STATE OF NEW YORK
SUPREME COURT ULSTER COUNTY
HAVERSTRAW TOWN POLICE (PO VEGA #238),

Petitioner,

-against-

**DECISION & ORDER**
Index No. 2022-2362

CHRISTOPHER M. GALLIGAN D/O/B: 07/30/1967,

Respondent.

Supreme Court, Ulster County
Motion Return Date: March 31, 2023

Present: Julian D. Schreibman, JSC

Appearances:

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**Schreibman, J.:**

This is a special proceeding under Article 63-A of the Civil Procedure Law & Rules, the Extreme Risk Protection Order Statute (also commonly referred to as the State's "Red Flag Law"). Under the provisions of this law, the Court issued a Temporary Extreme Risk Protection Order ("TERPO") on November 23, 2022, which barred Respondent Christopher M. Galligan from possessing or acquiring firearms, rifles or shotguns of any kind. As required by the Red Flag Law, the Court promptly scheduled a hearing on the issuance of a Final Extreme Risk Protection Order

("FERPO") to be held on November 29, 2022. The hearing was thereafter adjourned at Respondent's request.

Each year, close to 50,000 Americans die from gunshots. More than half of these are suicides. New York State has a relatively low crime rate and one of the lowest suicide rates in the nation. New York also has one of the lowest rates of gun ownership in America along with some of the strictest laws for accessing firearms. As a result of all these factors, it has one of the lowest rates of gun-related deaths in the country.[1] Nevertheless, each year, hundreds of New Yorkers die from gun use, the majority as suicides. "Having a firearm in the home dramatically raises the risk of gun death, including both homicides and suicides."[2] In particular, "having easy access to guns makes the difference whether a suicidal crisis ends up being a fatal or a nonfatal event," because the likelihood of a successful suicide attempt is far greater when a gun is used.[3]

Despite New York's consistent ranking as one of the safest states when it comes to gun violence, the State Legislature and the Governor saw fit in 2019 to enact the Red Flag Law and to further enhance its provisions in 2022. The Red Flag Law seeks to keep guns out of the hands of persons who may be suffering from acute emotional trauma or a mental health crisis and are at risk of harming themselves or others. More specifically, the Law enacts a multi-step procedure by which a court may, upon factual findings established by clear and convincing evidence, order that

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[1] *See* Lindsay Beyerstein, *Why New York Has Such a Low Rate of Gun Death*, (Jan. 20, 2020); available at: https://www.cityandstateny.com/opinion/2020/01/why-new-yor-has-such-a-low-rate-of-gun-dealer/176503 [last accessed April 20, 2023].

[2] Roni Caryn Rabin, *Gun-Related Suicides and Killings Continued to Rise in 2021, C.D.C. Reports*, **New York Times** (Oct. 6, 2022).

[3] Kaiser Health News, *New York Has the Lowest Suicide Rate in America*, **U.S. News & World Report** (Dec. 11, 2019) (internal quotation omitted). The rate varies considerably across the State with rural communities having much higher rates of suicide than New York City.

an individual surrender their guns and refrain from obtaining new guns for a defined period of time.

Respondent now moves this Court to find the Red Flag Law unconstitutional on the grounds that it violates his rights under the 2nd, 4th, 5th and 6th Amendments of the U.S. Constitution and the coordinate provisions of the Constitution and statutes of the State of New York. Petitioner, Officer Walter Vega of the Town of Haverstraw Police Department, opposes the motion.[4] The Office of the Attorney General, having been given proper notice, has submitted a letter stating that it will not intervene. For the reasons set forth herein, the motion is denied.

As a preliminary matter, when considering the constitutionality of legislation, a court's approach must be conservative. It may not go looking for bases to over-rule the enactments of the people's legislative representatives; rather, "courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional." (*LaValle v Hayden*, 98 NY2d 155, 161 [2002]). "Questions as to need, wisdom or appropriateness are for the Legislature. Courts strike down statutes only as a last resort." (*Paterson v University of State of NY*, 14 NY2d 432, 438 [1964]). This Court is cognizant that two coordinate courts have recently found the Red Flag Law to be unconstitutional. (*G.W. v C.N.*, 181 NYS3d 432 [Sup.Ct., Monroe Cty. 2022]; *R.M. v C.M.*, Index No. 434-2023 [Sup.Ct., Orange Cty. April 4, 2023]).[5] However, this Court respectfully disagrees with the conclusions in those cases.

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[4] An ERPO proceeding is not brought in the name of the People of the State of New York, as would be done in a criminal proceeding. Furthermore, the Red Flag Law technically authorizes only named individuals to initiate ERPO applications; they are not brought in the name of an agency or entity. Accordingly, the proper petitioner here is the police officer, not the police agency. Contrary to the other ERPO-related decisions cited herein this Court does not see a basis to redact the name of the applicant-officer.

[5] The motion in *R.M.* was unopposed; no papers were submitted supporting the statute's constitutionality.

The Red Flag Law Does Not Violate the Second Amendment

The Second Amendment to the U.S. Constitution provides:

> A well-regulated Militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

The same right is protected by statute as part of New York's Civil Rights Law. (NYCRL Art.2, §4), and is interpreted consistently with federal Second Amendment jurisprudence. (*Citizens for a Safer Community v City of Rochester*, 164 Misc.2d 822, 829 [Sup. Ct., Monroe Cty. 1994] [abrogated on other grounds by *District of Columbia v Heller*, 554 U.S. 570 [2008]).

In 2008, the United States Supreme Court found, for the first time, that the U.S. Constitution affords an individual the right to bear arms untethered to any state or national defense obligation. (*Heller*, 554 U.S. 570). Two years later, the Supreme Court held that this right also restrained regulations by State governments under the 14th Amendment. (*McDonald v City of Chicago*, 561 US 742 [2010]). Perhaps inevitably, the Supreme Court last year found that New York's century-old pistol licensing regime failed to pass constitutional muster under *Heller*, *McDonald*, and their progeny. (*New York Rifle and Pistol Assoc., Inc. v Bruen*, -- U.S. --, 142 S.Ct. 2111 [2022]).

These cases, however, did not foreclose all gun regulations. Indeed, the *Bruen* Court took pains to identify gun control laws in several states that it viewed as compliant with the Second Amendment. (*Id.* at 2123-24 [majority opinion] and 2161-62 [Kavanagh, J., concurring]). Distilled to its essence, what the *Bruen* Court found constitutionally offensive in the New York licensing regime was that it put the burden on individuals to prove entitlement to a pistol permit, rather than presuming such entitlement absent objective, disqualifying factors. (*Id.* [distinguishing "shall issue" regimes from now-unconstitutional "may issues" regimes such as New York's]). *Bruen* did

not undermine a state's ability to disqualify an individual from gun ownership based on that person's conduct. (*See, id.* at 2157 ["Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun."] [Alito, J., concurring]).

This is where Respondent (and the *G.W.* court) go astray. They analyze the Red Flag Law as if it were a generally-applicable gun control regulation. It is not. It is a procedural mechanism by which a court may make an individualized determination to suspend one person's access to guns based on specific, evidentiary findings.[6] There is nothing in the jurisprudence of *Heller* and *Bruen* to suggest that such proceedings are an affront to the Second Amendment. Indeed, such individualized assessments, which place the burden on the party seeking to remove the weapons, are exactly what *Bruen* embraces.

New York's laws contain multiple similar provisions, none of which appear to have raised Second Amendment concerns. For example, a criminal defendant, who has been no more than accused of a crime under a probable cause standard (a standard lower than that necessary to issue an ERPO), may be denied access to guns throughout the pendency of his or her case as a non-monetary condition of release. (*See* CPL §§ 500.10[3-a];530.40). In Family Court, a judge may issue an order of protection, under a preponderance of the evidence standard, and upon such issuance may suspend an individual's pistol permit, or order them ineligible for such a permit. The judge may further order the immediate surrender of all of that person's firearms if the court finds there is a "substantial risk" that the subject "may use or threaten to use a firearm unlawfully" against the protected person. (Family Court Act §842-a). Under a portion of New York's pistol

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[6] Somewhat oddly, given its subject matter, the Red Flag Law does not include a definition of "firearm," nor does it cross-reference any other definition in our laws. However, the consistent use of the triad "firearm, rifle or shotgun," tracks the usage in the Penal Law and the Court accordingly applies the definitions of those terms as set forth in Penal Law §265.00.

licensing laws not challenged in *Bruen*, a licensing officer, including where applicable, a judge, may revoke an individual's pistol permit "at any time" for essentially any reason, specific to that licensee. (PL §400.00[11][a]). Upon such a revocation, the former licensee "shall" surrender not only all their licensed firearms, but their rifles and shotguns as well, to law enforcement and if they fail to do so, "such items shall be removed and declared a nuisance" and any police officer is empowered to "remove any and all such weapons." (PL §400.00[11][c]).[7]

In this context, the procedures of the Red Flag Law plainly do not offend the Second Amendment.

The Red Flag Law is Not Unconstitutionally Vague

A law violates the Fifth Amendment when it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." (*FCC v Fox Television Stations Inc.*, 567 U.S. 239, 253 [2012]). Respondent argues that the Red Flag Law fails to give persons of ordinary intelligence notice of what conduct it proscribes. A good faith reading of the plain language of the statute reveals otherwise.

CPLR §6342 provides for the issuance of a 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." For the definition of "likely to engage in conduct that would result in serious harm," the Red Flag Law cross-references the definition of "likelihood to result in serious

[7] Although not part of the Red Flag Law, and therefore not challenged here, this provision does authorize the search for and seizure of firearms without the formal procedures of a search warrant in the case of a person whose pistol license has been suspended or revoked. This may encompass many ERPO respondents because it would be routine for such a suspension to be ordered contemporaneously with the issuance of a TERPO if the respondent is a permit holder. In such case, however, the permit itself establishes the existence of firearms in the subject premises.

harm" under §9.39(a) of the Mental Hygiene Law. CPLR §6342 goes on to require the issuing court to consider "any relevant factors," including seven specific criteria which a court "shall" consider; the court is also mandated to consider the passage of time since the triggering incident and the age of the respondent. As another of our sibling courts has recently found, rejecting the same argument as raised here, these criteria provide ample notice of the circumstances in which an individual may be made the subject of an ERPO. (*Anonymous Detective v A.A.*, 71 Misc.3d 810 [Sup.Ct., Westchester Cty. 2021]).

Moreover, Respondent's vagueness argument is principally targeted at the language imported from the Mental Hygiene Law. (*See* Respondent's Memorandum of Law at 11-12). That provision governs when an individual may be confined against their will in a mental health facility – obviously a significant deprivation of liberty. New York's involuntary commitment statute has been on the books for more than 30 years. Respondent has failed to identify any case suggesting that this provision of the Mental Hygiene Law is void for vagueness. It cannot be that a legal term that is constitutionally sound for purposes of depriving an individual of their liberty becomes unsound when used in a statute that permits temporary deprivation of property.

Finally, our laws are replete with provisions that require some level of judgment - the application of "common intelligence" - to understand. If the Red Flag Law is excessively vague then so too would be numerous provisions of our Penal Law, such as, to name only a few: Menacing (PL§120.15 [placing a person in reasonable fear of physical injury]; Stalking (PL §120.45); Criminal Tampering (PL §145.14 [tampering with property with intent to cause "substantial inconvenience"]); Criminal Contempt (PL §215.50 [including "insolent" behavior "tending to disrupt" court proceedings]); Disruption or Disturbance of a Religious Service,

Funeral, Burial or Memorial Service (PL §240.21 [making "unreasonable noise" recklessly or with intent to cause "annoyance or alarm" at such service]).

Accordingly, the Court finds that the Red Flag Law provides constitutionally sufficient notice of conduct which may trigger its application.

Respondent also argues that the Red Flag Law's vagueness will result in arbitrary and discriminatory enforcement. Historically, this concern arose out of the use of vague statutory language to maintain social order by enabling police to arrest poor persons and members of minority groups for almost any reason (*see Papachristou v City of Jacksonville*, 405 US 156, 170-71 [1972]) or to suppress otherwise protected exercises of free speech and assembly. (*See, e.g., Grayned v City of Rockford*, 408 U.S. 104, 109 [1972] [in "close" question, upholding anti-noise ordinance used to prosecute participant in civil rights demonstration near school]).

Here, Respondent does not identify any particular risk of discriminatory enforcement. Rather, he points to three allegedly vague elements of the law which he argues will result in arbitrary enforcement. First, he argues that police are not given sufficient boundaries regarding the conduct of searches authorized in Red Flag Law applications. As discussed *infra*, the Court does not find that the search provisions are unconstitutional and Respondent does not give any reason to suggest that law enforcement's conduct of such searches will be any different from that of any other court-ordered search. (*See Anonymous Detective,* 71 Misc.3d at 816-17).

Second, Respondent points to statutory ambiguity regarding the admissibility of hearsay at ERPO hearings as likely to result in courts applying different evidentiary standards. It is true that the Red Flag Law's treatment of hearsay evidence is unclear. The statute plainly authorizes the Court to consider – and therefore, necessarily, to receive as evidence – two forms of hearsay: (1) the petition itself and (2) the background report that a Court may authorize at the time a TERPO

is issued.[8] (CPLR §6343[2]). Whether these authorizations imply the admissibility of hearsay in general at the FERPO hearing is debatable and courts would undoubtedly welcome legislative clarification. Respondent, however, does not argue that the admission of hearsay at ERPO proceedings is constitutionally impermissible. In any event, judges do not make universally identical evidentiary rulings nor do they place identical weight on admitted evidence. This does not render the decisions of every judge arbitrary. To the extent any given decision is alleged to be arbitrary, appellate courts are available to make corrections. Any variation in the weighing of evidence by different courts does not render the statute itself defective.

For the same reasons, Respondent's third argument, that a court may be making findings related to a respondent's mental health without assistance of medical testimony also does not render application of the statute unconstitutionally arbitrary. As discussed by the court in *Anonymous Detective*, the fact-finding obligations imposed on the court by the Red Flag Law are well within the bounds of a court's function in a variety of legal realms. Accordingly, the Court concludes that the language of this Statute does not raise any meaningful concern of arbitrary or discriminatory enforcement.

The Red Flag Law Does Not Otherwise Violate the Constitutional Guarantee of Due Process

The Fifth Amendment to the U.S. Constitution provides, in relevant part, that "no person . . . shall be deprived of . . . property, without due process of law." New York's Constitution contains identical language at Article 1, Section 6. Respondent alleges that the procedures set forth in the Red Flag Law are insufficient to permit a court to prohibit his possession of firearms.[9]

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[8] In this Court's experience, the background report has consisted solely of a copy of a respondent's criminal history.

[9] Respondent argues this issue as part of his claim that the law is void for vagueness. His position is that the Red Flag Law's procedures will lead to arbitrary application of the law. The Court

The focus of Respondent's argument here – and the court's analysis in *G.W.* – is the application of the standard in the Mental Hygiene Law to respondents in ERPO cases. Respondent discusses at length the fact that a physician's medical determination is required in the first instance to forcibly hospitalize a mentally ill person and that medical testimony is universally offered in the event of a subsequent hearing to extend the involuntary retention of the patient.

As an initial matter, this framework unduly conflates the substance of the Red Flag Law and the Mental Hygiene Law. Certainly, the Red Flag Law was intended, in part, to reduce access to guns by persons experiencing a mental health crisis. In this regard, it is understandable that the Legislature looked to the Mental Hygiene Law for definitional guidance. But the law also was plainly intended to encompass circumstances outside the realm of mental illness such as, for example, perpetrators of domestic violence. The Red Flag Law does *not* require proof that a respondent is eligible for involuntary commitment. 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.

Respondent also argues that the Mental Hygiene Law offers greater procedural protections and that the Red Flag Law is deficient by comparison. (*See G.W.*, 181 NYS3d at 437). This is not correct. Section 9.39 of the Mental Hygiene Law permits an individual to be deprived of their liberty – confined to a mental health facility against their will – on the say-so of a private citizen armed only with a medical license. The involuntary confinement may be extended to up to 15 days upon the say-so of a second private citizen with no greater credentials or authority. During this

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considers this more properly framed as a challenge to the constitutional sufficiency of the procedures, which is also the analytic framework applied by the court in *G.W. v C.N.*

period, the individual is entitled to a hearing, but only if they (or a family member/advocate) formally request one, in which case the hearing must be held within five days of the request. Only at that point does the confined individual have recourse to judicial process. (MHL §9.39).

In contrast, even the issuance of a TERPO requires a Court to make factual findings to determine probable cause, and the Court may take recorded, sworn testimony. The subject of a TERPO is then entitled to a full evidentiary hearing within six business days, which can be adjourned at the request of the respondent, but not the petitioner. A petitioner must establish that a FERPO should issue under a "clear and convincing" standard. An evidentiary hearing is the essence of Fifth Amendment due process. (*See Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v McElroy*, 367 U.S. 886, 894-95). At such a hearing, the absence of a *requirement* that the court receive expert mental health testimony cannot render the Red Flag Law invalid. Courts are well-equipped to evaluate evidence and assess such evidence against statutory standards. If the evidence is insufficient – and the lack of medical evidence in some cases may highlight such a deficiency – then the petition will be denied. But courts cannot impose a mandate for such testimony (*see G.W.*, 181 NYS3d at 437) – especially where a finding of mental illness is not required by the statute – as the price for finding the law constitutional.[10]

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[10] The *G.W.* court went on to hold that to pass constitutional muster a physician must opine on the risk of serious harm prior to a *temporary* ERPO even being applied for, let alone issued. (181 NYS3d at 437-38). It is not clear why this would be constitutionally preferable. Aside from the fact that, as noted, a person's dangerousness to particular individuals may not be grounded in mental illness, *G.W.*'s rule would *require* a subject to be taken into custody and transported to a mental health facility for evaluation *every time* a law enforcement officer perceived that their filing obligations under the Red Flag Law had been triggered. (In rural communities, such as this Court's jurisdiction, this may involve transporting the subject well over an hour to find a suitable facility.) Currently, in this Court's experience, the majority of ERPO applications do not involve an arrest of the respondent. The *G.W.* rule, therefore, would substantially *increase* the liberty infringement of the Statute. This requirement would also essentially negate the ability of non-law enforcement petitioners, such as family members, to bring ERPO petitions. Such persons might justifiably want to have firearms removed from a home without "calling the cops" on a loved one, but they would

The Red Flag Law Does Not Violate a Respondent's Right Against Self-Incrimination

Both the U.S. and New York Constitutions provide that "no person shall be compelled in any criminal case to be a witness against himself." ERPO proceedings are not criminal, but Respondent here contends that they fall within a zone as to which courts have expanded the right against self-incrimination.

A TERPO's standard terms include the requirement that a respondent turn over all firearms in his or her possession. This may present some respondents with a dilemma. If they are in possession of firearms *illegally* (for example, if they possess a pistol without a license), then admitting such possession and turning over the firearm could subject them to prosecution for that crime. On the other hand, failing to admit the possession and to surrender the firearm would be a violation of the TERPO and, if discovered, could subject them to additional penalties or even prosecution.

As Respondent notes, our State's highest court has dealt with precisely this issue. In *People v Havrish*, the defendant was the subject of an order of protection requiring him to disclose and surrender all guns. (8 NY3d 389, 391 [2007]). He revealed and surrendered an illegal handgun and was charged with that crime. The Court of Appeals suppressed the evidence on Fifth Amendment grounds and dismissed the charges. (*Id.* at 396). "[D]efendant's statements about the gun were integral to compliance with the directive in the order of protection. . . . The statements defendant made – advising police that he owned a revolver and indicating where it was – went no further than what a person complying with such an order would have been expected to communicate."

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be functionally unable to proceed in this manner if a medical exam were required prior to initiating a proceeding. Finally, this proposed requirement raises serious medical privacy issues – a respondent would not only be required to submit to a medical evaluation and diagnosis, but to consent to the release of that evaluation to law enforcement, which itself raises constitutional concerns.

(*Id.*; *see also United States v Swanson*, 635 F.3d 995 [reversing denial of suppression motion where defendant revealed possession of gun where such disclosure was court-ordered]).

Unfortunately for Respondent, he draws the wrong lesson from *Havrish*. The Court did not hold that the issuance of the underlying order of protection was unconstitutional or that the mandate that the subject disclose and turn-over his weapons was improper. In fact, the Court did not call into doubt the propriety of those events in any way. Rather, the Court found that as a *consequence* of those events, the evidence obtained could not be used in a subsequent *criminal* prosecution. And so, applying *Havrish*, that may be the result in many future criminal cases. If so, whether to continue down that path is a policy decision for the Legislature to make. The *Havrish* decision is now 15 years old. Consistent with the cautious approach that a court must bring to assessing constitutionality, this Court must presume the Legislature's familiarity with it. To that end, it is presumed that the Legislature understood the interplay between ERPO proceedings and potential, subsequent prosecutions. Regardless, as in *Havrish*, the Red Flag Law is not itself constitutionally deficient merely because its enforcement may impair other proceedings.

The Red Flag Law's Search Provisions Are Not Unconstitutional

Respondent argues that the Red Flag Law allows for searches of a respondent's person and property without the protections afforded by the Fourth Amendment of the U.S. Constitution and Article 1, Section 12 of the New York Constitution. Specifically, Respondent claims that a court may authorize a search upon a finding of probable cause that the respondent is likely to engage in conduct that would cause serious harm to himself or others. In this interpretation, a court could authorize a search in connection with any TERPO because the only legal standard for authorizing a search is the same as the standard for issuing the TERPO.

This is not what the statute says. Rather, the Red Flag Law authorizes a court to order a search for weapons "in a manner consistent with the procedures of article six hundred ninety of the criminal procedure law." Application of Article 690 of the Criminal Procedure Law to ERPO searches ensures that searches authorized under the Red Flag Law are subject to the same legal standards as all other search warrants. In particular, as relevant to ERPOs, these provisions require that the applicant demonstrate that there is reasonable cause to believe that there is unlawfully possessed property in the premises to be searched. (*See* CPL §§690.10, 690.35). Because possession of firearms, rifles and shotguns would be unlawful for a respondent upon issuance of a TERPO, probable cause to believe that a particular premises will contain such weapons will support authorization of a search (subject to the remaining procedural obligations of the Criminal Procedure Law). Accordingly, the search provisions of the Red Flag Law do not violate respondents' constitutional protections. (Even if the Court agreed with the Respondent on this issue, it would not support striking down the law in its entirety as the search provisions are severable.)

The decision in *G.W.* also identifies as a constitutional concern the prospect that a search may result in the seizure of firearms lawfully owned by persons other than the respondent. (181 N.Y.S.3d at 439). However, the Red Flag Law now provides for the return of such weapons and the Penal Law expressly permits an ERPO respondent to be in a home with *someone else's* guns, so long as those guns are secured as provided by law. (*See* CPLR §6343[5][b] and PL §265.45).

The Red Flag Law Does Not Violate the Right to Counsel

Criminal defendants have a right to counsel under both the U.S. and New York Constitutions. Although civil, Respondent contends that the nature of an ERPO proceeding is one

in which a right to counsel should be recognized, such that an indigent respondent should be entitled to appointed counsel.

This is the most legally firm attack on the ERPO statute. An ERPO respondent attending a hearing, without counsel, could make admissions that might later be used against him or her.[11] Moreover, an ERPO respondent could be a minor or suffer from a serious mental illness. While Respondent identifies genuine concerns and reasons why appointed counsel *should* be available to ERPO respondents, neither the U.S. nor the New York Constitutions *require* the provision of counsel in proceedings such as these.

An ERPO proceeding is not criminal. As the Respondent recognizes, the right to counsel in civil proceedings is tied to the risk of incarceration. (*See Turner v Rogers*, 546 U.S. 431 [2011]). Even when incarceration is possible, the right to counsel may not attach. (*Id.* at 441-42 [indigent defendant was not entitled to counsel at civil contempt hearing despite being imprisoned as a result]). Here, there is no risk at all of incarceration. The *only* consequence of an ERPO is the denial of access to guns for a period of time. None of the usual liberty restrictions associated with orders of protection – limiting where a person can go or with whom they can associate – are present. The suggestion that there could be future criminal proceedings is purely speculative and, in any event, a respondent would have access to counsel in that proceeding.

A ruling that counsel are constitutionally required for ERPO respondents would be a significant expansion of Sixth Amendment law. Such an expansion is best left for higher courts or, if it deems appropriate as a matter of public policy to provide for such representation, to the Legislature.

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[11] It is this Court's practice to warn self-represented respondents at such hearings that they are not required to say anything and that anything they do say could be used against them.

The Red Flag Law is Not Unconstitutional As Applied Specifically to Respondent

Respondent's argument that the Red Flag Law is unconstitutional as applied to him under the facts and circumstances of the case does not provide further reason to find the law unconstitutional. Rather, it is essentially an argument that the facts and circumstances of his case do not merit the issuance of a FERPO. This may well be true. Consistent with the statute, the Court scheduled a hearing on November 29, 2022, just six days after the issuance of the TERPO. At that hearing, respondent would have had no evidentiary burden whatsoever, and the petitioner would have to have demonstrated, by clear and convincing evidence, that an ERPO should issue. To the extent respondent believes no TERPO should have been issued in the first place, the rapid hearing afforded by the law ensured his opportunity to promptly obtain redress. Accordingly, this portion of Respondent's motion also fails.

Based on the foregoing, it is hereby

ORDERED that Respondent's motion to dismiss this proceeding on the grounds that the Red Flag Law is unconstitutional is DENIED, and it is further

ORDERED that counsel shall appear at a virtual status conference on May 1, 2023 at 1:45 p.m. via MS Teams, for the purpose of scheduling the hearing on the FERPO, and it is further

ORDERED that the expiration date of the TERPO is hereby extended to May 15, 2023.

This shall constitute the Decision and Order of the Court. The original Decision and Order and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provisions of that rule regarding

notice of entry.

**SO ORDERED.**

Dated: April 20, 2023
Kingston, New York

**ENTER,**

**JULIAN D. SCHREIBMAN, JSC**

Papers considered: Notice of Motion, Affirmation and Memorandum of Law by Brittany A. Kessler, Esq. dated February 17, 2023, with attachments; Letter submission of State of New York Office of the Attorney General by Ester Murdukhayeva, Deputy Solicitor General, dated February 23, 2023; Affirmation in Opposition and Memorandum of Law by James M. Birnbaum, Esq. dated March 1, 2023, with attachments; Sur-Reply Memorandum of Law by Brittany A. Kessler, Esq. dated March 17, 2023; Letter submission by Brittany A. Kessler, Esq. dated April 6, 2023, with attachment; and Letter submission by James M. Birnbaum, Esq. dated April 6, 2023.