NBC NEWS (last updated Mar. 13, 2018), https://www.nbcnews.com/health/health-news/australian-gun-laws-stopped-16-mass-shootings-new-calculations-show-n855946.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Fewer gun deaths in states with most gun laws, study finds*, NBC NEWS (Mar. 6, 2013), http://vitals.nbcnews.com/_news/2013/03/06/17213303-fewer-gun-deaths-in-states-with-most-gun-laws-study-finds?lite.

33. *Id.*

Arguably the most significant barrier to gun control legislation is the existence and vast influence of the gun lobby, which is unique to the United States. In the 2016 election, the NRA contributed $3.1 million to Donald Trump's campaign.[34] It has contributed at least another $4.1 million to current members of Congress as of October 2017.[35] Beyond mere campaign contributions, the NRA also exerts powerful influence over its more than five million members. It constantly communicates with its members about gun issues and advises them on how to vote and which campaigns to finance on an individual capacity.[36] This political power allows the NRA to block any piece of gun legislation it deems too restrictive on the Second Amendment right of its constituents.

II. Why Extreme Risk Protection Orders?

One form of common sense gun legislation which has the potential to bridge the gap between NRA supporters and gun control advocates are Extreme Risk Protection Orders ("ERPOs"), otherwise known as Gun Violence Restraining Orders. ERPOs are protective orders issued by a court aimed at prohibiting certain individuals from owning or possessing firearms and ammunition. They are intended to provide community members with a formal legal process through which to prevent gun violence before it occurs.

While other types of gun control laws are often met with much resentment from pro-gun advocates, ERPOs target the issue of gun violence in such a way as to consolidate differing opinions across political platforms. They are aimed at a narrow sect of the population which exhibits a risk to themselves or others, individuals who pro-gun advocates point to as the cause of all mass shootings, after the fact.[37] Even John McCain, who has received the highest amount of NRA funding over the course of his career of

34. Sarah Binder, *Three reasons you should expect congressional gridlock on gun control*, WASH. POST (Feb. 27, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/27/yes-you-can-expect-congressional-gridlock-on-gun-regulations-these-are-the-3-biggest-barriers-to-action/?utm_term=.358e86cc2b4d.

35. Aaron Williams, *Have your representatives in Congress received donations from the NRA?*, WASH. POST (Feb. 15, 2018), http://linkis.com/washingtonpost.com/aPeFE.

36. Leigh Ann Caldwell, *How the NRA Exerts Influence Beyond Political Contributions*, NBC NEWS (June 15, 2016), https://www.nbcnews.com/storyline/orlando-nightclub-massacre/nra-s-political-influence-far-goes-beyond-campaign-contributions-n593051.

37. *See* Jonathan M. Metzl et al., *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105(2) AM. J. PUBLIC HEALTH 240–59 (Feb. 2015). *See also* Ann Coulter, *Guns Don't Kill People, the Mentally Ill Do* (Jan. 16, 2013), http://www.anncoulter.com/columns/2013-01-16.html.

any other current House or Senate member at $7,740,521,[38] has urged for "sensible laws so that crazy people can't get guns."[39] Despite his troublesome use of the term "crazy people," his argument runs parallel to the Supreme Court's opinion in *Heller*: A piece of legislation may be justifiable if it restricts certain dangerous individuals from possessing firearms. But how can these dangerous individuals be readily identified?

Studies conducted by the Consortium for Risk-Based Firearms Policy in 2013 have shown that individuals who are engaged in certain dangerous behaviors are significantly more likely to be a danger to themselves or others within the near future.[40] Recent mass shootings, such as the one in Isla Vista, California in 2015, have further shown that family and close friends are often the first to notice such dangerous behaviors prior to an individual's involvement in a mass shooting. The shooter in the Isla Vista incident, Elliot Rodger, spent over a year planning his attack.[41] This premeditation included amassing numerous firearms and training himself to kill as many people as possible. There were at least 14 separate instances, prior to the shooting, during which local deputies were notified of Rodger's dangerous behavior, including a welfare check requested by his concerned mother.[42] Rodger's parents also tried to contact his therapist three weeks before the shooting due to their concerns about his behavior. Though the therapist contacted the police, none of the parties had the legal means by which to remove Rodger's access to guns, which subsequently led to the deaths of three people, the wounding of 13 others, and ultimately Rodger's suicide.[43]

The Federal Bureau of Investigation ("FBI") conducted a study in June of 2018 detailing certain dangerous behaviors commonly exhibited by active

38. David Leonhardt et al., *Thoughts and Prayers and N.R.A. Funding*, N.Y. TIMES (Oct. 4, 2017), https://www.nytimes.com/interactive/2017/10/04/opinion/thoughts-prayers-nra-funding-senators.html.

39. Tania Lombrozo, *Is Gun Violence Due To Dangerous People Or Dangerous Guns?*, NPR (Aug. 31, 2015), https://www.npr.org/sections/13.7/2015/08/31/436264866/is-gun-violence-due-to-dangerous-people-or-dangerous-guns.

40. *See*, Consortium for Risk-Based Firearms Policy, *Guns, Public Health, and Mental Illness: An Evidence-Based Approach for State Policy,* JOHNS HOPKINS CTR. FOR GUN POL'Y AND RESEARCH (Dec. 2, 2013), http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/GPHMI-State.pdf.

41. Joseph Serna, *Elliot Rodger meticulously planned Isla Vista rampage, report says*, L.A. TIMES (Feb. 19, 2015), http://www.latimes.com/local/lanow/la-me-ln-santa-barbara-isla-vista-rampage-investigation-20150219-story.html.

42. *Id.*

43. Joe Mozingo, *Frantic parents of shooting suspect raced to Isla Vista during rampage*, L.A. TIMES, (May 25, 2014), http://www.latimes.com/local/lanow/la-me-ln-frantic-parents-isla-vista-shootings-20140525-story.html.

shooters just prior to an attack.[44] The study, which examined 63 active shooting incidents in the U.S. between 2000 and 2013, pointed to a common history among a majority of active shooters of "abusive, harassing, and oppressive" behaviors.[45] Such behaviors manifested most commonly in the form of declining mental health, injury to or lack of interpersonal relationships, discussion of the planned attack, and suicidal ideation.[46] On average, each active shooter in the study exhibited 4.7 examples of such concerning behavior before committing their attacks and 77 percent spent a week or more planning these attacks.[47] The study also noted that those most likely to identify these examples of concerning behavior are family and friends closest to the potential shooter.

Despite these indications of noticeable behaviors and the ability of those closest to the individual to identify such behaviors, most jurisdictions provide no legal means by which family, close friends, or law enforcement officials can restrict a dangerous individual from accessing and obtaining firearms. Under federal law, an individual suffering from mental instability or mental illness has equal access to purchase or possess firearms unless the individual has been involuntarily committed to a mental institution, been found not guilty by reason of insanity, or undergone some other formalized court proceeding regarding his or her mental illness.[48]

However, a new trend is on the horizon. In the last two years, a number of states have begun to pass ERPO laws, and the momentum is building for other states to follow suit. Such legislation exists in California, Washington, Oregon, Florida, Delaware, Illinois, Maryland, and Massachusetts. Sadly, the passing of such legislation often occurs in the wake of a mass shooting within that state. In her speech following the deadliest school shootings in American history,[49] Stoneman Douglas High School senior, Emma Gonzalez, called attention to the fact that the shooter was known to be a danger to others. In her words, "[n]eighbors and classmates knew he was a big problem. We [reported his erratic behavior] time and time again. Since he was in middle school. It was no surprise to anyone who knew him to hear

44. James Silver et al., *A Study of the Pre-Attack Behaviors of Active Shooters in the United States Between 2000 and 2013*, FEDERAL BUREAU OF INVESTIGATION (June 2018), https://www.fbi.gov/file-repository/pre-attack-behaviors-of-active-shooters-in-us-2000-2013.pdf/view.

45. *Id*.

46. *Id.*

47. Silver, *supra* note 44.

48. 18 U.S.C. § 922(g)(4) (2018).

49. *Florida student Emma Gonzalez to lawmakers and gun advocates: 'We call BS'*, CNN (Feb. 17, 2018), https://www.cnn.com/2018/02/17/us/florida-student-emma-gonzalez-speech/index.html.

that he was the shooter."[50] The #NeverAgain movement started by Gonzalez and the other students of Stoneman Douglas has led to countless marches across the nation in an effort to demand more common sense gun laws. As a result, on March 7, 2018, Senator Marco Rubio (who has received the sixth highest amount of NRA contributions in the Senate at $3,303,355[51]) held a news conference proposing that Florida pass an ERPO law, saying "it would be a tool . . . [to prevent] dangerous individuals from being able to take the next step and actually take the lives of innocent people."[52]

III. The Purpose and Process of Obtaining an ERPO

California's ERPO law[53] is worth detailing because it offers a framework with which to think about ERPOs generally. California modeled its law on existing state legislation which prohibits those charged with domestic violence from owning and possessing firearms.[54] Under California's ERPO law, an immediate family member or a law enforcement officer may request a gun violence protective order to prohibit an individual "from having in his or her custody or control, owning, purchasing, possessing, or receiving any firearms or ammunition"[55] for a period of one year. A temporary ex parte order may also be issued by the court to prohibit the subject of the petition from purchasing or possessing firearms and ammunition prior to the hearing for a one-year protective order, if the court deems this necessary based on the circumstances.

Upon the issuance of a one-year protective order (or earlier if an ex parte order is issued), the court will order the respondent to surrender all firearms and ammunition within their control, possession, or ownership to their local law enforcement agency or otherwise to provide a receipt showing the sale of those firearms to a licensed firearm dealer.[56] Any purchase or possession of a firearm or ammunition following the issuance of the protective order will constitute a misdemeanor.[57] The individual will subsequently be prohibited from purchasing or possessing a firearm or

50. *Florida student Emma Gonzalez to lawmakers and gun advocates, supra* note 49.

51. Leonhardt et al., *supra* note 38.

52. Alex Leary, *Rubio, Nelson pitch idea to encourage states to adopt 'gun violence restraining orders'*, TAMPA BAY TIMES (Mar. 7, 2018), http://www.tampabay.com/florida-politics/buzz/2018/03/07/rubio-nelson-pitch-idea-to-encourage-states-to-adopt-gun-violence-restraining-orders/.

53. CAL. PEN. CODE § 18100 (West 2014).

54. CAL. PEN. CODE § 29805 (West 2011).

55. CAL. PEN. CODE § 18175 (West 2014).

56. CAL. PEN. CODE § 18120 (West 2014).

57. CAL. PEN. CODE § 18205 (West 2014).

ammunition for an additional five years, starting on the date the existing protective order expires. At any time during the one-year period, the subject of the protective order may submit one written request for a hearing to terminate the order based on an argument that he or she does not pose—or no longer poses—a threat to themselves or others.[58]

In the three months before the order is due to expire, the petitioner may request a renewal of the restraining order for another year.[59] If the order is terminated or expires without being renewed, the law enforcement agency will notify the respondent that he or she may request the return of their firearms or ammunition.

IV. Passing an ERPO Law is Feasible in Each of the Twelve Federal Circuits

Many circuits—namely the First, Fourth, Eighth, Ninth, and Tenth Circuits—have considered Second Amendment challenges in the context of domestic violence restraining orders, upon which ERPOs are based. Cases about 18 U.S.C. §§ 922(g)(8) and 922(g)(9) are therefore particularly analogous and suggestive of the circuits' expected decisions if an ERPO law is introduced and challenged in those circuits. Similarly analogous are cases related to individuals (1) previously involuntarily committed to a mental institution, (2) previously convicted of a misdemeanor felony, (3) who are known substance abusers, and (4) who are otherwise deemed a danger to themselves or others. Together, these make up most of the Second Amendment case law considered thus far in each of the twelve circuits.

From the case law examined in the following sub-sections, it appears that ERPOs are likely to be upheld as constitutional in each of the twelve circuits because (1) they are narrowly tailored to accomplish a legitimate government interest and (2) the limit on one's Second Amendment right to bear arms is minimal and temporary.

A. United States Court of Appeals for the First Circuit

1. United States v. Torres-Rosario

Defendant, Torres-Rosario, was arrested for the sale and possession of drugs, and indicted for being a felon in possession of a firearm, pursuant to 18 U.S.C. § 922(g)(1).[60] His primary argument was that § 922(g)(1) constituted an unconstitutional categorical ban, particularly in his case

58. CAL. PEN. CODE § 18185 (West 2014).

59. CAL. PEN. CODE § 18190 (West 2014).

60. United States v. Torres-Rosario, 658 F.3d 110, 112 (1st Cir. 2011).

because though he had prior convictions, none were for violent felonies.[61] The court considered a decision by the North Carolina Supreme Court, wherein a specific felony conviction was deemed insufficient to deprive the defendant of his Second Amendment rights.[62] However, this decision was criticized because it urged a case-by-case analysis, which the court in *Torres-Rosario* believed to be too inconsistent and conducive to administrative issues in practice.[63]

The court also considered the argument that "felons are more likely to commit violent crimes than are other law-abiding citizens," but conceded that the *Heller* decision did not specifically allow for a categorical ban in cases that involve "tame and technical" activities.[64] However, the court ultimately reasoned that this was not the case here. The main purpose of a firearm in the possession of a drug dealer is to protect the drugs.[65] Thus, drug dealing is not a "tame" felony, but rather one that ubiquitously involves violence.[66] For that reason, a categorical ban on the possession of firearms by such a felon is "presumptively lawful" under *Heller*.[67]

2. United States v. Booker

Defendant, Booker, was found in possession of seven firearms eight years after he was convicted of assault against his then-wife.[68] He was indicted on two counts of knowing possession of a firearm by an individual convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. § 922(g)(9).[69] In his motion to dismiss, he argued that § 922(g)(9)'s restriction on individual possession of firearms violates the Second Amendment.[70] The First Circuit referenced the *Heller* decision in order to delineate that there are "presumptively lawful" regulations which apply to categories of individuals whose gun possession, ownership, and/or use may be regulated without violating the Second Amendment.[71] Citing the Seventh Circuit's decision in *United States v. Skoien*, the First Circuit asserted that "preventing armed mayhem" is an undeniably important governmental

61. *Torres-Rosario*, 658 F.3d at 113.
62. Britt v. State, 363 N.C. 546 (N.C. 2009).
63. *Torres-Rosario*, 658 F.3d at 113.
64. *Id.*
65. *Id.* at 114.
66. *Id.* at 113.
67. *Id.*
68. United States v. Booker, 644 F.3d 12, 14 (1st Cir. 2011).
69. *Id.*
70. *Id.*
71. *Id.* at 24.

objective.[72] It further referenced figures collected by the Justice Department on the increased risk of homicide by convicted domestic abusers with guns and the recidivism rates of domestic violence. From this data, the court concluded that § 922(g)(9) substantially promotes the government interest of preventing domestic gun violence.[73]

3. Pineiro v. Gemme

Plaintiff, Pineiro, applied for an unrestricted license to carry in Massachusetts as a result of the violent crimes occurring around his office building.[74] Such an unrestricted license would allow him to carry a concealed weapon in public for self-defense. However, he was granted a license subject to the restriction that he use his firearms only for the purpose of sport and target-shooting.[75] Massachusetts courts have distinguished between a "proper purpose" for obtaining a firearm and a "suitable person" determination as separate requirements for distributing a license to carry in the state.[76] Here, Plaintiff's stated purpose for applying for a license was to avoid "spend[ing] his entire life behind locked doors [and to prevent becoming] a potential victim of crimes."[77] The licensing authority decided that this was not a sufficient reason to grant a concealed carry license.[78]

Plaintiff claimed the statute's "suitable person" standard violated his Second Amendment rights because it was "subjective and unattainable."[79] Plaintiff also challenged the state law's "proper purpose" requirement, which requires an applicant to show that the license is being sought with "good reason to fear injury to his person or property."[80] Plaintiff asserted that self-defense is a "core lawful purpose" protected by the Second Amendment (as was stated in *Heller*) and thereby the state was not permitted to further limit gun possession.[81] Finally, Plaintiff challenged the licensing authority's power to decide whether to impose restrictions on an applicant's ability to carry a weapon, arguing that this power is unconstitutional.[82]

72. United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010).
73. *Booker*, 644 F.3d at 25–26.
74. Pineiro v. Gemme, U.S. Dist. LEXIS 117749 at *2–3 (2011).
75. *Id.* at *3–4.
76. *Id.* at *6–7.
77. *Id.* at *7.
78. *Id.*
79. *Id.* at *11.
80. *Id.* at *11–12.
81. *Id.* at *12.
82. *Id.* at *13.

In deciding on these issues, the court considered whether or not to apply the *Pullman* abstention. This principle was designed on the premise that "federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them."[83] Abstention is appropriate only where (1) the state law is ambiguous and (2) deciding the issue regarding the state law may avoid the need to resolve a significant federal constitutional question.[84] The court ruled that the *Pullman* abstention did not apply to Plaintiff's first claim because "suitable person" had been clearly defined in Massachusetts case law to mean "a person who is sufficiently responsible and skilled with firearms to hold a license without posing a risk to public safety."[85] "Good reason to fear injury" is likewise clearly defined in Massachusetts case law;[86] the statute requires that an applicant demonstrate some specific circumstance giving rise to fear beyond the risks faced by the public at large.[87] The court also ruled that the delegation of license restriction authority was unambiguous.[88] The Appeals Court of Massachusetts ruled in *Ruggiero v. Police Commissioner of Boston* that determinations relating to the "suitable person" and "proper purpose" requirements may only be reversed if they are "arbitrary, capricious or an abuse of discretion."[89]

4. Summary and Application

In *U.S. v. Torres-Rosario*, the court shied away from creating a precedent of case-by-case analysis and instead decided that certain dangerous individuals may be prohibited from possessing or purchasing firearms via a categorical ban. The First Circuit reasoned that allowing drug dealers to possess guns for the purpose of defending their drugs was not a purpose protected by the Second Amendment, based on its interpretation of the *Heller* decision. Because ERPO laws specifically address individuals who exhibit dangerous behaviors and because these individuals' main purpose for possessing a firearm is likely to harm others or themselves (and not for self-defense), it is likely that a claim against an ERPO law would yield a result comparable to that in *U.S. v. Torres-Rosario*.

83. *Pineiro*, U.S. Dist. LEXIS 117749 at *14.
84. *Id.*
85. *Id.* at *19.
86. *Id.* at *22.
87. *Id.* at *22–23.
88. *Id.* at *25.
89. Ruggiero v. Police Comm'r of Boston, 18 Mass. App. Ct. 256, 261 (1984).

By the same logic used in *U.S. v. Booker*, the First Circuit will certainly deem it appropriate to prevent mentally ill individuals from possessing, owning, or using firearms, as this category of individuals is explicitly mentioned in the *Heller* decision. If the court decides that this categorical prohibition would help keep deadly weapons out of the hands of individuals that pose a potential danger to the public, then ERPOs should likewise be permissible since they also target individuals who pose a risk of danger to themselves or others. The decision in *Booker* thus makes it likely that a challenge to an ERPO law in the First Circuit would be unsuccessful because, as the court stated in *Booker*, protecting against gun violence is an important and legitimate government interest.[90]

The decision in *Pineiro v. Gemme* suggests that questions relating to requirements similar to Massachusetts's "suitable person" and "proper purpose" requirements may be raised in an attempt to implement an ERPO law. However, as the court ruled in *Pineiro*, a claim will not require a constitutional review if the state statute in question is not ambiguous.

B. United States Court of Appeals for the Second Circuit

1. Libertarian Party v. Cuomo

The plaintiffs in this case argued that New York State's firearms licensing laws—which required a showing of good moral character and proper cause—were unconstitutional.[91] In considering their case, the court defined the core Second Amendment right as the "right to possess handguns in defense of hearth and home."[92] While the New York laws encroached on this right, they did so to a marginal degree; "law-abiding, responsible citizens face[d] nothing more than time, expense, and questioning of close friends or relatives."[93] The laws were designed to ensure that "only law-abiding, responsible citizens [were] allowed to possess a firearm . . . by ensuring that classes of individuals who [did] not have the necessary character and qualities to possess firearms [were] not able to do so."[94] Therefore, the court ruled in favor of the defendants.

90. United States v. Booker, 644 F.3d 12, 26 (1st Cir. 2011).

91. Libertarian Party v. Cuomo, 300 F. Supp. 3d 424, 430 (W.D.N.Y. 2018).

92. *Id.* at 442 (internal quotations omitted).

93. *Id.* at 443.

94. *Id.* at 443–44.

2. State v. Hope

The Connecticut Appellate Court ruled that similar restrictions of up to one year on those who pose a risk of imminent physical harm to themselves or others was "an example of the longstanding presumptively lawful regulatory measures articulated in [*Heller*]."[95] Therefore, the court concluded that the statute in question did not violate the Second Amendment.[96]

3. Connecticut's Risk Warrant Gun Removal Law

Connecticut was the first state to pass a law in 1999 authorizing police to temporarily remove guns from individuals who they had probable cause to believe posed a danger to themselves or others. The law was passed after a highly publicized mass shooting in the state. Part of the design of this Connecticut risk warrant gun removal law was meant to ensure that the respondent whose guns were being removed would retain his or her due process rights. These precautions included a three-fold review process, including a reflection on the situation and facts at hand by the police, the State's Attorney, and a judge.[97]

Following the passing of this law, researchers at Duke University began conducting a study to analyze the outcomes of the law.[98] The study spanned from 1999 through 2013. During the interviews conducted as part of the study, a number of individuals expressed concern over the effectiveness of having such a cumbersome three-fold review process, and it was this concern which prevented more extensive application of the Connecticut law.[99] In spite of these extensive hurdles to implementation, the study did see a noticeable increase of the number of gun removal cases following the mass shooting at Virginia Tech University in 2007.[100] Overall, the study concluded that the Connecticut law was a useful tool for preventing gun violence, and for reducing suicide rates in particular.[101]

95. Hope v. State, 163 Conn. App. 36, 43 (2016).

96. *Id.* at 43.

97. *See*, Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does it Prevent Suicides?* 80 LAW & CONTEMP. PROBS. 179, 180 (2017).

98. *Id.* at 180.

99. *Id.* at 205.

100. *Id.* at 189.

101. *Id*. at 205–08.

4. Summary and Application

The lack of relevant case law in the Second Circuit does not yield any certain conclusions in this jurisdiction. However, *Libertarian Party v. Cuomo* established that a restriction on firearm possession based on an individual's moral character and fitness is permissible. This suggests that a comparable restriction based on the risk an individual poses to themselves or others may similarly be argued to encroach only marginally on the core right of the Second Amendment. *State v. Hope* further suggests that a one-year protective order constructed like that in California will likely not meet opposition as to the length of time for which the ban spans.

While the Connecticut study is somewhat persuasive and reveals some correlation between the implementation of the law and a decrease in gun violence and gun-related suicides in particular, it is not a conclusive study. It also questions the plausibility of implementing such a cumbersome review process in every jurisdiction. Further, it is a limited version of an ERPO (allowing only the police to petition for a warrant to remove an individual's firearms) and therefore the findings are of limited scope.

C. United States Court of Appeals for the Third Circuit

1. Keyes v. Lynch

Plaintiff Yox was involuntarily committed to psychiatric hospital when he was 15 years old, while he was grappling with his parents' divorce.[102] Plaintiff rested his argument on the assumption that the Supreme Court's decision in *Heller* prohibited firearm possession by persons who are *currently* mentally ill.[103] On the other hand, Defendants' relied on the theory that all persons who have experienced some form of mental illness at some point in their lives are more prone to violent or dangerous behavior and are, thereby, the exact class of individuals the Supreme Court meant to prohibit from firearm possession.[104] The court in this case acknowledged that there are certain mental illnesses, such as anxiety and ADHD, that may be considered more "temporary" and not dangerous.[105] While it is unclear what the Supreme Court meant to include under the umbrella term of "mentally ill," this court reasoned that, at the very least, that definition must include

102. Keyes v. Lynch, 195 F. Supp. 3d 702, 706–07 (M.D. Pa. 2016).

103. *Id.* at 719.

104. *Id.* at 719–20.

105. *Id.* at 719.

individuals who had mental impairments that made them a danger to themselves or others.[106]

Here, Defendants failed to provide evidence of any subsequent episodes of mental illness exhibited by Yox or that he misused firearms in his professional capacity.[107] Though Yox exhibited behavior dangerous to himself and possibly others when he was involuntarily committed, the court decided that there was no current "continuing threat."[108] (The psychological evaluation, which said as much, proved especially convincing.) The court therefore ruled in favor of Yox on his Second Amendment claim.[109]

2. Summary and Application

Though sparse, case law in the Third Circuit's jurisdiction suggests that the existence of mental illness alone is not an automatic and absolute bar to possession of a firearm. That the court in *Keyes* differentiated certain mental illnesses as temporary and not dangerous may provide an argument against certain ERPO petitions that may be brought, if such laws were to be introduced into this jurisdiction. For example, if an individual exhibited dangerous behaviors, prompting a relative to file for an ERPO, that individual may be able to argue at his or her hearing that the dangerous behaviors were a temporary effect of a mental illness rather than an episode that may reoccur in the future. A psychological evaluation affirming that argument would prove particularly persuading, as in the case with Yox. However, this case alone is not necessarily dispositive of whether an ERPO law as a whole would encounter issues that would make implementation impossible in this jurisdiction.

D. United States Court of Appeals for the Fourth Circuit

1. United States v. Chapman

Defendant, Chapman, attempted to kill himself and shoot his ex-wife with at least three firearms in his possession at the time.[110] Defendant's then-girlfriend subsequently filed a domestic violence protective order against him, which he contested on the basis of a violation of his right to self-defense.[111] The Fourth Circuit refrained from deciding on the Second

106. *Keyes*, 195 F. Supp. 3d at 719–20.

107. *Id.* at 720.

108. *Id.* at 720.

109. *Id.* at 722.

110. United States v. Chapman, 666 F.3d 220, 223 (4th Cir. 2012).

111. *Id.* at 224.

Amendment challenge in this case because it determined that this was unnecessary given that the law in question survives intermediate scrutiny.[112] In the court's opinion, the law survived intermediate scrutiny because it constituted an "exceedingly narrow" "prohibitory sweep."[113]

As part of its argument, the government provided social science evidence proving that:

> (1) domestic violence is a serious problem in the U.S., (2) the rate of recidivism among domestic violence misdemeanants is substantial, (3) the use of firearms in connection with domestic violence is all too common, (4) the use of firearms in connection with domestic violence increases the risk of injury or homicide during a domestic violence incident, and (5) the use of firearms in connection with domestic violence often leads to injury or homicide.[114]

The court found this evidence persuasive in showing that the government met its burden of establishing a reasonable fit between the substantial governmental objective of preventing domestic gun violence and keeping firearms out of the hands of domestic abusers.

2. United States v. Conrad

The court concluded here that 18 U.S.C. § 922(g)(3), which prohibits firearm possession by unlawful users of controlled substances, does not violate the Second Amendment.[115] The law passes the intermediate scrutiny standard because it is limited in its temporal scope and because the government submitted sufficient evidence demonstrating a "nexus between controlled substances and crime."[116] With regard to the temporal scope, the law prohibits firearm possession only if the individual is currently a user or addict. The prohibition ends when a person is no longer using drugs. With regard to the nexus, the government provided scientific studies affirming their stance.

112. *Chapman*, 666 F.3d at 228.

113. *Id.* at 228.

114. *Id.* at 230.

115. United States v. Conrad, 923 F. Supp. 2d 843, 851 (W.D. Va. 2013).

116. *Id.* at 850.

3. United States v. Mudlock

Defendant, Mudlock, was arrested after he called 911 stating he was going to kill himself and that he would shoot any law enforcement officer who approached his home to stop him.[117] During this time, Defendant had a domestic restraining order filed against him, barring him from possessing a firearm for one year.[118] Defendant challenged the restraining order, arguing that 18 U.S.C. § 922(g)(8) violated his Second Amendment rights.[119] The Fourth Circuit disagreed because § 922(g)(8) provides a time-limited restriction, a hearing prior to the triggering of the firearm restriction, and was put in place for the purpose of avoiding reasonable fear of bodily injury. The court thereby found that there was a reasonable fit between the statute and "the substantial governmental objective of reducing domestic gun violence."[120]

4. Summary and Application

Based on the rulings in *Chapman*, *Conrad*, and *Mudlock*, if an ERPO survives intermediate scrutiny, then a Second Amendment challenge will not be considered. It is likely that this will be the case because ERPOs are targeted specifically at a group of individuals deemed by those close to them to exhibit dangerous behavior. Therefore, a law aimed at preventing any dangerous behavior by keeping firearms out of the hands of those likely to be engaged in such dangerous behavior meets the reasonable fit test under intermediate scrutiny. An ERPO further passes the intermediate scrutiny standard because it provides for only a temporary (one-year) prohibition of firearm possession, as in *Conrad* and *Mudlock*. Similar to statute at issue in those cases, an ERPO law also requires a hearing prior to the actual triggering of the firearm prohibition.

E. United States Court of Appeals for the Fifth Circuit

1. United States v. Anderson

Defendant, Anderson, challenged his conviction as a felon in possession of a firearm by arguing that 18 U.S.C. § 922(g)(1) violated his Second Amendment rights.[121] The court reaffirmed its previous decision,[122] holding

117. United States v. Mudlock, 483 F. App'x 823, 825 (4th Cir. 2012).

118. *Id.* at 826.

119. *Mudlock*, 483 F. App'x at 826.

120. *Id.* at 828.

121. United States v. Anderson, 559 F.3d 348, 352 (5th Cir. 2009).

122. United States v. Darrington, 351 F.3d 632, 633–34 (5th Cir. 2003).

that § 922(g) does not violate the Second Amendment and that *Heller* provided no basis for reconsidering that decision.[123] According to the Fifth Circuit's precedent, "limited, narrowly tailored exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country . . ."[124] Further, the Fifth Circuit previously noted that "those of unsound mind may be prohibited from possessing firearms."[125]

2. Piscitello v. Bragg

The District Court for the Western District of Texas rejected Piscitello's Second Amendment challenge to 18 U.S.C. § 922(g)(3), which makes it unlawful for a person using a controlled substance to possess a firearm.[126] The court reasoned that the Supreme Court explained in *Heller* that there are certain exceptions to the right to possess a firearm.[127] While certain exceptions were enumerated in the *Heller* decision, the Supreme Court noted that the list was not meant to be exhaustive, implying that there are other categories of exceptions which Congress could regulate.[128] The court thus concluded that Congress's determination that the prohibition of firearm possession by those unlawfully using or addicted to controlled substances is consistent with "well-rooted, public-safety-based-exceptions to the Second Amendment right."[129]

3. Summary and Application

The reasoning in the Fifth Circuit's precedents, cited in *Anderson*, suggests the court would uphold an ERPO law because it is designed to temporarily prohibit firearm possession by "those of unsound mind," so long as the ERPO law is applied in a narrow set of "reasonable" cases. The rationale in *Piscitello* suggests that an ERPO law would be upheld since such laws are similarly based on reasonable determinations that people who demonstrably pose a danger to themselves or others should not be allowed to have easy access to firearms.

123. *Anderson*, 559 F.3d at 352.

124. United States v. Emerson, 270 F.3d 203, 261 (5th Cir. 2001).

125. *Id.* at 261.

126. Piscitello v. Bragg, 2009 U.S. Dist. LEXIS 21658 at *11 (W.D. Tex. 2009).

127. *Id.* at *12.

128. *Id*.

129. *Id.*

F. United States Court of Appeals for the Sixth Circuit

1. Stimmel v. Sessions

Plaintiff, Stimmel, was barred from purchasing a firearm under 18 U.S.C. § 922(g)(9) due to his prior conviction of misdemeanor domestic violence.[130] In his appeal, Plaintiff argues that § 922(g)(9) placed an unconstitutional burden on his Second Amendment rights.[131] The court reasoned that the core of the Second Amendment's protections pertain to the rights of "law-abiding, responsible citizens," which lends itself to the presumption that some individuals may not fall under such a characterization and would thereby be "disqualified from exercising Second Amendment rights."[132] Thus, the court determined that "some categorical disqualifications are permissible" in order to enforce important governmental interests, such as protecting victims of domestic violence.[133]

2. Tyler v. Hillsdale County Sheriff's Department

Plaintiff, Tyler, was involuntarily committed to a mental hospital nearly thirty years ago after his wife of over two decades left him for another man.[134] In the years between his hospital discharge in 1986 and 2012, there was no evidence of mental illness.[135] Despite this fact, Tyler was denied the purchase of a gun in 2011. His chief challenge in the present case was that 18 U.S.C. § 922(g)(4) unconstitutionally placed a permanent ban on his fundamental right to bear arms.[136] Here, the court decided not to blindly apply the statute, which the Supreme Court expressly enumerated as a "presumptively lawful" restriction in *Heller*.[137] Instead, it reasoned that an individual who was previously involuntarily committed should be allowed to argue against 18 U.S.C. § 922(g)(4) if he or she believes that they no longer poses a danger to society.[138]

130. Stimmel v. Sessions, 879 F.3d 198, 201 (6th Cir. 2018).
131. *Id*. at 201.
132. *Id.* at 203.
133. *Id.* at 210–11.
134. Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 683 (6th Cir. 2016).
135. *Id.* at 684.
136. *Id.* at 684.
137. *Id.* at 687.
138. *Id.* at 687–88.

3. Summary and Application

The decision in *Tyler* suggests that prior involuntary commitment to a mental institution does not equate to current mental illness, and that the federal law thereby does not automatically bar individuals who were once involuntary committed from possessing firearms. In contrast, ERPOs are targeted at dispossessing people who are shown to pose a *current* danger to themselves or others. Therefore, it is reasonable to assume that the Sixth Circuit could uphold an ERPO law because it relies on indications of dangerous behaviors which suggest the individual is *currently* a danger and/or mentally ill. Further, as the court decided in *Stimmel*, such a categorical ban on a group of individuals is permissible if it reasonably serves to enforce the governmental interest of public safety.

G. United States Court of Appeals for the Seventh Circuit

1. United States v. Skoien

Defendant, Skoien, had twice been convicted of misdemeanor crimes of domestic violence when he was found in possession of a shotgun.[139] As a condition of his guilty plea, he reserved the right to bring a facial challenge against 18 U.S.C. § 922(g)(9).[140] The court reasoned that Section 922(g)(9) was rooted in the belief that people who have been convicted of a violent offense in the past are more likely to commit similarly violent acts in the future.[141] Therefore, it becomes imperative to keep "the most lethal weapon" out of the hands of domestic violence misdemeanants.[142] By this logic, the court decided to uphold Section 922(g)(9) against Defendant's facial challenge.[143]

2. United States v. Yancey

The court here reasoned that Congress intended to exclude certain individuals who are "presumptively risky people" from possessing firearms by passing section 922(g) of the federal code.[144] Congress acted within its constitutional bounds in doing so because it is "substantially related to the important governmental interest in preventing violent crime."[145] The court

139. United States v. Skoien, 614 F.3d 638, 639 (7th Cir. 2010).
140. *Id.*
141. *Id.* at 642.
142. *Id.* at 643.
143. *Id.* at 645.
144. United States v. Yancey, 621 F.3d 681, 683 (7th Cir. 2010).
145. *Id.* at 687.

also drew an analogy between habitual drug abusers and the mentally ill, stating that both categories of individuals "are more likely to have difficulty exercising self-control, making it dangerous for them to possess deadly firearms."[146] Further, with respect to commitment to a mental institution, the court appeared to decide that such a commitment legitimizes a lifetime ban on firearm possession.[147]

3. Rhein v. Pryor

The Illinois Compiled Statutes (the "ILCS") contain a provision that allows the Illinois Department of State Police to revoke an individual's license to acquire or possess a firearm if the Department finds that, at the time of issuance, the individual's mental condition was "of such a nature that it pose[d] a clear and present danger to the applicant, any other person or persons or the community."[148] The ILCS was recently amended to define "clear and present danger" as:

> [A] person who: (1) communicates a serious threat of physical violence against a reasonably identifiable victim or poses a clear and imminent risk of serious physical injury to himself, herself, or another person as determined by a physician, clinical psychologist, or qualified examiner; or (2) demonstrates threatening physical or verbal behavior, such as violent, suicidal, or assaultive threats, actions, or other behavior, as determined by a physician, clinical psychologist, qualified examiner, school administrator, or law enforcement official.[149]

Here, one of the plaintiffs claimed that (1) he did not have a mental illness and (2) that therefore his firearm license was improperly revoked.[150] While the court ruled that the plaintiff's claims may advance past the motion to dismiss at issue here, it noted that if it is later found that the nature of the plaintiff's mental condition posed a clear danger to himself or others, his claim that his Second Amendment rights were deprived will be unsuccessful.[151]

146. *Yancey*, 621 F.3d at 685.

147. *Id.* at 686.

148. 430 ILL. COMP. STAT. ANN. 65/8 (LEXIS through 2017 Legis. Sess.).

149. 430 ILL. COMP. STAT. ANN. 65/1.1 (LEXIS through 2017 Legis. Sess.).

150. Rhein v. Pryor, 2014 U.S. Dist. LEXIS 36305 at *6–7 (N.D. Ill. Mar. 20, 2014).

151. *Id.* at *17.

4. Summary and Application

The decision in *Skoien* to uphold 18 U.S.C. § 922(g)(9) against facial challenges bodes well for the passage of an ERPO law in the Seventh Circuit. The court's decision hinged on the amount of scientific proof regarding the high rate of recidivism of domestic abusers and the danger posed to partners and spouses of those abusers. Similarly, the studies done by the Consortium for Risk-Based Firearms Policy and the FBI show clear signs of concerning conduct which are often readily apparent to those closest to a potential shooter in the time leading up to that shooter's attack. Such a present threat to public safety should not be overlooked, and, in light of the *Skoien* decision, the Seventh Circuit may be open to such a comparison.

Further, the decision in *Yancey* suggests that the Seventh Circuit would uphold an ERPO law because it is "substantially related to the important governmental interest in preventing violent crime."[152] Under *Yancey*, the Seventh Circuit also appears more stringent than other circuits—like the Sixth Circuit, for example—by ruling in favor of the lifetime ban of individuals who were once committed to mental institutions. It will thus be more difficult for individuals to bring a claim against an ERPO law based on the argument that there is no evidence of continued or reoccurring mental illness after an earlier commitment to a mental institution.

The *Rhein* decision suggests that an ERPO law could be integrated in the Northern District of Illinois since the ILCS already provides for much of the restrictions contained in California's ERPO law. In fact, the ILCS appears to be more restrictive because it allows for an indefinite revocation of firearm possession for individuals who displayed evidence of mental illness at the time of the issuance of their license.

H. United States Court of Appeals for the Eighth Circuit

1. United States v. Bena

In its analysis of the constitutionality of domestic violence restrictions on firearm possession, the Eighth Circuit reasoned that, even though federal law did not prohibit firearm possession by the mentally ill until 1968, Congress had long since sought to keep firearms out of the possession of dangerous classes of individuals.[153] Because this type of restriction is in place to "promote the government's interest in public safety consistent with our common law tradition," the court held that the Second Amendment does

152. *Yancey*, 621 F.3d at 687.

153. United States v. Bena, 664 F.3d 1180, 1182–83 (8th Cir. 2011).

not prohibit such restrictions.[154] This reasoning is consistent with classical republican philosophy, which tied the right to bear arms with being a "virtuous citizen."[155]

2. United States v. Seay

Defendant, Seay, was convicted of distrusting and possessing marijuana.[156] During a search subsequent to his arrest, police found four firearms at Defendant's residence. He was thereby indicted for possessing a firearm while using a controlled substance in violation of 18 U.S.C. § 922(g)(3). Defendant argued that the indictment violated his Second Amendment rights.[157] However, the court refrained from considering Defendant's arguments. In so doing, it cited past decisions within the circuit as well as in other circuits which dictated that this and other sections of § 922(g) are facially constitutional.[158]

3. Summary and Application

Bena suggests that the Eighth Circuit would uphold an ERPO law because it is aimed specifically at individuals who pose a danger to themselves or others, which the Eighth Circuit held was not a restriction prohibited by the Second Amendment. Further, it would be difficult for a defendant in the Eighth Circuit to argue that an ERPO is facially unconstitutional as comparable sections of 18 U.S.C. § 922(g) have been held to be constitutional, as was reiterated in *Seay*.

I. United States Court of Appeals for the Ninth Circuit

1. Pyles v. Winters

Plaintiff, Pyles, was working as a transportation planner at the Oregon Department of Transportation when he began suffering from "perceived mental decline" in 2009.[159] When told he was being placed on administrative leave by his manager, Plaintiff caused a scene in the office for about 20 minutes before he was escorted off the premises by police officers.[160] Plaintiff's actions on that day were so violent that, in the days that followed,

154. *Bena*, 664 F.3d at 1184.

155. *Id.* at 1183.

156. United States v. Seay, 620 F.3d 919, 920 (8th Cir. 2010).

157. *Seay*, 620 F.3d at 920.

158. *Id.* at 924.

159. Pyles v. Winters, 2013 U.S. Dist. LEXIS 96227 at *2 (D. Or. July, 9, 2013).

160. *Id.* at *2–3.

many of his co-workers felt unsafe even when they got home after work.[161] As a result, Plaintiff's district manager notified the local Sheriff's Office of the events that occurred and asked that Plaintiff's activities be monitored, in case Plaintiff returned to the office and displayed further violent behavior.[162] Two days after he was told he was going to be placed on administrative leave, Plaintiff purchased a firearm and the district manager was notified of the purchase.[163] Further investigation revealed that Plaintiff had actually purchased three firearms in those two days—two handguns and an AK-type assault rifle.[164] Plaintiff claimed the timing of these purchases was merely coincidental and that he believed he never posed a danger to anyone, including himself.[165] Police seized Plaintiff's firearms soon thereafter and he was transported to a hospital for a mental health evaluation. The evaluation did not indicate that Plaintiff was a danger to himself or others.[166] Plaintiff argued that the seizure of his firearms was a violation of his Second Amendment rights, particularly because the mental health evaluation proved that he was not mentally ill.[167]

The court ruled that the results of the mental health evaluation were irrelevant; it did not matter that Plaintiff was not actually mentally ill.[168] The police lawfully seized Plaintiff's firearms because they had probable cause to suspect that Plaintiff might be mentally ill and a danger to himself or others.[169] Furthermore, Plaintiff's firearms were returned to him "within a reasonable amount of time" following the results of his mental health evaluation.[170] Therefore, Plaintiff's Second Amendment claim was dismissed.

2. United States v. Garretson

Defendant, Garretson, was reported for producing and distributing marijuana.[171] When police searched his residence pursuant to this report, they found him in possession of multiple firearms. At the time of the search,

161. *Pyles*, 2013 U.S. Dist. LEXIS 96227 at *4.

162. *Id.* at *3.

163. *Id.* at *2–4.

164. *Id.* at *4.

165. *Id.* at *5.

166. *Id.* at *6–7.

167. *Pyles*, 2013 U.S. Dist. LEXIS 96227 at *8.

168. *Id.* at *16.

169. *Id.*

170. *Id*.

171. United States v. Garretson, 2013 U.S. Dist. LEXIS 154246 at *2–4 (D. Nev. June 12, 2013).

there was an Extended Order for Protection Against Domestic Violence filed against Defendant. He was therefore indicted for possession of firearms in violation of 18 U.S.C. § 922(g)(8).[172] Against this, Defendant argued the statute violated his Second Amendment rights, as applied.[173]

The court referred to the Fourth Circuit's decision in *United States v. Mahin*, in which the Fourth Circuit ruled that § 922(g)(8)'s prohibition was "temporally limited and therefore 'exceedingly narrow.'"[174] The temporary burden is only instated to prevent "a particular risk of future abuse."[175] Here, the court decided that the mere one-year duration of the domestic violence order—which was shorter than the two year duration at issue in *Mahin*—along with the credible threat to the physical safety of an intimate partner was enough justification to enforce § 922(g)(8), as applied, upon Defendant.[176]

3. Summary and Application

Pyles implies that a mental health evaluation proving the lack of a threat of danger to one's self or others is irrelevant, so long as the firearms are seized upon probable cause and are returned to the owner "within a reasonable amount of time" after the mental health evaluation is conducted.[177] The decision in *Garretson* further enforces the constitutionality of a temporary burden on one's Second Amendment rights when there is threat of physical safety.[178] Together, these decisions suggest the Ninth Circuit would likely uphold an ERPO law because ERPOs are temporary and imposed against those who are a danger to themselves or others. Once the one-year period lapses, the order may be renewed, but if it is not renewed, then the individual may request the return of his or her firearms.

J. United States Court of Appeals for the Tenth Circuit

1. United States v. Gillman

Defendant, Gillman, was found in possession of a firearm after his ex-girlfriend filed a protective order against him. He contested the

172. *Garretson*, 2013 U.S. Dist. LEXIS 154246 at *3-4.
173. *Id.* at *6.
174. United States v. Mahin, 668 F.3d 119, 125 (4th Cir. 2012).
175. *Garretson*, 2013 U.S. Dist. LEXIS 154246 at *18.
176. *Id.* at *18–20.
177. *Pyles*, 2013 U.S. Dist. LEXIS 96227 at *16.
178. *Garretson*, 2013 U.S. Dist. LEXIS 154246 at *18.

constitutionality of 18 U.S.C. § 922(g)(8), arguing that that section of the statute unduly punishes people who do not pose a threat to public safety and, as applied to him, restricted his Second Amendment rights even though there was no evidence that he posed a danger to anyone.[179] Defendant maintained that the protective order held against him was based on a property crime—slashing his ex-girlfriend's tires—rather than threat of bodily harm and therefore he should not be subject to § 922(g)(8).

Citing the Supreme Court's decision in *Heller*, the United States District Court for the District of Utah reasoned that, while there is no clear definition for a "presumptively lawful" restriction, § 922(g)(8) likely falls under this category.[180] Section 922(g)(8) is narrower in scope and "more limited in its temporal applicability" when compared to the statute at issue in *Heller*.[181] The statute here targeted a limited group of citizens who may present legitimate concerns in relation to the safety of an intimate partner and is therefore narrow in scope.[182] Thus, the court upheld the federal statute as applied against the Defendant.

2. Summary and Application

Case law is limited in this circuit and therefore no definitive conclusion can be drawn. However, the narrow scope and temporal applicability of ERPOs are comparable to that of § 922(g)(8), suggesting that an ERPO law will likely be upheld, at least in the limited jurisdiction of the Central Division of the District of Utah.

K. United States Court of Appeals for the Eleventh Circuit

There is virtually no case law in the Eleventh Circuit addressing a Second Amendment challenge to a law analogous to an ERPO law. However, the Eleventh Circuit has issued decisions categorically upholding more aggressive lifetime bans on firearm possession. Such decisions reflect the circuit's understanding that "the right recognized in *Heller* is a qualified right—not intended to 'cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.'"[183] This suggests that

179. *Garretson*, 2013 U.S. Dist. LEXIS 154246 at *4.

180. *Id.* at *7.

181. *Id.*

182. *Id.* at *8.

183. United States v. McIlwain, 772 F.3d 688, 698 (11th Cir. 2014) (citing District of Columbia v. Heller, 554 U.S. 570, 626–27); *see also* United States v. Rozier, 598 F.3d 768, 771 (11th Cir. 2010) (per curiam) (holding that "statutory restrictions of firearm possession, such as § 922(g)(1), are a constitutional avenue to restrict the Second Amendment right of certain classes of people" and the plaintiff, "by virtue of his felony conviction, falls within such a class").

the Eleventh Circuit might uphold an ERPO law as a similar statutory restriction of firearm possession for certain classes of people who have been determined more likely to be a danger to themselves or others.

L. United States Court of Appeals for the District of Columbia Circuit

1. Schrader v. Holder

Plaintiff, Schrader, was convicted of misdemeanor assault and battery forty years prior to the filing of this case. When he was subsequently denied the purchase of a firearm forty years after the conviction, he learned that he was barred from doing so under 18 U.S.C. § 922(g)(1).[184] In considering Plaintiff's constitutional challenge, the court reasoned that Congress originally enacted the statute to keep firearms away from individuals "who might be expected to misuse them."[185] The court ruled that § 922(g)(1) survived intermediate scrutiny because disarming "common-law misdemeanants as a class is substantially related to the important governmental objective" of preventing gun violence.[186]

2. Summary and Application

The reasoning in *Schrader* is applicable in the ERPO context because it suggests an ERPO law would survive intermediate scrutiny because it is based on a similar rationale that people "expected to misuse" firearms may permissibly be prohibited from possessing them. Thus, though there is limited case law, the ruling in *Schrader* bodes well for the success of an ERPO law in this jurisdiction.

Conclusion

Something needs to be done about the amount of gun violence in this country. For many years, the shooting at Columbine High School in 1999 was referred to as one of the deadliest massacres in history. Now, it is no longer even among the 10 deadliest shootings in modern U.S. history.[187] While there continues to be debate over the true cause of these repeated mass

184. Schrader v. Holder, 704 F.3d 980, 982-83 (2013).

185. *Id.* at 990.

186. *Id.* at 990.

187. AJ Willingham et al., *19 years ago, Columbine shook American to its core. Now, it's not even among the 10 deadliest shootings in modern US history*, CNN (Apr. 20, 2018), https://www.cnn.com/2017/11/07/health/deadliest-mass-shootings-columbine-in-modern-us-history-trnd/index.html.

shootings, there is at least a proven correlation between more guns and higher firearm homicide rates.[188] Due to the Supreme Court precedent in *D.C. v. Heller*, the control the NRA exerts on Congress,[189] and the anti-gun control sentiments of at least one third of the American population,[190] it is unlikely that a strong-headed movement in the direction of general gun restrictions will yield any results. One compromise, that has been agreed upon by representatives on both sides of the political divide as an acceptable means through which to at least rein in the amount of access to guns by those who pose a danger to themselves or others, is the type of ERPO law that exists in California, Washington, Oregon, Florida, Delaware, Illinois, Maryland, and Massachusetts.

While only time will tell whether such a law will be passed in each of the remaining 42 states, this Note posits that passage of ERPO laws in each of the 12 circuits is plausible and perhaps even necessary. Existing case law in each of these jurisdictions has shown that the limited and specific nature of ERPOs will likely withstand a constitutional challenge. All that stands in the way of the passage of such laws is an unwillingness to place boundaries on Second Amendment rights.

Hopefully, this incorrect perception of common sense gun laws will be changed in the coming years, because the reality is that these limited restrictions on firearm ownership are not aimed at infringing on individual rights. Rather, they are aimed at protecting innocent lives from gun violence. If lawmakers can be persuaded to simply shift their point of view, it becomes an easy decision to pass minimally-restrictive, common sense gun laws to protect American citizens from the dangers of guns when placed in the wrong hands.

188. Max Fisher et al., *What Explains U.S. Mass Shootings? International Comparisons Suggest an Answer*, N.Y. TIMES (Nov. 7, 2017), https://www.nytimes.com/2017/11/07/world/americas/mass-shootings-us-international.html.

189. *See, e.g.* Dominic Rushe, *Why is the National Rifle Association so powerful?*, THE GUARDIAN (May 4, 2018), https://www.theguardian.com/us-news/2017/nov/17/nra-gun-lobby-gun-control-congress.

190. Steven Shepard, *Gun control support surges in polls*, POLITICO (Feb. 28, 2018), https://www.politico.com/story/2018/02/28/gun-control-polling-parkland-430099.