A MATTER OF LIFE OR DEATH: DEFENDING TEMPORARY FIREARM SURRENDER ORDERS FROM FIFTH AMENDMENT CHALLENGES

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INTRODUCTION

The presence or absence of a firearm largely determines whether someone survives a moment of acute crisis, such as suicidality or intimate partner violence. While only four percent of suicides attempted without firearms result in death,[1] that figure skyrockets to ninety percent when a

[1] *Gun Suicide*, EVERYTOWN FOR GUN SAFETY, https://www.everytown.org/issues/gun-suicide/ (last visited Dec. 5, 2025).

gun is involved.[2] Headlines are tragically replete with stories of women fatally shot by former intimate partners after filing for separation,[3] custody,[4] or seeking a restraining order.[5] Every year, nearly 26,000 people

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[2] *See* Andrew Conner et al., *Suicide Case-Fatality Rates in the United States, 2007 to 2014: A Nationwide Population-Based Study*, 171 ANNALS OF INTERNAL MED. 885, 887 (2019).

[3] *See, e.g.*, WLBT Staff, *Husband and wife killed in murder-suicide had started process of divorce, friend says*, WLBT (Dec. 30, 2024, 4:55 PM), https://www.wlbt.com/2024/12/30/husband-wife-killed-murder-suicide-had-started-process-divorce-friend-says/; Henri Hollins et al., *She filed for divorce. He shot her to death near Spalding courthouse, cops say,* THE ATLANTA JOURNAL-CONSTITUTION (Sept. 16, 2024), https://www.ajc.com/news/crime/she-filed-for-divorce-he-shot-her-to-death-near-courthouse-georgia-cops-say/6KS544ERABDITKBY5AVXLOSM6E/; Lux Butler, *Wife filed for divorce 8 days before her husband shot and killed her, police say*, ARIZONA REPUBLIC (June 26, 2024, 3:25 PM), https://www.azcentral.com/story/news/local/arizona/2024/06/26/sun-city-man-arrested-after-wife-and-mother-in-law-shot-to-death/74221761007/; Camille Amiri & David Komer, *Woman killed by ex-husband morning of divorce hearing; police find him standing over body*, FOX 2 DETROIT (Aug. 5, 2023, 12:27 AM), https://www.fox2detroit.com/news/woman-killed-by-ex-husband-morning-of-divorce-hearing-police-find-him-standing-over-body; Nadine Yousif, *Utah shooting: A man killed his family after wife filed for divorce*, BBC NEWS (Jan. 5, 2023), https://www.bbc.com/news/world-us-canada-64172722; Anders Anglesey, *Mother of Seven Shot Dead by Husband Hours Before Divorce Hearing: Police*, NEWSWEEK (updated Aug. 8, 2023, 4:58 AM), https://www.newsweek.com/mother-seven-shot-dead-husband-hours-before-divorce-hearing-1818154.

[4] *See, e.g.*, James Schaeffer & Linsey Lewis, *Woman shot, killed by ex-father-in-law during deposition in Las Vegas law office filed for sole custody morning of shooting: sources*, KLAS 8 NEWS NOW (Apr. 8, 2024, 11:13 PM), https://www.8newsnow.com/news/local-news/woman-shot-killed-by-ex-father-in-law-during-deposition-in-las-vegas-law-office-filed-for-sole-custody-morning-of-shooting-sources/; Emily Van de Riet, *Man shoots, kills woman when she tries to serve him child custody papers, police say*, WCTV (May 13, 2022, 3:40 PM), https://www.wctv.tv/2022/05/13/man-shoots-kills-woman-when-she-tries-serve-him-child-custody-papers-police-say/; WRAL, *North Carolina woman killed during custody exchange of sister's child, child's father facing murder charge, officials say*, WXII 12 News (updated Mar. 18, 2024, 11:27 AM), https://www.wxii12.com/article/north-carolina-woman-killed-custody-exchange-sisters-child-father-murder/60229896.

[5] *See, e.g.*, Ashley Mackey, *Hours after she sought restraining order, Bellflower woman killed by ex-boyfriend, officials say*, ABC7 KABC (Oct. 16, 2024), https://abc7.com/post/bellflower-woman-killed-apparent-murder-suicide-adult-son-wounded-authorities-say/15434483/; Marlene Lenthang, *Instagram influencer fatally shot by husband days after she was granted a restraining order against him*, NBC NEWS (Dec. 26, 2023, 3:44 PM), https://www.nbcnews.com/news/us-news/instagram-influencer-fatally-shot-husband-days-was-granted-restraining-rcna131206; Tony Kurzweil, *Woman killed after getting restraining order against ex-boyfriend in Los Angeles County*, KTLA (updated Oct. 16, 2024, 5:24 AM), https://ktla.com/news/local-news/woman-killed-after-filing-restraining-order-against-ex-boyfriend-in-los-angeles-county/; Meredith Deliso, *Boyfriend kills girlfriend, her mother in shooting outside Kentucky courthouse: Police*, ABC NEWS (Aug. 19, 2024, 3:55 PM), https://abcnews.go.com/US/elizabethtown-kentucky-courthouse-shooting/story?id=112953536; Pocharapon Neammanee, *Judge Denied Nurse's Protective Order Before Ex Fatally Shot Her*, HUFFPOST (Feb. 17, 2024, 2:30 PM), https://www.huffpost.com/entry/judge-denied-nurses-protective-order-before-ex-fatally-shot-her_n_65d0cf06e4b04daca6972325; Tahleel Mohieldin, '*My daughter did not deserve to die like this': Family says woman killed tried to get restraining order*, TMJ4 NEWS (Apr. 5, 2024, 11:29 PM), https://www.tmj4.com/news/local-news/my-daughter-did-not-deserve-to-die-like-this-family-says-woman-killed-tried-to-get-restraining-order.

in the United States die by gun suicide[6] and over 18,000 by gun homicide,[7] including an average of more than seventy women shot to death by an intimate partner every month.[8] In many cases, these tragedies could be prevented.

Many states have civil mechanisms in place that prevent someone from accessing firearms during the crisis period, often both requiring the temporary surrender of any firearms currently in their possession and preventing them from obtaining new firearms for the duration of the order.[9] The precise mechanism available to petitioners differs based on their state of residence and the context within which the risk of harm arises: Some states only allow petitioners to obtain firearm surrender orders pursuant to the process of obtaining domestic violence restraining orders ("DVROs").[10] Many states also allow certain individuals to petition the court for an extreme risk protection order ("ERPO")—enabled by what are commonly referred to as "red flag" laws—if the respondent poses a danger to themselves or others.[11] Evidence strongly indicates that these measures save lives,[12] and, in so doing, spare loved ones the irreversible heartbreak caused by firearm-related deaths by suicide and intimate partner violence. They are indispensable tools, and often the only option that allows a concerned party to intervene *before* violence occurs without relying on emergency responders or involuntary commitment while someone is in crisis—both of which may involve additional risks and long-term ramifications for the respondent.

However, despite their efficacy and critical importance, respondents have recently challenged temporary firearm surrender mechanisms, asserting a variety of defenses[13]—including claims that complying

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[6] *Firearm Suicide in the United States*, EVERYTOWN RSCH. & POL'Y (Aug. 30, 2019), https://everytownresearch.org/report/firearm-suicide-in-the-united-states/.

[7] *See Gun Violence in America*, EVERYTOWN RSCH. & POL'Y (May 19, 2020), https://everytownresearch.org/report/gun-violence-in-america/#homicide.

[8] *Guns and Violence Against Women*, EVERYTOWN RSCH. & POL'Y (Oct. 17, 2019), https://everytownresearch.org/report/guns-and-violence-against-women-americas-uniquely-lethal-intimate-partner-violence-problem/.

[9] While these mechanisms often require the respondent to both temporarily surrender their firearms *and* prohibit them from acquiring new firearms, this Article will refer to such orders generally as "firearm surrender orders."

[10] *The Effects of Surrender of Firearms by Prohibited Possessors*, RAND (July 16, 2024), https://www.rand.org/research/gun-policy/analysis/prohibited-possessors.html.

[11] *ERPO Laws by State*, UNIV. MICH. INST. FOR FIREARM INJ. PREVENTION (2025), https://firearminjury.umich.edu/erpo-by-state/.

[12] *See, e.g.*, Matthew Miller et al., *Updated Estimate of the Number of Extreme Risk Protection Orders Needed to Prevent 1 Suicide*, 7 JAMA NETWORK OPEN 1, 1 (2024) (finding that one suicide was prevented for every twenty-two ERPOs issued).

[13] Including Second Amendment challenges, which have been largely unsuccessful. *See, e.g.*, *Hope v. State*, 163 Conn. App. 36, 41-43 (2016) (rejecting a Second Amendment challenge to Connecticut's ERPO law); *R. M. v. C. M.*, 226 A.D.3d 153, 165-66 (2024) (same for New York); *State v. Rumpff*, 308 A.3d 169, 200 (Del. Super. Ct. 2023) (same for *ex parte* DVROs); *State v. Poole*, 228 N.C. App. 248, 266, 745 S.E.2d 26, 38 (2013) (same).

with such orders violates their Fifth Amendment privilege against self-incrimination. While these arguments have largely been limited to lower courts thus far, an increasingly conservative judiciary, paired with a firearms community emboldened by the advent of another Trump Administration,[14] suggests that advocates and practitioners should be equipped to refute such challenges should they arise and percolate up through the courts.

This Article sets forth the appropriate framework for understanding and responding to these challenges and explores the Fifth Amendment regulatory regime exception. A close reading of the Supreme Court's jurisprudence in this area strongly supports the argument that this exception applies to civil firearm surrender orders and requires individuals to comply despite the rare case-by-case instances in which doing so presents a risk of incrimination. The Introduction of this Article provides an overview of firearm surrender mechanisms in the context of domestic violence and extreme risk protection orders ("DVROs" and "ERPOs"). Part I discusses foundational Fifth Amendment principles and their application to the types of disclosures implicated by firearm surrender orders. Part II analyzes the Fifth Amendment's Regulatory Regime Exception and then demonstrates that it applies to require compliance with firearm surrender orders even in the rare individual instances when doing so implicates self-incrimination risks.

I. THE BASICS OF TEMPORARY FIREARM SURRENDER ORDERS

This Section briefly introduces the two types of civil protective orders that courts use to require individuals to temporarily surrender their firearms as a preventive measure. Despite the demonstrable effectiveness and critical importance of temporary firearm surrender orders, many factors—including a growing number of states adopting extreme risk laws[15]—have subjected these laws and procedures to renewed scrutiny.

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[14] *See, e.g.*, Press Release, Firearms Policy Coalition, FPC Statement on the 2024 General Election, (Nov. 6, 2024) (on file with author) ("President Trump will very possibly have the opportunity to nominate multiple Supreme Court justices and fill hundreds of circuit and district court judgeships during his upcoming term. Accordingly, we are especially optimistic about the long-term judicial outlook for our fight to restore the right to keep and bear arms."); Matt Manda, *NSSF Government Relations Team Forecasts What's Ahead for Industry in 2025*, NSSF (Dec. 13, 2024), https://www.nssf.org/articles/nssf-forecasts-whats-ahead-for-industry-in-2025/ ("The firearm and ammunition industry has received a shot in the arm after years of aggressive and combative gun control coming from activists in Washington, D.C."); Michael Hensley, *Gun Owners of America Ready to Work with Trump Administration on Gun Promises*, GOA (Jan. 20, 2025), https://www.gunowners.org/gun-owners-of-america-ready-to-work-with-trump-administration-on-gun-promises/; Press Release, NRA, NRA Statement on President Trump's Executive Order Protecting Second Amendment Rights, (Feb. 7, 2025) (on file with author).

[15] Press Release, Everytown Support Fund, New Everytown Analysis Found 59% Increase in Extreme Risk Protection Law Usage in 2023 (Feb. 5, 2025) (on file with author).

The following discussion provides a foundational understanding of firearm relinquishment in the context of these two mechanisms.

A. What Is a Domestic Violence Restraining Order?

Until the mid-1980s, few temporary civil remedies were available for individuals fearing intimate partner violence.[16] Before then, many states only allowed petitioners to obtain temporary protection orders in the context of divorce proceedings.[17] By 1994, however, all fifty states (and the District of Columbia) had adopted some form of civil protection orders independent of divorce proceedings.[18] To obtain a DVRO, petitioners must generally allege conduct that aligns with the state's definition of domestic violence.[19] This often includes causing, attempting to cause, or threatening to cause physical harm against a member of the family or household.[20] In some states, the definition extends to intimidation and emotional abuse.[21] While some statutory schemes require the court to find, by a preponderance of evidence, that a predicate act of domestic violence may have occurred for the purposes of issuing the order,[22] it is important to note that DVROs are by no means precursors to criminal prosecution.[23] And they do not require courts to determine whether the respondent is in fact criminally liable for the underlying allegations.[24] Such allegations

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[16] *See* Matthew J. Carlson et al., *Protective Orders and Domestic Violence: Risk Factors for Re-Abuse*, 14 J. OF FAM. VIOLENCE 205, 205 (1999).

[17] *See, e.g.*, *Roper v. Jolliffe*, 493 S.W.3d 624, 632 n.5 (Tex. App. 2015) ("A battered spouse who needs immediate protection and does not wish to file for divorce currently has no adequate solution under the law.") (internal citation omitted).

[18] *See* Carlson et al., *supra* note 16, at 206.

[19] *Domestic Violence (Family Offense)*, NYCOURTS.GOV, https://ww2.nycourts.gov/COURTS/nyc/family/faqs_domesticviolence.shtml (last visited Dec. 15, 2025).

[20] *See, e.g.*, W.V. CODE § 48-27-202 (including among the definition of domestic violence "[a]ttempting to cause" or "recklessly causing" physical harm, "placing another in reasonable apprehension of physical harm," and "creating fear of physical harm by harassment, stalking, psychological abuse or threatening acts" between family or household members).

[21] *See, e.g.*, DEL. STAT. tit. 10, § 1041 ("Engaging in a course of alarming or distressing conduct in a manner which is likely to cause fear or emotional distress or to provoke a violent or disorderly response."); MO. ANN. STAT. § 455.010 (including conduct that "would cause a reasonable adult or child to suffer substantial emotional distress and must actually cause substantial emotional distress to the petitioner or child").

[22] *See, e.g.*, *T.B. v. I.W.*, 479 N.J. Super. 404, 412 (App. Div. 2024).

[23] *See, e.g.*, *In re B.B.*, No. 12-24-00010-CV, 2024 WL 874706, at *4 (Tex. App. Feb. 29, 2024) ("[A] protective order does not require a party to establish liability on an underlying cause of action. Moreover, '[c]ourts have long held that entry of a protective order is not equivalent to prosecution for the underlying offense, and a protective order is not punishment.' Nor is a criminal conviction required to justify a protective order. Instead, a protective order is intended to give immediate protection to the applicant and is not intended to correct past wrongs or establish liability. Although a protective order under the Texas Code of Criminal Procedure is predicated on the applicant being a victim of a criminal offense, protective-order proceedings are civil proceedings, not criminal or quasi-criminal proceedings.") (citations omitted).

[24] *See, e.g.*, *Roper v. Jolliffe*, 493 S.W.3d 624, 633-34 (Tex. App. 2015) ("[A] family violence protective order is obtained through an independent statutory proceeding initiated by filing

are considered in order to determine whether the order is necessary for the petitioner's safety, not for prosecutorial purposes or to adjudicate the respondent's guilt.[25] DVROs are prophylactic, harm-prevention tools, and only implicate criminal penalties if one fails to abide by the terms of the order.[26]

Federal law[27] and most states[28] prohibit most individuals who are subject to a final DVRO from possessing or acquiring a firearm while it remains in effect. This is critically important, but insufficient on its own from a harm-prevention perspective for two important reasons: First, it is widely understood that the most dangerous time for someone experiencing intimate partner violence is the period immediately following separation.[29] The risk of violence escalates shortly after the petitioner leaves, or takes other legal action, in part because the abuser may perceive a loss of power over the other person and take drastic steps to punish or attempt to regain control.[30] Having temporary or emergency firearm surrender mechanisms

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an application for a protective order with the clerk of the court. No underlying cause of action or liability finding is required before a court may grant a family violence protective order. The purpose of the statute is to provide an expedited procedure for victims of domestic violence; the purpose is not to correct past wrongs or establish liability but to give immediate protection to the applicant.").

[25] *Id.*

[26] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3602(R); N.D. CENT. CODE ANN. § 14-07.1-06 (first violation constitutes criminal contempt); N.J. STAT. ANN. § 2C:25-30 (criminal contempt); OR. REV. STAT. ANN. § 107.720(4) (criminal contempt); 23 PA. STAT. AND CONS. STAT. ANN. § 6113 (criminal contempt).

[27] 18 U.S.C. § 922(g)(8).

[28] *See, e.g.*, *Which states prohibit domestic abusers under restraining orders from having guns?*, EVERYTOWN RSCH. & POL'Y, https://everytownresearch.org/rankings/law/prohibition-for-domestic-abusers-under-restraining-orders/ (last updated Jan. 15, 2025).

[29] *See, e.g.*, Garen J. Wintemute et al., *Firearms and the incidence of arrest among respondents to domestic violence restraining orders*, 2:14 INJURY EPIDEMIOLOGY 2 (2015), https://injepijournal.biomedcentral.com/articles/10.1186/s40621-015-0047-2 ("[A] a woman's risk for IPV is highest immediately after she attempts to leave an abusive partner."); Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93:7 AM. J. OF PUB. HEALTH 1089, 1092, 1095 (2003), https://pmc.ncbi.nlm.nih.gov/articles/PMC1447915/pdf/0931089.pdf ("Women who separated from their abusive partners after cohabitation experienced increased risk of femicide. . . . It is also clear that extremely controlling abusers are particularly dangerous under conditions of estrangement."); Tanesha Ash-Shakoor, *Leaving an abusive relationship is the most dangerous time: local activist*, WLNS (Jul. 15, 2023), https://www.wlns.com/news/leaving-an-abusive-relationship-is-the-most-dangerous-time-local-activist/ (updated Jul. 16, 2023).

[30] *See, e.g.*, *Why People Stay in an Abusive Relationship*, NAT'L DOMESTIC VIOLENCE HOTLINE, https://www.thehotline.org/support-others/why-people-stay-in-an-abusive-relationship/ ("When a survivor leaves their abusive relationship, they threaten the power and control their partner has established over the survivor's agency. This often causes the partner to retaliate in harmful ways. As a result, leaving is often the most dangerous period of time for survivors of abuse.") (last visited Feb. 24, 2025); Jerry Mitchell, *Most dangerous time for battered women? When they leave.*, CLARION LEDGER (Jan. 28, 2017), https://www.clarionledger.com/story/news/2017/01/28/most-dangerous-time-for-battered-women-is-when-they-leave-jerry-mitchell/96955552/ ("Domestic violence is all about power and control, and when a woman leaves, a man has lost his power and control.").

available prior to the issuance of a final order can thus be a matter of life or death. Second, prohibitory laws are only effective when states take proactive steps to ensure that firearms *are in fact removed* from the custody of those temporarily unable to possess them.[31] While thirty-two states prohibit persons subject to final DVROs from possessing guns,[32] only twenty-two states affirmatively require them to *surrender* any guns in their possession while the order remains in effect.[33] These laws are associated with fourteen[34] or sixteen[35] percent lower rates of intimate partner firearm homicide. Some statutory schemes require certain findings before the court is either required[36] or permitted[37] to order the respondent to relinquish their firearms as part of a DVRO. But, importantly, none of the statutory schemes that instruct the court to make special findings require the petitioner to establish that a firearm was, in fact, used or threatened to be used during the conduct that gave rise to the petition.[38]

Some states have closed this gap even further by prohibiting persons under temporary emergency (or "*ex parte*") restraining orders from possessing firearms in addition to final DVROs.[39] Persons fearing

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[31] *See generally Ensuring Effective Implementation of Laws that Disarm Domestic Abusers*, EVERYTOWN RSCH. & POL'Y (June 27, 2024), https://everytownresearch.org/report/laws-that-disarm-domestic-abusers/; *Firearm Relinquishment*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/firearm-relinquishment/ (last visited Feb. 26, 2025).

[32] *See supra* note 28.

[33] *See Which states require prohibited domestic abusers to turn in any guns while under a restraining order?*, EVERYTOWN RSCH. & POL'Y, https://everytownresearch.org/rankings/law/relinquishment-for-domestic-abusers-under-restraining-orders/ (last updated Jan. 15, 2025).

[34] *See, e.g.*, Carolina Díez et al., *State Intimate Partner Violence–Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015*, 167 ANNALS OF INTERNAL MED. 536, 539 (Oct. 17, 2017), www.acpjournals.org/doi/full/10.7326/M16-2849.

[35] April M. Zeoni 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. OF EPIDEMIOLOGY 2365, 2369 (2018).

[36] *See, e.g.*, MINN. STAT. § 518B.01(6)(g) (2025) ("An order granting relief *shall* prohibit the abusing party from possessing firearms for the length the order is in effect *if the order* (1) restrains the abusing party from harassing, stalking, or threatening the petitioner or restrains the abusing party from engaging in other conduct that would place the petitioner in reasonable fear of bodily injury, *and* (2) includes a finding that the abusing party represents a credible threat to the physical safety of the petitioner or prohibits the abusing party from using, attempting to use, or threatening to use physical force against the petitioner.") (emphasis added).

[37] *See, e.g.*, N.D. CENT. CODE ANN. § 14-07.1-02(4)(g) (2023) (the court *may* require the respondent to "surrender for safekeeping any firearm" in their possession "if the court has probable cause to believe that the respondent is likely to use, display, or threaten to use the firearm or other dangerous weapon in any further acts of violence").

[38] Fredrick Vars & Ian Ayres, *A Simple Way to Protect Domestic Violence Orders Against the Next Constitutional Challenge,* HARV. L. REV.: BLOG (July 3, 2024), https://harvardlawreview.org/blog/2024/07/a-simple-way-to-protect-domestic-violence-orders-against-the-next-constitutional-challenge/.

[39] *See Which states prohibit domestic abusers under temporary restraining orders from having firearms?*, EVERYTOWN RSCH. & POL'Y, https://everytownresearch.org/rankings/law/emergency-restraining-order-prohibitor/ (last updated Jan. 15, 2025).

immediate harm to themselves or others, such as their children or other members of the household, may seek an *ex parte* restraining order.[40] *Ex parte* orders are stop-gap measures that cover the dangerous period of time between when one applies for and receives a final protective order—a process that may take several weeks—or simply to deal with an acute period of crisis.[41] As one Delaware court observed, "Without emergency *ex parte* [restraining orders], victims would be forced to fend for themselves against the accused in possession of a firearm for the interim period between when the [restraining order] is requested and when the hearing can be scheduled—often, the most dangerous period of time due to high retaliation rates."[42]

An *ex parte* DVRO hearing only requires participation from the petitioner, and orders generally last between seven to thirty days, or until a full hearing is scheduled.[43] After an *ex parte* order has run its course, the court must hold a full hearing where both parties have the opportunity to participate and present evidence.[44] States differ slightly with respect

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[40] *See Extreme Risk Laws*, EVERYTOWN RSCH. & POL'Y, https://everytownresearch.org/solution/extreme-risk-laws (last visited Aug. 24, 2025).

[41] *See Extreme Risk Laws Save Lives,* EVERYTOWN RSCH. & POL'Y, https://everytownresearch.org/report/extreme-risk-laws-save-lives/#appendix-c-extreme-risk-protection-orders-in-action (last updated May 1, 2025).

[42] *State v. Rumpff*, 308 A.3d 169, 195 (Del. Super. Ct. 2023).

[43] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3624(E) (2022) (seven days); N.C. GEN. STAT. ANN. § 50B-2(c)(5) (2022) (ten days); MICH. COMP. LAWS ANN. § 600.2950(11)(g) (2018) (fourteen days); LA. STAT. ANN. § 46:2135(C) (2019) (twenty-one days); GA. CODE ANN. § 19-13-3(c) (2018) (thirty days).

[44] It is well-settled that this *ex parte* mechanism satisfies procedural due process requirements. *See, e.g.*, *United States v. Calor*, 340 F.3d 428, 432 (6th Cir. 2003) ("With respect to Calor's due process challenge to the seizure of his firearms, the district court found that Calor's argument failed because, under the balancing test articulated in *Mathews v. Eldridge*, Kentucky's interest in protecting the victims of domestic violence from further violence, and possibly death, outweighed Calor's interest in maintaining possession of his firearms during the brief period between seizure and a hearing, and that the risk of an erroneous deprivation of property rights was small. The district court's balancing of the relative interests appropriately assigns greater weight to the government's interest in protecting an alleged domestic violence victim from gun violence and possible death after an alleged abuser has been served an EPO than to a gun owner's brief loss of possession.") (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). *See also Hightower v. City of Bos.*, 693 F.3d 61, 84 (1st Cir. 2012) (rejecting appellant's claim that revoking her firearms license prior to a hearing violated procedural due process requirements in part because of the "paramount governmental interest" in protecting public health and safety); *Rumpff*, 308 A.3d at 199 (Del. Super. Ct. 2023) ("There is no violation of Due Process when a court implements a temporary short term [protective order] if '[t]he degree of deprivation . . . prior to the full hearing is extremely short.'") (quoting *State v. Poole*, 228 N.C. App. 248, 261, *writ denied, review denied, appeal dismissed,* 367 N.C. 255, 749 S.E.2d 885 (2013)); *Kampf v. Kampf*, 603 N.W. 295, 383 (Michigan Ct. App. 1999) ("There is no procedural due process defect in obtaining an emergency order of protection without notice to a respondent when the petition for the emergency protection order is supported by affidavits that demonstrate exigent circumstances justifying entry of an emergency order without prior notice."); *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 232 (Mo. 1982) ("The interests and procedures considered, these ex parte order provisions comply with due process requirements because they are a reasonable means to achieve the state's legitimate

to the burdens of proof required to obtain a DVRO.[45] Some require a reduced standard, such as "reasonable grounds," for emergency (*ex parte*) orders and a more demanding "preponderance of the evidence" for final orders.[46] Others maintain the "reasonable grounds" or "cause" standard for both emergency/*ex parte* and final protective orders.[47] To receive a final order, a judge must find that the petitioner meets the appropriate evidentiary burden during a civil hearing at which *both* parties have the opportunity to attend and present evidence, in line with procedural due process requirements.[48]

Once a protective order expires, the respondent may seek the return of any surrendered firearms that he or she is lawfully able to possess.[49] This illustrates the remedial and preventative, not punitive, goal of these statutes: firearm surrender provisions seek to temporarily remove access during high-risk periods, not to seek out or prosecute individuals engaged in criminal conduct.

DVROs are vital civil mechanisms that can help prevent interpersonal violence. But even the strongest statutory schemes that require or permit firearm surrender orders do not cover other individuals in crisis who pose a danger to themselves or others *outside* of the context of family or intimate partner violence. ERPO laws fill this gap by allowing loved ones and law enforcement officers (and sometimes certain health or school figures) to petition a court to enter a time-limited order preventing these individuals from possessing or obtaining firearms.[50]

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goal of preventing domestic violence, and afford adequate procedural safeguards, prior to and after any deprivation occurs."); *Burkstrand v. Burkstrand*, 632 N.W.2d 206, 212 (Minn. 2001); *Sanders v. Shephard*, 185 Ill. App. 3d 719, 718 (1989) ("[P]rocedural due process with respect to the issuance of an emergency protection order does not require prior notice to a respondent where there is a showing of exigent circumstances.").

45 *Extreme Risk Laws Save Lives, supra* note 41.

46 *See, e.g.,* MD. CODE ANN., FAM. LAW § 4-505(a)(1) (2016) (temporary orders); *id.* § 4-506(c) (final orders).

47 *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3624(C) (2022) (emergency orders); *id.* § 13-3602(E) (final orders); WIS. STAT. ANN. § 813.12(3)(a)(2) (2022) (temporary orders), *id.* § 813.12(4)(a)(3) (final orders).

48 *See, e.g.*, *Shephard*, 185 Ill. App. 3d at 718 (rejecting appellant's due process challenge as Illinois's statutory scheme requires notice and a hearing before issuing a final DVRO); *see also Marsh*, 626 S.W.2d at 227 ("Two types of relief are available: ex parte orders issued without notice to the respondent or a hearing, and orders issued after notice and an on record hearing."); *Burkstrand*, 632 N.W.2d at 212.

49 *See, e.g.*, MD. CODE ANN., FAM. LAW § 4-506.1(b)(2) (2010) ("The respondent may retake possession of the firearm at the expiration of a final protective order unless. . . the respondent is not otherwise legally entitled to own or possess the firearm."); N.Y. CRIM. PROC. LAW § 530.14(5)(b) (the court may order the return of a surrendered firearm "upon a written finding that there is no legal impediment to the subject's possession"); *see also* WIS. STAT. ANN. § 813.1285(7)(2) (2018); W. VA. CODE R. PRAC. & P. DOM. VIOL. Rule 10b(4) (2011).

50 *Extreme Risk Laws Save Lives, supra* note 41.

B. Extreme Risk Protection Orders

1. The Significance of Extreme Risk Protection Orders

Extreme risk protection orders, or ERPOs, allow certain individuals to intervene when someone known to possess firearms demonstrates a substantial risk of harming themselves or others.[51] ERPO laws fill a significant gap left by DVRO firearm surrender orders: namely, if the risk of harm does not fall within the category of intimate partner violence, there isn't another timely remedy.[52] As one expert put it, "An ERPO is one option that's designed to temporarily create space and time between a gun and a dangerous situation."[53] Most people—including most gun owners[54]—can readily appreciate the danger of someone having easy access to firearms if there is evidence that they intend to harm themselves or others. But many people would be surprised at the lack of recourse available in these situations without ERPO laws. To appreciate how ERPOs can mean the difference between life and death, consider the following contrasting accounts.

Janet Delana's daughter was in the midst of an acute mental health crisis.[55] Janet knew that if she was able to acquire a gun, the consequences would be deadly—for her daughter, for others, or both.[56] She had already contacted the police, who suggested that she call the ATF, who referred her to the FBI.[57] In a final desperate move, Janet Delana called the local gun store in Odessa, Missouri. On the phone with the owner, she pleaded: "I'm begging you as a mother, if she comes in, please don't sell her a gun."[58] Janet did everything she could to prevent her daughter from being able to purchase a gun, but no system or procedure could respond quickly enough. The FBI told Janet that it would take weeks to review her daughter's

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[51] *Q&A with Ali Rowhani-Rahbar: How extreme risk protection orders are an important tool in preventing firearm injury and death in the U.S.*, UNIV. WASH. SCH. OF PUB. HEALTH (June 18, 2024), https://sph.washington.edu/news-events/sph-blog/qa-ali-rowhani-rahbar-how-extreme-risk-protection-orders-are-important-tool.

[52] *See Which states prohibit domestic abusers under restraining orders from having guns?*, EVERYTOWN RSCH. & POL'Y, https://everytownresearch.org/rankings/law/prohibition-for-domestic-abusers-under-restraining-orders/ (last updated Jan. 15, 2025).

[53] *Q&A with Ali Rowhani-Rahbar, supra* note 51.

[54] *See, e.g.*, Leigh Paterson, *Poll: Americans, Including Republicans And Gun Owners, Broadly Support Red Flag Laws*, NPR (Aug. 20, 2019), https://www.npr.org/2019/08/20/752427922/poll-americans-including-republicans-and-gun-owners-broadly-support-red-flag-law ("Two-thirds of Republicans and 60% of gun owners support allowing police to seek the court orders; higher percentages — 70% of Republicans and 67% of gun owners — support allowing family members to seek them.").

[55] Ann E. Marimow, *Despite a mother's plea, her mentally ill daughter was sold a firearm. Here's why she sued.*, WASH. POST (Mar. 6, 2017), https://www.washingtonpost.com/sf/local/2017/03/06/despite-a-mothers-plea-her-mentally-ill-daughter-was-sold-a-gun-with-tragic-results/.

[56] *Id.*

[57] *Id.*

[58] *Id.*

medical records, and even then, there was no guarantee that they would be able to flag her in the national database licensed firearms dealers use to perform background checks before selling a gun.[59] With no legal recourse left, Janet's daughter was able to purchase a handgun.[60] Hours later, in the midst of this acute crisis, she tragically killed her father before attempting to turn the gun on herself.[61] The answer as to how this could have been prevented lies two states away.

Just outside of Denver, Colorado, another woman was desperate—this time, out of dire concern for her husband, who had been making suicidal statements.[62] She knew she had to keep him from acquiring another gun.[63] After the third time he seriously talked about killing himself, she decided to apply for an "extreme risk protection order."[64] This allowed law enforcement to intervene safely and in a civil capacity, temporarily removing his access to firearms and flagging him in the system to prevent him from purchasing another gun while the order remained in place.[65]He did not object to the order, and today, his wife believes that this mechanism is one of the reasons her husband is still alive.[66] "He kept finding different ways to get a gun, so the red flag law was our only recourse."[67]

Temporary firearm surrender mechanisms like those enabled by ERPOs and DVROs save lives.[68] Not only are countless individuals alive today because they (or those around them) did not have easy access to firearms during acute moments of crisis,[69] but innumerable families and communities are saved from experiencing the aching loss associated with losing loved ones to gun violence. There is no other procedure that works quickly enough to be able to remove someone's access to firearms when they are at immediate risk of harming themselves or others. And when someone is experiencing suicidal or violent ideation, every hour counts. Critically, most people who attempt suicide do not die—unless they use a gun: 8.5 percent of suicide attempts across all methods result

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59 *Id.*

60 *Id.*

61 *Id.*

62 Elise Schmelzer & Shelly Bradbury, *Colorado's red flag law is one year old. Here's who's using the law to confiscate guns — and why.*, THE DENVER POST (Jan. 10, 2021), https://www.denverpost.com/2021/01/10/red-flag-law-colorado-first-year-2020-stats/.

63 *Id.*

64 *Id.*

65 *See Extreme Risk Laws Save Lives*, EVERYTOWN RSCH. & POL'Y, https://www.everytown.org/solutions/extreme-risk-laws/ (last visited Sept. 6, 2025).

66 Elise Schmelzer & Shelly Bradbury, *supra* note 62.

67 *Id.*; *see supra* note 47.

68 *See, e.g.*, *Research on Extreme Risk Protection Orders*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, 1, https://publichealth.jhu.edu/sites/default/files/2023-02/research-on-extreme-risk-protection-orders.pdf (last visited Feb. 21, 2025).

69 *See, e.g.*, *Examples of How Extreme Risk Laws Save Lives*, EVERYTOWN RSCH. & POL'Y (Apr. 17, 2020), https://everytownresearch.org/report/appendix-a-extreme-risk-laws-save-lives-stories/.

in death, but that lethality rate jumps to ninety percent when a firearm is used.[70] Furthermore, data indicates that most people who survive a suicide attempt do not go on to die from a later attempt.[71] Considering these data points together means that the difference between life and death for tens of thousands of people comes down to whether or not they have a gun near them during what may be a moment of overwhelming crisis.[72] One study found that one death by suicide is prevented for every twenty-two ERPOs issued.[73]

States have used ERPO laws thousands of times in response to individuals who appear to be at risk of harming themselves or others, thus preventing untold tragedies.[74] Two studies of the effectiveness of Connecticut's extreme risk law—the first in the nation, so the law for which we have the most data—are particularly telling. One study found that increased enforcement of the law was associated with a fourteen percent reduction in firearm suicides,[75] while another found that one suicide was prevented for every eleven firearms surrendered.[76] Indiana, with the second-oldest extreme risk law, saw a 7.5 percent reduction in firearm suicides in the ten years after the law's enactment.[77] There are countless examples of other types of tragedies averted due to the timely use of ERPOs.[78]

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[70] Andrew Conner, Deborah Azrael & Matthew Miller, *Suicide Case-Fatality Rates in the United States, 2007 to 2014: A Nationwide Population-Based Study*, 171 ANNALS OF INTERNAL MED. (2019), 885-95, https://doi.org/10.7326/M19-1324.

[71] Robert Carroll et al., *Hospital Presenting Self-Harm and Risk of Fatal and Non-Fatal Repetition: Systematic Review and Meta-Analysis*, 9 PLoS ONE (Feb. 28, 2014), https://doi.org/10.1371/journal.pone.0089944; David Owens et al., *Fatal and Non-Fatal Repetition Of Self-Harm: Systematic Review*, 181 BRITISH J. OF PSYCHIATRY (2002), 193-99, https://doi.org/10.1192/bjp.181.3.193.

[72] *See, e.g.*, Jeffrey W. Swanson et al., *Suicide Prevention Effects of Extreme Risk Protection Order Laws in Four States*, 52 THE J. OF THE AM. ACAD. OF PSYCHIATRY & THE LAW (2024), https://jaapl.org/content/early/2024/08/20/JAAPL.240056-24 ("This study's findings add to growing evidence that ERPOs can be an effective and important suicide prevention tool.").

[73] *See supra* note 8.

[74] Aaron J. Kivisto & Peter Lee Phalen, *Effects of Risk-Based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981–2015,* 69 PSYCHIATRIC SERVICES (Aug. 2018): 855–62, https://ps.psychiatryonline.org/doi/10.1176/appi.ps.201700250.

[75] *Id.* at 855.

[76] Jeffrey W. Swanson et al., "*Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does It Prevent Suicides?* 80 LAW AND CONTEMPORARY PROBLEMS 179, 203 (2017).

[77] Kivisto, *supra* note 74, at 855.

[78] *See, e.g.*, *Examples of How Extreme Risk Laws Save Lives*, EVERYTOWN RSCH. & POL'Y, https://everytownresearch.org/report/appendix-a-extreme-risk-laws-save-lives-stories/ (last updated Feb. 3, 2025); Lucia I. Suarez Sang, *Attentive Student Foiled Possible School Shooting, Vermont Police Say*, FOX NEWS (Dec. 19, 2018), https://www.foxnews.com/us/attentive-student-foiled-possible-school-shooting-vermont-police-say; Patrick Malone, *How Richard Sherman's family, police and a gun dealer intervened to prevent potential tragedy*, THE SEATTLE TIMES (Aug. 5, 2021), https://www.seattletimes.com/seattle-news/times-watchdog/

In addition to helping prevent firearm suicides and interpersonal violence, ERPOs can be used to prevent large-scale tragedies like mass shootings.[79] After the horrific mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida, news outlets reported that community members had raised concerns about the shooter's behavior prior to the shooting. At that time, however, there was no viable legal mechanism with which authorities could remove his firearms.[80] Four years earlier, a shooter in Isla Vista, California, issued homicidal and suicidal threats before shooting six others and himself,[81] but without an established procedure, efforts to notify law enforcement were similarly ineffectual.[82] Stories like these are not uncommon: One report published by the U.S. Secret Service found that 100 percent of students who carried out a violent attack at school exhibited behavioral warning signs beforehand,[83] and eighty-three percent communicated their intent to carry out an attack.[84] An Everytown for Gun Safety analysis similarly revealed that in thirty-two percent of

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how-richard-shermans-family-police-and-a-gun-dealer-intervened-to-prevent-potential-tragedy; Joe Brandt, *Princeton man posted about bringing his AR-15 rifle to Walmart, so cops seized all his guns*, NJ.COM (Nov. 11, 2019), https://www.nj.com/mercer/2019/11/princeton-man-posted-about-bringing-his-ar-15-rifle-to-walmart-so-cops-seized-his-all-his-guns.html; Joe Atmonavage, *N.J. seized this man's gun because he glorified violence against Jews, cops say*, NJ.COM (updated Nov. 11, 2019), https://www.nj.com/news/2019/11/nj-man-glorified-extreme-violence-against-jews-cops-say-so-they-seized-his-gun.html; Peter Hermann, *D.C. police use District's 'red flag' law for first time to seize firearms*, WASH. POST (Sept. 18, 2019), https://www.washingtonpost.com/local/public-safety/dc-police-use-districts-red-flag-law-for-first-time-to-seize-firearms/2019/09/18/2a77bc60-da2b-11e9-a688-303693fb4b0b_story.html; Ben Leonard, *Two years in, Maryland leads most other states in use of red flag law*, THE BALTIMORE SUN (Oct. 23, 2020), https://www.baltimoresun.com/2020/10/23/two-years-in-maryland-leads-most-other-states-in-use-of-red-flag-gun-law/; Alain Stephens, *San Diego Is Showing California How to Use Its Red Flag Law*, THE TRACE (Aug. 21, 2019), https://www.thetrace.org/2019/08/red-flag-laws-san-diego-mara-elliot/; Scott Pelley, *A look at Red Flag laws and the battle over one in Colorado*, CBS NEWS (Aug. 30, 2020), https://www.cbsnews.com/news/red-flag-gun-laws-a-standoff-in-colorado-60-minutes-2020-08-30/; Erin Donaghue, *Florida's "red flag" law, passed after Parkland shooting, is thwarting "bad acts," sheriff says*, CBS NEWS (Aug. 19, 2019), https://www.cbsnews.com/news/florida-red-flag-law-passed-after-parkland-has-saved-lives-advocates-say/.

[79] *Extreme Risk Protection Orders: New Evidence on a Tool for Preventing Gun Violence*, UC DAVIS VIOLENCE PREVENTION RSCH. PROGRAM 1 (2022), https://cvp.ucdavis.edu/sites/g/files/dgvnsk16226/files/inline-files/vprp-erpo-short-report_0.pdf.

[80] *See, e.g.*, Lenny Bernstein, *Five states allow guns to be seized before someone can commit violence*, WASH. POST (Feb. 16, 2018), https://www.washingtonpost.com/national/health-science/five-states-allow-guns-to-be-seized-before-someone-can-commit-violence/2018/02/16/ ("'This morning I heard the sheriff [in Parkland] lament the fact that he did not have the tools to remove the firearms from the shooter,' Joshua Horwitz, executive director of the Coalition to Stop Gun Violence, said Thursday. 'Had he lived in one of those states where this law is in place, he would have had the tools, and this shooting may have been averted.'").

[81] Kate Pickert, *Mental-Health Lessons Emerge from Isla Vista Slayings*, TIME (May 27, 2014), https://time.com/121682/isla-vista-shooting-elliot-rodger/.

[82] *Id.*

[83] *See* National Threat Assessment Center, *Protecting America's Schools: A U.S. Secret Service Analysis of Targeted School Violence*, U.S. SECRET SERVICE 43 (2019), https://www.secretservice.gov/sites/default/files/2020-04/Protecting_Americas_Schools.pdf.

[84] *Id.* at 45.

mass shootings in general between 2015 to 2022 the shooter exhibited warning signs that they posed a risk to themselves or others.[85]

Finally, ERPO mechanisms are significant because sometimes family or friends may feel unable to safely have conversations with loved ones about their access to firearms, particularly if the individual about whom they are concerned is already behaving in an erratic or hostile manner.[86] This reinforces the importance of having access to a judicially supervised civil procedure. Mechanisms like ERPOs may also prevent law enforcement from having to intervene in a criminal capacity or to involuntarily institutionalize someone before an act of violence occurs, either towards themselves or others.[87] In other words, preventative measures like ERPOs save individual lives, spare loved ones tremendous loss, and also reduce the need for more restrictive measures, like involuntary commitment, which can have lifelong repercussions.

2. How Extreme Risk Protection Orders Work

ERPO laws function largely the same way across states. First, a concerned party files a petition[88] for an ERPO with the court. Jurisdictions differ with regard to who can file a petition: All states with ERPO laws allow law enforcement officers to ask for an ERPO, and sixteen states also allow family (or household) members to file petitions.[89] The limitation on who can file a petition reflects the underlying policy justification: The people closest to the individual—thus, those most likely to notice troubling signs of self-harm or violence—are the ones able to apply for an ERPO.

After receiving an ERPO petition, the court determines whether clear and convincing evidence—or under some statutes, a preponderance of the evidence or probable cause—demonstrates that the individual poses a genuine risk of physical harm to themselves or others.[90] The burden of

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[85] *See Mass Shootings in the United States*, EVERYTOWN FOR GUN SAFETY SUPPORT FUND, https://everytownresearch.org/mass-shootings-in-america/ (last updated Mar. 2023).

[86] Matt Vasilogambros & Amanda Hernández, *Red-Flag Laws Are Increasingly Being Used to Protect Gun Owners in Crisis*, CT MIRROR (Mar. 18, 2025), https://ctmirror.org/2025/03/18/red-flag-laws/.

[87] *Frequently Asked Questions About Extreme Risk Protection Orders*, CTR. FOR AM. PROGRESS (Feb. 10, 2021), https://www.americanprogress.org/article/frequently-asked-questions-extreme-risk-protection-orders/ (last visited Aug. 26, 2025).

[88] *See, e.g.*, *Petition for Extreme Risk Protection Order*, D.C. SUPER. CT., https://www.dccourts.gov/sites/default/files/2019-07/Petition%20for%20Extreme%20Risk%20Protection%20Order%20.pdf.

[89] *See* National Center on Protection Orders and Full Faith & Credit, *Extreme Risk Protection Orders - Frequently Asked Questions*, BATTERED WOMEN'S JUSTICE PROJECT 5-6, 7-12 (July 2023), https://bwjp.org/wp-content/uploads/2024/04/ERPO-FAQ.pdf.

[90] *See id.* at 12-13, 14-20; *see also Extreme Risk Protection Orders*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/ (last visited Feb. 26, 2025).

proving that an ERPO is necessary lies with the petitioner.[91] States' ERPO laws often specify the types of evidence that a judge can consider as part of these proceedings.[92] Many also include penalties to deter filing an ERPO petition for improper purposes or based on false evidence.[93]

As with DVROs, persons seeking an ERPO may file for a temporary *ex parte* order to allow for an immediate removal mechanism prior to a full hearing.[94] This mechanism is critical to preventing tragedies like the Delana family suffered. An initial *ex parte* order expires quickly—usually within twenty-one days or less.[95] The court must then hold a hearing to determine whether to issue a full order, which may last up to a year, including possible renewals.[96] This procedure complies with due process guarantees, including a hearing, for which the respondent must receive notice and have an opportunity to speak and respond to evidence.[97]

If the court finds that the individual presents a risk of physical harm according to the specified burden of proof, then the court will enter a firearm relinquishment order.[98] This order requires the removal of any firearms in the person's possession and prohibits the person from acquiring new ones.[99] Depending on the jurisdiction, this can mean surrendering their firearms to law enforcement, selling them, transferring them to a friend or family member, or storing them with a licensed firearm dealer.[100] The subject of the order may need to certify that they have complied with the order and no longer retains possession or control of any firearms.[101] Once the protective order is lifted or expires, the respondent is permitted to seek return of the surrendered firearms.[102]

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91 *See, e.g.*, CAL. PENAL CODE § 18175(b).

92 *See, e.g.*, CAL. PENAL CODE §§ 18155, *id.* § 18175; COLO. REV. STAT. ANN. § 13-14.5-105(3); CONN. GEN. STAT. ANN. § 29-38c(c); FLA. STAT. ANN. § 790.401(3)(c); NEV. REV. STAT. ANN. § 33.550(1); N.M. STAT. ANN. § 40-17-7; OR. REV. STAT. ANN. § 166.527(4).

93 *See, e.g.*, CAL. PENAL CODE § 18200; 430 ILL. COMP. STAT 67/35(c); MASS. GEN. L., ch. 140, Section 131V(a); OR. REV. STAT. ANN. § 166.543(3); WASH. REV. CODE ANN. § 7.105.460.

94 *See, e.g.*, CAL. PENAL CODE § 18125.

95 *See, e.g.*, CAL. PENAL CODE § 18165 (twenty-one days); DEL. CODE ANN. tit. 10, § 7703(f) (fifteen days); N.M. STAT. ANN. § 40-17-6(C) (ten days). *See also ERPO Laws by State*, UNIV. MICH. INST. FOR FIREARM INJ. PREVENTION, https://firearminjury.umich.edu/erpo-by-state/ (last visited Sept. 4, 2025) (listing the durations of ERPO orders by type).

96 *See*, *e.g.*, N.M. STAT. ANN. § 40-17-6(C).

97 *See*, *e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970) (notice and a hearing standard).

98 *See*, *e.g.*, CAL. PENAL CODE § 18175(b)(2); N.Y. C.P.L.R. § 6342(1).

99 *See*, *e.g.*, N.Y. C.P.L.R. §§ 6342(7)-(8).

100 *See supra* note 89 at Table 4, 23-31.

101 *See, e.g.*, MICH. COMP. LAWS ANN. § 691.1810(1)(a), (4) (requiring an ERPO respondent to file a document certifying compliance with the order and scheduling a compliance hearing within five days of the order, which may be cancelled if the respondent has filed the requisite documents); WASH. REV. CODE ANN. § 7.105.340(6) (requiring a compliance review hearing to be scheduled within three days of the ERPO, which may be cancelled if the respondent has otherwise demonstrated their compliance).

102 *See, e.g.*, *id.* at 34.

Seventeen states have enacted extreme risk laws since the 2018 mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida.[103] This terrible tragedy—and the possibility that it could have been averted if law enforcement had a tool like ERPOs at their disposal[104]—highlighted the importance of these mechanisms. In fact, of the nearly 35,000 ERPO petitions were filed between 1999 and 2022, ninety-five percent were submitted after the mass shooting in Parkland.[105] In total, twenty-two states and the District of Columbia have adopted extreme risk laws in an attempt to prevent gun suicides, mass shootings, and interpersonal gun violence.[106]

But as these laws grow in popularity, they have begun to face increased legal challenges—including the claim that complying with firearm surrender orders violates the Fifth Amendment privilege against self-incrimination.[107]

II. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

This Section reviews foundational Fifth Amendment principles. It begins by orienting the reader with an introduction to Fifth Amendment jurisprudence, then it explores each of the three elements that must be present for one to invoke the privilege against self-incrimination.

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103 *See id.*

104 *See, e.g.*, Richard Fausset & Serge F. Kovaleski, *Nikolas Cruz, Florida Shooting Suspect, Showed 'Every Red Flag'*, N.Y. TIMES (Feb. 18, 2025), https://www.nytimes.com/2018/02/15/us/nikolas-cruz-florida-shooting.html.

105 *Extreme Risk Laws Save Lives*, EVERYTOWN RSCH. & POL'Y (May 1, 2025), https://everytownresearch.org/report/extreme-risk-laws-save-lives/ (last visited Feb. 15, 2024).

106 CAL. PENAL CODE §§ 18100-18205 (2021); COLO. REV. STAT. §§ 13-14.5-101, 13-14.5-116 (2023); CONN. GEN. STAT. § 29-38(c)(2025); DEL. CODE ANN. tit. 10, §§ 7701–7709 (2025); FLA. STAT.§ 790.401 (2025); HAW. REV. STAT. §§ 134-61, 134-72 (2020); 430 ILL. COMP. STAT. ANN. §§ 67/1-67/85 (2019); IND. CODE §§ 35-47-14-1 - 35-47-14-13 (2019); MD. PUB. SAFETY CODE § 5-601-5-610 (2019); MASS. GEN. LAWS ch. 140, § 131R-131Y (2024); MICH. COMP. LAWS Ann. §§ 691.1801-691.1821 (2024); MINN. STAT. ANN. § 624.7171 (2024); NEV. REV. STAT. ANN. § 33.590 (2024); N.J. Stat. Ann. § 2C:58-20-2C:58-30 (2018); N.M. STAT. ANN. §§ 40-17-1—40-17-13 (2020); N.Y. C.P.L.R. §§ 6340–6348 (2022); OR. REV. STAT. ANN. §§ 166.525-166.543 (2017); tit. 8. R.I. GEN. LAWS §8-8.3-1-8-8.3-14 (2018); VT. STAT. ANN. tit 13, §§ 4051–4062 (2023); VA. CODE ANN. §§ 19.2-152.13 - 19.2-152.17 (2020); WASH. REV. CODE ANN §§ 7.105.330-7.105.375 (2021); D.C. CODE ANN. §§ 7-2510.01-7.2510.13 (2024). In November 2025, Maine voters approved an ERPO ballot initiative which is expected to be codified ME. REV. STAT. ANN. tit. 25, §§ 2241-2252

107 *See, e.g.*, Kelsey Turner et al., *Why many judges in WA won't order abusers to turn in guns*, WASH. STATE STANDARD (July 4, 2023), https://washingtonstatestandard.com/2023/07/04/why-many-judges-in-wa-wont-order-abusers-to-turn-in-guns/; Andrew Willinger, *Litigation Highlight: New York State Appellate Court Upholds Red Flag Law*, DUKE CTR. FOR FIREARMS LAW: BLOG (Apr. 26, 2024), https://firearmslaw.duke.edu/2024/04/litigation-highlight-new-york-state-appellate-court-upholds-red-flag-law.

A. Introduction to the Fifth Amendment

The Fifth Amendment of the U.S. Constitution functions in part to protect individuals from being forced to provide information that could be used against them in criminal proceedings. The self-incrimination provision specifically declares that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[108] To effectuate this purpose, individuals may invoke the Fifth Amendment—referred to within popular culture as "pleading the Fifth"—when faced with the prospect of being compelled to provide information that could be used in subsequent criminal proceedings. This privilege is available even if the individual is not currently facing criminal prosecution,[109] and it applies to verbal or spoken disclosures as well as "acts that imply assertions of fact."[110]

Whether or not a compelled disclosure (or the government's subsequent use thereof) constitutes a Fifth Amendment violation is determined on a case-by-case basis.[111] The court may determine that the privilege against self-incrimination excuses an individual from complying with *certain* disclosures, but not others.[112] Finally, it is important to note that in most instances, one's Fifth Amendment privilege against self-incrimination is not self-executing.[113] Individuals must, in other words, invoke this privilege at the time they face the compulsion; it is generally not available retroactively.[114]

B. The Three Elements of Self-Incrimination

The Fifth Amendment privilege against self-incrimination applies to disclosures that are (1) compelled; (2) incriminating; and (3) testimonial.[115]

1. Elements of Self-Incrimination: "Compelled"

Compulsion in the Fifth Amendment context is fairly straightforward. A statement is compelled if, "considering the totality of the circumstances, the free will of the witness was overborne."[116] A disclosure is not compelled for the purposes of self-incrimination if it was made pursuant to a "free and voluntary"[117] decision—one made without express or implied

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108 U.S. CONST. amend. V.

109 *See, e.g., Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79 (1964).

110 *United States v. Hubbell*, 530 U.S. 27, 36 n.19 (2000).

111 *See, e.g.*, *Branzburg v. Hayes,* 408 U.S. 665, 710 (1972) (Powell, J., concurring).

112 *See, e.g.*, *United States v. Sullivan*, 274 U.S. 259, 263 (1927) ("If the form of [tax] return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all.").

113 *See, e.g.*, *Minnesota v. Murphy*, 465 U.S. 420, 431 (1984).

114 *See, e.g.*, *id.* at 427.

115 *See*, *e.g.*, *Baltimore City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 554 (1990).

116 *United States v. Washington*, 431 U.S. 181, 188 (1977).

117 *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

threats or promises, "however slight."[118] Being forced to decide between complying with an order or facing criminal penalties naturally constitutes compulsion, since the decision to disclose the desired information is made under the threat of sanctions.[119]

2. Elements of Self-Incrimination: "Testimonial"

A compelled disclosure must also be "testimonial" for the Fifth Amendment privilege against self-incrimination to apply.[120] A disclosure is considered to be testimonial if it reveals the communicator's subjective knowledge or thought process.[121] This clearly encompasses explicit, direct communications, such as spoken or written answers.[122] But in some circumstances, the very act of producing something tangible can be considered testimonial.[123] This "act of production"[124] may require the individual to tacitly concede information with inescapably testimonial qualities. This could include the very fact that the item exists, for example, or that the item in question was within the possession and control of the person compelled to produce it.[125] The act of production may thus be considered incriminating if the defendant's possession of (or control over) an object was not a "foregone conclusion"[126]—in other words, if the tacitly conveyed information about the item's existence, possession, or control had been unknown to the government and would not reasonably have been discovered otherwise.

This was the situation in *Baltimore City Dept. of Social Services v. Bouknight*. *Bouknight* concerned an infant who was subjected to physical abuse and adjudicated a "child in need of assistance" by the juvenile court.[127] The child was temporarily returned to the custody of his mother, Bouknight, subject to "extensive conditions" approved by the court.[128] Months later, concern for the child's welfare escalated and the court ordered that he be removed from Bouknight's custody and placed in foster care.[129] Bouknight refused to reveal where the child was or to bring him before the

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118 *Id.*

119 *See, e.g.*, *Murphy*, 465 U.S. at 434.

120 *Doe v. United States*, 487 U.S. 201, 213 (1988).

121 *See, e.g.*, *id.* at 211-13 (1988).

122 *See, e.g., id.* at 208.

123 *Id.*

124 *See id.* at 209.

125 *See, e.g.*, *Baltimore City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 555 (1990) ("The Fifth Amendment's protection may nonetheless be implicated because the act of complying with the government's demand testifies to the existence, possession, or authenticity of the things produced.").

126 *Fisher v. United States*, 425 U.S. 391, 411 (1976).

127 *Bouknight*, 493 U.S. at 550.

128 *See id.* at 552 (including therapy, parenting programs, and refraining from physical punishment).

129 *Id.*

court as required by the civil order.[130] Fearing that the child was dead or in danger, the court held Bouknight in contempt until she agreed to produce him or reveal his whereabouts.[131] The Maryland Court of Appeals held that this contempt order unconstitutionally compelled Bouknight to admit—through the act of production—her continued control over the child, under circumstances that presented a reasonable likelihood of prosecution.[132]

On review, the Supreme Court acknowledged that Bouknight's "implicit communication of control over Maurice at the moment of production might aid the State in prosecuting Bouknight."[133] In his dissent, Justice Marshall further reasoned that the child's appearance before the court could potentially provide information that could give rise to other charges—if there was evidence of abuse or neglect, for instance.[134] Nevertheless, the Court held that "a person may not claim the Amendment's protections based upon the incrimination that *may result* from the contents or nature of the thing demanded."[135] She was not excused from complying with the order, even though it was possible that the child might appear before the court in a neglected or abused state, which could potentially implicate liability for Bouknight.[136] The Court affirmed that *not every circumstance* in which an "act of production" order compels testimonial assertions that could prove incriminating allows the individual to refuse to comply by invoking the Fifth Amendment.[137] This is due to an important nuance to Fifth Amendment self-incrimination jurisprudence entitled the "regulatory regime" doctrine, explored in detail in Section III.

3. Elements of Self-Incrimination: "Incriminating"

As indicated above, the *mere possibility* that a compelled disclosure could incriminate a respondent is often insufficient to overcome the strong public policies giving rise to the order.[138] To invoke one's Fifth Amendment privilege, the risk of incrimination must be "realistic" and "substantial," not "merely trifling or imaginary."[139] Courts also consider the nature of the statutory scheme giving rise to the mandated disclosure. If it implicates an area that is "permeated with criminal statutes"[140] or otherwise pervasively criminalized[141] the court is more likely to recognize the challenger's

130 *Id.* at 553.
131 *Id.*
132 *Id.* at 554.
133 *Id.* at 555.
134 *Id.* at 563 (Marshall, J., dissenting).
135 *Id.* at 555 (emphasis added).
136 *Id.*
137 *See id.* at 561 (emphasis added).
138 *California v. Byers*, 402 U.S. 424, 428 (1971) (emphasis added).
139 *Marchetti v. United States*, 390 U.S. 39, 53 (1968).
140 *Albertson v. Subversive Activities Control Bd.,* 382 U.S. 70, 79 (1965).
141 *Byers*, 402 U.S. at 430.

privilege against self-incrimination. Compelled disclosures may also be considered incriminating if they form a significant "link in a chain" of evidence tending to establish guilt.[142]

Significant risks of self-incrimination are present when the mandated disclosure almost *necessarily* implicates the individual in criminal activities, a principle illustrated by *Albertson v. Subversive Activities Control Board*.[143] *Albertson* concerned an order requiring members of the Communist Party to register with the government by filing a form with the Attorney General or face substantial penalties.[144] But these individuals faced an impossible quandary, as membership in the Communist Party was already criminalized under at least two federal statutes.[145] The compelled disclosure was thus "directed at a highly selective group inherently suspect of criminal activities" (namely, membership in the Communist Party) and answering the form's questions therefore constituted "the admission of a crucial element of a crime."[146] The Court described this as an "obvious" risk of incrimination and held that all such orders—not just as applied to Albertson—were inconsistent with the Fifth Amendment's self-incrimination clause.[147]

The Court employed similar reasoning but with a slightly different result a few years later in *Marchetti v. United States.*[148] Marchetti had been convicted of violating federal gambling tax statutes by failing to register as being in the business of accepting wagers (facilitating gambling) and failing to pay the subsequent occupational tax.[149] After the verdict, Marchetti moved to set aside his conviction on the ground that requiring him to comply with these statutory requirements violated his privilege against self-incrimination.[150] The Court agreed: It first examined the "implications of these statutory provisions," observing that wagering and other such gambling activities were "very widely prohibited" under federal and state law.[151]

As such, persons who, for whatever reason, did not assert their privilege or could not demonstrate that they would face "substantial hazards" of self-incrimination by complying would not be shielded from penalties for failing to do so.[152]

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142 *Marchetti*, 390 U.S. at 48.

143 *Albertson*, 382 U.S. at 79 (". . . the pervasive effect of the information called for by [the] Form [] is incriminatory, [so] their claims are substantial and far from frivolous.").

144 *Id* at 75.

145 *Id.* at 77.

146 *Id.* at 79.

147 *See id.* at 77, 79, 81.

148 *Marchetti*, 390 U.S. at 51-53.

149 *Id*. at 40-41.

150 *Id*. at 41-42.

151 *Id.* at 44.

152 *Marchetti v. United States*, 390 U.S. 39, 61 (1968).

Similarly, in *Leary*[153] the Court considered a statutory scheme that required (1) persons who "deal in" marijuana to register and pay an annual occupational tax[154] and (2) a tax on all transfers of marijuana.[155] Leary was arrested with a few marijuana cigarettes and convicted of violating the transfer tax portion of the Marihuana Tax Act.[156] The Act specifically required unregistered transferees to obtain a written order form and provide their name and address, and ensured that this information was shared with law enforcement and open to inspection by prosecutorial officials at any time.[157] At the time Leary failed to comply with the order form and transfer tax requirement, possession of marijuana was criminalized in every state.[158] And since this requirement was levied against individuals who were unregistered—and therefore, almost certainly unable to lawfully possess any amount of marijuana—complying almost necessarily meant incriminating oneself.[159]

Thus, at the time petitioner failed to comply with the Act those persons who might legally possess marijuana under state law were virtually certain either to be registered under § 4753 or to be exempt from the order form requirement. It follows that the class of possessors who were both unregistered and obliged to obtain an order form constituted a 'selective group inherently suspect of criminal activities.' Since compliance with the transfer tax provisions would have required petitioner unmistakably to identify himself as a member of this 'selective' and 'suspect' group, we can only decide that when read according to their terms these provisions created a 'real and appreciable' hazard of incrimination.[160]

Albertson, *Marchetti*, and *Leary* each concerned statutorily-mandated disclosures that almost *per se* implicated the declarant in a crime.[161] *Hiibel v. Sixth Judicial District Court of Nevada* lies on the other end of the incriminatory spectrum.[162] The Supreme Court in *Hiibel* considered whether one may invoke the Fifth Amendment privilege against self-incrimination in response to a law enforcement officer's request for identification pursuant to a "stop and identify" statute.[163] The challenged statutory provision "only" allowed officers to require drivers encountered

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153 *Leary v. United States*, 395 U.S. 6 (1969).

154 Almost all states had limited exceptions to the overall criminalization of marijuana wherein possession was permitted by specific persons. *See id.* at 16-17. These persons were required to register and pay the annual occupational tax. *Id.* at 17.

155 *Id.* at 14-15.

156 *Id.* at 10-11.

157 *Id.* at 15.

158 *Id.* at 16.

159 *See id.* at 16-18.

160 *Id.* at 18.

161 *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965); *Marchetti v. United States*, 390 U.S. 39 (1968); *Leary v. United States*, 395 U.S. 6 (1969).

162 *Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humboldt Cnty.*, 542 U.S. 177 (2004).

163 *See id.* at 182.

under "suspicious circumstances" to identify themselves.[164] The statute did not authorize officers to compel answers to any other questions. The officer in *Hiibel* responded to a report of assault occurring in a particular car. The man, Hiibel, was agitated and hostile and refused to tell the officer his name eleven times. After being convicted of obstructing an officer discharging their official duties, Hiibel argued that his conviction violated the Fifth Amendment's prohibition against self-incrimination.[165]

The state argued that Hiibel's claim failed because the compelled disclosure (sharing one's name) is a nontestimonial act.[166] The Court indicated disagreement with this argument,[167] but declined to resolve the case on that ground, instead holding that merely disclosing his name did not place Hiibel in any reasonable danger of incrimination. "As best we can tell, petitioner refused to identify himself only because he thought his name was none of the officer's business. Even today, petitioner does not explain how the disclosure of his name could have been used against him in a criminal case."[168] Absent any realistic prospect of self-incrimination, the Court held that Hiibel's ideological objections did not override the legislature's judgment in enacting this statutory requirement with an eye towards public safety.[169]

III. THE FIFTH AMENDMENT'S REGULATORY REGIME EXCEPTION

This Section introduces the regulatory regime exception ("RRE") and demonstrates that temporary firearm surrender orders issued pursuant to ERPOs or DVROs fit within this exception. It begins by reviewing the purpose of this exception and the factors that courts consider when determining its applicability. This Section then applies these factors to conclude that the RRE requires compliance with civil firearm surrender orders even in the rare instances in which self-incrimination may be implicated.

A. Introduction to the Regulatory Regime Exception

The RRE has its roots in the early twentieth century, when the Supreme Court began developing a carveout in its Fifth Amendment analysis for laws that seek information on a broad scale—disclosures that, for most people, would not prove incriminating. While self-incrimination issues are subject to close judicial scrutiny, courts have consistently recognized that strong public interests justify a variety of mandatory disclosures.

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164 *Id.* at 181-82.
165 *Id.* at 189.
166 *Id.*
167 *Id.*
168 *Id.* at 190.
169 *Id.* at 190-91.

> Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need, on the one hand, and the individual claim to constitutional protections, on the other; neither interest can be treated lightly.[170]

The RRE is a testament to the fact that "an organized society imposes many burdens on its constituents."[171] Maintaining our systems of government, civil society, and even the economy requires imposing a variety of disclosure obligations on individuals and entities. Manufacturers and purveyors of certain goods must retain records and demonstrate compliance with regulations.[172] Every U.S. resident has to submit annual income tax returns. A multitude of examples abound.[173] It is easy to imagine that, in complying with these uncontroversial disclosure requirements, a person or entity may submit information that poses a risk of incrimination—evidence of tax fraud, import/export violations, or possession of stolen goods, for example. The RRE functions as a pressure release valve for this inherent tension."[T]he fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement, such as filing an income tax return, maintaining required records, or reporting an accident, does not clothe such required conduct with the testimonial privilege."[174] The fundamental question under the RRE is whether the disclosure is compelled in order to effectuate an important non-criminal regulatory scheme, in which case the Fifth Amendment is not an excuse for noncompliance, or for the investigation and prosecution of criminal conduct, in which case it may be. To aid this determination, courts generally consider three overarching—and conceptually related—factors: whether the disclosure requirement (1) is imposed as part of an "essentially non-criminal and regulatory area of inquiry,"[175] (2) targets "a selective group inherently suspect of criminal activities,"[176] and (3) creates a substantial likelihood of prosecution.[177]

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170 *California v. Byers*, 402 U.S. 424, 427 (1971).

171 *Id.*

172 *See, e.g.*, *Shapiro v. United States*, 335 U.S. 1, 4-5 (1948).

173 *See, e.g.*, *Byers*, 402 U.S. at 427-28.

174 *United States v. Hubbell*, 530 U.S. 27, 35 (2000).

175 *Baltimore City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 557 (1990). *See also United States v. Alkhafaji*, 754 F.2d 641, 643 (6th Cir. 1985); *United States v. Stirling*, 571 F.2d 708, 728 (2d Cir. 1978); *United States v. Garcia-Cordero*, 610 F.3d 613, 617 (11th Cir. 2010).

176 *Bouknight*, 493 U.S. at 557. *See also Alkhafaji*, 754 F.2d at 645; *Stirling*, 571 F.2d at 728; *Garcia-Cordero*, 610 F.3d at 617; *United States v. Flores*, 753 F.2d 1499, 1504 (9th Cir. 1985).

177 *See, e.g.*, *Byers*, 402 U.S. at 430-31; *Alkhafaji*, 754 F.2d at 647; *Flores*, 753 F.2d at 1501-02.

B. Regulatory Regime Basics: Essentially Non-Criminal and Regulatory Area of Inquiry

The Supreme Court has recognized that "the Fifth Amendment privilege may not be invoked to resist compliance with a *regulatory regime* constructed to effect the State's *public purposes unrelated to the enforcement of its criminal laws*."[178] The first step, therefore, is to determine whether the disclosure functions as an important part of a regulatory scheme or is motivated by an essentially prosecutorial objective.

First, it is useful to briefly revisit the well-established principles courts employ to determine whether a statute is properly characterized as "criminal" or "regulatory." The most significant consideration is legislative intent. "If the intention of the legislature was to impose punishment, that ends the inquiry."[179] Only exceptional circumstances justify departing from the legislature's intent—namely, if the statutory scheme is "so punitive either in purpose or effect" that the relevant provision is properly characterized as a "criminal penalty" rather than "a civil remedy."[180]

Courts look to the text, structure, and stated purpose of the statute itself to determine the legislature's intent.[181] In *Smith v. Doe*, for example, the Court observed that the Alaska Legislature had expressly identified "protecting the public safety"[182] as the primary objective of a sex offender registry statute. "In this case . . . '[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm.'"[183]

Courts may also consider where the statute is codified, along with any enforcement provisions. The Court in *Smith*, for instance, noted that the challenged statute was located within the state's civil code.[184] This bolstered its conclusion that the legislature's intention was to create a nonpunitive regulatory scheme. The Court was careful to note, however, that this factor was probative but not dispositive. "The location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one."[185] The legislature's intent, along with the presence of any punitive—as opposed to remedial—characteristics[186] remain paramount.

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178 *Bouknight*, 493 U.S. at 556 (emphasis added).

179 *Smith v. Doe*, 538 U.S. 84, 92 (2003).

180 *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

181 *See, e.g.*, *id.* at 92-93.

182 *Id.* at 93.

183 *Id.* ("[E]ven if the objective of the Act is consistent with the purposes of the Alaska criminal justice system, the State's pursuit of it in a regulatory scheme does not make the objective punitive.").

184 *Id.* at 94.

185 *Id.*

186 *See, e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) ("Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation

Finally, the fact that a statute may provide for criminal penalties in the event of noncompliance does not necessarily transform the provision from regulatory to punitive.[187]

The Supreme Court's decision in *California v. Byers*[188] exemplifies this analysis in the context of the RRE. In *Byers*, the Court considered a challenge to a California "hit-and-run" law that required any driver involved in a car accident that resulted in property damage to stop at the scene and provide their name and address. Byers was charged with a moving violation and failure to comply with the aforementioned statute.[189] He argued that absent a grant of immunity, the latter charge violated his Fifth Amendment privilege against self-incrimination. California's highest court agreed, but the Supreme Court reversed.[190] A plurality found that the statute in question was "not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents."[191] Not only did the Court conclude that the statutory purpose was noncriminal—it also held that the self-reporting requirement was "indispensable to its fulfillment."[192] Lower courts interpreting the RRE have consistently cited the factors analyzed by the Court in *Byers*, including the importance of self-reporting to effectuate the purpose of the regulatory scheme.[193]

The Eleventh Circuit Court of Appeals undertook a similar analysis when it heard a challenge to a federal immigration law requiring persons

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will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of [legislative] intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.").

187 *Smith*, 538 U.S. at 96 ("Invoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive.").

188 *California v. Byers*, 402 U.S. 424 (1971).

189 *Id.* at 425-26.

190 Notably, Justice Harlan—who authored the foundational self-incrimination opinions in *Marchetti*, *Grosso*, and *Haynes*—concurred in the *Byers* opinion. *See id.* at 434 (Harlan, J., concurring).

191 *Id.* at 430.

192 *Id.* at 431.

193 *See, e.g.*, *U.S. v. Alkhafaji* ("The court . . . conducted the 'close scrutiny' dictated by *Byers,* using the balancing approach described in that decision. . . . [A]n 'essentially regulatory statute' does not violate the Fifth Amendment privilege against self-incrimination where four conditions are found to exist: (1) self-reporting is essential to fulfillment of the regulatory objective, (2) the burden of disclosure is placed on the general public rather than a selective, suspect group, (3) the general activity is lawful and (4) the possibility of incrimination is not substantial."); *United States v. Stirling*, 571 F.2d 708 (2d Cir. 1978) ("The [Byers] Court held that compliance with an essentially regulatory statute, where (1) self-reporting is essential to the fulfillment of its objective, (2) the burden is placed upon the general public rather than a "highly selective group inherently suspect of criminal activities," (3) the general activity is lawful and (4) the possibility of incrimination is not substantial, does not violate the Fifth Amendment privilege against self-incrimination.").

transporting international passengers to "bring and present" them to U.S. immigration officers.[194] The appellant, who had been charged with smuggling undocumented persons into the U.S., argued that the "bring and present" requirement violated his Fifth Amendment privilege against self-incrimination.[195] The government responded that the requirement was "outside the ambit of the privilege because it is part of a broader scheme of immigration law. In other words, the requirement is part of a noncriminal regulatory scheme not directed at persons suspected of committing a crime."[196] The Eleventh Circuit noted that lawmakers "may in some instances, without violating the privilege, require individuals to report information to the government which may incriminate the individual" pursuant to the regulatory regime exception[197] It observed that immigration law is "more properly classified as regulatory rather than criminal," despite the fact that there are undoubtedly crimes related to immigration violations, and noted that the requirement "is part of the federal regulatory scheme through which the government controls our national borders."[198] The court ultimately held that the privilege against self-incrimination did not protect the appellant from prosecution for failing to comply with the bring and present requirement.

C. Regulatory Regime Basics: Inherently Suspect Groups and the Likelihood of Prosecution

The RRE will not apply if the provision requiring the disclosure serves an essentially prosecutorial objective. To make this determination, courts consider the overall likelihood that the information is likely to result in prosecution,[199] and whether the burden is directed to the public at large or a highly selective group targeted because they are inherently suspected of criminal activities.[200] It is worth noting that this inquiry conceptually relates to Subsection B above since, logically, the stronger the regulatory and non-criminal nature of the area of inquiry, the less likely the requirement targets a select group inherently suspected of criminal activities and carries a substantial risk of prosecution.

The overarching inquiry, consistent with the purpose of the Fifth Amendment, is the extent to which the compelled disclosure serves a criminal or prosecutorial purpose. Establishing a realistic threat of incrimination is, of course, a threshold that an individual must meet to invoke their Fifth Amendment privilege against self-incrimination. But

194 *United States v. Garcia-Cordero*, 610 F.3d 613 (11th Cir. 2010).
195 *Id.* at 615.
196 *Id.* at 616.
197 *Id.* at 616-17.
198 *Id.* at 618.
199 *See supra* note 139.
200 *See supra* note 138.

this analysis is performed at a higher level of generality in the context of the RRE. Rather than considering the fact-specific circumstances of an individual seeking to invoke this right, courts considering whether the RRE applies to require compliance look at the overall likelihood that the type of compelled disclosure—based on the nature of the information, the purpose for which it is provided, and how it will likely be used—poses a substantial risk of prosecution in many, most, or all circumstances.

1. Lawfulness of the Underlying Activity

The plurality in *Byers* thus observed that complying with the statutes at issue in *Marchetti* and *Albertson* would have resulted in disclosures that gave rise to prosecution "in almost every conceivable situation."[201] One reason for this is that the activities underlying the disclosures were pervasively criminalized. The significance of this factor is apparent: Requiring individuals to disclose information related to an activity that is generally *un*lawful increases the likelihood that the challenged provision poses a substantial risk of self-incrimination, as opposed to serving a prospective, remedial purpose.[202] In *Marchetti* or *Albertson*, the underlying activities themselves—wagering and membership in the Communist Party, respectively—were largely unlawful and carried a very real prospect of criminal penalties. In contrast, the Court observed in *Byers* that "[d]riving an automobile, unlike gambling, is a lawful activity. Moreover, it is not a criminal offense under California law to be a driver 'involved in an accident.'"[203]

In addition to the lawfulness of the underlying conduct, certain features of the statutory schemes themselves may increase the likelihood that the disclosure would aid criminal prosecutions. The statutory scheme at issue in *Marchetti*, for instance, required that a list of individuals who complied with the requirement be kept for public inspection and made available to any prosecuting officer.[204] Beyond this being an objective feature of the statute, the Court observed that it had "evidently been the consistent practice" of the agency to provide such information to prosecutors.[205] Similarly, the statute at issue in *Leary* required copies to

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201 *Byers*, 402 U.S. at 430. *See also Albertson*, 382 U.S. at 79 ("Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where *response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime*.") (emphasis added); *Mackey v. United States*, 401 U.S. 667, 709 (1971) (Brennan, J., concurring) ("Where the essence of a statutory scheme is to forbid a given class of activities, it may not be enforced by requiring individuals to report their violations.").

202 *See, e.g.*, *Byers*, 402 U.S. at 431 ("The disclosure of inherently illegal activity is inherently risky.").

203 *Id.*

204 *Marchetti* at 58-59 n.15.

205 *Id.* at 59.

be made available to prosecuting officials and furnished upon request.[206] In fact, the congressional record explicitly stated that one objective behind the operative statute was to publicize marijuana dealings and "control the traffic effectively."[207]

In contrast, the Court in *Byers* and *Hiibel* upheld the challenged statutory provisions under the RRE because, in most cases, the disclosures were unlikely to lead to criminal prosecution. "[D]isclosures with respect to automobile accidents simply do not entail the kind of substantial risk of self-incrimination involved in *Marchetti*, *Grosso*, and *Haynes*."[208] The purpose and effect of the disclosure provision was to "promote the satisfaction of civil liabilities" arising from car accidents.[209]

2. Selective Group Inherently Suspect of Criminal Activity

Courts evaluating the applicability of the RRE consider whether the disclosure requirement is aimed at a "highly selective group inherently suspect of criminal activities."[210] This phrase requires some unpacking. There is ample room for interpretation, but prior case law establishes at least a few operational parameters.

First, the plurality in *Byers* upheld a law requiring drivers involved in accidents that resulted in property damage to provide their name and address to the person in charge of the damaged property.[211] The fact that this statute was upheld pursuant to the RRE logically stands for the proposition that "selective group" cannot be taken to invalidate *any* statutory provision that applies only to a particular subset of individuals. Put differently, if "highly selective group" meant that statutes requiring disclosures by certain classes of persons—like drivers in car accidents that resulted in property damage—could not fall under the RRE, then the *Byers* plurality could not have arrived at its decision.[212] The Court's more recent decision in *Hiibel* supports this conclusion.[213] The relevant statute permitted officers to "detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed,

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206 *Id.* at 59 n.15.

207 *Leary v. United States*, 395 U.S. 6, 27 (1969).

208 *California v. Byers*, 402 U.S. 424, 431 (1971).

209 *Id.* at 430.

210 *See, e.g.*, *id.*; *Baltimore City Dep't of Soc. Serv. v. Bouknight*, 493 U.S. 549, 557 (1990); *United States v. Flores*, 753 F.2d 1499, 1504 (9th Cir. 1985); *United States v. Garcia-Cordero*, 610 F.3d 613, 617–618 (11th Cir. 2010); *United States v. Alkhafaji*, 754 F.2d 641, 643–644 (6th Cir. 1985); *United States v. Stirling*, 571 F.2d 708, 727–728 (2d Cir. 1978).

211 Barry Bassis, *Constitutional Law–A Driver Involved in an Accident Resulting in Property Damage Can Be Required by Statute to Stop and Identify Himself to the Other Driver*, 21 BUFF. L. REV. 509, 517–518 (1972).

212 Bryan H. Choi, *For Whom the Data Tolls: A Reunified Theory of Fourth and Fifth Amendment Jurisprudence*, 37 CARDOZO L. REV. 185 (2015).

213 *See Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humboldt Cnty.*, 542 U.S. 177, 181 (2004).

is committing or is about to commit a crime,"[214] and required individuals detained under such circumstances to identify themselves by name.[215] The limited nature of the disclosure (one's first and last name) undoubtedly affected the Court's reasoning.[216] But it is still notable, for the purposes of establishing this analytical framework, that the majority decided to uphold this provision as a valid application of the RRE despite the fact that the disclosure was triggered only for certain persons.[217]

There are ample examples of statutorily mandated disclosures invalidated on Fifth Amendment grounds due in part to the fact that they targeted impermissibly selective and suspect groups. These include cases such as *Marchetti*, *Haynes*, and *Leary*. In each of these instances, the statutory provisions almost per se targeted classes of individuals suspected of engaging in *the very criminal activity to which the compelled disclosure related*.[218] In *Marchetti*, for example, the statutory scheme required disclosures of individuals specifically engaged in "wagering," an activity pervasively criminalized across state and federal law. The statutory scheme in *Leary* similarly required all persons dealing in marijuana to register and pay an occupational tax.[219] Like in *Haynes*, described below, the specific form of compliance demanded of the appellant in *Leary* almost necessarily placed him in a select group suspected of criminal activity:

> [A]t the time petitioner failed to comply with the Act those persons who might legally possess marihuana under state law were virtually certain either to be registered . . . or to be exempt from the order form requirement. It follows that the class of possessors who were both unregistered and obliged to obtain an order form constituted a 'selective group inherently suspect of criminal activities.'"[220]

In each of these cases, the Court held that the requirements were indeed "directed at a 'selective group inherently suspect of criminal activities.'"[221]

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214 *Id.*

215 Setting aside the undoubtedly serious Fourth Amendment concerns implicated by this statutory scheme. *See, e.g.*, *id.* at 197 (Breyer, J., dissenting).

216 *See id.* at 191.

217 This was, in fact, one of the bases for Justice Stevens' dissent. *See id.* at 191-92 (Stevens, J., dissenting) ("The Nevada law at issue in this case imposes a narrow duty to speak upon a specific class of individuals. The class includes only those persons detained by a police officer 'under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime'—persons who are, in other words, targets of a criminal investigation. The statute therefore is directed not 'at the public at large,' but rather 'at a highly selective group inherently suspect of criminal activities.'").

218 Minn. L. Rev. Editorial Board, *The Marchetti Approach to Self-Incrimination in Cases Involving Tax/Registration Statutes*. MINN. L. REV. 219, 231-237 (1971).

219 *See generally Leary v. United States, 395 U.S. 6 (1969).*

220 *Id.* at 18.

221 *Marchetti v. United States*., 390 U.S. 39, 57 (1968).

This Article posits that there should be a relationship between the constitution of the selective group—the reason(s) why members of the group are inherently suspect of criminal activities—and the risk of incrimination threatened by the compelled disclosure in order for the RRE not to apply. In other words, in each of the cases above there was a relationship between the makeup of the "selective group" and the incriminating disclosure: (1) the select group in *Marchetti* was those engaged in wagering and the compelled disclosure was a tax on wagering; (2) the select group in *Leary* was unregistered marijuana transferees and the compelled disclosure was a transfer tax and order form related to the sale of marijuana; and (3) the select group in *Haynes*, as described below, consisted of people who had obtained a particular firearm without complying with federal requirements, and the compelled disclosure was a form registering one's possession of such. In contrast, as explored in Section V.A.2, the type of incrimination risk faced by some ERPO/DVRO respondents in complying with a firearm surrender order does not have the same *necessarily* close relationship with the reason they are subject to the order as the appellants in *Marchetti*, *Leary*, and *Haynes*.[222]

Whether or not a particular statutorily mandated disclosure falls under the auspices of the RRE ultimately comes down to a careful interplay between each of the aforementioned factors: (1) the non-criminal and regulatory area of inquiry; (2) the likelihood of prosecution; and (3) the nature of the selective group targeted for disclosure.[223] Such interplay is the nature of any multi-factor inquiry, but it is important to recognize the functional interplay between these factors. For instance, self-reporting being indispensable to a statute's fulfillment weighs in favor of the RRE applying. But placing too much weight on one factor alone without also considering, for example, the lawfulness of the underlying activity and the practical likelihood of prosecution, could seriously erode the protections guaranteed by the Fifth Amendment.[224]

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[222] *See also* Isabella Glassman, *A Yellow Light for New York's Red Flag Law in Criminal Prosecutions: Contextualizing the Fruits of New York Extreme Risk Protection Orders*, 90 BROOK. L. REV. 1345, 1369 (2025).

[223] MINN. L. REV., *supra* note 218.

[224] *See, e.g.*, *California v. Byers*, 402 U.S. 424, 453-454 (1971) (Harlan, J., concurring) ("If the technique of self-reporting as a means of achieving regulatory goals unrelated to deterrence of antisocial behavior through criminal sanctions is carried to an extreme, the 'accusatorial' system which the Fifth Amendment is supposed to secure can be reduced to mere ritual. . . . In other words, we must deal in degrees in this troublesome area."); *Baltimore City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 568 (1990) ("Virtually any civil regulatory scheme could be characterized as essentially noncriminal by looking narrowly or, as in this case, solely to the avowed non-criminal purpose of the regulations. If one focuses instead on the practical effects, the same scheme could be seen as facilitating criminal investigations.") (Marshall, J., dissenting).

D. Contrasting Case Studies: Haynes *and* Bouknight

The following case comparison illustrates some of the key differences that inform whether the RRE could apply to a statutory scheme to require compliance despite potential incrimination risks.

Haynes v. United States concerned registration requirements in the National Firearm Act ("NFA") that sought to collect taxes on certain classes of firearms.[225] Notably, it's understood that the firearms implicated by this scheme were types mainly used in criminal activity, such as machineguns, short-barreled rifles, and silencers.[226] Two particular NFA provisions were at issue in *Haynes*: one that criminalized the possession of certain types of unregistered firearms and one that criminalized the failure to register those enumerated firearms.[227] These provisions effectively forced individuals, in all but extremely rare circumstances (such as finding a lost machine gun), to register their possession of weapons that had not been properly registered—thus, in effect, registering their violation of the statute.[228] For this reason, the statute indisputably targeted an "inherently suspect" class of persons. By complying with the statute, individuals more likely that not resulted in, or at least provided grounds for, criminal prosecution.[229]

The government attempted to emphasize the (highly unusual) instances in which compliance would not necessarily incriminate the declarant, such as finding a lost or abandoned machinegun.[230] But the Court held that "the correlation between obligations to register violations can only be regarded as exceedingly high, and a prospective registrant *realistically can expect* that registration will *substantially increase the likelihood* of his prosecution."[231] The Court also acknowledged that while the government (here, the Treasury Department) had a compelling "need for accurate and timely information,"[232] this interest was insufficient to override the Fifth Amendment's guaranteed protections.[233] This holding did not invalidate the relevant statutes wholesale.[234] Instead, the Court held

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225 *Haynes v. United States*, 390 U.S. 85, 96 (1968).

226 *Id.* at 87.

227 *See id.* at 88-89.

228 *Haynes*, 390 U.S. at 96 ("The registration requirement is thus directed principally at those persons who have obtained possession of a firearm without complying with the Act's other requirements, and who therefore are immediately threatened by criminal prosecutions under §§ 5851 and 5861. They are unmistakably persons 'inherently suspect of criminal activities.'") (quoting *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 79 (1965)).

229 *Id.* at 96

230 *Id*.

231 *Id.* at 97 (emphasis added).

232 *Id.* at 98.

233 *Id.* at 99.

234 Although the agency responsible for effectuating the NFA acknowledges that the Court's ruling made this version of the statute "virtually unenforceable." *See National Firearms Act*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, https://www.atf.gov/rules-and-regulations/national-firearms-act (last reviewed Mar. 14, 2025).

that invoking the privilege against self-incrimination provided immunity from prosecution for failure to comply with those statutory provisions.[235]

Bouknight, as introduced in Section II, stands in sharp contrast to *Haynes* as a prime example of the regulatory regime exception. As described above, the court ordered Bouknight to bring her infant son before them due to serious concerns about his safety and wellbeing.[236] The boy had been previously designated a "child in need of assistance" by Baltimore social welfare officials and returned to his mother's custody subject to certain conditions.[237] She refused to bring him back before the court and instead invoked her privilege against self-incrimination.[238] In a 7/2 decision, the Court determined that the RRE applied to require her compliance with the order despite the fact that the act of production had testimonial qualities:

> The possibility that a production order will compel testimonial assertions that may prove incriminating does not, in all contexts, justify invoking the privilege to resist production. . . . The Court has on several occasions recognized that the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws.[239]

First, the Court examined the relationship between the regulatory objectives and the government's interest in gaining access to the object (or information) compelled.[240] Once the court declared Bouknight's son a "child in need of assistance," his "care and safety became the particular object of the State's regulatory interests."[241] Assuming custody pursuant to city official's specifications meant that Bouknight had "submitted to the routine operation of the regulatory system."[242] Critically, the Court observed that this was accomplished as "part of a broadly directed, noncriminal regulatory regime governing children cared for pursuant to custodial orders."[243]

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235 *Haynes*, 390 U.S. at 99 ("[T]he rights of those subject to the Act will be fully protected if a proper claim of privilege is understood to provide a full defense to any prosecution either for failure to register under § 5841 or, under § 5851, for possession of a firearm which has not been registered.").

236 *Baltimore City Department of Social Services v. Bouknight,* 493 U.S. 549, 552 (1990).

237 *Bouknight*, 493 U.S. at 552.

238 *Id.*

239 *Id.* at 555.

240 *Id.* at 558 ("When a person assumes control over items that are the legitimate object of the government's noncriminal regulatory powers, the ability to invoke the privilege is reduced.").

241 *Id.* at 559.

242 *Id.*

243 *Id.*

Finally, the Court determined that persons subject to child custody orders are not a "selective group inherently suspect of criminal activities." A court may deem a child "in need of assistance" simply because their parent(s) may be "unable or unwilling to give [the child] proper care and attention."[244] Such a determination does not necessarily implicate criminal activity; certainly not to the likelihood of prosecution faced by petitioners in *Marchetti* and its progeny.[245] The Court observed that compliance in the "vast majority" of cases will not produce incriminating testimony.[246] Even where required production might reveal criminal conduct, the government's reasons are "related entirely to the child's well-being and through measures unrelated to criminal law enforcement or investigation."[247]

Importantly, the Court emphasized that requiring Bouknight to produce her son did not necessarily mean that she had no recourse pertaining to her Fifth Amendment rights. "We are not called upon to define the precise limitations that may exist upon the State's ability to use the testimonial aspects of Bouknight's act of production in subsequent criminal proceedings. But we note that imposition of such limitations is not foreclosed."[248] In other words, she may be unable to *avoid compliance* by invoking her privilege against self-incrimination, but the Fifth Amendment could function to limit prosecutors' ability to use the "testimony" against her if—in the future—she did face criminal charges related to the child's welfare.[249]

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244 *Id.* at 560.

245 *Id.*

246 *Id.* at 561.

247 *Id.*

248 In support of this proposition, the Court cited a range of cases in which prosecutors' ability to use testimonial statements against the compelled speaker has been limited. *See id.* at 562.

249 *Id.* at 561-62 ("The State's regulatory requirement in the usual case may neither compel incriminating testimony nor aid a criminal prosecution, but the Fifth Amendment protections are not thereby necessarily unavailable to the person who complies with the regulatory requirement after invoking the privilege and subsequently faces prosecution."). Lower courts have discussed these dicta in subsequent self-incrimination cases. *See, e.g.*, *United States v. Wilson*, 98 F.4th 1204, 1234 (10th Cir. 2024) (finding it a "reasonable inference" that "in any future criminal prosecution of [appellant], the government may not be able to use the testimonial components of his compliance") (Hartz, J., concurring); *Hastings v. State*, 560 N.E.2d 664, 668 n.4 (Ind. Ct. App. 1990) ("[W]hile the holding in *Bouknight* would effectively prevent [appellant] from invoking the Fifth Amendment right against self-incrimination during the proceeding itself, the Supreme Court expressly acknowledged that the Fifth Amendment may be invoked to limit the admission into evidence of incriminating statements made during the investigation in a subsequent criminal proceeding."). But the operational parameters of potential use limitations in the context of the RRE appears to be an open question and is beyond the scope of this Article.

IV. THE FIFTH AMENDMENT AND COMPLIANCE WITH TEMPORARY FIREARM SURRENDER ORDERS

Firearm surrender orders may implicate the Fifth Amendment by compelling individuals to disclose information that has testimonial and, in rare instances, incriminating qualities. But as this Article has discussed, this does not mean that persons subject to such orders may simply refuse to comply on Fifth Amendment grounds. Section V explores this reasoning, but first, this Section provides a detailed overview of how compliance with firearm surrender orders may, on a case-by-case basis, implicate the Fifth Amendment.

A. Fifth Amendment Implications of Temporary Firearm Surrender Orders

There are two overarching ways in which firearm surrender mechanisms may compel disclosures of a testimonial and incriminating nature. The first relates to the act of production in and of itself, and the second concerns certain sworn, certified statements that an individual may have to submit in order to comply with the order.

1. The Act of Production

As discussed above, the "act of production" alone may be testimonial if it tacitly "testifies to the existence, possession, or authenticity of the things produced."[250] This is relevant in the context of temporary firearm surrender orders because, as the name suggests, one complying with the order must "produce" or otherwise deliver possession of any firearms under their control to the appropriate authority.[251]

In most cases the recipient is law enforcement, although some statutory schemes permit respondents to store their firearm(s) with a licensed gun dealer for the duration of the order.[252] Of course, to merit Fifth Amendment protections, a compelled disclosure—including an act of production—must be both testimonial *and* incriminating.[253] The

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[250] *Id.* at 554; *see also Fisher v. United States*, 425 U.S. 391, 410-11 (1976).

[251] *Extreme Risk Protection Orders*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/# (last visited Aug. 29, 2025).

[252] *See, e.g.*, CAL. FAM. CODE § 6389(c)(2) (West 2025) (allowing a licensed firearm dealer to receive firearms surrendered pursuant to a DVRO), CAL. PENAL CODE § 18120(b)(3) (West 2025) (same for ERPOs). *See also* NAT'L CTR. ON PROT. ORDS. AND FULL FAITH & CREDIT, *supra* note 89, at 22 n.251.

[253] *See Hoffman v. U.S.*, 341 U.S. 479, 486 (1951) ("The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if 'it clearly appears to the court that he is mistaken.'") (internal citations omitted).

question, then, is whether there are circumstances in which tacitly testifying as to the possession of a firearm is incriminating. The sale and possession of firearms is subject to a comprehensive regulatory system designed to prevent deadly weapons from falling into dangerous hands. Some people, categorized as "prohibited purchasers," are categorically prohibited from possessing firearms due to a felony conviction, involuntary institutionalization, or another enumerated reason.[254] There also may be case-by-case adjudications wherein an individual is prohibited from possessing a firearm—for instance, while a protective order is in effect.[255] Under these circumstances, the act of production may have incriminating qualities because *the very fact that they possessed* or retained control over the firearm(s) may subject them to criminal penalties, if categorically prohibited,[256] or constitute a violation of the terms of a civil protective order.[257] Accordingly, for individuals prohibited from possessing firearms, being compelled to produce them pursuant to a temporary surrender order would constitute a testimonial and incriminating disclosure.

A self-incrimination claim could be raised if the person seeking a DVRO or ERPO stated the respondent used a particular firearm during the conduct that gave rise to their petition (for example, stating the respondent brandished a Glock pistol) and the respondent subsequently surrendered a firearm matching that description.[258] This could be thought of as a "link in the chain"[259] of evidence needed to prosecute that individual. It is worth noting that in most cases this scenario does not fit neatly within the same act of production doctrine discussed above, wherein the mere act of producing the item—separate and apart from the qualitative characteristics thereof—provides everything needed to prosecute that individual. These circumstances are distinguishable from those present in *Marchetti*, *Leary*, *Haynes*, and *Albertson*, wherein compliance necessarily and categorically provided officials with everything they

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254 *See* 18 U.S.C.A. § 922(g) (West).

255 *See id.* § 922(g)(8).

256 *See id.* § 924(a)(2).

257 *See id.* § 924(a)(8); N.Y. FAM. CT. ACT § 842-a (McKinney).

258 *See R. M. v. C. M.*, 207 N.Y.S.3d 634, 645-46 (App. Div. 2024).

259 *Byers*, 402 U.S. 424 at 432. Justice Marshall cited the "link in the chain" concept in his *Bouknight* dissent, arguing that the majority downplayed Bouknight's incrimination risk: "Bouknight's ability to produce the child would conclusively establish her actual and present physical control over him, and thus might 'prove a significant 'link in a chain' of evidence tending to establish [her] guilt.'" 493 U.S. at 563 (Marshall, J., dissenting). Critically, his "link in a chain" assessment was informed by the fact that Bouknight's control over the child was the main point of contention because the state admitted that it believed that the child was dead and police were investigating the case as a possible homicide. "In these circumstances, the potentially incriminating aspects to Bouknight's act of production are undoubtedly significant." *Id.* at 564.

needed to establish guilt on one or more offenses. In contrast, the act of producing a firearm that aligns with a petitioner's description does not constitute an admission as to the underlying conduct. At most, it could be considered a tacit admission that the respondent had control or possession over a certain firearm at the moment they surrendered it to law enforcement.[260] It is also important to remember that civil DVROs are preventative measures separate from the state's criminal, prosecutorial functions.[261] At the time of writing, there are no published cases or identifiable accounts of persons prosecuted on domestic violence charges based on evidence acquired from complying with a firearm surrender order. In practice, and because the act of production in this scenario does not categorically constitute an admission as to underlying unlawful conduct (like those present in *Marchetti*, *Leary*, *Haynes*, and *Albertson*) this possibility does not present a "non-trifling" risk of incrimination for the purposes of analyzing whether the RRE applies generally to firearm surrender orders.

2. The Process of Certifying Compliance

Temporary firearm surrender orders may also involve testimonial and incriminating disclosures when an individual fills out and signs a form certifying that they have complied with the order.[262] Many states provide these forms as part of the standard procedure for firearm surrender mechanisms.[263] The purpose behind these forms is two-fold. First, they provide and memorialize an accurate record of the items temporarily surrendered so they are returned to the individual when the order of protection expires. Second, and most obviously, they require the respondent to complete and sign the form to ensure they have complied with the order.[264]

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260 *See Haverstraw Town Police v. C.G.,* 190 N.Y.S.3d 588, 598 (Sup. Ct. 2023) ("A TERPO's standard terms include the requirement that a respondent turn over all firearms in his or her possession. . . . If they are in possession of firearms *illegally* (for example, if they possess a pistol without a license), then admitting such possession and turning over the firearm could subject them to prosecution for that crime.").

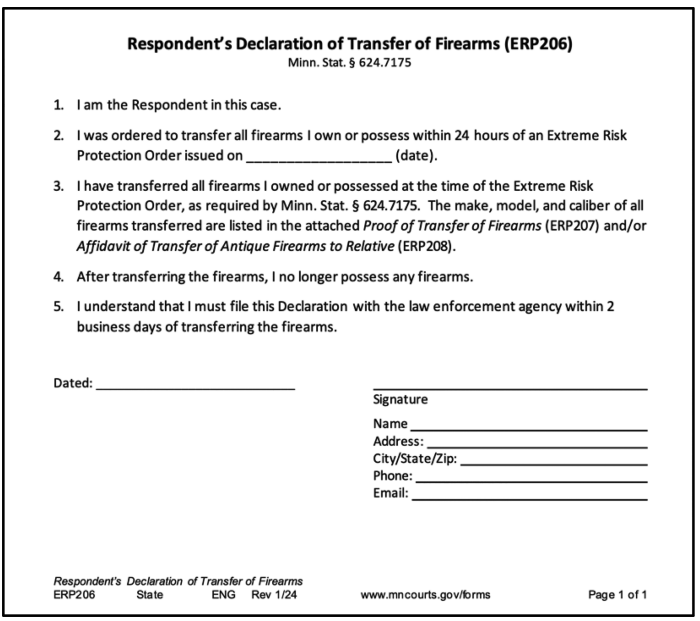
261 *See Smith v. Smith,* 404 P.3d 101, 105-06 (Wash. Ct. App. 2017) (discussing the distinctions between Washington's civil DVRO proceedings and criminal domestic violence charges).

262 *State v. Flannery*, 520 P.3d 517, 523-24 (Wash. Ct. App. 2022).

263 *See, e.g.*, WASH. REV. CODE ANN. § 9.41.804 (West 2025).

264 *See, e.g.*, *id.*

Examples of the forms associated with these processes are pictured below:



Respondent's Declaration of Transfer of Firearms (ERP206)
Minn. Stat. § 624.7175

1. I am the Respondent in this case.
2. I was ordered to transfer all firearms I own or possess within 24 hours of an Extreme Risk Protection Order issued on _____ (date).
3. I have transferred all firearms I owned or possessed at the time of the Extreme Risk Protection Order, as required by Minn. Stat. § 624.7175. The make, model, and caliber of all firearms transferred are listed in the attached *Proof of Transfer of Firearms* (ERP207) and/or *Affidavit of Transfer of Antique Firearms to Relative* (ERP208).
4. After transferring the firearms, I no longer possess any firearms.
5. I understand that I must file this Declaration with the law enforcement agency within 2 business days of transferring the firearms.

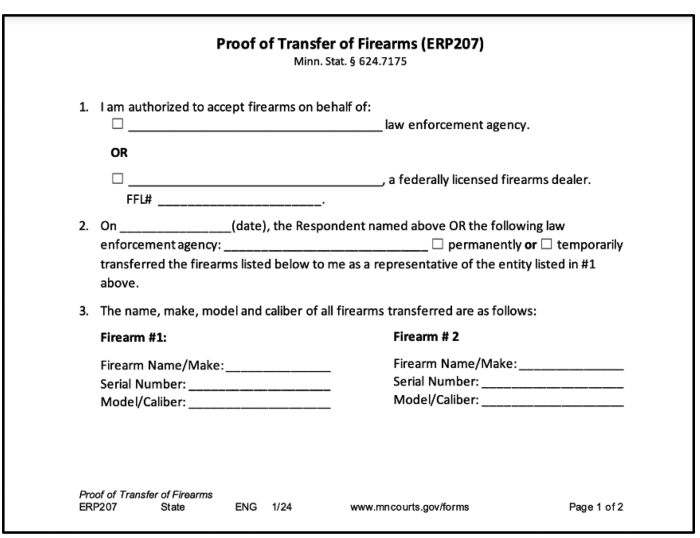
Dated: _____

_____
Signature

Name _____
Address: _____
City/State/Zip: _____
Phone: _____
Email: _____

Respondent's Declaration of Transfer of Firearms
ERP206 State ENG Rev 1/24 www.mncourts.gov/forms Page 1 of 1

Image A: Minnesota ERP206 Declaration of Transfer form.[265]



Proof of Transfer of Firearms (ERP207)
Minn. Stat. § 624.7175

1. I am authorized to accept firearms on behalf of:
   ☐ _____ law enforcement agency.

   OR

   ☐ _____, a federally licensed firearms dealer.
   FFL# _____.
2. On _____(date), the Respondent named above OR the following law enforcement agency: _____ ☐ permanently **or** ☐ temporarily transferred the firearms listed below to me as a representative of the entity listed in #1 above.
3. The name, make, model and caliber of all firearms transferred are as follows:

Firearm #1:

Firearm Name/Make: _____
Serial Number: _____
Model/Caliber: _____

Firearm # 2

Firearm Name/Make: _____
Serial Number: _____
Model/Caliber: _____

Proof of Transfer of Firearms
ERP207 State ENG 1/24 www.mncourts.gov/forms Page 1 of 2

Image B: Minnesota ERP207 Proof of Transfer form.[266]

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265 *Respondent's Declaration of Transfer of Firearms (ERP206)*, MINN. JUD. BRANCH, https://www.mncourts.gov/mncourtsgov/media/CourtForms/ERP206_Current.pdf?ext=.pdf (last visited Mar. 3, 2025).

266 *Proof of Transfer of Firearms (ERP207)*, MINN. JUD. BRANCH, https://www.mncourts.gov/mncourtsgov/media/CourtForms/ERP207_Current.pdf?ext=.pdf (last visited Mar. 3, 2025).

The first form, depicted in Image A, is filed by the person subject to the firearm surrender order. As indicated by item number three, the respondent must attach a completed Proof of Transfer form (shown above in Image B) listing the make and model of any surrendered firearm(s). Details about the firearms may be filled out by law enforcement, but the form is attached to the declaration that the respondent must certify and file with the court, thus constituting an admission on their behalf. This is significant because details about the make and model of the firearms in one's possession may be incriminating if that particular firearm is illegal in the respondent's jurisdiction. New York, for instance, largely prohibits the possession of assault weapons.[267] Certifying that they possessed this type of firearm could certainly be considered a "link in a chain"[268] of incriminatory evidence.

Before reviewing cases that have addressed self-incrimination in the firearms surrender context, a few important points bear repeating.

First, the Fifth Amendment applies to disclosures that are compelled, testimonial, *and incriminating*. This means that the compliance process discussed above only necessarily implicates Fifth Amendment protections if the individual's (a) possession in and of itself, or (b) particular type of firearm(s) possessed, was in fact unlawful. Therefore, the average person complying with an ERPO/DVPO firearm surrender order might be compelled to make a disclosure that is testimonial in nature—the fact that they possessed a firearm, for instance—but without that incriminating character, the privilege against self-incrimination does not apply. In short, individuals in lawful possession of firearms are not categorically compelled to make *incriminating* disclosures. They may have deeply-held ideological objections to complying with the order, but as the Court held in *Hiibel*, a "petitioner's strong belief that he should not have to disclose his identity . . . does not override the . . . Legislature's judgment . . . absent a reasonable belief that the disclosure would tend to incriminate him."[269] Accordingly, in most cases where the person subject to an ERPO/DVRO firearm surrender is in lawful possession of their firearms, the inquiry ends here and compliance is required.

Second, the principle explored in *Bouknight* remains highly relevant: The act of production *alone* can only be considered testimonial and incriminating to the extent that one's inherent possession or control over the item is somehow material.[270] One cannot invoke the privilege against self-incrimination on the basis that information gained from subsequent

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267 *See* N.Y. PENAL LAW § 265.00(22)(h) (McKinney).

268 *See, e.g.*, *Byers*, 402 U.S. at 428; *Marchetti*, 390 U.S. at 49; *Leary*, 395 U.S. at 16; *Hiibel*, 542 U.S. at 190.

269 542 U.S. at 190-91.

270 *Bouknight*, 493 U.S. at 554-55.

examination of the object(s) produced might be incriminating.[271] In *Bouknight* this meant the Defendant was compelled to bring her son before the court even though authorities might subsequently glean information, either from speaking with him or observing his condition, related to acts of neglect or abuse that could give rise to criminal charges.[272] Similarly, while subsequent examination of the surrendered firearms might reveal, for example, unlawful features or modifications,[273] this cannot be a basis for avoiding compliance on Fifth Amendment grounds. The remote possibility that the firearm is connected to other crimes, such as an unrelated homicide, would also fall into this category. Such information would be garnered not from the act of *production* or the corresponding certification required by the respondent, but by performing ballistics tests[274] and/or running a "trace"[275] on the firearm. These acts should be considered in the same vein as the *Bouknight* court's hypothetical scenario of authorities examining the child and discovering evidence of criminal abuse or neglect. "When the government demands that an item be produced, 'the only thing compelled is the act of producing the [item].'"[276]

B. Fifth Amendment Challenges to Firearm Surrender Orders

Relatively few cases have addressed the intersection of the Fifth Amendment privilege against self-incrimination and firearm surrender orders issued pursuant to DVROs or ERPOs. Courts that have considered these issues have arrived at mixed results—sometimes holding that the Fifth Amendment was not implicated,[277] or that it was implicated but compliance was required regardless[278]—but only one court has invalidated a statutory provision governing firearm surrender on Fifth Amendment grounds.[279] This section discusses these decisions and suggests that the

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271 *See, e.g.*, *id.* at 555 ("[A] person may not claim the Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded. . . Bouknight therefore cannot claim the privilege based upon anything that examination of Maurice might reveal[.]").

272 *Id.*

273 *See, e.g.*, N.Y. PENAL LAW § 265.00(22)(h) (McKinney 2025) (prohibiting assault weapons); FLA. STAT. ANN. § 790.222 (West 2025) (prohibiting bump stocks); MINN. STAT. ANN. § 609.67(d) (West 2025) (prohibiting auto sears).

274 *See, e.g.*, *Fact Sheet - National Integrated Ballistic Information Network*, BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS (June 2025), https://www.atf.gov/resource-center/docs/undefined/nibin-fact-sheet-fy24-508cpdf/download.

275 *See, e.g.*, *National Tracing Center,* BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, https://www.atf.gov/firearms/national-tracing-center (last reviewed Sept. 19, 2024).

276 *Bouknight*, 493 U.S. at 554-55 (quoting *Fisher v. United S*tates, 425 U.S. 391, 410 n.11 (1976)).

277 *See, e.g.*, *U.S. v. Duncan*, 331 F. App'x 270 (4th Cir. 2009).

278 *See, e.g.*, *Haverstraw Town Police v. C.G.*, 79 Misc. 3d 1005 (N.Y. Sup. Ct. 2023).

279 *State v. Flannery*, 24 Wash. App. 2d 466 (2022).

outlier striking down the statute is a wrongly decided aberration born of a unique confluence of circumstances.

1. Holding: The Fifth Amendment Is Implicated, Statute Is Upheld

It bears repeating at the outset that there have actually been very few challenges to firearm surrender orders on Fifth Amendment self-incrimination grounds. The below discussion of these challenges might lead a casual reader, operating without context, to infer that there is indeed some outsized incrimination risk associated with complying with such orders, since the few cases that *do* discuss the issue naturally feature a set of facts wherein a respondent could colorably make such a claim. But it is worth bearing in mind that as of February 2025, this author could only identify nine cases featuring challenges on these grounds. Consider this figure in the context of the hundreds, if not thousands,[280] of ERPO/DVRO firearm surrender orders issued every year across the country.

The first major Fifth Amendment challenge to firearm surrender mechanisms was considered in *People v. Havrish* out of the New York Court of Appeals.[281] This case concerned the prosecution of a defendant who produced an unlicensed handgun pursuant to complying with a DVRO firearm surrender order.[282] Havrish had turned his long guns over to law enforcement, but Havrish and his wife were aware that he also possessed a handgun at an undetermined location. Havrish eventually located the revolver and contacted law enforcement to arrange for its surrender. Police subsequently discovered that the handgun was unlicensed; a misdemeanor offense for which he was subsequently charged.[283] Havrish argued that the surrender order had put him in "an impossible dilemma," requiring him to either produce the unlicensed handgun, "thereby incriminating himself," or refuse to comply with the order and face contempt charges.[284] The town court agreed that Havrish's surrender of the pistol was privileged under the

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[280] Maryland courts granted 463 total emergency ERPOs in 2023, *see* Table, *District Court of Maryland - Extreme Risk Protection Order (ERPO) Activity Report*, https://www.mdcourts.gov/sites/default/files/import/district/statistics/ERPO_2023.pdf. New Jersey officials reported that courts granted 664 temporary ERPOs between 2019 and 2021, *see* Press Release, Off. of the Att'y Gen., Acting AG Bruck: More Than 300 "Extreme Risk Protective Orders" Issued in New Jersey Since Landmark Gun Safety Law Went Into Effect Two Years Ago (Sept. 1, 2021), https://www.njoag.gov/acting-ag-bruck-more-than-300-extreme-risk-protective-orders-issued-in-new-jersey-since-landmark-gun-safety-law-went-into-effect-two-years-ago/. For more data points regarding the number of ERPOs issued per year, *see The Effects of Extreme-Risk Protection Orders*, RAND, https://www.rand.org/research/gun-policy/analysis/extreme-risk-protection-orders.html (last updated July 16, 2024). A reasonable inference drawn from these data is that *at least* several hundred ERPOs alone (in other words, not considering DVRO firearm surrender orders) are issued nationally every year.

[281] *People v. Havrish*, 8 N.Y.3d 389 (2007), *cert denied* 552 U.S. 886 (2007).

[282] *Id.* at 391.

[283] *Id.*

[284] *Id.* at 391-92.

Fifth Amendment, but the county court reversed, holding that surrendering the pistol involved the production of physical evidence, not rising to the level of a compelled communication.

On appeal, New York's highest court briefly discussed the regulatory regime exception ("RRE"), noting that the privilege against self-incrimination "could not be used to resist compliance with a civil regulatory regime constructed to effectuate governmental purposes unrelated to law enforcement. . . ."[285] But the State had failed to argue the applicability of *Bouknight* and the RRE, so the court considered the argument unpreserved and waived.[286] Regardless, the court reasoned that *Bouknight* may not have helped the State anyway because *Havrish* concerned prosecution after the fact, rather than contesting compliance with the order, and the Supreme Court had noted that "the Fifth Amendment protections are not . . . necessarily unavailable to the person who complies with the regulatory requirement after invoking the privilege and subsequently faces prosecution."[287] In other words, if someone invokes and establishes a real and substantial risk of incrimination but the RRE nevertheless operates to require compliance, the Fifth Amendment still may limit prosecutors' ability to use information gained as a result of that compulsion.[288]

The Court of Appeals easily concluded that Havrish had been "compelled" under the meaning of the Fifth Amendment, since he had to either comply with the order or be prosecuted for contempt.[289] The trickier question for the court was whether Havrish's compliance involved *testimonial* and *incriminating* disclosures. The court easily concluded that the act of production *can* be testimonial, citing *Bouknight* as an example.[290] It reasoned that Havrish's weapon surrender was testimonial because it "revealed [his] subjective thought process—that he knowingly possessed the weapon—and, absent this revelation, the information would not have come to the attention of the police."[291] In other words, it was not a "foregone conclusion"[292] that law enforcement would have discovered Havrish's possession of an unlicensed handgun absent his compliance with the order. It also determined that the weapon surrender was incriminating, since it provided virtually all of the information necessary to prosecute the weapons offense, and because Havrish was not offered immunity.[293]

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285 *Id.* at 394.

286 *Id.* at 394-95 ("In this case, the People did not assert below, and do not argue here, that the *Bouknight* regulatory regime exception applies to this factual scenario. Thus, the pivotal issue here is whether defendant's act of producing the unlicensed handgun was privileged.").

287 *People v. Havrish*, 8 N.Y.3d 389, 394 n.3 (2007).

288 *Bouknight*, 493 U.S. at 562.

289 *Havrish*, 8 N.Y.3d at 392.

290 *Id.* at 393-93.

291 *Id.* at 396.

292 *Id.* at 395.

293 *Id.* at 396.

Accordingly, the act of production—Havrish's surrender of the firearm—was privileged, and the court ordered both the evidence suppressed and the indictment for the weapons charge dismissed.

Ultimately, there is a significant distinction here: The court did not hold, or even suggest, that the surrender mechanism or statutory scheme itself was invalid, or that Havrish was excused from complying because of the risk of self-incrimination. It merely held that on the facts before the court—and in the absence of the state invoking the RRE—the act of production could not be used as evidence in his subsequent prosecution and must be suppressed. Nothing in this holding goes against the theses in this Article—namely, that compliance with firearm surrender orders may sometimes present an individual risk of incrimination, compliance is nevertheless required as part of the RRE.

A lower court relied upon this important distinction fifteen years later in *Haverstraw Town Police v. C.G.*[294] This time, a challenge was brought by an individual subject to an ERPO rather than a DVRO firearm surrender order. To avoid compliance, the respondent asked the court to find New York's ERPO statute ("Red Flag Law") unconstitutional on grounds including the Fifth Amendment—an invitation the court declined. It began by noting that courts must take a conservative approach to considering the constitutionality of legislation. "It may not go looking for bases to over-rule the enactments of the people's legislative representatives; rather, 'courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional.'"[295]

The court acknowledged that compliance with firearm surrender orders "may present some respondents with a dilemma," if they possessed a firearm illegally, for instance. But the *Havrish* court addressed this issue by suppressing that evidence and dismissing the charge, so the respondent drew "the wrong lesson" from that case:

> The Court did not hold that *the issuance* of the underlying order of protection was unconstitutional *or that the mandate* that the subject disclose and turn-over his weapons was improper. In fact, the Court did not call into doubt the propriety of those events in any way. Rather, the Court found that *as a consequence* of those events, the evidence obtained could not be used in a subsequent criminal prosecution.[296]

The court additionally observed that the *Havrish* decision was twelve years old by the time the legislature enacted New York's Red Flag Law.

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294 *Haverstraw Town Police v. C.G.*, 79 Misc. 3d 1005 (N.Y. Sup. Ct. 2023).
295 *Id.* at 1009-10.
296 *Id.* at 1017-18 (emphasis added).

Accordingly, it had to presume "that the Legislature understood the interplay between ERPO proceedings and potential, subsequent prosecutions."[297] "[A]s in *Havrish*, the Red Flag Law *is not itself constitutionally deficient* merely because its enforcement may impair other proceedings."[298]

One other case challenging New York's ERPO law was resolved easily on standing grounds.[299] The respondent argued that requiring persons subject to an ERPO to sign a receipt for the firearms they surrender, "whether or not the items are lawfully possessed,"[300] violates one's Fifth Amendment rights. The court declined to address the substance of this argument, however, because he had no firearms to surrender and thus lacked standing to challenge this provision.[301] It noted in dicta, though, that the privilege against self-incrimination is "a fundamental trial right of criminal defendants," and because the instant proceeding was civil, his challenge was "without merit" anyway.[302]

2. Holding: The Fifth Amendment Is Implicated, Statute Is Struck Down

Only one Fifth Amendment challenge has led to a court invalidating an entire statutory scheme governing firearm surrender orders: *State v. Flannery*[303] in Washington State. On June 30, 2019, the police in Kitsap County, Washington were called after a neighbor heard screams coming from a nearby residence. When deputies arrived, they saw a woman lying on her back, struggling to breathe after being beaten and strangled by her boyfriend, Dwayne Flannery, from whom she was separating. She told the officers that they had saved her life, believing that Flannery would not have stopped until he killed her. At Flannery's arraignment the following day, the court entered a DVRO and temporarily firearm surrender order.[304] But he never turned over a single weapon. On the same day, in open

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297 *Id.* at 1018.

298 *Id.* (emphasis added).

299 *Melendez v. T.M.*, 80 Misc. 3d 1235(A) (N.Y. Sup. Ct. 2023).

300 *Id.* at *3.

301 *Id.* at *6.

302 This same reasoning carried the day in *Anonymous Detective at Westchester Cnty. Police v. A.A.*, 71 Misc. 3d 810 (N.Y. Sup. Ct. 2021). Here, an individual subject to an ERPO argued that the statute violated his privilege against self-incrimination both via the act of production and completing the form listing the firearms. *Id.* at *5. The court dispensed with this challenge succinctly, stating that the Fifth Amendment is a "fundamental trial right of criminal defendants." *Id.* (quoting *Chavez v. Martinez*, 538 U.S. 760, 767 (2003)). Accordingly, while law enforcement conduct before a trial may "impair" a defendant's Fifth Amendment rights, those rights are only violated when the statement or evidence is sought to be used at trial. *Id.* Since the respondent's challenge did not arise in the context of a trial, this argument was rejected.

303 *State v. Flannery*, 24 Wash. App. 2d 466 (2022).

304 *See* Ord. to Surrender Weapons, *State v. Flannery*, No. 19-1-00826-18, Kitsap Cnty. Sup. Ct. (Jul. 1, 2019), https://digitalarchives.wa.gov/OrderFulfillment/8A0A5849F02ECE847A3397114F19957F_260523.pdf.

court, Flannery filed a written objection and proposed order[305] excusing his compliance with the surrender order's requirements (surrendering any firearms in his possession and signing a sworn statement certifying his compliance) based on his privilege against self-incrimination. Flannery argued that it became illegal for him to possess firearms *the moment* the no-contact order was issued. Accordingly, he argued, complying with the order would necessarily incriminate himself unless he was granted immunity. The trial court declined to sign Flannery's proposed order, instead signing the State's surrender order, and six months later Flannery was charged with knowingly failing to comply.[306] Flannery moved to vacate the surrender order and dismiss the charge, asking the court to find the statutory scheme unconstitutional and void.

The trial court ruled in his favor two years later, a decision affirmed by the Washington Court of Appeals. The trial court based its conclusion on the interplay between two different statutes: Revised Code of Washington § 9.41.040 and § 9.41.800. Section 9.41.040(2)(a)(ii) made it a crime to possess firearms "[d]uring *any period of time*" that one is subject to certain protective orders, including the particular DVRO to which Flannery was subject. Section 9.41.800(3) required parties subject to orders like Flannery's to surrender their firearms immediately.[307] The court thus determined that § 9.41.040(2)(a)(iii) "instantaneously made it a felony offense"[308] for Flannery to possess a firearm *the moment* the DVRO was issued on July 1.

Despite this somewhat convoluted procedural posture, the analytical flaws and missed opportunities that made this decision possible are

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[305] *See* Assertion of Fifth Amendment Privilege Against Self-Incrimination & Obj. to Court's Ord. to Surrender Weapons on Const. Grounds, *State v. Flannery*, No. 19-1-00826-18, Kitsap Cnty. Sup. Ct. (Jul. 1, 2019), https://digitalarchives.wa.gov/OrderFulfillment/91DA2D4DC0604E5F12405DF4F118DD78_260521.pdf.

[306] *See* Findings of Fact and Conclusions of Law Regarding Defs. Mot. to Vacate and Dismiss Based on Const. Violation, *State v. Flannery*, No. 19-1-00826-18, Kitsap Cnty. Sup. Ct. (Apr. 2, 2021), at 3:12-14 https://digitalarchives.wa.gov/OrderFulfillment/EEB9949E9BF89DE89DAAD6F855C5CC9A_260531.pdf.

[307] *State v. Flannery*, 24 Wash. App. 2d 466, 478 (2022). In affirming this misguided holding, the appellate court invalidated Washington's firearm surrender statutes and threw the state's regulatory regime into chaos. The decision was rendered in a criminal context, but because it implicated the entire statutory scheme that governed firearm surrender orders, it was interpreted by many courts to also apply to civil orders. Some counties ceased issuing firearm surrender orders altogether, resulting in a dangerous patchwork approach.

See, e.g., Kelsey Turner, *Why Many Judges in WA Won't Order Abusers to Turn in Guns*, KUOW (July 7, 2023), https://www.kuow.org/stories/why-many-judges-in-wa-won-t-order-abusers-to-turn-in-guns. A case originating in King County—which continued to issue surrender orders—might involve an abuser living just over the line in Pierce County, which had ceased the practice. Advocates feared for their clients' lives. "'This isn't going to stop until somebody gets killed by a gun that should have been taken away,' said [an attorney with the Northwest Justice Project]. 'That's what keeps me up at night.'" *Id.*

[308] Findings of Fact and Conclusions of Law Regarding Def. Motion to Vacate and Dismiss Based on Const. Violation, *supra* note 306, at 2.

deceptively simple—and avoidable in the future. First, the court overreached by invalidating the entire statutory scheme. It conceded that "Flannery d[id] not expressly state whether he is raising a facial or as-applied challenge."[309] Given this ambiguity, the court should have abided by the well-established principle of judicial restraint,[310] disfavoring facial challenges and refraining from interpreting a constitutional question more broadly than necessary to resolve the instant dispute. Instead, the appellate court simply noted that Flannery's briefings "*appear* to raise a facial challenge"[311] and proceeded to invalidate the entire statutory scheme on this presumption.

The second major issue with the court's decision lies within its substantive Fifth Amendment analysis. As previously discussed, the privilege against self-incrimination applies when one is compelled to make disclosures that are testimonial and incriminating. Courts must examine "whether the claimant is confronted by *substantial and 'real,' and not merely trifling or imaginary*, hazards of incrimination."[312]

The *Flannery* court erred significantly at this analytical step. Flannery did not contend that he was prohibited from possessing firearms outside the context of the DVRO issued on July 1, the same day the surrender order was issued, or that he possessed a type of firearm banned in Washington. Only the court's perceived interplay between the aforementioned statutes, Wash. Rev. Code Ann. § 9.41.040 and § 9.41.800, served as grounds for Flannery's incrimination. Accordingly, for the court to conclude that Flannery faced a substantial hazard of incrimination, it had to assume that the legislature intended this bizarre result—a 'Catch-22' that rendered lawful compliance impossible. The actual language of Flannery's DVRO also weakens the conclusion that the two statutes should be read in this manner. The order cites to both § 9.41.040 and § 9.41.800 *and then* states that the respondent "shall immediately surrender" any firearms to local law enforcement.[313] The firearms surrender order, issued on the same day, also cites both statutes as bases for liability "*[i]f you fail to comply* with this Order."[314] Considering these mechanisms together—assuming that the legislature did not intend to make it impossible to lawfully comply with its own enactments and that there is no record of anyone being prosecuted on this basis—leads a reasonable person to conclude that the risk of incrimination in these particular circumstances is, in fact, "trifling or imaginary."

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309 *Flannery*, 24 Wash. App. 2d at 478 n.6.

310 *See, e.g.*, *United States v. Chappell*, 691 F.3d 388, 392 (4th Cir. 2012).

311 *Flannery*, 24 Wash. App. 2d at 478. (emphasis added).

312 *Marchetti v. United States*, 390 U.S. 39, 53 (1968) (emphasis added) (citing *Rogers v. United States*, 340 U.S. 367, 374 (1951)).

313 Brief of Appellant at 2, *State v. Flannery*, 24 Wash. App. 2d 466 (2022) (No. 55682-1-II).

314 Ord. to Surrender Weapons, *supra* note 304, at *3 (emphasis added).

This conclusion is bolstered by the fact that months[315] before Flannery's arraignment, the legislature enacted a new section (codified at § 9.41.801) establishing that "immediately," in the context of firearm surrender, meant on the day of the hearing—if entered in open court—or otherwise within twenty-four hours of service. This law was set to go into effect on July 28, 2019, nine days after Flannery's arraignment, but surely could have been considered as an additional interpretative tool to avoid construing the statutory scheme in a way that produced such an absurd result.[316]

The final problem with the *Flannery* decision is rooted in the State's briefing. One of its primary arguments was that Flannery's Fifth Amendment rights would be violated only if information obtained as a result of compliance was used against him at trial.[317] However, other case law recognizes Fifth Amendment violations in pre-trial contexts, such as when the government threatens to impose penalties unless one surrenders the claim of privilege.[318] The State failed to put forth compelling arguments in the alternative, such as the threshold absence of a substantial, real risk of incrimination. Once the Court of Appeals discounted the State's bright-line rule regarding use at trial, the State did not put forth any alternative arguments that could have helped the court arrive at a different result.

There are several lessons to be learned from the flawed result in *State v. Flannery*. One is for lawmakers to consider the interplay between statutes to stave-off any perception of instantaneous incrimination. Another is for practitioners (namely attorneys representing the state) to thoroughly brief all relevant Fifth Amendment issues and not concede important arguments, such as the threshold issue of the likelihood of incrimination. Finally, future courts should employ the well-established canons that would have avoided this result, including the constitutional avoidance and absurdity doctrines, and the foundational principle of judicial restraint. Ultimately, each of these unique factors combined to result in the invalidation of the statutory scheme—perhaps explaining why this result has, thankfully, not occurred elsewhere.[319]

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315 H.B. 1786, 66th Leg., Reg. Sess. (Wash. 2019).

316 *Id.*

317 *See* Brief of Appellant, *supra* note 313, at *14-15 (Wash.App.2d) (2021); *see also State v. Flannery*, 24 Wash. App. 2d 466, 479 (2022).

318 *See, e.g.*, *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977) (holding that the Fifth Amendment privilege against self-incrimination protects individuals from providing testimony that may later be used in trial).

319 The appellate court's *Flannery* decision has also only been cited three times, twice for the proposition that the government may violate the Fifth Amendment by imposing substantial penalties for exercising the privilege against self-incrimination. *See State v. Merritt*, 28 Wash. App. 2d 1066 (2023); *State v. Hillestad*, No. 39084-5-III, 2024 WL 5054436 (Wash. Ct. App.

3. Holding: The Fifth Amendment Is Insufficiently Implicated

Several courts considering challenges to firearm surrender measures have held that compliance was not imbued with sufficiently testimonial qualities to implicate Fifth Amendment protections. In *U.S. v. Duncan,*[320] the U.S. Court of Appeals for the Fourth Circuit upheld a finding that the appellant's Fifth Amendment rights were not violated when he was convicted for being a felon in possession of a firearm after he complied with a DVRO firearm surrender order.

Notably, the appellant's own brief acknowledged the applicability of the RRE in this context and instead took issue with the subsequent prosecution:

> Although, in a regulatory context that is unrelated to enforcement of the criminal laws, a person may not refuse to produce what is demanded, limitations on the government's ability to use that evidence in a criminal prosecution may still be limited. Thus, even if the state court order in this case involved simply a regulatory function, the same order compelled Mr. Duncan to incriminate [] himself and in fact established the basis for his criminal prosecution.[321]

The court declined to follow this line of reasoning, instead resting its decision on the threshold issue of whether the act of production was sufficiently testimonial and incriminating to implicate the Fifth Amendment:

> In this case, Duncan's production of the gun is nontestimonial, as no evidence suggests he was compelled to produce it *for the purpose* of revealing his knowledge or admission that he possessed a firearm. Nor were Duncan's actions "compelled" because Duncan *never claimed* the Fifth Amendment privilege in response to the [DVRO] directing him to turn over a firearm to state officials, and no evidence suggests the Government sought to induce forfeiture of the privilege by threatening sanctions through service of the protective order.[322]

The court in *Duncan* appeared to apply a narrower understanding of the term "testimonial." It centered the government's *subjective intent* behind

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Dec. 10, 2024) (finding that the application of Washington's coroner notification statute violated appellant's Fifth Amendment rights).

320 *U.S. v. Duncan*, 331 F. App'x 270 (4th Cir. 2009).

321 Brief for Appellant at 15, *United States v. Duncan*, 331 F. App'x 270 (4th Cir. 2009) (No. 07-5011).

322 *Duncan*, 331 F. App'x at 272 (emphasis added).

the order, rather than the objective reality that in order to comply, Duncan would have to engage in an act of production that tacitly conceded his unlawful possession as a felon. The court held "a compelled action is nontestimonial if it is not compelled for the purpose of obtaining knowledge that the person taking the action might have."[323]

Years later, the U.S. District Court for the Southern District of West Virginia considered a similar challenge in *U.S. v. Spurlock*.[324] The defendant in *Spurlock* was ordered to temporarily surrender his firearms pursuant to an emergency DVRO and arranged with law enforcement to accompany him home so he could relinquish control of the weapons.[325] When Spurlock led the officers to where he stored his guns, an officer noticed that one of his firearms—a shotgun—appeared to have a short barrel and another had a scraped-off serial number. Spurlock was subsequently charged with offenses related to those firearms' unlawful characteristics.[326] He argued that he was forced to incriminate himself by complying with the firearm surrender order, since the state now sought to introduce those firearms in a criminal case.[327] But the court rejected this argument, finding that the guns themselves were merely physical evidence that were themselves nontestimonial:

> The guns Defendant seeks to suppress are not protected, because they are not testimonial in nature. . . . To be testimonial, a communication "must itself, explicitly or implicitly, relate a factual assertion or disclose information" that expresses "the contents of an individual's mind." On the other hand, "compulsion which makes a suspect or accused the source of real or physical evidence generally does not violate the Fifth Amendment." Defendant's guns are mere physical evidence that neither explicitly nor implicitly reveal any contents of Defendant's mind.[328]

In other words, the guns *themselves* could not be suppressed on self-incrimination grounds. The court acknowledged that the act of production, distinct from the physical evidence itself, might have been sufficiently testimonial.[329] But since Spurlock's counsel failed to brief this issue, the court

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323 *Id.* at 272 (citing *Doe v. U.S.*, 487 U.S. 201, 217 (1988)).

324 *U.S. v. Spurlock*, 2014 U.S. Dist. LEXIS 171968 (S.D. W. Va. Dec. 12, 2014), *aff'd,* 642 F. App'x 206 (4th Cir. 2016).

325 *Id.* at *2.

326 *Id.* at *3.

327 *Id.* at *7.

328 *Id.* at *8 (internal citations omitted).

329 *Id.* at *21 ("The introduction of evidence that Defendant lead the officers to his safe and unlocked it for them so that they could remove the guns from within it could arguably be construed as implicitly admitting possession of the guns-one of the elements the Government would be required to prove as to both counts under which Defendant is charged.").

declined to consider it. Moreover, it held that Spurlock was not sufficiently "compelled," under the meaning of the Fifth Amendment, because "[w]hile he may well have faced a contempt proceeding or other sanction in state court for simply refusing to comply with the order, there is *no evidence that he would have faced any penalty for asserting the privilege* and no evidence that any such penalty was threatened."[330] Since he failed to invoke the Fifth Amendment at the time of production the court held that he could not do so retroactively—a holding later affirmed by the Fourth Circuit.[331]

V. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT EXCUSE COMPLIANCE WITH FIREARM SURRENDER ORDERS

Having concluded that firearm surrender orders may, under certain circumstances, implicate one's Fifth Amendment rights, the next step is to determine whether states can nevertheless require compliance without running afoul of the Fifth Amendment. The regulatory regime exception ("RRE") requires compliance, given the overwhelmingly non-criminal purpose of such civil orders; the general lawfulness of the underlying activity of gun ownership; and the insubstantial likelihood of incrimination in most cases. It is important to note at the outset, however, that just because the privilege against self-incrimination would not *excuse compliance* with civil firearm surrender orders does not mean that persons subject to these orders are never able to effectuate their Fifth Amendment rights.[332] The following section will explore this nuance and apply the factors underlying the RRE to firearm surrender orders issued pursuant to DVROs and ERPOs.

A. The RRE Applies to Firearm Surrender Orders

As described in Section III, the RRE functions to compel respondents to comply with regulatory regimes designed to effectuate important governmental interests unrelated to law enforcement. If the law compels disclosures for "public purposes"[333]—i.e., not motivated by investigatory or prosecutorial objectives—and the persons subject to compulsion do not belong to a group "inherently suspect"[334] of criminal activity, thus giving rise to a high likelihood of incrimination, under the RRE, one cannot refuse to comply by invoking the privilege against self-incrimination. The following Section analyzes each RRE factor in

330 *Id.* at *9 (emphasis added).
331 *United States v. Spurlock*, 642 F. App'x 206, 210 (4th Cir. 2016).
332 *See* discussion *infra* Subsection IIA.
333 *Baltimore City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 556 (1990).
334 *See, e.g.*, *id.* at 559-60.

the context of ERPO/DVRO firearm surrender orders, concluding that these mechanisms are an indispensable part of a civil regulatory scheme focused on harm-prevention and generally implicate a low likelihood of incrimination. Accordingly, the RRE should apply to mandate compliance with firearm surrender orders.

1. ERPO and DVRO Firearm Surrender Orders Are Preventative and Remedial, Not Punitive or Prosecutorial in Nature

As illustrated throughout this Article, ERPO/DVRO firearm surrender orders are a life-saving part of a regulatory system designed solely to prevent harm—not to root out or prosecute illegal conduct. The RRE may apply if the statutory provision in question is "imposed [as part of] an essentially non-criminal and regulatory area of inquiry."[335] Characterizing anything related to firearms as "essentially non-criminal and regulatory" may seem counterintuitive, given that firearm sales and possession are subject to substantial statutory schemes—some of which are criminal in nature. But this would be a critical oversimplification in the context of the RRE analysis. First, courts have applied the RRE in the context of firearm statutes,[336] thus negating the idea of a bright line inherently characterizing firearm-related provisions as sufficiently criminal in nature to rule out application of the RRE. Second, and most importantly, courts have uniformly interpreted DVRO/ERPO statutory schemes as remedial and preventative in nature—looking in part to abundant evidence of legislative intent to that effect.

The Supreme Court has affirmed that the RRE applies in other areas that are subject to comprehensive regulatory schemes that include or otherwise implicate criminal offenses. The California Vehicle Code in *Byers*, for instance, defined innumerable criminal offenses.[337] Most important to the Court was that the particular statutory provision in question—requiring drivers involved in an accident that resulted in property damage to stop and share information—was "essentially regulatory, not criminal."[338] Specifically, the provision was "not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents."[339] Similarly, the Eleventh Circuit observed that while some crimes are immigration-related, generally immigration law is more properly characterized as regulatory rather than criminal, and the

335 *Id.* at 557.

336 *See, e.g.*, *United States v. Alkhafaji*, 754 F.2d 641, 642, 647, 648 (6th Cir. 1985); *United States v. Wilson*, 721 F.2d 967, 969, 973, 974 (4th Cir. 1983); *United States v. Flores*, 753 F.2d 1499, 1499-1500, 1501, 1502 (9th Cir. 1985).

337 *See generally* CAL. VEH. CODE §§ 23100-23135 (Deering 1981).

338 *California v. Byers*, 402 U.S. 424, 426, 430 (1971).

339 *Id.* at 430.

particular reporting requirement at issue served to advance those regulatory public interest aims.[340]

The Sixth Circuit Court of Appeals' decision in *U.S. v. Alkhafaji* exemplifies this distinction. There, Alkhafaji was convicted of attempting to illegally export firearms[341] and failing to notify an airline before transporting firearms in his luggage in violation of 18 U.S.C. § 922(e)—a section of the federal criminal code.[342] He appealed his conviction on the grounds that mandating compliance with § 922(e) violated his privilege against self-incrimination.[343] Holding that requiring compliance with the self-reporting requirement in § 922(e) was not inconsistent with the Fifth Amendment,[344] the court looked in part to legislative history which demonstrated that statute's primary purpose was not to discover and prosecute illegal activity but to help carriers comply with their statutory responsibilities.[345]Although § 922(e) "does reflect congressional concern with weapons and ammunition, an area permeated with criminal statutes,"[346] the particular statute was "primarily a regulatory statute, enacted to assist common carriers in their duty not to transport weapons and ammunition under conditions which violate other laws. This purpose is expressed in the legislative history."[347] The court also discussed the insubstantial likelihood of criminality, but that component will be explored in subsection 2(b) below.[348]

The Fourth[349] and Ninth[350] Circuits arrived at the same conclusion regarding the 922(e) self-reporting requirement.

> We are confronted, in this situation, with a conflict between two critical interests: the government's need to regulate for the safety of its citizens, and the privilege against self-incrimination. . . . [I]t is significant that the purpose of the [Gun Control] Act is a general regulatory one. The Act is not directed at catching illegal firearm exporters at the airport, but rather at helping the individual

340 *United States v. Garcia-Cordero*, 610 F.3d 613, 618 (11th Cir. 2010).
341 *Alkhafaji*, 754 F.2d at 642.
342 *Id.* at 642; 18 U.S.C. § 922(e).
343 *Alkhafaji*, 754 F.2d at 642.
344 *Id.* at 648.
345 *Id.* at 646-47.
346 *Id.* at 647.
347 *Id.*
348 *See infra* Section VI.A.b.
349 *United States v. Wilson*, 721 F.2d 967, 974 (4th Cir. 1983) ("[T]he legislative history of § 922(e) indicates that its primary purpose was not the apprehension of illegal arms dealers; rather, it was designed to enable common carriers to fulfill more effectively their own statutory responsibilities under § 922(f).").
350 *United States v. Flores*, 753 F.2d 1499, 1500-1502 (9th Cir. 1985).

> states regulate firearm distribution for the safety of their citizens by shutting off the flow of weapons across their borders.[351]

In addition to the statutory provision's nature itself, courts may consider where the provision is codified—within the criminal code versus the civil code, for instance—but this factor is by no means determinative, as "a statutory provision[ʻs location and labels] do not by themselves transform a civil remedy into a criminal one."[352] The Supreme Court previously addressed this distinction in *U.S. v. One Assortment of 89 Firearms*.[353] Although *89 Firearms* concerned a double jeopardy issue rather than self-incrimination, ultimately the outcome hinged on whether a particular forfeiture proceeding[354] was criminal or civil in nature.[355] Despite statute enabling the forfeiture proceeding being embedded in the federal criminal code, the Court ultimately found that Congress intended it to be a "civil, not a criminal, sanction."[356] The Court noted that when Congress passed the Gun Control Act of 1968—which established the forfeiture provision challenged in *89 Firearms*[357]—it was expressly concerned with public health and safety, including firearms being possessed by dangerous persons.[358] This statute effectuated this interest because "[k]eeping potentially dangerous weapons out of the hands of unlicensed dealers is a goal plainly more remedial than punitive."[359] The Court then considered whether the statutory scheme was nevertheless so punitive in purpose or effect as to transform Congress's original intent.[360] Only one factor supported the defendant's argument—namely, that the conduct giving rise to such forfeiture proceedings might also implicate independent criminal penalties.[361] But this possibility alone did not rise to the level of "the clearest proof"[362] required to transform Congress's intent. Rather, the Court explained, "[w]hat overlap there is between the two sanctions is not sufficient to persuade us that the forfeiture proceeding may not legitimately be viewed as civil in nature."[363]

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351 *Id.*

352 *Smith v. Doe*, 538 U.S. 84, 94 (2003).

353 *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984).

354 The statute—since revised—then provided for the "seizure and forfeiture" of any firearm or ammunition involved in, used, or intended to be used in any violation of the GCA or other federal criminal law. *See id.* at 356 n.2.

355 *Id.* at 355-56, 362.

356 *Id.* at 363, 365.

357 *Id.* at 364.

358 *Id.* at 364; *Huddleston v. United States*, 415 U.S. 814, 824 (1974).

359 *One Assortment*, 465 U.S. at 364.

360 *Id.* at 365.

361 *Id.* at 365.

362 *Id.* at 366.

363 *Id.*

This reasoning readily applies to statutory provisions that compel compliance with DVRO/ERPO firearm surrender orders. First, a wealth of precedent expressly states that legislatures intended[364] such provisions to constitute civil remedial measures aimed at protecting individuals and public safety—*not* punitive measures meant to facilitate prosecution.

There are innumerable examples of courts interpreting the legislature's remedial and preventative intent regarding DVROs. One appellate court in Texas hearing a challenge to the statute that formed the basis for the State's DVRO mechanism observed:

> The purpose of the statute is to provide an expedited procedure for victims of domestic violence; *the purpose is not to correct past wrongs or establish liability but to give immediate protection* to the applicant. Title 4 is *remedial in nature* and should be broadly construed to 'effectuate its humanitarian and preventive purposes.'"[365]

A Maryland court similarly observed, regarding its DVRO-enabling statute, that "the primary goals of the statute are preventive, protective and remedial, not punitive. The legislature did not design the statute as punishment for past conduct; it was instead intended to prevent further harm to the victim."[366] Many other courts examining the purpose behind their states' DVRO-enabling statutes have arrived at similar conclusions.[367]

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364 Some legislatures directly expressed this intent within the statutory scheme. *See, e.g.*, WASH. REV. CODE ANN. § 9.41.801(1) (LexisNexis 2019) ("Because of the heightened risk of lethality to petitioners when respondents to protection orders become aware of court involvement and continue to have access to firearms, and the frequency of noncompliance with court orders prohibiting possession of firearms, law enforcement and judicial processes must emphasize swift and certain compliance" with firearm surrender orders.).

365 *Roper v. Jolliffe*, 493 S.W.3d 624, 634 (Tex. App. 2015) (emphasis added) (internal citation omitted).

366 *Coburn v. Coburn*, 342 Md. 244, 252 (1996).

367 *See MacDonald v. State*, 997 P.2d 1187, 1191 (Alaska Ct. App. 2000) (rejecting appellant's argument regarding the constitutional sufficiency of *ex parte* DVPO's because the "purpose of the Domestic Violence Prevention and Victim Protection Act of 1996 [] is to protect victims of domestic violence"); *State v. Rumpff*, 308 A.3d 169, 199 (Del. Super. Ct. 2023) ("The State's interest is clear—to protect domestic violence victims from dangerous encounters and prevent those dangerous encounters from escalating to homicides."); *People v. Whitfield*, 147 Ill. App. 3d 675, 679 (1986) ("The express legislative purpose of [the] statute is to prevent and alleviate domestic violence."); *State v. Poole*, 228 N.C. App. 248, 745 S.E.2d 26, *writ denied, review denied, appeal dismissed,* 367 N.C. 255, 263 (2013) ("The government's interest in this case is clear—the protection of domestic violence victims and preventing domestic violence from escalating to murder."); *Gaab v. Ochsner*, 2001 ND 195 669 ("The legislature intended the adult abuse laws to fill the void in existing laws in order to protect victims of domestic violence from further harm."); *Frisk v. Frisk*, 2006 719 N.W.2d 332, 336 ("[The statute] is a remedial statute 'which we construe liberally, with a view to effecting its objects and to promoting justice.' The purpose of the statute is to protect victims of domestic violence from further harm."); *State v. Reyes*, 172 N.J. 154, 160 (2002) ("Because it is remedial in nature, the Legislature directed that the Act be liberally construed to achieve its salutary purposes."); *Davis v. Arledge*, 27 Wash.

Indeed, two of the limited decisions specifically concerning self-incrimination challenges to DVRO firearm surrender orders also affirmed their preventative and non-punitive nature. One court characterized a defendant's argument that DVRO proceedings were "not civil in nature, but rather criminal or quasi-criminal" as both a "red herring" and a "misunderstanding of the applicable Fifth Amendment law."[368] Another observed that "the ostensible purpose of the order was to protect the person whose complaint prompted the order from domestic violence."[369]

There is also ample evidence of courts construing the legislative history and intent behind their state's ERPO laws as undeniably civil and remedial in nature.[370] The courts in both *Haverstraw Town Police* and *Anonymous Detective* both noted that New York's ERPO mechanism is "civil in nature, not criminal,"[371] and looked to the legislature's purpose in enacting the statute:

> This law and its restrictions indeed bear a substantial relationship to the government's responsibility of protecting the public at large and preventing crime and serious injury to others from individuals who, by their conduct, raise serious concerns that, at that moment and for a limited time in the future, they should not be entrusted with a dangerous instrument.[372]

Other courts have characterized their states' ERPO mechanisms similarly. The U.S. District Court for the District of Maryland observed that the

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App. 2d 55, 72 (2023) ("DV statutes reflect the government's substantial interest in protecting the safety of the petitioner and the public.").

368 *United States v. Spurlock*, No. 2:14-CR-00094, 2014 WL 7013801 at *7 (S.D.W. Va. Dec. 12, 2014), *aff'd*, 642 F. App'x 206 (4th Cir. 2016).

369 *United States v. Duncan*, 331 F. App'x 270, 272 (4th Cir. 2009).

370 *See, e.g.*, *Davis v. Gilchrist Cnty. Sheriff's Off.*, 280 So. 3d 524 (Fla. Dist. Ct. App. 2019) ("At the outset, we note the statute's purpose is not punitive, but rather preventative."); *Anonymous Detective at Westchester Cnty. Police v. A.A.*, 144 N.Y.S.3d 809, 820 (N.Y. Sup. Ct. 2021) ("This law and its restrictions indeed bears a substantial relationship to the government's responsibility of protecting the public at large and preventing crime and serious injury to others from individuals who, by their conduct, raise serious concerns that, at that moment and for a limited time in the future, they should not be entrusted with a dangerous instrument."); *Willey v. Brown*, No. CV 23-2299-BAH, 2024 WL 3557937, *2 (D. Md. July 25, 2024) ("The law is preventative in that it permits judicial intervention before an individual commits an act of violence."); *San Diego Police Dep't v. Geoffrey S.*, 86 Cal. App. 5th 550, 560 (2022), *review denied* (Mar. 22, 2023) ("These types of proceedings are all intended to prevent a threat of harm. . . .").

371 *Anonymous Detective at Westchester Cnty. Police*, 144 N.Y.S.3d at 818.

372 *Id.* at 822. *See also* N.Y. State Assem. *Mem. in Supp. of Leg. A02689*, https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A02689&term=2019&Memo=Y ("Under the current law, despite the fact that family members often contact law enforcement when they fear that a loved one poses a threat of violence to others or him or herself, a court can only issue a temporary order of protection in connection with a criminal or family offense proceeding. More protections are needed to prevent unnecessary gun violence by those pose a threat of harm to themselves or others.").

state's ERPO law "is preventative in that it permits judicial intervention before an individual commits an act of violence,"[373] also noting that "red flag laws have become a vital tool in efforts to proactively intervene to prevent gun violence."[374] A California appellate court similarly noted that the state's ERPO law was "intended to prevent a threat of harm,"[375] and the Supreme Court of Florida characterized its ERPO law as functioning "to prevent persons who are at high risk of harming themselves or others from accessing firearms or ammunition."[376] Few states have had their ERPO laws in place for more than ten years, perhaps accounting for the relative dearth of case law on this point, but more recent legislative history also reinforces this characterization.[377]

Finally, courts analyzing the RRE will consider whether "self-reporting is indispensable to [the statutory scheme's] fulfillment."[378] In the context of DVRO/ERPO firearm surrender orders, self-reporting (here, both the act of production and accompanying certifications of compliance) is absolutely essential to effectuate the regulatory schemes. As described above, ERPO and DVRO laws aim to prevent harm to and by individuals experiencing acute crises. Firearm surrender orders function within this regulatory environment to temporarily separate an individual who poses a risk of harming themselves or others from these particularly lethal[379] instruments. It is nearly impossible to imagine fulfilling the purpose of ERPO/DVRO statutory schemes—preventing firearm injuries, suicides, and homicides—without ensuring that the respondent has, in fact, been separated from their firearms. This critical objective is accomplished through the disclosure requirements discussed in Section I,A, both (1) producing one's firearms for safekeeping by law enforcement or a licensed

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373 *Willey v. Brown*, No. CV 23-2299-BAH, 2024 WL 3557937, at *2 (D. Md. July 25, 2024).

374 *Id.* (quoting EVERYTOWN FOR GUN SAFETY SUPPORT FUND & JOHNS HOPKINS CTR. FOR GUN VIOLENCE SOLUTIONS, PROMISING APPROACHES FOR IMPLEMENTING EXTREME RISK LAWS: A GUIDE FOR PRACTITIONERS AND POLICYMAKERS 8 (May 2023).

375 *San Diego Police Dep't v. Geoffrey S.*, 86 Cal. App. 5th 550, 302 Cal. Rptr. 3d 545 (2022).

376 *In re Certification of Need for Additional Judges*, 260 So. 3d 182, 183 (Fla. 2018). *See also* Fl. Senate, *Bill Analysis and Fiscal Impact Statement* 21 (Feb. 28, 2018), https://www.flsenate.gov/Session/Bill/2018/7026/Analyses/2018s07026.ap.PDF ("The intent of the process and court intervention is to temporarily prevent persons from accessing firearms when there is demonstrated evidence that a person poses a significant danger to himself or herself or others, including significant danger as a result of a mental health crisis or violent behavior.").

377 *See, e.g.*, Mich. Sen. Committee on Civil Rights, Judiciary, and Pub. Safety, *S.B. 83 (S-1) & 84-86: Summ. of Bill Reported from Committee* 2 (2023), https://legislature.mi.gov/documents/2023-2024/billanalysis/Senate/pdf/2023-SFA-0083-F.pdf ("[W]hen an individual is under extreme duress, certain people, such as family members, often are the first to notice. So-called 'red flag laws' purport to prevent suicide and violence perpetrated by an individual under extreme duress. . . ."); N.M. Senate Leg. Finance Committee, *S.B. 5 Fiscal Impact Report* 2 (2020), https://www.nmlegis.gov/Sessions/20%20Regular/firs/SB0005.PDF.

378 *California v. Byers*, 402 U.S. 424, 431 (1971).

379 *See, e.g.*, *supra* note 41.

dealer, and (2) certifying that one has done so, including by listing the firearms temporarily surrendered. Listing the make, model, and serial number of the firearms one has surrendered is also important for the law enforcement officials responsible for administering the program, as they must ultimately return the respondent's firearms after the order has expired. Maintaining a record as to what was, in fact, temporarily submitted into their custody is thus essential. In sum, both the act of production and certification of compliance are indispensable to effectuate the purpose of the regulatory scheme; anything less would mean putting lives at risk by forgoing enforcement.

In sum, DVRO and ERPO firearm surrender orders are harm-prevention mechanisms designed to effectuate a regulatory scheme focused on public safety—not to seek out or prosecute criminal activity. This is supported by both courts' interpretations of the purpose and function of such orders, and the legislative history that illuminates lawmakers' intentions. The mere fact that the challenged provision pertains to firearms is not dispositive, nor is the location of the statutory provision within the criminal or civil code. In determining whether a statute is essentially non-criminal and regulatory, deference must be given to the legislature's purpose and intent. Only incontrovertible evidence to the contrary, such as overwhelmingly punitive characteristics,[380] can override express legislative intent. And as demonstrated by *89 Firearms*, the fact that a civil order may have some overlap with criminal sanctions is "not sufficient to persuade [the Court] that the [] proceeding may not legitimately be viewed as civil in nature."[381] The record is clear for both DVROs and ERPOs: Courts have uniformly interpreted the legislative purpose behind such orders to be remedial and preventative. Indeed, they have rejected arguments to the contrary.[382]

2. Compliance With Firearm Surrender Orders Generally Implicates a Low Likelihood of Incrimination

As described in III.A, whether a compelled disclosure is an indispensable part of a regulatory regime designed to accomplish goals unrelated to criminal law enforcement is only half of the equation. For the RRE to apply, the compulsion must not pose a high risk of incrimination. This inquiry is informed by factors including the lawfulness of the underlying activity, and whether the requirement is directed at a selective group inherently suspect of criminal activity.

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380 *See, e.g.*, *Smith v. Doe*, 538 U.S. 84, 92-95 (2003).

381 *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 366 (1984).

382 *See, e.g.*, *Davis v. Gilchrist Cnty. Sheriff's Off.*, 280 So. 3d 524, 532-33 (Fla. Dist. Ct. App. 2019).

a. The Disclosures Compelled by Firearm Surrender Orders Concern an Underlying Activity That Is Generally Lawful

As the Supreme Court has observed pithily, "[t]he disclosure of inherently illegal activity is inherently risky."[383] Requiring individuals to disclose information related to an activity that is generally *un*lawful increases the likelihood that the challenged provision poses a substantial risk of self-incrimination, as opposed to serving a prospective, remedial purpose.

To faithfully apply this factor in the context of ERPO/DVRO firearm surrender orders, it is critical to carefully consider what underlying activity is actually implicated by complying with an order. This nuanced analysis is incredibly important. Firearm surrender orders simply require the respondent to (a) temporarily turn in their firearms, and (b) certify that they have complied with the order.[384] This means that complying with a firearm surrender order only categorically implicates self-incrimination in two contexts: *First*, since physically surrendering the firearm(s) is an act of production—only testimonial to the extent that it provides evidence of control or possession over the object in question—it *only* poses a risk of self-incrimination if the individual happened to be prohibited from possessing firearms.[385] *Second*, filling out and/or certifying a proof-of-compliance form—which often requires listing the make, model, and serial number of the surrendered firearm(s)—poses a risk of self-incrimination *only* if the make or model of the surrendered firearm is unlawful to possess within that jurisdiction, such as assault weapons in states like California or New York.[386]

Revisiting some of the foundational Fifth Amendment self-incrimination cases can help clarify this analysis. In these cases, the lawfulness of the underlying activity—that about which individuals were compelled to disclose—aligns with whether the Court decided that their privilege against self-incrimination was violated. In *Albertson*, *Marchetti*, *Haynes*, and *Leary*, complying with the disclosure requirement necessarily meant admitting to engaging in an illegal activity: membership in the

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383 *Byers*, 402 U.S. at 431.

384 Information about the surrendered firearm(s) is collected for remedial and administrative purposes: to ensure that all of their firearms are turned over, and to facilitate an orderly return of their firearms once the protective order expires.

385 The potential risk of incrimination derived from producing a firearm that matches one that a petitioner described as being used to threaten them, for instance, is more of a gray area. The act of production would constitute a tacit admission that the respondent had control over the instant firearm at the time of surrender, but not an admission as to the underlying conduct.

386 *See Which states prohibit assault weapons?*, EVERYTOWN RSCH. & POL'Y, https://everytownresearch.org/rankings/law/assault-weapons-prohibited/ (last updated Jan. 15, 2025).

Communist Party,[387] wagering,[388] selling marijuana,[389] and owning an inherently suspect category of firearm,[390] respectively. The statute at issue in *Byers*, by contrast, required drivers involved in crashes to pull over and share their contact information. The relevant underlying conduct was being involved in a car accident—and, as the plurality noted, "it is not a criminal offense under California law to be a driver 'involved in an accident.'"[391] In other words, the activity that their self-reporting requirement concerned was not itself inherently unlawful.

Requiring compliance with a firearm surrender order is much more similar to the circumstances in *Byers* and *Bouknight* than *Albertson* and its progeny. Complying with a firearm surrender order may require respondents to submit testimonial statements pertaining to their firearm ownership or possession; nothing more.[392] This analysis would be quite different if *complying* with the order required one to admit or concede to the conduct[393] that gave rise to the DVRO/ERPO itself, such as having made threats or otherwise demonstrating a risk of harming another person. To be sure, there may be cases where the conduct leading to the issuance of the DVRO involves, for example, threats made with a firearm, and thus producing that firearm and identifying the make and model could provide some element of corroboration for what may constitute criminal conduct. But neither the act of production nor listing the surrendered models as part of certifying compliance require providing even a tacit admission of such conduct. Furthermore, the author is unable to identify any instances in which a criminal prosecution on domestic violence charges was aided by information about a firearm garnered from the act of complying with a surrender order, or data supporting the premise that a DVRO is correlated with future criminal prosecution on domestic violence charges.[394]

Instead—critically—the two steps generally required to comply with a firearm surrender order mandate testimonial disclosures only *about firearm ownership*. And owning a firearm is a generally lawful activity, *not* unlawful or criminalized like the conduct at issue in *Albertson*, *Marchetti*,

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387 *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 77 (1965).

388 *Marchetti v. United States*, 390 U.S. 39, 42-44 (1968).

389 *Leary v. United States*, 395 U.S. 6, 17-18 (1969).

390 *Haynes v. United States*, 390 U.S. 85, 96 (1968).

391 *Byers*, 402 U.S. at 431.

392 *See supra* Section II.A.

393 Indeed, in some states, "[n]o underlying cause of action or liability finding is required before a court may grant a [DVRO]." *Roper*, 493 S.W.3d at 634. *See also id.* ("[A] protective order does not require a party to establish liability on an underlying cause of action, and it is the result of an expedited proceeding.").

394 *Cf.* TK Logan et al., *The Kentucky Civil Protective Order Study: A Rural and Urban Multiple Perspective Study of Protective Order Violation Consequences, Responses, & Costs* 17 (2009), https://www.ojp.gov/pdffiles1/nij/grants/228350.pdf ("The presence of a protective order does not appear to affect arrest or prosecution rates of partner violence offenders.") (citation omitted).

Leary, and *Haynes*. Certainly, there may be individual instances in which someone owns a firearm illegally, either because they are prohibited from legally doing so, or because they own a make or model outlawed in a particular jurisdiction. In *Byers*, the plurality similarly acknowledged that there would be instances in which someone involved in a car crash was engaged in illegal activity, such as driving recklessly, or without a license, or driving a stolen vehicle. But the mere possibility that compliance might, *in some individual cases,* result in an incriminating disclosure does not change the fact that the underlying activity it concerns—here, gun ownership—*is itself generally lawful*. Respondents are not being asked to make disclosures about activity that is generally and even categorically unlawful, like gambling in *Marchetti* or illegally selling marijuana in *Leary*. And that is the focus of this part of the RRE inquiry.

b. DVRO and ERPO Firearm Surrender Orders Are Not Targeted Toward Specific Groups Inherently Suspect of Criminal Activities

Whether a disclosure poses a substantial risk of incrimination is also informed by the makeup of the group being compelled. The RRE is unlikely to apply if the requirement is directed at a "highly selective group inherently suspect of criminal activities."[395] At first glance, without careful analysis, this factor might be viewed as undermining the RRE's applicability to firearm surrender orders, particularly in the DVRO context. This subsection aims to demonstrate otherwise by considering not just the type of testimonial disclosure required but also the underlying reason that the group is considered inherently suspect.

First, the decisions in *Byers* and *Hiibel* stand for the proposition that statutory schemes are *not* necessarily excluded from the RRE simply because they require disclosures by a particular group of people. In *Byers*, the requirement applied specifically to drivers involved in car accidents that resulted in property damage; in *Hiibel* it applied specifically to select individuals whom officers encountered amid "suspicious circumstances."[396] These holdings mean that the phrase "selective and inherently suspect" *does not necessarily* function to exclude provisions simply because they are directed towards certain individuals. In both *Byers* and *Hiibel*, an individual's conduct or behavior leads them to be placed in the group(s) subject to the disclosure requirement. But the Court considered the risk of incrimination low in both cases:

> The [*Marchetti*] Court noted that *in almost every conceivable situation* compliance with the statutory gambling

395 *Byers*, 402 U.S. at 430.

396 *See Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humboldt Cnty.*, 542 U.S. 177, 181 (2004).

> requirements would have been incriminating. Largely because of these pervasive criminal prohibitions, gamblers were considered by the Court to be 'a highly selective group inherently suspect of criminal activities.' . . . It is difficult to consider [Petitioner's] group as either 'highly selective' or 'inherently suspect of criminal activities.' Driving an automobile, unlike gambling, is a lawful activity. Moreover, it is not a criminal offense under California law to be a driver 'involved in an accident.'[397]

Every case in which the Court found that a group was impermissibly "selective and inherently suspect of criminal activity" featured a close *relationship between the group's makeup and the incriminating disclosure sought*.[398] The group in *Marchetti* faced the reporting requirement because of the unlawful activity they engaged in (wagering), the specific reporting requirement concerned that very same activity, and the risk of incrimination sprang from that very same activity. The group in *Albertson* faced the reporting requirement because of the unlawful activity they engaged in (membership in the Communist Party), the specific reporting requirement concerned that very same activity, and the risk of incrimination sprang from that very same activity. The group in *Leary* faced the reporting requirement because of the unlawful activity they engaged in (dealing marijuana), the specific reporting requirement concerned that very same activity, and the risk of incrimination sprang from that very same activity.

In contrast, individuals subject to DVRO/ERPO firearm surrender orders are not singled-out because they are suspected of either of the types of conduct that pose the risk of incrimination as a result of complying with the order, i.e. possessing firearms unlawfully or possessing unlawful firearms. To analytically frame the issue using the same syntax as above: ERPO/DVRO respondents faces the reporting requirement because there has been some determination that they pose a risk of harm to themselves or others,[399] the specific reporting requirement *does not* concern that very same activity, and the risk of incrimination *does not* spring from that very same activity.

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397 *Byers*, 402 U.S. at 430-31.

398 *See, e.g.*, *supra* notes 309-312.

399 Critically, as discussed *supra* Section II(A), of the DVRO statutory schemes that include firearm surrender provisions, twenty states do not require that the court make any special findings in order to enter a temporary firearm surrender order—indeed, some mandate it. Thirteen states do require some special findings, such as "a substantial likelihood of immediate danger of abuse," *see* MASS. GEN. LAWS ch. 209A, § 3B, or "a credible threat to the physical safety" of the petitioner, *see* MINN. STAT. § 518B.01(6)(g), ARIZ. REV. STAT. § 13-3602(G)(4), in order to issue a temporary firearm surrender order. But critically, *none* of these require the petitioner alleging or the court finding that a firearm was used or present during the conduct that forms the basis for the DVRO petition.

This important nuance comes into greater relief when considered side-by-side with some of the foundational self-incrimination cases.

Case	Reason the group is targeted:	Specific disclosure required:	Type of incrimination risk:	Relation?
Marchetti	They earned income from illegal wagering	Report income earned from illegal wagering	Prosecution for engaging in unlawful wagering activity	Yes, almost necessarily
Haynes	They owned a special type of unregistered firearm	Register ownership of a special type of unregistered firearm	Prosecution for owning that particular type of unregistered firearm	Yes, almost necessarily
Albertson	They were members of the Communist Party	Register as a member of the Communist Party	Prosecution for being members of the Communist Party	Yes, almost necessarily
Leary	They sold marijuana	Identify oneself as an unlawful marijuana dealer	Prosecution for selling marijuana	Yes, almost necessarily
Byers	They were involved in a car accident resulting in property damage	Provide one's name and address	Possible discovery of having violated a vehicle code	Not necessarily
Bouknight	Their child was adjudged "in need of assistance"	Bring the child before the court	Possible discovery of criminal neglect or abuse	Not necessarily
Garcia-Cordero	They transported non-residents to the U.S.	Bring and present passengers to immigration officers at the point of entry	Possible discovery of smuggling undocumented persons	Not necessarily
ERPO/ DVROs	They pose a risk of harm to themselves or others	Produce firearm(s) and list the surrendered firearm(s)	Possible discovery of unlawful gun ownership or use	Not necessarily

The question is not whether the requirement is directed at a particular group for any reason, but whether a group is targeted because they are inherently suspected of engaging in the criminal activities *about which the compelled disclosure is sought*. Indeed, this is the only construction that makes sense when one considers that the "highly selective group inherently suspect of criminal activities"[400] inquiry is designed to help

[400] *See, e.g.*, *Byers*, 402 U.S. at 429-30; *United States v. Garcia-Cordero*, 610 F.3d 613, 617 (11th Cir. 2010); *United States v. Alkhafaji*, 754 F.2d 641, 643 (6th Cir. 1985).

courts evaluate the risk of incrimination; to evaluate whether it is trifling and imaginary, or real and substantial. If the reasoning behind the group's constitution was not substantively related to their risk of incrimination, it would be a pointless inquiry. This was not a close call for the Court in *Leary*:

> [A]t the time petitioner failed to comply with the Act those persons who might legally possess marihuana under state law were *virtually certain* either to be registered under § 4753 or to be exempt from the order form requirement. It follows that the class of possessors who were both unregistered and obliged to obtain an order form constituted a 'selective group inherently suspect of criminal activities.' Since compliance with the transfer tax provisions *would have required petitioner unmistakably to identify himself as a member of this 'selective' and 'suspect' group*, we can only decide that when read according to their terms these provisions created a 'real and appreciable' hazard of incrimination.[401]

The group faced with the disclosure requirement was entirely composed of persons who had indisputably engaged in illegal activity, and compliance would have necessarily incriminated them with regard to that particular illegal activity.

One could imagine scenarios where certain aspects of complying with a firearm surrender order are meaningfully different, giving rise to an overall greater risk of incrimination for respondents. For instance, if such orders were exclusively entered against persons who are categorically prohibited from possessing firearms. This would implicate a *Haynes*-like certainty of incrimination by targeting a select group inherently suspect of criminal activity—unlawful gun ownership—and demanding disclosures concerning that same activity. Or if certifying compliance required an individual to list all recent uses of the firearm(s), including brandishing or threatening the use thereof. Or even if there was a DVRO or ERPO regime limited to only those who had made threats with or otherwise misused firearms. These very different regimes would implicate testimonial and incriminating disclosures beyond the mere act of production or the unlikely possibility that one possesses a firearm illegally. But this is not the reality for those subject to such orders today.

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401 *Leary v. United States*, 395 U.S. 6, 18 (1969).

B. Respondents May Invoke the Privilege Against Self-Incrimination to Preserve the Objection in the Event of Future Prosecution, but This Does Not Excuse Compliance With the Order

As the Court established in *Bouknight*, just because the RRE applies to require compliance with a regulatory regime does not mean that respondents are necessarily without a remedy when it comes to vindicating their Fifth Amendment privilege against self-incrimination:

> The State's regulatory requirement in the usual case may neither compel incriminating testimony nor aid a criminal prosecution, but the Fifth Amendment protections are not thereby necessarily unavailable to the person who complies with the regulatory requirement after invoking the privilege and subsequently faces prosecution.[402]

In other words, if a respondent invokes their Fifth Amendment rights and establishes that surrendering their firearms and completing the certification presents a real and substantial risk of incrimination, they may not be able to avoid compliance, but there may be limitations[403] on the use of information provided. This may be accomplished on an ad hoc basis in the form of a use limitation agreement between the respondent and state officials, or it may simply be read-into by a court pursuant to its Fifth Amendment analysis if the respondent challenges an attempt to use information acquired as a result of compliance in a subsequent proceeding.

CONCLUSION

The regulatory regime exception should apply to temporary firearm surrender orders to require respondents to comply despite invoking their Fifth Amendment privilege against self-incrimination. DVRO/ERPO firearm surrender orders are an indispensable part of a

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402 *Baltimore City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 561-62 (1990) (internal citation omitted).

403 Some statutory schemes governing firearm surrender orders—such as Washington State, post-*Flannery*—explicitly prohibit the use of any information from the act of production or certification of compliance in any future criminal prosecution. *See* WASH. REV. CODE ANN. § 9.41.801(9)(a). *See also* D.C. CODE ANN. § 22-4503 (complying with an ERPO firearm surrender order precludes prosecution for violating statutes pertaining to the unlawful possession of firearms or ammunition). While these explicit guarantees may certainly help guard against Fifth Amendment challenges, they are by no means necessary to ensure the constitutionality of the statutory scheme. A statutory scheme may be considered unconstitutional if compliance categorically requires the class of persons at whom it is targeted to implicate themselves in a crime. *See* Section III. These situations, in which compliance by the targeted class necessarily provides every piece of evidence required to convict them of a crime, is very different from that presented by civil firearm surrender mechanisms, which only presents the rare incrimination risk on a case-by-case basis.

regulatory scheme designed to prevent immediate harm, not to seek out or prosecute unlawful conduct, and they are in no way limited to or targeted at only those who have criminally possessed or misused a firearm. The two disclosures required of a respondent (the act of production and certifying compliance) are integral to the fulfillment of this regulatory scheme because there is no other way to ensure that an individual has, in fact, been temporarily separated from their firearms as required by the DVRO/ERPO. Furthermore, compliance poses an overall low likelihood of incrimination: First, the underlying activity—gun ownership—is generally lawful for responsible, law-abiding citizens, unlike the inherently unlawful activity about which individuals in *Marchetti*, *Haynes*, and *Leary* were compelled to disclose. Second, the two particular disclosures required of a respondent only necessarily pose a risk of incrimination to individuals who are categorically prohibited from possessing firearms or happen to possess a type of firearm make or model that is prohibited in their jurisdiction. And third, respondents subject to a firearm surrender order are not targeted because they are inherently suspected of the type of criminal activity that would be discovered by complying with the order. Stated differently, respondents are not inherently suspected of unlawful firearm possession, which presents the only categorical risk of incrimination posed by compliance with the order, or even of criminal misuse of a firearm, where compliance might arguably in the rare case provide a link-in-the-chain for criminal prosecution.

In the rare instances in which an individual demonstrates that complying with a firearm surrender order presents a real and substantial risk of incrimination, the Supreme Court has left open the possibility that they may be able to invoke their Fifth Amendment right to later prevent use of any information garnered in a subsequent criminal prosecution. But critically, such an invocation does not operate to excuse compliance with the order itself, nor does it render the statutory scheme itself constitutionally vulnerable.