TESTIMONY IN SUPPORT OF LD 2283:
An Act to Enact the Crisis Intervention Order Act to Protect the Safety of the Public

Representative Moonen, Senator Carney and distinguished members of the Judiciary Committee, my name is Peter Fromuth, I am an attorney from Yarmouth. I strongly support LD 2283. This written testimony supplements my in-person testimony, April 5, 2024. It is in three sections: (I) deficiencies in the existing Yellow Flag system; (II) advantages of the proposed Red Flag system; (III) corrections to invalid legal challenges raised during and before the hearing April 5th.

Section I

Use of the Yellow Flag for public protection when dangerous people have access to firearms has increased since the Lewiston tragedy. It retains dangerous flaws:

1. It applies only to persons dangerous to themselves or others due to mental illness. Such persons represent 3-5% of homicides, the current scheme thus fails to protect the public from 95% of shooters and stigmatizes the other 95% of persons with diagnosable mental illness who are not a threat.
2. Police must make a probable cause determination of mental impairment and rely on a wellness check for this purpose. The subject may avoid a check indefinitely. The process can endanger police and subject safety. Subjects taken into protective custody lose their liberty. The process traumatizes families and can deter some from reporting the risk in the first place.
3. Once in custody an assessment by a medical practitioner must occur and can occasion prolonged delay.
4. Finally, a hearing must be scheduled so that a judge may endorse the medical assessment and order weapons removed. Judges are not qualified to make this endorsement, just as police are ill-equipped to make the initial assessment.

The Yellow Flag process is lengthy, involving over 10 steps, it is logistically complex, it is much more dangerous than it could be, and in a state already lacking medical and law enforcement resources, it wastes both.

Section I (continued)

The deficiencies noted above are echoed in police interviews, in the Interim Report of the Commission, and in April 5 testimony. Examples include:

- The foundation for a probable cause determination and protective custody is a belief in both a subject's dangerousness AND their mental impairment (Title 34-b, Chp. 3862).
- The Y Flag law does not require wellness checks but lacks clarity on what would suffice to commence protective custody. Police preference for checks before proceeding is understandable.
- **Sahagadoc** tried to do wellness checks three times on Robert Card, but failed to connect with him.
- Similarly concluding that eyes-on was required prior to a protective custody decision, **Cumberland** County Deputies sought to Yellow Flag an individual in December 2023 (after the Lewiston event) but gave up after 72 hours and $25,000 in operational expenses.
- **Cumberland** County Police Chief Joyce said "We tried everything…the yellow flag as it's written is useless if the individual doesn't want to have contact with you." "We're expected to fix it. So we need the tools to fix it."
- In testimony to this Committee, **Sanford** Police Sgt Colleen Adams stated that enforcement of Yellow Flag was impaired by the difficulty police have in making the medical assessment and the dangers and time required for a medical assessment and taking a subject into protective custody.
- **Sanford** Police Chief Craig stated that even excellent policing won't fix the problem given Maine's under-resourced mental health system.
- **Knox** County physician Harold Van Lonkhuyzen, veteran of 23 years as a community psychiatrist working with police, and making suicide and violence risk assessments told this Committee "law enforcement has often been reluctant to take patients into protective custody for transport and further assessment regardless of a conscientious physician's assessment."

Section II

The Red Flag system proposed in L.D. 2283 would not replace the Yellow Flag system, but where police/family/household member perceive dangerousness it allows immediate petition for gun removal, without the mental impairment predicate and associated risk. It does this by:

1. Allowing a family or household member or law enforcement official to petition the court directly by affidavit stating that the person poses a significant danger of causing severe harm to self or others.
2. A hearing is held within 14 days with the respondent present and represented, or, if the danger is imminent then an emergency petition for an ex parte hearing may be filed.
3. The petitioner has the burden of proof, by a preponderance of the evidence, that the respondent fits the dangerousness determination – a finding that judges are called upon to make all the time;
4. If the petition is granted, the judge orders relinquishment of all firearms for a period not to exceed one year and police (or an FFL) are authorized to accept the firearms, or if not voluntarily relinquished, the police shall enforce the order;
5. In the case of ex parte proceedings the respondent must be offered a hearing in which to challenge the removal within 14 days;
6. Respondents may request termination of the temporary removal, and courts must hold a hearing within 14 days of the request.

This streamlined, three step process (petition, hearing, removal) provides faster protection for the public, greater due process for the subject (who experiences no loss of liberty) and is safer for police to execute. While a superior tool to prevent mass killings, its most far-reaching and fastest effect regards suicides. It empowers families to help loved ones quickly, quietly, and without fear of their physical detention by the police.

Section III

Some witnesses mistakenly alleged various infirmities in the text, including:

That “significant danger of causing sever harm” is not defined.

This is incorrect. § 4804 B defines such a danger as:

The respondent has inflicted or attempted to inflict bodily harm on another person; (2) By the respondent's threats or actions, the respondent has placed another person in reasonable fear of physical harm; or (3) By the respondent's actions or inactions, the respondent has presented a danger to persons in the respondent's care.

And, relevant to self-harm or suicide:

C. A significant danger of causing severe harm to the respondent may be shown by establishing that the respondent has threatened or attempted suicide or serious bodily harm.

<u>That penalties for a false allegation are lesser than for an ERPO violation.</u>

This is incorrect. The reverse is true. LD 2283 would make an ERPO violation a Class D crime subject to a fine up to $2000 and up to 364 days in prison. Under Maine criminal law the penalty for perjury is a fine up to $5000 and up to 5 years in prison.

<u>That there is no provision for return of a relinquished weapon.</u>

This is incorrect. § 4810 - 6. Requires release within 3 days of the date specified in the relinquishment order.

<u>That this bill violates the Maine Constitution, Article I, Sec. 16.</u>

This is incorrect. The Maine Supreme Judicial Court has repeatedly found that the (Art. 1 -16) right to bear arms is subject to the “power to make reasonable laws for the defense and benefit of the people of this state.” (Art. IV, part 3, sec 1). civilians who have neither the legal authority to begin the Yellow Flag process nor any legal authority to seize weapons. This is known as the police power.

<u>That LD 2283 uses too low a standard of proof.</u>

This is incorrect. In the bill as originally proposed, the standard of proof is preponderance of the evidence, the same standard for any asset forfeiture (Maine did away with civil forfeiture in 2021), e.g. houses, cars, boats, present and future financial assets, and guns. It is also the standard used in Protection from Abuse orders, which apply to persons, not property. *It is unlikely that any court would hold that a gun has a greater liberty interest than its owner*.

That LD 2283 does not provide procedural due process

This is incorrect. The U.S. and the Maine Supreme Courts have held that due process requires balancing the individual's and the state's interests (e.g. *Mahoney v. State*, 610, A.2d 738, 742 (ME. 1992). They have also held that the notice and opportunity requirements of due process may occur after the deprivation of an individual's rights. Rogers v. Sylvester, 570 A. 2d 311, 314 (Me. 1990). The US Supreme Court has concluded the same. Zimmerman v. Burch, 494 U.S. 113, 132 (1990).

This concludes my testimony. I would be pleased to answer your questions.

Peter Fromuth
Yarmouth
LD 2283

TESTIMONY IN SUPPORT OF LD 2283:
An Act to Enact the Crisis Intervention Order Act to Protect the Safety of the Public

Representative Moonen, Senator Carney and distinguished members of the Judiciary Committee, my name is Peter Fromuth, I am an attorney from Yarmouth. I strongly support LD 2283. This written testimony supplements my in-person testimony, April 5, 2024. It is in three sections: (I) deficiencies in the existing Yellow Flag system; (II) advantages of the proposed Red Flag system; (III) corrections to invalid legal challenges raised during and before the hearing April 5th.

Section I

Use of the Yellow Flag for public protection when dangerous people have access to firearms has increased since the Lewiston tragedy. It retains dangerous flaws:

1.It applies only to persons dangerous to themselves or others due to mental illness. Such persons represent 3-5% of homicides, the current scheme thus fails to protect the public from 95% of shooters and stigmatizes the other 95% of persons with diagnosable mental illness who are not a threat.
2.Police must make a probable cause determination of mental impairment and rely on a wellness check for this purpose. The subject may avoid a check indefinitely. The process can endanger police and subject safety. Subjects taken into protective custody lose their liberty. The process traumatizes families and can deter some from reporting the risk in the first place.
3.Once in custody an assessment by a medical practitioner must occur and can occasion prolonged delay.
4.Finally, a hearing must be scheduled so that a judge may endorse the medical assessment and order weapons removed. Judges are not qualified to make this endorsement, just as police are ill-equipped to make the initial assessment.

The Yellow Flag process is lengthy, involving over 10 steps, it is logistically complex, it is much more dangerous than it could be, and in a state already lacking medical and law enforcement resources, it wastes both.

Section I (continued)

The deficiencies noted above are echoed in police interviews, in the Interim Report of the Commission, and in April 5 testimony. Examples include:

•The foundation for a probable cause determination and protective custody is a belief in both a subject's dangerousness AND their mental impairment (Title 34-b, Chp. 3862).
•The Y Flag law does not require wellness checks but lacks clarity on what would suffice to commence protective custody. Police preference for checks before proceeding is understandable.
•Sahagadoc tried to do wellness checks three times on Robert Card, but failed to connect with him.
•Similarly concluding that eyes-on was required prior to a protective custody decision, Cumberland County Deputies sought to Yellow Flag an individual in December 2023 (after the Lewiston event) but gave up after 72 hours and $25,000 in operational expenses.
•Cumberland County Police Chief Joyce said "We tried everything…the yellow flag as it's written is useless if the individual doesn't want to have contact with you." "We're expected to fix it. So we need the tools to fix it."
•In testimony to this Committee, Sanford Police Sgt Colleen Adams stated that enforcement of Yellow Flag was impaired by the difficulty police have in making the medical assessment and the dangers and time required for a medical assessment and taking a subject into protective custody.
•Sanford Police Chief Craig stated that even excellent policing won't fix the

problem given Maine's under-resourced mental health system.
•Knox County physician Harold Van Lonkhuyzen, veteran of 23 years as a community psychiatrist working with police, and making suicide and violence risk assessments told this Committee "law enforcement has often been reluctant to take patients into protective custody for transport and further assessment regardless of a conscientious physician's assessment."

Section II

The Red Flag system proposed in L.D. 2283 would not replace the Yellow Flag system, but where police/family/household member perceive dangerousness it allows immediate petition for gun removal, without the mental impairment predicate and associated risk. It does this by:

1.Allowing a family or household member or law enforcement official to petition the court directly by affidavit stating that the person poses a significant danger of causing severe harm to self or others.
2.A hearing is held within 14 days with the respondent present and represented, or, if the danger is imminent then an emergency petition for an ex parte hearing may be filed.
3.The petitioner has the burden of proof, by a preponderance of the evidence, that the respondent fits the dangerousness determination – a finding that judges are called upon to make all the time;
4.If the petition is granted, the judge orders relinquishment of all firearms for a period not to exceed one year and police (or an FFL) are authorized to accept the firearms, or if not voluntarily relinquished, the police shall enforce the order;
5.In the case of ex parte proceedings the respondent must be offered a hearing in which to challenge the removal within 14 days;
6.Respondents may request termination of the temporary removal, and courts must hold a hearing within 14 days of the request.

This streamlined, three step process (petition, hearing, removal) provides faster protection for the public, greater due process for the subject (who experiences no loss of liberty) and is safer for police to execute. While a superior tool to prevent mass killings, its most far-reaching and fastest effect regards suicides. It empowers families to help loved ones quickly, quietly, and without fear of their physical detention by the police.

Section III

Some witnesses mistakenly alleged various infirmities in the text, including:

That "significant danger of causing sever harm" is not defined.

This is incorrect. § 4804 B defines such a danger as:
The respondent has inflicted or attempted to inflict bodily harm on another person; (2) By the respondent's threats or actions, the respondent has placed another person in reasonable fear of physical harm; or (3) By the respondent's actions or inactions, the respondent has presented a danger to persons in the respondent's care.

And, relevant to self-harm or suicide:

C. A significant danger of causing severe harm to the respondent may be shown by establishing that the respondent has threatened or attempted suicide or serious bodily harm.

That penalties for a false allegation are lesser than for an ERPO violation.

This is incorrect. The reverse is true. LD 2283 would make an ERPO violation a Class D crime subject to a fine up to $2000 and up to 364 days in prison. Under Maine criminal law the penalty for perjury is a fine up to $5000 and up to 5 years in prison.

That there is no provision for return of a relinquished weapon.

This is incorrect. § 4810 - 6. Requires release within 3 days of the date specified in

the relinquishment order.

That this bill violates the Maine Constitution, Article I, Sec. 16.

This is incorrect. The Maine Supreme Judicial Court has repeatedly found that the (Art. 1 -16) right to bear arms is subject to the "power to make reasonable laws for the defense and benefit of the people of this state." (Art. IV, part 3, sec 1). civilians who have neither the legal authority to begin the Yellow Flag process nor any legal authority to seize weapons. This is known as the police power.

That LD 2283 uses too low a standard of proof.

This is incorrect. In the bill as originally proposed, the standard of proof is preponderance of the evidence, the same standard for any asset forfeiture (Maine did away with civil forfeiture in 2021), e.g. houses, cars, boats, present and future financial assets, and guns. It is also the standard used in Protection from Abuse orders, which apply to persons, not property. It is unlikely that any court would hold that a gun has a greater liberty interest than its owner.

That LD 2283 does not provide procedural due process

This is incorrect. The U.S. and the Maine Supreme Courts have held that due process requires balancing the individual's and the state's interests (e.g. Mahoney v. State, 610, A.2d 738, 742 (ME. 1992). They have also held that the notice and opportunity requirements of due process may occur after the deprivation of an individual's rights. Rogers v. Sylvester, 570 A. 2d 311, 314 (Me. 1990). The US Supreme Court has concluded the same. Zimmerman v. Burch, 494 U.S. 113, 132 (1990).

This concludes my testimony. I would be pleased to answer your questions.