

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
R.M.,

Petitioner,

DECISION, ORDER
AND JUDGMENT

- against -

Index No. EF000434-2023

C.M.,

Respondent.

-----X
CRAIG STEPHEN BROWN, J.

Respondent C.M. moves for an order declaring CPLR §§ 6340-6347 unconstitutional and unenforceable.

The following papers were read:

Notice of Motion - Affirmation of Brittany A. Kessler, Esq. - 1 - 5

Memorandum of Law - Annexed Exhibit - Affidavit of Service

Upon the foregoing papers it is hereby ORDERED that the respondent C.M.'s motion is granted without opposition. It is ORDERED, ADJUDGED, and DECREED that CPLR §§ 6340-6347 are hereby declared unconstitutional, the Temporary Extreme Risk Protection Order dated January 20, 2023 is vacated, and the petition against respondent C.M. is dismissed.

The instant matter arises out of the issuance of a Temporary Extreme Risk Protection Order against the respondent C.M. on January 20, 2023. A petition, dated January 19, 2023, alleges that on January 18, 2023 at 230-232 Concord Lane, Middletown, New York the respondent brandished a loaded shotgun, cocked it, and pointed it at his neighbor during a verbal dispute. The respondent denies these allegations and challenges the constitutionality of New York's "Red Flag Law" as set

forth in CPLR §§ 6340-6347.

CPLR § 6340(1) defines "Extreme Risk Protection Order" as "a court-issued order of protection prohibiting a person from purchasing, possessing or attempting to purchase or possess a firearm, rifle or shotgun." Further, CPLR § 6340(2) provides that a "petitioner" may be a "police officer... district attorney... family or household member... a school administrator... or a school administrator's designee" including a teacher, guidance counselor, or school social worker. While "a licensed physician" or "licensed psychiatrist" *may*, under CPLR § 6340(2), be a petitioner, there is no requirement that such licensed professional be a petitioner or be involved in any manner to provide any evaluation or opinion whatsoever as a basis for the issuance of a Temporary Extreme Risk Protection Order ("TERPO") or a Final Extreme Risk Protection Order ("ERPO"). Therein lies one constitutional impediment with New York's Red Flag Law.

Without the requirement of any input from a medical or mental health expert, the Court is required to make a determination of whether the respondent "is likely to engage in conduct that would result in serious harm to himself, herself or others, as defined in... section 9.39 of the mental hygiene law" (CPLR § 6342[1]; CPLR § 6343[2]). Under Mental Hygiene Law § 9.39, a person's liberty rights cannot be curtailed unless a physician opines that the person is suffering from a condition "likely to result in serious harm." Further, in order to extend any such curtailment of liberty beyond 48 hours, a second doctor's opinion must be obtained and such opinion must be consistent with the first doctor's opinion. Absent from New York's Red Flag Law is any provision whatsoever requiring even a single medical or mental health expert opinion providing a basis for the order to be issued. New York's Red Flag Law, as currently written, lacks sufficient statutory guardrails to protect a citizen's Second Amendment Constitutional right to bear arms.¹

¹ The law is replete with issues regarding who will represent underage respondents, respondents confined to OMH facilities, and respondents who might otherwise qualify for

"Second Amendment rights are no less fundamental than... Fourth Amendment rights (the right to liberty), and must be provided the same level of due process and equal protection" (*G.W. v. C.N.*, 181 NYS3d 432, 437 [Sup. Ct., Monroe County 2022] citing *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 780, 130 S.Ct. 3020). Accordingly, this Court joins the Monroe County Supreme Court (Moran, J.) in holding that, "under CPLR 63-a, in order to pass constitutional muster, the legislature must provide that a citizen be afforded procedural guarantees, such as a *physician's* determination that a respondent presents a condition 'likely to result in serious harm,' before a petitioner files for a TERPO or ERPO. Since this standard is required to prevent a respondent from being deprived of fundamental rights under the Mental Hygiene Law, then anything less (as contained in 63-a) deprives a citizen of a fundamental right without due process of law" (*G.W. v. C.N.*, 181 NYS3d 432, 437-438 [Sup. Ct., Monroe County 2022]; see *State on Relation of Hector F. v. Lopez*, 69 Misc.3d 191 [Sup. Ct., New York County 2020]; see also *Rodriguez v. City of New York*, 72 F.3d 1051 [2d Cir. 1995]).² This Court declares CPLR §§ 6340-6347 to be unconstitutional.

The foregoing constitutes the Decision, Order, and Judgment of this Court.

Dated: April 4, 2023
Goshen, New York



HON. CRAIG STEPHEN BROWN
Acting Supreme Court Justice

indigent legal services. Underage respondents cannot legally represent themselves, nor can respondents confined to OMH facilities, yet there is no mechanism by which these parties are entitled to representation in these civil proceedings.

² On May 18, 2022, Governor Hochul signed an Executive Order limiting the discretion of law enforcement and requiring that the New York State Police "must" file applications for ERPOs, even if the respondent would otherwise already be prevented from purchasing or possessing a firearm, rifle, or shotgun. While certainly well-intentioned, the far-reaching impact of the Executive Order has resulted in applications being filed and hearings being held in hundreds of cases where seasoned law enforcement officers would have been aware that the respondents in those cases already were prevented from purchasing or possessing a firearm, rifle, or shotgun, thereby eliminating the necessity for an application to be filed.

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