



## **Primer: Red Flag Laws Are Unconstitutional and Dangerous**

### **Introduction**

The Second Amendment is an inalienable right to bear arms in order to defend one's family and community from harm, but more importantly, from the authoritarian tendencies of government that encroach on liberty over time. It is so fundamental to our system that the founders were very specific in enumerating it and bluntly stating that it "shall not be infringed." Over time, courts have determined that this blanket protection covers common arms in common usage. Unfortunately, many in elected office are now attempting to circumvent these protections by inventing new workarounds that ultimately undermine the ability of Americans to keep and bear arms. One such method is to redefine what is meant by "due process." These attempts to undermine Second Amendment rights must be opposed, even in the heat of the "we must do something" sentiment that follows certain tragedies. Certainly, we should not see attacks on our rights from those who call themselves conservative. Unfortunately, in Tennessee, that is happening with Republican Governor Bill Lee. Conservatives should stand up and strongly advocate for protecting their rights.

### **Summary**

The United States has experienced a series of horrific, high-profile mass murders in recent years—the Parkland school shooting in 2018, the Uvalde elementary school massacre and the Buffalo grocery store shooting in 2022, and most recently, the Allen shopping mall attack in Texas and the Covenant School shooting in Nashville earlier this year. These attacks shock the souls of good and decent people who understand life is precious. That only evil seeks to murder the innocent and inflict suffering on families forced to move forward in unfathomable grief.

Unfortunately, these horrific events follow an all-too-predictable pattern. A spiritually and mentally ill individual, often already on the radar of law enforcement or local officials, targets the innocent at a relatively unprotected location. Law enforcement then responds with wildly varying degrees of speed and competence. While the bodies of the fallen are still warm, progressive activists and their allies in the corporate press push for gun control. Each heinous event exposes the true nature of the anti-gun activist class. They view tragedies as the latest opportunity to advance their progressive agenda to disarm and control the masses.

Elected officials, particularly those who understand the purpose of the Second Amendment, are often subjected to overwhelming vitriol by these committed progressive ideologues and the groups backing them. The pressure to “do something” after a horrific mass murder—especially when children are the victims—can overwhelm even the supposedly staunchest proponent of constitutionally-protected rights. Among the en vogue policies that have gained significant traction in recent years is the so-called extreme risk protection order (ERPO), commonly known as a “red flag laws.”

This paper examines how these laws came about, what they do, and why they’re dangerous while providing better solutions—real solutions—that address the root cause of our broken culture while ensuring that fundamental rights are not only protected but strengthened.

### **Background: Gun Control and Red Flag Laws**

While gun control has long been a policy plank among the activist Left, it has faced stiff resistance from the American electorate over the decades. Some states have loosened gun restrictions amidst the calls to disarm law-abiding citizens following high-profile mass shooting incidents. Since 2021, eleven states have passed permitless carry laws.<sup>1</sup> Most recently, Florida became the 26th state in the nation to enact a form of permitless carry—sometimes called constitutional carry—for its citizens, ensuring that most states now provide ways for their adult residents to carry firearms without a license.<sup>2</sup> These constitutional carry states span the ideological spectrum, including deeply liberal states like Vermont and deeply conservative states like Alabama. Despite record spending by gun control activists in recent years,<sup>3</sup> citizen-led efforts to protect their natural rights have found significant success. Meanwhile, evidence suggests that gun control efforts rarely succeed at their stated goals.

Crime rates—particularly crimes committed with firearms—remain staggeringly high in some areas of the United States where gun control measures are often the most stringent. Colorado remains a peculiar case study as it was once one of the more reliable states to uphold the Second Amendment rights of its citizens.

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<sup>1</sup> Brownlee, C. (April 3, 2023). “A Majority of U.S. States Now Have Permitless Carry,” *The Trace*. <https://www.thetrace.org/2023/04/permitless-concealed-carry-gun-law-map/>

<sup>2</sup> Chasan, A. (April 3, 2023). “DeSantis Signs Bill Allowing Florida Residents to Carry Concealed Guns Without a Permit,” *CBS News*. <https://www.cbsnews.com/news/florida-concealed-carry-no-permit-ron-desantis/>

<sup>3</sup> Kulish, N., Glueck, K., and Bender, M. (June 17, 2022). “Gun Control Advocates Have More Money Now, but Money Can’t Buy Zeal,” *The New York Times*. <https://www.nytimes.com/2022/06/17/business/gun-control-nra-money.html>

Nevertheless, Colorado's political transformation over the last 15 years has resulted in some of the strictest gun control measures in the nation.<sup>4</sup> Since passage of legislation limiting ammunition magazine sales and mandating background checks on private purchases in 2013, the state's gun-related homicide rate has steadily increased, and it continues to experience a disproportionate share of mass shooting events and deaths for a state that gun control advocates dominate.<sup>5</sup>

According to the Violence Project, which defines mass shootings as public shootings that kill four or more people, Colorado ranks seventh in the nation in the number of mass shootings and third in per capita rate of mass shootings.<sup>6</sup> Many factors contribute to crime rates, including whether or not states or municipalities have defunded police, legalized drug use, or adopted soft-on-crime approaches to law enforcement through left-wing "criminal justice reform" advances. The extent to which those policy positions have also contributed to Colorado's rising gun crime is indeterminate. However, before undermining the rights of law-abiding citizens, such policies should be causally linked to achieving desired outcomes.

The factors that lead an individual to commit such a grave and evil act to pull a trigger and take an innocent life are myriad and extend far beyond a particular state's carry policies or background check processes. An individual's family, lifestyle, activities, peer group or lack thereof, emotional development, and spiritual health remain critical factors that shape who they are and will become. Most Americans intuitively understand this and increasingly distrust the government when crafting laws that could diminish their ability to defend themselves and their families.

In response to the rejection of direct gun-grabbing efforts, progressive activists have pivoted toward more covert methods for seizing firearms and stripping Americans of their God-given rights: namely through so-called "red-flag" or extreme risk protection orders.

### **Analysis: How Do Red Flag Laws Work?**

The current bipartisan gun-grabbing method is "red flag" ERPO laws wherein judges are empowered to discard constitutional rights, including due process, and unilaterally determine whether law enforcement officials may seize an individual's firearms. Though state provisions may vary, typically a family member or law enforcement officer files a petition with the court, and a judge determines if the individual in question risks

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<sup>4</sup> Everytown Research and Policy (2023). "Gun Laws in Colorado," *Everytown for Gun Safety*. <https://everytownresearch.org/rankings/state/colorado/>

<sup>5</sup> Fogleman, J. (May 5, 2023). "Analysis: Has a Decade of Colorado Tightening its Gun Laws Worked?," *The Reload*. <https://thereload.com/analysis-has-a-decade-of-colorado-tightening-its-gun-laws-worked-member-exclusive/>

<sup>6</sup> The Violence Project Database (July 19, 2023). "Mass Public Shootings in the United States, 1966 - Present," *The Violence Project*. <https://www.theviolenceproject.org/mass-shooter-database/>

committing violence against themselves or others. If the judge determines that to be the case, an order is given to confiscate that individual's firearms pending further evaluation and hearings. In other words, the individual's property is seized first, and due process is only provided thereafter: guilty until proven innocent.

Currently, more than 20 states have enacted some type of ERPO law. Tennessee will likely consider red flag legislation in its August 2023 special session. The following states have passed these laws:

- California
- Colorado
- Connecticut
- Delaware
- District of Columbia (not a state)\*
- Florida
- Hawaii
- Illinois
- Indiana
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Nevada
- New Jersey
- New Mexico
- New York
- Oregon
- Rhode Island
- Vermont
- Virginia
- Washington

Last year, the U.S. Senate passed a poorly-conceived bill that reframed “extreme risk protection orders” (ERPO) as “state crisis intervention orders.” The change in the lexicon is significant as the ease with which a confiscation order can be issued is greatly expanded under “crisis intervention” orders. Further, the legislation incentivized states to adopt them with federal funds dangled as carrots to entice state lawmakers to violate their citizens’ constitutional rights.<sup>7</sup>

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<sup>7</sup> Treene, A. (June 12, 2022). “Senators Reach Gun Safety Deal,” *Axios*.  
<https://www.axios.com/2022/06/12/senators-reach-gun-safety-deal>

Reframing ERPO as “state crisis intervention orders” is one example of how constitutional rights are diminished. Yet, threats to citizens’ rights abound. Radical ideologues on the Left have promoted notions that “silence is violence” and characterize “misgendering” an individual as a hostile and potentially violent act. The slippery slope of playing fast and loose with language and ever-changing definitions among the activist class, coupled with animosity toward fundamental constitutional rights, is illustrative of the potent danger that ever-expanding red flag laws pose to ordinary, law-abiding citizens. It is increasingly likely that such ERPO measures will be weaponized against innocent people in states and locales hostile to the constitutional order.

Further, no available data suggests that red flag laws would have prevented many of the most recent mass shootings. In fact, the nation’s most stringent red flag law is found in New York state—the site of the Buffalo mass murder last year. Not a single provision within that law was triggered before the killer went on his horrific rampage. Despite various iterations of state red flag laws, none of the existing ones have proven effective in preventing the mass murders witnessed in Buffalo and Uvalde. Either because such killers either present no “red flags” before committing their evil crimes (as occurred in Buffalo) or because authorities fail to act on prior prosecutable behavior, arrests, or involuntary commitment (as happened in Uvalde).

This has been the case in a string of recent mass shooting incidents dating back to the Santa Fe, Texas, school shooting in 2018, where no red flags were triggered, and the killer stole the firearms he used to murder his victims.<sup>8</sup>

While elected officials who ostensibly support the Second Amendment have increasingly turned to ERPO laws to satiate the activist class and the understandable cries from otherwise well-meaning citizens to “do something,” such laws are a flagrant violation of the U.S. Constitution and jeopardize the God-given rights of the constituents represented by these officials.

This is also the case with the upcoming special legislative session in Tennessee, wherein Governor Bill Lee (R-TN) plans to push forward some form of ERPO law in the wake of the Covenant School shooting in Nashville.

### **Tennessee and the Covenant School Shooting**

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<sup>8</sup> Brown, R. (May 18, 2018). “Texas School Shooting Suspect Backed Out of Suicide: Governor,” *The New York Post*. <https://nypost.com/2018/05/18/texas-school-shooting-suspect-backed-out-of-suicide-governor/>

According to the Violence Project, Tennessee has suffered three mass shootings since 1966—and ranks 28th in per capita rates of mass shootings.<sup>9</sup> A total of 15 people have been killed and 12 injured in these events. These deaths and injuries are gut-wrenching, particularly the loss of three precious young children in this year’s Covenant school shooting by a mentally ill and cowardly transgender killer.

Critically, the manifesto of the radical transgender murderer remains sealed, giving rise to speculation that the attack may have been an anti-Christian hate crime carried out by a member of the LGBTQ community. Family members of the victims have pushed back on releasing the manifesto to prevent copycat attacks and giving voice to the deranged murderer’s dark heart, but they have signed off on police summaries that detail the murderer’s motives.

Public safety requires those summaries be made available so that any links to a broader anti-Christian sentiment developing on the extreme Left can be determined. It is also important to realize that authorities released the Buffalo mass murderer’s racist screeds the *same day* as the act was committed. Respect should be given to the victims’ families, but the public deserves answers on the killer’s motivations nonetheless.

It is known that the Covenant School mass murderer was under treatment for an “emotional disorder.” While the murderer purchased her guns legally, she hid the firearms from her family.<sup>10</sup>

What is not clear is how a red flag law would have prevented the attack. No red flags were triggered. No family members had knowledge of the firearm purchases. And no one utilized existing Tennessee statute—specifically § 33-6-402 that provides for the detention of individuals experiencing a mental health crisis—to move the killer off the streets.

This form of involuntary hospitalization can be utilized by law enforcement, physicians, psychologists, and other mental health professionals to bypass a court order and put them into a facility for treatment.<sup>11</sup> Why wasn’t this law used? Perhaps officials in

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<sup>9</sup> The Violence Project Database (July 19, 2023). “Mass Public Shootings in the United States, 1966 - Present,” *The Violence Project*. <https://www.theviolenceproject.org/mass-shooter-database/>

<sup>10</sup> Alsharif, M. (April 4, 2023). “Suicide Note, Weapons and Ammunition Found in Nashville Shooter’s Home, Officials Say,” *NBC News*. <https://www.nbcnews.com/news/us-news/suicide-note-weapons-ammunition-found-nashville-shooters-home-official-r-cna78128>

<sup>11</sup> Bliss, J. and Wadhvani, A. (November 17, 2018). “How Tennessee’s Involuntary Psychiatric Treatment Law Works,” *The Tennessean*. <https://www.tennessean.com/story/news/2018/11/18/mental-illness-involuntary-psychiatric-commitment-tennessee/1580525002/>

Tennessee have not released the killer's manifesto because they do not want to risk a public debate on whether or not transgenderism is a mental illness.

Further—given that Tennessee has an involuntary commitment law on the books, why would lawmakers pass ERPO laws that violate existing due process mechanisms regarding property and jeopardize the rights of law-abiding citizens? Once again, it appears that a mass shooting could have been potentially thwarted if individuals in positions of authority had simply utilized the tools at their disposal.

Such approaches are ultimately an abrogation of leadership—looking to impose penalties and infringements on everyone due to the actions of a single individual. Instead of assessing the broader cultural and societal dynamics that play into the actions of a mentally-ill individual who commits or tries to commit mass murder, elected officials instead focus on the tool being used. Little thought or focus is given to the broken households and institutions that contribute to these events—thereby guaranteeing that they will continue unless and until our increasingly broken spirit as a people is renewed.

ERPO laws—like any gun control measure—are an approach destined to fail, divide, and disrupt an already fragile social fabric.

### **The Problems with ERPO Provisions**

Aside from the clear constitutional concerns that red flag laws possess over both due process and Second Amendment rights, there remain three core issues with any proposed ERPO provision—all three of which strike at the heart of citizens' current distrust and dismay with their government:

1. **Punishes Good Citizens:** ERPO laws create impositions on law-abiding, model citizens by undermining their God-given, constitutionally-affirmed rights to due process and self-defense. This will further erode civic comity and deepen distrust in America's rapidly-waning institutions.
2. **Weaponizes Government:** ERPO laws give the Left the power and ability to target their political opponents. The stated belief that speech can be equivalent to violence, and given the ever-changing lexicon, there is no guarantee that red flag laws cannot or will not be used to persecute those who possess disfavored political views eventually.
3. **Balkanized Communities:** ERPO laws incentivize conservatives to flee to red states or red communities and progressives to do the same in blue states or blue communities. This deepening balkanization will not only deteriorate trust between citizens but will amplify tensions among neighbors and communities.

A more thoughtful, effective, and constitutional approach to improve the safety and security of our communities is both possible and necessary. Lawmakers should focus on hardening schools, expanding mental health institutions, committing mentally ill individuals who show a verifiable propensity towards violence for needed therapy, and restoring broken families through policies that reward and emphasize fatherhood.

### **Curbing the Violence Without Infringing on Fundamental Rights**

Better policy approaches respect the rights of citizens. Lawmakers in Tennessee and elsewhere rightly sense the need to do something. Real policy solutions include:

- **Reinstitutionalization:** A report by the Treatment Advocacy Center in 2008 expressed the need for at least 50 psychiatric beds per 100,000 people.<sup>12</sup> Today, the number of beds is 11.7 per 100,000 and is 96 percent lower than the number of beds available in 1955, which stood at 340 beds per 100,000 people.<sup>13</sup> The de-institutionalization movement of the 1960s failed, and it is past time to build new mental facilities and pass laws that make it easier to commit mentally and emotionally-troubled individuals involuntarily.
- **Hardened Schools:** According to a March 2022 report from the *Wall Street Journal*, almost 93 percent of emergency COVID relief for schools has gone unspent.<sup>14</sup> This totals nearly \$113 billion that remains available to K-12 public schools that can and should be used to harden infrastructure, hire additional school resource officers for security, implement single entry protocols, and adopt security measures utilized in other government buildings occupied by elected officials. States should be encouraged to experiment with what measures best protect children.
- **Armed Teachers:** On a voluntary basis, schools should provide for teachers and staff to carry firearms. Furthermore, state lawmakers should pass legislation providing for teachers and staff in K-12 schools who *volunteer* to undergo firearm certification and training to amplify student protection already provided by school resource officers.
- **Ending “Gun Free” Zones:** The majority of targets hit (roughly 90 percent) by mass shooters are so-called “gun free” zones such as schools, shopping centers,

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<sup>12</sup> Treatment Advocacy Center (2008), “The Shortage of Public Hospital Beds for Mentally Ill Persons,” *Treatment Advocacy Center*.

[https://www.treatmentadvocacycenter.org/storage/documents/the\\_shortage\\_of\\_publichospital\\_beds.pdf](https://www.treatmentadvocacycenter.org/storage/documents/the_shortage_of_publichospital_beds.pdf)

<sup>13</sup> Treatment Advocacy Center (September 2016), “Psychiatric Bed Supply Needed Per Capita,” *Treatment Advocacy Center*. <https://www.treatmentadvocacycenter.org/storage/documents/backgrounders/bed-supply-need-per-capita.pdf>

<sup>14</sup> Chapman, B. and Randazzo, S. (May 18, 2022). “Billions in School COVID-Relief Funds Remain Unspent,” *The Wall Street Journal*.

<https://www.wsj.com/articles/school-districts-are-struggling-to-spend-emergency-covid-19-funds-11652866201>



and entertainment venues.<sup>15</sup> State legislators should abolish these measures, which create soft targets for criminal killers who prey on the defenseless.

- **The Fatherhood Initiative:** While some elected officials have been criticized by woke activists dedicated to the abolition of the nuclear family, both federal and state lawmakers should double down on emphasizing stable homes and present fathers to the overall mental, spiritual, and physical health of communities and families. Broken homes create broken people. Public policy should encourage marriage and the presence of both a mother and father as an intrinsic good that will ensure our communities remain healthy and safer.

### **Conclusion**

Far too many legislators view traumatic events as an opportunity to seize additional power and control over citizens who dare to exercise their God-given rights. The core provisions of an ERPO law are unlikely to have any meaningful impact on reducing violent crimes committed with guns. However, they are guaranteed to threaten the rights and interests of patriotic Americans who remain besieged by the unrelenting advance of harmful progressive policies. Tennessee lawmakers must resist activist pressure to abrogate the Second Amendment and not infringe on their fellow citizens' constitutional rights.

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<sup>15</sup> Crime Prevention Research Center (June 15, 2018). "Updated: Mass Public Shootings Keep Occurring in Gun-Free Zones: 94 Percent of Attacks Since 1950," *Crime Prevention Research Center*. <https://crimeresearch.org/2018/06/more-misleading-information-from-bloombergs-everytown-for-gun-safety-on-guns-analysis-of-recent-mass-shootings/>