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"Red Flag" Laws: How Law Enforcement's Controversial New Tool to Reduce Mass Shootings Fits Within Current Second Amendment Jurisprudence

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"RED FLAG" LAWS: HOW LAW ENFORCEMENT'S CONTROVERSIAL NEW TOOL TO REDUCE MASS SHOOTINGS FITS WITHIN CURRENT SECOND AMENDMENT JURISPRUDENCE

Abstract: In the face of increased gun violence and mass shootings in the United States, so-called "red flag" laws have become a new and popular tool for protecting public safety. The laws are gaining momentum in state houses around the country because they provide law enforcement with a means to expeditiously remove firearms from potentially dangerous individuals—regardless of the individual's criminal record and mental health history. Thus far, the laws are a magnet for constitutional challenges—including claims that the laws violate the Second Amendment to the U.S. Constitution. This Note provides a historical and legal background of red flag laws in four states—Connecticut, Indiana, California, and Florida—and briefly examines the surrounding case law in those states. It then explains the analytical framework that federal circuit courts use to analyze Second Amendment challenges to regulations restricting firearm possession. It proceeds to discuss how federal courts apply that legal framework to laws that—like red flag laws—prohibit or restrict the possession of firearms by individuals deemed "dangerous" by society. It concludes by arguing that courts considering a Second Amendment challenge to a red flag law should find that the law regulates conduct and individuals protected by the Second Amendment, and then evaluate the law under a test of intermediate scrutiny.

INTRODUCTION

On February 14, 2018, a gunman opened fire at Marjory Stoneman Douglas High School in Parkland, Florida, killing seventeen students and staff members and injuring seventeen others.[1] Not long after the shooting, law enforcement apprehended nineteen-year-old former student Nikolas Cruz, who confessed to the shooting.[2] In the days following the tragedy, news reports revealed that what is typical of mass shooters was also true of Cruz: he had dis-

[1] Audra D.S. Burch & Patricia Mazzei, *Death Toll Is at 17 and Could Rise in Florida School Shooting*, N.Y. TIMES (Feb. 15, 2018), https://www.nytimes.com/2018/02/14/us/parkland-school-shooting.html [https://perma.cc/UT7X-AGXZ]; David Fleshler, *Named for the First Time: All 17 Who Survived Nikolas Cruz's Bullets*, ORLANDO SENTINEL (Mar. 7, 2018), https://www.orlandosentinel.com/news/fl-florida-school-shooting-wounded-list-20180307-story.html [https://perma.cc/7LDM-3BXG].

[2] *Florida School Shooting Suspect Hid Among Students After Massacre*, CBS NEWS (Feb. 20, 2018), https://www.cbsnews.com/news/parkland-florida-shooting-nikolas-cruz-continued-coverage-2018-02-15-live-updates/ [https://perma.cc/ZBP8-G8R9].

played multiple signs of mental health issues, instability, and a desire to harm others using firearms.[3] Those close to Cruz repeatedly reported warning signs to law enforcement.[4] Despite the warning signs, local law enforcement officials took no action to remove Cruz's firearms from his possession or prevent him from purchasing firearms in the future because they did not believe Cruz had committed a crime.[5]

Only weeks after the Parkland shooting, in nearby Orange County, Florida, University of Central Florida student Christian Velasquez caught law enforcement's attention.[6] On a reddit.com page, he referred to Nikolas Cruz and Stephen Paddock—perpetrator of the mass shooting in Las Vegas that led to the death of fifty-eight people—as heroes.[7] In a subsequent interview with law

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[3] Mark Berman, *Red Flags. Warnings. Cries for Help. How a System Built to Stop the Parkland School Shooter Repeatedly Broke Down*, WASH. POST (Feb. 23, 2018), https://www.washingtonpost.com/national/red-flags-warnings-cries-for-help-how-a-system-built-to-stop-the-parkland-school-shooter-broke-down/2018/02/23/3ccff52c-18d9-11e8-b681-2d4d462a1921_story.html?utm_term=.1e388b83573f [https://perma.cc/2PJ8-ZRP4]. A recent study suggests that 42% of shooters displayed "warning signs or concerning behavior" to family members before perpetrating their respective crimes. BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, HOW EXTREME RISK LAWS WORK TO SAVE LIVES, https://brady-static.s3.amazonaws.com/extremeriskfactsheet_Jan2020.pdf [https://perma.cc/W97W-LQNC]. In addition, thirty-eight out of the sixty-two mass shooters in the last twenty years reportedly exhibited mental health issues before perpetrating the shooting. Mark Folman, *Mass Shootings: Maybe What We Need Is Better Mental Health Policy*, MOTHER JONES (Nov. 9, 2012), https://www.motherjones.com/politics/2012/11/jared-loughner-mass-shootings-mental-illness/ [https://perma.cc/8GRY-R2V7]. A FBI study of the pre-attack behaviors of active shooters between 2000 and 2013 found that the average shooter engaged in four to five instances of concerning conduct. JAMES SILVER ET AL., FED. BUREAU OF INVESTIGATION, A STUDY OF THE PRE-ATTACK BEHAVIORS OF ACTIVE SHOOTERS IN THE UNITED STATES 7 (2018), https://www.fbi.gov/file-repository/pre-attack-behaviors-of-active-shooters-in-us-2000-2013.pdf/view [https://perma.cc/2HJD-PC8K].

[4] Berman, *supra* note 3. In the days and weeks before the shooting, the FBI received two anonymous tips regarding Cruz's behavior. Paula McMahon & Brittany Wallman, *How the FBI Botched Tips About the Parkland School Shooter*, ORLANDO SENTINEL (Aug. 29, 2018), https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-florida-school-shooting-fbi-tips-problems-20180828-story.html [https://perma.cc/PXV3-VA4U]. First, from a YouTube user who noticed another user with the screen name "nikolas cruz" had written, "I'm going to be a professional school shooter." *Id.* Second, from a long-time friend of the Cruz family who expressed her concern that Cruz was going to "explode" and "get into a school and just shoot the place up." *Id.* In addition, local law enforcement received twenty-three calls about Cruz's behavior between 2008 and the shooting, including one from a caller who alerted the Broward County Sheriff's Office that Cruz was amassing weapons—possibly to perpetrate a school shooting—and was liable to commit suicide. Berman, *supra* note 3.

[5] *See* Charles Rabin & Jay Weaver, *In Wake of Parkland Massacre, Police Chiefs—Again—Call for Assault-Weapons Ban*, MIAMI HERALD (Feb. 19, 2018), https://www.miamiherald.com/news/local/article201002389.html [https://perma.cc/YL3X-8ZWB] (statement of Broward County Sheriff Scott Israel) ("Based on the law, if someone [who has weapons] says I want to grow up and be a serial killer, there's nothing you can do about it . . . . We can't arrest for something a person is thinking about.").

[6] Krista Torralva, *UCF Student Who Idolized Mass Shooters Online Can Buy Guns, Judge Decides*, ORLANDO SENTINEL (Apr. 2, 2018), https://www.orlandosentinel.com/news/breaking-news/os-hearing-risk-protection-order-velasquez-20180402-story.html [https://perma.cc/J7G6-CNXT].

[7] *Id.*

enforcement, Velasquez answered a set of hypothetical questions by saying if he were to commit a mass shooting, he would likely do so where he had been bullied in the past: at the local middle or high school.[8] By this time, however, Florida law enforcement possessed a statutory tool that allowed it to act on these warning signs.[9] On March 16, 2018, Orlando police served Velasquez with a temporary *ex parte* risk protection order, which authorized them to search Velasquez's home, seize any firearms he possessed, and prevent Velasquez from purchasing any firearm for the duration of the order.[10]

In an effort to thwart tragedies like the Parkland shooting, more and more states are turning to the type of law used by Florida law enforcement in the Velasquez case.[11] The purpose behind these laws—commonly known as "red flag" laws—has largely been to reduce the prevalence of what has become one

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[8] *Id.* Velasquez also stated, "I can't imagine myself ever doing that. It would take a lot to push me over the edge." *Id.*

[9] *See* FLA. STAT. § 790.401 (2018) (providing for risk protection orders, which allow law enforcement to seize (and prevent future purchases of) firearms from an individual found to pose "a significant danger of causing personal injury" to themselves or others via a firearm).

[10] Temporary *Ex Parte* Risk Protection Order, City of Orlando v. Christian Velasquez, No. 2018-DR-3425-O (Fla. Cir. Ct. Apr. 2018); *see* Torralva, *supra* note 6 (noting that a Florida Circuit judge granted the order filed by Orlando city attorneys).

[11] *See* Ryan J. Foley, *Gun-seizure Laws Grow in Popularity Since Parkland Shooting*, ASSOCIATED PRESS (Feb. 10, 2019), https://www.apnews.com/3d5722abc06245b4b931933f253e3743 [https://perma.cc/PJD5-M4CS]; *see also* Sean Campbell et al., *Red Flag Laws: Where the Bills Stand in Each State*, THE TRACE (Feb. 25, 2020), https://www.thetrace.org/2018/03/red-flag-laws-pending-bills-tracker-nra/ [https://perma.cc/28D9-99DZ]. In the wake of the Parkland shooting, twelve states and the District of Columbia enacted red flag laws. COLO. REV. STAT. § 13-14.5-101 (2019); DEL. CODE ANN. tit 10 § 7701 (2018); D.C. CODE § 7-2510.01 (2019); FLA. STAT. § 790.401 (2018); HAW. REV. STAT. § 134-61 (2019); ch. 430 ILL. COMP. STAT. ANN. § 67/35 (West 2019); MD. CODE ANN. PUB. SAFETY § 5-604 (West 2018); MASS. GEN. LAWS ch. 140, § 131R (2018); NEV. REV. STAT. § 33.560 (2019); N.J. REV. STAT. § 2C:58-20 (2018); Extreme Risk Firearm Protection Order Act, S. 5, 2020 Leg., Reg. Sess. (N.M. 2020) N.Y. C.P.L.R. 6340 (MCKINNEY 2019); 8 R.I. GEN. LAWS § 8-8.3-2 (2018); VT. STAT. ANN. tit. 13, § 4054 (2018). In twenty-three additional states, red flag laws are either pending or have been rejected. Campbell et al., *supra*. Five states had red flag laws on the books before the Parkland shooting. CAL. PENAL CODE § 18150 (West 2020); CONN. GEN. STAT. ANN. § 29-38c (West 2020); IND. CODE ANN. § 35-47-14-2 (West 2020); OR. REV. STAT. ANN. § 166.527 (West 2020); WASH. REV. CODE ANN. § 7.94.030 (West 2020). At the federal level, Representative Salud Carbajal (CA-24) proposed legislation that would incentivize states to pass red flag laws by providing funding for those that do. Lindsey McPherson, *Democrats Push Bill They Say Could Have Prevented Parkland Shooting*, ROLL CALL (Feb. 16, 2018), https://www.rollcall.com/news/politics/democrats-push-bill-say-prevented-parkland-shooting [https://perma.cc/9YZ7-PGBU]. Senators Richard Blumenthal (CT) and Lindsey Graham (SC) have proposed similar legislation. Kristina Peterson, *Senate Panel Considers 'Red Flag' Gun Laws in Aftermath of Mass Shootings*, WALL ST. J. (Mar. 26, 2019), https://www.wsj.com/articles/senate-panel-considers-red-flag-gun-laws-in-aftermath-of-mass-shootings-11553601603 [https://perma.cc/JC6R-7ETF]. President Donald Trump has publicly supported state red flag laws and their companion federal legislation. Jordain Carney, *Graham to Offer Bipartisan 'Red Flag' Bill with Trump's Support*, THE HILL (Aug. 5, 2019), https://thehill.com/blogs/floor-action/senate/456205-graham-to-offer-bipartisan-red-flag-bill-with-trumps-support [https://perma.cc/6J8S-LX7U].

of the nation's most serious threats to public safety: mass shootings.[12] While homicide rates in the United States are generally decreasing, incidents of mass shootings are steadily increasing.[13] Since 2011, the frequency of mass shootings—defined by the FBI as shootings resulting in four or more fatalities—has tripled.[14] In 2019, there were thirty-six mass shootings, up from twenty-six in 2018.[15] Over fifty people died in U.S. mass shooting incidents in August of 2019 alone.[16]

Though red flag laws differ slightly from state to state—both in nomenclature and in substance—they all create a mechanism by which law enforcement can petition a court for an order restricting an individual's access to

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[12] *See* Matt Vasilogambros, *After Parkland, States Pass 50 New Gun-control Laws*, PEW CHARITABLE TR. (Aug. 2, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/08/02/after-parkland-states-pass-50-new-gun-control-laws [https://perma.cc/JY9J-UAM3] (citing mass shootings as the impetus for states' enacting red flag laws). Law enforcement experts consider mass shootings to be one of the most serious threats to public safety in the United States. *See, e.g.*, Meghan Keneally, *Mass Shootings 'Increasing' and Pose 'Most Serious Threat' in US, Expert Says*, ABC NEWS (Nov. 8, 2018), https://abcnews.go.com/US/mass-shootings-increasing-pose-threat-us-expert/story?id=59056868 [https://perma.cc/Q5XD-3W7D] (quoting former acting Department of Homeland Security undersecretary Jerry Cohen); Matt Zapotosky et al., *Barr Fields Questions on Mueller Probe, Independence from Trump at Attorney General Confirmation Hearing*, WASH. POST (Jan. 15, 2019), https://www.washingtonpost.com/world/national-security/barr-confirmation-hearing-trumps-attorney-general-nominee-likely-to-face-tough-questioning-today-from-senate-panel/2019/01/15/02467a16-15e0-11e9-803c-4ef28312c8b9_story.html?utm_term=.ea3780b8a4de [https://perma.cc/2P6A-WWTG] (quoting U.S. Attorney General William Barr as calling gun violence the "problem of our time").

[13] Philip Bump, *The Frequency of High-Fatality Mass Shootings Has Increased Significantly*, WASH. POST (Nov. 8, 2018), https://www.washingtonpost.com/politics/2018/11/08/frequency-high-fatality-mass-shootings-has-increased-significantly/?utm_term=.f1c4cd22f1d6 [https://perma.cc/Z9DS-DWXC]. U.S. mass shootings over the past decade occur three times as often as during prior periods. *See* Amy P. Cohen et al., *Rate of Mass Shootings Has Tripled Since 2011, Harvard Research Shows*, MOTHER JONES (Oct. 15, 2014), https://www.motherjones.com/politics/2014/10/mass-shootings-increasing-harvard-research/ [https://perma.cc/4V8B-LNRR] (finding that the average number of days separating mass shooting occurrences went from two hundred between 1983 and 2011 to sixty-four since 2011). This trend is occurring even though the U.S. gun homicide rate has decreased by half in the past twenty-five years. D'VERA COHN ET AL., PEW RESEARCH CTR., GUN HOMICIDE RATE DOWN 49% SINCE 1993 PEAK; PUBLIC UNAWARE 1 (2013).

[14] BEHAVIORAL ANALYSIS UNIT, FED. BUREAU OF INVESTIGATION, SERIAL MURDER: MULTIDISCIPLINARY PERSPECTIVES FOR INVESTIGATORS 7 (2005), https://www.fbi.gov/stats-services/publications/serial-murder#two [https://perma.cc/6XSU-7LTN]; Cohen et al., *supra* note 13.

[15] *Mass Shootings in 2019*, GUN VIOLENCE ARCHIVE, https://www.gunviolencearchive.org/reports/mass-shooting?page=12&year=2019 [https://perma.cc/6EWS-NV3E]. The year 2017 saw the highest annual total of gun deaths in the United States since 1968. Sarah Mervosh, *Nearly 40,000 People Died from Guns in U.S. Last Year, Highest in 50 Years*, N.Y. TIMES (Dec. 18, 2018), https://www.nytimes.com/2018/12/18/us/gun-deaths.html [https://perma.cc/27VH-XMX5].

[16] Neil Vigdor, *53 People Died in Mass Shootings in August Alone in the U.S.*, N.Y. TIMES (Aug. 31, 2019), https://www.nytimes.com/2019/08/31/us/us-mass-shootings.html [https://perma.cc/NAT2-A9LQ].

guns.[17] Most importantly, red flag laws apply to individuals deemed at risk of causing some *future* harm.[18]

Red flag laws are not without their critics.[19] All red flag laws authorize law enforcement to seize an individual's firearms temporarily before affording any type of notice or due process.[20] Some contain broad terms and elements—like "threat," "mental illness," and "near future"—that are vague or unde-

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[17] *See, e.g.*, CAL. PENAL CODE § 18150 (providing that law enforcement or an "immediate family member" may file initial petition for seizure of an individual's firearms); 8 R.I. GEN. LAWS § 8-8.3-2) (allowing law enforcement to file initial petition for seizure of an individual's firearms); VT. STAT. ANN. tit. 13, § 4054 (requiring the state's attorney's office or state attorney general to file initial petition).

[18] *See* Nathalie Baptiste, *What You Need to Know About Red Flag Gun Laws*, MOTHER JONES (Mar. 7, 2018), https://www.motherjones.com/politics/2018/03/what-you-need-to-know-about-red-flag-gun-laws/ [https://perma.cc/9WC4-GBHB] (stating that red flag laws allow a judge to issue an order permitting law enforcement to confiscate firearms from individuals deemed a threat to themselves or others). Red flag laws do not require an individual to be a felon or have been adjudicated mentally ill or involuntarily committed. *See, e.g.*, MD. CODE ANN. PUB. SAFETY § 5-604 (containing no requirement of official determination of mental illness or felony record); 8 R.I. GEN. LAWS § 8-8.3-5 (same); VT. STAT. ANN. tit. 13, § 4054 (same).

[19] *See* ACLU OF R.I., AN ANALYSIS OF 18-H 7688 AND 18-S 2492, RELATING TO EXTREME RISK PROTECTION ORDERS 3 (2018), http://riaclu.org/images/uploads/180302_analysis_RedFlagsLegislation.pdf [https://perma.cc/VT9M-U9EP] (pointing out several constitutional issues and vagueness problems with Rhode Island's proposed red flag law); Jim DeMint, Opinion, *Red Flag Laws to Fight Mass Shootings? Fine for an Ideal World, but We Don't Live in One*, USA TODAY (Sept. 9, 2019), https://www.usatoday.com/story/opinion/2019/09/09/red-flag-laws-mass-shootings-government-power-grab-jim-demint-column/2220820001/ [https://perma.cc/3CTE-CXB8] (arguing that red flag laws sound good in theory, but in practice trample individuals' due process rights and could lead to government overreach); Jessica Lipscomb, *Florida's Post-Parkland "Red Flag" Law Has Taken Guns from Dozens of Dangerous People*, MIAMI NEW TIMES (Aug. 7, 2018), https://www.miaminewtimes.com/content/printView/10602359 [https://perma.cc/5YZA-9PX4] (explaining gun rights advocacy group Florida Carry's opposition to Florida's red flag law); Joe Seyton, *Hundreds of Floridians Ordered to Surrender Guns Thanks to 'Red Flag' Law, Report Says*, REASON (July 31, 2018), https://reason.com/blog/2018/07/31/hundreds-of-floridians-ordered-to-surren [https://perma.cc/96ZP-L27Z] (detailing concerns of the Cato Institute). The National Rifle Association of America (NRA) initially opposed red flag laws; it then announced its qualified support for the laws. *Emergency Risk Protection Orders (ERPOs)*, NRA-ILA (Jan. 8, 2019), https://www.nraila.org/get-the-facts/emergency-risk-protection-orders-erpos/ [https://perma.cc/3Q4Z-EJTA]. However, the NRA has worked behind the scenes to sink legislative proposals in some state houses. *See, e.g.*, James Pindell, *Unlike Many Gun Measures, 'Red Flag' Laws Are Actually Passing. It Looks Like Mass. Will Be Next*, BOS. GLOBE (May 24, 2018), https://www.bostonglobe.com/metro/2018/05/24/unlike-many-gun-measures-red-flag-laws-are-actually-passing-looks-likes-mass-will-next/hSHxHWx0vckxMwr0rv7FEO/story.html [https://perma.cc/RT2K-4BWE] (detailing the NRA's opposition to Massachusetts's red flag law); Alex Yablon, *First, the NRA Watered Down a Red Flag Bill. Then It Mobilized to Kill It.*, THE TRACE (July 12, 2018), https://www.thetrace.org/2018/07/red-flag-laws-pennsylvania-nra-stephens/ [https://perma.cc/4MFT-Y8RV] (detailing the NRA's opposition to Pennsylvania's red flag law).

[20] *See, e.g.*, FLA. STAT. § 790.401 (authorizing law enforcement to temporarily confiscate an individual's firearms if a judge at an *ex parte* hearing finds the individual poses a danger to self or others); OR. REV. STAT. ANN. § 166.527 (same); VT. STAT. ANN. tit. 13, § 4054 (not requiring any notice to individual before law enforcement conducts a search); WASH. REV. CODE ANN. § 7.94.030 (same as Vermont).

fined.[21] Many contain no guidance on procedural minutiae that can bear heavily on the disposition of a proceeding, such as which code of procedure applies, whether hearsay evidence is admissible, and whether judges can grant continuances.[22] To be sure, the red flag law landscape seems fertile for lawsuits and constitutional challenges.[23]

Critics have also speculated that red flag laws may violate individuals' Second Amendment right to keep and bear arms.[24] Two state courts have considered such challenges and both upheld the respective laws.[25] In 2016, in *Hope v. State*, the Appellate Court of Connecticut held that the red flag law did

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[21] *See, e.g.*, FLA. STAT. § 790.401 (not defining the terms "acts or threats of violence," "seriously mentally ill" or "near future"); 8 R.I. GEN. LAWS § 8-8.3-2 (not defining the term "significant danger," despite ACLU of Rhode Island's complaints that the term could be construed by a judge to be satisfied solely because the individual owns a firearm); ACLU OF R.I., *supra* note 19, at 6.

[22] *See, e.g.*, CONN. GEN. STAT. ANN. § 29-38c (containing no guidance on any procedural rules); FLA. STAT. § 790.401 (same); 8 R.I. GEN. LAWS § 8-8.3-2 (same); VT. STAT. ANN. tit. 13, § 4054 (same); Amended Initial Brief of Appellant at 1, Davis v. Gilchrest Cty. Sheriff's Office, 280 So. 3d 524 (Fla. Dist. Ct. App. 2019) (No. 1D18-3938) (observing that Florida's red flag law is problematic in part because it became effective so quickly that law enforcement agencies, court clerks, and judges had no time to train or prepare for how to properly implement and uniformly apply the statute).

[23] *See, e.g.*, Hope v. State, 133 A.3d 519, 524 (Conn. App. Ct. 2016) (addressing a Second Amendment constitutional challenge to Connecticut's red flag law); *Davis*, 280 So. 3d at 528 (considering void for vagueness, due process, and Second Amendment challenges to Florida's red flag law); Redington v. State, 992 N.E.2d 823, 835 (Ind. Ct. App. 2013) (considering challenges that the Indiana red flag law is void for vagueness and violates the state constitution's Second Amendment analogue); Algernon D'Ammassa, *One Thing These Two New Mexico Sheriffs Agree On: 'Red Flag' Law Will End Up in Court*, LAS CRUCES SUN-NEWS (Mar. 1, 2020), https://www.lcsun-news.com/story/news/2020/03/01/new-mexico-red-flag-law-challenged-sheriffs-gov-lujan-grisham/4823861002/ [https://perma.cc/NU94-QS4F] (describing New Mexico sheriffs' opposition to the state's red flag law); Marty Johnson, *Conservative Group Sues Over Nevada's 'Red Flag' Gun Law*, THE HILL (Dec. 5, 2019), https://thehill.com/homenews/state-watch/473267-conservative-group-sues-over-nevada-red-flag-gun-law [https://perma.cc/TF87-K73Q] (describing a lawsuit brought in Nevada arguing Nevada's red flag law violates the federal and Nevada constitutional rights to a jury trial).

[24] *See* Tom Brewer, *Red Flag Law a Bad Idea*, RAPID CITY J. (Jan. 27, 2019), https://rapidcityjournal.com/community/chadron/opinion/red-flag-law-a-bad-idea/article_0347a199-140d-5fd0-ac71-ea12b2c91ed1.html [https://perma.cc/G3PA-FPHT] (voicing opposition as a Nebraska state senator); Michael Hammond, Opinion, *Kafkaesque 'Red Flag Laws' Strip Gun Owners of Their Constitutional Rights*, USA TODAY (Apr. 19, 2018), https://www.usatoday.com/story/opinion/2018/04/19/red-flag-laws-strip-gun-rights-violate-constitution-column/526221002 [https://perma.cc/S7K7-GEDB]; Gregg Re, *Colorado Enacts 'Red Flag' Law to Seize Guns from Those Deemed Dangerous, Prompting Backlash*, FOX NEWS (Apr. 14, 2019), https://www.foxnews.com/politics/sheriff-fires-back-after-colorado-enacts-red-flag-law-to-seize-guns-from-individuals-deemed-dangerous [https://perma.cc/6649-63LJ] (explaining how half of Colorado's sixty-four counties have passed resolutions declaring themselves "Second Amendment sanctuaries" opposed to the state's red flag law); Answers to Questions for the Record Posed to U.S. Attorney General Nominee William Barr Following the Senate Judiciary Committee Hearing, at 12 (Jan 27, 2019), https://www.judiciary.senate.gov/imo/media/doc/Barr%20Responses%20to%20QFRs.pdf [https://perma.cc/5XLD-QWR2] (including questioning from U.S. Senator John Cornyn (TX) about whether red flag laws infringe upon Second Amendment rights).

[25] *Hope*, 133 A.3d at 524–25; *Redington*, 992 N.E.2d at 833–35.

not implicate the Second Amendment and ended its inquiry there.[26] In 2013, in *Redington v. State*, the Indiana Court of Appeals evaluated a Second Amendment challenge under rational basis review and concluded the red flag law was constitutional.[27] This Note will evaluate those decisions within the current federal Second Amendment framework and suggest a different approach to considering facial and as-applied challenges to red flag laws.[28]

Part I of this Note provides a historical and legal background of red flag laws in four states—Connecticut, Indiana, California, and Florida—and examines the relevant case law in those states.[29] Part II explains the framework under which federal courts analyze Second Amendment challenges.[30] Part III discusses how federal courts have applied that framework to laws that prohibit or restrict the possession of firearms by individuals that society has deemed dangerous, and then discusses the two aforementioned state court decisions in light of this framework.[31] Part IV argues that courts considering a Second Amendment challenge to a red flag law should proceed with the analysis by finding that the law regulates individual conduct protected by the Second Amendment and should ultimately draw intermediate scrutiny.[32]

I. RED FLAG LAWS' HISTORICAL AND LEGAL BACKGROUND

In 2008, in its first meaningful foray into a Second Amendment question since 1939, the Supreme Court held in *District of Columbia v. Heller* that the Second Amendment guarantees an individual's fundamental right to keep and bear arms for self-defense in the home.[33] Two years later, in *McDonald v. City of Chicago*, the Court affirmed its ruling in *Heller* and incorporated the Second Amendment against the states.[34] Since these two landmark cases, laws aimed at reducing gun violence are predominately limited to preventing dangerous people from having guns.[35] As a result, red flag laws have become a popular

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[26] 133 A.3d at 524–25.

[27] 992 N.E.2d at 833–35.

[28] *See infra* notes 151–247 and accompanying text.

[29] *See infra* notes 33–114 and accompanying text.

[30] *See infra* notes 115–150 and accompanying text.

[31] *See infra* notes 151–212 and accompanying text.

[32] *See infra* notes 213–247 and accompanying text.

[33] 554 U.S. 570, 635 (2008). The Second Amendment states in its entirety: "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." U.S. CONST. amend. II. The Court had not meaningfully examined the Second Amendment since its decision seventy years prior in *United States v. Miller*. 307 U.S. 174, 183 (1939); *see* Linda Greenhouse, *Justices Rule for Individual Gun Rights*, N.Y. TIMES (June 27, 2008), https://www.nytimes.com/2008/06/27/washington/27scotuscnd.html [https://perma.cc/NSG3-R522].

[34] 561 U.S. 742, 750 (2010) (plurality opinion).

[35] *See* Jeffrey W. Swanson et al., *Gun Violence, Mental Illness, and Laws That Prohibit Gun Possession: Evidence from Two Florida Counties*, 35 HEALTH AFF. 1067, 1068 (2016) (explaining

approach among commentators because they allow law enforcement to remove firearms from individuals who have not been convicted of a crime and may not meet the criteria for involuntary psychiatric commitment.[36] Some red flag law proponents advocate for them because they take a symptom-based, behavioral approach to regulating possession and purchase of firearms instead of a diagnosis-based categorical approach.[37] Section A of this Part details the history, statutory construction, and case law surrounding Connecticut's red flag law.[38] Section B discusses Indiana's red flag law.[39] Section C examines California's red flag law.[40] Section D considers Florida's red flag law.[41]

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that, since *Heller* and *McDonald*, "the role of law is limited in preventing gun violence mainly to keeping guns out of the hands of dangerous individuals").

[36] *See, e.g.*, Kelly Roskam, *The Gun Violence Restraining Order: An Opportunity for Common Ground in the Gun Violence Debate*, 34 DEV. MENTAL HEALTH L. 1, 22 (2015) (expressing support for red flag laws); Frederick Vars, *Symptom-Based Gun Control*, 46 CONN. L. REV. 1633, 1643 (2014) (approvingly discussing Indiana's red flag law); Roxana Rudolph, Note, *Balancing Public Safety with the Rights of the Mentally Ill: The Benefit of Behavioral Approach in Reducing Gun Violence in Tennessee*, 45 U. MEM. L. REV. 671, 685–687, 709 (2015) (arguing in favor of a behavioral approach and citing Indiana's red flag law as a positive example); Editorial Board, Opinion, *There's Something States Can Do About Gun Violence: 'Red-flag' Laws*, WASH. POST (Mar. 1, 2018), https://www.washingtonpost.com/opinions/theres-something-states-can-do-about-gun-violence-red-flag-laws/2018/03/01/22ddf06c-1cc4-11e8-ae5a-16e60e4605f3_story.html?utm_term=.a5c3ee8f75ce [https://perma.cc/66CV-DB9G] (advocating for red flag laws as sensible solutions to gun violence at the state level); David French, *A Gun-Control Measure Conservatives Should Consider*, NAT'L REV. (Feb. 16, 2018), https://www.nationalreview.com/2018/02/gun-control-republicans-consider-grvo/ [https://perma.cc/4NTC-JTML] (discussing why red flag laws are a sensible approach that respect due process and the Second Amendment).

[37] *See* Vars, *supra* note 36, at 1639–42 (presenting an empirical argument for the behavioral approach and discussing Indiana's red flag law); Rudolph, *supra* note 36, at 685–87 (arguing for the behavioral approach instead of the categorical approach). Statutes based on the behavioral approach allow for a holistic examination of the behavior of an individual and consider violent actions or mental health issues when assessing whether to disqualify someone from possessing or purchasing firearms. Emily Wajert, Note, *Navigating the Rights of the Mentally Ill and Second Amendment: Defining Responsibility, Balancing Safety, and Weighing Constitutional Rights*, 19 U. PA. J. CONST. L. 731, 742–43 (2015). In a categorical model, those determined by mental health professionals to have a diagnosis classified as dangerous are then categorically prohibited from possessing or purchasing firearms. *Id.* Critics of the categorical approach argue that the mental health diagnoses that such statutes typically rely on are frequently not trustworthy, and, moreover, are not accurate predictors of whether the patient will engage in violent behavior in the future. *Id.* at 742. In fact, studies continuously show that patients with mental disorders are not more violent, unless they are using drugs, in which case their propensity for violence increases significantly. *See* Marie E. Rueve & Randon S. Welton, *Violence and Mental Illness*, 5 PSYCHIATRY 34, 39, 46 (2008) (discussing one study that "discovered that the combination of alcoholism and antisocial personality disorder increased the odds of women committing homicide 40 to 50 fold, while the diagnosis of schizophrenia increased the risk only 5 to 6 fold").

[38] *See infra* notes 42–67 and accompanying text.

[39] *See infra* notes 68–85 and accompanying text.

[40] *See infra* notes 86–98 and accompanying text.

[41] *See infra* notes 99–114 and accompanying text.

A. Connecticut: The Nation's First Red Flag Law

On March 6, 1998, an employee of the Connecticut Lottery Corporation murdered four coworkers with a handgun and a knife before killing himself.[42] The shooter, Matthew Beck, was a troubled individual; police previously had been called to his apartment after he allegedly attempted to commit suicide and he received treatment for depression.[43] In response to the public outcry over the shooting, state legislators passed Public Act 99-212, making Connecticut the first state to authorize the seizure of firearms from allegedly dangerous individuals who are not otherwise legally prohibited from purchasing or possessing firearms.[44]

The law was written purposefully to exclude mental illness from the list of factors a judge may consider in deciding whether to order the removal of an individual's firearms.[45] Instead, the legislative scheme is based solely on an assessment of whether an individual poses a risk of imminent personal injury to himself or others—regardless of that individual's mental health history.[46] Despite initial opposition by gun rights advocates and a vigorous debate in the Connecticut legislature, the law eventually passed with bipartisan support.[47]

Under the statute, a state's attorney, assistant state's attorney, or two law enforcement officers (petitioner(s)) may submit a complaint under oath to a superior court judge alleging there is probable cause to show: (1) the subject of the complaint (respondent) poses a risk of imminent harm to himself or others; and (2) that the respondent possesses one or more firearms.[48] The petitioners

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[42] Jonathan Rabinovitz, *Rampage in Connecticut: The Overview; Connecticut Lottery Worker Kills 4 Bosses, Then Himself*, N.Y. TIMES (Mar. 7, 1998), https://www.nytimes.com/1998/03/07/nyregion/rampage-connecticut-overview-connecticut-lottery-worker-kills-4-bosses-then.html [https://perma.cc/V256-H9ST].

[43] *Id.*

[44] CONN. GEN. STAT. ANN. § 29-38c; Jeffrey Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-Based Removal Law: Does It Prevent Suicides?*, 80 LAW & CONTEMP. PROBS. 179, 185 (2015). Lawmakers crafting the legislation were concerned about how to balance the interest of identifying potentially dangerous individuals with the interest of maintaining the confidentiality of those individuals' mental health. Swanson et al., *supra*, at 186.

[45] Swanson et al., *supra* note 44, at 186. One initial proposal would have required a mental health professional to evaluate the individual before the individual's firearms could be seized. *Id.* Lawmakers rejected that proposal because they worried it would stigmatize the mentally ill. *Id.*

[46] CONN. GEN. STAT. ANN. § 29-38c. Such an approach was deemed less stigmatizing to the mental health community. Swanson et al., *supra* note 44, at 186 n.41.

[47] *See* Swanson et al., *supra* note 44, at 187 n.42 (describing how the legislation eventually garnered support from more conservative lawmakers who had initially opposed the bill). The Connecticut House of Representatives approved the legislation 103 to 47, which included a 28–19 vote in favor among Republicans. *Id.* The vote was 29–6 in the Senate, and garnered 11 Republican votes. *Id.* Still, some pro-gun rights legislators were not convinced and remained skeptical of the measure; state representative Richard Tulisano suggested that the bill constituted an "invidious encroachment by men of zeal, well meaning, but without understanding," on individual liberties. State v. Avery, 1999 WL 1207153, at *3 (Conn. Super. Ct. Nov. 30, 1999) (citing Tulisano who quoted Justice Brandeis).

[48] CONN. GEN. STAT. ANN. § 29-38c(a).

may only file the complaint after they have conducted an independent investigation to establish that probable cause exists and that there is no reasonable alternative to prevent the respondent from causing the imminent harm.[49]

In determining whether such probable cause exists, the judge must consider any recent threats, acts of violence, or cruelty to animals by the respondent.[50] The judge may also consider: reckless gun use or display; a history of the use, attempted use, or threatened use of physical force against other persons; prior involuntary psychiatric hospitalization; and illegal use of drugs or alcohol abuse.[51] The hearing at which the judge makes her initial decision is conducted *ex parte*.[52]

If the judge finds probable cause that the respondent poses a risk of imminent harm and grants the order (risk warrant), law enforcement may proceed to the residence of the respondent and conduct an unannounced search of the premises for firearms and ammunition.[53] Within fourteen days of the firearm removal, the court must hold a second hearing.[54] At this second hearing, the respondent may present evidence and cross-examine witnesses, and the judge must determine whether the firearms should be returned to the respondent or retained by the state for an additional year.[55]

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[49] *Id.* § 29-38c(b). State representative Michael Lawlor explained that an "independent investigation" should "require the police to go out and talk to other witnesses to find out if, in fact, the allegations [being] made [are] true or can be corroborated in any way. In other words, not to just take the word of one individual for it, but to go out and attempt to corroborate it." *Avery*, 1999 WL 1207153, at *4 (alterations in original).

[50] CONN. GEN. STAT. ANN. § 29-38c(b).

[51] *Id.*

[52] *See id.* § 29-38c(c) (preventing the court at which the petition is filed from disclosing any information in the petition to anyone, including the respondent).

[53] *Id.* In practice, law enforcement usually takes the respondent's guns initially as part of "securing the scene" and then files the petition for a risk warrant with a judge after the confiscation of firearms. Swanson et al., *supra* note 44, at 188 n.52. Upon the execution of a risk warrant, law enforcement must also make a decision about what to do with the respondent: arrest if there is evidence of a crime; transport to a hospital for a mental health evaluation; or just leave the person alone. *Id.* at 188. Research shows that, in Connecticut, respondents are transferred to the hospital for psychiatric evaluation 55% of the time. Reena Kapoor et al., *Resource Document on Risk-Based Gun Removal Laws*, 37 DEV. MENTAL HEALTH L. 6, 10 (2018).

[54] CONN. GEN. STAT. ANN. § 29-38c(d).

[55] *Id.* At this second hearing, the state must prove by "clear and convincing" evidence that the respondent poses an imminent risk of harm. *Id.* This is a higher standard of proof than the standard at the initial *ex parte* hearing, which is "probable cause." *See id.* § 29-38c(b) (listing "clear and convincing" as the standard instead of "probable cause"). Connecticut courts generally—60% of the time—find that the state has sustained its burden at this second hearing and order the firearms retained for a year. Kapoor et al., *supra* note 53, at 5. In only 10% of follow-up hearings, Connecticut courts find that the state has not sustained its burden and order the firearms returned. *Id.* The rest of the time, the study found that Connecticut courts order the guns destroyed or transferred to an individual known to the respondent who can legally possess the firearm. *Id.*

Initially, law enforcement tended not to use the statute.[56] Nonetheless, following the mass shooting at Virginia Tech in 2007, the annual number of risk warrants granted increased to about one hundred per year.[57] Researchers have found it difficult, however, to determine the effectiveness of Connecticut's law in preventing mass shootings and whether the law has reduced suicide rates in the state.[58]

Perhaps unsurprisingly, given its age, Connecticut's red flag law has been the subject of the most published court opinions.[59] A Connecticut appeals court has upheld the constitutionality of the law.[60] In 2016, in *Hope v. State*, the plaintiff claimed that the law facially violated the Second Amendment of the U.S. Constitution.[61] After reviewing the Supreme Court's decision in *Heller*, the Appellate Court of Connecticut rejected the plaintiff's claim and found that the law did not violate the Second Amendment.[62] In addition, Connecticut courts have attempted to define the "risk of imminent harm" standard required for a judge to grant the risk warrant.[63] In 2007, in *In re Nardelli-Firearm Safety*

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[56] Swanson et al., *supra* note 44, at 189. This may have been due to how much time it takes law enforcement to file a complaint for a risk warrant with a superior court judge. *Id.*

[57] *See id.* (constituting a five-fold increase).

[58] Aaron Kivisto & Peter Phalen, *Effects of Risk-Based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981–2015*, 69 PSYCHIATRIC SERVS. 855, 861 (2018); Swanson et al., *supra* note 44, at 206. Researchers in one study estimate that the law may have prevented 128 firearm suicides between 2007 and 2015. *Id.* Nonetheless, the study found the law coincided with an estimated increase of 140 non-firearm suicides over the same period. *Id.*

[59] *See, e.g.*, *Hope*, 133 A.3d at 519; State v. Reddy, 42 A.3d 406, 409 (Conn. App. Ct. 2012); *In re* Belanger, No. CV17890, 2017 WL 5707658, at *1 (Conn. Super. Ct. Nov. 1, 2017); State v. Zarembski, No. CV13003765S, 2016 WL 6121394, at *1 (Conn. Super. Ct. Sept. 14, 2016).

[60] *Hope*, 133 A.3d at 519.

[61] *Id.* at 524. In *Hope*, the police were called to the plaintiff's home to investigate a possible burglary. *Id.* at 522. After searching the house, they found no intruder or evidence of forced entry. *Id.* But the plaintiff insisted that he heard voices coming from his basement and that unknown individuals were attempting to hack into his computer. *Id.* After the plaintiff's wife informed police that plaintiff had become increasingly agitated and delusional, and that she returned home that night to find him with a rifle in his hands, police removed the plaintiff's firearms from the premises. *Id.* at 523. Following the grant of an initial *ex parte* risk warrant, the trial court then found by clear and convincing evidence the plaintiff posed an imminent risk of harm to himself and others and ordered the firearms retained for a year; the plaintiff appealed. *Id.*

[62] *Id.* at 524–25. The court found that the law did not infringe upon the plaintiff's Second Amendment right. *Id.* See *infra* notes 203–212 for further discussion of the court's analysis.

[63] *In re* Nardelli-Firearm Safety Hearing, 918 A.2d 1081, 1084 n.3 (Conn. Super. Ct. 2007). The legislative history behind the law indicates that the question of imminence was of concern to the legislators. *Avery*, 1999 WL 1207153, at *4 (citing to the legislative record). Specifically, during debate on the floor of the Connecticut House of Representatives, state representative Ronald San Angelo indicated,

> [T]he standard is set extremely high. Imminent danger to himself or to others which means that he has to be getting ready to either kill himself or to kill somebody else . . . . I believe that any reasonable judge in the State of Connecticut will be extremely cautious in putting this provision forward, will look very closely for absolute purposes of

Hearing, the Superior Court of Connecticut denied the state's petition to extend the risk warrant to a year because the state had not shown that the respondent's risk of harm to himself or others was imminent.[64] Referring to the statute's legislative history, the court concluded that imminent means "anywhere from hours to a few days in time."[65] Connecticut courts have also taken a strict approach to the statute's requirement that the second hearing be held fourteen days after the initial removal of the firearms following the *ex parte* hearing.[66] In 2012, in *State v. Reddy*, the Connecticut appeals court denied the state's petition for an extended risk warrant because the state had failed to schedule the second hearing within the required fourteen days.[67]

B. Indiana: The Jake Laird Law

In January of 2004, paramedics called Indianapolis police to help them with a combative patient.[68] Police placed the patient—thirty-three year-old Kenneth Anderson—under detention at a local hospital and confiscated a large quantity of firearms and ammunition from his residence.[69] Upon release from the hospital, Anderson sought the return of his firearms; in the absence of any legal authority to retain the firearms, police returned them to Anderson in March of 2004.[70] Only five months later—using one of the guns that had been returned to him—Anderson went on a shooting rampage, killing his mother, Officer Jake Laird, and injuring four other police officers.[71]

The next year, the Indiana General Assembly passed by wide margins a red flag law known as the "Jake Laird Law."[72] The law grants two mechanisms

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> legislative intent, [and the language] makes it absolutely clear that this is not intended to be used very often, but only in very rare extreme situations.

Id. at *5.

[64] *In re Nardelli-Firearm Safety Hearing*, 918 A.2d at 1084.

[65] *Id.* at 1084 n.3; *see Avery*, 1999 WL 1207153, at *4 (discussing Connecticut state senator George Jepsen's statements on the meaning of "imminent").

[66] *Reddy*, 42 A.3d at 413.

[67] *Id.*; *see also In re* Zordan Firearms Safety Hearing, No. CV1814203, 2013 WL 2947311, at *3 (Conn. Super. Ct. May 23, 2013) (denying the state's petition for failure to file within the required fourteen days).

[68] *Indiana AG Reminds Police, Prosecutors of Law Allowing Officers to Take Guns from 'Dangerous' People*, CBS4 (Feb. 21, 2018), https://cbs4indy.com/2018/02/21/indiana-ag-reminds-police-prosecutors-of-law-allowing-officers-to-take-guns-from-dangerous-people/ [https://perma.cc/XV35-ASKR].

[69] *Id.*; Fatima Hussein & Ryan Martin, *Indiana's 'Red Flag' Gun Law Is Getting National Attention. But Does It Work?*, INDIANAPOLIS STAR (Feb. 22, 2018), https://www.indystar.com/story/news/2018/02/22/indianas-red-flag-gun-law-getting-national-attention-but-does-work/355132002/ [https://perma.cc/2VHE-TNWB].

[70] Hussein & Martin, *supra* note 69.

[71] *Id.*

[72] *Id.* The measure was extremely popular in the Indiana General Assembly; the House passed it 91–0 and the Senate passed it 48–1. *Id.*

by which law enforcement can remove firearms from individuals deemed dangerous: (1) by obtaining a warrant from a judge before the seizure; or (2) through a warrantless seizure, followed by the submission of an affidavit of cause to be reviewed by a judge.[73]

To obtain a warrant, law enforcement must present evidence to support a judicial finding that probable cause exists to believe the subject of the warrant is "dangerous" and in the possession of a firearm.[74] After obtaining the warrant and executing the search, law enforcement must file a return with the court indicating the warrant was served and detailing what was taken.[75] If a police officer executes a warrantless firearm search and seizure from an individual she believes dangerous, the officer must submit to the judge a written statement describing the basis for the officer's belief that the individual is dangerous.[76] If the judge then finds there is probable cause to believe the individual is indeed dangerous, the court must order the law enforcement agency to retain the firearms.[77]

Within fourteen days from documentation of the seizure—made with or without a warrant—the court must conduct a hearing to determine whether the seized firearm should be returned to the individual or retained by law enforcement.[78] At this second hearing, the respondent may present evidence and cross-examine witnesses.[79] To retain the respondent's firearms, the state must prove by clear and convincing evidence that the respondent is still "dangerous" with-

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[73] IND. CODE ANN. § 35-47-14-2; § 35-47-14-3(a). By providing for a warrantless seizure, Indiana's red flag differs from Connecticut's—at least theoretically. *Compare id.* § 35-47-14-3(a), *with* CONN. GEN. STAT. ANN. § 29-38c. In practice, however, Connecticut law enforcement frequently remove a respondent's firearms and file for a risk warrant after the removal. Swanson et al., *supra* note 44, at 186.

[74] IND. CODE ANN. § 35-47-14-2(3). Under the statute, an individual is "dangerous" if:

> (1) the individual presents an imminent risk of personal injury to the individual or to another individual; or
> (2) the individual may present a risk of personal injury to the individual or to another individual in the future and the individual:
> (A) has a mental illness (as defined in IC 12-7-2-130) that may be controlled by medication, and has not demonstrated a pattern of voluntarily and consistently taking the individual's medication while not under supervision; or
> (B) is the subject of documented evidence that would give rise to a reasonable belief that the individual has a propensity for violent or emotionally unstable conduct.

Id. § 35-47-14-1(a). Noteworthy is the statute's reduced standard for those individuals with both a history of mental illness and who have demonstrated a pattern of avoiding taking their medication—these individuals may be subject to the warrant on a showing that they present a risk of injury to themselves or others "in the future," rather than an "imminent risk" of injury. *Id.*

[75] *Id.* § 35-47-14-4.

[76] *Id.* § 35-47-14-3(a).

[77] *Id.* § 35-47-14-3(b). If the court finds there is not probable cause to believe the individual is dangerous, the court must order the state to return the respondent's firearms. *Id.*

[78] *Id.* § 35-47-14-5(a).

[79] *Id.* § 35-47-14-6(b).

in the meaning of the statute.[80] Researchers have estimated that Indiana's red flag law has contributed to a 7.5% decrease in firearm suicides in the state since it was enacted.[81]

Indiana's red flag law has been the subject of two major decisions by Indiana courts.[82] In 2013, in *Redington v. State*, the Indiana Court of Appeals upheld the state's red flag law under rational basis review in the face of the plaintiff's challenge under the Indiana state constitution's Second Amendment analogue.[83] In 2014, in *Rebolledo v. Eden*, the U.S. District Court for the Southern District of Indiana found that Indiana's red flag law does not authorize law enforcement to seize firearms from an individual who shares residence with a person perceived to be dangerous.[84] In so finding, the court also clarified that an individual's diagnosis of a mental illness does not automatically establish that individual as "dangerous" within the statutory definition.[85]

C. California: Immediate Family Members as Petitioners

In April of 2014, Chin Rodger, mother of Elliot Rodger, called her son's therapist and expressed concerns about his welfare.[86] The therapist communi-

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[80] *Id.* If the state meets this burden, it may retain the respondent's firearm(s) until the court orders them returned or otherwise disposed of. *Id.* § 35-47-14-6(b)–(c). After 180 days, the respondent may petition the court for a hearing to determine whether he or she is still "dangerous"; if the respondent proves by preponderance of the evidence that she is no longer dangerous, the court must order law enforcement to return the firearms. *Id.* § 35-47-14-8(a). This right to bring a reinstatement action is another difference between the Indiana and Connecticut laws. *Compare* IND. CODE ANN. § 35-47-14-8(a), *with* CONN. GEN. STAT. ANN. § 29-38c. If, however, the respondent fails to meet this burden, the respondent may not file a subsequent appeal of the order until at least 180 days after the date on which the court denied the first appeal. IND. CODE ANN. § 35-47-14-8(f).

[81] Kivisto & Phalen, *supra* note 58, at 861 (presenting evidence suggesting that the law prevented 383 firearm suicides in its first ten years, while contributing to forty-four non-firearm suicides).

[82] Rebolledo v. Eden, 12 F. Supp. 3d 1125, 1126 (S.D. Ind. 2014); *Redington*, 992 N.E.2d at 823.

[83] 992 N.E.2d at 833–35. The plaintiff in *Redington* was found by police on the third-floor of a Bloomington, Indiana parking garage looking through binoculars down on the streets below. *Id.* at 825. He was armed with two firearms and had another in his car. *Id.* at 826. He told police he had come to Bloomington to avenge Lauren Spierer—who disappeared in 2011 and is presumed dead by law enforcement—and that he was "looking at or for people and at buildings and at lights." *Id.* The officer who conducted the interview reported that the plaintiff was "very delusional." *Id.* at 827. The officers executed a warrantless seizure of the plaintiff's firearms and obtained a risk warrant to search his home for additional firearms. *Id.* The officers then filed a petition for a hearing with the court pursuant to § 35-47-14-5. *Id.*

[84] 12 F. Supp. 3d at 1135–36.

[85] *Id.* at 1136. The court explained that petitioners would have to make a showing that the respondent has a mental illness that may be controlled by medication, but has not been voluntarily taking the medicine. *Id.* The court also warned that the law does not give officers "carte blanche" to seize firearms from anyone they deem to be potentially dangerous. *Id.* In all circumstances, when executing a warrantless seizure, officers must operate with the knowledge that they must then convince a judge that probable cause exists to justify the police retaining possession of the firearm. *Id.*

[86] Adam Nagourney, *Parents' Nightmare: Futile Race to Stop Killings*, N.Y. TIMES (May 25, 2014), https://www.nytimes.com/2014/05/26/us/parents-nightmare-failed-race-to-stop-killings.html

cated Chin's concerns to law enforcement and officers visited Elliot's apartment.[87] After a brief conversation with Elliot, the officers determined that he did not meet the criteria for an emergency involuntary commitment and thus had no legal basis to search his apartment or take further action.[88] Three weeks later, Elliot carried out a mass shooting in Isla Vista, California that left six dead and thirteen others wounded.[89]

In the months following the Isla Vista shooting, the California State Legislature adopted its own red flag law, which provides for the issuance of "gun violence restraining orders" (GVROs).[90] GVROs are similar to the risk war-

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[https://perma.cc/4T7G-ZC7V]. Chin Rodger had stumbled across several concerning videos posted by Elliot to YouTube. Joe Mozingo, *Frantic Parents of Shooting Suspect Raced to Isla Vista During Rampage*, L.A. TIMES (May 25, 2014), https://www.latimes.com/local/lanow/la-me-ln-frantic-parents-isla-vista-shootings-20140525-story.html [https://perma.cc/S6PE-CLPL].

[87] Mozingo, *supra* note 86.

[88] *See* Harold Pollack, *Why Law Enforcement Was Powerless to Stop Elliot Rodger from Buying Guns*, WASH. POST (May 29, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/05/29/why-law-enforcement-was-powerless-to-stop-elliot-rodger-from-buying-guns/?utm_term=.5a68498a751a [https://perma.cc/LA67-2HD7] (explaining that Rodger had no criminal background or diagnosis of mental illness, and law enforcement did not find him to meet the criteria required for an involuntary civil commitment); *Face the Nation* (CBS television broadcast May 25, 2014), https://www.cbsnews.com/news/elliot-rodger-long-concealed-mental-health-issues-sheriff-says/ [https://perma.cc/L36X-LWKF] (featuring Santa Barbara County Sheriff Bill Brown explaining why his deputies did not see reason to subject Rodger to involuntary commitment or search his apartment). By the time of the apartment visit by law enforcement, Rodger had acquired several firearms and a stockpile of ammunition. Nagourney, *supra* note 86. In a manifesto posted online before the shooting, Rodger said of the meeting with law enforcement,

> I had the striking and devastating fear that someone had somehow discovered what I was planning to do, and reported me for it. If that was the case, the police would have searched my room, found all of my guns and weapons, along with my writings about what I plan to do with them.

Holly Yan et al., *California Mass Killer Thought Plan Was Over During April Visit by Deputies*, CNN (May 27, 2014), https://www.cnn.com/2014/05/25/justice/california-shooting-deaths/ [https://perma.cc/87CU-LL2J].

[89] Adam Nagourney, *Video Rant, Then Deadly Rampage in California Town*, N.Y. TIMES (May 25, 2014), https://www.nytimes.com/2014/05/25/us/california-drive-by-shooting.html [https://perma.cc/63A4-UYNG].

[90] CAL. PENAL CODE § 18150. State senator Nancy Skinner's report of the legislation to the California Senate Committee on Public Safety included an article detailing the Isla Vista shooting—strongly suggesting the legislation was passed in direct response to the shooting. NANCY SKINNER, S. COMM. ON PUB. SAFETY, BILL ANALYSIS OF GUN VIOLENCE RESTRAINING ORDERS, AB 1014, Reg. Sess., at S (Cal. 2014), http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1001-1050/ab_1014_cfa_20140623_104818_sen_comm.html. In addition, in the wake of the shooting, U.S. Senator Dianne Feinstein (CA) proposed federal legislation that would provide funding to incentivize states to adopt red flag laws after the Isla Vista shooting. Press Release, Senator Dianne Feinstein, Feinstein, Boxer, Capps Introduce Bill to Help Families Prevent Gun Violence (June 5, 2014), https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=3b6bf98e-674f-4529-93c7-4ccc3e83a758 [https://perma.cc/T8DH-H435]. Skinner's report to the Committee on Public Safety stated that the proposed legislation was modeled on California's domestic violence restraining order system. SKINNER, *supra*, at R. The report noted that the standard for requesting a gun violence restraining order (GVRO) would

rants of Connecticut and Indiana, with one major exception that responded directly to the circumstances of the Isla Vista shooting: immediate family members can file them, in addition to law enforcement.[91]

The California statutory scheme provides for three forms of GVROs.[92] The first form is a temporary emergency GVRO that can be sought at any time of the day or night but only by a law enforcement officer.[93] The second form is an *ex parte* GVRO that can be sought by a law enforcement officer or an immediate family member during normal court hours.[94] The third form is a GVRO issued after notice and hearing that, if granted by a judge, compels the

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be satisfied by a more "attenuated" showing of future significant risk than would the standard involved in issuing a domestic violence restraining order. *Id.* at G. In the report, some questions seeking to address the law's constitutionality went unanswered. *See id.* at H (failing to substantively respond to questions such as, "Is the standard 'significant risk of personal injury to himself, herself, or others' vague?" and, "Is it constitutional to temporarily deprive a person of their Second Amendment rights based on a finding that the person poses a 'significant risk of personal injury to himself, herself, or others?'").

[91] CAL. PENAL CODE § 18150(a)(1). As defined in the statute, "immediate family member" includes: spouse, domestic partner, parent, child, any person related by affinity within the second degree, or any other person who regularly resides in the household. *Id.* § 18150(a)(2) (using the same definition of "immediate family member" as CAL. PENAL CODE § 422.4). In 2019, California Governor Gavin Newsom signed into law a provision that adds employers, co-workers, and some high school and college staff to the list of individuals who can seek a GVRO. Bryan Anderson, *California Employers, Schools Can Now Seek Gun Restraining Orders on 'Dangerous' Individuals*, SACRAMENTO BEE (Oct. 11, 2019), https://www.sacbee.com/news/politics-government/capitol-alert/article235959727.html [https://perma.cc/UC25-QKVE]. The legislation goes into effect on September 1, 2020. *Id.*

[92] *See* CAL. PENAL CODE § 18125 (providing for temporary emergency GVROs); *id.* § 18150 (providing for *ex parte* GVROs); *id.* § 18170 (providing for a GVRO issued after notice and hearing).

[93] *Id.* § 18125; Roskam, *supra* note 36, at 9. A temporary emergency GVRO may be granted by the judge on an *ex parte* basis if the judge finds there is reasonable cause to believe that the respondent poses an "immediate and present danger of injury to self or others by having a firearm in his or her possession and that less restrictive alternatives have been ineffective, inadequate, or inappropriate." CAL. PENAL CODE § 18125(a). The temporary emergency GVRO prohibits the respondent from possessing or purchasing a firearm and expires twenty-one days after the date the order is issued. *Id.* § 18125(b).

[94] CAL. PENAL CODE § 18150(a)(1). A judge may issue an *ex parte* GVRO if the petitioner demonstrates that there is a substantial likelihood that (1) the respondent "poses a significant danger, in the near future, of causing personal injury" to the subject of the petition or another "by having in [their] custody or control, owning, purchasing, possessing, or receiving a firearm;" and (2) the *ex parte* GVRO "is necessary to prevent personal injury to the subject of the petition or another because less restrictive alternatives either have been tried and found to be ineffective, or are inadequate or inappropriate for the circumstances." *Id.* § 18150(b)(1)–(2). In making that determination, the judge *must* consider: (a) recent threats of violence or acts of violence to himself or others; (b) recent violations of protective orders; (c) conviction for a violent crime; and (d) pattern of violent acts or threats within the last twelve months. *Id.* § 18155(b)(1). The court *may* also consider other evidence of an increased risk for violence, such as: (a) past acts of brandishing a gun; (b) threatened use or actual use of violent force against another; and (c) evidence of recent acquisitions of firearms. *Id.* § 18155(b)(2). As with the temporary emergency GVRO, the *ex parte* GVRO lasts for twenty-one days, after which a judge must either dissolve it or hold a hearing to determine whether it should be extended. *Id.* § 18165(c).

state to retain the respondent's firearms for one year.[95] Though the GVRO statute was passed in 2016, news reports and county data suggest it has been infrequently used by California law enforcement and prosecutors.[96]

No California court has published a decision addressing the constitutionality of GVROs, but the California Court of Appeal did consider a Second Amendment challenge to a similar statute authorizing law enforcement to seize and retain firearms from individuals detained for medical examination under the state's involuntary civil commitment statute.[97] California's Court of Appeal held that the law did not violate the Second Amendment because individuals whose firearms are seized as a result of their involuntary civil commitment under Section 8102 of the California Penal Code fall outside the scope of the Second Amendment's protections.[98]

D. Florida: A Quick Response to Parkland

Florida's red flag statute was signed into law twenty-three days after the Parkland shooting—a testament to the degree of public outrage in a state that had not passed a single piece of legislation tightening firearm regulations since 1996.[99] Law enforcement immediately put the red flag law to use.[100] In

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[95] *Id.* § 18170. A judge may issue the GVRO after notice and hearing only if the petitioner has proven by clear and convincing evidence that the respondent: (1) poses a significant risk of personal injury to himself or another by possessing or purchasing a firearm; and (2) that there are no less restrictive alternatives that could mitigate the risk. *Id.* § 18175(b)(1)–(2). If the GVRO after notice and hearing is granted, the respondent has one opportunity within the year to request a hearing to show there is no longer clear and convincing evidence to demonstrate that the above two elements are satisfied. *Id.* § 18185(a).

[96] *See* Alexei Koseff, *'Best Tool' to Prevent Gun Violence Is Rarely Used in California*, SACRAMENTO BEE (Mar. 29, 2018), https://www.sacbee.com/latest-news/article206994229.html [https://perma.cc/A7L5-3HRX] (citing data to show that as of the end of 2017, judges in twenty-six of California's fifty-eight counties had not issued a single GVRO—of any type).

[97] City of San Diego v. Boggess, 157 Cal. Rptr. 3d 644, 648 (Ct. App. 2013). The challenged statute was CAL. WELF. & INST. CODE § 8102 (West 2020). *Id.* at 650. California's involuntary civil commitment statute allows the state—upon a showing of probable cause that the individual has a mental disorder—to commit such individual to a mental health facility for a seventy-two-hour period of evaluation and treatment. CAL. WELF. & INST. CODE § 5150.

[98] *Boggess*, 157 Cal. Rptr. 3d at 653–54. In so holding, the court affirmed its decision in *Rupf v. Yan*, a case that was decided before *Heller*. *Id.* (citing 85 Cal. App. 4th 411, 416–417 (2000)). The *Boggess* court examined the Supreme Court's Second Amendment decisions and concluded, with little analysis, that § 8102 was among those "presumptively lawful" categories of regulations listed in *Heller*. *See id.* at 652–53 (explaining that "both *Heller* and *McDonald* identified an expressly nonexclusive list of traditional limitations on the right to bear arms, characterizing them as 'presumptively lawful regulatory measures'" and concluding that "Section 8102 . . . is such a regulatory measure"). It did not apply the two-step analysis, discussed *infra* at notes 131–142, that federal courts use to evaluate whether a law passes constitutional muster. *See id.*

[99] Lipscomb, *supra* note 19. The passage of Florida's red flag law, which was part of a legislative package enacting many gun control laws called the Marjory Stoneman Douglas High School Public Safety Act, was welcomed as a massive legislative win for gun control advocates in a state historically

Broward County alone, Florida law enforcement filed 108 petitions under Florida's red flag law between March and July of 2018—about three-quarters of which were granted.[101] An October 2019 news story reported that as many as 2,500 Floridians have had firearms removed from their possession since the law was passed.[102] It is perhaps unsurprising that the Supreme Court of Florida, in its request for funding for eight additional trial court judgeships, explained that the law had significantly increased trial court judges' respective caseloads.[103]

The Florida law created two types of "risk protection orders": temporary *ex parte* risk protection orders and full risk protection orders.[104] In general, the

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dominated by the NRA. *Id.* The package passed in the Florida Senate by a 20–18 margin and the Florida House by 67–50. *Id.*

[100] *Id.* On March 7, 2018, Broward County police checked on a man whom neighbors had seen "clutching at his face" and "talking to himself." *Id.* When police spoke with the man, he explained that he had been having numerous break-ins, which he blamed on the FBI and his neighbor—who he said "looked like Osama bin Laden." *Id.* As the man elaborated on how his neighbor could shape-shift and change heights, law enforcement spotted two firearms in the residence. *Id.* The man was involuntarily committed for treatment under Florida's Baker Act. *Id.* While the Baker Act allows for seizure of firearms, firearms must be returned after release from treatment. *Id.* After the passage of the Marjory Stoneman Douglas High School Public Safety Act on March 9, 2018, however, law enforcement was able to file a petition with a judge, who agreed that the man's firearms should be retained for at least a year. *Id.*

[101] *Id.* In Florida's Pinellas County, where the sheriff created a five-officer task force specifically devoted to filing risk protection orders, sixty-four of the orders were filed between March and July of 2018. Katie LaGrone, *More Than 450 People in Florida Ordered to Surrender Guns Months After New Gun Law Took Effect*, ABC-WFTS (July 30, 2018), https://www.abcactionnews.com/news/local-news/i-team-investigates/more-than-450-people-in-florida-ordered-to-surrender-guns-months-after-new-gun-law-took-effect [https://perma.cc/C59V-NGKS]. All order requests were granted by Pinellas County Circuit Court judges. *Id.* By comparison, California judges granted 190 GVROs during the entirety of 2016 and 2017. Koseff, *supra* note 96. Nonetheless, Florida is not the most active user of red flag laws; in the first three months of Maryland's red flag law, judges granted 302 orders authorizing seizures. Luke Broadwater, *Sheriff: Maryland's 'Red Flag' Law Prompted Gun Seizures After Four 'Significant Threats' Against Schools*, BALT. SUN (Jan. 15, 2019), https://www.baltimoresun.com/news/maryland/politics/bs-md-red-flag-update-20190115-story.html [https://perma.cc/YJ5N-RAE6]. A final order—authorizing the state to keep the seized firearms for a year—was granted in 148 of those 302 initial orders. *Id.* Sheriff Darren Popkin, a leader in the Maryland Sheriffs' Association who helped develop the state's red flag law, testified before the Maryland House of Delegates Judiciary Committee that he believes the state's law is being used at a higher rate than that of any other state. *Id.*

[102] Katie Lagrone, *Red Flag Law Used Against Young Kids "Shocking," Says Florida Senator*, ABC-WFTS (Oct. 8, 2019), https://www.abcactionnews.com/news/local-news/i-team-investigates/red-flag-law-used-against-young-kids-shocking-says-florida-senator.

[103] *See In re* Certification of Need for Additional Judges, 260 So. 3d 182, 183–84 (Fla. 2018) (per curiam) (stating that about one hundred risk protection order cases per month came before Florida trial court judges in 2018).

[104] FLA. STAT. § 790.401(3)–(4). A judge *must* grant law enforcement's temporary *ex parte* risk protection if she finds by "reasonable cause" that the respondent poses a significant danger of causing personal injury to himself or others in the "near future." *Id.* § 790.401(4)(c). Notice is not given to the respondent before law enforcement executes the temporary *ex parte* risk protection order. *Id.* § 790.401(4)(a). The judge must hold a full hearing within fourteen days of the grant of the temporary

statutory scheme is similar to that of Connecticut, but with two notable differences: (1) only law enforcement officers or law enforcement agencies can file for either type of risk protection order; and (2) with respect to full risk protection orders, a petitioner is not required to show that the "significant danger" posed by the respondent is imminent or likely to arise in the near future.[105] In addition, the law lists fifteen factors a judge may consider when making a determination of whether the respondent poses a significant risk to himself or others by possessing firearms.[106]

In 2019, in *Davis v. Gilchrest County Sheriff's Office*, a Florida appeals court considered a constitutional challenge to the state's red flag law.[107] The respondent, a former Deputy Sheriff with the Gilchrest County Sheriff's Office, discovered that his girlfriend of six years was also carrying on a relationship with another officer in the Sheriff's Office.[108] The respondent contacted the sheriff to ask for help.[109] After the sheriff asked him how he felt about the situation, the respondent answered by saying he was so upset he wanted to kill the other man with his gun.[110] Based on that statement, law enforcement subsequently filed a petition for a full risk protection order to seize the respondent's firearms for a year, which was granted by a judge.[111] The respondent ap-

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ex parte risk protection order, at which time the state may petition for a full risk protection order. *Id.* § 790.401(3)(a). At the full hearing, the state's burden of proof is "clear and convincing." *Id.* § 790.401(3)(b). If the judge deems the state to have met its burden, the judge *must* grant the risk protection order. *Id.*

[105] *See id.* § 790.401(2)(a), (3)(a) (containing no imminence requirement). For temporary *ex parte* risk protection orders, however, a petitioner *is* required to show imminence: that the respondent poses a significant danger of causing personal injury to himself or herself or others in the "near future." *Id.* § 790.401(4)(a). "Near future" is not defined in the statute. *See id.* § 790.401(1). This author's March 2020 canvass of the nineteen jurisdictions that had red flag laws on the books determined that sixteen out of the nineteen require some showing of sufficient imminence for a temporary *ex parte* risk protection order to be granted (the District of Columbia, Massachusetts, and New York did not). D.C. CODE § 7-2510.04; MASS. GEN. LAWS ch. 140, § 131T; N.Y. C.P.L.R. 6342. Only five out of nineteen jurisdictions, however, require some showing of sufficient imminence for full risk protection orders to be granted (Connecticut, Indiana, New Mexico, Oregon, and Rhode Island). CONN. GEN. STAT. ANN. § 29-38c(d); IND. CODE ANN. § 35-47-14-6; N.M. S. 5; OR. REV. STAT. ANN. § 166.527(6)(a); 8 R.I. GEN. LAWS § 8-8.3-5(a).

[106] FLA. STAT. § 790.401(3)(c). Those factors include: (1) a recent act or threat of violence, though the terms "act of violence" and "threat of violence" are not defined; (2) any act or threat of violence within the last twelve months; (3) evidence of a serious mental illness, though that is not defined; (4) reckless use, display, or brandishing of a firearm. *Id.* In the case of Christian Velasquez, discussed *supra* notes 6–10, the judge denied law enforcement's petition for a risk protection order because he did not feel that what Velasquez said amounted to "threats of violence," nor did he feel Velasquez suffered from a "serious mental illness." Temporary *Ex Parte* Risk Protection Order, *supra* note 10, at 1.

[107] 280 So. 3d at 528 (considering vagueness, due process, and Second Amendment challenges to Florida's red flag law).

[108] Amended Initial Brief of Appellant, *supra* note 22, at 2–3.

[109] *Id.* at 3.

[110] *Id.* at 5.

[111] *Id.* at 6, 12. Following his comment to the sheriff, the petitioner was evaluated at a hospital and submitted for an involuntary examination pursuant to Florida's Baker Act. *Id.* at 5. Mental health

pealed the order and challenged the constitutionality of the law under theories of vagueness and substantive due process.[112] The appeals court rejected the challenge, ruling that the law's language was not vague and that it contained sufficient due process safeguards.[113] In addition, at least one Florida court has ruled that a risk protection order may not be granted based on conduct that occurred before the law's passage.[114]

II. SECOND AMENDMENT JURISPRUDENCE POST-*HELLER*

In 2008, in *District of Columbia v. Heller*, the Supreme Court issued a landmark ruling that greatly expanded the Second Amendment's protections.[115] In 2010, in *McDonald v. City of Chicago*, the Court applied *Heller*'s expansive holding to the states.[116] The two decisions, however, left little by way of an analytical framework for lower courts to follow in subsequent Second

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professionals discharged the petitioner without requiring any follow-up and gave him a violence risk category assessment of zero. *Id.* The petitioner argued, inter alia, that the hyperbolic statements he made in frustration were not sufficient to support the state's deprivation of his Second Amendment rights. *Id.* at 14.

[112] *See id.* at 32, 39–42 (arguing that terms in the statute are unconstitutionally vague and that because the law improperly infringes on two fundamental rights—speech and the right to bear arms—the court should evaluate the law under strict scrutiny); *see also Davis*, 280 So. 3d at 531–32. The respondent argued that the law impermissibly required an individual to choose between exercising his fundamental rights to free speech and bear arms. Amended Initial Brief of Appellant, *supra* note 22, at 42.

[113] *Davis*, 280 So. 3d at 532–33. The Florida appeals court did not specifically address the respondent's First and Second Amendment substantive due process claims. *Id.* at 533. Instead, it based its ruling on procedural due process considerations. *See id.* The court noted,

> The statute also requires a hearing within fourteen days of an RPO petition being filed, thus affording a respondent due process . . . . Moreover, the statute incorporates an added due process safeguard by requiring proponents to meet the heightened "clear and convincing" burden of proof standard . . . . Furthermore, the duration of the RPO may not exceed twelve months . . . .

Id. The court purported to apply strict scrutiny to the statute and seemed to assume the statute burdened individuals' fundamental rights, but did not analyze whether that burden was constitutionally justified. *See id.* at 531–33 (announcing that Florida courts apply strict scrutiny to a statue that "impairs the exercise of a fundamental right," and finding that the statute addresses a compelling interest of thwarting public shootings, but not evaluating whether the statute's burden on fundamental rights is appropriately tailored). The court also declined to address the respondent's as-applied challenge, ruling it was waived since it had not been argued before the trial court. *Id.* at 531.

[114] Order Dissolving Temporary Risk Protection Order and Granting the Respondent's Motion to Dismiss the Risk Protection Petition on Retroactive Application Grounds at 1, City of Apopka v. Thorn, No. 2018-MH-2002-O (Fla. Cir. Ct. Sept. 24, 2018).

[115] *See* 554 U.S. 570, 581, 635 (2008). *See generally* Christopher Dunn, *The Gun Grenade in the Hands of the Supreme Court*, N.Y. L.J. (Feb. 6, 2019), https://www.law.com/newyorklawjournal/2019/02/06/the-gun-grenade-in-the-hands-of-the-supreme-court/ [https://perma.cc/BE66-U6HC] (providing background on Second Amendment jurisprudence in his capacity as Legal Director of New York Civil Liberties Union).

[116] *See* 561 U.S. 742, 750 (2010) (plurality opinion).

Amendment cases.[117] The rulings also included ambiguous dicta that left lower courts guessing as to how to answer key doctrinal questions.[118] Section A of this Part briefly summarizes the important legal rules from the Supreme Court's two landmark Second Amendment cases.[119] Section B of this Part discusses the two-part test nearly all federal circuits have adopted for evaluating whether laws violate the Second Amendment.[120] Section C of this Part examines how the federal circuit courts have treated *Heller*'s ambiguous dicta about certain presumptively lawful regulatory infringements on the right to bear arms.[121]

A. Heller *and* McDonald*: Delineating the Right to Bear Arms*

In *Heller*, the Supreme Court waded into the nation's gun debate and decided for the first time that the scope of the Second Amendment's protection includes an individual's fundamental right to keep and bear arms for the purposes of self-defense in the home, unconnected to service in a militia.[122] After an extensive textual and historical analysis of the Second Amendment, Justice Scalia, writing for the majority, struck down two District of Columbia ordinances as facially unconstitutional: one that prohibited individuals from possessing handguns and another that banned individuals from keeping assembled, functional firearms in the home.[123]

In so ruling, the Court made clear that though the Second Amendment's protections extend to lawful activities like hunting, target-shooting, and partici-

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[117] AMY SWEARER, HERITAGE FOUND., LONGSTANDING AND PRESUMPTIVELY LAWFUL? *HELLER*'S DICTA V. HISTORY AND DICTA 2 (2018), https://www.heritage.org/sites/default/files/2018-11/LM-238.pdf [https://perma.cc/A96T-2C4P].

[118] *Id.* at 2; *see* United States v. Marzzarella, 614 F.3d 85, 91 (3d Cir. 2010). The Third Circuit explained how *Heller*'s "presumptively lawful" dictum left unsolved what is still an open question among the federal circuits: whether the measures listed are presumptively lawful because they: (1) concern conduct outside the scope of the Second Amendment's protection, or (2) concern conduct within the scope of the Second Amendment that is justifiably restricted under some level of scrutiny. *Marzzarella*, 614 F.3d at 91.

[119] *See infra* notes 122–130 and accompanying text.

[120] *See infra* notes 131–142 and accompanying text.

[121] *See infra* notes 143–150 and accompanying text.

[122] *See* 554 U.S. at 581, 635 (explaining that the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home" and that the right is "exercised individually and belongs to all Americans"); *see also* Greenhouse, *supra* note 33 (detailing how the court rejected the until-then prevailing view that the Second Amendment enshrined the right to bear arms only if exercised collectively or in connection with service in a militia). The Court had not meaningfully examined the Second Amendment in seventy years. Greenhouse, *supra* note 33 (noting *United States v. Miller*, 307 U.S. 174 (1939) as the Court's seminal Second Amendment decision that preceded *Heller*).

[123] *Heller*, 554 U.S. at 635. The Court also considered a third D.C. ordinance prohibiting the carrying of a firearm (including in one's home) without first obtaining a license. *Id.* The Court left that ordinance intact, but ruled that the District of Columbia had to issue the requisite license to the plaintiff. *Id.* at 576, 635.

pating in a militia, self-defense in the home is at the core of the right.[124] Though the Court did not specify the standard of scrutiny under which courts should evaluate laws implicating rights guaranteed by the Second Amendment, it did reject rational basis review and "interest-balancing" approaches as insufficient to afford proper protection to the right.[125] But the Court also explained that the rights secured by the Second Amendment are not unlimited and do not guarantee a right to keep or bear arms in any manner and for any purpose.[126] To that end, Justice Scalia wrote in a footnote that longstanding prohibitions on the possession of firearms by felons and the mentally ill are "presumptively lawful."[127]

In *McDonald*, the Supreme Court followed up on its decision by incorporating the Second Amendment as fully applicable to the states.[128] The Court was unequivocal that Second Amendment rights are just as fundamental as other rights guaranteed by the Bill of Rights, and warned courts not to treat it

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[124] *See id.* at 614, 628–29, 635 (stating that "the inherent right of self-defense has been central to the Second Amendment right" and explaining that the home is where an individual's need for self-defense is most critical).

[125] *Id.* at 628 n.27. The Court noted,

> Obviously, [rational basis review] could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms . . . . If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.

Id. (citations omitted); *see id.* at 634 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach.").

[126] *Id.* at 626.

[127] *Id.* at 626–27 n.26. The Court did not allude to any historical evidence to support the notion that felons or the mentally ill were not understood to have Second Amendment rights at the time of the Constitution's ratification. *Id.*; *see* SWEARER, *supra* note 117, at 2 ("The Court did not attempt to justify this presumption or its assertion that such prohibitions are long-standing in nature . . . ."). In addition to felons and the mentally ill, Justice Scalia's list of "presumptively lawful" regulations also included laws prohibiting the carrying of firearms in sensitive places such as schools or government buildings, and laws imposing certain burdens on the commercial sale of firearms. *Heller*, 554 U.S. at 626–27 n.26. The Court declined to elaborate on justifications for these four exceptions, choosing instead to wait for a case to raise the specific issue. *Id.* at 626–27 n.26, 635. Although the exceptions were arguably dicta, courts generally treat Supreme Court dicta from recent cases as binding. *See* United States v. Colasuonno, 697 F.3d 164, 179 (2d Cir. 2012) ("[W]e have an obligation to accord great deference to Supreme Court dicta . . . ."); McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) ("We think that federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement."). On the other hand, the Seventh Circuit has side-stepped much of *Heller*'s dicta and followed alternative approaches. *See* Friedman v. City of Highland Park, 784 F.3d 406, 410 (7th Cir. 2015) ("Cautionary language about what has been left open should not be read as if it were part of the Constitution or answered all possible questions."). Scholars have speculated that Justice Scalia included the "presumptively lawful" dicta to win Justice Kennedy's fifth and deciding vote. *See, e.g.*, Mark Tushnet, Heller *and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 420 (2009) (supporting this view).

[128] *See* 561 U.S. at 750.

as a "second class" right.[129] But the *McDonald* Court did not attempt to clarify any of *Heller*'s ambiguous language; instead, Justice Alito, writing for the majority, simply repeated *Heller*'s dicta declaring certain longstanding regulatory measures to be "presumptively lawful."[130]

B. Second Amendment Jurisprudence's Two-Part Test

Though landmark decisions, *Heller* and *McDonald* left little by way of an analytical framework for lower courts to follow in subsequent Second Amendment cases.[131] Nevertheless, almost every federal circuit has adopted some form of the two-step test announced by the United States Court of Appeals for the Third Circuit in *United States v. Marzzarella*.[132]

Step One of the test asks whether the challenged law implicates or infringes upon conduct falling within the scope of the Second Amendment's pro-

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[129] *Id.* at 778–80. As if to hammer home the point, Justice Alito wrote that the Second Amendment may not be "singled out [by courts] for special—and specially unfavorable— treatment." *Id.* at 779–80.

[130] *Id.* at 786. The *McDonald* Court's decision to simply reiterate *Heller*'s "presumptively lawful" dicta left unsolved what is still an open question among the federal circuits: whether the presumptively lawful measures (1) concern conduct outside the scope of the Second Amendment's protection; or (2) concern conduct within the scope of the Second Amendment that is justifiably restricted under some level of scrutiny. *See, e.g.*, *Marzzarella*, 614 F.3d at 91 (suggesting that both interpretations of *Heller* dicta are reasonable).

[131] SWEARER, *supra* note 117, at 2. That the court did not provide a framework was likely intentional. *See Heller*, 554 U.S. at 635 ("But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than *Reynolds v. United States*, 98 U.S. 145 (1879), our first in-depth Free Exercise Clause case . . . .") (citation omitted).

[132] 614 F.3d at 89; *see* N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 254 (2d Cir. 2015) (explaining that the two-step approach has also been adopted by the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits). The *Marzzarella* court fashioned this two-step approach by looking to First Amendment jurisprudence for guidance. 614 F.3d at 89 n.4; *see* David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417, 435 (2014) (discussing the Third and Seventh Circuits' adoption of the First Amendment analytical framework into Second Amendment cases). The Sixth Circuit has questioned the wisdom of *Marzzarella*'s importation of First Amendment jurisprudence into the doctrine governing the Second Amendment. *See* Tyler v. Hillsdale Cty. Sheriff's Dep't (*Tyler I*), 775 F.3d 308, 318 (6th Cir. 2014), *vacated*, 837 F.3d 678 (6th Cir. 2016). The Sixth Circuit noted,

> There may be a number of reasons to question the soundness of this two-step approach. It derives from the Third Circuit's decision in [*Marzzarella*], which primarily rested on a view that because "*Heller* itself repeatedly invokes the First Amendment in establishing principles governing the Second Amendment," that fact "implies the structure of First Amendment doctrine should inform . . . analysis of the Second Amendment." . . . There is significant language in *Heller* itself, however, that would indicate that lower courts should not conduct interest balancing or apply levels of scrutiny.

Id. (citation omitted).

tection.[133] To determine whether the conduct implicates the Second Amendment, courts will look to whether the conduct was understood to fall within the scope of the Amendment when it was ratified in 1791.[134] At this step, the government bears the burden of showing that the activity, person, or thing at issue is outside the scope of the Second Amendment as traditionally understood.[135] If the conduct does not fall within the Amendment's scope, the challenged regulation passes constitutional muster and the inquiry is over.[136]

If the conduct does indeed fall within the Amendment's scope, the court then moves on to Step Two, where it analyzes the law under some form of heightened means-end scrutiny—at least, in theory.[137] In practice, however,

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[133] *Marzzarella*, 614 F.3d at 89. This threshold inquiry seems to follow from *Heller*. *See* 554 U.S. at 635 (ordering the District of Columbia to issue a license to Heller, as long as he is "not disqualified from the exercise of Second Amendment rights"). At this step, the burden of proof is on the government. Dave Kopel & Joseph Greenlee, *The Federal Circuit Courts' Second Amendment Doctrine*, 61 ST. LOUIS U. L.J. 193, 214 (2016).

[134] *See Marzzarella*, 614 F.3d at 89–90 (explaining that the Supreme Court has instructed courts, when determining the scope of an enumerated right, to look to how the right was interpreted at the time of ratification); *see also* Tyler v. Hillsdale Cty. Sheriff's Dep't (*Tyler II*), 837 F.3d 678, 685–86 (6th Cir. 2016) ("If the government establishes that the challenged law regulates activity outside the scope of the Second Amendment as understood at the time of the framing of the Bill of Rights, the activity is unprotected and the law is not subjected to further constitutional scrutiny."); Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 194 (5th Cir. 2012) ("To determine whether a law impinges on the Second Amendment right, we look to whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee."); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012) ("Under the first prong, the court asks whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood."); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010) ("This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification.").

[135] Kopel & Greenlee, *supra* note 133, at 214.

[136] *N.Y. State Rifle & Pistol Ass'n, Inc.*, 804 F.3d at 254; *Marzzarella*, 614 F.3d at 89.

[137] *Marzzarella*, 614 F.3d at 89. Means-end scrutiny generally refers to the mode of analysis courts use to ensure government action complies with constitutional principles. Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449, 449 (1988). Heightened scrutiny generally refers to either strict scrutiny or intermediate scrutiny. *See* Kopel & Greenlee, *supra* note 133, at 302 (explaining that strict scrutiny and intermediate scrutiny are the best-known forms of heightened scrutiny). Strict scrutiny promotes several principles, including: (1) that important rights deserve special protection, (2) these rights are best protected by requiring sufficiently compelling government interests, and (3) unneeded deprivation of individual rights is best avoided by requiring close attention to the breadth of the policy or law. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (indicating that a higher level of scrutiny should apply to legislation that implicates important rights, such as those enumerated in the U.S. Constitution and Bill of Rights); *see also* Richard Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273–75 (2006) (tracing the emergence of strict scrutiny in Supreme Court jurisprudence). Strict scrutiny places the burden on the government to show that the law is narrowly tailored to a compelling government interest. *Id.* at 1301. Intermediate scrutiny is less exacting, requiring that the law be substantially related to an important government interest. *Id.* at 1302. Some courts use the language of "reasonable fit" between the law and the interest to be addressed. *Id.* The Supreme Court has explicitly deployed intermediate scrutiny only in cases involving biological sex classifications and in "content-neutral" First Amendment regulations. SWEARER, *supra* note 117, at 2 n.13.

some federal circuits end up applying the sort of interest-balancing approach explicitly rejected by Justice Scalia in *Heller*.[138] To be sure, the appropriate level of scrutiny to apply in Second Amendment cases has generated much debate among legal scholars and has even prompted state legislatures to codify a particular standard into law.[139] As with Step One, the burden at Step Two is on the government to prove that the law passes whichever level of scrutiny applied by the court.[140] Though it is undisputed the government bears the burden of proof at Step Two, federal circuits disagree on the amount of evidence governments must put forth to satisfy that burden under intermediate or strict scrutiny.[141] The circuits also disagree on when a general government interest of

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[138] *Heller*, 554 U.S. at 628 n.27; *see* Silvester v. Harris, 843 F.3d 816, 821 (9th Cir. 2016) (referring to the means-end scrutiny as a "sliding scale"); *Nat'l Rifle Ass'n of Am., Inc.*, 700 F.3d at 195 (holding that a law burdening the core of Second Amendment right—self-defense in home—gets strict scrutiny, while a less severe burden gets a less exacting form of means-end scrutiny); United States v. Decastro, 682 F.3d 160, 164 (2d Cir. 2012) (noting the application of heightened scrutiny to laws only when the Second Amendment right is substantially burdened); Heller v. District of Columbia, 670 F.3d 1244, 1257 (D.C. Cir. 2011) ("[A] regulation that imposes a less substantial burden should be proportionately easier to justify.").

[139] *See, e.g.*, Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 HASTINGS L. J. 1371, 1379–80, 1382 (2009) (arguing that *Heller* implicitly ruled out strict scrutiny because the four identified "presumptively lawful" restrictions on Second Amendment rights could not survive strict scrutiny); Lawrence Rosenthal, *Second Amendment Plumbing After* Heller*: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 82–84 (2009) (proposing undue burden test); Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What's a Court to Do Post-*McDonald*?*, 21 CORNELL J.L. & PUB. POL'Y 489, 493 (2012) (same); Fredrick E. Vars & Amanda Adcock Young, *Do the Mentally Ill Have a Right to Bear Arms?*, 48 WAKE FOREST L. REV. 1, 7–11 (2013) (discussing reasonableness, intermediate scrutiny, strict scrutiny, and hybrid approaches as possibilities); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1446–47 (2009) (arguing that courts should discard the standard tiers of scrutiny in the Second Amendment context, and instead analyze the challenged law based on four discrete categories purportedly justifying the restriction of the right); Stephen Kiehl, Note, *In Search of a Standard: Gun Regulations After* Heller *and* McDonald, 70 MD. L. REV. 1131, 1133 (2011) (arguing that courts should apply intermediate scrutiny when evaluating firearm regulations that are not complete bans on possession); Elke C. Meeùs, Note, *The Second Amendment in Need of a Shot in the Arm: Overhauling the Courts' Standards of Scrutiny*, 45 W. ST. U. L. REV. 29, 73 (2017) (suggesting an approach whereby courts consider two factors to determine whether strict or intermediate scrutiny applies: (1) the degree to which the law restricts the "core" of the right; and (2) the extent of the law's restriction); Jason Racine, Note, *What the Hell(er)? The Fine Print Standard of Review Under* Heller, 29 N. ILL. U. L. REV. 605, 618 (2009) (proposing a three-step test considering categorical rules, the nature of the firearm to be regulated, and the intended locality of the regulation). Given the confusion surrounding which level of scrutiny courts ought to apply in Second Amendment cases, three states—Louisiana, Missouri, and Alabama—have gone so far as to codify the standard of review in their state constitutions. ALA. CONST. art. I, § 26 (codifying strict scrutiny as applicable standard); LA. CONST. art. I, § 11 (same); MO. CONST. art. I, § 23 (same).

[140] Kopel & Greenlee, *supra* note 133, at 214.

[141] *See, e.g.*, Drake v. Filko, 724 F.3d 426, 436–37 (3d Cir. 2013) (giving great deference to legislature's decisions and wisdom within the context of the Second Amendment); Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir 2012) (same). Other courts require a greater showing of evidence to prove the restriction's justification. *See, e.g.*, Ezell v. City of Chicago, 651 F.3d 684, 709–10

"reducing crime" or "increasing public safety," without supporting data or proof, is sufficient under intermediate scrutiny to justify an infringement on a Second Amendment right.[142]

C. The Difficult Applications: "Presumptively Lawful" Regulations

Most applications of the two-part test are at least conceptually straightforward; however, the analysis gets complicated when applied to cases involving the "longstanding" and "presumptively lawful" measures identified in *Heller*.[143] These measures include: laws barring firearms for (1) felons and (2) the mentally ill; (3) laws prohibiting firearms in "sensitive places"; and (4) laws imposing conditions and qualifications on the commercial sale of arms.[144] For cases involving a challenge to these type of laws, the question is: should the government win at Step One because any law that regulates conduct falling within *Heller*'s listed exceptions does not implicate the Second Amendment?[145] Or, alternatively, should these laws be scrutinized at Step Two, with the (rebuttable) presumption that they pass constitutional muster?[146]

To illustrate this question, consider a law banning the carrying of firearms in federal post offices and recall that *Heller* identified laws prohibiting firearms in "sensitive places" as "presumptively lawful."[147] *Heller*'s listing of the "sensitive places" exception could imply that no person has Second Amendment rights in government buildings (failing at Step One), or it could imply that the right

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(7th Cir. 2011) (holding restriction on firearm ownership was unconstitutional because the government produced no evidence to justify it); *Chester I*, 628 F.3d at 683 (ruling against the government because it offered "reasons," rather than evidence, to support the law's Second Amendment infringement).

[142] *Compare* Wollard v. Gallagher, 712 F.3d 865, 879 (4th Cir. 2013) (concluding that Maryland's "good-and-substantial" requirement to obtain handgun permit passed intermediate scrutiny because it advanced public safety by reducing number of handguns in public), *with* Moore v. Madigan, 702 F.3d 933, 939 (7th Cir. 2012) (rejecting "mere possibility that allowing guns to be carried in public would increase the crime or death rates" as sufficient justification for restriction of public carry).

[143] Kopel & Greenlee, *supra* note 133, at 214.

[144] *Heller*, 554 U.S. at 626–27, 627 n.26.

[145] Kopel & Greenlee, *supra* note 133, at 216. Some circuits have resolved cases dealing with the "presumptively lawful" regulations identified in *Heller* at Step One. *See, e.g.*, *Marzzarella*, 614 F.3d at 91 (noting that the Court in *Heller* discussed "presumptively lawful" regulations immediately preceding its discussion of unusual and dangerous weapons, which the Court stated do not fall within the Amendment's protections).

[146] Kopel & Greenlee, *supra* note 133, at 216. Some circuits have resolved cases dealing with the "presumptively lawful" regulations identified in *Heller* at Step Two. *See, e.g.*, *Chester I*, 628 F.3d at 679 (rejecting the approach of concluding the conduct is outside the scope of Second Amendment at Step One as approximating a kind of rational basis review which *Heller* expressly proscribed). The Fourth Circuit in *Chester I* suggested resolving the inquiry at Step Two under some form of heightened scrutiny, observing that a "presumptively lawful" regulation could be shown to be unconstitutional, particularly in as-applied challenges. *Id.*

[147] *Heller*, 554 U.S. at 626 n.26; *see* Bonidy v. U.S. Postal Serv., 790 F.3d 1121, 1123 (10th Cir. 2015) (illustrating a challenge to such a law).

extends to such buildings but that a restriction on carrying firearms in them presumptively survives scrutiny at Step Two.[148] The difference between the two interpretations is significant: if the first interpretation is adopted, it would follow that no plaintiff could ever successfully challenge the regulation; if the second is adopted, there could be situations where the regulation unconstitutionally burdens the right.[149] While the question of whether to analyze *Heller*'s "presumptively lawful" regulations at Step One or Step Two remains unresolved, another question arises: whether regulations resembling those listed in *Heller* could also be considered among the "presumptively lawful" categories.[150]

III. COURTS' TREATMENT OF RED FLAG LAWS AND THEIR "PRESUMPTIVELY LAWFUL" BRETHREN

District of Columbia v. Heller's "presumptively lawful" dicta can, arguably, be applied to two different categories of laws: (1) laws that fit exactly within the list of permissible Second Amendment regulation, such as laws prohibiting the possession of firearms by felons or the mentally ill; and (2) laws that resemble or might be analogized to something on the list, such as laws banning the possession of firearms by types of individuals considered especially dangerous.[151] Since red flag laws apply to individuals regardless of whether the individual is a felon or has been found mentally ill, the laws are best described to fit within that second category.[152] As of this Note's writing, no federal court has considered a Second Amendment challenge to a red flag law; however, federal courts have considered Second Amendment challenges to laws that fit within the second category outlined above.[153] In an effort to shed

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[148] *Bonidy*, 790 F.3d at 1136 n.7 (Tymkovich, J., concurring in part and dissenting in part).

[149] *See id.* (arguing that interpreting *Heller* to mean that no person has Second Amendment rights in government buildings "goes too far"); *see also* United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010) (noting that although a law prohibiting felons from possessing firearms did not violate the Second Amendment on its face, an as-applied challenge by a non-violent felon might succeed).

[150] *Heller*, 554 U.S. 626 n.26. The Third Circuit has cautioned against extending the "presumptively lawful" exception to new regulations that resemble but are not among those explicitly listed by *Heller*. *See Marzzarella*, 614 F.3d at 93 ("[P]rudence counsels caution when extending these recognized exceptions to novel regulations unmentioned by *Heller*.").

[151] 554 U.S. 570, 627 n.26 (2008); Kopel & Greenlee, *supra* note 133, at 215.

[152] *See, e.g.*, FLA. STAT. § 790.401(3) (2018) (applying to anyone found to pose a "significant danger of causing personal injury to himself or others by having in his or her custody or control, or by purchasing, possessing, or receiving, a firearm," and listing evidence of "recurring mental health issues"—notably, not an adjudication of mental illness—as one of fifteen different criteria a judge may consider in determining whether to grant the order). In comparison, the federal statute that prohibits the mentally ill from possessing a firearm only applies if the individual has been formally adjudicated mentally ill or involuntarily committed. 18 U.S.C. § 922(g)(4) (2018).

[153] *See, e.g.*, United States v. Carter, 750 F.3d 462, 470 (4th Cir. 2014) (upholding § 922(g)(3), the federal statute prohibiting drug users from possessing firearms); United States v. Dugan, 657 F.3d 998, 1000 (9th Cir. 2011) (upholding same statute); United States v. Reese, 627 F.3d 792, 804 (10th Cir. 2010) (upholding § 922(g)(8), the federal statute prohibiting individuals subject to a restraining

light on how courts might go about analyzing a Second Amendment challenge to a red flag law, Section A of this Part will discuss how several federal circuit courts have analyzed challenges to laws in the second category described above—laws that regulate possession of firearms of individuals society considers especially dangerous but who are not felons or mentally ill.[154] Section B of this Part will then discuss the analytical framework used by the Appellate Court of Connecticut and the Indiana Court of Appeals in upholding their respective states' red flag laws as constitutional.[155]

A. Federal Courts' Treatment of Laws Regulating the Possession of Firearms by Dangerous Individuals

Step One of the two-step test asks whether the challenged law implicates or infringes upon conduct or individuals falling within the scope of the Second Amendment's protections.[156] When evaluating a regulation that resembles one of the "presumptively lawful" regulations listed in *Heller*, some courts simply give a quick cite to *Heller*'s dicta and conclude that the regulation in question is lawful because its purpose is generally similar to the "presumptively lawful" regulations on felons and the mentally ill.[157] These courts, for all practical purposes, resolve the case at Step One because they assume *Heller* to have placed felons, the mentally ill, and other similar classes of persons as outside the Sec-

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order from possessing firearms, in face of as-applied challenge); United States v. White, 593 F.3d 1199, 1206 (11th Cir. 2010) (upholding § 922(g)(9), the federal statute prohibiting domestic violence misdemeanants from possessing firearms).

[154] *See infra* notes 156–191 and accompanying text.

[155] *See infra* notes 192–212 and accompanying text.

[156] United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010). This threshold inquiry seems to follow from *Heller*. *See* 554 U.S. at 635 (ordering the District of Columbia to issue a license to Heller, as long as he is "not disqualified from the exercise of Second Amendment rights").

[157] *See, e.g.*, *Dugan*, 657 F.3d at 999–1000. The Ninth Circuit noted,

> Like our sister circuits, we see the same amount of danger in allowing habitual drug users to traffic in firearms as we see in allowing felons and mentally ill people to do so. Habitual drug users, like career criminals and the mentally ill, more likely will have difficulty exercising self-control, particularly when they are under the influence of controlled substances.

Id.; *see also* United States v. Seay, 620 F.3d 919, 925 (8th Cir. 2010) ("As such, we find that § 922(g)(3) is the type of 'longstanding prohibition[] on the possession of firearms' that *Heller* declared presumptively lawful.") (alteration in original); *White*, 593 F.3d at 1206 ("We see no reason to exclude § 922(g)(9) from the list of longstanding prohibitions on which *Heller* does not cast doubt."); United States v. Richard, 350 F. App'x 252, 260 (10th Cir. 2009) (citing *Heller*'s presumptively lawful measures and concluding § 922(g)(3) is among them, and thus, is constitutional); United States v. Korbe, No. 09-05, 2010 WL 2404394, at * 3–4 (W.D. Pa. June 9, 2010) (holding that § 922(g)(3) is among *Heller*'s "presumptively lawful" regulations); United States v. Lacy, No. 09-CR-135, 2009 WL 3756987, at *1 (E.D. Wis. Nov. 6, 2009) (resolving the case upon concluding that "nothing in *Heller* indicates that § 922(g)(3) somehow falls outside the range of permissible limitations on the right to bear arms").

ond Amendment's scope.[158] For example, in 2010, in *United States v. Dugan*, the U.S. Court of Appeals for the Ninth Circuit considered a facial challenge to a federal provision that prohibits unlawful users of drugs from possessing firearms.[159] The *Dugan* court upheld the provision, reasoning that *Heller* implicitly allowed for categorical prohibitions on drug users because drug users are just as dangerous as felons and the mentally ill.[160]

Though the *Dugan* court did not articulate the usual two-step test, it implicitly resolved the issue at Step One, reasoning that regulations on some classes of individuals similar to felons and the mentally ill—like drug users—fall outside the Second Amendment's scope.[161] As a result, regulations targeting such classes are constitutional.[162] Other circuits have followed a similar approach when analyzing Second Amendment challenges to the same statute that was at issue in *Dugan*: a citation to *Heller*, a comparison of drug users' propensity for violence to that of felons or the mentally ill, and no means-end analysis.[163]

Likewise, courts have followed a similar approach when considering challenges to prohibitions on possession of firearms by domestic violence misdemeanants.[164] In 2010, in *United States v. White*, the U.S. Court of Appeals

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[158] *See, e.g.*, United States v. Bena, 664 F.3d 1180, 1184 (8th Cir. 2011) ("Insofar as § 922(g)(8) prohibits possession of firearms by those who are found to represent 'a credible threat to the physical safety of [an] intimate partner or child,' . . . it is consistent with a common-law tradition that the right to bear arms is limited to peaceable or virtuous citizens.") (alteration in original).

[159] 18 U.S.C. § 922(g)(3); 657 F.3d at 999. In passing § 922(g)(3), Congress intended to reduce the likelihood that firearms would find their way into the hands of dangerous people. *Seay*, 620 F.3d at 925.

[160] *See Dugan*, 657 F.3d at 999. In *Dugan*, the court explained,

> [W]e see the same amount of danger in allowing habitual drug users to traffic in firearms as we see in allowing felons and mentally ill people to do so . . . . Because Congress [under *Heller*] may constitutionally deprive felons and mentally ill people of the right to possess and carry weapons, we conclude that Congress may also prohibit illegal drug users from possessing firearms.

Id. By its own terms, however, *Heller* did not conclusively allow for categorical prohibitions on possession of firearms by felons and the mentally ill. *See Heller*, 554 at 626–27 (observing that such regulations would be "presumptively" lawful—not "conclusively" lawful); *see also* Tyler v. Hillsdale Cty. Sheriff's Dep't (*Tyler II*), 837 F.3d 678, 686 (6th Cir. 2016) ("*Heller* only established a presumption that such bans were lawful; it did not invite courts onto an analytical off-ramp to avoid constitutional analysis.").

[161] *See* 657 F.3d at 999–1000 (resolving the issue without conducting a means-end scrutiny analysis). If the *Dugan* court had concluded that drug users have Second Amendment rights, it would necessarily have had to evaluate the law under some form of heightened scrutiny. *See Heller*, 554 U.S. at 626 (precluding rational-basis review in Second Amendment analysis).

[162] *Dugan*, 657 F.3d at 999–1000.

[163] *See Seay*, 620 F.3d at 925 ("As such, we find that § 922(g)(3) is the type of 'longstanding prohibition[] on the possession of firearms' that *Heller* declared presumptively lawful.") (alteration in original); *Richard*, 350 F. App'x at 260 (citing *Heller*'s presumptively lawful measures and concluding § 922(g)(3) is among them, and thus is constitutional).

[164] *White*, 593 F.3d at 1206.

for the Eleventh Circuit considered a Second Amendment challenge to a federal statute that prohibits domestic violence misdemeanants from possessing a firearm.[165] Like the *Dugan* court, the *White* court equated domestic violence misdemeanants to felons and the mentally ill, and then quickly upheld the federal statute as a "presumptively lawful" and longstanding measure on which *Heller* cast no constitutional doubt.[166]

As the U.S. Court of Appeals for the Fourth Circuit observed in another case, courts following the *Dugan* and *White* approach essentially treat *Heller*'s "presumptively lawful" dicta as a "safe harbor" for unlisted regulatory measures that merely resemble those that are listed.[167] The Fourth Circuit criticized that approach as approximating rational basis review, a level of scrutiny *Heller* expressly forbid for Second Amendment challenges.[168] To that end, some circuits have embraced the Fourth Circuit's reasoning and rejected the *Dugan* court's "safe harbor" approach.[169] These courts heeded the Third Circuit's caution in *Marzzarella* that regulations that merely resemble the "presumptively lawful" regulations listed in *Heller* should not be given such an easy pass, and instead be evaluated under heightened scrutiny at Step Two.[170]

In 2010, in *United States v. Chester*, the Fourth Circuit demonstrated the Step Two analysis when considering a Second Amendment challenge to the federal ban on the possession of firearms by domestic violence misdemeanants.[171] The *Chester* court began its analysis at Step One by asking whether domestic violence misdemeanants have a right to keep and bear arms protected by the Second Amendment.[172] To determine this, the court looked to whether domestic violence misdemeanants had Second Amendment rights at the time of the Constitution's ratification.[173] Finding the evidence to be inconclusive, the court assumed *arguendo* that domestic violence misdemeanants *do* have Second

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[165] 18 U.S.C. § 922(g)(9); *White*, 593 F.3d at 1206. The statute, known as the Lautenberg Amendment, was passed by Congress to reduce the likelihood that firearms end up in the hands of people deemed dangerous by society. U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 1117 (2013), https://www.justice.gov/jm/criminal-resource-manual-1117-restrictions-possession-firearms-individuals-convicted [https://perma.cc/D6C8-S48C].

[166] *White*, 593 F.3d at 1206.

[167] United States v. Chester (*Chester I*), 628 F.3d 673, 679 (4th Cir. 2010).

[168] *Id.*; *see Heller*, 554 U.S. at 628 n.27, 634–35 (rejecting rational basis review and "interest-balancing" tests as insufficient for evaluating the extent to which a regulation may infringe upon a fundamental right).

[169] *See, e.g.*, *Tyler II*, 837 F.3d at 686; United States v. Chovan, 735 F.3d 1127, 1137 (9th Cir. 2013); United States v. Greeno, 679 F.3d 510, 517–18 (6th Cir. 2012) ("Because [*Heller*'s] list does not contain the Section 2D1.1(b)(1) dangerous weapon enhancement at issue in this case, we cannot rely on the list, alone, to reject Greeno's Second Amendment challenge."); United States v. Staten, 666 F.3d 154, 160 (4th Cir. 2011); *Reese*, 627 F.3d at 800–01.

[170] *See Marzzarella*, 614 F.3d at 93.

[171] 18 U.S.C. § 922(g)(9); *Chester I*, 628 F.3d at 673.

[172] *Chester I*, 628 F.3d at 680–81.

[173] *Id.*

Amendment rights.[174] At Step Two, the court announced that intermediate scrutiny was the applicable level of scrutiny.[175] It then remanded the case to the district court because the government did not meet its burden of showing that the prohibition was substantially related to an important government interest.[176] Other courts have taken a similar approach when evaluating challenges to the federal ban on firearm possession by domestic violence misdemeanants.[177]

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[174] *Id.* Whether or not felons—let alone misdemeanants—had Second Amendment rights at the time of the founding and beyond has been a subject of substantial debate among scholars. *Compare* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 714 (2009) (reviewing founding-era precedents and explaining, "much like the American authorities for a century and a half after the Second Amendment's adoption, the actual English antecedents point against lifetime total disarmament of all 'felons,' but do support lesser limitations"), *and* Larson, *supra* note 139, at 1376 ("[State and federal] felon disarmament laws significantly postdate both the Second Amendment and the Fourteenth Amendment. An Originalist argument that sought to identify 1791 or 1868 analogues to felon disarmament laws would be quite difficult to make."), *with* Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1360 (2009) ("[T]here is every reason to believe that the Founding Fathers would have deemed persons convicted of any of the common law felonies not to be among 'the [virtuous] people' to whom they were guaranteeing the right to arms.") (second alteration in original), *and* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995) ("[F]elons, children, and the insane were excluded from the right to arms precisely as (and for the same reasons) they were excluded from the franchise."). For a compelling argument as to why the mentally ill *do* have a fundamental right to keep and bear arms, see Vars & Young, *supra* note 139, at 7, 23 (arguing that the most persuasive reading of *Heller* is that it did not stand for the proposition that the mentally ill fall outside the scope of the Second Amendment and proposing three different types of scrutiny for any law implicating Second Amendment rights of the mentally ill).

[175] *Chester I*, 628 F.3d at 683. The court rejected the plaintiff's argument that because the right to keep and bear arms is fundamental, strict scrutiny should automatically apply. *Id.* at 682–83. The court explained that like challenges in the First Amendment context, the court does not always apply strict scrutiny whenever a fundamental right is involved; instead, the level of scrutiny applied "depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *Id.* at 682. Here, the plaintiff's claim did not fall within the "core" of the Second Amendment right—which the Fourth Circuit described as "the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense"—because the plaintiff was not a law-abiding citizen, given his misdemeanor. *Id.* at 683.

[176] *Id.* at 683.The court observed that although the government had offered numerous *reasons* why the prohibition of firearm possession by domestic violence misdemeanants was substantially related to an important government interest, it had not offered sufficient *evidence* to justify the burden on the right. *Id.* On remand, the district court found that the government had met its burden; the Fourth Circuit affirmed on appeal. United States v. Chester (*Chester II*), 514 F. App'x 393, 395 (4th Cir. 2013). The government met its burden in *Chester II* because it established the following: (1) domestic violence is a serious problem in the United States; (2) the rate of recidivism among domestic violence misdemeanants is substantial; (3) the use of firearms in connection with domestic violence is all too common; (4) the use of firearms in connection with domestic violence increases the risk of injury or homicide during a domestic violence incident; and (5) the use of firearms in connection with domestic violence often leads to injury or homicide. *Id.* (citing *Staten*, 666 F.3d at 167).

[177] *See, e.g.*, *Chovan*, 735 F.3d at 1137–41 (concluding at Step One that the government had not met its burden of showing that, as a historical matter, persons with domestic violence convictions were outside the Second Amendment right, and upholding § 922(g)(9) at Step Two); *Staten*, 666 F.3d at 160 (assuming that domestic violence misdemeanant's Second Amendment rights were intact, but upholding § 922(g)(9) under intermediate scrutiny); United States v. Skoien, 614 F.3d 638, 651 (7th

In 2010, in *United States v. Reese*, the U.S. Court of Appeals for the Tenth Circuit considered an as-applied challenge to the federal law prohibiting firearm possession by individuals subject to a restraining order.[178] At Step One, the court concluded that the individual subject to a restraining order had Second Amendment rights and that the law implicated those rights.[179] At Step Two, the court selected intermediate scrutiny as the proper level of scrutiny and upheld the government's prosecution under the law.[180] *Reese*'s determination that individuals subject to a restraining order have Second Amendment rights has not been completely adopted by other circuits that have considered similar challenges to the statute.[181]

Perhaps unsurprisingly, most courts that have considered Second Amendment challenges to regulations that fall squarely within *Heller*'s "presumptively lawful" list of measures—such as those regulations prohibiting possession of firearms by felons or the mentally ill—have disposed of the petitioners' claims with a citation to the *Heller* language.[182] In 2016, however, in *Tyler v. Hillsdale County Sheriff's Department*, the U.S. Court of Appeals for the Sixth Circuit reached a different conclusion.[183] The petitioner, who had been adjudicated mentally ill as a result of a "brief depressive episode" thirty years prior to the litigation, brought a Second Amendment challenge to the federal statute that prohibits those found mentally ill from possessing firearms.[184] The Sixth Circuit chided the district court for incorrectly "understand[ing] *Heller*'s pronouncement about 'presumptively lawful' prohibitions to insulate § 922(g)(4) from constitutional scrutiny."[185] At Step One, the Sixth Cir-

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Cir. 2010) (Sykes, J., dissenting) (pointing out that because the majority upheld § 922(g)(9) under means-end scrutiny at Step Two, it must have concluded that the convicted misdemeanant had Second Amendment rights that were implicated by the regulation).

[178] 18 U.S.C. § 922(g)(8); *Reese*, 627 F.3d at 800.

[179] *See Reese*, 627 F.3d at 801 ("Applying that approach here, there is little doubt that the challenged law, § 922(g)(8), imposes a burden on conduct, i.e., Reese's possession of otherwise legal firearms, that generally falls within the scope of the right guaranteed by the Second Amendment.").

[180] *Id.* at 802, 805.

[181] *See, e.g.*, United States v. Mahin, 668 F.3d 119, 124 (4th Cir. 2012) (declining at Step One to decide whether an individual subject to a restraining order has Second Amendment rights, yet still proceeding to Step Two and upholding § 922(g)(8) under intermediate scrutiny); *Bena*, 664 F.3d at 1184 (implying that those subject to a restraining order fall outside the Second Amendment's scope and upholding § 922(g)(8)).

[182] *See* Kopel & Greenlee, *supra* note 133, at 218–19 (collecting cases).

[183] *Tyler II*, 837 F.3d at 699.

[184] *Id.* at 683–84, 688. Under the federal provision, once an individual has been formally adjudicated mentally ill, he or she is permanently prohibited from possessing a firearm. 18 U.S.C. § 922(g)(4); Catherine Dowie, Comment, *Constitutional Law—Impact of Involuntary Commitment and Mental Illness on Second Amendment Rights*—Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678 (6th Cir. 2016), 13 J. HEALTH & BIOMEDICAL L. 275, 275 (2018). An individual may apply for relief from the permanent ban. *See Tyler II*, 837 F.3d at 682, 697 (noting that Congress has conditioned certain federal funds for states that facilitate the restoration of gun rights among those who fell within § 922(g)(4)'s bar).

[185] *Tyler II*, 837 F.3d at 681.

cuit concluded that individuals who have been adjudicated mentally ill "are not categorically unprotected by the Second Amendment."[186] At Step Two, it applied intermediate scrutiny and held that the government had not met its burden of establishing a reasonable fit between its important interest of reducing crime and the regulation's disarmament of anyone ever adjudicated mentally ill.[187]

In sum, there are several key trends in the federal circuits' Second Amendment jurisprudence when analyzing challenges to regulations resembling Heller's "presumptively lawful" exceptions.[188] First, courts are increasingly finding—or, at least, assuming—that individuals society has deemed dangerous—such as drug users, domestic violence misdemeanants, and those subject to a restraining order—have a right to keep and bear arms that is protected by the Second Amendment.[189] To that end, the "safe harbor" approach exemplified by the *Dugan* and *White* courts seems to be increasingly disfavored.[190] Second, having either found or assumed a Second Amendment right is implicated by the regulation at Step One, courts almost always proceed to apply intermediate scrutiny at Step Two.[191]

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[186] *Id.* at 690. The court observed that, given the inconclusive evidence surrounding whether *Heller*'s presumptively lawful measures were actually longstanding and accepted at the time of the Constitution's ratification, it would be "peculiar to conclude that § 922(g)(4) does not burden conduct within the ambit of the Second Amendment as historically understood based on nothing more than *Heller*'s observation that such a regulation is 'presumptively lawful.'" *Id.* (quoting *Heller*, 554 U.S. at 627 n.26).

[187] *Id.* at 699. The district court has not yet issued a ruling on the case on remand.

[188] *See supra* notes 164–181 and accompanying text.

[189] *See, e.g.*, *Chovan*, 735 F.3d at 1137; *Mahin*, 668 F.3d at 124; *Staten*, 666 F.3d at 160; *Chester I*, 628 F.3d at 680–81; *Reese*, 627 F.3d at 801. The Sixth Circuit has effectively found that the mentally ill have a right to bear arms protected by the Second Amendment, constrained as it may be. *See Tyler II*, 837 F.3d at 690.

[190] *See Tyler II*, 837 F.3d at 692 (calling the approach an "analytical off-ramp" and excuse not to do a constitutional analysis); *Chester I*, 628 F.3d at 682–83 (claiming the approach approximates rational basis review).

[191] *See, e.g.*, *Tyler II*, 837 F.3d at 692 (applying intermediate scrutiny); *Chovan*, 735 F.3d at 1137–38 (same); *Mahin*, 668 F.3d at 124 (same); *Staten*, 666 F.3d at 159 (same); *Chester I*, 628 F.3d at 682–83 (same); *Skoien*, 614 F.3d at 641–42 (requiring "some form of strong showing" approximating intermediate scrutiny). Courts generally do not apply strict scrutiny to these cases because, as their reasoning goes, though the general Second Amendment right is implicated, the "core" of the right—that of a law-abiding citizen to keep and bear arms for self-defense in the home—is not implicated because the petitioners have proven themselves to be non-law-abiding. *See Tyler II*, 837 F.3d at 691 ("To hold, as Tyler requests, that he is at the core of the Second Amendment despite his history of mental illness would cut too hard against Congress's power to categorically prohibit certain presumptively dangerous people from gun ownership."). A critic of applying different scrutiny based on how close to the "core" of the right the regulated conduct or person is might argue that this resembles the sort of "interest-balancing" rejected by *Heller*. *See* Brief for the States of Texas et al. as Amici Curiae in Support of Petitioner at 2, Mance v. Whitaker, *petition for cert. filed*, No. 18-663 (U.S. Dec. 21, 2018) (arguing that appellate courts are functionally applying the type of interest-balancing test that *Heller* rejected). In response, courts typically draw an analogy to First Amendment jurisprudence, where—despite the presence of a fundamental right—the level of scrutiny applied depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.

B. State Courts' Treatment of Second Amendment Challenges to Red Flag Laws

In late July of 2012, a man approached a parking garage officer and told the officer he had found a dead body behind a gun range located on his property—and that *he* himself might have been the killer.[192] The man, Robert Redington, also informed the officer that he sees "dark spirits and dark entities," that his firearms made him feel "courageous," and that he came to Bloomington, Indiana to avenge Lauren Spierer, a college student who had gone missing.[193] A week later, the parking officer observed Redington on the third floor of the garage looking through binoculars down onto the street below and called law enforcement.[194] After making contact with Redington and interviewing him at the police station, law enforcement searched Redington's residence and seized forty-eight firearms.[195] Following a trial judge's order granting the state's petition to retain Redington's firearms for a year, Redington on appeal brought an as-applied challenge to Indiana's red flag law, arguing that it violated his right to keep and bear arms under the Indiana state constitution's Second Amendment analogue.[196]

See Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 198 (5th Cir. 2012) ("First Amendment doctrine demonstrates that, even with respect to a fundamental constitutional right, we can and should adjust the level of scrutiny according to the severity of the challenged regulation."); *Chester I*, 628 F.3d at 682 (citing laws regulating commercial speech as an example). Critics respond by arguing the First Amendment "content neutral" laws that trigger less exacting scrutiny are more similar to gun laws regulating type of weapons and methods of carry—which could arguably get intermediate scrutiny—than they are to laws that completely deny the fundamental right—which should always get strict scrutiny. *See* SWEARER, *supra* note 117, at 2 n.19.

[192] Redington v. State (*Redington I*), 992 N.E.2d 823, 825 (Ind. Ct. App. 2013).

[193] *Id.* at 825–26. The parking officer's manager told him to call law enforcement if he noticed Redington in the parking garage again. *Id.* at 825.

[194] *Id.*

[195] *Id.* at 825–27. When law enforcement first contacted Redington in the parking garage, they recovered two loaded handguns and a shotgun. *Id.* at 826. During an interview, Redington appeared delusional and was transported to a local hospital for a mental evaluation. *Id.* at 827. A licensed psychiatrist evaluated Redington; he was then treated and released. *Id.* at 827, 840. That same day, law enforcement obtained warrants pursuant to IND. CODE § 35-47-14-2 to retain the three guns already seized and to search Redington's residence. *Id.* The state then filed a petition for a full hearing to determine whether it could retain Redington's firearms for a full year. *Id.* at 827–28.

[196] *Id.* at 828. Indiana's constitution states: "The people shall have a right to bear arms, for the defense of themselves and the State." IND. CONST. art. 1, § 32. Despite the fact that *McDonald* incorporated the Second Amendment against the states, Redington did not argue the law violated his Second Amendment rights under the U.S. Constitution. *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) (plurality opinion); *Redington I*, 992 N.E.2d at 830. Redington has since filed a successful petition under IND. CODE § 35-47-14-8 for return of his firearms. *See* Redington v. State (*Redington II*), 121 N.E.3d 1053, 1057, 1066 (Ind. Ct. App. 2019) (reversing the trial court's denial of Redington's petition and ordering his firearms to be returned).

In upholding Indiana's red flag law, the Indiana Appeals Court did not deploy the two-step test adopted by the federal circuits.[197] Instead, it announced a different test: first, it evaluates the law under some sort of means-end scrutiny; second, if the law passes constitutional muster under the first step, the court then must determine if the law imposes a material burden on the exercise of the right.[198] This second step can be broken into three distinct inquiries: (1) does the law implicate the "core value" of the right to keep and bear arms; (2) if so, does the law impose a "substantial obstacle" on the exercise of that core value; and (3) even if the law does impose a substantial obstacle, does the petitioner's exercise of the right threaten a "particularized harm" to another party.[199]

The court began by evaluating the law under rational basis review, and upheld it as rationally calculated to advance the state's interest in seizing firearms from dangerous persons.[200] Moving on to the second step, the court assumed the law *did* implicate the core value of Redington's right to keep and bear arms.[201] But the court then found that the law did not impose a substantial obstacle on that right, and, even if it did, Redington's exercise of the right threatened "particularized harm" to other parties.[202]

In 2016, in *Hope v. State*, the Appellate Court of Connecticut considered a similar challenge to Connecticut's red flag law that was brought under the Second Amendment instead of a state constitution analogue.[203] The case

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[197] *See Redington I*, 992 N.E.2d at 833 (applying rational basis review and "material burden" test). This was likely because Redington's claim was brought under the state constitution rather than the U.S. Constitution. *See* Wilder v. State, 91 N.E.3d 1016, 1027 (Ind. Ct. App. 2018) (explaining that Indiana courts analyze claims made under Article 1, § 32 of the state constitution differently from claims made under Second Amendment).

[198] *Redington I*, 992 N.E.2d at 833–34.

[199] *Id.* The core value embodied by Article 1, § 32 is the right of law-abiding citizens to keep arms for self-defense. *Id.* at 833. No matter the court's answer to the first two inquiries, the petitioner's claim fails if his exercise of the right threatens a "particularized harm" to another party. *Id.*

[200] *Id.* at 833. The court dedicated just one sentence to its analysis under rational basis review. *Id.* The court cited *Heller* and *McDonald* in this part of its opinion, alluding to those opinions' language that laws regulating the possession of firearms by the mentally ill are "presumptively lawful." *Id.* It did not address *Heller*'s rejection of rational basis review as an inappropriate level of scrutiny. *See id.*; *see also Heller*, 554 U.S. at 628 n.27. In a Second Amendment challenge to a separate Indiana law that prohibits individuals on probation from possessing firearms, the Indiana Court of Appeals proceeded to evaluate the law under the two-part test used in the federal circuits. *Wilder*, 91 N.E.3d at 1025. The court upheld that law under intermediate scrutiny. *Id.* at 1026.

[201] *Redington I*, 992 N.E.2d at 833. The court did not engage in the question of whether the mentally ill or those exhibiting symptoms consistent with a mental illness even had rights protected by Article 1, § 32 of Indiana's constitution. *See id.* (assuming Redington's right to keep and bear arms remained intact).

[202] *Id.* at 834–35. The court pointed to the law's mechanism allowing for Redington to regain possession of his firearms on appeal after 180 days to support its conclusion that the law did not impose a "substantial obstacle." *Id.* at 834.

[203] 133 A.3d 519, 524 (Conn. App. Ct. 2016). The plaintiff did not claim the law violated his right to bear arms under Connecticut's constitution. *Id.* at 522 n.1.

stemmed from an incident which occurred on May 15, 2014, when the petitioner called law enforcement to his residence to investigate a possible burglary.[204] Though law enforcement found no evidence of a break-in, the petitioner continued to insist to officers that he heard voices coming from the basement and that unnamed individuals were trying to hack into his electronic devices.[205] That evening, law enforcement searched the petitioner's residence and, against his will, confiscated his firearms and transported him to a hospital for a psychiatric evaluation.[206] The petitioner appealed after a superior court judge granted the state's petition to retain the firearms for a year.[207]

The *Hope* court began its analysis by noting that *Heller* and *McDonald* recognized that legislatures may use a variety of "presumptively lawful" measures to prevent gun violence.[208] It then went on to announce the two-step test used by federal courts in analyzing Second Amendment claims.[209] The court proceeded to uphold the law at Step One, concluding that it does not implicate the Second Amendment because it does not restrict the right of law-abiding, responsible citizens to use arms in defense of their home.[210] Implicit in the court's reasoning was that an individual like the petitioner—who had never been adjudicated mentally ill or convicted of a felony but who was exhibiting delusional behavior and in the possession of firearms—did not have a right to keep and bear arms protected by the Second Amendment *because* he was not a law-abiding citizen.[211] The court then concluded by calling the law an example of the "presumptively lawful" measures contemplated by *Heller*.[212]

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[204] *Id.* at 522.

[205] *Id.* at 522–23. Law enforcement also spoke to the plaintiff's wife, who said her husband had become increasingly delusional and had been holding a rifle when she arrived home that evening. *Id.*

[206] *Id.* at 523.

[207] *Id.* Law enforcement seized the plaintiff's firearms before filing for a temporary risk warrant. *See id.* The judge found by clear and convincing evidence that the plaintiff posed an imminent risk of physical harm to himself or others, as he suffered from a paranoia that had not been completely treated. *Id.*

[208] *Id.* at 524.

[209] *See id.* (citing *State v. DeCiccio*, 105 A.3d 165, 187 (Conn. 2014) for its layout of the two-step test and its acknowledgement that rational basis review is an inappropriate level of means-end scrutiny at Step Two). The court noted that the limited amount of time the state may legally retain plaintiff's firearms, the process afforded, and the limited class of people to which the law applies (those whom a court has adjudged to pose a risk of imminent physical harm to themselves or others) were ancillary considerations in favor of the law's constitutionality. *Id.*

[210] *Id.* The *Hope* court, having determined the law did not implicate conduct or persons protected by the Second Amendment, did not apply means-end scrutiny at Step Two. *Id.*

[211] *See id.* (identifying the right protected by the Second Amendment as that of law-abiding citizens to use arms for self-defense in the home and stating that such a right was not implicated in the instant case). For support, the *Hope* court noted the observation of a California appeals court that *Heller* did not extend Second Amendment protections to persons whose firearms were seized because they were found to be a danger to themselves due to their mental health. *Id.* at 525 (citing City of San Diego v. Boggess, 157 Cal. Rptr. 3d 644, 652 (Ct. App. 2013)). In reaching this conclusion, the court foreclosed the possibility of finding that although the plaintiff had Second Amendment rights, the

IV. How Courts Should Analyze Second Amendment Challenges to Red Flag Laws

Courts have clearly struggled to develop a uniform consensus on how to evaluate Second Amendment challenges to laws that either (1) fall directly into *Heller*'s list of "presumptively lawful" measures, or (2) are unlisted but resemble those measures.[213] Red flag laws are arguably among the latter group.[214] Due to the speed at which some states enacted their red flag laws, the controversial nature of the laws, and law enforcement officials' increased reliance on the laws to seize firearms from individuals they deem dangerous, it is likely that the laws will continue to be challenged in court.[215] This Part argues

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burden imposed on the right was either not significant enough to present a constitutional issue or was sufficiently justified to pass constitutional muster. *Compare Redington I*, 992 N.E.2d at 831–35 (assuming the right was implicated and then considering the significance of the burden), *with Hope*, 133 A.3d at 524–25 (resolving the case at Step One).

[212] *Hope*, 133 A.3d at 524–25.

[213] *Compare* United States v. Dugan, 657 F.3d 998, 999–1000 (9th Cir. 2011) (resolving a challenge to federal prohibition on possession of firearms by drug users at Step One), *and* United States v. White, 593 F.3d 1199, 1206 (11th Cir. 2010) (resolving a challenge to federal prohibition on possession of firearms by domestic violence misdemeanants at Step One), *with* United States v. Chester (*Chester I*), 628 F.3d 673, 680 (4th Cir. 2010) (resolving a challenge to federal prohibition on possession of firearms by domestic violence misdemeanants at Step Two), *and* United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010) (resolving a challenge to federal prohibition on possession of firearms by individuals subject to a restraining order at Step Two), *and* Tyler v. Hillsdale Cty. Sheriff's Dep't (*Tyler II*), 837 F.3d 678, 690 (6th Cir. 2016) (resolving challenge to federal prohibition on possession of firearms by mentally ill at Step Two).

[214] *See, e.g.*, FLA. STAT. § 790.401(3) (2018) (applying to anyone found to pose a "significant danger of causing personal injury to himself or others by having in his or her custody or control, or by purchasing, possessing, or receiving, a firearm," and listing evidence of "recurring mental health issues"—notably, not an adjudication of mental illness or an involuntary commitment—as one of fifteen different criteria a judge may consider in determining whether to grant the order). Unlike 18 U.S.C. § 922(g)(1) and § 922(g)(4), red flag laws do not apply only to felons or those adjudicated to be mentally ill or involuntarily committed. *Compare* 8 R.I. GEN. LAWS § 8-8.3-5 (2018) (listing "criminal history" and "mental health history" as two out of eleven factors a judge might consider in determining whether grounds for an extreme risk protection order exist), *with* 18 U.S.C. § 922(g)(4) (2018) (conditioning prohibition of firearm possession on a formal adjudication of a mental illness or an involuntary commitment).

[215] *See, e.g.*, Amended Initial Brief of Appellant, *supra* note 22, at 1–2 (arguing that Florida's red flag law is problematic partly because it was hastily implemented and gave those involved in the criminal justice system little time to prepare for how to uniformly apply the statute); Colin Campbell, *Anne Arundel Police Say Officers Fatally Shot Armed Man While Serving Protective Order to Remove Guns*, BALT. SUN (Nov. 5, 2018), https://www.baltimoresun.com/news/maryland/crime/bs-md-aa-shooting-20181105-story.html [https://perma.cc/SE8Q-M74P] (detailing how police fatally shot a man in Maryland while serving a risk protection order, stirring controversy); *see also* Johnson, *supra* note 23 (describing a lawsuit brought in Nevada arguing that the state's red flag law violates the federal and Nevada constitutions' right to a jury trial); Dave Soloman, *Both Sides Brace for Battle Over 'Red Flag' Law Today in House*, N.H. UNION-LEADER (Mar. 4, 2019), https://www.unionleader.com/news/politics/both-sides-brace-for-battle-over-red-flag-law-today/article_ed375c77-964c-5254-9807-98500b3a2849.html [https://perma.cc/CMG8-PPML] (detailing strong opposition to proposed red flag

that courts should proceed with the analysis of a Second Amendment challenge to a red flag law by finding that the laws regulate conduct and individuals protected by the Second Amendment at Step One, and then evaluate the law under intermediate scrutiny at Step Two.[216]

In reviewing a Second Amendment challenge to a red flag law, it is likely that some courts will resolve the dispute at Step One by concluding that the regulated conduct falls outside the ambit of the Second Amendment, or that the regulated person lacks Second Amendment rights, and uphold the law as constitutional.[217] Indeed, the *Hope* court followed just this line of reasoning in rejecting a Second Amendment challenge to Connecticut's red flag law.[218] The Fourth Circuit referred to this type of reasoning as the "safe harbor" approach while the Sixth Circuit characterized it as a court taking an "analytical off-ramp."[219] It is an unsatisfactory approach for a number of reasons.[220]

First, prohibitions on possession of firearms by individuals included in *Heller*'s presumptively lawful list—for example, the mentally ill—were practically nonexistent at the time of the Second Amendment's ratification and

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law in New Hampshire legislature); *supra* note 101 and accompanying text (discussing law enforcement's increased reliance on red flag laws in Florida and Maryland).

[216] *See infra* notes 217–247 and accompanying text.

[217] *See* Binderup v. Att'y Gen. U.S., 836 F.3d 336, 360 n.6 (3d Cir. 2016) (en banc) (Hardiman, J., concurring) (explaining that respondents' as-applied challenge to § 922(g)(1) should fail at Step One because—as misdemeanants whose punishments were large enough to qualify them as felons—respondents did not have Second Amendment rights); *Dugan*, 657 F.3d at 999–1000 (resolving a challenge to federal prohibition on possession of firearms by drug users at Step One); United States v. Seay, 620 F.3d 919, 925 (8th Cir. 2010) (resolving challenge to federal prohibition on possession of firearms by drug users at Step One); *White*, 593 F.3d at 1206 (resolving a challenge to federal prohibition on possession of firearms by domestic violence misdemeanants at Step One); United States v. Richard, 350 F. App'x 252, 260 (10th Cir. 2009) (responding to prohibition challenge from drug users at Step One); Hope v. State, 133 A.3d 519, 525 (Conn. App. Ct. 2016) (concluding that Connecticut's red flag law does not implicate the Second Amendment at Step One because it applies to non-law-abiding individuals who don't have Second Amendment rights). Some scholars support these courts' decisions. *See, e.g.*, Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 413 (2009) ("*Heller* categorically excludes certain types of 'people' and 'Arms' from Second Amendment coverage, denying them any constitutional protection whatsoever."); Racine, *supra* note 139, at 623 (asserting that "the Second Amendment individual right to bear arms does not encompass felons or the mentally ill"). *But see* Vars & Young, *supra* note 139, at 4 (arguing that *Heller* does not disqualify the mentally ill—or any class of individuals—from the right to bear arms).

[218] *See Hope*, 133 A.3d at 525 (reasoning that non-law-abiding individuals don't have Second Amendment rights and upholding Connecticut's red flag law in the face of a Second Amendment challenge). In addition, the Appeals Court of California followed this same line of reasoning in reviewing a Second Amendment challenge to a statute that authorizes law enforcement to seize and retain firearms belonging to individuals detained for medical examination under the state's involuntary civil commitment statute. City of San Diego v. Boggess, 157 Cal. Rptr. 3d 644, 653–54 (Ct. App. 2013).

[219] *Tyler II*, 837 F.3d at 686; *Chester I*, 628 F.3d at 679.

[220] *See infra* notes 221–239 and accompanying text.

therefore are not "longstanding" relative to the Constitutional Convention.[221] To the extent courts are true to the inquiry to be conducted at Step One, the absence of any such laws in 1791 prohibiting persons deemed mentally unstable by society from possessing firearms is a strong indication that such persons were thought to have Second Amendment rights.[222] Moreover, the *Heller* majority repeatedly implied that the Second Amendment applies to *all* citizens, not just the subset of citizens deemed responsible or law-abiding.[223] In sum, the lack of clear historical evidence showing the existence of laws categorically prohibiting individuals deemed mentally ill by society from possessing firearms should cut in favor of the notion that these individuals do have Second Amendment rights, however limited, and that any law infringing upon that right must withstand some type of means-end scrutiny.[224]

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[221] *See Tyler II*, 837 F.3d at 690 (characterizing the historical evidence of laws prohibiting possession of firearms by the mentally unstable as ambiguous at best); Larson, *supra* note 139, at 1374–78 (concluding that no government had laws prohibiting felons, the mentally ill, or other individuals deemed dangerous from possessing firearms until the twentieth century). One scholar observed,

> One thing the Founders did not do was impose any gun control laws obviously equivalent to those on the laundry list. They had no restrictions on the commercial sales of firearms as such . . . . Nor did the Founders have bans on guns in schools, government buildings, or any other "sensitive place." The Founding generation had no laws limiting gun possession by the mentally ill, nor laws denying the right to people convicted of crimes. Bans on ex-felons possessing firearms were first adopted in the 1920s and 1930s, almost a century and a half after the Founding.

Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1563 (2009).

[222] *See* Kopel & Greenlee, *supra* note 133, at 244 (arguing that there is no historical support for the proposition that individuals subject to modern categorical bans on firearm possession have no Second Amendment rights); Vars & Young, *supra* note 139, at 7 (arguing that the mentally ill have Second Amendment rights because prohibitions on possession of firearms by mentally ill are not longstanding); Winkler, *supra* note 221, at 1563 n.67 (arguing that governments can lawfully ban felons and the mentally ill from possessing guns, not because those individuals lack Second Amendment protection, but because the government has sufficiently compelling reasons for doing so).

[223] Vars & Young, *supra* note 139, at 4–5. The *Heller* Court repeatedly stated that the Second Amendment applies to *all* citizens. *See* District of Columbia v. Heller, 554 U.S. 570, 580–81, 583 (2008) (stating the strong presumption that the Second Amendment right is "exercised individually and belongs to all Americans" and observing that the term "the people" in the Constitution and Bill of Rights refers to all citizens, not just a subset). While the Court *did* imply that the "core" of the right was that of law-abiding citizens to keep and bear arms for self-defense in the home, nothing in its opinion held that the "core" of the right represents the outer bounds of the protection the right affords, or that some classes of individuals have no Second Amendment rights. *See id.* at 614, 628–29, 635; Rosenthal, *supra* note 139, at 2 (observing that the only clear boundary on Second Amendment rights to emerge from *Heller* is that the right to keep and bear arms "does not protect those weapons not typically possessed by law abiding citizens for lawful purposes, such as short-barreled shotguns," or otherwise "dangerous and unusual weapons").

[224] *See* Kopel & Greenlee, *supra* note 133, at 244 (arguing that there is no historical support for the proposition that individuals subject to modern bans on firearm possession have no Second Amendment rights); Vars & Young, *supra* note 139, at 7 (arguing the mentally ill have Second Amendment rights because prohibitions on possession of firearms by mentally ill are not longstanding).

Second, the "safe harbor" approach has the effect of reading the word "presumptively" out of the *Heller* opinion.[225] *Heller* stated that the listed measures were "presumptively lawful," *not* conclusively lawful.[226] Presumptions ought to be rebuttable.[227] In effect, *Heller*'s "presumption" amounts to a judicial best-guess that these types of laws are supported by sufficiently weighty interests and appropriately tailored to carry out that interest.[228] But the "presumption" itself should have no analytical role to play in the constitutional analysis.[229] Indeed, courts that resolve the challenge at Step One necessarily deprive the challenging party of the opportunity to rebut *Heller*'s presumption that the measures are lawful.[230] Moreover, as the Third Circuit noted in *Marzzarella*, to treat Heller's presumptions as irrebuttable would negate the Second Amendment.[231]

Third, the "safe harbor" approach will present problems for courts evaluating as-applied challenges to red flag laws brought under the Second Amendment.[232] As an initial matter, if a court adopts the view that potentially danger-

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[225] Kopel & Greenlee, *supra* note 133, at 216; Vars & Young, *supra* note 139, at 7.

[226] 554 U.S. at 627 n.26.

[227] *See* United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010) ("*Heller* referred to felon disarmament bans only as 'presumptively lawful,' which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge."); *Presumption*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/presumption [https://perma.cc/25DN-ENJU] (defining presumption as "a belief that something is true because it is likely, although not certain"); *Presumption*, MACMILLAN DICTIONARY, https://www.macmillandictionary.com/us/dictionary/american/presumption [https://perma.cc/Q29U-6XTB] ("[T]he belief that something is true because no one has proved that it is not.").

[228] *See Binderup*, 836 F.3d at 360 n.6 (Hardiman, J., concurring) ("To so hold would ignore the meaning of the word 'presumption.' A presumption of constitutionality 'is a presumption . . . [about] the existence of factual conditions supporting the legislation. As such it is a *rebuttable* presumption.'") (alterations in original).

[229] *See Tyler II*, 837 F.3d at 686 (criticizing the safe harbor approach as an "analytical off-ramp"); *Chester I*, 628 F.3d at 679 (same).

[230] *See* United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010) (stating that if the plaintiff fails at Step One, the challenged law passes constitutional muster and the inquiry is complete—meaning the government is not required to show the challenged law satisfies the appropriate means-end scrutiny).

[231] *Id.* at 92 n.8. The Third Circuit reached this conclusion by reasoning that if all listed measures in *Heller*'s "presumptively lawful" dicta were lawful because they regulated conduct that fell outside the Second Amendment's ambit, then *any* restriction on the commercial sale of firearms (one of the four listed measures in *Heller*'s dicta) would be acceptable. *Id.* It would then follow that a government could enact a complete ban on the commercial sale of firearms, which would be an unacceptable result under *Heller*. *Id.*

[232] *See* Schrader v. Holder, 704 F.3d 980, 991 (D.C. Cir. 2013) (expressing hesitation to find that the plaintiff—whose conviction was forty years prior, received no jail time, and served honorably in the Vietnam War—was outside the ambit of the Second Amendment simply because he was a felon); *see also* United States v. Carpio-Leon, 701 F.3d 974, 981 (4th Cir. 2012) ("The *Heller* Court's holding that defines the core right to bear arms by law-abiding, responsible citizens does not preclude some future determination that persons who commit some offenses might nonetheless remain in the protected class of 'law-abiding, responsible' persons."). The *Schrader* court did not have to decide the "difficult" question of whether the plaintiff himself fell within the scope of the Second Amendment, because the plaintiff had not raised an as-applied challenge to 18 U.S.C. § 922(g)(1). 704 F.3d at 991. Nevertheless, it cast

ous people do not have Second Amendment rights and simply resolves the issue at Step One, then no as-applied challenge to the laws brought by such an individual could ever be successful.[233] Such reasoning surely goes too far and could preclude valid constitutional claims.[234] In addition, operating on this assumption in the context of red flag laws—that finding an individual to be dangerous within the meaning of the pertinent red flag statute eliminates that individual's Second Amendment rights—paints with too wide a brush.[235] For example, could it really be that the petitioner in *Davis v. Gilchrest County Sheriff's Office* was disqualified from protection under the Second Amendment simply because of his comment to the sheriff?[236] How about Mr. Velasquez after his comment to law enforcement that if he was going to commit a school shooting, it would be at his middle school?[237] Courts adopting the "safe harbor" approach could unnecessarily be forced to answer difficult questions at Step One about what level of dangerousness disqualifies an individual from the Second Amendment's protections.[238] Instead, courts should determine at Step

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doubt on the idea that the plaintiff lacked Second Amendment rights merely because he was convicted of a felony in a bar fight forty years prior. *Id.* at 992.

[233] *See Marzzarella*, 614 F.3d at 89 (stating that if the plaintiff cannot pass Step One—that is, cannot show he falls with the Second Amendment's ambit—the inquiry is over and no means-end scrutiny is necessary).

[234] *See Binderup*, 836 F.3d at 366–67 (Hardiman, J., concurring) ("But to deny one even the opportunity to 'develop [a] factual basis' in support of his constitutional claim would run afoul of both Supreme Court guidance regarding the scope of the Second Amendment and the concept of an as-applied challenge.") (alteration in original); Bonidy v. U.S. Postal Serv., 790 F.3d 1121, 1137 (10th Cir. 2015) (Tymkovich, J., concurring) (arguing that the Tenth Circuit majority misinterpreted *Heller's* "presumptively lawful" dicta to suggest that the Second Amendment right does not exist in government buildings).

[235] *See Bonidy*, 790 F.3d at 1137 (Tymkovich, J., concurring).

[236] Amended Initial Brief of Appellant, *supra* note 22, at 12; *see supra* notes 108–111 and accompanying text (describing the facts of *Davis*). Judge White of the Sixth Circuit has taken issue with what she calls this "on/off switch" approach to the Second Amendment—where someone can quickly lose or regain Second Amendment rights depending on their current mental health status—arguing it is less workable than applying means-end scrutiny to the law. *Tyler II*, 837 F.3d at 700–01 (White, J., concurring). Judge Barrett of the Seventh Circuit has echoed Judge White's concern. Kanter v. Barr, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J. dissenting) (observing that an interpretation of the Second Amendment which would lead to an individual being "in one day and out the next" is an unusual way to think about constitutional rights).

[237] Torralva, *supra* note 6; *see supra* notes 7–8 and accompanying text (detailing Mr. Velasquez's interview with law enforcement).

[238] *See Binderup*, 836 F.3d at 351 (plurality opinion) (applying a somewhat vague "civic virtue" standard at Step One to determine whether an individual has rights protected by the Second Amendment); *id.* at 375–76 (Hardiman, J., concurring) (deploying a "dangerousness" standard as the touchstone at Step One—a standard apparently intended to be less rigorous than the "civic virtue" standard adopted by the plurality); *Schrader*, 704 F.3d at 991 (expressing hesitation to find that an aged and honorably discharged veteran plaintiff was outside the ambit of the Second Amendment simply because he committed a felony forty years ago). The *Schrader* court did not have to decide one way or the other because the plaintiff had not raised an as-applied challenge to 18 U.S.C. § 922(g)(1). 704 F.3d at 991. In making the "level of dangerousness" determination within the context of red flag laws, trial

One that red flag laws in most cases *do* implicate the Second Amendment—because *Heller* does not place potentially dangerous individuals outside the Amendment's scope—and then proceed to apply intermediate scrutiny to the challenged law.[239]

The appropriate level of scrutiny to apply in Second Amendment cases has generated much debate among legal scholars.[240] *Heller*'s clearest dictate was that rational basis review would be an inappropriate level of review for a "specific, enumerated right" such as the right to keep and bear arms.[241] Justice Scalia, writing for the majority, also appeared to reject Justice Breyer's proposal for an "interest-balancing" test that would weigh the particular individual's asserted right to keep and bear arms against the state's need to provide for public safety.[242] After *Heller*, most courts have adopted a hybrid that applies strict scrutiny when the regulated conduct is at the "core" of the Second Amendment—that of law-abiding citizens to keep arms for self-defense in the home—and

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courts generally must evaluate the future behavior of the defendant, which can be difficult. Greg Allen, *Florida Could Serve as Example for Lawmakers Considering Red Flag Laws*, NPR (Aug. 21, 2019), https://www.npr.org/2019/08/21/752815318/florida-could-serve-as-example-for-lawmakers-considering-red-flag-laws [https://perma.cc/G26T-QLY7]. Regarding this difficulty, the Broward County circuit court chief judge said, "You're trying to determine is [the defendant] going to harm himself or others and should he have a weapon or ammunition? And so it's a decision you're making based on future behavior, which isn't one we do a lot in the court system." *Id.*

[239] *See Kanter*, 919 F.3d at 453 (Barrett, J., dissenting) ("Neither felons nor the mentally ill are categorically excluded from our national community . . . . Thus, I treat Kanter as falling within the scope of the Second Amendment and ask whether Congress and Wisconsin can nonetheless prevent him from possessing a gun."); *Tyler II*, 837 F.3d at 690 (finding that those adjudicated mentally ill or involuntarily committed are not left unprotected by the Second Amendment); *Reese*, 627 F.3d at 801 (holding that an individual subject to a restraining order had Second Amendment rights).

[240] *See supra* note 139 and accompanying text.

[241] *Heller*, 554 U.S. at 628–29 n.27.

[242] *See id.* at 634 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."). Justice Breyer's proposed "interest-balancing" test would require the Court to ask "whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Id.* at 689–90 (Breyer, J., dissenting). Nevertheless, in the majority opinion, Justice Scalia seemed to extend an open invitation for courts to conduct such an "interest-balancing" inquiry by identifying the core of the right as that of the law-abiding citizen to keep arms for self-defense in the home. *See id.* at 635 (majority opinion) (explaining that the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home"). Some courts have accepted the invitation, at least when the conduct involved does not represent the "core of the right," and generally apply some version of an "interest-balancing" test which they label intermediate scrutiny. *See, e.g.*, Ezell v. City of Chicago, 846 F.3d 888, 892 (7th Cir. 2017). The Seventh Circuit noted,

> The rigor of this means-end review depends on "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." Severe burdens on the core right of armed defense require a very strong public-interest justification and a close means-end fit; lesser burdens, and burdens on activity lying closer to the margins of the right, are more easily justified.

Id. (citation omitted).

intermediate scrutiny when the regulated conduct falls outside of the "core."[243] This hybrid approach, though occasionally resembling the "interest-balancing" Justice Scalia rejected in *Heller*, is sensible in the context of red flag laws because it allows courts to balance the weight of the right against *Heller*'s caution that an individual may not "carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[244] In addition, Justice Scalia implied that Justice Breyer's "interest-balancing" approach was *only* inappropriate when the "core" of the Second Amendment's protection was involved.[245] When law enforcement seeks to use a red flag law to seize an individual's firearms, the individual's conduct generally does not fall within the "core" of the Second Amendment's protection—the right of law abiding citizens to keep firearms for self-defense in the home.[246] Therefore, unless and until the Supreme Court clarifies its current Second Amendment jurisprudence, these cases should generally be evaluated under intermediate scrutiny rather than strict scrutiny.[247]

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[243] *See, e.g.*, *Tyler II*, 837 F.3d at 690, 692; Jackson v. City & County of San Francisco, 746 F.3d 953, 961 (9th Cir. 2014); Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 195 (5th Cir. 2012); Heller v. District of Columbia, 670 F.3d 1244, 1257 (D.C. Cir. 2011); *Chester I*, 628 F.3d at 680; *see also* SARAH PECK, CONG. RESEARCH SERV., R44618, POST-*HELLER* SECOND AMENDMENT JURISPRUDENCE 16–17 (2019) (explaining that most courts apply either intermediate or strict scrutiny depending on how great a burden the law puts on the right).

[244] *See* 554 U.S. at 626 (observing that "[l]ike most rights, the right secured by the Second Amendment is not unlimited"); Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1137 (2000) (arguing that the hybrid approach strikes an appropriate balance between protecting the individual right and preserving the state's interest in enacting public safety laws).

[245] See *Heller*, 554 U.S. at 634 ("We know of no other enumerated constitutional right whose *core* protection has been subjected to a freestanding 'interest-balancing' approach.") (emphasis added).

[246] *See, e.g.*, Amended Initial Brief of Appellant, *supra* note 22, at 2–6 (explaining how petitioner threatened to shoot a fellow co-worker while enraged about his co-worker's relationship with petitioner's girlfriend); Berman, *supra* note 3 (detailing how Nikolas Cruz stated he wanted to commit a school shooting, among other violent acts); Torralva, *supra* note 6 (explaining how Christian Velasquez told police he might commit a school shooting). *But see* Lipscomb, *supra* note 19 (telling the story of a man who, though likely delusional, did not make any explicit threats and did not carry his firearm outside his home).

[247] *See Tyler II*, 837 F.3d at 690–91 (holding that although the Second Amendment applied to Tyler, he was not at the "core" of its protections because he had a history of mental illness); Brannon P. Denning, *The New Doctrinalism in Constitutional Scholarship and* District of Columbia v. Heller, 75 TENN. L. REV. 789, 799 (2008) (arguing that intermediate scrutiny is the baseline standard for Second Amendment cases); Massey, *supra* note 244, at 1137 (explaining why the hybrid approach strikes an appropriate balance between protecting the individual right and preserving the state's interest in enacting public safety laws); Kiehl, *supra* note 240, at 1133 ("[C]ourts should apply intermediate scrutiny in evaluating gun regulations that are short of absolute bans on possession, and that prohibitions on carrying weapons do not implicate the core constitutional right identified in *Heller* and *McDonald* of possessing a gun in the home for self-defense."). The Supreme Court is currently considering its first Second Amendment case since *McDonald*. Adam Liptak, *Supreme Court Will Review New York City Gun Law*, N.Y. TIMES (Jan. 22, 2019), https://www.nytimes.com/2019/01/22/us/politics/supreme-court-guns-nyc-license.html [https://perma.cc/4E3J-AQ7E].

CONCLUSION

In the face of increased gun violence and mass shootings, red flag laws have become a popular legislative tool among policymakers, commentators, and legal scholars for protecting public safety. The laws are gaining momentum in state houses around the country because they provide law enforcement with a means to expeditiously remove firearms from potentially dangerous individuals—regardless of the individual's criminal record and mental health history. Thus far, the laws have been a magnet for constitutional challenges—many of which have been brought under the Second Amendment. In considering such challenges, courts should conclude that red flag laws *do* regulate individuals protected by the Second Amendment, and then proceed to apply intermediate scrutiny. This should be the case despite the Supreme Court's recent push to ensure that lower courts treat the right protected by the Second Amendment as equivalent to those protected by other amendments in the Bill of Rights. Though red flag laws often do infringe upon an individual's right to bear arms, they frequently regulate conduct that falls outside the core protection of the Second Amendment. For that reason, they generally will not merit strict scrutiny. Such an approach strikes a sensible balance between, on the one hand, allowing state legislatures to act to address a burgeoning public health concern, and, on the other hand, ensuring that citizens can vindicate their individual rights and that the Second Amendment assumes its place as equal to other amendments in the Bill of Rights.

COLEMAN GAY