

# Living with Guns: Legal and Constitutional Considerations for Those Cohabiting with Temporarily Prohibited Possessors

by  
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## Introduction

The Second Amendment is frequently portrayed as among the most individualistic of constitutional rights, even within the broadly individualistic American rights tradition.<sup>1</sup> Especially now that the U.S. Supreme Court has detached the Amendment from the collective entity—the “well regulated militia”—that might otherwise be central to its interpretation and implementation,<sup>2</sup> the paradigmatic figure for the right to keep and bear arms is a lone person defending himself or herself (and his or her family) against physical threats.<sup>3</sup> Given the Court’s description in *District of Columbia v. Heller* of an “individual right”<sup>4</sup> whose “core” is

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<sup>1</sup> See, e.g., Clark M. Neily III, *The Right to Keep and Bear Arms in the States: Ambiguity, False Modesty, and (Maybe) Another Win for Originalism*, 33 HARV. J.L. & PUB. POL’Y 185, 193 (2010) (calling the Second Amendment a pledge about “spiritual” and “physical autonomy”); Robert Weisberg, *The Utilitarian and Deontological Entanglement of Debating Guns, Crime, and Punishment in America*, 71 U. CHI. L. REV. 333, 337 (2004) (noting the “association of the gun with a form of individual autonomy” (reviewing GUNS, CRIME, AND PUNISHMENT IN AMERICA (Bernard E. Harcourt ed., 2003))).

<sup>2</sup> For an exploration of this theme and consideration of other institutions that might play a similar role, see Darrell A. H. Miller, *Institutions and the Second Amendment*, 66 DUKE L.J. 69 (2016).

<sup>3</sup> See Joseph Blocher & Reva Siegel, *Guns Are a Threat to the Body Politic*, ATLANTIC (Mar. 8, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/guns-are-threat-body-politic/618158>.

<sup>4</sup> *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

self-defense,<sup>5</sup> especially in the home,<sup>6</sup> the right might seem almost entirely self-regarding. It is unsurprising that many opponents of gun regulation invoke language reminiscent of privacy, saying that they merely want to be let alone.

But gun-bearing and gun regulation are embedded in contexts that implicate a wide range of other constitutional and individual interests. Consider that, during 2020 and 2021, armed protestors successfully forced the temporary closure of the Michigan legislature<sup>7</sup> (thereby establishing a playbook for the January 6 Capitol riots<sup>8</sup>), while armed right-wing militia “policed” various public forums,<sup>9</sup> and some individuals displayed weapons at Black Lives Matter protestors.<sup>10</sup> The paradigm scene of an individual defending his home from criminal threats fails to account for these increasingly common use of guns in shared spaces where multiple constitutional interests are in play.<sup>11</sup>

But one need not venture into public spaces to see individuals’ gun-related rights, responsibilities, and interests coming into conflict—the same is true even *within* the home. Whose decisions about guns are to be privileged when one member of a household feels safer with a gun, and others do not?<sup>12</sup> (Here, too, Covid-era events are instructive, given the increased risk of gun-

<sup>5</sup> *Id.* at 630.

<sup>6</sup> *Id.* at 628 (concluding that the home is the place where “the need for defense of self, family, and property is most acute”).

<sup>7</sup> David Welch, *Michigan Cancels Legislative Session to Avoid Armed Protesters*, BLOOMBERG NEWS (May 14, 2020), <https://www.bloomberg.com/news/articles/2020-05-14/michigan-cancels-legislative-session-to-avoid-armed-protesters>.

<sup>8</sup> See Rebecca Boone, *Armed Statehouse Protests Set Tone for US Capitol Insurgents*, STARS & STRIPES (Jan. 7, 2021), <https://www.stripes.com/news/us/armed-statehouse-protests-set-tone-for-us-capitol-insurgents-1.657770> (calling the state capitol protests in Michigan, Idaho, and Oregon, “dress rehearsals” for D.C.).

<sup>9</sup> See, e.g., Evelyn Holmes, *Armed Bystanders Line Black Lives Matter Protest in Indiana*, EYEWITNESS NEWS ABC7 (June 7, 2020), <https://abc7.com/timely-armed-protesters-black-lives-matter-indiana-protest/6234854>.

<sup>10</sup> Jim Salter, *St. Louis Couple Charged for Pulling, Waving Guns at Protest*, ASSOCIATED PRESS (July 20, 2020), <https://apnews.com/article/virus-outbreak-us-news-st-louis-racial-injustice-crime-85e4f25f10b73e8926f6602b6a76bfef>.

<sup>11</sup> Blocher & Siegel, *supra* note 3.

<sup>12</sup> Cf. Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1 (2012). For an analysis of the gendered nature of the gun debate, see

linked intimate partner violence.<sup>13</sup>) What about when one person's desire to self-protect with a gun comes into direct conflict with cohabitants' desires to protect themselves by avoiding firearms? Identifying and analyzing such questions demonstrates the ways in which the right to keep and bear arms is intertwined with other rights and interests, including within a single family or cohabiting unit.

Our goal in this article is to explore that issue through the lens of a concrete and seemingly discrete question: Can a legal gun owner face legal liability while cohabiting with a temporarily prohibited possessor?<sup>14</sup> If, for example, a person is subject to a gun-prohibiting order because a judge has found that he poses an immediate risk to others, must his cohabiting spouse surrender *her* gun as well—especially at a time when her potential need for self-defense might be especially high?

The very act of sharing a home raises that possibility, since it can result in the prohibited person having “constructive possession” of other people's firearms.<sup>15</sup> And yet co-habitation also raises the constitutional stakes, since the Supreme Court has emphasized that Second Amendment interests are “at their apex” in the home.<sup>16</sup> The result seems to be a collision between enforce-

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Susan P. Liebell, *Sensitive Places?: How Gender Unmasks the Myth of Originalism in District of Columbia v. Heller*, 53 *POLITY* 207 (2021).

<sup>13</sup> A survey conducted in late 2020 found that about 50% of service providers to survivors of gender-based violence reported an increase since the pandemic in survivors being threatened by firearms. Kellie Lynch & TK Logan, *Assessing Challenges, Needs, and Innovations of Gender-Based Violence Services During the COVID-19 Pandemic*, UNIV. OF TEX. AT SAN ANTONIO, COLL. FOR HEALTH, CMTY. & POL'Y (Feb. 2021), <https://s3.documentcloud.org/documents/20498812/covid-gender-based-violence-final-report.pdf>.

<sup>14</sup> We focus on temporarily prohibited possessors in the ERPO/DVRO context because we are particularly interested in the application of protective orders that might arise in a family setting. Analogous questions have also arisen in the context of other kinds of prohibited possessors, such as those enumerated in the Gun Control Act. Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended in scattered sections of 18 and 26 U.S.C.) (prohibiting possession by felons, the “mentally defective,” fugitives, and others).

<sup>15</sup> See *infra* notes 87-115 and accompanying text (describing and applying elements of constructive possession).

<sup>16</sup> Joseph Blocher, *Domestic Violence and the Home-Centric Second Amendment*, 27 *DUKE J. GENDER L. & POL'Y* 45, 45 (2020).

ment of person-based prohibitions and the constitutional rights of the *non*-prohibited persons with whom they live.

As a practical matter, it is increasingly important to resolve that tension, as support grows for adoption of temporary gun prohibitions like emergency risk protection orders (ERPOs) and domestic violence restraining orders (DVROs).<sup>17</sup> As opposed to broad class-based restrictions like the federal prohibitions on possession by felons and the mentally ill, ERPOs and DVROs apply to individuals who present an immediate risk of harm to themselves or others.<sup>18</sup> This kind of closely tailored regulation has largely been able to sidestep the trenches in the gun debate, commanding a fair bit of bi-partisan support, as evidenced by the fact that roughly twenty states have adopted ERPOs in the eight years since Parkland.<sup>19</sup> Yet, protective orders still face some significant opposition, and were a primary target of Second Amendment sanctuary cities and counties.<sup>20</sup>

Courts and commentators are still working through a range of complications related to their enforcement, however. For example, many ERPO statutes include a receipt requirement as proof of compliance—does this implicate the Fifth Amendment privilege against self-incrimination?<sup>21</sup> Does court-ordered firearm removal compliance amount to an unlawful search and seizure, especially in light of the limited sources of information regarding firearms possession (often the petitioner in cases of domestic violence)? Such questions tend to focus the constitutional rights and interests of those subject to the orders—people we’ll call *respondents*. But the implementation of those orders also implicates the rights and interests of others in the household—especially those who are legally entitled to own guns. Untangling the rights, responsibilities, and interests implicated in those scenarios

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<sup>17</sup> See *infra* Section II.1.

<sup>18</sup> Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: “Red Flag” Laws and Due Process*, 106 VA. L. REV. 1285, 1305–13 (2020) (describing ERPOs as “retail” gun regulation).

<sup>19</sup> *Id.* at 1285.

<sup>20</sup> *Id.* at 1287.

<sup>21</sup> See, e.g., *State v. Zachary James Marshall*, Memorandum Decision and Order, Kitsap County (Wash.) Dist. Ct. No. 23650101 at 38-57 (May 20, 2020), [https://www.kitsapgov.com/dc/Documents/Kitsap%20County%20District%20Court%20Surrender%20of%20Weapons%20Decision%20\(May%2027%2C%202020\).pdf](https://www.kitsapgov.com/dc/Documents/Kitsap%20County%20District%20Court%20Surrender%20of%20Weapons%20Decision%20(May%2027%2C%202020).pdf).

reveals important lessons about the interpretation and enforcement of these gun laws, and about the Second Amendment more broadly.

To frame the discussion, Part I provides a short Second Amendment primer, focusing on the debate that was central to the Supreme Court's seminal decision in *Heller* and showing how that debate cemented a view of the Amendment that is distinctly individualistic, home-bound, and focused on self-defense. Indeed, the Court seems to equate the self-defense interest of the gun-owner with that of the household as a collective.

As Part II shows, gun regulations like ERPOs and DVROs acknowledge and attempt to address a different kind of gun threat: one that often originates *within* the home, not leveled against it. Especially as these legal devices continue to spread, it will be increasingly important to identify and understand their legal implications—including their impact on cohabitants. In particular, the doctrine of “constructive possession” attributes legal possession where a person can legally possess an object that is not in his or her immediate control.<sup>22</sup> A temporarily prohibited person might therefore end up violating the terms of an order while living with a legal gun-owner. And as we show, that can turn otherwise-legal gun-owning cohabitants into accomplices, or subject them to liability for criminal negligence.

One solution to this problem is to require that cohabitants with knowledge of a gun-prohibiting order safely store their weapons so that the respondent cannot access them. And that, as Part III shows, brings us back to the Second Amendment. In *Heller*, the Supreme Court struck down a direct safe-storage requirement, concluding that such a requirement made it “impossible for citizens to use them for the core lawful purposes of self-defense.”<sup>23</sup> Would a safe storage requirement in the ERPO/DVRO context similarly run afoul of the Constitution? We argue that it would not, and conclude with some thoughts about how evaluation of the question highlights central tensions within the broader Second Amendment debate.

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<sup>22</sup> WAYNE LAFAVE, PRINCIPLES OF CRIMINAL LAW § 5.1(e) (3d ed. 2017) [hereinafter LAFAVE, CRIMINAL LAW].

<sup>23</sup> *Heller*, 554 U.S. at 630.

## I. *Heller's Individualism, and Threats To (and in) the Home*

For generations, the central question for Second Amendment law and scholarship was whether the Amendment's twenty-seven words are limited to militia-related people, actions, and arms, or whether they also encompass a right to keep and bear arms for private purposes like self-defense.<sup>24</sup> Countless articles and books staked out positions on one side or the other<sup>25</sup>—or elaborate alternatives<sup>26</sup>—while courts continued faithfully to apply the militia-based view. For more than two centuries, no federal case struck down a gun law on Second Amendment grounds.<sup>27</sup>

For present purposes, we are interested not in the evidence supporting these competing positions, but the labels that came to be applied to them: the “collective right” (i.e., militia-based) and “individual right” (i.e., private purposes). This framing—collective versus individual—was undoubtedly advantageous for the latter, given the individualism at the heart of most American rights, rhetoric, and doctrine. Little wonder that the “individual right” reading was soon dubbed the “Standard Model” by its sup-

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<sup>24</sup> For a brief overview of the competing positions, see JOSEPH BLOCHER & DARRELL A.H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF Heller* 59–66 (2018).

<sup>25</sup> The literature is far too wide to attempt a list here. For overviews of the debate in the law reviews, see ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 95–99 (2008); Don B. Kates, *A Modern Historiography of the Second Amendment*, 56 *UCLA L. REV.* 1211 (2009); Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 *CHI.-KENT L. REV.* 349, 363–84 (2000).

<sup>26</sup> SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 214 (2006) (describing the right in civic republican terms).

<sup>27</sup> Clark Neily, *District of Columbia v. Heller: The Second Amendment Is Back, Baby*, 2007-2008 *CATO SUP. CT. REV.* 127, 140. We are aware of just two district court opinions that did so, both of which were reversed. See *United States v. Emerson*, 46 F. Supp. 2d 598 (N.D. Tex. 1999), *rev'd and remanded*, 270 F.3d 203 (5th Cir. 2001); *United States v. Miller*, 26 F. Supp. 1002 (W.D. Ark. 1939), *rev'd and remanded*, 307 U.S. 174 (1939).

porters in an impressively effective declaration of scholarly victory.<sup>28</sup>

In 2008's *District of Columbia v. Heller*, the Supreme Court made that victory doctrinal, adopting the private purposes view while heavily citing "individual right" scholarship. In the course of doing so, the majority used the words "individual" and "individuals" a total of 51 times, deriding the notion that a right might be embedded in a "collective" like the organized militia.<sup>29</sup>

Framed thus—as individual versus collective—the question may have seemed easy. But as Justice Stevens pointed out in the first sentence of his dissent: "The question . . . is not whether the Second Amendment protects a 'collective right' or an 'individual right.' Surely it protects a right that can be enforced by individuals."<sup>30</sup> He noted that whether "the Second Amendment protects an individual right does not tell us anything about the scope of that right."<sup>31</sup> Stevens argued, on originalist grounds, that the Amendment was ratified as a structural federalism provision designed to protect state-affiliated militia from disarmament by the federal government.<sup>32</sup>

For the majority, the paradigmatic scene was not a militia muster, but a home invasion. The first sentence of the majority opinion described the question presented in terms of home possession,<sup>33</sup> and repeatedly tied "home" to self-defense,<sup>34</sup> ultimately concluding that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."<sup>35</sup> The Court determined that the "core" interest was one of self-defense, which is "most acute" in the home.<sup>36</sup> And in striking down the District's

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<sup>28</sup> Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 463–64 (1995); see also Kates, *supra* note 25, at 1212 n.7 (noting use even by supporters of militia-based interpretation).

<sup>29</sup> See generally *Heller*, 554 U.S. 570.

<sup>30</sup> *Id.* at 636 (Stevens, J., dissenting).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 637.

<sup>33</sup> *Id.* at 573 ("We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.").

<sup>34</sup> *Id.* at 573, 575, 576, 577, 593, 615, 616.

<sup>35</sup> *Id.* at 635.

<sup>36</sup> *Id.* at 626.

handgun ban, the Court asserted that “the American people have considered the handgun to be the quintessential self-defense weapon,” explaining that “it is easier to use for those without the upper-body strength to lift and aim a long gun” and “can be pointed at a burglar with one hand while the other hand dials the police.”<sup>37</sup> The paradigmatic scene was clear.

It is not our goal here to review the debate about the Second Amendment’s central meaning and scope. *Heller* resolved that question in favor of the private purposes view (reflecting, it should be noted, popular opinion at the time<sup>38</sup>), even as it also affirmed the constitutionality of a wide range of gun laws.<sup>39</sup> Rather, we want to identify and explore two complications inherent in the majority’s individual- and home-focused understanding of the fundamental right to armed self-defense.

First, the “individual” right does not extend to all individuals. As Justice Stevens noted in his dissent, “when it finally drills down on the substantive meaning of the Second Amendment, the Court limits the protected class to ‘law-abiding, responsible citizens.’”<sup>40</sup> Indeed, the majority went out of its way to signal approval for prohibitions on classes of persons, especially felons and the mentally ill<sup>41</sup>—neither of which were at issue in *Heller* itself, but are already prohibited under federal law. Lower courts applying *Heller* have taken that language as constitutional approval of other group-based prohibitions, including limitations on possession by minors, immigrants unlawfully present, and those convicted of domestic violence misdemeanors.<sup>42</sup> The fact that certain *persons*—rather than, for example, certain contexts or actions—fall outside the scope of the right makes the Second Amendment substantively different from other guarantees in the

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<sup>37</sup> *Id.* at 629.

<sup>38</sup> Jeffrey Jones, *Public Believes Americans Have Right to Own Guns*, G???? (Mar. 27, 2008), <http://www.gallup.com/poll/105721/public-believes-americans-right-own-guns.aspx>.

<sup>39</sup> *Heller*, 554 U.S. at 626–27.

<sup>40</sup> *Id.* at 644 (Stevens, J., dissenting).

<sup>41</sup> *Id.* at 626–27 (majority opinion).

<sup>42</sup> Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms after Heller*, 67 DUKE L.J. 1433, 1481 (2018) (noting that just 4% of Second Amendment challenges to prohibited classes of persons have succeeded).



Bill of Rights, including the First.<sup>43</sup> And it sets up potential conflicts, or at least differentials, in people's invocations of the right.

Second, *Heller* conflates the individual gun-owner's self-defense interests with those of the household as a unit. The majority speaks of guns being used against "burglar[s]" and "intruders,"<sup>44</sup> not by or against abusive intimate partners. Threats are cast as emerging from outside the home, not within it, and guns are a way for the family unit to exercise a shared right—one might even say "collective right"—to self-defense.

This, it must be said, reflects a gendered reading of threat.<sup>45</sup> For women in the United States, the primary threats of violence—including gun violence—come from *within* the home. Intimate partners are a greater threat than lurking strangers or home invaders,<sup>46</sup> and most intimate partner murders involve a firearm.<sup>47</sup> (By comparison, about 6% of male homicide victims are killed by an intimate partner.<sup>48</sup>) For some gun rights advocates, the solution is as simple as arming more women.<sup>49</sup> But

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<sup>43</sup> Cf. *Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting).

<sup>44</sup> *Heller*, 554 U.S. at 629-31.

<sup>45</sup> For an analysis of *Heller's* endorsement of a "patriarchal theory of armed self-defense," see Liebell, *supra* note 12.

<sup>46</sup> Katie Zezima et al., *Domestic Slayings: Brutal and Foreseeable*, WASH. POST (Dec. 9, 2018), <https://www.washingtonpost.com/news/posteverything/wp/2017/06/15/what-do-many-mass-shooters-have-in-common-a-history-of-domestic-violence>.

<sup>47</sup> Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003–2014*, 66 MORBIDITY & MORTALITY WKLY. REP. 741, 741 (July 2017). See also Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 EVALUATION REV. 313, 313 (2006) (concluding that roughly 60% of intimate-partner homicides are committed with a firearm).

<sup>48</sup> Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L.J. 1257, 1278 n.109 (2017) (internal citation omitted).

<sup>49</sup> NRA Women Staff, *The Armed Citizen*, NRA WOMEN (Sept. 24, 2021), <https://www.nrawomen.com/content/the-armed-citizen-september-24-2021> (advocating for more "armed citizens" and citing news article about an armed woman who successfully thwarted her abusive ex-husband's attack and attempted rape by shooting him).

studies show that the very presence of a gun makes it five times more likely that a woman will be killed by an abusive partner.<sup>50</sup>

Putting these two observations together reveals a difficult issue: The right to keep and bear arms, though described in terms of a fundamental individual right, as a practical matter is *not* held equally by all individuals. Even within a single household, rights may diverge. Moreover, despite *Heller*'s conflation of individual with household, people within a home may have divergent self-defense interests—as when one member of a household presents a threat to others. Emphasizing the individualistic and home-bound nature of the right, as *Heller* does, exacerbates these tensions. And attempts to regulate within the household unit, including through the use of targeted, temporary prohibitions against at-risk individuals, can create a possibility of legal liability for *non*-prohibited persons, as Part II explains.

## II. Legal Gun Owners' Potential Liability While Cohabiting with a Temporarily Prohibited Possessor

As noted above, *Heller* specifically approves as constitutional a range of laws that prohibit gun possession by certain classes of persons. The most prominent such classes are set out in the federal Gun Control Act, including convicted felons and those who have been adjudicated mentally ill.<sup>51</sup> Courts have overwhelmingly rejected challenges to the constitutionality of those prohibitions; aside from some possible as-applied exceptions, they are on firm constitutional footing.<sup>52</sup>

But what about the liabilities and rights of those who cohabit with a prohibited person? Can they be prosecuted for permitting such a person to “constructively” possess a weapon? Courts in some cases have concluded that they can and that the Second Amendment does not forbid such a result.<sup>53</sup>

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<sup>50</sup> Aaron J. Kivisto et al., *Firearm Ownership and Domestic Versus Nondomestic Homicide in the U.S.*, 57 (3) AM. J. PREVENTATIVE MED. 311, 312 (2019).

<sup>51</sup> Gun Control Act of 1968, 18 U.S.C. §§ 921–931.

<sup>52</sup> Ruben & Blocher, *supra* note 42, at 1481.

<sup>53</sup> See *infra* notes 116–119 (discussing constructive liability in cases involving felons).

Increasingly, though, the question is likely to arise in cases involving a different kind of gun regulation: Not broad, class-wide restrictions, but those individualized orders that would temporarily deny guns to those who present an immediate danger to themselves or others—including family members or intimate partners. Such laws have the potential to provide tailored solutions to temporary risks. And yet, because they focus on possession—a complicated concept in cohabitation—they also implicate legal rights and duties beyond those of the respondent.

### *A Primer on Temporary Firearm Prohibition Through ERPOs and DVROs*

ERPOs and DVROs are a means to preemptively take away firearms from specific individuals whom judges have determined are a temporary danger to themselves or others.<sup>54</sup> Though both types of orders have similar goals of targeted gun safety, they also differ in key respects.

#### 1. *ERPOs*

ERPO laws (also known as “red flag” laws<sup>55</sup>) authorize courts to issue orders temporarily banning possession of firearms by those who present an immediate risk of harm to themselves or others.<sup>56</sup> Such laws are temporary civil orders designed “to respond to acute periods of elevated risk of violence” that are specific to the person and the situation.<sup>57</sup>

As of 2020, nineteen states and the District of Columbia have enacted some form of extreme risk law,<sup>58</sup> giving almost half

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<sup>54</sup> *Extreme Risk Protection Orders vs. Domestic Violence Restraining Orders: How Are They Different?*, EDUC. FUND TO STOP GUN VIOLENCE (July 2018) [hereinafter *ERPOs vs. DVROs*, EFSGV], <http://efsgv.org/wp-content/uploads/2018/07/ERPO-DVRO-Comparison-July-2018-FINAL-1.pdf>.

<sup>55</sup> See Blocher & Charles, *supra* note 18, at 1301 (explaining that the term *red flag* “might convey a stigma”).

<sup>56</sup> *The Effects of Extreme Risk Protection Orders*, RAND CORP. (Apr. 22, 2020) [hereinafter *Effects of ERPOs*, RAND], <https://www.rand.org/research/gun-policy/analysis/extreme-risk-protection-orders.html>.

<sup>57</sup> *Id.*

<sup>58</sup> *Extreme Risk Protection Orders: State Laws at a Glance*, BLOOMBERG AM. HEALTH INITIATIVE, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH 2 (Apr. 16, 2020) [hereinafter *ERPOs: State Laws at a Glance*], <https://ameri->

of the U.S. population access to ERPOs.<sup>59</sup> The details of these laws vary by state, but they have some common characteristics. There are generally two types of ERPOs: an emergency *ex parte* version that is available without notice to the respondent and a “final” version that usually lasts up to a year and which the respondent has been allowed to challenge at a noticed hearing.<sup>60</sup> A person subject to the order is unable to purchase or possess guns during the pendency of the order.<sup>61</sup> States differ based on who can petition a court to issue an ERPO, but most allow family or household members or law enforcement to request one.<sup>62</sup> ERPOs also differ in the burden of proof that must be provided, with that burden generally being higher for final orders.<sup>63</sup>

Proponents praise ERPOs because they often allow those closest to the respondent (family members) to proactively take steps to prevent gun violence through individualized, targeted action, which is especially useful because studies suggest that there are “warning signs observable to others before most acts of violence.”<sup>64</sup> In practice, studies have also suggested that ERPOs can lower instances of suicide,<sup>65</sup> and can effectively disarm individuals who have made significant, credible violent threats to

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canhealth.jhu.edu/sites/default/files/inline-files/GENERAL\_StateLawTable\_v7.pdf.

<sup>59</sup> *Extreme Risk Laws*, EDUC. FUND TO STOP GUN VIOLENCE (July 2020) [hereinafter *Extreme Risk Laws*, EFSGV], <https://efsgv.org/learn/policies/extreme-risk-laws>.

<sup>60</sup> *Id.*

<sup>61</sup> *Extreme Risk Protection Order: A Tool to Save Lives*, BLOOMBERG AM. HEALTH INITIATIVE, JOHNS HOPKINS BLOOMBERG SCHOOL OF PUB. HEALTH, <https://americanhealth.jhu.edu/implementERPO> (last visited Feb. 16, 2022).

<sup>62</sup> *ERPOs: State Laws at a Glance*, *supra* note 58, at 2. Other states also allow prosecutors (Connecticut, New York, Vermont, Virginia), mental or general health professionals (D.C., Hawaii, Maryland), educators (Hawaii, New York), or work colleagues (Hawaii) to petition the court for ERPOs. *Id.*

<sup>63</sup> *ERPOs*, GIFFORDS, <https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders> (last visited Feb. 16, 2022).

<sup>64</sup> *Id.*

<sup>65</sup> See generally Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut’s Risk-Based Gun Removal Law: Does It Prevent Suicides?*, 80 LAW & CONTEMP. PROBS. 179 (2017).

others.<sup>66</sup> Opponents, however, including the National Rifle Association, criticize ERPOs on the basis that they allow petitions by “persons who have no specific expertise, and who may be mistaken.”<sup>67</sup> To date, no courts have invalidated ERPOs under the Second Amendment.<sup>68</sup>

## 2. DVROs

Domestic violence restraining orders are similar to ERPOs in terms of their targeted approach to gun removal and risk, but are focused specifically on giving domestic abuse survivors a way to defend themselves against abusers.<sup>69</sup> Depending on the state, DVROs can include different types of conditions that the respondent must adhere to, including orders for no contact, orders to move out of a shared home house, orders to attend counseling, and orders that restrict purchasing or possessing firearms.<sup>70</sup>

DVROs that specifically prohibit firearm possession and purchase serve an important role in the public health crisis of violence against intimate partners and family members.<sup>71</sup> As noted above, there is strong evidence that guns can exacerbate intimate partner violence.<sup>72</sup> Federal law prohibits those convicted

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<sup>66</sup> See Jesse Paul, *Colorado's Red Flag Gun Law Was Used 73 Times in Its First 7 Months. Here's How the Rollout Has Gone*, COLO. SUN (Aug. 21, 2020, 3:15AM), <https://coloradosun.com/2020/08/21/red-flag-law-colorado-usage>; Ovetta Wiggins, *Red-Flag Law in Maryland Led to Gun Seizures from 148 People in First Three Months*, WASH. POST (Jan. 15, 2019, 7:01 PM), [https://www.washingtonpost.com/local/md-politics/red-flag-law-in-maryland-led-to-148-gun-seizures-in-first-three-months/2019/01/15/cfb3676c-1904-11e9-9ebf-c5fed1b7a081\\_story.html](https://www.washingtonpost.com/local/md-politics/red-flag-law-in-maryland-led-to-148-gun-seizures-in-first-three-months/2019/01/15/cfb3676c-1904-11e9-9ebf-c5fed1b7a081_story.html).

<sup>67</sup> See, e.g., *Washington: VOTE NO ON 1491! Ballot Initiative Will Selectively Target Gun Owners*, NRA-ILA (Sept. 6, 2016), <https://www.nraila.org/articles/20160906/washington-vote-no-on-1491-ballot-initiative-will-selectively-target-gun-owners>.

<sup>68</sup> Blocher & Charles, *supra* note 18, at 1301 (noting that few Second Amendment challenges have been made to extreme risk laws but those have been unsuccessful); Hannah Eason, *Case Challenging Va.'s 'Red Flag' Law Dismissed*, NBC12 (Nov. 15, 2020, 3:02 PM), <https://www.nbc12.com/2020/11/15/case-challenging-va-red-flag-law-dismissed>; ERPOs, GIFFORDS, *supra* note 63.

<sup>69</sup> ERPOs vs. DVROs, EFSGV, *supra* note 54.

<sup>70</sup> *Id.*

<sup>71</sup> *Protective Orders + Firearm Prohibitions*, DISARM DOMESTIC VIOLENCE, <https://www.disarmdv.org> (last visited Feb. 16, 2022).

<sup>72</sup> See *supra* notes 46–50 and accompanying text.

of domestic violence crimes from purchasing or possessing firearms, and it also prohibits possession and purchase by domestic abusers subject to DVROs, if the order meets certain conditions.<sup>73</sup> For federal law to apply to DVROs, the order must have been issued after noticed hearing with opportunity for the respondent to participate, it must protect an “intimate partner,”<sup>74</sup> and there must either be a finding of credible threat to safety or the order’s terms must prohibit acts that cause a threat to safety.<sup>75</sup> Thus, the federal firearms ban does not reach many temporary DVROs.<sup>76</sup>

State-law domestic violence restraining orders are available in all fifty states.<sup>77</sup> The most robust laws prohibit anyone subject to the order from buying or possessing guns while the order is in effect and can require surrender of firearms.<sup>78</sup> Like ERPOs, temporary DVROs can be issued *ex parte* in emergencies, or for longer periods after notice and hearing.<sup>79</sup> About half of the states broaden the scope of who can request gun-restricting DVROs by also allowing former or current romantic partners, cohabitants, or other family members to submit the petitions.<sup>80</sup>

Some states give judges explicit discretionary authority to order firearms removed from the DVRO’s respondent, and some

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<sup>73</sup> *Disarming Domestic Abusers*, COALITION TO STOP GUN VIOLENCE, <https://www.csgv.org/issues/disarming-domestic-violence> (last visited Feb. 16, 2022).

<sup>74</sup> “Intimate partner” is narrowly defined as a current/former spouse, someone with whom the respondent shares a child, or a current/former cohabitant. 18 U.S.C. § 921(a)(32). This definition leaves a significant gap, commonly called the “boyfriend loophole” because it does not reach dating partners who have never lived together with no children in common. *What Is the “Boyfriend Loophole”?*, EVERYTOWN FOR GUN SAFETY (July 29, 2020), <https://everytown.org/what-is-the-boyfriend-loophole>.

<sup>75</sup> 18 U.S.C. § 922(g)(8) (2020).

<sup>76</sup> *Firearm Removal/Retrieval in Cases of Domestic Violence*, PROSECUTORS AGAINST GUN VIOLENCE & THE CONSORTIUM FOR RISK-BASED FIREARM POLICY 7 (Feb. 2016) [hereinafter *Firearm Removal/Retrieval in Cases of Domestic Violence*], <http://efsgv.org/wp-content/uploads/2016/02/Removal-Report-Updated-2-11-16.pdf>.

<sup>77</sup> Blocher & Charles, *supra* note 18, at 1294.

<sup>78</sup> *Domestic Violence & Firearms*, GIFFORDS L. CTR. [hereinafter *Domestic Violence*, GIFFORDS], <https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms> (last visited Feb. 16, 2022).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

states require judges to order firearms removed.<sup>81</sup> Other states give judges broad discretion to order whatever relief they feel is necessary to protect the domestic violence victim.<sup>82</sup> States also vary in the methods used to remove guns from DVRO respondents, though generally they employ methods of surrender, search and seizure of the respondent's home, or a hybrid of the two methods.<sup>83</sup>

### B. *Potential Liability for Prohibited Possessors Cohabiting with Legal Gun Owners*

Individuals subject to ERPOs and DVROs have challenged their orders' constitutionality, but courts have generally concluded that orders premised on a judicial finding of immediate risk satisfy the Second Amendment.<sup>84</sup> What about legal gun owners who cohabit with respondents? If a cohabiting spouse, relative, or friend legally possesses a gun in their shared home, it may fall within the constructive possession of the respondent and thereby cause them to violate the order.<sup>85</sup> In the domestic vio-

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<sup>81</sup> *Firearm Removal/Retrieval in Cases of Domestic Violence*, *supra* note 76, at 8 (citing CAL. FAM. CODE § 6389(c)(1) (2020) ("Upon issuance of a protective order, . . . the court shall order the respondent to relinquish any firearm or ammunition in the respondent's immediate possession or control or subject to the respondent's immediate possession or control.") and DEL. CODE ANN. tit. 10, § 1045(a)(8) (2020) ("After consideration of a petition for a protective order, the Court may . . . [o]rder the respondent to temporarily relinquish to a police officer or a federally-licensed firearms dealer located in Delaware the respondent's firearms and to refrain from purchasing or receiving additional firearms for the duration of the order. . . .")).

<sup>82</sup> *Id.* (citing VA. CODE ANN. § 16.1-253.1 (2020) ("A preliminary protective order may include any . . . other relief necessary for the protection of the petitioner and family or household members of the petitioner.")).

<sup>83</sup> *Id.* at 9. However, this process can be complicated because identifying respondents in possession of guns is not always easy since many states do not maintain comprehensive records of those with licensed firearms and many firearms remain legally or illegally unlicensed. Garen J. Wintemute et al., *Identifying Armed Respondents to Domestic Violence Restraining Orders and Recovering Their Firearms: Process Evaluation of an Initiative in California*, 104 AM. J. PUB. HEALTH e113, e113 (2014).

<sup>84</sup> Blocher & Charles, *supra* note 18, at 1301 (noting that few Second Amendment challenges have been made to extreme risk laws, but those have been unsuccessful).

<sup>85</sup> *Nat'l Safe Deposit Co. v. Stead*, 232 U.S. 58, 67 (1914); *United States v. Perez*, 661 F.3d 568, 576 (11th Cir. 2011); *Extreme Risk Protection Orders: New*

lence context, the respondent's cohabitating victim could own a gun, or if the respondent has to move in compliance with a DVRO, a cohabitant in their new living situation might legally possess a gun.<sup>86</sup> Cohabiting with a legal gun owner places the respondent at risk of violating the order (or, worse, misusing the gun in the manner the order was entered to prevent), and also raises the possibility of legal liability for the cohabitant.

More than a century ago, the Supreme Court said that the term *possession* "is interchangeably used to describe actual possession and constructive possession which often so shade into one another that it is difficult to say where one ends and the other begins."<sup>87</sup> Actual possession generally involves true, immediate physical possession.<sup>88</sup> But constructive possession is a legal fiction used "to find possession in situations where it does not in fact exist, but where they nevertheless want an individual to acquire the legal status of a possessor."<sup>89</sup> The doctrine expands the meaning of possession to reach situations where possession must be proven by circumstantial evidence.<sup>90</sup>

Generally, a person has constructive possession over an object when "though lacking such physical custody," that person "still has the power and intent to exercise control over the object."<sup>91</sup> Constructive possession thus generally requires two elements: (1) power to exercise control over the object and (2) intent to exercise that control.<sup>92</sup>

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*Policy Recommendations for Policy and Implementation*, CONSORTIUM FOR RISK-BASED FIREARM POLICY 9, 19 (Oct. 2020) [hereinafter *Policy Recommendations*, CONSORTIUM], <https://efsgv.org/wp-content/uploads/EFSGV-ConsortiumReport2020-ERPOs.pdf>.

<sup>86</sup> Darren Mitchell & Susan B. Carbon, *Firearms and Domestic Violence: A Primer for Judges*, CT. REV. 32, 39 (Summer 2002), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?&httpsredir=1&article=1148&context=ajacourtreview>.

<sup>87</sup> *Nat'l Safe Deposit Co.*, 232 U.S. at 67.

<sup>88</sup> LAFAVE, CRIMINAL LAW, *supra* note 22, § 6.1(e).

<sup>89</sup> Charles H. Whitebread & Ronald Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 VA. L. REV. 751, 761-62 (1972).

<sup>90</sup> LAFAVE, CRIMINAL LAW, *supra* note 22, § 5.1(e).

<sup>91</sup> *Henderson v. United States*, 135 S. Ct. 1780, 1784 (2015).

<sup>92</sup> JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW 133 (8th ed. 2017). Some courts consider "knowledge" an additional element of the analysis, but here we analyze knowledge as a component of both the power and intent elements. *See* Blocher, *The Right Not to Keep or Bear*



### 1. *Power to Exercise Control Element*

The power-to-exercise-control element of constructive possession necessarily requires knowledge that the object is relatively close and available for control, though circumstantial evidence alone can be used to demonstrate this knowledge.<sup>93</sup> The actual location of the object is influential, though not sufficient, in finding this first element.<sup>94</sup> Courts have said that, “mere proximity to the [object], or mere presence on the property where it is located or mere association with the person who does control the [object] or the property” is not enough to establish power to exercise control.<sup>95</sup> For example, one court found that a defendant was not necessarily in control of drugs that were discovered sandwiched between cushions on the couch where he was sitting at a friend’s house.<sup>96</sup>

Courts generally find that power to exercise control is present when the object is located in a person’s home, even if the house or room is shared with others.<sup>97</sup> The very fact that a respondent has “dominion over the premises where the item is located” can be enough circumstantial evidence for constructive possession.<sup>98</sup> As the D.C. Circuit has explained, “The natural in-

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*Arms, supra* note 12, at 33 (“In criminal law, constructive possession usually requires presence of an object, knowledge of that object, and ability and intent to exercise control over it.” (citing *Rivas v. United States*, 783 A.2d 125, 129 (D.C. 2001))).

Possession can also include joint control, where more than one person is in possession at a single time. JOHN M. BURKOFF, *ACING CRIMINAL LAW* 12 (4th ed. 2020). For example, in one such case the Eighth Circuit found that evidence was sufficient for joint possession of a firearm when a defendant and his girlfriend shared the bedroom where the firearm was discovered. *United States v. Williams*, 512 F.3d 1040, 1044 (8th Cir. 2008).

<sup>93</sup> *United States v. Nungaray*, 697 F.3d 1114, 1117 (9th Cir. 2012).

<sup>94</sup> KAPLAN, WEISBERG & BINDER, *supra* note 92, at 135.

<sup>95</sup> *United States v. Jenkins*, 90 F.3d 814, 818 (3d Cir. 1996).

<sup>96</sup> *Id.*

<sup>97</sup> *United States v. Zavala Maldonado*, 23 F.3d 4, 7 (1st Cir. 1994).

<sup>98</sup> *United States v. Hill*, 79 F.3d 1477, 1485 (6th Cir. 1996); *see also* *United States v. Middleton*, 628 Fed. Appx. 433, 434 (6th Cir. 2016) (affirming a defendant’s firearm sentencing enhancement because the defendant “had dominion over the premises where the gun was found, and so he cannot hang possession of the guns on his roommate alone” (internal quotation omitted)); *United States v. Wheaton*, 517 F.3d 350, 367 (6th Cir. 2008) (affirming a defendant’s sentencing enhancement for constructive possession of a gun concealed in a

ference is that those who live in a house know what is going on inside, particularly in the common areas.”<sup>99</sup> Other courts have emphasized the difference between contraband hidden and in plain view in a common area.<sup>100</sup> Additional factors to support the finding of power to exercise control have included exclusive ownership or access to the object, sole occupancy of the place where the object was found, and incriminating statements or flight.<sup>101</sup>

## 2. *Intent to Exercise Control Element*

The second element of constructive possession, intent to exercise control, can involve a more difficult analysis.<sup>102</sup> Knowledge of the firearm’s presence is again necessary, but intent to control usually requires more than “mere awareness of the firearm.”<sup>103</sup> As with the power-to-control element, courts may infer intent solely from the location of the object itself in the circumstances.<sup>104</sup> But generally there has to be some type of corroborating evidence—a nexus between the person and the object, beyond just proximity.<sup>105</sup> For example, in *State v. Bailey*,<sup>106</sup> the North Carolina Court of Appeals held that the state had failed to produce circumstantial evidence that the defendant, a convicted

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couch because the defendant lived at the house where the gun was found); *Zavala Maldonado*, 23 F.3d at 7.

<sup>99</sup> *Jenkins*, 928 F.2d at 1179.

<sup>100</sup> *United States v. Dorman*, 860 F.3d 675, 681 (D.C. Cir. 2017) (upholding the defendant’s conviction for felon-in-possession for a gun found in the bedroom only he lived in, though his mother stored some of her belongings in the room).

<sup>101</sup> *Id.*

<sup>102</sup> *Zavala Maldonado*, 23 F.3d at 8. Some states may de-emphasize the intent element altogether. See Chad Flanders, “Actual” and “Constructive” Possession in Alaska: Clarifying the Doctrine, 36 ALASKA L. REV. 1, 1 (2019) (expressing a concern that “Alaska’s definition of ‘constructive possession’ invites juries to find possession where the defendant is only near an object and has knowledge of its presence”).

<sup>103</sup> *United States v. James*, 631 Fed. Appx. 803, 805–06 (11th Cir. 2015).

<sup>104</sup> *Zavala Maldonado*, 23 F.3d at 8. Cf. *United States v. Bailey*, 553 F.3d 940, 946 (6th Cir. 2009) (holding that the government presented no evidence of the defendant’s constructive possession of a gun that was found underneath the seat of the stolen car he was driving).

<sup>105</sup> See, e.g., *State v. Bailey*, 757 S.E.2d 491, 491 (N.C. Ct. App. 2014); *United States v. Griffin*, 684 F.3d 691, 695 (7th Cir. 2012).

<sup>106</sup> *Bailey*, 757 S.E.2d 491.

felon prohibited from possessing a firearm, constructively possessed an AK-47 registered to his girlfriend that was discovered in the backseat of his own car.<sup>107</sup> The defendant was in the passenger seat while his girlfriend was driving, but the court said that even if the defendant admitted that he knew the firearm was in the car, it would not be enough to establish that the defendant constructively possessed the weapon.<sup>108</sup> He had not formed the required intent to exercise control over the gun.<sup>109</sup>

### 3. *Constructive Possession, Cohabitants, and Restrictive Orders*

Some states specifically address the issue of legal firearm ownership by cohabitants of prohibited persons.<sup>110</sup> Colorado's ERPO statute explicitly requires that a respondent surrender all of their firearms.<sup>111</sup> Then, if a person other than the respondent is actually the firearm's lawful owner, the firearm will be returned as long as "[t]he firearm is removed from the respondent's custody, control, or possession, and the lawful owner agrees to store the firearm so that the respondent does not have access to or control of the firearm."<sup>112</sup> Other states plainly prohibit the respondent from transferring their seized weapons to cohabitants.<sup>113</sup>

Additionally, some states' DVRO firearm statutes specifically address cohabitants or the victims of domestic violence. Ar-

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<sup>107</sup> *Id.* at 491.

<sup>108</sup> *Id.* at 494.

<sup>109</sup> *Id.*

<sup>110</sup> *See also infra* Part II.D. (discussing three state laws that impose safe-storage requirements on cohabitants of prohibited possessors).

<sup>111</sup> COLO. REV. STAT. § 13-14.5-108 (2020).

<sup>112</sup> *Id.* § 13-14.5-108(5)(a). The District of Columbia's ERPO statute uses almost identical language. D.C. CODE § 7-2510.07(d) (2020) (providing that a seized gun will be returned to the lawful owner "provided, that the firearm or ammunition is removed from the respondent's possession or control, and the lawful owner agrees to store the firearm or ammunition in a manner such that the respondent does not have possession or control of the firearm or ammunition").

<sup>113</sup> *See, e.g.,* MD. CODE ANN., PUB. SAFETY § 5-608(c)(1) (2020) ("A respondent . . . may: sell or transfer title to the firearm or ammunition to: . . . another person who is not prohibited from possessing the firearm or ammunition under State or federal law and who does not live in the same residence as the respondent . . .").

izona's DVRO law expressly disallows seizure of a domestic violence victim's firearm, unless there is probable cause that both parties involved independently committed acts of domestic violence.<sup>114</sup> Minnesota also explicitly forbids a respondent from transferring their firearms to a cohabitant to comply with a DVRO.<sup>115</sup>

However, most states are silent on the issue of cohabitants and how they relate to these restrictive orders. But because respondents have the requisite legal intent to possess a firearm, their constructive possession of a cohabitant's firearms would be incredibly easy to find unless their power to exercise control over the weapon was cut off, for example through secure, locked storage of the weapon.

### *C. Potential Liability for Legal Gun Owners Cohabiting with Prohibited Possessors*

While respondents would be found guilty of violating the order against them if they came into legal possession of their cohabitant's firearms, what legal consequences might cohabitants themselves face if a respondent came into constructive possession of their weapons? Two types of criminal liability are immediately apparent: accomplice liability or reckless endangerment.

#### *1. Accomplice Liability*

A cohabitant might become an "accomplice" of the respondent if the respondent constructively possesses the cohabitant's legally owned firearm.<sup>116</sup> Though the issuance of an ERPO/DVRO is a civil proceeding, violating an ERPO/DVRO is usually a misdemeanor or felony, depending on the state statute.<sup>117</sup> A cohabitant who allows a respondent to constructively possess the

<sup>114</sup> ARIZ. REV. STAT. ANN. § 13-3601 (2020).

<sup>115</sup> MINN. STAT. § 518B.01(6)(g) (2020).

<sup>116</sup> See C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 734 (2009) (stating that the banning felons-in-possession "goes beyond even stripping the convict of the entire core of the right, by pressuring those who share his household to disarm themselves as well, to avoid the risk of the convict's being prosecuted for unlawful possession based on theories of joint or constructive possession").

<sup>117</sup> See, e.g., 430 ILL. COMP. STAT. § 65/9.5(d) (2020) (stating that an ERPO firearms violation is a misdemeanor); CAL. PENAL CODE § 18205 (2020) (stating that an ERPO firearms violation is a misdemeanor); CONN. GEN. STAT.

cohabitant's firearm could be found to have aided and abetted this crime.<sup>118</sup> Many states' ERPO/DVRO laws include language that deals with individuals who actively furnish firearms to prohibited possessors,<sup>119</sup> but in the constructive possession context, the analysis is more nuanced because the respondent's possession may result from passivity or an omission by the accomplice/cohabitant rather than an affirmative act.<sup>120</sup>

The modern view of "aiding and abetting" is that it is a particular manner of committing a crime, rather than a distinct crime in of itself.<sup>121</sup> Individual state statutes stipulate the requisite mens rea and necessary act or omission of an accomplice in their aid of the main actor (the principal),<sup>122</sup> so the following observations are necessarily general.

Accomplice liability requires the appropriate mens rea and actus reus.<sup>123</sup> There is a split of authority on the appropriate mens rea for accomplice liability: whether actual intent to aid the crime is required, or whether a lesser mental state is enough, such as simple knowledge that the accomplice is aiding the principal or knowledge that "one is aiding reckless or negligent conduct which may produce a criminal result."<sup>124</sup> Most commonly,

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§ 53a-217(b) (2020) (stating that an ERPO firearms violation is a class D felony).

<sup>118</sup> There are many examples of defendants charged with aiding and abetting a felon-in-possession when they assist in the convicted felon's possession. *See, e.g.,* United States v. Ford, 821 F.3d 63, 76 (1st Cir. 2016); United States v. Huet, 665 F.3d 588, 602 (3d Cir. 2012); United States v. Samuels, 521 F.3d 804, 812 (7th Cir. 2008); United States v. Diaz, No. 4:17-CR-0038, 2018 WL 6617648, at \*1 (N.D. Ga. Dec. 18, 2018).

<sup>119</sup> *See, e.g.,* CONN. GEN. STAT. § 29-37j (2020) (stating that purchasing a firearm to transfer to a person that the transferor "knows or has reason to believe" is a prohibited possessor is a class C felony).

<sup>120</sup> There could, however, be an issue when the victim of the DVRO is the cohabitating legal gun owner. Generally, the victim of a crime cannot be charged with aiding and abetting that crime. WAYNE R. LAFAYE, SUBSTANTIVE CRIMINAL LAW § 13.3(e) (3d ed. 2020) [hereinafter LAFAYE, SUBSTANTIVE CRIMINAL LAW].

<sup>121</sup> Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 224 (2000).

<sup>122</sup> LAFAYE, CRIMINAL LAW, *supra* note 22, § 12.2(b).

<sup>123</sup> *Id.* § 12.2.

<sup>124</sup> *Id.*; *see also* Weisberg, *supra* note 121, at 232 ("[O]ne finds it very difficult even to sort out and enumerate, much less evaluate, the various notions of the mens rea of complicity.").

the act is that the accomplice's giving "assistance or encouragement or fail[ing] to perform a legal duty to prevent" the crime.<sup>125</sup> Further, participation in aiding and abetting "may be established by circumstantial evidence, and the evidence may be of relatively slight moment."<sup>126</sup>

Accomplice liability in the case of allowing a respondent to constructively possess a firearm would likely at least require the level of mens rea that the cohabitant knew or had reason to know that the respondent was subject to an ERPO/DVRO.<sup>127</sup> The accomplice must have made the "moral" choice to aid a prohibited possessor or omit their duty to act, because otherwise the accomplice would not have any kind of knowledge that their behavior was not innocent.<sup>128</sup> However, courts have held that accomplice liability attaches in felon-in-possession cases when the accomplice knew that the prohibited possessor was a felon, not only when they knew that felons were prohibited from possessing firearms; ignorance of the law is generally not an excuse.<sup>129</sup>

It seems likely that the mental state of actual knowledge of the order will be satisfied in most cases of cohabitants. After all, household members themselves are typically allowed to petition the court for the order, and might well be the impetus for the

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<sup>125</sup> LAFAVE, *CRIMINAL LAW*, *supra* note 22, § 12.2.

<sup>126</sup> *United States v. Samuels*, 521 F.3d 804, 811 (2008) (quoting *United States v. Folks*, 236 F.3d 384, 389 (7th Cir. 2001)).

<sup>127</sup> *See, e.g., id.* at 812 ("[T]o aid and abet a felon in possession of a firearm, the defendant must know or have reason to know that the individual is a felon at the time of the aiding and abetting . . ."); *United States v. Ford*, 821 F.3d 63 (1st Cir. 2016). *Cf.* *United States v. Canon*, 993 F.2d 1439, 1442 (9th Cir. 1993) ("[The defendant] also contends the court should have instructed the jury that he had to know [the principal] was a felon before [the defendant] could aid [the principal's] possession of a firearm. We disagree with these contentions.").

<sup>128</sup> *Rosemond v. United States*, 572 U.S. 65, 78 (2014); *see also Ford*, 821 F.3d at 69 ("This choice [to participate in an illegal scheme] . . . can hardly be presented as such if one does not know the very facts that distinguish the behavior in question from that which is perfectly innocent.").

<sup>129</sup> For example, in *Ford*, 821 F.3d 63, the defendant was convicted of aiding and abetting a felon in possession after she allowed her husband, a convicted felon, to use her semi-automatic rifle for target practice. *Id.* at 65. The First Circuit overturned her conviction on that charge because the trial court had instructed the jury to find her guilty if she "knew or had reason to know" her husband was a felon. *Id.* Instead, the First Circuit said she could only be convicted on actual knowledge of her husband's felony conviction, though she did not have to know that it was illegal for felons to possess firearms. *Id.*

order's entry.<sup>130</sup> Some states allow or require law enforcement to search the residence of the respondent to the order to ensure there are no firearms subject to their possession, making the fact of the order difficult to hide from cohabitants.<sup>131</sup>

The strictest version of *mens rea* would require the cohabitant to have the actual intent of aiding the respondent in possessing a firearm.<sup>132</sup> In the context of constructive possession by a prohibited possessor, this would mean that the cohabitant/accomplice must intend to empower the respondent to exercise control over the firearm. For example, in *United States v. Huet*<sup>133</sup> when a cohabitant was charged with knowingly aiding and abetting her convicted-felon partner's possession of a firearm, she was alleged to have intentionally aided him in the underlying crime.<sup>134</sup> Generally, this level of *mens rea* means the cohabitant would have to intentionally allow the respondent to gain constructive possession of the firearm, or the cohabitant would have to intentionally omit precautions necessary to prevent the respondent's constructive possession.

In terms of the required *actus reus* for accomplice liability, any amount of aid is usually sufficient,<sup>135</sup> and an accomplice does not have to aid in every element of the crime.<sup>136</sup> Specifically, there are generally three types of acts that an accomplice can commit: (1) physical assistance, such as actively furnishing an instrumentality of the offense; (2) psychological assistance, such as encouraging the principal to commit the crime; or (3) assistance by omission if the accomplice has a duty to act, such as a prop-

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<sup>130</sup> *Domestic Violence*, GIFFORDS, *supra* note 78; *ERPOs*, GIFFORDS, *supra* note 63.

<sup>131</sup> *Domestic Violence*, GIFFORDS, *supra* note 78; *ERPOs*, GIFFORDS, *supra* note 63.

<sup>132</sup> LAFAVE, *CRIMINAL LAW*, *supra* note 22, § 12.2(b).

<sup>133</sup> *United States v. Huet*, 665 F.3d 588 (3d Cir. 2012).

<sup>134</sup> *Id.* at 602.

<sup>135</sup> JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 30.04(B)(1) (7th ed. 2015) ("Any aid, *no matter how trivial*, suffices."); *see also* Commonwealth v. Murphy, 844 A.2d 1228, 1234 (Pa. 2004) ("With regard to the amount of aid, it need not be substantial . . .").

<sup>136</sup> *Rosemond v. United States*, 572 U.S. 65, 72 (2014).

erty owner having a duty to intervene in a crime on their property.<sup>137</sup>

For physical assistance, it could be enough that the cohabitant was “willing to give the felon access to [the firearm] or to accede to the felon’s instructions about the[ ] future use [of the firearm].”<sup>138</sup> In the ERPO/DVRO context, with the requisite mens rea, physical assistance could take the form of simply leaving a gun-safe or room unlocked. Some ERPO/DVRO statutes even provide their own penalties for a person who actively physically aids a prohibited possessor in actual possession of a firearm.<sup>139</sup>

Psychological assistance can include encouraging the crime or communicating an “assurance of passivity” that the accomplice will not act to stop a respondent’s constructive possession of a firearm.<sup>140</sup> Any act of encouragement or revealing where the firearm is located would easily meet the minimum requirements, should the cohabitant also have the requisite mens rea.

Accomplice liability generally does not stem from a failure to intervene, unless there is an affirmative duty to act to prevent a crime.<sup>141</sup> Specifically, in some cases a property owner may have an affirmative legal duty to prevent a crime that occurs on their own property.<sup>142</sup> Some courts also ascribe a legal duty to cohabitants to aid the other when they become vulnerable to harm, instructive when the respondent is a serious danger to themselves

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<sup>137</sup> DRESSLER, *supra* note 135, § 30.04(A)(1); *see also* MODEL PENAL CODE § 2.06(3)(a).

<sup>138</sup> *Henderson*, 135 S. Ct. at 1784.

<sup>139</sup> *See, e.g.*, CONN. GEN. STAT. § 29-37j (2020) (stating that purchasing a firearm to transfer to a person that the transferor “knows or has reason to believe” is a prohibited possessor is a class C felony).

<sup>140</sup> LAFAVE, CRIMINAL LAW, *supra* note 22, § 12.2(a).

<sup>141</sup> *Id.* § 12.2(a). Arguably, constructive possession itself does not require any affirmative act itself. Corey Rayburn Yung, *The Incredible Ordinarity of Federal Penalties for Inactivity*, 2012 WIS. L. REV. 841, 851 (“For a [constructive possession] conviction, the government must show neither any affirmative act by the defendant acquiring the cocaine nor the defendant exercising actual possession. The criminal act, as defined by statute and the courts, is one with no affirmative conduct at all.”).

<sup>142</sup> DRESSLER, *supra* note 135, § 30.04(A)(4).



or others.<sup>143</sup> An ERPO/DVRO rests on a determination that the respondent presents just such a danger,<sup>144</sup> which in turn might impose on the cohabitant a duty to prevent the respondent's constructive possession of their firearm during the period of the order.

## 2. Reckless Endangerment or Criminal Negligence

Cohabitants who allow respondents to constructively possess their legally owned firearm could also be subject to charges for criminal negligence or reckless endangerment. The two charges have similar concepts, and are often used interchangeably for the same idea in criminal statutes.<sup>145</sup> Criminal negligence is a gross deviation from the reasonable standard of care, where the person “takes a substantial and unjustifiable risk of causing the social harm that constitutes the offense charged,”<sup>146</sup> that a reasonable person would be aware of.<sup>147</sup> Doctrinally, recklessness takes this a step further and requires the actor to disregard a “substantial and unjustifiable risk” that she was subjectively aware of.<sup>148</sup> Thus, a charge of criminal negligence/reckless endangerment requires (1) great and unjustifiable risk and (2) subjective or objective knowledge of the risk, regardless of any actual harm that results.

A cohabitant who allows a respondent to constructively possess a firearm is almost certainly taking a great and unjustifiable risk. The very existence of the ERPO or DVRO reflects a judicial

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<sup>143</sup> LAFAVE, *SUBSTANTIVE CRIMINAL LAW*, *supra* note 120, § 6.2(a)(1) (“So also if two people, though not closely related, live together under one roof, one may have a duty to act to aid the other who becomes helpless.”).

<sup>144</sup> Blocher & Charles, *supra* note 18, at 1289.

<sup>145</sup> LAFAVE, *CRIMINAL LAW*, *supra* note 22, § 4.4(b); Micah Schwartzbach, *What Is Criminal Negligence?*, NOLO, <https://www.nolo.com/legal-encyclopedia/what-criminal-negligence.html> (last visited Feb. 17, 2022).

<sup>146</sup> DRESSLER, *supra* note 135, § 10.04(D)(2)(b).

<sup>147</sup> LAFAVE, *CRIMINAL LAW*, *supra* note 22, § 4.4(b); *see also* MODEL PENAL CODE § 2.02(2)(d).

<sup>148</sup> DRESSLER, *supra* note 135, § 10.04(D)(3); *see also* MODEL PENAL CODE § 2.02(2)(c).

For an example of a state statute of reckless endangerment, see WIS. STAT. § 941.30(2) (2020) (“Whoever recklessly endangers another’s safety is guilty of a Class G felony.”) and TENN. CODE ANN. § 39-13-103(a) (2020) (“A person commits an offense who recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury.”).

determination of the respondent's temporary individualized extreme dangerousness around firearms.<sup>149</sup> Constructive possession by respondent is thus, *prima facie*, a great risk.<sup>150</sup>

Of course, as discussed in Part. III.A, the cohabitant would necessarily have to know of the respondent's status as a prohibited possessor to meet the proper mens rea of the crime. Otherwise, there would be no way for the cohabitant to know, either objectively or subjectively, of the risk involved in the respondent's constructive possession. But should the cohabitant know of the respondent's status, the cohabitant is objectively and subjectively knowledgeable of the risk. That leaves the question of whether possession is *justifiable*—and thus what steps the cohabitant might take to cut off the respondent's power to exercise control.<sup>151</sup>

#### D. *Avoiding Liability Through Safe Storage*

To avoid the possibility of criminal liability, a cohabitant must prevent the respondent from constructively possessing the firearms in their shared home. The easiest and most obvious way to do this would be to end cohabitation. But moving out is a drastic solution, and there are potentially major costs to such a step—including undermining the goals of the order itself. A person subject to an or ERPO or DVRO is definitionally in an extreme risk state,<sup>152</sup> and disrupting his or her living situation may exacerbate the risk. For ERPO respondents in particular, the risk may be

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<sup>149</sup> See, e.g., Blocher & Charles, *supra* note 55, at 1289 (calling ERPOs “tailored, individualized risk assessments”).

<sup>150</sup> Though a charge for reckless endangerment/criminal negligence would turn on the exact state statute, some states even have specific heightened penalties for reckless endangerment when a firearm is involved. For example, a Virginia statute states that “[i]t shall be unlawful for any person to handle recklessly any firearm so as to endanger the life, limb or property of any person.” VA. CODE ANN. § 18.2-56.1 (2020).

<sup>151</sup> Although our focus here is on criminal liability, it is possible that a cohabitant could also be liable for civil negligence if the cohabitant negligently stored their firearm. However, one scholar argues that “[c]ourts have generally refused to hold gun owners liable for harm [in tort] . . . caused by a third-party actor using a stolen gun.” Andrew Jay McClurg, *The Second Amendment Right To Be Negligent*, 68 FLA. L. REV. 1, 23 (2016).

<sup>152</sup> *Domestic Violence*, GIFFORDS, *supra* note 78; *ERPOs*, GIFFORDS, *supra* note 63.

one of self-harm; preventing deaths by suicide is a key goal of ERPO statutes. In such cases, the value of a stable living situation with relatives or friends—even those who own guns—might outweigh the cost of possible access to a cohabitant’s guns.

Other practical considerations caution against preventing cohabitants from possessing their own guns in their home. Realistically and by design in some statutes, often a cohabitant will be the person who requests the ERPO/DVRO.<sup>153</sup> If cohabitants have reason to fear that their own guns may be taken away, they might be less likely to report the danger that the respondent poses. These concerns are especially heightened where cohabitants themselves are potentially in danger and want to keep weapons for self-defense.

Short of ending co-habitation, the most straightforward way to prevent constructive possession is to store the guns in a way that denies access to the respondent.<sup>154</sup> Some states already have storage requirements as a matter of law. Specifically, California, Connecticut, and New York all require cohabitants of prohibited possessors to keep their firearms locked when stored at home.<sup>155</sup> California law provides that a firearm-owning cohabitant “who knows or has reason to know” that they are living with a person prohibited by state or federal law from possessing a gun must lock or otherwise disable the firearm when they are not carrying it themselves.<sup>156</sup> Violation of California’s law is a misdemeanor.<sup>157</sup> A similar law in New York only applies to prohibited possessors whom the cohabitant “knows or has reason to know” are forbidden from firearm possession under certain federal laws,<sup>158</sup> and requires that the cohabitant store any gun outside of their immediate possession locked or disabled.<sup>159</sup> Connecticut’s

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<sup>153</sup> *Domestic Violence*, GIFFORDS, *supra* note 78; *ERPOs*, GIFFORDS, *supra* note 63.

<sup>154</sup> See Patrick D. Murphree, Comment, “Beat Your Wife, and Lose Your Gun”: Defending Louisiana’s Attempts To Disarm Domestic Abusers, 61 *LOY. L. REV.* 753, 785–86 (2015) (arguing briefly that there is no constructive possession if a gun was stored in a way that a domestic abuser could not access).

<sup>155</sup> *Safe Storage*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/child-consumer-safety/safe-storage> (last visited Feb. 17, 2022).

<sup>156</sup> CAL. PENAL CODE § 25135 (2020).

<sup>157</sup> *Id.* § 25135(b).

<sup>158</sup> 18 U.S.C. § 922(g)(1), (4), (8) or (9).

<sup>159</sup> N.Y. PENAL LAW § 265.45 (2020).

law only applies to loaded firearms, but also requires securing the firearm in a locked box when the individual knows or reasonably should know that they are cohabitating with a prohibited person or with a person who poses a “risk of imminent personal injury” to themselves or others.<sup>160</sup>

In its October 2020 policy recommendations, the Consortium for Risk-Based Firearm Policy, the group largely responsible for the development of ERPOs,<sup>161</sup> specifically addressed the question of cohabitants’ rights and duties under ERPO laws.<sup>162</sup> The Consortium recommended that it should be unlawful for “any legal firearms owner to knowingly, recklessly, or negligently allow an individual they know is the respondent to an ERPO to access their firearms.”<sup>163</sup> The Consortium further recommended that cohabitants who have their firearms seized pursuant to an ERPO be able to petition for return of their seized firearms, but that they should make a plan indicating “how the legal owner intends to prevent access by the respondent” with clearly defined civil penalties for failure to follow the plan.<sup>164</sup>

A safe storage requirement or temporary transfer requirement would also be in accordance with *Henderson v. United States*,<sup>165</sup> where the Supreme Court in 2015 held that a felon-in-possession could be allowed to transfer their guns to a third party of their choice, but “only if, that disposition prevents the felon from later exercising control over those weapons.”<sup>166</sup> Importantly, the Supreme Court itself recognized the importance of cutting off a prohibited possessor’s control over the firearms by mandating that the third party would “not allow the felon to exert *any* influence over their use.”<sup>167</sup>

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<sup>160</sup> CONN. GEN. STAT. § 29-37i(2)–(3) (2020).

<sup>161</sup> THE EDUCATION FUND TO STOP GUN VIOLENCE, ABOUT THE CONSORTIUM FOR RISK-BASED FIREARM POLICY, <https://efsgv.org/consortium-risk-based-firearm-policy/about> (last visited Feb. 17, 2022).

<sup>162</sup> *Policy Recommendations*, CONSORTIUM, *supra* note 85, at 19.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 19.

<sup>165</sup> *Henderson*, 135 S.Ct. 1780.

<sup>166</sup> *Id.* at 1786.

<sup>167</sup> *Id.* at 1787 (emphasis added).

### III. Constitutional Considerations

In sum, cohabitants of temporarily prohibited possessors—those subject to an ERPO or DVRO—can potentially face legal liability unless they safely store their weapons. This creates, in essence, a roundabout safe storage requirement, based on the *respondent's* risk profile. Would cohabitants facing criminal liability have a similar argument against the implied safe storage requirement laid out above?

*Heller* invalidated a District requirement that a lawful firearm in the home be rendered “inoperable” by disassembling the firearm or binding it by a trigger lock because, the Court held, doing so it made it “impossible for citizens to use them for the core lawful purpose of self-defense.”<sup>168</sup> The District affirmatively argued that its safe storage law—which had never been enforced against a person using a gun in self-defense—had a self-defense exception, and thus that guns could be unlocked in an appropriate situation of need.<sup>169</sup> These kinds of exceptions are presumed to exist for any law, from speed limits to trespass. The dissenters agreed, emphasizing the majority’s own assumption that a self-defense exception would have applied to colonial-era gun laws.<sup>170</sup> Indeed, *Heller’s* own lawyer said at oral argument that so long as there was a self-defense exception, the District could “require safe storage” of guns, “for example, in a safe.”<sup>171</sup> The majority, however, concluded that D.C.’s particular law did *not* have such an exception,<sup>172</sup> and struck it down for that reason.

By casting D.C.’s safe storage law as prohibiting even the use of weapons in self-defense, *Heller* made the law into an unconstitutional outlier. In the vast majority of cases, self-defense is an implied—and sometimes explicit—exception for otherwise applicable legal prohibitions,<sup>173</sup> meaning that safe storage re-

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<sup>168</sup> *Heller*, 554 U.S. at 628, 630.

<sup>169</sup> See Brief for Petitioners at 56, *Heller*, 554 U.S. 570 (No. 07-290) (arguing that a self-defense exception is fairly implied in the trigger lock requirement); Brief for the United States as Amicus Curiae at 30–31, *Heller*, 554 U.S. 570 (No. 07-290) (same).

<sup>170</sup> *Heller*, 554 U.S. at 686–87, 692–93 (Breyer, J., dissenting).

<sup>171</sup> Transcript of Oral Argument at 72, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

<sup>172</sup> *Heller*, 554 U.S. at 630.

<sup>173</sup> DRESSLER, *supra* note 135, at 152.

quirements should rarely run into the specific problem that D.C. confronted. And yet safe storage requirements do *burden*, if not forbid, the exercise of armed self-defense. That burden—the delay in unlocking a gun or gun safe, for example—can trigger constitutional scrutiny, rather than *Heller*’s apparent finding of *per se* invalidity.<sup>174</sup>

All lower federal courts that have addressed the question have adopted a two-step framework to review Second Amendment challenges.<sup>175</sup> Under that framework, courts first decide whether the regulation touches people, places, or firearms that fall under the scope of the Second Amendment.<sup>176</sup> If not, the Second Amendment is not implicated and the regulation passes review.<sup>177</sup> In making this determination, the courts typically look at the text and history of the original meaning of the Second Amendment right.<sup>178</sup>

For a regulation that does implicate the Second Amendment, courts apply the appropriate level of scrutiny: rational basis review, intermediate scrutiny, or strict scrutiny.<sup>179</sup> If the challenged regulation burdens the “core” of the Second Amend-

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<sup>174</sup> Some courts have upheld such a burden. For example, see *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014), discussed *infra* notes 209-211.

<sup>175</sup> See, e.g., *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *Ezell*, 651 F.3d at 703-04; *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

<sup>176</sup> *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (“Under the first prong, the court asks whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood.”).

<sup>177</sup> SARAH PECK, CONG. RSCH. SERV., *POST-Heller* Second Amendment Jurisprudence 12 (Mar. 25, 2019), <https://sgp.fas.org/crs/misc/R44618.pdf>.

<sup>178</sup> See *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) (“To determine whether a law impinges on the Second Amendment right, we look to whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee.”).

<sup>179</sup> PECK, *supra* note 177, at 15.

ment right, such as self-defense in the home, courts may be especially inclined to apply strict scrutiny.<sup>180</sup>

### A. *Scope of Cohabitants' Second Amendment Rights*

First, the “coverage” question: does the scope of the Second Amendment reach criminal liability or safe-storage requirements for cohabitants of ERPO/DVRO respondents?<sup>181</sup> And if so, does it burden the “core” of the Second Amendment right substantially?<sup>182</sup>

*Heller* specifically approved as “presumptively lawful” certain “longstanding prohibitions” such as those regarding possession by “felons and the mentally ill.”<sup>183</sup> Some courts have found that ERPOs and DVROs fall within these carveouts,<sup>184</sup> and others have used similar reasoning to uphold regulations burdening cohabitants of people who are subject to “presumptively lawful” regulation.<sup>185</sup>

In *United States v. Huet*,<sup>186</sup> the Third Circuit denied a woman’s Second Amendment defense against grand jury indictment for aiding and abetting a felon in possession of a firearm.<sup>187</sup> The FBI had seized a semi-automatic rifle from the bedroom of Melissa Huet and her live-in boyfriend who was a convicted felon.<sup>188</sup> Though Huet claimed she owned the weapon legally, a grand jury indicted her for aiding and abetting her partner’s prohibited

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<sup>180</sup> See *United States v. Masciandaro*, 638 F.3d 458, 470–71 (4th Cir. 2011) (“[W]e assume that any law that would burden the ‘fundamental,’ core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny.”).

<sup>181</sup> See Jacob D. Charles, *Defeasible Second Amendment Rights: Conceptualizing Gun Laws That Dispossesses Prohibited Persons*, 83 LAW & CONTEMP. PROBS. 53, 54 (2020) (“The question of coverage asks whether the conduct or activity falls within the scope of the particular constitutional guarantee.”).

<sup>182</sup> See *id.* at 57.

<sup>183</sup> *Heller*, 55 U.S. at 626–27 & n.26.

<sup>184</sup> *Hope v. State*, 133 A.3d 519, 525 (Conn. App. Ct. 2016) (“The [Connecticut ERPO] statute is an example of the longstanding ‘presumptively lawful regulatory measures’ articulated in *District of Columbia v. Heller*.”).

<sup>185</sup> See, e.g., *Jackson*, 746 F.3d 953 at 958; *United States v. Huet*, 665 F.3d 588, 601 (3d Cir. 2012); *City of San Jose v. Rodriguez*, No. H040317, 2015 WL 1541988, at \*6 (Cal. Ct. App. Apr. 2, 2015).

<sup>186</sup> *Huet*, 665 F.3d 588.

<sup>187</sup> *Id.* at 603.

<sup>188</sup> *Id.* at 592.

possession.<sup>189</sup> When Huet challenged the indictment under the Second Amendment, the Third Circuit denied her motion to dismiss.<sup>190</sup> Instead, the court held that the indictment did not otherwise bar Huet from owning a legal firearm and her right to possess a gun was not implicated.<sup>191</sup> Instead, the Second Amendment did not protect carrying arms for “any purpose” and Huet’s right to possess a gun did not “give her the right to facilitate Hall’s possession of the weapon.”<sup>192</sup> The court said that *Heller’s* “longstanding prohibitions” like the prohibition allowing Huet’s indictment were “exceptions to the right to bear arms.”<sup>193</sup>

Huet’s difficulty in legally possessing a gun in the home she shared with a prohibited possessor could be considered an imposition on her right.<sup>194</sup> But the court concluded that her right to *own* a firearm was unaffected; the regulation simply restricted the *manner* in which she could do so.<sup>195</sup> The court noted that the indictment raised a “risk” that a cohabitant of a prohibited possessor might be subject “to liability simply for possessing a weapon in the home,” but that this particular case did not go that far.<sup>196</sup>

If a safe-storage requirement or cohabitant criminal liability does not fall under the umbrella of a presumptively lawful regulation, some level of scrutiny would be necessary if the court decided that the conduct falls under the scope of the Second Amendment.<sup>197</sup>

In the ERPO/DVRO context, self-defense could be especially important because cohabitants may need to defend themselves against the person subject to the order. The reasoning behind an ERPO/DVRO, after all, is typically that the respon-

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<sup>189</sup> *Id.* at 593.

<sup>190</sup> *Id.* at 601.

<sup>191</sup> *Id.* at 601–02.

<sup>192</sup> *Id.* at 602.

<sup>193</sup> *Id.* at 600.

<sup>194</sup> *Id.* at 602.

<sup>195</sup> *Id.* For an analysis of how courts apply the First Amendment doctrine of “time, place, and manner” restrictions to Second Amendment challenges to gun laws, see Jacob D. Charles, *Constructing a Constitutional Right: Borrowing and Second Amendment Design Choices*, 99 N.C. L. REV. 333, 351–52 (2021).

<sup>196</sup> *Huet*, 665 F.3d at 601.

<sup>197</sup> PECK, *supra* note 177, at i.



dent is “adjudged to pose a particular risk” of violence.<sup>198</sup> Any cohabitant could therefore plausibly assert a heightened need for armed self-defense.<sup>199</sup> *Heller* further identified the “law-abiding, responsible citizen[ ]” as a person whose interest in bearing arms was elevated.<sup>200</sup> A cohabitant is ostensibly law-abiding and is not directly subject to the restrictions of the order. The cohabitant may even be the law-abiding victim or other person the firearm restriction was intended to protect.<sup>201</sup>

Since regulation of a cohabitant otherwise might burden the core of the right—self-defense in the home by law-abiding citizens—some form of heightened scrutiny would apply.<sup>202</sup> Strict scrutiny is the “most exacting standard of review” where the government must show that the law furthers a compelling government interest while being narrowly tailored to serve that interest.<sup>203</sup> The compelling government interest “must specifically identify an ‘actual problem’ in need of solving,” and the “curtailment of [the constitutional right] must be actually necessary to the solution.”<sup>204</sup> Both of these prongs seem satisfied.

First, the most obvious government interest—public safety and preventing violent crime—is clearly compelling.<sup>205</sup> The na-

<sup>198</sup> *United States v. Mahin*, 668 F.3d 119, 125 (4th Cir. 2012).

<sup>199</sup> See generally Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L.J. 1257 (2017) (analyzing the “costs of ratcheting up the scope and enforcement of [domestic violence] firearms bans”).

<sup>200</sup> *Heller*, 554 U.S. at 635.

<sup>201</sup> See *supra* note 120.

<sup>202</sup> See *Masciandaro*, 638 F.3d at 470–71 (“[W]e assume that any law that would burden the ‘fundamental,’ core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny.”).

<sup>203</sup> PECK, *supra* note 177, at 15.

<sup>204</sup> *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (quoting *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822 (2000)).

<sup>205</sup> See, e.g., *United States v. Chapman*, 666 F.3d 220, 226–27 (4th Cir. 2012) (holding that “the government has carried its burden of establishing that reducing domestic gun violence is a substantial governmental objective of” [the federal DVRO firearm ban]); *United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011) (stating that the federal DVRO firearm ban “promote[s] the government’s interest in public safety consistent with our common law tradition”). See also Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1470 (2009) (“[V]irtually every gun control law is aimed at serving interests that would usually be seen as compelling—preventing violent crime, injury, and death.”).

ture of ERPOs and DVROs also suggests that any regulation of a cohabitant would be narrowly tailored. The orders themselves are already tailored specifically to the individual circumstances of the respondent, and a court has decided that the respondent represents an individualized threat to public or private safety.<sup>206</sup> The orders are also temporary—again, tailored to an individualized heightened risk that the respondent poses at that particular time.<sup>207</sup>

A safe-storage requirement during the period of the order is a relatively narrow way to avoid constructive possession by the respondent. A restrictive order would mean nothing if a respondent were able to constructively possess a cohabitant's firearm, alone in a private home with them. In order to remove the danger entirely and serve the order, a cohabitant must cut off the constructive possession or face liability.

Moreover, a safe-storage requirement only regulates the *manner* in which cohabitants exercise their Second Amendment rights. Certain types of safe-storage requirements, different than those struck down in *Heller*,<sup>208</sup> have been upheld as not burdening the core of the right, even within the home. The Ninth Circuit in *Jackson v. City & County of San Francisco*<sup>209</sup> upheld an ordinance that required handguns in the home be stored in a locked container or be disabled with a trigger lock if not being carried on the owner's person.<sup>210</sup> The court held that the ordinance was covered by the Second Amendment, but that it passed intermediate scrutiny.<sup>211</sup>

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<sup>206</sup> See, e.g., Blocher & Charles, *supra* note 18, at 1289 (calling ERPOs “tailored, individualized risk assessments”).

<sup>207</sup> *Domestic Violence*, GIFFORDS, *supra* note 78; *ERPOs*, GIFFORDS, *supra* note 63.

<sup>208</sup> *Heller*, 554 U.S. at 630.

<sup>209</sup> 746 F.3d 953, 964 (9th Cir. 2014).

<sup>210</sup> *Id.* at 958.

<sup>211</sup> *Id.* at 970. Justice Thomas and Justice Scalia disagreed with the Ninth Circuit and dissented from the denial of certiorari in the case. *Jackson v. City & Cnty. of San Francisco*, 135 S.Ct. 2799, 2800 (2015) (Thomas, J., dissenting from denial of cert.). However, the dissenters seemed to imply that they would take no issue with the law in particular circumstances, like having children in the home. *Id.* at 2800 (“The law applies across the board, regardless of whether children are present in the home.”).

In *City of San Jose v. Rodriguez*,<sup>212</sup> Edward Rodriguez's guns were confiscated from his home after his detainment for a mental health episode as required by a type of ERPO under California law.<sup>213</sup> Following the confiscation, the city petitioned for disposition of the firearms, arguing that a return of the weapons could endanger Edward or others.<sup>214</sup> His wife Lori challenged the petition under the Second Amendment because the guns were her joint property—including one gun she owned herself—and she claimed she would take necessary steps to secure the guns in a safe away from her husband the respondent.<sup>215</sup> The trial court upheld the city's petition for disposition of the guns, citing the possibility that Edward could overpower his wife or coerce her into opening the safe.<sup>216</sup> In examining Lori's appeal, the California appellate court found instructive that *Heller* "recognized that the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.'"<sup>217</sup>

## Conclusion

ERPOs and DVROs are powerful, targeted tools to prevent gun violence. But they are only successful to the extent that they actually keep firearms out of the hands of the respondents. Imposing cohabitant liability in the absence of safe storage is a powerful way to prevent the respondent's constructive possession. Such a requirement passes Second Amendment scrutiny and furthers the goals of firearm-restrictive orders.

More broadly, the analysis helps demonstrate that the Second Amendment debate must itself recognize the ways in which

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<sup>212</sup> *Rodriguez*, 2015 WL 1541988.

<sup>213</sup> *Id.* at \*1.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at \*2.

<sup>216</sup> *Id.* at \*3. In the context of the home, *Rodriguez* raises an interesting consideration: the potential for the prohibited possessor to overpower the cohabitant behind closed doors and gain access to the guns, even safely stored. This is especially problematic in DVRO context where a victim/cohabitant may already be involved in the abuser's cycle of domestic violence intimidation and control. See *Dynamics of Abuse*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/dynamics-of-abuse>.

<sup>217</sup> *Rodriguez*, 2015 WL 1541988, at \*7 (emphasis in original) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)).

gun rights are embedded in other structures and institutions—including the home. All too often, argument frameworks in the gun debate emphasize gun owners' fundamental individual right to keep and bear arms as if it stands alone, subject to regulation only in the name of "policy" considerations. As we have discussed above, that framing is plainly incorrect, even in the place—the home—where Second Amendment interests are at their "most acute."<sup>218</sup> Especially to the degree that the right itself is described in terms of personal safety, it must take into account the safety not only of gun-owners, but those with whom they interact—and for that matter, cohabit.

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<sup>218</sup> *Heller*, 554 U.S. at 628.