



Testimony in Opposition to LD 1378:

“An Act to Enact the Extreme Risk Protection Order Act Presented to the Joint Standing Committee on Judiciary”

Senator Carney, Representative Kuhn, and the distinguished members of the Committee on Judiciary, my name is Harris Van Pate and I serve as policy analyst for Maine Policy Institute. Maine Policy is a free-market think tank, a nonpartisan, nonprofit organization that advocates for individual liberty and economic freedom in Maine. Thank you for the opportunity to testify in opposition to LD 1378, a bill that proposes to enact the "Extreme Risk Protection Order Act."

While we recognize and share the deep desire to prevent violence and protect the public, we cannot support legislation that would undermine the constitutional rights of Mainers in the process. LD 1378 would erode the fundamental liberties protected by both the United States Constitution and the Maine Constitution—namely, the right to keep and bear arms, the right to due process, the right to face one’s accuser, and the right to be free from unreasonable seizures of personal property.

Constitutional Concerns

LD 1378 allows the state to confiscate firearms from individuals who have not been convicted—or in some cases, not even charged—with a crime. This strikes at the heart of due process, a cornerstone of American jurisprudence. The bill empowers courts to issue both standard and emergency “extreme risk protection orders” (ERPOs) based on a mere preponderance of the evidence, a legal standard appropriate for civil litigation, not for depriving individuals of their constitutional rights.

The emergency order provision is particularly troubling, permitting one-sided (*ex parte*) proceedings without the respondent present or aware, let alone allowed to defend themselves. Only after their firearms have been seized would the respondent be notified and allowed to challenge the allegations in court. This is a clear violation of the Sixth and Fourteenth Amendments, as interpreted in *Mattox v. United States* (asserting the constitutional importance of allowing cross-examining witnesses) and *Mullane v. Central Hanover Bank* (asserting the importance of proper notice to all interested parties in court cases). These cases combine to show the central importance of those who are involved in these red flag hearings to be able to cross-examine witnesses and be notified of these hearings before, not after, they occur.



Violations of the Right to Bear Arms

The Maine Constitution provides even stronger protections than the U.S. Constitution's Second Amendment, stating that the right to keep and bear arms "shall never be questioned." Of the states with similarly unequivocal constitutional language, none, save for Colorado, under narrow exceptions, have adopted red flag laws. Enacting LD 1378 would directly conflict with the plain text of our state's foundational law.

Moreover, in *New York State Rifle & Pistol Association v. Bruen* (2022), the United States Supreme Court reaffirmed that the Second Amendment protects an individual's right to possess firearms for self-defense, and any restriction must be consistent with the nation's historical tradition of firearm regulation. The Court explicitly rejected means-end scrutiny and held that laws must be justified by historical precedent, not only by appeals to public policy or generalized safety concerns.

Red flag laws like LD 1378 clearly fail this historical test. No such mechanism existed in the founding era to disarm individuals through judicial orders absent criminal conviction or mental adjudication, especially not without the right to respond to accusations. In fact, *Bruen* reinforces that governments may not suspend constitutional rights based on speculative fears or preemptive accusations. That is precisely what LD 1378 seeks to do.

Some might feel red flag laws do not violate the *Bruen* test, as the Supreme Court later upheld a court-issued arms seizure due to domestic violence charges in *US v. Rahimi*. However, this case further cements the legal issues with this proposed law, rather than proving a legal analogue. Primarily, in *Rahimi*, the Supreme Court confirmed that historical analogues for gun restrictions were required; in this case, the relevant laws were colonial surety and "going armed" laws. Notably, the court stated that:

"These laws often offered the accused significant procedural protections. Before the accused could be compelled to post a bond for 'go[ing] armed,' a complaint had to be made to a judge or justice of the peace by 'any person having reasonable cause to fear' that the accused would do him harm or breach the peace. Mass. Rev. Stat., ch. 134, §§1, 16. The magistrate would take evidence, and—if he determined that cause existed for the charge—summon the accused, who could respond to the allegations." (emphasis added).

A notable difference between these laws and red flag laws is that the accused had the right to contest the claims before an order was issued. There are essentially no direct historical analogues for the proposed law before you. Furthermore, the court has



specifically confirmed the importance of the right to face one's accusers and respond to allegations, as described in the Sixth Amendment of the Bill of Rights.

Unintended Consequences

Beyond the constitutional violations, red flag laws introduce serious risks of abuse and government overreach. Family members or police—perhaps motivated by misunderstanding, disagreement, fear, or vendetta—could initiate proceedings that unjustly strip someone of their rights. Moreover, Mainers living in rural areas, who may own firearms as a matter of necessity and cultural tradition, could become targets of unfair scrutiny under vague and subjective criteria.

If someone is truly a threat to themselves or others, disarming them does not eliminate that threat. They may still access other weapons or means of harm. Instead of disarming citizens without due process, Maine should invest in strengthening its clearly failing mental health system¹ and improving law enforcement's response to credible threats.

Conclusion

We urge the committee and the people of Maine to reject LD 1378. While the intentions behind this bill may be noble, its effects would be dangerous and unconstitutional at the state and federal levels. It sacrifices essential liberties for a promise of safety that it cannot truly deliver. Public safety and constitutional freedom must not be seen as competing values—they are mutually reinforcing. Any measure that erodes constitutional rights in the name of security ultimately endangers both.

For these reasons, we respectfully request that this committee vote “Ought Not to Pass” report on LD 1378. Thank you for your time and thoughtful consideration.

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<https://mainemorningstar.com/2023/11/15/renewed-energy-to-address-maines-broken-mental-health-care-system-in-upcoming-session/>