JUST A MINOR INFRINGEMENT:

HOW FLORIDA'S EXTREME RISK PROTECTION ORDER APPLIES TO AT-RISK YOUTH AND OTHER HOUSEHOLD MEMBERS

*Jack Kappelman**

INTRODUCTION

Suicide by firearm is perhaps one of the most overlooked public health crises in the United States. With over 23,000 firearm suicides every year, and nearly five-percent of those suicides being minors under the age of eighteen, this issue is cause for serious concern.[1] When it comes to gun violence, mass shootings and gruesome homicides garner much of the public attention, but suicide remains the leading form of firearm violence—accounting for nearly two-thirds of all gun deaths in the United States.[2] Youth suicide by firearm—though only a relatively small proportion of all firearm suicides nationally—has continually increased in severity, with recent studies showing a nineteen-percent increase in the rate of suicide by firearm in the last ten years, and young white men being the most adversely affected population.[3] As the issue has grown, many states have sought to

---

*Jack Kappelman is a 2022 Candidate for Bachelor of Arts in Political Science and a 2022 Candidate for Master's in Public Administration at the University of Alabama. Previously, he served as the head lobbyist for the advocacy group "March for Our Lives" in Austin, Texas, from March 2018 to August 2018. During this time, he also testified before the Texas State House Criminal Jurisprudence Committee for the Interim hearing on Red Flag Laws and the Texas Senate Select Committee on Violence in Schools and School Security. Recently, The Journal of Suicide and Life-Threatening Behavior published Jack Kappelman's and Dr. Richard Fording's article "The Effect of State Gun Laws on Youth Suicide by Firearm: 1981-2017." *See* Jack Kappelman & Dr. Richard C. Fording, "The Effect of State Gun Laws on Youth Suicide by Firearm: 1981-2017," J. L. THREATENING BEHAV. (April 20, 2021)

[1] *WISQARS Injury Data*, CENTER FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/injury/wisqars/index.html (last visited Dec. 30, 2020). A yearly average was developed using the five most recent years of available data: 2014-2018. Children and teens are defined as those aged 0-19. "WISQARS" stands for "Web-based Injury Statistics Query and Reporting System." *Id.*

[2] *See id.* (showing the firearm suicide to total suicide ratio and daily average developed using the five most recent years of available data: 2014-2018).

[3] *See Child Access Prevention*, GIFFORDS LAW CENTER, https://lawcenter.giffords.org/gun-laws/policy-areas/child-consumer-safety/child-access-prevention (last visited Oct. 5, 2020)

adopt restrictive firearm policies designed to reduce the rate of suicide by firearm, with some of these policies specifically focusing on the prevention of youth suicides.[4] Of these policies, many states have focused on designing child access prevention (CAP) laws or have set minimum age purchase and possession statutes to regulate the access that minors have to firearms.[5]

Even with the adoption of these policies, suicide by firearm remains a pressing issue. Recent studies have pointed to a relationship between firearm ownership and the risk of firearm injury or violence, with one study finding that simply having a firearm in the home can increase the likelihood of death by firearm suicide as much as three times.[6] As far as minors are concerned, ease of access to firearms plays an important role in the likelihood of suicide by firearm, as studies have shown that adolescent victims of suicide often use unlocked firearms found in their place of residence.[7] Unlocked firearms, along with firearms that are loaded when stored, are more likely to be used in a suicide attempt than firearms locked in storage or left unloaded.[8] With these points in mind, it is clear that a major issue relating to firearm suicide by minors is the ease of access that minors have to deadly weapons. Therefore, in order to reduce the rate of suicide by firearm among youth populations, efforts should be made to limit the access that minors have to firearms.

This paper will seek to discuss: (1) how a statute in Florida has been used to address the issue of youth suicide by firearm, (2) the details of how the statute is written and how it applies to minors, and (3) a discussion of

---

(providing research summaries about populations most adversely affected by firearm suicide).

[4] *See id.* (providing overview of statewide policies that have been adopted to prevent youth suicide).

[5] *Id.*

[6] Andrew Anglemyer, et al., *The Accessibility of Firearms and Fisk for Suicide and Homicide Victimization Among Household Members: a Systematic Review and Meta-Analysis*, 160 ANNALS OF INTERNAL MED. 101, 110 (2014).

[7] Seema Shah, et al., *Adolescent Suicide and Household Access to Firearms in Colorado: Results of a Case-Control Study*, 26 JOURNAL OF ADOLESCENT HEALTH 157, 161 (2000).

[8] David A. Brent, et al., *Firearms and Adolescent Suicide: A Community Case-Control Study*, 147 AM. J. OF DISEASES OF CHILD 1066, 1066-67 (1993); *see generally* Arthur Kellerman et al., *Suicide in the Home in Relation to Gun Ownership*, 327 NEW. ENG. J. OF MED. 467 (1992).

whether or not the statute—as written and as theoretically applied under specific circumstances—may or may not be constitutional. In order to determine the constitutionality of the statute, this paper approaches the analysis of the statute with an overview of relevant court precedent and discusses whether the statute would survive intermediate scrutiny.

I. THE (FLORIDA) PROBLEM

Recently, many states have adopted policies to reduce gun violence in general by enacting limitations on ownership and possession.[9] Because many incidents of gun violence are preceded by warning signs, "red flag" laws are designed to allow family members or law enforcement officials and agencies to petition courts for orders that temporarily remove firearms from dangerous situations.[10] These orders are officially known as Extreme Risk Protection Orders (ERPOs) or Gun Violence Prevention Orders (GVPOs), and, depending on the design of the specific state's law, a person is temporarily prohibited from purchasing or possessing firearms if the court finds that an individual poses a severe risk of injury to oneself or others with any firearms in their possession.[11] After a mandated hearing in compliance with due process, the court may deem it necessary to enact the order and thereafter allow law enforcement to temporarily retain firearms formerly in possession of the individual.[12]

ERPOs vary in stringency and design. An article from PEW Research points to Florida's ERPO statute as perhaps the most interesting of all states'

---

[9] *See* Miles Kohrman & Alain Stephens, *States are Embracing Red Flag Laws for Gun Owners. Here's How They Work.*, THE TRACE (Feb. 18, 2020), https://www.thetrace.org/2020/02/states-are-embracing-red-flag-laws-for-gun-owners-heres-how-they-work/ (stating that, as of February 2020, seventeen states and Washington, D.C. have some form of an ERPO law in effect with roughly fourteen other states considering the adoption of such a policy).

[10] *See generally id.* (providing a general overview of standard practices for ERPO petitions).

[11] Timothy Williams, *What Are 'Red Flag' Gun Laws, and How Do They Work?*, N.Y. TIMES (Aug. 6, 2019), https://www.nytimes.com/2019/08/06/us/red-flag-laws.html.

[12] *See id.* (providing a brief discussion on Due Process issues).

ERPO laws.[13] Implemented in 2018,[14] it has been widely used, with over 2,000 petitions filed in the first two years since the statute went into effect.[15] While ERPOs are traditionally designed to reduce many forms of gun violence, Florida's ERPO statute is unique by targeting minors at risk of gun violence.[16] Reports indicate that, since Florida's adoption of the ERPO statute, nearly 100 minors have had their Second Amendment rights restricted even though Florida law already prohibited the sale of firearms to anyone under the age of twenty-one.[17] Many of these court actions against minors are restricted to Polk County, Florida.[18] The Polk County Sheriff's office faces criticism in its seemingly impractical and unnecessary persecution of youths, since over twenty-percent of all ERPOs filed in Polk County were targeted at individuals under the age of twenty-one.[19] In an interview with a local media outlet, Polk County Sheriff Grady Judd justified his widespread use of ERPOs against minors:

> First, [the reasoning behind filing ERPOs against minors is] to put the parents on notice that you got to do a really good job at securing your firearms, so your children can't get to it and number two, it's putting the parents on notice about your kid's got an issue here.[20]

Polk County, unlike any other place in the country, is specifically limiting the firearm rights of minors in an attempt to mitigate the chances of firearm-

---

[13] Florida's ERPO statute is the only existing ERPO law with a "confiscation" clause that allows law enforcement officers to retain a weapon if they believe it will be stored improperly, opening up the possible Second Amendment challenges that will be discussed later in this paper. *See* Matt Vasilogambros, *Red Flag Laws Spur Debate Over Due Process*, THE PEW CHARITABLE TRUSTS (Sept. 4, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/09/04/red-flag-laws-spur-debate-over-due-process.

[14] FLA. STAT. ANN. § 790.401 (2018).

[15] *Extreme Risk Laws Save Lives*, EVERYTOWN RESEARCH (Apr. 17, 2020), https://everytownresearch.org/extreme-risk-laws-save-lives/.

[16] Katie LaGrone, *Children as Young as 8 Years Old Face Gun Ban Under Florida's New Red Flag Law*, ABC ACTION NEWS (Oct. 8, 2019, 2:03 PM), https://www.abcactionnews.com/news/local-news/i-team-investigates/children-as-young-as-8-years-old-face-gun-ban-under-floridas-new-red-flag-law.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

related violence involving adolescents.[21] The real question that lingers is whether Polk County is justified in this approach, and whether other places in the United States should attempt a similar course of action.

As discussed earlier in this paper, youth suicide by firearm is a serious public health crisis, and there have been many attempts at tackling the issue.[22] While policies such as child access prevention laws have been more popular than ERPOs and have survived intermediate scrutiny by courts,[23] the simple fact remains that minors are still obtaining access to firearms and using them to commit suicide.[24] As previous research has shown, minors are more likely to use firearms already in their place of residence to commit suicide, even if that firearm belongs to a parent or guardian.[25] In states where legal firearm owners are required to safely store their weapons, youth suicide by firearm is still a pressing concern.[26] Even in states that have set minimum age requirements for the purchase or possession of a firearm, such as Florida, minors are still getting access to firearms and using them to commit suicide.[27] Polk County's approach of limiting the firearm rights of minors through ERPOs raises a core concern of youth suicide by firearm: can ERPOs intended to restrict the rights of a minor dependent or cohabitant apply to the legal guardian or cohabitant who is also the legal owner of the firearm that the minor is at risk of using?

Most ERPO statutes limit the parties allowed to file a petition to family members and law enforcement agencies, with Florida restricting petitions to law enforcement officers and other state agencies.[28] That said, a number of ERPO laws in other states allow for mental health professionals

---

[21] *Id.*

[22] For instance, child access prevention and ERPO laws are designed, in part, to reduce suicide by firearm.

[23] *See, e.g.,* Jackson v. City & Cty. of S.F., 746 F.3d 953, 966 (9th Cir. 2014).

[24] Anglemeyer, et al., *supra* note 6.

[25] Brent, et al., *supra* note 8.

[26] *The Effects of Minimum Age Requirements*, RAND (Apr. 22, 2020), https://www.rand.org/research/gun-policy/analysis/minimum-age.html.

[27] Kellerman, et al., *supra* note 8; *see also The Effects of Minimum Age Requirements*, *supra* note 26.

[28] FLA. STAT. ANN. § 790.401(1)(a), (2)(a) (2018).

to file petitions for ERPOs.[29] So, in a hypothetical situation where an at-risk individual alerts their parent, therapist, or a law enforcement officer to the potential for suicidal actions, an ERPO petition could be filed to limit the ability to possess or purchase a firearm. In Polk County, Florida, however, an ERPO may be issued simply because their parent, guardian, or cohabitant owns a firearm.[30] Polk County can issue such broad ERPOs because the language in the Florida statute can be interpreted to apply to minors, and the statute as currently written could potentially be used to restrict the firearm possession rights of anyone in the home of the ERPO respondent, including the legal parents or guardians of a minor against whom an ERPO petition is filed.[31]

II. THE FLORIDA STATUTE

It is important to provide a general overview of the Florida ERPO statute in order to support this argument. Specifically, an ERPO may be issued if "[t]he respondent poses a significant danger of causing personal injury to himself or herself or others by having a firearm or any ammunition in his or her custody or control or by purchasing, possessing, or receiving a firearm or any ammunition."[32] It should be noted that Florida's minimum age statutes prevent minors from legally purchasing firearms from federally licensed dealers.[33] However, minors are nonetheless subject to an ERPO petition because the Florida statute allows for a petition to be filed if a respondent has "control" of or can "receive" a firearm or ammunition and may pose significant danger to themselves or others.[34] This portion of the statute applies to minors if a firearm is in their place of residence and is easily

---

[29] See *Who Can Have a Gun: Extreme Risk Protection Orders*, GIFFORDS LAW CENTER (2020), https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/ (Such states include Hawaii, Maryland, and the District of Columbia.).

[30] LaGrone, *supra* note 16.

[31] *See* FLA. STAT. ANN. § 790.401(2)(e)(1) (2018) (using the phrase "custody or control" and possibly creating an interpretation that the firearm need not belong lawfully to the respondent of the ERPO petition).

[32] *Id.*

[33] *Minimum Age to Purchase & Possess*, GIFFORDS LAW CENTER, https://Giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/minimum-age/ (last visited Oct. 5, 2020).

[34] FLA. STAT. ANN. § 790.401(2)(e)(1) (2018).

accessible.[35] Under those circumstances, there could be reason to believe a respondent has a firearm in their "custody or control" despite the fact that one cannot legally purchase or possess a firearm due to minimum age purchasing requirement laws.[36] While the argument could be made that the "custody or control" language does not apply to minors' ability to access their cohabitants' guns, further language in the Florida statute reaffirms that parties other than the respondent are subject to firearm confiscation under the ERPO petition.[37]

Section 7 of the Florida statute pertains to the "[s]urrender of firearms and ammunition" under an ERPO petition.[38] Following the issuance of a risk protection order, the court shall order the respondent to surrender "all firearms and ammunition owned by the respondent in the respondent's custody, control, or possession" to a local law enforcement agency.[39] Again, the language of "custody, control, or possession" could be interpreted to refer to firearms not legally owned by the respondent, and could apply to firearms legally owned by a third party to which the respondent simply has access.[40] Therefore, an ERPO petition filed against a minor could potentially lead to the confiscation of firearms legally owned by a parent or guardian or cohabitant.[41] The statuttory language addresses this eventuality:

> If a person other than the respondent claims title to any firearms or ammunition surrendered pursuant to this section and he or she is determined by the law enforcement agency to be the lawful owner of the firearm or ammunition, the firearm or ammunition shall be returned to him or her, if . . .

---

[35] *See id.* (implying through the "custody or control" language that anyone may be a respondent if the gun is accessible to them, even if it is not their registered property).

[36] *See e.g.*, Anglemeyer, et al., *supra* note 6 (showing the prevalence of minors committing suicide with weapons in their homes).

[37] *See* FLA. STAT. ANN. § 790.401(7)(e)(1) (2018) (allowing confiscation to be applied to parties other than the respondent of the original petition).

[38] *Id.*

[39] *Id.* at § 790.401(7)(a).

[40] *Id.* at § 790.401(7)(e)(1).

[41] *See id.* (discussing that law enforcement officers are not required to release a firearm if it is suspected that it will not be stored properly by the lawful owner, confiscation is a distinct and realistic possibility).

> [t]he lawful owner agrees to store the firearm or ammunition in a manner such that the respondent does not have access to or control of the firearm or ammunition.[42]

This language effectively allows the third-party owner of a firearm to petition the law enforcement agency responsible for confiscating the firearms under the control of the respondent if it has taken a firearm that legally belongs to the third-party owner.[43] However, the subclause referring to the agreement of the lawful owner to "store the firearm or ammunition in a manner such that the respondent does not have access to or control of the firearm or ammunition"[44] implies that the lawful owner is subject to confiscation or continued holding of their legally-purchased firearms if the firearms are stored in a manner in which the respondent could easily access them. This argument follows the reasoning explained previously about how parents or guardians could have their firearm rights restricted if these rights are found to have a potentially harmful effect on others.[45] If parents or guardians do not safely store their legally purchased firearms, then ERPOs filed against their children or dependents could also apply to them.[46] While Polk County, Florida has been criticized for the number of ERPOs it has enforced against minors,[47] its sheriff's office does have the authority and legal standing to confiscate the firearm of a parent, legal guardian, or cohabitant even if there is no evidence that such action has occurred yet.[48]

By including this language on "custody, control, or possession,"[49] the Florida ERPO statute has opened the door to the potential revocation of

---

[42] *Id.*

[43] FLA. STAT. ANN. § 790.401(7)(e)(1) (2018).

[44] *Id.*

[45] This would largely depend on the individual circumstances, but many contemporary studies have found an elevated risk of firearm-based violence simply due to the presence of a gun in the household. *See, e.g.*, Shah, et al., *supra* note 7; Anglemeyer, et al., *supra* note 6.

[46] This interpretation is based from the understanding of the "access to or control of" language in the Florida ERPO statute. FLA. STAT. ANN. § 790.401(7)(e)(1) (2018).

[47] LaGrone, *supra* note 16.

[48] *See* FLA. STAT. ANN. § 790.401(7)(f) (2018) (stating an ERPO need not be filed *before* an act of violence has taken place, and an ex parte order can preempt any expected violence that might occur).

[49] *Id.*

Second Amendment rights of a third party if the government fears that a different individual poses a risk to oneself or others.[50] If an ERPO is filed against a minor and a court determines that their parent is improperly storing firearms, many of the aforementioned concerns could suddenly come before a court.[51] The court tasked with executing the ERPO would need to determine whether the parents's right to own a firearm poses a significant risk to their dependent and rule on whether or not the government is justified in abrogating the parents' Second Amendment rights for the purpose of protecting the minor.[52] At the very least, the court should determine whether it is constitutional to enforce the safe storage of the parent's firearms, which has some precedent that will be discussed later.[53] While the Polk County Sheriff's office has not yet filed an ERPO petition that has resulted in the confiscation of a parent's firearms, such action is not entirely out of the question.[54] When thinking about Sheriff Grady Judd's comments on why officers in Polk County file more ERPOs against minors than any other place in the country, his reasoning indicates that this hypothetical situation is not a distant possibility.[55] Sheriff Judd commented, as quoted previously, that many ERPOs filed against minors serve as wake-up calls to parents about the need for safe firearm storage practices.[56] Although the Polk County Sheriff's Office is not currently pursuing any confiscation of a parent's firearms,[57] the fact that the sheriff views this possibility as a key reason for

---

[50] Confiscation is a potentially serious revocation of Second Amendment protections. Many critics of ERPO laws argue that ERPO usage is overbroad and subject to abuse. *See, e.g.*, Jim DeMint, *Red Flag Laws to Fight Mass Shootings? Fine for an Ideal World, but We Don't Live in One*, USA TODAY (Sep. 9, 2019, 6:00 AM), https://www.usatoday.com/story/opinion/2019/09/09/red-flag-laws-mass-shootings-government-power-grab-jim-demint-column/2220820001/.

[51] *Id.*

[52] FLA. STAT. ANN. § 790.401(7)(e)(1) (2018) (Because confiscation must be justified by a reasonable belief that the respondent can obtain access to a firearm, the court would need to determine if the "access to or control of" language overrules a parent/guardian's Second Amendment rights.).

[53] *See* discussion, *infra* Section IV.

[54] *See* LaGrone, *supra* note 16.

[55] *Id.*

[56] *Id.*

[57] *Id.*

filing ERPOs against minors is reason enough to believe that this situation could occur in the future.

Given that a case like this may well come before a court, it is prudent to discuss the possible outcomes. This paper will argue how the current state of the Florida statute, judicial precedent, and public health concerns could lead a court to deny the Second Amendment protections afforded to a lawful gun owner who is the guardian, parent, or cohabitant of a dependent minor against whom an ERPO has been filed.

III. A HYPOTHETICAL APPLICATION

While the situations in which these questions arise have already been discussed and detailed, it is important to approach the answer with a specific case in mind. For that reason, this paper will provide a hypothetical context for a case of this matter. The hypothetical facts are as follows: A public school official in Polk County, Florida, overhears a fifteen-year-old resident making statements about plans to commit suicide by firearm. The minor claims to have access to a parent's handgun, which the parent keeps loaded and unlocked in the parent's bedroom. The minor intends to access the firearm and commit suicide. The public school official notifies the Polk County Sheriff's Office, who then determines that the best course of action is to petition for a risk protection order under Florida Statute § 790.401 since the minor poses a significant danger to oneself due to their ability to obtain custody or control of their parent's legally purchased handgun. The petition includes a detailed description of the firearm in question, and requests the court grant a temporary ex parte risk protection order, allowing for an ERPO to be enforced until an official hearing can be held about the granting of a full ERPO petition.[58]

A temporary ex parte order is granted only if the "court believes there is a reasonable cause the minor posed a significant danger" to others.[59] This petition is granted, and the temporary ex parte risk protection order is carried out in advance of the official hearing for the twelve-month risk protection order jointly requested by the Sheriff's Office. In carrying out the issuance

[58] FLA. STAT. ANN. § 790.401(4) (2018).
[59] *Id.* § 790.401(4)(c).

of the temporary ex parte risk protection order, the Sheriff's Office requires the respondent (the minor) to surrender the handgun, which is found loaded and unlocked in the parent's bedroom. The firearm is confiscated by the Sheriff's Office for the duration of the ex parte order, and a receipt itemizing the handgun is given to the parent, who claims legal ownership of the firearm, as documented by registration, permit, and purchase records. At the hearing for the twelve-month risk protection order, the respondent is found to pose a severe risk to oneself, and the twelve-month risk protection order is granted. Following that decision, the parent requests that the handgun be returned to their possession, but the Sheriff's Office refuses to release the weapon to the parent because they failed to agree to safely store the firearm "in a manner such that the respondent does not have access to or control of the firearm," as required under Florida' statute.[60] The parent appeals this decision to the courts on the grounds of an infringement of their Second Amendment rights. The question then before the court is whether the decision by the Sheriff's Office to not release the handgun back to the parent is lawful under the Florida statute, and, if so, whether this statute is constitutional.

As discussed previously, the actions taken by the Polk County Sheriff's Office in this hypothetical situation are entirely supported by Florida statutes. There is no stipulation regarding the age requirements for the respondent of an ERPO, and, because the handgun in question is determined to be in the custody or control of the respondent, it is removed from the place of residence by law enforcement officials.[61] The decision of the Sheriff's Office to continue to hold the handgun and refuse to release it is further substantiated by Florida statutes if the parent is unwilling to safely store their firearm.[62] However, it is worth noting that the outcome of this hypothetical situation would not necessarily be the norm, as it seems unlikely that the Sheriff's Office would confiscate the parent's weapon on the spot, and this action has only been included in this hypothetical case to emphasize the severity and imminent danger surrounding the circumstances.

---

[60] *Id.* § (7)(e)(1) (2019).
[61] *Id.*
[62] *Id.*

IV. CONTEXTUALIZING CAP LAWS AND RELEVANT COURT PRECEDENT

Florida, like many other states, has a child access prevention (CAP) law in effect that regulates safe storage practices by firearm owners.[63] According to the Florida statute, any individual who owns a firearm and reasonably knows that a person under the age of sixteen has ready access to the weapon must either "keep the firearm in a securely locked box or container," keep the firearm "in a location which a reasonable person would believe to be secure," or "secure [the firearm] with a trigger lock," unless the owner is carrying the firearm on their person or has it in their proximity.[64] However, the Florida statute only makes the firearm owner criminally liable if the minor gains access to the firearm without the owner's permission and "possesses or exhibits" the firearm in a public place, or exhibits it "in a rude, careless, angry, or threatening manner," in which case the owner may face a misdemeanor charge in the second degree.[65] With this law in mind, the Polk County Sheriff's Office could easily argue that it was ensuring compliance with this statute by refusing to release the firearm to the parent, since the parent could have hypothetically been charged under the child access prevention law had the respondent gained access to the firearm and taken some sort of violent action.[66] So, while the ERPO statute allows for confiscation of a firearm, the CAP law allows for a misdemeanor charge, at most.[67] The most likely course of action in the hypothetical previously discussed would be that the parent would face a minimal fine or misdemeanor charge for violating a child access prevention law.[68] If the firearm is not found to be the property of the parent, legal guardian, or cohabitant, then confiscation would be far more likely, as the law enforcement agency would remove any firearm that it believes the respondent could readily access.[69] In sum, the CAP law in conjunction with the ERPO statute implies that the Polk County Sheriff's Office may legally

---

[63] *Child Access Prevention*, *supra* note 3.
[64] FLA. STAT. ANN. § 790.174(1) (2018).
[65] *Id.* § 790.174(2).
[66] *Id.* § 790.401(7)(e)(1).
[67] *Id.* § 790.174(1).
[68] *See id.*
[69] *Id.* § 790.401(7)(e)(1) (2019).

refuse a release of a firearm back to the parent who fails to safely store it.[70] The question for the court would then be whether or not this action—and these laws—are constitutional.

Following the U.S. Supreme Court decision in *District of Columbia. v. Heller* in 2008, courts have used a two-step approach for Second Amendment inquiries.[71] First, a court determines whether the law in question burdens conduct that is protected by the Second Amendment.[72] Secondly, if it does, the inquiry then proceeds with a means-end scrutiny.[73] While there have not yet been any Second Amendment challenges to the Florida ERPO statute that offer the court any precedent to follow, cases in other jurisdictions have used this two-step inquiry to address the constitutionality of CAP laws.[74] Perhaps the most relevant case that offers the Florida court a baseline understanding of how to proceed in their ruling is *Jackson v. City and County of San Francisco*. In *Jackson,* the court reviewed two Second Amendment-limiting firearm regulations, one of which was a safe storage law, and found them to withstand tests of their constitutionality.[75] The San Francisco Police Code provided a similar statute to the Florida CAP law, requiring that any handgun not carried on the person of an individual over eighteen years of age must be stored in a locked container or disabled with a trigger lock.[76] In *Jackson,* the court began by asking whether the safe storage code regulated conduct "'historically understood to be protected' by the Second Amendment 'right to keep and bear arms.'"[77] The court found that the section in question resembled no presumptively lawful regulations as provided by *Heller*, because "[Section

---

[70] *See* FLA. STAT. ANN. § 790.174(b)(2) (2018) (this is supported by the "access to or control of" language in the ERPO statute, as well as the "threatening manner" language from the CAP law).

[71] Sarah Herman Peck, *Post-Heller Second Amendment Jurisprudence*, CONGRESSIONAL RESEARCH SERVICES 12 (last updated Mar. 25, 2019), https://fas.org/sgp/crs/misc/R44618.pdf.

[72] *Id.*

[73] ANDREW J. MCCLURG & BRANNAN P. DENNING, GUNS AND THE LAW: CASES, PROBLEMS, AND EXPLANATION, 140-42 (2016).

[74] Jackson v. City & Cty. of S.F., 746 F.3d 953, 960-61 (9th Cir. 2014).

[75] *Id.* at 957-58.

[76] S.F., Cal., Police Code art. 45, § 4512(a), (c)(1).

[77] *Jackson*, 746 F.3d at 962 (citing U.S. v. Chovan, 735 F.3d 1127, 1136-37 (9th Cir. 2013)).

4512] regulates conduct at home, not in 'sensitive places'; applies to all residents of San Francisco, not just 'felons or the mentally ill'; has no impact on the 'commercial sale of arms,' and it regulates handguns, which *Heller* itself established were not 'dangerous and unusual.'"[78] These determinations led the court to conclude that the safe storage regulations were a burden on the rights protected by the Second Amendment.[79]

The Court applied intermediate scrutiny to the regulation, as it found that the regulation burdened the core of the Second Amendment right to self-defense in the home, but determined that it was not too severe of a burden, as the regulation still allowed for self-defense and the exercise of Second Amendment rights so long as residents of San Francisco comply with the storage requirements.[80] The court's first step in applying intermediate scrutiny was to determine whether the government's stated objective of "reduc[ing] the number of gun-related injuries and deaths from having an unlocked handgun in the home" was significant, substantial, or important.[81] The court decided not to impose a rigid burden of proof on the City, and so considered whatever evidence the City provided to the Court as being relevant to the problem that the ordinance sought to address.[82] Appellee City and County of San Francisco provided ample evidence to show that the ordinance was related to public safety—an important government interest—and thus "carried its burden of demonstrating that its locked-storage law serves a significant government interest by reducing the number of gun-related injuries and deaths from having an unlocked handgun in the home."[83] In determining whether the section was substantially related to Appellee's interests, the appelle had "concluded that firearm injuries are the third-leading cause of death in San Francisco, and that having unlocked firearms in the home increases the risk of gun-related injury, especially to children."[84] The court determined that the section is substantially related to the objective of reducing the risk of firearm injury and death in the home, and ruled the

---

[78] *Id.* at 626-27.
[79] MCCLURG & DENNING, *supra* note 73, at 180.
[80] *Id.* at 179.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*

ordinance to be constitutional as it was appropriately tailored to fit Appellee's interest.[85]

The court rejected Appellant's arguments that the section is over-inclusive.[86] Although Appellant contended that Section 4512 should be struck down because it applies even when the "risk of unauthorized access by children or others is low," Appellee demonstrated a broader interest than simply preventing unauthorized access, including "an interest in preventing firearms from being stolen and in reducing the number of handgun-related suicides and deadly domestic violence incidents."[87] The court also found that storage requirements are a small burden on the right to self-defense because they cause "a delay of only a few seconds while the firearm is unlocked or retrieved from storage."[88]

V. THE CONSTITUTIONALITY OF CONFISCATION

The *Jackson* decision provides valuable insight for how a court might rule in a case under the hypothetical situation outlined earlier. While CAP laws have largely been ruled to be constitutional,[89] it is important to note the difference between enforcing "safe storage" practices and confiscating legally-obtained firearms. Confiscation may be an issue that is closer to the core of the protections granted by the Second Amendment, but an ERPO is reliant on an individualized showing of danger.[90] This discrepancy is therefore a major issue that the court would need to resolve. The court would need to determine whether or not there is a greater burden on Second Amendment rights under a law which allows for confiscation. However, this point may not be relevant because the Florida ERPO in question provides many avenues for an individual to appeal the confiscation of their firearms.[91]

---

[85] MCCLURG & DENNING, *supra* note 73, at 180.
[86] *Id.* at 179.
[87] *Id.*
[88] *Id.* at 180.
[89] *See Child Access Prevention*, *supra* note 3.
[90] FLA. STAT. ANN. § 790.401 (2018).
[91] *Id.* § 790.401(7)(e)1.

The question for the hypothetical Florida court, as in the *Jackson* case, is whether the actions of the Polk County Sheriff--and the CAP and ERPO laws--are unconstitutional. As seen in *Jackson,* the Florida court would need to first determine whether these laws burden the rights guaranteed by the Second Amendment.[92] The Florida court would likely find both the CAP law and the ERPO law are a burden under any circumstance, but the ERPO law may be less of a burden because it is designed in part to regulate the firearm ownership rights of the "mentally ill," which is one of the "presumptively lawful" regulations from *Heller.*[93] However, because of the precedent set by cases such as *Jackson,* the Florida court would be hard-pressed to rule differently on the Florida CAP law than the Ninth Circuit did on the San Francisco storage statute.[94] The court would likely spend far more time and energy reviewing speculation of the ERPO statute because the statute has not yet faced any constitutional challenge.[95]

Were the plaintiff—in this hypothetical case the parent of the minor—to make a facial challenge to the ERPO statute, the court would likely hold that the statute survives intermediate scrutiny in a manner similar to the *Jackson* decision. Intermediate scrutiny does not require a statute like the ERPO law to be the least restrictive means of preventing gun violence.[96] When one considers the due process protections that the ERPO statute provides,[97] it seems that a court would struggle to conclude that the Florida statute is not appropriately tailored to fit the government's interest in reducing gun violence. However, because ERPOs are automatically individualized and therefore as-applied at the core of the order,[98] a facial challenge would likely be impossible.

---

[92] Jackson v. City & Cty. of S.F., 746 F.3d 953, 968 (9th Cir. 2014).
[93] District of Columbia v. Heller, 554 U.S. 570, 627-28 (2008).
[94] *Jackson,* 746 F.3d at 970.
[95] There is no evidence that the Florida ERPO has been legally challenged as of yet. *But see* D.T.M. v. Judd, No. 2018-631, 2020 WL 3022533 (Fla. Dist. Ct. App. June 5, 2020) (affirming trial court's rejection of the argument that Florida's statute was impermissibly vague under the Florida State Constitution because it failed to adequately define "significant danger.").
[96] MCCLURG & DENNING, *supra* note 73.
[97] For instance, places a clear and convincing standard of proof on the party filing the petition. FLA. STAT. ANN. § 790.401(b)(3) (2018).
[98] *See generally id.* § 790.401.

The real challenge to the ERPO statute would likely come from an as-applied challenge by a plaintiff. As detailed in the very specific circumstances under which this case would arise, it seems likely that the plaintiff would make an as-applied challenge based on their particular involvement in the issues. However, it is more likely that the as-applied challenge would have a similar outcome to the prediction for the facial challenge, since a court may find that there is a burden on the plaintiff's Second Amendment rights, but not one that can be separated from the compelling government interest.[99] In an as-applied challenge, the government would simply need to demonstrate that the plaintiff failed to indicate that they would store their handgun safely, and thus the respondent of the ERPO (in this case the minor and dependent of the plaintiff) has a credible safety concern by having an unlocked and unsafely stored firearm readily accessible.[100] Due to this accessibility--as well as the parents' violation of the Florida CAP law--the government would likely be justified in refusing to release the handgun back to the parent.[101]

Because other courts have found CAP laws constitutional,[102] the plaintiff would at the very least be required under Florida law to safely store their handgun.[103] There is a chance that the court would strike down the subclause of the ERPO statute that allows the law enforcement agency to reject any request for a release of the firearm to the legal owner, but the court would have to weigh that decision against the *Heller* precedent that presumes the validity of regulations that limit firearm ownership rights of the "mentally ill"[104] because the ERPO statute is written to prevent potentially dangerous people—such as individuals experiencing a mental health crisis an individual with suicidal inclinations—from having ready access to a firearm.[105] And again, while the court could say that this is a great burden on the plaintiff because their rights are being restricted, under intermediate scrutiny, the government need not have the least restrictive burden in effect;

---

[99] Which is, in this case, preventing the potential for violence. *Id.*
[100] *Id.*
[101] *Id.* § 790.401(7)(e)(1).
[102] *See, e.g.*, Jackson v. City & Cty. of S.F., 746 F.3d 953 (9th Cir. 2014).
[103] FLA. STAT. ANN. § 790.401(7)(e)(1) (2018).
[104] District of Columbia v. Heller, 554 U.S. 570, 626 (2008).
[105] FLA. STAT. ANN. § 790.401 (2018).

it must simply be able to connect the burden to a compelling government interest.[106] In this case, that interest is in keeping the minor respondent from accessing a firearm to attempt suicide, and a plaintiff would have to show that access to an unlocked handgun would not put the minor at any elevated risk.

As previously discussed in this paper, research shows that the very presence of a gun in a household increases the risk of firearm-related injuries to all members of the household.[107] The threshold to prove that reducing the risk of firearm-related injuries is *not* a compelling government interest is high at the very least, and the plaintiff would likely struggle to make a convincing argument that overrides the research that would likely be submitted by the government in defense of the statute. Furthermore, the fact that the Sheriff's Office would not release the firearm is *not* a full removal of the parent's Second Amendment rights, because at the very least, the parent could purchase another firearm legally. Because this new firearm would not be in question under the original ERPO petition, the state would not be able to confiscate the weapon without having another ERPO petition filed.[108] As the government is not entirely burdening the parent's Second Amendment right to own a firearm, this burden is certainly not the most restrictive burden possible, and is related to a compelling government interest regarding public safety and reducing youth suicide by firearm. This "catch-22" ensures that there would be a very high threshold to meet in order to prove that one's Second Amendment rights have been severely limited under an ERPO petition in such circumstances.

However, both a facial and as-applied challenge raise one serious concern which the court would need to address, and failure to do so could potentially set a dangerous precedent. Should the court uphold the government action under these circumstances, it will have effectively ruled that the individual Second Amendment rights of one person *can* be restricted in a very serious way if another individual's life is potentially threatened. While the courts have previously ruled that rights of individuals can be restricted for the public good, these restrictions have taken the form of safe

---

[106] MCCLURG & DENNING, *supra* note 73.

[107] Brent et al., *supra* note 8, at 1067-68; Kellerman et al., *supra* note 8, at 140.

[108] *See* FLA. STAT. ANN. § 790.401 (2018) (including no provision for confiscation of a firearm that is not the subject of the original ERPO petition).

storage practices, public carry limitations (concealed or open carry, for instance), and sales restrictions, among many other issues.[109] This case, however, would be markedly different, as it would allow for the *confiscation* of arms belonging to one person should their firearms be at risk of being used by a minor dependent or cohabitant to cause public harm. From the standpoint of Second Amendment issues, court precedent, public health and safety concerns, and the current state of the Florida ERPO statute and other laws, there is a compelling case for the government to show that there was no unconstitutional action carried out in the enforcement of the ERPO. Therefore, the plaintiff would have to overcome a vast mountain of evidence to prove that their Second Amendment rights were unduly limited or infringed.

CONCLUSION

While ERPOs are designed to be used sparingly and only in very severe circumstances, the language and practical applications of the Florida statute raise many questions about the constitutionality of the laws themselves. So long as states such as Florida push the boundaries on acceptable practices for these laws, these questions remain unanswered. But under the current design and implementation of Florida's ERPO statute, there is ample evidence and reason demonstrating the constitutionality of such laws.

Reducing youth suicide by firearm is a compelling reason for the enforcement of ERPOs against minors, and if actions against a dependent's Second Amendment rights can have trickle-down effects on the protections afforded to cohabitants or legal guardians and their right to bear arms, there is a significant case to be made in favor of temporarily abrogating the Second Amendment rights of parents in order to protect the life of their child. Under any statute with the same design as Florida's ERPO law, if taking away the firearm of a parent is directly connected to the compelling government interest of reducing youth suicide or other firearm-related violence, then it is

[109] Jackson v. City & Cty. of S.F., 746 F.3d 953, 964, 968 (9th Cir. 2014).

entirely constitutional to confiscate a parent's, cohabitant's, or legal guardian's gun.