# Raising First Amendment Red Flags About Red Flag Laws: Safety, Speech and the Second Amendment

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## Introduction

On February 14, 2018, Nikolas Cruz shot and killed seventeen people at Marjory Stoneman Douglas High School in Parkland, Florida, using a semiautomatic AR-15 rifle.[1] Cruz, who confessed to the shootings, reportedly had mental health issues but no criminal record.[2] He was "a troubled young man with violent tendencies" about whom some people were so worried that they had contacted government agencies and officials, all to no avail.[3]

The killings sparked instant outrage and calls for greater regulation of weapons.[4] As Robert Runcie, superintendent of Broward County Public Schools, including Stoneman Douglas, put it, "[n]ow is the time for this country to have a real conversation on sensible gun-control laws. Our students are asking for that conversation."[5]

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[1] Audra D. S. Burch & Patricia Mazzei, *Horror at Florida School; Ex-Student Held*, N.Y. Times, Feb. 15, 2018, at A1.

[2] Richard Fausset & Serge F. Kovaleski, *Florida Shooting Suspect Displayed Flashes of Rage and Other Warning Signs*, N.Y. Times, Feb. 16, 2018, at A1; *see also* Audra D. S. Burch, et al., *Florida Agency Investigated Nikolas Cruz after Violent Social Media Posts*, N.Y. Times (Feb. 17, 2018), https://www.nytimes.com/2018/02/17/us/nikolas-cruz-florida-shooting.html.

[3] Audra D. S. Burch et al., *Florida Inquiry Found Suspect Was a Low Risk*, N.Y. Times, Feb. 18, 2018, at A1.

[4] Jacob Gershman, *States Wrestle with Gun Measures*, Wall St. J., Apr. 3, 2018, at A3 ("Gun control has become a more hotly debated agenda item since the killing of 17 people at Marjory Stoneman Douglas High School in Parkland, Fla., in February helped set off national protests and debate.").

[5] Jon Kamp et al., *Shooter Showed Warning Signs*, Wall St. J., Feb. 16, 2018, at A1.

In response to the tragedy in Parkland and other mass shootings, many states have enacted statutes that allow the government to temporarily confiscate the weapons of individuals who are deemed by a judge to be a danger to themselves or others.[6] Colloquially known as "red flag laws" and often officially called Extreme Risk Protection Order (ERPO) statutes,[7] these laws have drawn bipartisan support, garnered significant media attention, and been hailed as "good news" by major newspaper editorial boards.[8] Additionally, law enforcement officials trumpet their effectiveness.[9] Furthermore, the laws are designed to prevent suicides as well as mass violence.[10]

Prior to the Parkland shooting, only five states had red flag laws.[11] By March 2020, seventeen states and the District of Columbia had embraced them.[12] What is more, there are calls for a red flag law

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6 Timothy Williams, *What Are 'Red Flag' Laws, and How Do They Work?*, N.Y. TIMES, Aug. 7, 2019, at A14; Christopher M. Matthews et al., *Ten Killed at Texas School*, WALL ST. J., May 19, 2018, at A1 ("The February shooting at Florida's Marjory Stoneman Douglas High School sparked a national debate over gun-control laws, with calls for legislative efforts in many states, including . . . so-called red flag laws that give courts the authority to temporarily disarm people deemed dangerous.").

7 The official designation varies slightly sometimes from state to state. Williams, *supra* note 6, at A14 (using the term "extreme risk protection orders" to more formally capture the meaning of red flag laws). For example, California uses the term "gun violence restraining order." CAL. PENAL CODE § 18100(a) (West 2020). Illinois deploys the phrase "firearms restraining order." 430 ILL. COMP. STAT. §67/5 (2019).

8 Editorial, *Expand 'Red Flag' Laws to Curb Gun Massacres*, USA TODAY, Apr. 30, 2018, at 5A (lauding Red Flag laws); Michael Livingston, *More States Passing 'Red Flag' Gun Laws*, L.A. TIMES, May 14, 2018, at A8 ("While most legislative proposals to address gun violence stall, the 'red flag' laws, as they are known, have passed with bipartisan support and the collaboration of activists on both sides of the gun control debate."); Williams, *supra* note 6, at A14.

9 Richard A. Oppel, Jr., *'Red Flag' Laws Aren't Airtight, but Officials Say They've Saved Lives*, N.Y. TIMES, Aug. 9, 2019, at A13 (reporting that "law enforcement officials in states with red flag laws say they have already made a vital impact, including taking guns away from people who have posed a threat to schools," but pointing out that there are "few statistical studies of the effects of red flag laws").

10 Jacob Sullum, *'Red Flag' Laws Leave Gun Owners Defenseless*, REASON (Aug. 7, 2019), https://reason.com/2019/08/07/red-flag-laws-leave-gun-owners-defenseless/printer/ ("Although preventing mass shootings is the goal emphasized by advocates of red flag laws, data from Indiana and Connecticut, the first two states to enact them, show they are mainly used to protect people from their own suicidal impulses.").

11 Erin Donaghue, *Florida's "Red Flag" Law, Passed After Parkland Shooting, Is Thwarting "Bad Acts," Sheriff Says*, CBS NEWS (Aug. 9, 2019), https://www.cbsnews.com/news/florida-red-flag-law-passed-after-parkland-has-saved-lives-advocates-say/ ("Seventeen states and the District of Columbia now have some version of a red flag law on their books, in contrast to only five states had the laws before the Parkland school shooting that left 17 dead.").

12 Tom Vanden Brook & Kevin Johnson, *Past Cases Show How Red Flags Missed*, USA TODAY, Aug. 9, 2019, at 3A; *see* CAL. PENAL CODE §§ 18100–18205 (West 2019); COLO. REV.

at the federal level, with several federal lawmakers introducing ERPO bills in the 116th Congress.[13]

Opponents including the National Rifle Association, however, have criticized the measures on due process grounds.[14] This argument is grounded partly in the theory that people might lose their weapons based on mere allegations and sometimes initially without notice and an opportunity to contest an order.[15] As Louise Melling—Deputy Legal Director of the American Civil Liberties Union (ACLU) and Director of its Center for Liberty—explains, red flag laws may "be a reasonable way to further public safety. To be constitutional, however, they must at a minimum have clear, nondiscriminatory criteria for defining persons as dangerous and a fair process for those affected to object and be heard by a court."[16] Red flag laws are also criticized[17] for allegedly impinging on the Second Amendment right of individuals to bear arms.[18] Moreover, Harvard Law Professor Emeritus Alan

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STAT. §§ 13-14.5-101 to 13-14.5-114 (2019); CONN. GEN. STAT. § 29-38c (2020); DEL. CODE ANN. tit. 10, §§ 7701–7709 (West 2020); D.C. CODE §§ 7-2510.01 to 7-2510.12 (2020); FLA. STAT. § 790.401 (2019); HAW. REV. STAT. §§ 134-61 to 134-72 (2019); 430 ILL. COMP. STAT. ANN. §§ 67/1–67/80 (West 2019); IND. CODE ANN. §§ 35-47-14-1 to 35-47-14-13 (2019); MD. CODE ANN., PUB. SAFETY §§ 5-601 to 5-610 (2020); MASS. GEN. LAWS ch. 140, §§ 131R–131Y (2019); NEV. REV. STAT. §§ 35.500-33.670 (2019) (effective Jan. 1, 2020); N.J. REV. STAT. §§ 2C:58-20 to 2C:58-26 (2019); N.Y. C.P.L.R. 6340–6347 (McKinney 2020); OR. REV. STAT. §§ 166.525–166.543 (2019); 8 R.I. GEN. LAWS §§ 8-8.3-1 to 8-8.3-14 (2020); VT. STAT. ANN. tit. 13, §§ 4051–4061 (2019); WASH. REV. CODE §§ 7.94.010–7.94.900 (2019).

13 *See* S. 7, 116th Cong. (2019); S. 506, 116th Cong. (2019); H.R. 1236, 116th Cong. (2019); H.R. 3076, 116th Cong. (2019); *see also* Marco Rubio, *A Red-Flag Law to Tackle Gun Violence*, N.Y. TIMES, Sept. 13, 2019, at A31 (describing, from his position as a United States Senator from Florida, why bipartisan legislation for a federal red flag law is necessary).

14 Zusha Elinson, '*Red Flag' Gun Provisions Gather Bipartisan Support*, WALL ST. J., June 3, 2019, at A3 (quoting Jennifer Baker, an NRA spokesperson, for the proposition that "the NRA will oppose risk-protection orders that lack adequate due-process protections.").

15 Matthew Larosiere, *Opposing View: Red Flag Laws Violate Rights to Due Process*, USA TODAY, Aug. 9, 2019, at 7A; *see, e.g.,* 430 ILL. COMP. STAT. § 67/35(d) (2019) ("An emergency firearms restraining order shall be issued on an ex parte basis, that is, without notice to the respondent.").

16 Louise Melling, *The ACLU's Position on Gun Control*, ACLU (Mar. 26, 2018), https://www.aclu.org/blog/mobilization/aclus-position-gun-control.

17 Kate E. Britt, *Domestic Violence Convictions and Firearms Possession: The Law as It Stands and as It Moves*, 98 MICH. B.J. 66, 67 (2019) ("Opponents criticize these protection orders for infringing on the constitutional rights of due process and to bear arms.").

18 The Second Amendment to the U.S. Constitution provides that "[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 Second Amendment has been incorporated by the Supreme Court to apply to state and local government entities and officials through the Fourteenth Amendment Due Process Clause. *See* McDonald v. City of Chicago, 561 U.S. 742,

Dershowitz complains that the laws are dangerous because they take away rights based on unreliable predictions that an individual will become violent.[19]

This Article examines another troubling aspect of red flag laws yet to be thoroughly addressed in law journal articles that have analyzed these statutes.[20] That issue is how these laws implicate First Amendment speech rights[21] when an individual's writings, words, posts, and even media consumption[22] may be used as evidence to obtain an ERPO. First, this Article analyzes how speech and speech activities traditionally safeguarded by the First Amendment may be turned against an individual under red flag laws.[23] Second, this Article evaluates how the term "threat" as used in these statutes may be interpreted loosely and colloquially by both law enforcement officials and judges without applying the Supreme Court's "true threat" doctrine.[24] The Article then offers five suggestions for how these issues might be cured. The authors' goal is not to have red flag laws jettisoned from the pages of code books. Rather, it is to ensure that freedom of expression is not unnecessarily sacrificed or chilled by laws that serve the patently compelling interests of preventing bloodshed and saving lives.

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750, 791 (2010) ("Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.").

19 Alan M. Dershowitz, *A Yellow Light for Red Flag Laws*, WALL ST. J., Aug. 7, 2019, at A15.

20 *See, e.g.,* Mystica M. Alexander & Scott R. Thomas, *Rogue Retailers or Agents of Necessary Change? Using Corporate Policy as a Tool to Reshape Gun Ownership*, 166 U. PA. L. REV. ONLINE 283 (2018); Britt, *supra* note 17; Joseph Frydenlund, *Colorado's Proposed "Red Flag" Gun Bill: Extreme Risk Protection Orders*, 97 DENV. L. REV. 82 (2019); Aaron Edward Brown, *This Time I'll Be Bulletproof: Using Ex Parte Firearm Prohibitions to Combat Intimate-Partner Violence*, 50 COLUM. HUM. RTS. L. REV. 159 (2019); Tara Sklar, *Elderly Gun Ownership and the Wave of State Red Flag Laws: An Unintended Consequence That Could Help Many*, 27 ELDER L.J. 35 (2019); Bethany Stevens, *Massachusetts Adopts "Red Flag" Law*, 62 BOS. B.J. 6 (2018).

21 The First Amendment to the U.S. Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated ninety-five years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (finding "that freedom of speech and of the press – which are protected by the First Amendment from abridgment by Congress – are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States").

22 For example, websites visited, movies watched, and books read.

23 *See infra* Part I.

24 *See infra* Part II.

## I. TURNING FIRST AMENDMENT-PROTECTED SPEECH INTO A TOOL TO CONFISCATE WEAPONS

The first danger red flag laws pose is that offensive speech that normally would be shielded by the First Amendment[25]—for instance, hate speech[26] and messages that reference violence or extremist groups, but do not rise to the level of a true threat[27]—will be used to impinge on a person's Second Amendment right to possess handguns for purposes of self-defense.[28] In other words, beyond simply using prior acts of violence, stalking, or diagnoses of mental illness to justify an ERPO, protected speech may be swept up in a sprawling evidentiary dragnet.

### A. *The Dangers of "including but not limited to" Language*

The risk of infringing upon protected speech exists in this context because many of the statutes recite non-exhaustive lists of items that may serve as evidence for granting an ERPO, but also broadly allow judges to consider any other form of unspecified evidence they deem relevant.[29] It is through such "including-but-not-limited-to" eviden-

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[25] The First Amendment generally protects offensive speech. *See* Matal v. Tam, 137 S. Ct. 1744, 1751 (2017) (holding that the statute at issue in the case "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend"); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

[26] Erwin Chemerinsky, *Tobriner Memorial Lecture: Free Speech on Campus*, 69 HASTINGS L.J. 1339, 1346 (2018) ("Hate speech is protected as a form of free speech."); Leslie Kendrick, *The Answers and the Questions in First Amendment Law*, *in* CHARLOTTESVILLE 2017: THE LEGACY OF RACE AND INEQUITY 70, 70–71 (Louis P. Nelson & Claudrena N. Harold eds., 2018) ("In America, hate speech is not a legal category. The First Amendment protects most speech on matters of public concern, even if that speech is racist, anti-Semitic, or otherwise counter to our nation's commitment to the fundamental equality of all people.").

[27] *See* Elonis v. United States, 135 S. Ct. 2001, 2016 (2015) (Alito, J., concurring in part, dissenting in part) ("It is settled that the Constitution does not protect true threats."); Virginia v. Black, 538 U.S. 343, 344 (2003) (noting that "the First Amendment permits a State to ban 'true threats'" (quoting Watts v. United States, 394 U.S. 705, 708 (1969))).

[28] *See* District of Columbia v. Heller, 554 U.S. 570, 636 (2008) (concluding that "the absolute prohibition of handguns held and used for self-defense in the home" violates the Second Amendment).

[29] The statutes typically do this by including some variation of "including, but not limited to" language. *See, e.g.,* CAL. PENAL CODE § 18155(b)(2) (West 2019) (providing that when deciding whether to grant an ex parte gun violence restraining order, "the court may consider any other evidence of an increased risk for violence, including, but not limited to" a list of seven factors); CAL. PENAL CODE § 18175(a) (West 2019) (providing that when deciding whether to

tiary openings that disquieting, yet protected, messages may come into play.

For example, consider New York's evidentiary requirements for obtaining, on an *ex parte* basis, a temporary ERPO.[30] That statute allows a judge to consider "any relevant factors including, but not limited to" a list of seven enumerated items.[31] The problem is that the "but not limited to" language means that other unenumerated factors may be considered relevant, including First Amendment-protected speech, since "not limited to" does not preclude such protected speech in the consideration.[32]

Florida's statute opens a window for protected speech to be considered not only by including the language "any relevant evidence, including, but not limited to,"[33] but also by expressly stating that "[a]ny relevant information from family and household members" may be considered.[34] Moreover, a law enforcement officer or agency may file an ERPO petition based on an affidavit "stating the specific *statements*, actions, or facts that give rise to a reasonable fear of significant dangerous acts by the respondent."[35] Thus, one can easily imagine that family members might describe to a law enforcement officer protected speech activities of an individual such as: (1) visiting web-

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grant a gun violence restraining order after notice and a hearing, a judge "may consider any other evidence of an increased risk for violence, including, but not limited to" factors specified in California Penal Code § 18155(b)(2)); COLO. REV. STAT. § 13-14.5-105(3) (2019) (identifying twelve factors for consideration, but making it clear these factors are not the only ones that may be considered by noting that "any relevant evidence, including but not limited to" them may be evaluated); 8 R.I. GEN. LAWS § 8-8.3-5(b) (2020) (identifying eleven factors for possible consideration, but adding that a court is "not limited to" them); WASH. REV. CODE § 7.94.040(3) (2019) (identifying fourteen factors for consideration, but adding that "the court may consider any relevant evidence including, but not limited to" those factors).

30 N.Y. C.P.L.R. 6342 (McKinney 2020).

31 *Id.* 6342(2). The seven factors are:

(a) a threat or act of violence or use of physical force directed toward self, the petitioner, or another person;
(b) a violation or alleged violation of an order of protection;
(c) any pending charge or conviction for an offense involving the use of a weapon;
(d) the reckless use, display or brandishing of a firearm, rifle or shotgun;
(e) any history of a violation of an extreme risk protection order;
(f) evidence of recent or ongoing abuse of controlled substances or alcohol; or
(g) evidence of recent acquisition of a firearm, rifle, shotgun or other deadly weapon or dangerous instrument, or any ammunition therefor.

*Id.*

32 *See id.*

33 FLA. STAT. § 790.401(3)(c) (2019).

34 *Id.* § 790.401(3)(c)(14).

35 *Id.* § 790.401(2)(e)(1) (emphasis added).

sites of extremist or hate groups that espouse violence; (2) verbally expressing to family members support for groups that preach violence; (3) expressing sympathy for school shooters who were bullied and an understanding of their motivations to kill others; or (4) advocating the use of violence in an abstract fashion as a means of dealing with problems or people.[36] The officer, in turn, might list such statements in an affidavit accompanying an ERPO petition.

In one case under Florida's red flag law, police questioned a teenage girl not only about her social media posts, but also about "her fondness for the television show 'Vampire Diaries.'"[37] In other words, police may decide whether to seek an ERPO based on not only what people say, but also the media content they consume.[38] Kendra Parris, who has represented several individuals against whom protective orders have been sought under Florida's red flag law, contends that "[t]hese are individuals who are often exercising their First Amendment rights online, who are [using] constitutionally protected speech online . . . . Maybe it was odious, maybe people didn't like it but they were hit with the risk protection order because of it."[39]

In Rhode Island, posting images of oneself brandishing a firearm on a social media platform is specified as a statutory factor that can be weighed in determining whether the grounds for an ERPO exist.[40] The Supreme Court, however, has never declared that such images fall outside the ambit of First Amendment protection.[41] Additionally, akin to Florida's statute, a petition for an ERPO in Rhode Island "must state the specific *statements*, actions, or facts" that cause the petitioner to believe a person is dangerous.[42] As with Florida's stat-

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36 Importantly, the Supreme Court has held that the "mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982).

37 Rafael Olmeda, *Broward Leads State in 'Red Flag' Gun Seizures*, SUN SENTINEL (Ft. Lauderdale, Fla.), Apr. 30, 2018, at 1.

38 *See id.*

39 Katie LaGrone, *More Than 450 People in Florida Ordered to Surrender Guns Months After New Gun Law Took Effect*, ABC ACTION NEWS WFTS (Tampa Bay, Fla.), 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.

40 8 R.I. GEN. LAWS § 8-8.3-5(b)(7) (2019). Social media is broadly defined to include "any cell phone- or internet-based tools and applications that are used to share and distribute information." *Id.* § 8-8.3-1(10).

41 *See* Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 795 (2011).

42 8 R.I. GEN. LAWS § 8-8.3-3(d) (2019) (emphasis added).

ute, there is no limiting language requiring that such statements be confined to true threats of violence.[43]

Oregon's red flag law makes it clear that, in addition to the enumerated factors, a court making an ERPO determination "shall consider . . . *[a]ny additional information* the court finds to be reliable."[44] This opens the door for speech that is fully protected by the First Amendment to be considered if a judge finds it "reliable."[45] The danger is apparent that information concerning a person who makes statements referencing violence or in support of a violent organization will be deemed reliable, even if those statements do not fall into one of the few categories of unprotected speech.[46]

Additionally, Maryland allows "the behavior and *statements of the respondent* or any other information that led the petitioner to believe that the respondent presents an immediate and present danger of causing personal injury to the respondent or others" to be considered as "supporting facts" in an ERPO petition.[47] In Maryland, the term "petitioner" broadly encompasses "a physician, psychologist, clinical social worker, licensed clinical professional counselor, clinical nurse specialist in psychiatric and mental health nursing, psychiatric nurse practitioner, licensed clinical marriage or family therapist, or health officer or designee of a health officer who has examined the individual[,]" as well as a spouse, relative, cohabitant, dating partner, and law enforcement official.[48] Colloquially put, there may be a lot of different people who may have heard a lot of different statements by

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43 *See* FLA. STAT. § 790.401(3)(c) (2019); 8 R.I. GEN. LAWS § 8-8.3-3(d) (2019).

44 OR. REV. STAT. § 166.527(4)(h) (2019) (emphasis added). While this section also notes that "a statement by the respondent" may be considered, this presumably refers to a statement made by the respondent during an ERPO hearing rather than to all statements made by the respondent at other times and locations. *Id.*

45 *See id.*

46 The Supreme Court has identified several categories of speech not protected by the First Amendment. *See* United States v. Alvarez, 567 U.S. 709, 717 (2012) (identifying categories of unprotected expression as incitement to violence, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats and "speech presenting some grave and imminent threat the government has the power to prevent"); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245-46 (2002) ("The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.").

47 MD. CODE ANN., PUB. SAFETY § 5-602(a)(1)(iv) (2019) (emphasis added). The respondent is the "person against whom a petition for an extreme risk protective order is filed." *Id.* § 5-601(f). Judges are directed to consider "all relevant evidence presented by the petitioner" when deciding whether to grant an interim extreme risk protective order. *Id.* § 5-603(a)(2)(i).

48 *Id.* § 5-601(e)(2)(i)-(viii).

the respondent, all of which may be protected by the First Amendment, yet still may be used in the ERPO analysis.[49]

All of this ultimately boils down to the fact that in some states, law enforcement officials use protected speech as a red flag predictor of possible future violence and considers it sufficient to remove a person's firearms.[50] One can imagine law enforcement officials actively monitoring the social media activity of individuals who have been called to their attention by family members or friends in an effort to find speech that might be used in an ERPO petition, including alarming, but protected speech.[51] For example, Chris Velasquez's posts on Reddit initially captured the attention of his peers at the University of Central Florida, which led police to interview him and then obtain a temporary protective order against him under Florida's red flag law in March 2018.[52] The judge later refused to extend the duration of the order.[53]

### B. *Predicting Future Violence: Fighting Words and Inciting Unlawful Action*

First Amendment jurisprudence embraces the notion that speech can be used to predict future violent conduct.[54] It does so, however, in two scenarios far removed from red flag situations and in which it is listeners—not speakers—who are forecasted to engage in future violence based upon others' words.[55]

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[49] *See Alvarez*, 567 U.S. at 717; *Ashcroft*, 535 U.S. at 245-46.

[50] It is important to emphasize that this is the situation in *some states*, but not all states, that have adopted red flag laws. For example, Vermont does not appear to allow protected speech to be used in an ERPO determination because its statute does not entail the typical "including, but not limited to" verbiage and does not specify among its lists of enumerated factors that statements or postings may be considered. 13 VT. STAT. ANN. tit. 13, § 4053(c)(2) (2019).

[51] *See* Rachel Levinson-Waldman, *Private Eyes, They're Watching You: Law Enforcement's Monitoring of Social Media*, 71 OKLA. L. REV. 997, 998 (2019) (noting that "many social media profiles may be observed by unwanted viewers, including law enforcement. In fact, social media accounts are now being monitored and surveilled by state and local law enforcement agencies across the country").

[52] Jacob Sullum, *This 'Awesome Dude' Lost His Gun Rights by Saying Stupid Stuff on Reddit*, REASON (Apr. 5, 2018), https://reason.com/2018/04/05/this-awesome-dude-lost-his-second-amendm/.

[53] *Id.*

[54] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[55] *See Brandenburg*, 395 U.S. at 444; *Chaplinsky*, 315 U.S. at 568.

First, more than seventy-five years ago, the Court in *Chaplinsky v. New Hampshire* held that fighting words are not protected by the First Amendment.[56] It defined fighting words, in key part, as speech that "tend[s] to incite an immediate breach of the peace."[57] The Court later clarified that fighting words are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[58] In a nutshell, the Court predicts, under the fighting words doctrine, that speech taking the form of "a direct personal insult"[59] tends to lead to violent behavior. Under this rationale, the Court forecasts that the audience—not the speaker—may engage in violence by attacking the speaker.[60] For example, a white person directing the "N-word" at a black person is a judicially recognized example of such speech.[61]

Second, the Court adopts that same reasoning in its incitement doctrine.[62] More than a half-century ago, the Court held in *Brandenburg v. Ohio* that:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is *likely* to incite or produce such action.[63]

The emphasized word "likely," which the Court reiterated in 2012 as an essential component of the *Brandenburg* test, involves a probability determination regarding whether a speaker's words are likely to lead to imminent violence or other lawless action.[64] Although the test is silent as to how likely violence must be before law

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[56] *Chaplinsky*, 315 U.S. at 568.

[57] *Id.*

[58] Cohen v. California, 403 U.S. 15, 20 (1971).

[59] *Id.*

[60] *See id.*

[61] *In re* Spivey, 480 S.E.2d 693, 698 (N.C. 1997) ("No fact is more generally known than that a white man who calls a black man a 'nigger' within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate.").

[62] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[63] *Id.* (emphasis added).

[64] *See* United States v. Alvarez, 567 U.S. 709, 717 (2012) (noting that "advocacy intended, and *likely*, to incite imminent lawless action" is among the few categories of "content-based restrictions on speech [that] have been permitted") (emphasis added).

enforcement officials can permissibly stop an individual from speaking, the test requires predictive judgments about speech leading to violence.[65] As with the fighting words doctrine, however, the prediction under *Brandenburg* has nothing to do with using the speaker's words to forecast whether the speaker is likely to be violent in the future.[66] Instead, in the incitement scenario, the prediction centers on foreseeing whether a speaker's words are likely to cause listeners to engage in violence against third parties.[67]

In summary, neither the fighting words doctrine nor the *Brandenburg* incitement standard offer support under the First Amendment for using a speaker's own words to predict that he is likely to engage in future violent acts.[68] If, as the Supreme Court has held, restrictions on lawful speech cannot be used as a means to suppress unlawful speech,[69] then one might reasonably wonder why apparently lawful speech can be used to punish a person for a merely speculative harm via the confiscation of otherwise lawfully possessed firearms.

### C. *Trading One Constitutional Right for Another*

People may engage in self-censorship and refrain from certain expression or from visiting particular websites if they understand that protected speech may be used against them to seize their otherwise lawfully possessed guns.[70] Self-censorship is a deep concern in First

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65 *See* Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 660 (2009) (noting that "*Brandenburg* does not tell us how likely it must be that speech will lead to unlawful conduct").

66 *See Alvarez*, 567 U.S. at 717.

67 *Id.*

68 *See id.*; *see also* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). If the respondent's words were to constitute a true threat of violence—a doctrine that is separate and distinct from the fighting words and true threats doctrines—then they would fall outside the scope of First Amendment protection. *See* Virginia v. Black, 538 U.S. 343, 359 (2003) (noting that states may ban true threats without violating the First Amendment, and adding that true threats include "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"); *see also infra* Part II (addressing the true threats doctrine in greater detail).

69 Packingham v. North Carolina, 137 S. Ct. 1730, 1738 (2017) ("It is well established that, as a general rule, the Government 'may not suppress lawful speech as the means to suppress unlawful speech.'") (quoting Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002)).

70 *See* Robert A. Sedler, *Self-Censorship and the First Amendment*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13, 13 (2011) ("Self-censorship refers to the decision by an individual or group to refrain from speaking and to the decision by a media organization to refrain from publishing information.").

Amendment jurisprudence.[71] Because most red flag laws do not specify what type of speech, other than threats, may be relevant in deciding if an ERPO is warranted, their "chilling effect" may be broad and wide-ranging.[72] For example, consider the following actions: writing fictional stories involving graphic violence; possessing grisly death-scene photos or visiting websites that feature them; creating artistic drawings and paintings of guns and assault rifles; or posting support online for extremist hate groups that have been linked to violence. All the above examples involve speech that, although noxious and unsettling, is protected by the First Amendment, unless a court were to find that they rise to the level of a true threat of violence because they actually target a specific individual or group of individuals.[73] Yet, the above examples might well militate in favor of granting an ERPO when a law enforcement officer presents such actions to a judge. One can easily envision a judge finding these actions relevant by erring on the side of caution while being fearful of not issuing an ERPO just in case the person in question were to commit violence. What judge, after all, wants to be the one who denied an ERPO application against an individual who subsequently commits a mass shooting?

The safe path for people is to engage in self-censorship and steer far clear from the above types of speech, even though the First Amendment protects them. Whether or not red flag laws ultimately will have such a chilling effect on speech is necessarily a matter of supposition, but the possibility exists.[74] Although the existence of a chilling effect may thus far be hazy, given that most red flag laws have been adopted in just the past two years, the ultimate danger is cer-

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71 Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 43 (2011) ("First Amendment doctrine exhibits considerable concern about the manner in which government regulation may produce self-censorship of protected speech when a regulation creates a risk that even those engaged in protected expression may be sanctioned.").

72 Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1481 (2013) ("A chilling effect occurs where one is deterred from undertaking a certain action X as a result of some possible consequence Y.").

73 Violence is not protected by the First Amendment. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982). Violent-themed speech, however, generally is protected by the First Amendment. *See* Brown v. Ent. Merchants Ass'n, 564 U.S. 786 (2011) (refusing to carve out an exception from First Amendment protection for violent video games).

74 Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1637-38 (2013). As Professor Leslie Kendrick explains, "[a] claim of a chilling effect necessarily rests upon suppositions about the deterrent effects of law. These suppositions rest in turn upon predictions about the behavior of speakers under counterfactual conditions." *Id.*

tainly clear: A person sacrifices and trades in one constitutional right—the First Amendment freedom of speech—to protect and preserve another—the Second Amendment right to possess guns at home for purposes of self-defense. That is a disturbing bargain somewhat akin to the one that the doctrine against unconstitutional conditions is designed to prevent.[75]

## II. THE MEANING OF THREATS: COLLOQUIAL THREATS OR TRUE THREATS?

A second danger red flag laws present is that their statutory language—for example, their use of terms such as "threat of violence"—will be interpreted in a colloquial sense by law enforcement officials that gives short shrift to First Amendment concerns.[76] Specifically, none of the statutes invoke the term "true threat," which is the nomenclature the Supreme Court uses in First Amendment jurisprudence to describe a threat that is not protected by that Amendment.[77]

For example, Vermont's statute permits consideration of "threats or actions [of] the respondent [that have] placed others in reasonable fear of physical harm to themselves."[78] Colorado has a modifier in its statute, using the term "credible threat of violence."[79] California's language is slightly different, referring to a "recent threat of violence."[80] Illinois requires a court to consider both a "recent threat of

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[75] *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604 (2013) (observing that the unconstitutional conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up").

[76] Numerous red-flag laws reference threats or threatened force as among the criteria to be considered in a protection order decision. *See, e.g.,* COLO. REV. STAT. § 13-14.5-105(3)(a)-(b), (g) (2019); D.C. CODE § 7-2510.04(c)(1)-(2) (2019); FLA. STAT. § 790.401(3)(c)(1)-(2) (2019); N.J. STAT. ANN. § 2C:58-23(f)(1) (2019); N.Y. C.P.L.R. § 6342(2)(a); OR. REV. STAT. § 166.527(4)(a)-(b) (2019); 8 R.I. GEN. LAWS § 8-8.3-5(b)(1)(2) (2019); VT. STAT. ANN. tit. 13, § 4053(c)(2)(A)(ii) (2019); WASH. REV. CODE § 7.94.040(3)(a)-(c) (2019).

[77] *See* Martin H. Redish & Matthew Fisher, *Terrorizing Advocacy and the First Amendment: Free Expression and the Fallacy of Mutual Exclusivity*, 86 FORDHAM L. REV. 565, 566 (2017) ("No one has seriously suggested that true threats – direct expressions by one individual to another of the speaker's intent to harm the other, often conditioned on the victim's willingness or unwillingness to comply with a condition – are protected speech under the First Amendment."); *see generally* Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *#I U: Considering the Context of Online Threats*, 106 CALIF. L. REV. 1886 (2018) (providing a timely and excellent overview of the true threats doctrine).

[78] VT. STAT. ANN. tit 13, § 4053(c)(2)(A)(ii) (2019).

[79] COLO. REV. STAT. § 13-14.5-105(3)(a) (2019).

[80] CAL. PENAL CODE § 18155(b)(1)(A) (2019).

violence" and a "pattern of . . . violent threats."[81] Due to the recency of these laws, state courts have not had the opportunity to apply them and provide both the public and law enforcement with a more detailed explanation of how these laws apply.

The definition of an unprotected "true threat" in First Amendment jurisprudence, unfortunately, is also unclear.[82] As Dean Lyrissa Lidsky and Linda Riedemann Norbut recently observed, "[t]he Court has failed . . . to answer fundamental questions regarding the 'true threats exception' to First Amendment protection, including whether courts should view threats from the vantage of the speaker, a reasonable recipient, a reasonable disinterested reader, or all of the above."[83] Unfortunately, the Court passed up a prime opportunity to clarify the muddle in 2017 when it denied a petition for a writ of certiorari in *Perez v. Florida*.[84] In concurring in the denial of certiorari, Justice Sonia Sotomayor expressed her desire for the Court to resolve the level of intent required on the part of a defendant-speaker for speech to amount to an unprotected true threat.[85] As the lead author of this Article remarked elsewhere, "the Court's decision to pass on hearing *Perez* leaves the true threats doctrine languishing in disarray."[86] More specifically to the issue of intent, another scholar notes that the "Court has continued to fail to provide an intent standard for true

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[81] 430 ILL. COMP. STAT. § 67/40(e)(5), (7) (2019).

[82] Jennifer Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y, 283-88 (2001) (observing that the Court "has not clearly defined what speech constitutes a true threat").

[83] Lidsky & Norbut, *supra* note 77, at 1889.

[84] Perez v. Florida, 137 S. Ct. 853 (2017). The case pivoted on an inebriated man named Robert Perez who was convicted of making a threat of violence toward a liquor store employee. *Id.* at 853 (Sotomayor, J., concurring). The troubling aspect of the case is that the speech in question "may have been nothing more than a drunken joke." *Id.* Yet, the Florida jury instruction under which Perez was convicted "permitted the jury to convict [him] based on what he 'stated' alone—irrespective of whether his words represented a joke, the ramblings of an intoxicated individual, or a credible threat." *Id.* at 854. In other words, "[t]he jury instruction . . . relieved the State of its burden of proving anything other than Perez's 'stated' or 'communicated' intent." *Id.* at 855.

[85] *See id.* at 855 (Sotomayor, J., concurring) (suggesting that she believes "*some* level of intent is required" to constitute an unprotected true threat and calling for the Court to "decide precisely what level of intent suffices under the First Amendment") (emphasis in original).

[86] Clay Calvert, *Beyond Headlines & Holdings: Exploring Some Less Obvious Ramifications of the Supreme Court's 2017 Free-Speech Rulings*, 26 WM. & MARY BILL OF RTS. J. 899, 937 (2018).

threats, and [c]ircuit courts have struggled with whether true threats require an objective or subjective intent standard."[87]

What the Court has explained about true threats, however, is this: "True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[88] The Court has added that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[89] Furthermore, the Court has suggested that there is an important line separating protected "political hyperbole," which may often be "vituperative, abusive, and inexact," from unprotected true threats.[90] In drawing that line, courts should take into account: (1) the context in which the words were used; (2) whether the words expressed a conditional or contingent possibility of violence; and (3) how the people who heard or read the words actually reacted to them.[91]

Ultimately, with insufficient guidance from the nation's ultimate arbiter of the First Amendment's meaning, lower court judges are left to determine on their own whether the speech in question actually is a true threat falling outside the fortress of First Amendment protection. This is far from an easy task, as a Florida appellate court explained in September 2019 when considering the merit of a temporary *ex parte* protection order granted under Florida's red flag law.[92] Writing for a unanimous three-judge panel, Judge Michael S. Sharrit remarked that

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87 JoAnne Sweeny, *Incitement in the Era of Trump and Charlottesville*, 47 CAP. U.L. REV. 585, 634-35 (2019).

88 Virginia v. Black, 538 U.S. 343, 359 (2003). Although seemingly straightforward, this statement by Justice Sandra Day O'Connor, in writing the plurality opinion in *Black*, sparked considerable confusion. As one First Amendment expert notes:

> Some commentators and courts have interpreted Justice O'Connor's use of the phrase "means to communicate" to indicate that the First Amendment requires courts to examine the defendant's subjective intent. Others have argued that the phrase indicated only that the communication must be intentional and not accidental or coerced. The constitutional uncertainty arising from *Black* has split federal circuit courts' interpretations regarding the constitutionality of intent standards and the First Amendment significance of media and cultural context in the assessment of true threats.

P. Brooks Fuller, *Evaluating Intent in True Threats Cases: The Importance of Context in Analyzing Threatening Internet Messages*, 37 HASTINGS COMM. & ENT. L.J. 37, 42 (2015).

89 *Black*, 538 U.S. at 360.

90 Watts v. United States, 394 U.S. 705, 708 (1969).

91 *Id.*

92 Davis v. Gilchrist Cty. Sheriff's Office, 280 So. 3d 524, 528 (Fla. Dist. Ct. App. 2019).

"[w]hen evaluating hostile words underlying petitions for protection, we recognize trial judges are often faced with the difficult task of differentiating between facetious or hyperbolic declarations meant to 'blow off steam' and those manifesting a genuine threat."[93] That case involved a sheriff's deputy who, among other things, stated that he wanted to shoot another deputy "in the face, eat his food, and wait for [law enforcement] to pick [him] up."[94] The appellate court concluded that the statements in question were more than just hyperbole because they were:

> . . . specific and graphic and made by someone with the wherewithal to carry them out. He was in a position of authority with advanced weapons training and ready access to firearms. In addition, the hostile words were preceded by loss of self-control, open aggression and property damage within a police facility.[95]

Such vigilance and analytical rigor are essential for all courts faced with ERPO petitions that allege a threat of violence has been made. This Article thus calls for judges to be cognizant of this problem, even in the face of strong public sentiment—or outright public pressure—to prevent mass shootings at any cost, which could influence an ERPO decision.

## III. FIVE SUGGESTIONS FOR IMPROVING ERPO STATUTES

Legislatures and courts can take several measures to cure the issues that this Article highlights. First, and perhaps most obvious, speech that is protected by the First Amendment should be eliminated from judicial consideration of whether an ERPO is warranted. Only mental health issues, prior conduct, and speech that falls outside the confines of First Amendment protection should be considered.[96]

Second, the principle that only speech beyond the scope of First Amendment protection may be considered means that red flag statutes that use terms such as a "threat of violence" when explicating relevant evidentiary factors for granting an ERPO should be amended

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[93] *Id.* at 529.

[94] *Id.*

[95] *Id.* at 530.

[96] *See* Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 795 (2011) (identifying categories of speech not protected by the First Amendment).

to include clarifying language. Specifically, supplementary language should make it clear that a threat of violence means a true threat of violence not sheltered by the First Amendment. In other words, ERPO statutes should make it clear that the definition of an unlawful threat conforms, at a minimum, to the First Amendment's strictures of the true threats doctrine.

Third, if statutes continue to permit the use of protected speech to determine whether an ERPO should be granted, then those statutes should be amended to specify that protected speech be given less weight than an individual's prior conduct, which generally does not trigger any First Amendment issues.[97] In other words, among the constellation or mosaic of evidentiary factors for granting an ERPO, protected speech should be given only minor or de minimis consideration. States that continue to use protected speech against individuals in their red flag laws should clearly articulate this lower-level evidentiary weighing of protected speech in their statutes.

Fourth, once again assuming that statutes continue to permit the use of protected speech in ERPO determinations, then not only should such speech weigh less than a person's conduct, but statutes should impose clear temporal-recency requirements and quantity mandates. As to the former, this means that speech and social media activity occurring more than a specified period of time before an ERPO is sought should be deemed irrelevant—for example, more than three months before a petition is filed. After all, if more than three months have passed without the speaker engaging in violence, it suggests that future violence is less assuredly predicted from that speech. In brief, the older the statement, the less that speech should factor into the ERPO equation. As to the latter, statutes should specify that there must be at least more than one instance of disturbing, but protected, speech within the temporal-recency time period in order for the speech to be considered. In other words, a lone statement or post that the First Amendment protects should not be consid-

[97] *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2373 (2019) (observing that "[w]hile drawing the line between speech and conduct can be difficult, this Court's precedents have long drawn it"); Otto v. City of Boca Raton, 353 F. Supp. 3d 1237, 1249 (S.D. Fla. 2019) (noting that "the speech/unprotected conduct dichotomy is a distinction repeatedly employed in First Amendment case law"); *see also* Diahann Dasilva, *Playing a "Labeling Game": Classifying Expression as Conduct as a Means of Circumventing First Amendment Analysis*, 56 B.C. L. REV. 767, 769 (2015) (noting "the speech versus conduct dichotomy," and examining the "distinction between speech and conduct, the implications of that distinction, and how courts have classified various activities as speech or conduct").

ered, as it might just represent a person cathartically blowing off steam on an isolated occasion.[98]

Fifth, and at a macro level beyond individual red flag laws, the Supreme Court must clarify what constitutes a true threat of violence. It passed on another opportunity to do so in 2019 with *Knox v. Pennsylvania*.[99] As Part II discussed, the Court's true threats jurisprudence is, to put it bluntly, a mess.[100] Red flag laws are ensnared in this state of doctrinal disarray because they refer to threats of violence as evidence that can be used to support an ERPO.[101] Whether the notion of threats deployed in these statutes is consonant or consistent with the Court's meaning of a true threat of violence is exceedingly hard to tell, given the Court's own definitional difficulties.[102] Furthermore, the problems sometimes are compounded when trying to decipher whether a message posted on a social media platform such as Twitter or Facebook is a true threat or mere hyperbole.[103] As suggested above, law enforcement officials might monitor and use an individual's social media posts to make the case for an ERPO under red flag laws.[104] The bottom line is that the Court should quickly clarify its true threats doctrine to inform state and federal lawmakers drafting red flag laws. Any discrepancy between the constitutional and statutory meaning of a threat must be eliminated.

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[98] *Cf.* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 13 (1992) ("If societies are not to explode from festering tensions, there must be valves through which citizens may blow off steam. Openness fosters resiliency; peaceful protest displaces more violence than it triggers; free debate dissipates more hate than it stirs.").

[99] Knox v. Pennsylvania, 139 S. Ct. 1547 (2019). The Court denied Jamal Knox's petition for a writ of certiorari after the Supreme Court of Pennsylvania in *Commonwealth v. Knox*, 190 A.3d 1146 (Pa. 2018), affirmed his conviction for making terrorist threats against two police officers in a rap song.

[100] *See supra* notes 82-95 and accompanying text (addressing the true threats doctrine).

[101] *See supra* notes 76-81 and accompanying text (addressing how red flag laws commonly refer to threats).

[102] *See supra* notes 82-95 and accompanying text (addressing the true threats doctrine).

[103] *See* Brooks Fuller, *The Angry Pamphleteer: True Threats, Political Speech, and Applying Watts v. United States in the Age of Twitter*, 21 COMM. L. & POL'Y 87, 88 (2016) (asserting that "true threats cases involving non-traditional, Internet-mediated communications fall along the borderlines of protected abstract political advocacy when they use potentially hyperbolic, violent language to express legitimate criticism of – and distaste for – public officials").

[104] *Supra* notes 50-51 and accompanying text.

## CONCLUSION

Ultimately, as the Supreme Court observed more than forty years ago in a capital punishment case, it is "not easy to predict future behavior."[105] States, in turn, must tread cautiously when, under red flag laws, they use speech safeguarded by the First Amendment to predict future violence by an individual and confiscate firearms under red flag laws. The better course—from a pro-First Amendment stance—is to use only prior conduct, mental illness, and unprotected expression, such as true threats of violence, to justify a risk protection order under a red flag law. Sadly, due to the Court's definitional imprecision regarding the elements of an unprotected true threat, state lawmakers lack the clear guidance necessary to ensure that red flag laws do not trample First Amendment speech rights while serving the compelling interest of protecting human life.

[105] Jurek v. Texas, 428 U.S. 262, 274 (1976).