



**GUN OWNERS OF AMERICA**

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**Via Email:**

To: Michael Csencsits, Deputy Director of Operations  
Chris Stone, State and Local Director  
Jordan Stein, Southeast Regional Director  
Gun Owners of America

From: Joshua Barnhill, State Legislative Counsel  
Gun Owners of America

Re: Analysis of Tennessee Temporary Mental Health Order of Protection Bill and House Bill 1233

Simply put, both the Temporary Mental Health Order of Protection bill (“Order of Protection Bill”) and HB 1233 arbitrarily and absolutely deprive individuals of their constitutionally protected right to keep and bear arms through the issuance of civil protection orders, or what are commonly known as “red-flag” orders.

Red-flag orders have been described and promoted as a “gap filler” option, the purpose of which is to disarm individuals who are deemed “dangers to themselves or to the public,” but who are otherwise not prohibited from possessing a firearm. The specific provisions of red-flag laws are different in each state, but generally they authorize courts to issue orders prohibiting individuals from owning, purchasing, and possessing firearms and ammunition, upon the premise that the individual is at risk of committing a crime, or hurting themselves at some unknown point in the future. Though not specifically identified as “red-flag orders,” based on this definition, both the Order of Protection Bill and HB 1233 are no different from any other red-flag law.

There are many who hold the position that the fundamental constitutional objection to red-flag laws is the lack of sufficient “due process” protections. That as long as these laws are drafted to ensure the protection of due process rights, red-flag orders do not unconstitutionally infringe on an individual’s right to keep and bear arms. This can be seen with the recent passage of the federal *Bipartisan Safer Communities Act* (2022), which provides grant money to states that implement red-flag laws with sufficient due process protections.

While it is true that both of these bills, and all red-flag laws, raise important due process concerns, what must not be overlooked is the fact that red-flag laws are a blatant violation of the Second Amendment to the United States Constitution, and no amount of “due process” can make it otherwise.

The Supreme Court, in *D.C. v. Heller* and *McDonald v. Chicago*, declared the right to keep and bear arms a fundamental and individual right of “the people,” holding that the Second and Fourteenth Amendments protect the right to possess and carry arms for self-defense. In *New York State Rifle and Pistol Assoc., Inc. v. Bruen*, the Court further held that the constitutional protections affirmed in *Heller* and *McDonald*

include the carrying of arms in public for self-defense, and expressly put forth a constitutional test that courts must use when applying Second Amendment protections:

*“When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s ‘unqualified command.’”*

Since *Bruen*, federal courts<sup>1</sup> have utilized the *Bruen* test to hold 18 USC 922(g)(8), a federal statute prohibiting individuals under civil protection orders from possessing firearms, to be unconstitutional. Specifically, the Fifth Circuit Court of Appeal, in *USA v. Rahimi*, based its finding of unconstitutionality on the fact that the federal statute (1) completely deprives an individual of their right to possess a firearm, (2) after a civil proceeding, (3) in which a court enters a protective order based on a finding of a “credible threat.”

This sounds exactly like a red-flag law.

**By employing this same reasoning to the Order of Protection Bill and HB 1233, it becomes perfectly clear that both of these bills are unconstitutional outliers when it comes to the historical tradition of firearm regulations and should both be opposed.**

In addition to the overall Second Amendment concerns, there are specific provisions in each bill which are particularly concerning.

#### **Concerns regarding the Order of Protection Bill:**

As a whole, this bill is written to provide as much due process as possible. This is dangerous if the primary focus of the bill’s unconstitutionality is lack of due process. For example, when compared to HB 1233, the Order of Protection Bill contains: (1) no ex parte provision; (2) requirement of more specific allegations of harm; (3) a shorter maximum time period for the duration of the order; (3) a lower evidentiary standard to have an order vacated; (4) a provision for expunging the public record for frivolous or denied orders; (5) causes of action against those who bring frivolous claims. Compared to HB 1233, the bill almost seems “reasonable,” especially to legislators who want to be seen as pro-public safety and mental health but are also “concerned” about the rights of gun owners. Due to the danger of bipartisan support for this bill, it should not only be strongly opposed, but our arguments should be squarely based in the Second Amendment and not due process concerns.

#### **Concerns regarding HB 1233:**

HB 1233 is really no different than many red-flag laws in other states and the arguments against it are the same that GOA has made time and again. However, one provision I wanted to point out is the creation of a reporting system under 39-17-1376(a) on p. 19 of the bill. This reporting system will collect extreme risk referrals from persons such as current or former spouses, persons who lives with the subject of the referral, a person who is dating or has been engaged in a sexual relationship with the subject of the referral, and transmit them to the appropriate law enforcement agency. It goes without saying that such a system can be abused and poses a danger to law abiding individuals. And together with the provision allowing for ex parte orders, this bill creates a perfect storm of angry dating partners or family members

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<sup>1</sup> *USA v. Rahimi*, 21-11001 (5<sup>th</sup> Cir. Feb. 2, 2023); *USA v. Perez-Gallan*, No. PE:22-CR-00427-DC,--F.Supp.3d—2022WL16858516 (W.D. Tex. Nov. 10, 2022); *USA v. Combs*, 5:22-cr-00136-DCR-MAS (E.D. Ky. Feb. 2, 2023).

together with overzealous law enforcement officers leading to the likely consequence of law abiding gun owners being injured, or worse, in their own homes during the execution of an ex parte order. As with the Order of Protection Bill, HB 1233 should be strongly opposed on Second Amendment grounds, but I believe we should also draw particular attention to the dangers of these two provisions.

Finally, in order to better evaluate the two bills, below is a chart comparing their key provisions.

	<b><u>Order of Protection Bill</u></b>	<b><u>HB 1233</u></b>
<b>Cause of Action</b>	Petition for a temporary mental health order of protection.	Petition for a risk protection order.
<b>Petitioner</b>	Law enforcement officer or law enforcement agency.	Law enforcement officer, law enforcement agency, or district attorney general.
<b>Allegation of Harm</b>	<p>Must allege that the respondent poses a <b>substantial likelihood of serious harm</b> by having a firearm or any ammunition.</p> <p>“Substantial likelihood of serious harm” is specifically defined in the bill and means that the respondent commits 1 or more of the identified acts which include threats or other violent behavior toward themselves or others.</p>	<p>Must allege that the respondent poses a <b>significant danger</b> of causing personal injury to the respondent’s self or others by having a firearm or any ammunition.</p> <p>There is no specific definition as what constitutes “significant danger,” however, a petition must be accompanied by an affidavit stating “specific statements, actions, or facts that give rise to a <b>reasonable fear of significant dangerous acts</b> by the respondent.”</p>
<b>Upon Receipt of Petition</b>	<p>Court must order:</p> <ol style="list-style-type: none"> <li>(1) Hearing;</li> <li>(2) Notice to respondent;</li> <li>(3) Appointment of an attorney;</li> <li>(4) Respondent to undergo an assessment for suicidal or homicidal ideation.</li> </ol>	<p>The court <u>must</u> order</p> <ol style="list-style-type: none"> <li>(1) Hearing;</li> <li>(2) Notice to respondent.</li> </ol> <p>The court <u>may</u> issue a temporary ex parte risk protection order.</p>
<b>Frivolous Petition</b>	If the court determines the petition to be frivolous, then it must order the dismissal of the petition without a hearing or mental health evaluation and the expunction of all public records of the petition.	(No provisions for a frivolous petition.)
<b>Hearing Date</b>	At least 3 days, but not more than 10 days after the petition is filed.	No later than 14 days after the date the petition is filed.
<b>Evidence Considered</b>	The court may consider any relevant evidence, subject to the rules of Civil Procedure.	The court may consider any relative evidence, including, but not limited to, 15 specific

		provisions identified on pp. 4-5 of the bill.
<b>Evidentiary Standard</b>	Clear and convincing evidence	Clear and convincing evidence
<b>Granting of Order</b>	<p>The court shall issue an order if it finds:</p> <ol style="list-style-type: none"> <li>(1) Respondent poses a current and ongoing substantial likelihood of serious harm by possessing firearms or ammunition;</li> <li>(2) Respondent has a mental illness, serious behavioral condition, or serious emotional disturbance; <b>and</b></li> <li>(3) No reasonable alternative is available by law.</li> </ol>	<p>The court shall issue an order if it finds that the respondent poses a significant danger of causing personal injury to the respondent or other by possessing firearms or ammunition.</p>
<b>Order Duration</b>	Up to 180 days (6 months)	Up to 12 months
<b>Included in the Order</b>	<p>An order must include the following:</p> <ol style="list-style-type: none"> <li>(1) The grounds supporting the order;</li> <li>(2) The dates the order is issued and expires;</li> <li>(3) Whether an additional mental health evaluation or substance abuse assessment is required;</li> <li>(4) Requirement that respondent attend available mental health treatment;</li> <li>(5) Requirements for the firearm and ammunition dispossession; and</li> <li>(6) a statement found on p. 6 of the bill.</li> </ol>	<p>An order must include the following:</p> <ol style="list-style-type: none"> <li>(1) The grounds supporting the order;</li> <li>(2) The dates the order is issued and expires;</li> <li>(3) Whether an additional mental health evaluation or substance abuse assessment is required;</li> <li>(4) Requirement that respondent attend available mental health treatment;</li> <li>(5) Requirements for the firearm and ammunition dispossession; and</li> </ol> <p>a statement found on p. 6 of the bill.</p>
<b>Denial of an Order</b>	<p>If the petition is denied, the court must issue a written order stating the particular reasons and ordering the expunction of all public records of the petition.</p>	<p>If the petition is denied, the court must issue a written order stating the particular reasons. (No requirement of expunction of all public records of the petition.)</p>
<b>Ex Parte Order</b>	(No ex parte orders.)	<p>A petitioner may request a temporary ex parte order be issued before a hearing for a risk protection order <b>without notice</b> to the respondent.</p>

		<p>Must include in the petition detailed allegations based on personal knowledge that the respondent poses a <b>significant danger of causing personal injury to the respondent’s self or others in the near future</b> by possessing a firearm or ammunition.</p> <p>The court considers the same evidence as in a non ex parte risk protection order.</p> <p>If a court finds <b>reasonable cause</b>, then it shall issue a temporary ex parte risk protection order, which expires upon the hearing on the risk protection order.</p>
<b>Vacate a Protection Order</b>	<p>Respondent may submit a motion to vacate the order starting after the date of the issuance of the order, and may file a motion a motion to vacate after every extension of the order.</p> <p>Hearing must occur between 14 and 30 days after service of the motion upon the petitioner.</p> <p>Respondent must prove by a <b>preponderance of the evidence</b> (a lower standard than clear and convincing) that the court should vacate the order.</p>	<p>Respondent may submit a motion to vacate the order starting after the date of the issuance of the order, and may file a motion a motion to vacate after every extension of the order.</p> <p>Hearing must occur between 14 and 30 days after service of the motion upon the petitioner.</p> <p>Respondent must prove by <b>clear and convincing</b> evidence that the court should vacate the order.</p>
<b>Extension of Order</b>	<p>The petitioner may file a motion to request an extension of an order.</p> <p>The hearing on the motion must be held no later than 14 days after receipt of the motion.</p> <p>Petitioner must prove by clear and convincing evidence for the order to be extended.</p>	<p>The petitioner may file a motion to request an extension of an order.</p> <p>The hearing on the motion must be held no later than 14 days after receipt of the motion.</p> <p>Petitioner must prove by clear and convincing evidence for the order to be extended.</p>

	Order may be extended up to 180 days (6 months).	Order may be extended up to 12 months.
<b>Upon Issuance of the Order</b>	<p>The court shall order the respondent:</p> <ol style="list-style-type: none"> <li>(1) Within 48 hours of the issuance of the order, transfer possession of all firearms and ammunition to a third part who is not prohibited from possessing firearms.</li> <li>(2) Return an affidavit of firearm dispossession within 3 days of issuance of the order.</li> <li>(3) The issuing court shall within 3 business days forward information to the department of safety to suspend any handgun permit issued to the respondent.</li> </ol>	<p>The court shall order the respondent to surrender the local law enforcement agency all firearms and ammunition possessed by respondent and any handgun carry permit held by respondent.</p> <p>At the time of surrender, the law enforcement officer taking possession shall issue a receipt identifying all firearms and the quantity and type of ammunition surrendered, and any permit surrendered.</p> <p>A respondent may elect to transfer all firearms and ammunition to another person. Law enforcement shall allow such a transfer <b>only</b> if the recipient:</p> <ol style="list-style-type: none"> <li>(1) Is eligible to possess a firearm and ammunition after passing a background check;</li> <li>(2) Attests to storing firearms and ammunition in a manner so that respondent does not have access or control; and</li> <li>(3) Attests not to transfer the firearms and ammunition to respondent until the order is vacated or ends.</li> </ol>
<b>NCIC Database</b>	<p>Upon receipt on a copy of the order, the law enforcement agency shall enter the order into the NCIC and similar state database.</p> <p>Law enforcement <b>may</b> only remove an order from the system which has ended or has been vacated.</p>	<p>Upon receipt on a copy of the order, the law enforcement agency shall enter the order into the NCIC and similar state database.</p> <p>Law enforcement <b>may</b> only remove an order from the system which has ended or has been vacated.</p>

	If an order is vacated before its end date, the clerk, shall forward a copy of the order to the appropriate law enforcement agency and within 1 business day or receipt, the agency <b>shall</b> remove the order from any computer-based system in which the order was entered.	If an order is vacated before its end date, the clerk, shall forward a copy of the order to the appropriate law enforcement agency and within 1 business day or receipt, the agency <b>shall</b> remove the order from any computer-based system in which the order was entered.
<b>Return of Firearms</b>	(No specific provision.)	When an order is vacated or ends the law enforcement agency <b>must</b> return the surrendered firearm, ammunition, or permit <b>only after confirming through a background check</b> that the respondent is eligible to own or possess firearms and ammunition. And after confirming that the order has been vacated or ended.
<b>False Statement</b>	<p>A person who intentionally makes a false statement or omits relevant information, with intent to deceive, commits aggravated perjury</p> <p>A respondent may bring an action against a person who intentionally makes a false statement or omits relevant information, with intent to deceive.</p> <p><b>A person who files a petition with intent to unlawfully deny or impede respondent’s exercise or enjoyment of any right commits official oppression.</b></p>	Any person who makes a false statement under oath in a hearing in regards to any material matter commits perjury
<b>Act Takes Effect</b>	October 1, 2023	Upon becoming law
<b>Reporting System</b>	(No reporting system.)	The department of safety shall create a reporting system to collect extreme risk referrals from certain identified persons (p. 19 of bill) and transmit the referrals to the appropriate law enforcement agency and district attorney general for further investigation.

