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New York Supreme Court

Appellate Division—Second Department

Docket No.: 2023-05418

In the Matter of the Application of

R.J. MONACO,

Petitioner,

– against –

COREY J. MONROE,

Respondent-Respondent,

– and –

LETITIA JAMES, Attorney General of the State of New York,

Intervenor-Appellant,

For an Order Pursuant to Article 63-A of the Civil Practice Law & Rules.

MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE*

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Orange County Clerk's Index No. EF000434/23

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

R.J. MONACO, Petitioner, v. COREY J. MONROE, Respondent-Respondent, LETITIA JAMES, Attorney General of the State of New York, Intervenor-Appellant.	No. 2023-05418 **NOTICE OF MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE***

PLEASE TAKE NOTICE that, upon the accompanying affirmation of Andrew Dunlap, dated July 27, 2023 and the exhibit thereto, the undersigned will move this Court at the Courthouse, 45 Monroe Place, Brooklyn, New York, on August 7, 2023, at 10:00 a.m., or as soon thereafter as counsel may be heard, for an order granting leave to the District of Columbia and the States of Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin to appear as *amici curiae* in support of Intervenor-Appellant and for submission of the enclosed brief and arguments for consideration.

Dated: New York, NY
July 28, 2023

Respectfully submitted,

SELENDY GAY ELSBERG PLLC

By: /s/ Andrew R. Dunlap

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISON: SECOND DEPARTMENT

R.J. MONACO, Petitioner, v. COREY J. MONROE, Respondent-Respondent, LETITIA JAMES, Attorney General of the State of New York, Intervenor-Appellant.	No. 2023-05418 **AFFIRMATION IN SUPPORT OF MOTION TO APPEAR AS *AMICI CURIAE***

Andrew Dunlap, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms the following to be true under penalty of perjury:

1. I am a member and Partner at Selendy Gay Elsberg PLLC, counsel for the District of Columbia and the States of Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin (collectively, the "proposed amici").

2. I submit this affirmation in support of the proposed *amici*'s motion for leave to appear as *amici curiae* in support of Intervenor-Appellant.

3. Attached hereto as Exhibit A is the brief the proposed *amici* seek leave to admit in this matter as *amici curiae*.

4. The proposed *amici* are states that have enacted similar extreme risk protection order ("ERPO") laws and therefore have a unique interest in supporting Intervenor-Appellant

New York in defending the constitutionality of its ERPO law and ensuring that ERPO laws remain valid and effective. *Amici* include: the District of Columbia and the States of Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin.

5. The proposed *amici* respectfully submit that the brief attached as Exhibit A will be helpful to the Court in its resolution of this appeal.

6. The issues presented in this appeal are of the utmost importance to the proposed *amici*. Specifically, this appeal presents the question whether New York's ERPO law, N.Y. C.P.L.R. § 6342, is unconstitutional because it lacks a medical-evaluation requirement. Given that no state's ERPO law contains a medical-evaluation requirement, the Supreme Court's reasoning calls into question the ERPO laws in effect in each of the *amici* states, threatening the national consensus on ERPO laws' importance and effectiveness.

7. The proposed *amici* anticipate that Intervenor-Appellant's briefing will fully address the reasons why New York's ERPO law is constitutional. As *amici curiae*, the the District of Columbia and the States of Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin seek to assist this Court by providing a national perspective on the effectiveness of ERPO laws and thereby demonstrate the significant policy implications of the Supreme Court's ruling both within and outside of the state of New York.

8. For these reasons, the proposed *amici* respectfully request permission to appear as *amici curiae* and submit the brief attached as Exhibit A for the Court's consideration.

Dated: New York, New York
July 28, 2023

SELENDY GAY ELSBERG PLLC

By: /s/ Andrew R. Dunlap

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EXHIBIT A
AMICI CURIAE BRIEF

New York Supreme Court

Appellate Division—Second Department

In the Matter of the Application of

R.J. MONACO,

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– against –

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LETITIA JAMES, Attorney General of the State of New York,

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For an Order Pursuant to Article 63-A of the Civil Practice Law & Rules.

Docket No.: 2023-05418

BRIEF FOR THE DISTRICT OF COLUMBIA AND STATES OF ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF INTERVENOR-APPELLANT

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Orange County Clerk's Index No. EF000434/23

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

INTRODUCTION AND INTEREST OF AMICI STATES

The District of Columbia and the states of Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin file this brief as amici curiae in support of intervenor New York, which is defending the constitutionality of its extreme risk protection order ("ERPO") law. Amici states have a strong interest in ensuring that ERPO laws—enacted by nearly half the states across the country—remain valid and effective.

ERPO laws authorize courts to issue temporary protective orders that keep firearms away from individuals who present a serious risk to themselves or others. Timothy Williams, *What Are Red Flag Laws, and How Do They Work?*, N.Y. Times (Aug. 6, 2019), https://tinyurl.com/2p9b9ays. With some differences, each state's ERPO law follows the same basic framework. *See* Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: "Red Flag" Laws and Due Process*, 106 Va. L. Rev. 1285, 1288 (2020). Petitioners who seek an ERPO bear the burden of proving that the respondent in fact poses a danger to themselves or others by possessing a firearm. "After receiving the petition, the court can enter a short-term, ex parte" order based on the allegations in the petition, and "a lengthier, but still temporary" order "[a]fter a full, adversary hearing." *Id.* at 1289. In

determining whether to issue an ERPO, courts consider evidence bearing on the respondent's dangerousness, including recent or prior acts of violence, *see, e.g.*, N.M. Stat. Ann. § 40-17-7, unlawful or reckless use or display of a firearm, *see, e.g.*, Fla. Stat. § 790.401(3)(b), drug or alcohol abuse, *see, e.g.*, N.J. Stat. Ann. § 2C:58-23(f), and mental health history, *see, e.g.*, Colo. Rev. Stat. § 13-14.5-105(7).

ERPO laws thus enable temporary firearm restrictions based on "tailored, individualized risk assessments." Blocher & Charles, *supra*, at 1289. They employ an evidence-based adjudicatory approach to determine whether to disarm—for a limited period of time—an individual who poses a danger to themselves or others.

ERPO laws garner support from "[s]trong majorities of Americans from across the political spectrum." Leigh Paterson, *Americans, Including Republicans and Gun Owners, Broadly Support Red Flag Laws*, NPR (Aug. 20, 2019), https://tinyurl.com/y6ap5e5w. Twenty-two jurisdictions, including states like California, Indiana, Florida, and Virginia, have enacted them. Jordyn Hermani, *Michigan 21st State To Enact Red Flag Gun Laws With Whitmer's Signature*, MLive (May 22, 2023), https://tinyurl.com/jsywjn2k. Others, like Tennessee, continue to consider enacting them as well. *See* Aaron Blake, *A GOP Governor Touched by Tragedy Makes Rare Push for Gun Law*, Wash. Post (Apr. 20, 2023), https://tinyurl.com/yc58bmwj. And recently, Congress passed the Bipartisan Safer Communities Act, which provided $750 million in federal funding to support states'

implementation of ERPO programs. *See* Pub. L. 117-159, 136 Stat. 1313, 1325, 1339 (2022).

This case involves a challenge to New York's ERPO law. Although New York courts deciding ERPO petitions can consider "*any* relevant factor" in their analysis, N.Y. C.P.L.R. § 6342(2) (emphasis added), including input from a medical or mental health expert, Supreme Court held the ERPO law unconstitutional because it does not *require* such input. Br. 1-2.

This Court should reverse because ERPO laws need not mandate a medical evaluation to satisfy due process. ERPO laws like New York's appropriately include several procedural safeguards—most importantly, hearings in which a respondent may present evidence of their lack of dangerousness. Given that no state's ERPO law contains a medical-evaluation requirement, Supreme Court's reasoning calls into question each of these laws, disrupting the national consensus on ERPO laws' importance and effectiveness. This Court should thus reject Supreme Court's outlier reasoning.

SUMMARY OF ARGUMENT

1. Like New York, twenty other states and the District of Columbia have enacted ERPO laws, which receive high levels of support from across the political spectrum, including gun owners. New York's ERPO law falls easily within the accepted boundaries of ERPO laws, which typically follow the same basic pattern.

A petitioner, such as a law enforcement officer or a family member, can petition a court for an ERPO by alleging that the respondent poses a significant and immediate danger to himself or others. Based on the petition and accompanying evidence, the court can enter a short-term, *ex parte* order disarming the respondent. Meanwhile, the court must notify the respondent and hold a full evidentiary hearing, in many cases within two weeks, in which the petitioner bears the burden of proof to establish that the respondent is dangerous. Based on the hearing, the court can deny or grant a longer-term ERPO, which generally lasts a year.

These laws save lives. Studies from Connecticut and Indiana, which have the oldest ERPO laws in the country, show that such laws are especially potent in curbing suicides. And there are several examples of petitioners using ERPO laws to disarm individuals who have threatened to murder others, including by committing mass shootings. This research suggests that ERPO laws can effectively reduce gun violence in the United States, which likely explains their robust popularity.

2. ERPO laws—including New York's—guard individuals' due process rights by providing respondents significant procedural protections before their firearms are seized for a significant period of time. Crucially, most ERPO laws require that respondents receive notice and a hearing—the heart of procedural due process—promptly after a court issues an *ex parte* ERPO, often within two weeks. Respondents cannot be deprived of the right to possess a firearm any longer without

such a hearing. ERPO laws also limit who can petition for an order. New York's statutory scheme, for example, allows applications to be brought only by law enforcement officers, family or household members, school administrators, and certain categories of health care providers like physicians and mental health workers. N.Y. CPLR §§ 6340(2); 6341. Further, ERPO laws often penalize those who lie in their petitions, ensuring that ERPOs cannot be used simply to harass respondents. Finally, petitioners cannot obtain ERPOs without satisfying their burden of proving their case under standards of proof like "preponderance of the evidence" or "clear and convincing evidence." This scheme assures that courts do not rubber stamp ERPO petitions.

Supreme Court overlooked these procedural protections and instead deemed New York's ERPO law unconstitutional because it lacks a medical-evaluation requirement. Supreme Court erred on the law and its decision threatens serious practical harm. First, requiring mental health evaluations is underinclusive and fails to cover individuals who pose a threat to others but do not suffer from mental illness. Second, the court's conclusion would saddle the ERPO process—intended in many circumstances to operate in emergency scenarios to save lives—with time-intensive and costly medical evaluations, thus defeating the core purpose of such laws. Finally, a medical-evaluation requirement would force courts to link dangerousness to mental health issues rather than allowing courts to determine risk on a case-by-

case basis. To be sure, mental health issues may be relevant to an assessment of dangerousness in certain circumstances. But nothing in the Constitution mandates a medical evaluation before courts temporarily disarm an otherwise dangerous individual. Given these significant concerns, it is unsurprising that neither the 22 jurisdictions with ERPO laws nor the Department of Justice's model ERPO statute requires a medical evaluation before an ERPO is issued.

ARGUMENT

I. ERPO LAWS EXIST IN NEARLY TWO DOZEN JURISDICTIONS, GARNER BROAD SUPPORT, AND PREVENT FIREARM SUICIDES AND MURDERS

A. Besides New York, Twenty-One Jurisdictions Have Enacted ERPO Laws, Which Enjoy Bipartisan Support

Twenty-one states and the District of Columbia have enacted ERPO laws.[1] Connecticut enacted the first ERPO law in the country in the wake of a shooting at the state's lottery commission. *See* Conn. Gen. Stat. § 29-38c; Blocher & Charles,

[1] Cal. Penal Code §§ 18100-18205; Colo. Rev. Stat. §§ 13-14.5-101 to 13-14.5-114; Conn. Gen. Stat. § 29-38c; D.C. Code §§ 7-2510.01 to 7-2510.13; Del. Code Ann. tit. 10 §§ 7701-7709; Fla. Stat. § 790.401; Haw. Rev. Stat. §§ 134-61 to 134-72; 430 Ill. Comp. Stat. §§ 67/1-67/85; Ind. Code §§ 35-47-14-1 to 35-47-14-13; Mass. Gen. Laws ch. 140, §§ 121, 131R-131Y; Md. Code Ann. Pub. Safety §§ 5-601 to 5-610; S.B. 83, 102d Leg., Reg. Sess. (Mich. 2023) (effective 2024); S.F. 2909, 93d Leg. (Minn. 2023) (effective 2024); N.J. Stat. Ann. §§ 2C:58-20 to 2C:58-32; N.M. Stat. Ann. §§ 40-17-1 to 40-17-13; N.Y. C.P.L.R. §§ 6340-48; Nev. Rev. Stat. §§ 33.500-33.670; Or. Rev. Stat. §§ 166.525-166.543; 8 R.I. Gen. Laws §§ 8-8.3-1 to 8-8.3-14; Va. Code Ann. §§ 19.2-152.13 to 19.2-152.17; Vt. Stat. Ann. tit. 13, §§ 4051-62; Wash. Rev. Code §§ 7.105.010-7.105.903.

supra, at 1294-95. Indiana followed suit a few years later, enacting an ERPO law after an Indianapolis police officer was shot and killed in the line of duty. *Id.* at 1295; *see also* Fatima Hussein & Ryan Martin, *Indiana's "Red Flag" Gun Law Is Getting National Attention. But Does It Work?*, IndyStar (Feb. 22, 2018), https://tinyurl.com/253rrjaw (explaining that the Indianapolis shooter had been hospitalized for mental health issues the prior year, but with no legal authority to retain seized firearms, police returned them to the shooter, who later murdered the officer). Since then, 20 jurisdictions have followed suit, some passing their ERPO laws in the wake of avoidable tragedies like public mass murder. *See, e.g.*, Erin Donaghue, *Florida's "Red Flag" Law, Passed After Parkland Shooting, Is Thwarting "Bad Acts," Sheriff Says*, CBS News (Aug. 9, 2019), https://tinyurl.com/mry9f7jd (detailing how Florida enacted its ERPO law in the aftermath of the Parkland school shooting).

ERPO laws command high approval ratings. A 2019 survey found that "77% of Americans surveyed support family-initiated ERPOs, and 70% support [ERPOs] when initiated by law enforcement." Paterson, *supra*. This support comes from "men and women" alike, members of both political parties, and gun owners. *Id.*; *see also* Nicole Kravitz-Wirtz et al., *Public Awareness of and Personal Willingness To Use California's Extreme Risk Protection Order Law To Prevent Firearm-Related Harm*, JAMA Health Forum (June 4, 2021), https://tinyurl.com/zcs73dz6 (surveying

Californians and finding support for ERPO laws among gun owners). Confirming this strong consensus, Congress recently passed the Bipartisan Safer Communities Act, which incentivizes states to pass ERPO laws with $750 million in federal funding to support their implementation. Pub. L. 117-159, 136 Stat. 1313, 1325 (2022).

Most ERPO laws share the same elements. First, they enumerate specific and limited categories of individuals who can petition for an ERPO. For example, all states' ERPO laws list law enforcement, *see, e.g.*, D.C. Code § 7-2510.01(2)(B), while some reference family or household members, *see, e.g.*, Or. Rev. Stat. § 166.527, and others name medical professionals, *see, e.g.*, Conn. Gen. Stat. § 29-38c. Next, ERPO laws provide that these specified petitioners can request an order from a court prohibiting a particular respondent from possessing or purchasing firearms. Such requests must allege facts about the respondent's actions or statements to support the conclusion that the respondent poses a danger to himself or others. *See, e.g.*, Del. Code Ann. tit. 10 § 7701-03; N.M. Stat. Ann. § 40-17-5.

ERPO laws usually authorize two types of orders—a short-term, *ex parte* order and a longer-term, final order. Immediately after a petition is filed, a court can issue a short-term, *ex parte* order without a hearing if it finds probable cause (or a similar level of proof) of risk based on allegations in the petition and additional available evidence. *See, e.g.*, 430 Ill. Comp. Stat. § 67/35 (authorizing an *ex parte*

ERPO "[i]f a circuit or associate judge finds probable cause"); Cal. Penal Code § 18125 (authorizing an *ex parte* order if the "judicial officer finds that there is reasonable cause"). Such orders last briefly, usually 14 days, before they expire. *See, e.g.*, Colo. Rev. Stat. § 13-14.5-103(5); Mass. Gen. Laws ch. 140 § 131T.

Meanwhile, courts must issue notice to the respondent, *see, e.g.*, Colo. Rev. Stat. § 13-14.5-105(1); Haw. Rev. Stat. § 134-63(d), and hold a hearing at which parties can present evidence and witnesses. Courts then consider all relevant evidence presented by the parties. The District of Columbia, for example, requires that courts consider "all . . . relevant evidence," including a history or pattern of threats or acts of violence, any recent acquisition of firearms, the unlawful or reckless use of a firearm, criminal history, and any mental health or substance abuse issues. *See* D.C. Code § 7-2510.03. Likewise, in Florida, courts may consider "any relevant evidence," including, among other factors, a recent act or threat of violence, previous or existing protective orders, and corroborated evidence of the abuse of controlled substances or alcohol by the respondent. Fla. Stat. § 790.401. Notably, though some states explicitly provide that courts may consider a history of mental illness, *see, e.g.*, *id.*, and other states specify that courts may consider whether a mental health evaluation is appropriate and order such an evaluation, *see, e.g.*, Wash. Rev. Code § 7.105.215(2), no state *requires* a medical examination before an ERPO is entered at the *ex parte* or the post-hearing stage.

At the hearing, the petitioner must prove that the respondent poses a risk under a standard of proof such as clear and convincing evidence or a preponderance of the evidence, and courts can then issue longer-term ERPOs. *See, e.g.*, Del. Code Ann. tit. 10 § 7704 (clear and convincing evidence); N.J. Stat. Ann. § 2C:58-24 (preponderance of the evidence). Longer-term ERPOs generally last between six months to a year, after which they may be renewed for a similar time period after another hearing. *See, e.g.*, Haw. Rev. Stat. § 134-66 (explaining that a "petitioner may submit a written request for a renewal of a one-year gun violence protective order within three months prior to the expiration of the order"). Alternatively, a respondent may petition the court before the expiration of an ERPO to hold a hearing about whether the order should be terminated. *See, e.g.*, D.C. Code § 7-2510.08(a) (explaining that a "respondent against whom a final extreme risk protection order . . . was issued may, on one occasion during the one-year period the order is in effect, submit a written motion to the Superior Court for the District of Columbia requesting that the order be terminated").

An ERPO forbids the respondent from, among other things, owning, buying, possessing, or receiving firearms. *See, e.g.*, Haw. Rev. Stat. § 134-65(d)(1). If the respondent in fact possesses firearms when an ERPO is issued, the respondent is required to voluntarily surrender them to law enforcement. *See, e.g.*, Va. Code Ann. § 19.2-152.13(C); Wash. Rev. Code § 7.105.340(1)(a). Courts can also authorize

warrants allowing law enforcement to search for and seize firearms that a respondent has not voluntarily relinquished. *See, e.g.*, D.C. Code § 7-2510.07a; 430 Ill. Comp. Stat. § 67/35(f-5). And respondents who violate ERPOs are subject to criminal penalties. *See, e.g.*, N.M. Stat. Ann. § 40-17-11; Or. Rev. Stat. § 166.543(1).

New York's ERPO law falls comfortably within this widely accepted framework. In New York, law enforcement, family or household members, school administrators, or licensed health care workers may petition for an ERPO. N.Y. C.P.L.R. § 6340(2). Petitioners may file a sworn application and "accompanying supporting documentation, setting forth the facts and circumstances justifying the issuance of an extreme risk protection order." *Id.* § 6341. Courts issue *ex parte* ERPOs upon finding probable cause that the respondent is likely to harm himself, herself, or others, and they issue final, post-hearing ERPOs upon finding clear and convincing evidence of the same. *Id.* §§ 6342-43. Hearings must occur within three to six business days of a temporary ERPO's issuance. *Id.* § 6343(1). Before issuing ERPOs, courts may consider, among other factors, any threats or acts of violence, any violations of past protective order, the reckless use, display or brandishing of a gun, and substance abuse. *Id.* § 6342. Final orders last for a year. *Id.* § 6343(3)(c). They may be renewed at the petitioner's request following a hearing "at any time within sixty days prior to the expiration of such existing [ERPO]," or may be

terminated at the respondent's request following a hearing "at any time during the effective period of an [ERPO]." *Id.* §§ 6343, 6345.

B. ERPO Laws Curb Firearm Violence

ERPO laws successfully reduce firearm suicides and murders. As studies show, they are especially effective in preventing firearm suicides. Researchers have focused on Connecticut and Indiana, which have had ERPO laws on the books for longer than other states and thus provide a broader sample size to study. In Connecticut, one study showed that every "ten to twenty gun seizures" averts approximately one suicide. Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal: Does It Prevent Suicides?*, 80 L. & Contemp. Probs. 179, 206 (2017). Likewise, in Indiana, researchers found that the state's ERPO law prevents one suicide for every ten orders issued. Jeffrey W. Swanson et al., *Criminal Justice and Suicide Outcomes with Indiana's Risk-Based Gun Seizure Law*, 47 J. Am. Acad. of Psychiatry & L. 188, 188 (2019). Another study showed that Connecticut and Indiana ERPO laws have reduced suicides by 13.7 and 7.5 percent, respectively. Aaron J. Kivisto & Peter Lee Phalen, *Effects of Risk-Based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981-2015*, 69 Psychiatric Servs. 855, 855 (2018).

ERPO laws also prevent homicides and mass shootings. A study on ERPO laws in six states—California, Colorado, Connecticut, Florida, Maryland, and

Washington—found that ERPO cases are often filed in response to threats against three or more people. April M. Zeoli et al., *Extreme Risk Protection Orders in Response to Threats of Multiple Victim/Mass Shooting in Six U.S. States: A Descriptive Study*, 165 Preventive Med. 107304-1 (2022). Another study revealed that among 201 California ERPO respondents with accessible court records, 58 had threatened mass shootings, including six who intended to target schools. Veronica A. Pear et al., *Gun Violence Restraining Orders in California, 2016-2018: Case Details and Respondent Mortality*, 28 Inj. Prevention 465, 467 (2022). An in-depth study on 21 California ERPO cases in which respondents had threatened mass shootings found that none of the threatened shootings had occurred. Garen J. Wintemute et al., *Extreme Risk Protection Orders Intended To Prevent Mass Shootings: A Case Series*, 171 Annals Internal Med. 655, 655 (2019). There are many additional examples of ERPO laws disarming someone who posed a meaningful threat to others. *See* Bernard Condon, *Red Flag Laws Get Little Use Even As Mass Shootings, Gun Deaths Soar*, PBS (Sept. 2, 2022), https://tinyurl.com/2p9djpcx (detailing episodes from (1) Colorado, where police seized "59 guns from a man who . . . bragged about shooting someone and repeatedly threatened his ex-wife," (2) New Jersey, where "police took seven guns from a man threatening on Facebook to attack a Walmart," and (3) Washington, where "police removed 12 guns from the home of a man who posted on social media

about killing Jews in a synagogue and kids in a school." Ultimately, "[n]one of those threatened shootings happened."); *see also* April M. Zeoli et al., *Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and Their Associations with Intimate Partner Homicide*, 187 Am. J. Epidemiology 2365, 2365 (2018) (finding that states with laws prohibiting individuals subject to domestic-violence restraining orders from possessing firearms reduced intimate-partner homicides by 10%).

Given that some ERPO laws were passed only recently and others are underutilized, studies on their effect are limited.[2] But the evidence that exists indicates that ERPO laws prevent firearm suicides, violence, and mass shootings. This likely explains why a broad cross-section of states have passed them and why they retain broad popularity.

II. THIS COURT SHOULD REJECT A MEDICAL-EVALUATION REQUIREMENT FOR ERPO LAWS

A. ERPO Laws Comply With Due Process Because They Already Contain Several Procedural Safeguards

ERPO laws "balance the need to keep dangerous persons away from firearms with the recognition that firearm ownership and possession are fundamental property and liberty interests." Blocher & Charles, *supra*, at 1318. These laws provide

[2] ERPO laws suffer from underutilization in part because of the public's lack of knowledge about them. *See* Condon, *supra* (detailing how "many U.S. states barely use the red flag laws," which is in part because of "a lack of awareness of the laws").

respondents with several procedural protections before final ERPOs are issued. These protections safeguard due process rights.

Most significantly, almost all ERPO laws provide notice and a hearing promptly after a court issues a temporary, *ex parte* ERPO and before a longer-term ERPO is issued. As the United States Supreme Court has explained, the core of procedural due process is the right to notice and a hearing. *See Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1863))). And, consistent with the Constitution, a hearing can take place after the deprivation of property depending on the private and government interests and the risk of error. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). As the State explains, temporary, prehearing *ex parte* ERPO orders do not offend due process because they impose a limited burden on respondents, provide numerous other procedural guardrails, and advance the compelling government interest in preventing gun violence. Br. 20-36. And longer-term ERPOs do not raise procedural due process concerns at all because they can be issued only after a respondent receives notice and has the opportunity to contest the petition at an evidentiary hearing. *See, e.g.*, Fla. Stat. § 790.401(3); 8 R.I. Gen. Laws §§ 8-8.3-4(g), 8-8.3-5; *see also Davis v. Gilchrist Cnty. Sheriff's*

Off., 280 So. 3d 524, 533 (Fla. 1st Dist. Ct. App. 2019) (reasoning that Florida's ERPO law "afford[s] a respondent due process" because it "requires a hearing within fourteen days" after a petition is filed).

ERPO laws provide additional procedural protections beyond hearings. For example, the laws limit who can petition a court for an ERPO. As explained above, every state authorizes law enforcement officers to file a petition. Some states also grant that authority to family and household members, *see, e.g.*, Del. Code Ann. tit. 10 § 7701; Mass. Gen. Laws ch. 140, § 121, while a small number of states allow petitions from others who have first-hand knowledge of a respondent's behavior, like an educator, *see, e.g.*, Haw. Rev. Stat. § 134-61, or a medical professional, *see, e.g.*, Conn. Gen. Stat. § 29-38c. These limited authorizations curb unfounded petitions from individuals who have little or no credible information about a respondent. Many ERPO laws also penalize petitioners who include materially false information in their petitions or those who file petitions simply to harass respondents. *See, e.g.*, Fla. Stat. § 790.401(11); Or. Rev. Stat. § 166.543(3). These penalties further protect individuals from baseless or frivolous petitions. *See generally* April M. Zeoli et al., *Use of Extreme Risk Protection Orders to Reduce Gun Violence in Oregon*, 20 Criminology & Pub. Pol'y 243, 258 (2021) (finding that Oregon's ERPO law is "overwhelmingly being used as intended," only in emergency situations dealing with an "imminent risk of harm").

Petitioners filing ERPO petitions also bear the burden of proving their case under certain standards of proof like "preponderance of the evidence" or "clear and convincing evidence." Standards of proof, as "embodied in the Due Process Clause," serve "to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). These burdens thus guard against judicial rubber stamps. That has been proven in practice, with evidence that courts deny ERPO petitions when they conclude that a petitioner has failed to meet the standard. *See* Ali Rowhani-Rahnbar et al., *Extreme Risk Protection Orders in Washington: A Statewide Descriptive Study*, 173 Annals Internal Med. 342, 346 (2020) (explaining that in Washington, of 237 ERPO petitions filed in the state between 2016 and 2019, 19% were denied).

Finally, ERPOs are almost always temporary. *Ex parte* orders usually last two weeks or less. *See, e.g.*, Ind. Code § 35-47-14-5 (14 days); Nev. Rev. Stat. § 33.575 (7 days). And post-hearing ERPOs typically last for a year or less (unless the terms of the ERPO are extended by court order). *See, e.g.*, D.C. Code §§ 7-2510.03(i) (1 year); Va. Code Ann. § 19.2-152.14(C) (180 days). Many ERPO laws also allow respondents to move to terminate an order before it expires by proving

that they no longer pose a risk to themselves or others. *See, e.g.*, Colo. Rev. Stat. § 13-14.5-107; Haw. Rev. Stat. § 134-66.

New York's ERPO law contains numerous procedural safeguards found in other states' ERPO laws. It permits only law enforcement, family members, health care workers, or school administrators to file petitions, which must be sworn as true and accompanied by supporting documentation justifying an ERPO. N.Y. C.P.L.R. §§ 6340-41. A hearing must be scheduled within six business days of the issuance of an *ex parte* order, at which a petitioner must prove dangerousness with clear and convincing evidence to secure a final ERPO. *Id.* § 6343; *see also Haverstraw Town Police v. C.G.*, 190 N.Y.S.3d 588, 597 (N.Y. Sup. Ct. 2023) (emphasizing the full evidentiary hearing and clear-and-convincing-evidence standard of proof in rejecting a due process challenge). Final orders expire after a year. *Id.* § 6343(3)(c). And a respondent can move to set aside the order before its expiration. *Id.* § 6343(6). These procedural requirements in New York's law amply protect a respondent's due process rights.

B. Requiring A Medical Evaluation Would Undermine The Purposes Of ERPO Laws, Rendering Them Far Less Effective

Despite the several procedural protections detailed above, Supreme Court held that New York's ERPO law fails to provide due process because it lacks a medical-evaluation requirement. As the State correctly explains, the court's conclusion does not accord with settled due-process doctrine. Br. 19. No court in

any other jurisdiction has held that due process mandates such a requirement for ERPO laws.

Supreme Court's conclusion would also have at least three serious policy implications.

First, hinging ERPO orders on a respondent's mental health would fail to capture the full range of dangerous individuals who pose a risk to themselves or others. That is: a medical-evaluation requirement would *immunize* dangerous individuals who do not present with a diagnosable medical condition from the ERPO system. Research shows that many factors besides mental illness are important in predicting violence. *See* Shaila Dewan, *What Are the Real Warning Signs of a Mass Shooting?*, N.Y. Times (Aug. 22, 2022) https://tinyurl.com/2etejraz. A study conducted by the FBI concluded that "declarations that all active shooters must simply be mentally ill are misleading and unhelpful," given that only 25% of the active shooters in the study "were known to have been diagnosed by a mental health professional with a mental illness *of any kind* prior to the offense." James Silver et al., *A Study of the Pre-Attack Behavior of Active Shooters in the United States Between 2000 and 2003* 17 (Fed. Bureau of Investigation, U.S. Dep't of Just. June 2018), https://tinyurl.com/bdh2bpaz. Other "warning signs," like "marked changes in behavior, demeanor or appearance, uncharacteristic fights or arguments, and telling others of plans for violence" may also be accurate predictors of future

violence. *See* Dewan, *supra.* Common sense accords with this research: an individual's credible threat to shoot and kill someone would by itself be strong evidence of dangerousness. Just as a doctor's testimony that the individual did not suffer any mental illness would not undermine the evidence, a doctor's testimony that an individual previously suffered from common mental health conditions like anxiety and depression would not necessarily reflect that the threat was any more credible. This is why red flag laws—which generally allow the admission of all relevant evidence of an individual's dangerousness—enable courts to focus on all existing behavioral factors that forecast violence, not just mental health. *Id.*

Second, requiring a medical evaluation could seriously slow the ERPO process—and, in particular, the issuance of short-term, *ex parte* ERPOs, which address urgent crisis situations in which "quick action is necessary." Blocher & Charles, *supra*, at 1331, 1334 (explaining that ERPO laws target crisis situations). The significant time required for a petitioner to contact a physician or mental health expert and conduct a medical evaluation of the respondent—who could decline an evaluation and/or become even more dangerous in the intervening time—before filing a petition is at odds with the "immediate and present" dangers contemplated by ERPO schemes. Del. Code Ann. tit. 10 § 7703. And, in case a petitioner does not have a medical evaluation available when filing, the time spent trying to acquire one post-filing could easily exceed the mere hours in which courts seek to rule on *ex*

parte petitions. *See, e.g.*, Cal. Penal Code § 18150(d) ("An ex parte order under this chapter shall be issued or denied on the same day that the petition is submitted to the court . . . ."). This could be a life-or-death delay. A medical-evaluation requirement would thus defeat the purpose of ERPO laws—to enable quick action in an emergency situation and on a short timeline before someone harms themselves or others.

Third, a medical-evaluation requirement would pressure states to use mental health issues as direct proxies for dangerousness rather than allowing for a case-by-case risk analysis. Although mental health issues are "strongly associated with increased risk of suicide," "[e]pidemiological studies show that the large majority of people with serious mental illnesses are never violent" toward others. Jeffrey W. Swanson et al., *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiological Research to Policy*, 22 Annals Epidemiology 366, 366 (2015), https://tinyurl.com/bddy34j3. Laws that equate mental health issues with dangerousness, without more, thus "risk unintended adverse consequences, such as deterring people with mental health problems from seeking care voluntarily, and reinforcing stigma associated with mental illness." *Id.* at 374. For that reason, some states' ERPO laws explicitly *limit* the significance attached to certain mental health issues. *See, e.g.*, Ind. Code § 35-47-14-1(1)(b) ("The fact that an individual has been released from a mental health facility or has a mental illness that is currently

controlled by medication does not establish that the individual is dangerous for the purposes of this chapter."); Or. Rev. Stat. § 166.527(6)(a) ("The court may not include in the findings any mental health diagnosis or any connection between the risk presented by the respondent and mental illness.").

To be sure, mental health can in some circumstances be probative of whether individuals pose a risk to themselves or others. Most states thus allow consideration of such evidence to the extent it is relevant. *See, e.g.*, Conn. Gen. Stat. § 29-38c(c); N.M. Stat. Ann. § 40-17-7(C); D.C. Code § 7-2510.03(e)(7). Notably, parties in New York may provide medical evaluations during an ERPO hearing to demonstrate dangerousness (or lack thereof). "Courts are well equipped to evaluate [such] evidence," and "[i]f the evidence is insufficient—[which] the lack of medical evidence in some cases may highlight," courts can deny the petitions. *Haverstraw*, 190 N.Y.S.3d at 597. Given that mental illness is merely one factor that could be relevant to dangerousness, however, it would be incongruous to *require* a medical evaluation in every case before issuing an ERPO.

Unsurprisingly, as explained, no state requires a medical evaluation in every case before a court issues an ERPO. The recently enacted federal Bipartisan Safer Communities Act confirms this consensus. That statute, which encourages states to adopt ERPO laws, stresses that such laws should protect "pre-deprivation and post-deprivation due process rights." Pub. L. 117-159, 136 Stat. 1313, 1325 (2022). But

it envisions due process as "notice, the right to an in-person hearing, an unbiased adjudicator, the right to know opposing evidence, the right to present evidence, and the right to confront adverse witnesses"—it does *not* require a medical evaluation. *Id.* Likewise, the commentary accompanying the Department of Justice's Model Code for ERPO laws calls for states to afford respondents due process. *See* Commentary for Extreme Risk Protection Order Legislation, U.S. Dep't of Just. (June 7, 2021), https://tinyurl.com/yfmj8hez. The model legislation itself provides that "court[s] shall consider *all relevant facts and circumstances* after reviewing the petitioner's application and conducting the hearing"; it does not direct courts to focus on whether a mental health evaluation has occurred. *Id.* (emphasis added). Supreme Court's reasoning is thus inconsistent with not only every ERPO law in the country, but also the settled consensus of Congress and the Department of Justice on how to craft ERPO laws and protect due process.

CONCLUSION

This Court should reverse.

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Respectfully submitted,

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