SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF LIVINGSTON

INVESTIGATOR MARK J. VILLONE,
NEW YORK STATE POLICE,

Petitioner,

-against-

JOSEPH T. McFADDEN,

Respondent.

MEMORANDUM OF LAW

Index No. 000769-2022

MEMORANDUM OF LAW

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PRELIMINARY STATEMENT

On December 2, 2022, Joseph McFadden ("Respondent"), who has access to multiple firearms including a modified AR-15 assault weapon, made graphic credible threats to commit suicide by shooting himself in the head. The threats were sufficiently alarming that McFadden's family called 911 to seek assistance and McFadden was ultimately hospitalized. Shortly thereafter, petitioner Mark Villone, an investigator with the New York State Police sought a temporary extreme risk protection order ("TERPO") under New York State's Extreme Risk Protection Order ("ERPO") law, codified at N.Y. C.P.L.R. art. 63-a. The ERPO statute authorizes a court to order the seizure of a person's firearms when clear and convincing evidence demonstrates that the person is likely to engage in conduct that would result in serious harm to himself or others. This Court issued a TERPO and State Police seized multiple firearms belonging to McFadden.

McFadden now moves to dismiss the application, arguing that the ERPO law violates his Second Amendment and due process rights. This Court should reject McFadden's arguments, deny the motion to dismiss, and schedule a final hearing on the petition.

The ERPO law is consistent with due process and the Second Amendment. The law contains numerous procedural safeguards, including the right to a prompt hearing before a New York Supreme Court Justice, a heightened standard of proof, the limited duration of any final ERPO, the opportunity for an additional hearing after issuance of a final ERPO, all resulting in a non-criminal disposition that becomes statutorily sealed. These safeguards ensure the ERPO statute does not burden peaceable, law abiding, responsible gun owners who pose no risk of harm to themselves or the community. The statute thus comports with the Second Amendment, which does not guarantee "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *District of Columbia v. Heller*, 128 S. Ct. 2783 at 2816 (2008). To the

contrary, the Second Amendment affords States wide regulatory latitude to confront modern challenges posed by firearm violence. *NYSRPA v Bruen*, 142 S Ct 2111, 2132 (2022); *see also id.* at 2162 (Kavanaugh, J., joined by Roberts, C.J., concurring). In addition, the ERPO law is consistent with the historical tradition of firearms regulation in that it expressly disarms solely based on assessments of dangerousness. As set forth in more detail below, the ERPO law falls well within the wide regulatory latitude permitted to States to address gun violence.

FACTS

A. Statutory Background

An extreme risk protection order is a "a court-issued order of protection prohibiting a person from purchasing, possessing, or attempting to purchase or possess a firearm, rifle, or shotgun." *See* CPLR § 6340(1). A petitioner may obtain such an order by filing a sworn application and supporting documentation in Supreme Court in the county where the respondent resides. *Id.* § 6341. The court may issue a temporary extreme risk protection order ("TERPO") "upon a finding that there is probable cause to believe the respondent is likely to engage in conduct that would result in serious harm to himself, herself, or others." CPLR § 6342. At a final hearing, the petitioner bears the burden of showing by clear and convincing evidence that the respondent is likely to engage in conduct that would result in serious harm to himself or others. *See* CPLR § 6343.

The Legislature has instructed courts on which risk factors it must consider in determining whether there are grounds to issue a TERPO, including (a) a threat or act of violence or use of physical force directed toward self, the petitioner, or another person; (b) a violation or alleged violation of an order of protection; (c) any pending charge or conviction for an offense involving the use of a weapon; (d) the reckless use, display or brandishing of a firearm, rifle or shotgun; (e) any history of a violation of an extreme risk protection order; (f) evidence of recent or ongoing

abuse of controlled substances or alcohol; or (g) evidence of recent acquisition of a firearm, rifle, shotgun or other deadly weapon or dangerous instrument, or any ammunition therefor. *See* CPLR § 6342(2).

B. Factual Background

On December 2, 2022, Holly Anderson called 911 to report that her son Joseph McFadden was threatening to shoot himself in the head. *See* Exhibit C. Several officers from the New York State Police ("NYSP") were dispatched to McFadden's residence, but McFadden had fled prior to NYSP's arrival. McFadden's mother advised an NYSP officer that McFadden stated that he was going to shoot himself in the head. NYSP also spoke to McFadden's wife, who confirmed that McFadden was suicidal and intoxicated. McFadden's wife further advised NYSP officers that there were several readily accessible firearms inside the residence. NYSP officers eventually located McFadden, who confirmed that he was distressed and intoxicated to the point of blacking out. McFadden was then transported to Strong Memorial Hospital pursuant to Mental Hygiene Law ("MHL") § 9.41. *See* Exhibit A.

On the same day, NYSP investigator Mark Villone ("Petitioner") applied for a TERPO, which was granted by Hon. Kevin Van Allen, Supreme Court Justice of the Livingston County Supreme Court. *See* Exhibit D. McFadden's wife consented to a search and allowed NYSP officers to recover five weapons from McFadden's residence, including a Black Rain Ordnance SPEC-15 Semi-Auto Rifle ("AR-15"), a Remington 700 .20 Gauge Rifle, a Remington 11-48 Shotgun, a Stevens 680A 12 Gauge Shotgun, and a Rossi Taurus Braztec S20 410 Shotgun. *See* Exhibit A. The AR-15, removed from McFadden's residence was modified to include a telescoping (or

collapsible) stock and a quick release detachable magazine. *See* Exhibit A. There is currently a criminal investigation pending regarding the illegality of this weapon.[1] *Id.*

McFadden was thereafter served with a Notice of Hearing for Final Extreme Risk Protection Order and associated documentation supporting the ERPO application. *See* Exhibit E. On or about December 5, 2022, Inv. Villone completed an Extreme Risk Protection Order (ERPO) Background Report, (a "BCI-9E"), and submitted it to the Livingston County Clerk's Office. *See* Exhibit F.

On February 28, 2023, McFadden indicated his intention to file a motion to dismiss, at which time the Court extended the TERPO through August 28, 2023. *See* Exhibit G. The Court scheduled a date for potential motion argument on March 27, 2023. On or about March 23, 2023, McFadden's counsel emailed a Notice of Motion seeking dismissal of "Plaintiff's Extreme Risk Protection Petition and vacating the temporary order and deeming article 63-a of the New York Civil Practice and Rule unconstitutional" to the Court and Petitioner. *See* Exhibit B and H. Petitioner only became aware of the motion via email. Petitioner did not consent to electronic service of McFadden's motion. This matter is now scheduled for motion argument on June 7, 2023; McFadden has yet to properly serve the motion papers on the Petitioner.

ARGUMENT

POINT I: MCFADDEN'S MOTION SHOULD BE DISMISSED FOR FAILURE TO PROPERLY SERVE PETITIONER

McFadden's motion should be summarily dismissed for improper service and failure to follow the requirements of Civil Practice Law and Rules ("CPLR") § 2214 and CPLR § 2103. Not

[1] New York State Penal Law § 265.00(22)(a)(i) deems a semiautomatic rifle that has an ability to accept a detachable magazine and has a telescoping stock as an "assault weapon." Penal Law § 265.02(7) states that a person is guilty of criminal possession of a weapon in the third degree, a D felony, when such person possesses an assault weapon.

only does the Notice of Motion state the incorrect date and time for the hearing of the motion, but McFadden has failed to properly serve Petitioner. To date, Petitioner was only made aware of the Notice of Motion via email from McFadden's counsel on March 23, 2023. At no time did Petitioner consent to service via email. *See* Exhibit H. In fact, Petitioner's counsel informed McFadden's counsel of this deficiency and explicitly asked for it to be cured. *Id.* "A motion that is not properly served must be denied." *Mitelman & Son Meat Processing, Inc. v Meat Packers & Butchers Supply Co.*, 272 AD2d 531, 708 N.Y.S.2d 897 (2d Dept 2000). Given the lack of proper service, the Court should deny McFadden's motion in its entirety.

POINT II: NEW YORK'S ERPO LAW DOES NOT VIOLATE THE CONSTITUTION

NEW YORK'S ERPO LAW IS PRESUMPTIVELY LAWFUL UNDER THE SECOND AMENDMENT AND IS DEEPLY ROOTED IN AMERICAN LAW AND HISTORY

Although McFadden argues that ERPO violates his rights under the Second Amendment, based largely on *G.W. v. C.N,* he is mistaken. New York's ERPO law is consistent with a long and robust history of governmental prohibitions on the possession of firearms by dangerous people. "Like most rights, the right secured by the Second Amendment is not unlimited." *Heller*, 128 S. Ct. 2783, 2816 (2008). As relevant here, the "people" protected by the Second Amendment are law-abiding and responsible citizens. *See United States v. Barnes,* 2023 WL 2268129 (S.D.N.Y. Feb. 28, 2023)*; United States v. Garlick,* 2023 WL 2575664 (S.D.N.Y Mar. 20, 2023). Accordingly, it has long been accepted that prohibitions on the possession of firearms by dangerous persons, such as felons and the mentally ill, comport with the constitution. *See Heller*, at 573; *Bruen* at 2117.

Indeed, restrictions based on dangerousness have existed since America's founding.[2] Supreme Court Justice Barrett, prior to joining the Supreme Court, opined that, "founding-era legislatures categorically disarmed groups whom they judged to be a threat to public safety." *Kanter v. Barr*, 919 F. 3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting). "Revolutionary War statutes also disarmed even non-violent persons whose actions were transgressive so as to reflect a refusal to comply with developing social and legal norms." *See United States v Rowson,* 2023 US Dist LEXIS 13832, at *52 (SDNY Jan. 26, 2023). And it is well understood that individuals cannot "bear arms in a way that spreads 'fear' or 'terror' among the people.[3] *Bruen*, 142 S. Ct. at 2145. *Bruen* provided numerous examples of historical lawful restrictions based on reasonable fear of danger.[4]

New York's ERPO law comports with the Second Amendment in that it restricts gun possession by individuals deemed to pose a threat to themselves or others. A final ERPO, which is granted upon a clear and convincing showing of substantial risk of harm is "consistent with a common-law tradition that the right to bear arms is limited to peaceable or virtuous citizens." *See*

[2] Act of Apr. 1, 1778, ch. LXI, §§ 2, 5, 1777-1778 Pa. Laws 123, 126 (requiring white males over the age of eighteen to take an oath of loyalty or to be disarmed); Act of Mar. 14, 1776, ch. VII, 1775-1776 Mass. Acts 31 (disarming persons who were "disaffected to the Cause of America").

[3] *See, e.g.*, Acts and Laws of His Majesty's Province of New Hampshire in New England 17 (1771) (statute enacted 1701); Collection of All Such Acts of the General Assembly of Virginia 33 (1794) (statute enacted 1786); 2 Laws of the Commonwealth of Massachusetts, from November 28, 1780 to February 28, 1807 p. 653 (1807) (statute enacted Jan. 29, 1795); A Compilation of the Statutes of Tennessee of a General and Permanent Nature, from the Commencement of the Government to the Present Time 99-100 (1836) (statute enacted 1801).

[4] These protections included surety laws, which sometimes included a restriction on firearm possession for persons who were reasonably likely to injure another or to breach the peace. As the Court explained, "In the mid-19th century, many jurisdictions began adopting surety statutes that required certain individuals to post bond before carrying weapons in public." *Bruen*, 142 S. Ct. at 2148. Massachusetts was the first state to adopt such a statute in 1836. *Id.* Under the Massachusetts statute, if any person was armed and could not show a special need for self-defense, he could "on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace." Mass. Rev. Stat. ch. 134, § 16 (1836). "Between 1838 and 1871, nine other jurisdictions adopted variants of the Massachusetts law." *Bruen*, 142 S. Ct. at 2148.

United States v. Bena, 664 F.3d 1180, 1184 (8th Cir. 2011).[5] Indeed, the statute has been found to be constitutional both before and after the *Bruen* decision. *See Anonymous Detective at Westchester Cnty. Police v. A.A.*, 71 Misc. 3d 810, 816 (N.Y. Sup. Ct. 2021) (upholding Article 63-a as constitutional after thorough due process review); *Matter of J.B. v K.S.G.*, ___Misc 3d___, 2023 NY Slip Op 23099, (N.Y. Sup. Ct. 2023) (upholding Article 63-a as constitutional after thorough review of law and the *G.W. v.C.N.* decision). *See* Exhibit I; *Haverstraw Town Police v. C.G.*, ___ Misc 3d ____, Index No. 2022-2362 (Ulster Co. Sup. Ct. 2023) (upholding Article 63-A as constitutional after review of due process challenge and analysis of *G.W. v. C.N.* decision). *See* Exhibit J.

The record readily establishes that the ERPO law, as applied to McFadden, is entirely consistent with these Second Amendment principles. McFadden's threats of violence toward himself, evidence of severe alcohol abuse, and ownership of a modified AR-15 (which is currently under criminal investigation) demonstrate that he is not law-abiding or responsible. The temporary removal of McFadden's firearms was both constitutional and necessary.

NEW YORK'S ERPO LAW PROVIDES AMPLE PROCEDURAL DUE PROCESS SAFEGUARDS

A. New York's ERPO Law Provides Ample Process

"The touchstone of due process, of course, is the 'requirement that a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it." *See Spinelli v. City of New York*, 579 F3d. 160, 169 (2d Cir. 2009). To satisfy procedural due process requirement Respondent must have the opportunity to be heard "at a meaningful time and in a meaningful

[5] *See also NRA of Am. V. Bureau of Alcohol*, 700 F.3d 185, 200 (2012); Robert H. Churchill, Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment, 25 Law & Hist. Rev. 139, 157-60 (2007); Saul Cornell & Nathan DeDino, A Well Regulated Right: The Early American Origins of Gun Control, 73 Fordham L. Rev. 487, 506-08 (2004); Joyce Lee Malcolm, To Keep and Bear Arms at 140-41 (1994).

manner." *See Mathews v Eldridge*, 424 US 319, 333 (1976). Contrary to McFadden's arguments, the ERPO statute provides adequate notice to individuals who are subject to a TERPO or final ERPO.

Under CPLR § 6342(4), a TERPO must set forth the grounds for issuance, the date and time the order expires, the address of the court that issues the order, and a statement informing the respondent that the court will hold a hearing 3-6 business days after service of the TERPO to determine whether a final ERPO will be issued and the date, time, and location of the hearing. CPLR § 6342(4)(a)(d). Here, McFadden was personally served and acknowledged service by signing the "Notification of Hearing for Final Extreme Risk Protection Order." *See* Exhibit E. McFadden was also provided sufficient notice for a final ERPO hearing and will have an opportunity to be heard at such hearing.

The Court in *J.B. v. K.S.G*, describes in detail the procedural safeguards within Article 63-a that protect against an improper deprivation of an individual's rights. "Initially, a temporary extreme risk protection order curtailing an individual's rights may only be granted following a preliminary finding by the court that there is probable cause to believe that the individual is likely to engage in conduct that would result in serious harm to the respondent or others, based on consideration of the standards specifically set forth in the statute." *Id.* 2023 NY Slip Op. 23099. Prior to any search being conducted pursuant to a TERPO application a petitioner must present the matter to a Supreme Court Justice. TERPOs may only be issued by a court, and only upon a finding that probable cause of a likelihood of harm exists. Where an individual poses an extreme risk due to likelihood of substantial harm to self or others, an ERPO-related search and seizure constitutes a special needs exception to the warrant requirement. *Anonymous Detective*, 71 Misc. 3d at 818.

At the ERPO hearing, the respondent has the right to be represented by counsel, to cross-examine witnesses, and to testify on their own behalf, and the petitioner bears the burden of proving by clear and convincing evidence that the respondent is likely to engage in conduct that would result in serious harm to themselves or others. *See* CPLR 6343. An evidentiary hearing is the essence of due process. *See Cafeteria & Rest. Workers Union v McElroy*, 367 US 886, 887 (1961); *Haverstraw Town Police v. C.G.*, ___ Misc 3d ____, Index No. 2022-2362 (Sup. Ct, Ulster County 2023).

The ERPO which prohibits an individual from possessing or purchasing a firearm is limited in scope and duration. A final ERPO may only extend, "as specified by the court, for a period of up to one year". *See* CPLR § 6343(3)(c). Moreover, should the respondent believe the circumstances which led to the issuance of an initial ERPO have changed, they have the right to another prompt hearing. *See* CPLR § 6343(6). At such hearing, respondent once again will have the opportunity to be heard, to call witnesses on their own behalf, and submit any relevant evidence as to whether any change of circumstances justifies setting aside the ERPO order ensuring their constitutional right to bear arms is not unjustifiably infringed upon. *Id.* Therefore, if the circumstances necessitate, any ERPO can be promptly lifted. Additionally, an Article 63-a hearing is a civil proceeding that is statutorily sealed upon the expiration of the active order. *See* CPLR § 6346. These statutory safeguards ensure that the ERPO's restriction is limited to the critical aim of preventing harm and will not have collateral consequences for McFadden.

Procedural safeguards also protect non-parties who may reside with a Respondent. If a TERPO results in a search of an area that is occupied by two or more parties, the law includes additional procedural safeguards to ensure any firearms recovered are not unlawfully dispossessed from a non-respondent. ERPO law states that the "court shall, upon a written finding that there is

no legal impediment to the person other than the respondent's possession of such firearm, rifle or shotgun, order the return of such firearm, rifle or shotgun to such lawful owner and inform such person of their obligation to safely store their firearm, rifle, or shotgun. *See* CPLR § 6344.

B. Due process does not require expert medical opinion before an ERPO may issue

Respondent asks this Court to adopt the reasoning and decision issued by Monroe County Supreme Court Justice Thomas E. Moran in *G.W v. C.N.*, which found that New York's ERPO law violates due process because it does not require sworn medical testimony to support an application or a temporary or final order, unlike sections of the Mental Hygiene Law ("MHL") pertaining to involuntary hospitalization or civil confinement. 2022 NY Slip Op 22392. As explained in more detail below, the decision in *G.W.* is not binding on this Court, is incorrect as a matter of law, and is contrary to the weight of authority from other courts.

The *G.W. v. C.N.* decision rests on the mistaken premise that ERPO requires a court to assess the mental health of a respondent. But whether a person has engaged in the type of conduct that evinces a likelihood of serious harm is a fact-based determination that may be made without the need for an expert medical opinion. *See J.B. v. K.S.G.* __ N.Y.S.3d ___, 2023 N.Y. Slip. Op. 23099 (2023). As a court in Cortland County recently recognized, the ERPO law's "definition of 'likelihood of serious harm' provides for a fact-based inquiry that does not require proof of mental illness or expert opinion; the definition can be satisfied by conduct alone. In other words, a person who has threatened or attempted suicide, engaged in conduct that demonstrates a danger to self, or engaged in homicidal or other violent behavior placing others in reasonable fear or serious harm satisfies the definition without the need for expert opinion." *See J.B. v. K.S.G.* __ N.Y.S.3d ___, 2023 N.Y. Slip. Op. 23099 (2023).

To make the determination of dangerousness, the Legislature has provided courts with clear guidance as to what factors and considerations must come into play while deciding whether serious harm is likely. In order to make the "serious harm" determination the statute requires the Court to consider: (a) a threat or act of violence or use of physical force directed toward self, the petitioner, or another person; (b) a violation or alleged violation of an order of protection; (c) any pending charge or conviction for an offense involving the use of a weapon; (d) the reckless use, display or brandishing of a firearm, rifle or shotgun; (e) any history of a violation of an extreme risk protection order; (f) evidence of recent or ongoing abuse of controlled substances or alcohol; or (g) evidence of recent acquisition of a firearm, rifle, shotgun or other deadly weapon or dangerous instrument, or any ammunition therefor. *See* CPLR § 6342(2).

A judge may apply these factors without expert testimony. For example, there is no logical reason for a doctor to testify about exhibited warning factors such as threatening violence against another, substance abuse, recent acquisitions of a firearm, reckless use a firearm, or a history of violating orders of protection. Throughout New York State, police officers and lay witnesses testify daily about many of these factors in criminal and civil cases. *Rivera v City of NY*, 253 AD2d 597, 600-601 (1st Dept 1998). And in these cases, fact finders are asked to listen to lay witnesses and determine whether a deadly use of physical force was justified[6] or if an individual placed or attempted to place another person in fear of death or imminent serious physical injury or imminent physical injury.[7] Courts also routinely assess, without the need for medical evidence or expert opinion, the risk of dangerousness posed by an individual against whom an order of protection is sought. Such orders may be granted *ex parte* solely based on a lay person's sworn petition. *See Matter of Lisa T. v. King E.T.*, 30 NY3d 548, 552 (2017); *Matter of Kathleen LL v. Christina KK.*,

[6] New York Penal Law § 35.15(2), Justification: Use of Deadly Physical Force in Defense of a Person.
[7] New York Penal Law § 120.15, Menacing Third Degree.

119 AD3d 1000 (3d Dept. 2014). As in those cases, a court presiding in an ERPO proceeding can evaluate likelihood of serious harm without additional testimony from medical professionals.

The decision in *G.W.* was premised largely on that court's assumption that the ERPO law's definitional cross-reference to the Mental Hygiene Law (MHL) somehow incorporated the procedural rules applicable to the proceedings governed by the MHL, some of which require sworn medical testimony to support various forms of involuntary hospitalization or civil confinement. To the contrary, the ERPO statute's reference to the MHL serves only to clarify the definition of conduct "likely to result in serious harm," i.e., "substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is dangerous to himself, or a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm." MHL § 9.39(a)(1 – 2). Beyond referencing MHL § 9.39 for definitional purposes, the ERPO statute does not borrow or adopt any other procedural requirement embodied in Mental Hygiene Law.[8] The ERPO law is not a part of MHL Article 9, or any other Article within Mental Hygiene Law. Instead, ERPO is found in CPLR Article 63-a, alongside Article 63, which governs injunctions.

Moreover, while the court in *G.W.* relied on the statutory requirement for medical opinion testimony in civil commitment proceedings, the liberty interest at stake in those proceedings differs significantly from the interest at stake in ERPO proceedings. As noted in the recent case of *Haverstraw Town Police v. C.G.*, respondent incorrectly argues Red Flag Law is deficient in comparison to the Mental Hygiene Law for failing to offer the same procedural protections. *See*

[8] Article 63-a includes references to Criminal Procedure Law, Social Services Law, Education Law, and Penal Law sections. See CPLR § 6340. Yet Respondent does not find issue with such references or seek to adopt Education Law principles into this proceeding.

Haverstraw Town Police v. C.G., ___ Misc 3d ____, Index No. 2022-2362 (Sup. Ct, Ulster County 2023).[9] MHL § 9.39 permits an individual to be deprived of their liberty . . . and be involuntarily confined." In contrast, Article 63-a does not result in an individual being retained against their will. *See* Exhibit J.

In short, the court in *G.W.* both "overstated the role of the physician in proceedings under Mental Hygiene Law Article 9 and misapprehended the extreme risk protection statute by concluding that it requires proof of mental illness-it does not."[10] *See J.B. v. K.S.G.* __ N.Y.S.3d ___, 2023 N.Y. Slip. Op. 23099 (2023); Exhibit I. "The Red Flag Law does *not* require proof that a respondent is eligible for involuntary confinement. It does not require proof that a respondent is mentally ill, *at all*. Rather, the Red Flag Law simply directs courts to apply the definition of "likely to result in serious harm" from the Mental Hygiene law when assessing a particular Respondent's behavior." *See Haverstraw Town Police v. C.G*; Exhibit J.

Finally, requiring a medical diagnosis or medical testimony prior to granting an ERPO would also prevent the law from serving its purpose of preventing harm. A study published in 2021 showed that in 56% of mass shootings, the shooters exhibited dangerous warnings signs before the shooting.[11] And warning signs for suicide include: threats to hurt or kill oneself; conduct evincing an intent to harm oneself: seeking pills, weapons, purchasing firearms; or talking or writing about death, dying or suicide, all of which are observable by lay persons.[12] These warning signs are

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[9] The *Haverstraw Town Police v. C.G.*, ___ Misc 3d ____, Index No. 2022-2362 (Sup. Ct, Ulster County 2023) decision issued on April 20, 2023 has yet to be published in a reporter and is attached hereto as Exhibit J.

[10] The Mental Hygiene Law itself explicitly empowers non-physicians, i.e., peace and police officers, to make determinations as to whether individuals are conducting themselves in a manner likely to result in serious harm in some circumstances. See Mental Hygiene Law § 9.41(a).

[11] Everytown for Gun Safety. "*Mass Shootings in America 2009-2020*". Everytown for Gun Safety. (2021). https://bit.ly/3fQBlc2

[12] *See* M. David Rudd, et al., *Warning Signs for Suicide: Theory, Research, and Clinical Applications*, 36(3) Suicide and Life-Threatening Behavior 255, 257 (2006) available at https://projects.iq.harvard.edu/files/nocklab/files/rudd_2006_warningsigns_suicide_sltb_0.pdf.

observable by family members, neighbors, teachers, police officers, friends, peers, or colleagues. Discrediting their reliable testimony about clearly observable behaviors that demonstrate risks of harm or about behaviors and factors that are laid out in the ERPO statute, will mean that, despite clear unequivocable warning signs individuals will retain access to firearms and be given the means to kill themselves or commit atrocities.

In this case, lay witness and police officer testimony is plainly capable of establishing the statutory factors considered in an evaluation of serious harm. For example, lay witnesses and police officers can testify as to McFadden's threats to shoot himself in the head, his possession of an unlawfully modified AR-15 to include a quick release magazine and a telescoping (collapsible) stock, and his severe intoxication. Asking this Court to require individual medical testimony is not only a misreading and mischaracterization of the ERPO statute, but it would also endanger the very purpose of the law.

RESPONDENT CANNOT ESTABLISH A SUBSTANTIVE DUE PROCESS VIOLATION

"Substantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority." *See Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir.1999). "[S]ubstantive due process prohibits the government from taking actions that are arbitrary, conscience-shocking, or oppressive in a constitutional sense. Incorrect or ill-advised government action is insufficient to give rise to a substantive due process violation." *See Aron v Becker*, 48 F Supp 3d 347, 376 (NDNY 2014). To successfully establish a claim, a respondent must prove the government's fault lies "in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *See County of Sacramento v Lewis*, 523 US 833, 846 (1998). McFadden has failed to show that this ERPO proceeding is arbitrary or shocks the conscience.

The ERPO law "bear[s] a substantial relationship to the government's responsibility of protecting the public at large and preventing crime and serious injury to others from individuals who, by their conduct, raise concerns that, at that moment and for a limited time in the future, they should not be entrusted with a dangerous instrument." *Anonymous Detective at Westchester Cnty Police v. A.A.*, 71 Misc. 3d 810, 822 (N.Y. Sup. Ct. 2021).

According to data from the U.S. Centers for Disease Control and Prevention, there were 48,830 firearm deaths in the United States in 2021—an average of 120 per day.[13] More than half of these deaths were suicides by firearm.[14] Suicide assisted by firearm is the most common method of ending one's life.[15] Suicide by firearm has devastating effects and is by far the most lethal manner of attempted suicide, with a fatality rate of approximately ninety percent.[16] A study of youth suicide found that the majority of guns used by youth in suicide attempts and unintentional suicides were kept in the home of the victim.[17] Beyond suicide, studies have shown a woman is six times more likely to be killed than other abused woman when a gun is kept in the house. *See United States v. Castleman*, 572 U.S. 157, 160 (2014) (*citing Campbell et al., Assessing Risk Factors for Intimate Partner Homicide,* Nat'l Inst. Of Justice J., No. 250 at 16 (Nov. 2003)).

ERPO statutes are designed to avoid these harms and effectively advance the State's interest. For example, in 2017, a thorough study of Connecticut's ERPO statute estimated that for

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[13] About Underlying Cause of Death, 2018-2021, National Vital Statistics System - Mortality Data (2021), available at: https://wonder.cdc.gov/controller/saved/D158/D321F161

[14] *Id.*

[15] Jonel Aleccia & Melissa Bailey, "Unlocked and Loaded: Families Confront Dementia and Guns", Kaiser Health News (June 25, 2018), https://khn.org/news/dementia-and-gun-safety-when-should-aging-americans-retire-their-weapons/.

[16] Conner A., Azrael D., and Miller M., "*Suicide Case-Fatality Rates in the United States, 2007 to 2014: A Nationwide Population-Based Study.*" Annals of Internal Medicine. (2019). https://doi.org/10.7326/M19-1324

[17] *See* David C. Grossman et al., "*Self-Inflicted and Unintentional Firearm Injuries Among Children and Adolescents: The Source of the Firearm",* 153 Archives of Pediatric & Adolescent Med. 875, 875 (1999).

every ten-to-eleven-gun seizure cases a suicide is averted.[18] A similar study found that Indiana's analogous law is equally effective at preventing suicide.[19] This study concluded that, for every ten gun removal actions, one life was saved.[20] This demonstrates that red flag laws are—at a minimum—rationally related to the legitimate governmental interest of protecting the public.

POINT III: NEW YORK'S ERPO LAW HAS BEEN UPHELD THROUGHOUT NEW YORK STATE AND ACCORDS WITH RED FLAG LAWS IN OTHER STATES

ERPO ORDERS HAVE BEEN GRANTED THROUGHOUT NEW YORK

A number of New York State courts have declared the ERPO statute constitutional after thorough review and constitutional analysis. *See Anonymous Detective at Westchester Cnty Police v. A.A.*, 71 Misc. 3d 810, 816 (N.Y. Sup. Ct. 2021); *J.B. v. K.S.G. 2023 N.Y. Slip. Op. 23099 (2023); Haverstraw Town Police v. C.G.*, ___ Misc 3d ____, Index No. 2022-2362 (Sup. Ct, Ulster County 2023). New York's ERPO law is a manifestation of the government's ultimate "responsibility of protecting the public at large and preventing crime and serious injury to others from individuals who, by their conduct, raise serious concerns that, at that moment and for a limited time in the future, they should not be entrusted with a dangerous instrument." *See Anonymous Detective,* 71 Misc. 3d 810, 816

Beyond published written decisions upholding ERPOs, Courts in nearly every New York Jurisdiction have issued final ERPO orders. The ERPO statute came into effect on August 24, 2019, long before the decision of *G.W. v. C.N.* on December 22, 2022. A recent sampling of forty-four (44) counties where final ERPO orders have been granted on behalf of New York State Police

[18] *See* Jeffrey Swanson et al., "Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does it Prevent Suicide? 82 Law & Contemp. Orivs,, at 179, 207 (2017).
[19] *See* Jeffrey Swanson et al., "Criminal Justice and Suicide Outcomes with Indiana's Risk-Based Gun Seizure Law," Journal of the American Academy of Psychiatry and the Law, Vol. 47, No. 2, 2019, pp. 1–10.
[20] *Id.*

petitioners shows that the law is being upheld regularly and consistently around the state: **Allegany County**, Judge Thomas P. Brown (Ind. No.: 2023-49443); **Broome County**, Judge Joseph A. McBride, (Ind. No.: 2022-00708); **Cattaraugus County**, Judge Ronald D. Ploetz (Ind. No.: 2022-91998); **Cayuga County,** Judge Thomas Leone (Ind. No.: 2022-0680); **Chautauqua County**, Judge David W. Foley, (Ind. No.: 2023-291); **Chemung County**, Judge Christopher P. Baker (Ind. No.: 2023-5058); **Chenango County**, Judge Joseph A. McBride (Ind. No.: 2023-02192); **Clinton County**, Judge Keith M. Bruno (Ind. No.: 2023-00095); **Colombia County,** Judge Jonathan M. Nichols (Ind. No.: 2023-19471); **Cortland County**, Judge Mark G. Masler (Ind. No.: 2022-555); **Delaware County**, Brian D. Burns (Ind. No.: 2023-18); **Dutchess County**, Judge Maria G. Rosa (Ind. No.: 2022-01131); **Erie County**, Judge Henry J. Nowak (Ind. No.: 2022-600534); **Essex County**, Judge Richard B. Meyer (Ind. No.: 2022-0255); **Greene County**, Judge Richard L. Mott (Ind. No.: 2023-7); **Franklin County**, Judge John T. Ellis (Ind. No.: 2023-17) and Judge Derek P. Champagne (Ind. No.: 2023-5); **Fulton County**, Judge Martin D. Auffredou (Ind. No.: 2023-10314); **Greene County**, Judge Richard L. Mott, (Ind. No.: 2023-7); **Herkimer County**, Judge John H. Crandall (Ind. No.: 2022-109990) and Judge Mark R. Rose (Ind. No.: 2023-10115); **Jefferson County**, Judge James P. McClusky (Ind. No.: 2023-00005); **Madison County,** Judge Donald F. Cerio Jr. (Ind. No.: 2023-1101) and Judge Patrick J. O'Sullivan (Ind. No.: 2023-1089); **Montgomery County**, Judge Rebecca A. Slezak (Ind. No.: 2022-691); **Nassau County**, Judge Terence P. Murphy III (Ind. No.: 2022-848); **Niagara County**, Judge Frank A. Sedita (Ind. No.: 2023-178895) and Judge Frank Caruso (Ind. No.: 2022-78861); **Onondaga County**, Judge Gerard J. Neri (Ind. No.: 2022-010334) and Judge Deborah H. Karalunas (Ind. No.: 2023-1125); **Ontario County**, Judge Kristina Karle (Ind. No.: 2023-135114) **Orange County**, Judge Maria S. Vazquez-Doles (Ind. No.: 2023-000988); **Oswego County**, Judge Scott J. DelConte (Ind. No.: 2023-0096);

Otsego County, Judge Brian D. Burns (Ind. No.: 2022-806); **Putnam County,** Judge Victor Grossman (Ind. No.: 2022-1093); **Saratoga County**, Judge James A. Murphy (Ind. No.: 2022-2841); and Judge Richard A. Kupferman (Ind. No.: 2023-00150); **Schuyler County**, Judge Christopher P. Baker (Ind. No.: 2023-04); **Seneca County**, Judge Barry L. Porsch (Ind. No.: 2023-54406); **St. Lawrence County**, Judge Mary M. Farley (Ind. No.: 2023-0044); **Stueben County**, Judge Jason L. Cook (Ind. No.: 2023-0032) and Judge Patrick F. McAllister (Ind. No.: 2023-0087); **Suffolk County**, Judge Timothy P. Mazzei (Ind. No.: 2022-206338) and Judge David A. Morris (Ind. No.: 2023-603637); **Tioga County**, Judge Oliver N. Blaise, III (Ind. No.: 2023-49627); **Tompkins County**, Judge Mark G. Masler (Ind. No.: 2022-0262); **Warren County**, Judge Robert Smith (Ind. No.: 2023-71060); **Washington County**, Judge Kelly S. McKeighan (Ind. No.: 2022-34647); **Wayne County,** Judge Richard M. Healy (Ind. No.: 2023-089416); **Wyoming County**, Judge Michael M. Mohun (Ind. No.: 2022-52345); **Yates County**, Judge Jason L. Cook (Ind. No.: 2023-0053). Petitioner asks this Court to rely upon the overwhelming trend in New York State, deny Respondent's motion and proceed to a final ERPO Hearing on the merits.

RED FLAG STATUTES HAVE BEEN UPHELD IN OTHER STATES AND HAVE BEEN BOTH UTILIZED AND SUPPORTED BY THE FEDERAL GOVERNMENT

Outside of New York, "red flag" laws have been passed and upheld against constitutional challenges in numerous states. California, Colorado, Connecticut, Delaware, District of Colombia, Florida, Hawaii, Illinois, Indiana, Maryland, New Jersey, New Mexico, Rhode Island, Vermont, and Washington are among a sampling of jurisdictions with red flag statutes.[21] The first "red flag" statute was passed in Connecticut in 1999 following a mass shooting tragedy. *See* Conn. Gen. Stat.

[21] Cal. Penal Code § 18150(a)(1)(B)-(C), 18170(a)(1)(B)-(C); Conn. Gen. Stat. § 29-38; Colo. Rev. Stat. § 13-14.5-102(2)(g); Del. Code Ann. tit. 10, § 7703(d).; D.C. Code § 7-2510.01(2)(C).; Fla. Stat. § 790.401(4)(c).; Haw. Rev. Stat. § 134-61.; 430 Ill. Comp. Stat. 67/40; Md. Code Ann., Pub. Safety § 5-601(e)(2)(i).; N.M. Stat. Ann. § 40-17-8(A).; R.I. Gen. Laws § 8-8.3-5(a); Vt. Stat. Ann. tit. 13, § 4053(e)(2).; Wash. Rev. Code § 7.94.040(2).

§ 29-38c (1999). At writing, twenty states and the District of Columbia have some form of "red flag" statute on their books.

These statutes have passed judicial scrutiny and have been enforced to help prevent gun violence across the Country. Florida's Risk Protection Order statute, § 790.401, Fla. Stat. (2018), was challenged as being unconstitutionally vague, violative of substantive due process, and overly broad. Florida's First District Court of Appeal upheld the red flag law recognizing that the law is meant to comprehensively address the crisis of gun violence. *See Davis v Gilchrist County Sheriff's Off.*, 280 So 3d 524, 533 (Fla Dist Ct App 2019). While Florida's statute maintains that a prompt hearing be held within fourteen days, New York's statute contains stronger procedural safeguards by granting a hearing in just three to six days. *See Id.*, CPLR §§ 6342(4)(d)(ii), 6343(1). Likewise, California's red flag "Gun Violence Restraining Order Law", California Penal Code § 18175, has been upheld by the California Fourth District Court of Appeals. *See San Diego Police Dept. v Geoffrey S.*, 86 Cal App 5th 550, 571 (2022). California's prompt hearing is granted within 21 days and may be granted upon evidence of an "increased risk for violence." *Id.*

A Connecticut appellate court rejected a constitutional challenge to their extreme risk law stating, "[i]t restricts for up to one year the rights of only those whom a court has adjudged to pose a risk of imminent physical harm to themselves or others after affording due process protection to challenge the seizure of the firearms. The statute is an example of the longstanding 'presumptively lawful regulatory measures' articulated in *District of Columbia v. Heller*." *See Hope v. State*, 133 A.3d 519, 524-525 (Conn. App. Ct. 2016).

The Indiana Court of Appeals similarly rejected challenges to their extreme risk law and held that their statute did not place a material burden on the core right of law-abiding citizens to bear arms in self-defense because it only applies to those shown by clear and convincing evidence

to present a risk of personal injury to either themselves or others. *See Redington v. State*, 992 N.E.2d 823, 830-839 (Ind. Ct. App. 2013). Washington State's Extreme Risk Protection Order Act, RCW 7.94.010-.900, allows for an ERPO to be granted upon a preponderance of the evidence showing, rather than the higher standard of clear and convincing evidence in New York, that an individual is at a risk of harming themselves or others. *See* RCW 7.94.010-.900; CPLR § 6343(2). Washington's Appeals Division has upheld ERPO orders. *See Seattle Police Dept. v Jones*, 18 Wash App 2d 931, 941, 496 P3d 1204, 1210 (2021). The New Jersey Appellate Division has also ruled that ERPOs may be granted when there is legal and competent evidence in the record to support the court's order. *See Matter of D.L.B.*, 468 NJ Super 397, 400, 258 A3d 1129, 1130 (N.J. Super Ct App Div 2021). Red flag laws continue to be passed in the post-*Bruen* era, on March 16, 2023, the Michigan State Senate passed a "red flag" statute, and on April 26, 2023, the Minnesota legislature passed "red flag" gun safety legislation.[22]

Beyond other states, the United States Government through the Department of Justice has stood in support of red flag laws. The United States Department of Justice has promulgated model legislation in support of "red flag" laws, which even cites to New York's ERPO law.[23] Their commentary recognizes that, "[r]esearch has shown that states can save lives by authorizing courts to issue extreme risk protection orders (ERPOs) that temporarily prevent a person in crisis from accessing firearms." *Id.* The federal government's endorsement of red flag laws further supports the constitutionality of New York State's ERPO statute.

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[22] *See* "Michigan Senate passes Gun Bills to Address Mass Shootings" via https://apnews.com/article/michigan-gun-laws-red-flag-democrats-b776dd9f64d2264a0f4c94a498b6035b; Minnesota legislation via https://www.twincities.com/2023/04.26/on-party-line-vote-minnesota-house-approves-new-gun-control-measures/

[23] *See* Commentary for Extreme Risk Protection Order Model Legislation, U.S. Department of Justice (June 7, 2021) https://www.justice.gov/doj/reducing-gun-violence/commentary-extreme-risk-protection-order-model-legislation.

CONCLUSION

For the aforementioned reasons, the Respondent's motion should be denied in its entirety and a final ERPO Hearing should be scheduled.

Dated: May 30, 2023
Rochester, New York

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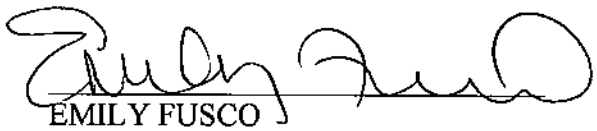

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