No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID M. GRECO, individually and on behalf of others similarly situated,

Petitioner,

v.

MATTHEW J. PLATKIN, in his official capacity as Acting Attorney General of the State of New Jersey, et al,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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August 10, 2022

QUESTIONS PRESENTED

The questions presented are:

1. Whether the fact that the challenged portions of New Jersey's ERPO Act are "... *flagrantly and patently violative* ..." of the Fourth Amendment to the United States Constitution bars the Federal Courts, as a matter of fact and law, from abstaining under *Younger*?

2. Whether the District Court and Third Circuit incorrectly applied this Court's precedents in *Younger* and the limited extension of that doctrine to related civil, quasi-criminal and administrative cases pending in state court and wrongfully and inappropriately abstained?

3. Whether the New Jersey Attorney General's "Memo Fix" is a remedy that violates the rule in *United States v. Steve*ns, 559 U.S. 460 (2010)?

This case involves two parallel ongoing civil proceedings, one pending in New Jersey state court, the other pending in the United States District Court for the District of New Jersey. Both proceedings involve application of an admittedly unconstitutional New Jersey state statute, New Jersey's version of a "Red Flag Gun Law", the *New Jersey Extreme Risk Protective Order Act of 2018* ("ERPO Act"), New Jersey *Public Law* 2018, Chapter 35, now codified at *N.J.S.A.* 2C:58-20 through -32 (Appendix G, Appendix pages 111-128). To be clear, all parties agree – and the District Court below agreed – that

the challenged portion of New Jersey's ERPO Act is *per se* facially unconstitutional and as written clearly violates the Fourth Amendment.

The state court voluntarily indefinitely stayed their civil proceeding so as to allow the federal court to be the forum for the parties to litigate and address the issue that the challenged ERPO Act is unconstitutional. The limited nature of what remains of the state court proceeding (where determination is ultimately to be made as to whether to make temporary ex parte order a final order) does not permit a forum, or a meaningful adequate forum, for petitioner Greco to raise his constitutional challenge to a state statute that "everyone" already agrees as a matter of fact and law, as written, is unconstitutional and violates the Fourth Amendment.

Fourteen months after the case was filed in federal court and after the district court made a series of substantive decisions on the merits – *including a finding and ruling that the literal text of the ERPO Act was unconstitutional and violated the Fourth Amendment* – on December 11, 2020 the district court suddenly and inexplicably took a literal "about face" and denied plaintiff Greco's motion for partial summary judgment and an injunction and granted the defendant's motion to dismiss the federal case without prejudice on *Younger* abstention grounds. Petitioner Greco immediately appealed.

On appeal, the Third Circuit, in an initial "NOT PRECEDENTIAL" panel opinion, and later in a superseding "NOT PRECEDENTIAL" panel opinion on reconsideration (the only difference between the two opinions being an added footnote to the later superseding Opinion) affirmed the district court. Petitioner Greco now seeks from this Court a writ of certiorari to the United States Court of Appeals for the Third Circuit reversing

their affirmance of the district courts abstention under *Younger*.

In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction. Abstention is not in order simply because a pending state court proceeding involves the same subject matter. In *Younger v. Harris*, 401 U. S. 37 (1971) this Court ruled that the United States federal courts were required to abstain from hearing any civil rights tort claims brought by a person currently being *criminally prosecuted* in state court for matter arising from that same factual claim. However, Justice Black, the author of the majority opinion in Younger, specifically recognized and held that a state statute that is "*.... flagrantly and patently violative of express constitutional prohibitions...*" would qualify as an "*... extraordinary circumstance ...*" that would therefore exempt a given case from the *Younger* rule of abstention when there is a parallel ongoing state court *criminal* case. *Id.* at 53-54.

Originally the *Younger* abstention rule applied only when there were ongoing parallel state *criminal* proceedings. However, eventually over time this Court extended *Younger* abstention from the criminal only context so as to also apply to certain unique particular state *civil proceedings* that are akin to criminal prosecutions, *see Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), and also later extended the doctrine to also apply to certain unique *civil proceedings* that implicate a State's interest in enforcing the orders and judgments of its courts, *see Pennzoil Company v. Texaco Inc.*, 481 U.S. 1 (1987).

Next in time, in *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*") this Court recognized that there are only three

"exceptional" instances in which the prospect of undue interference with ongoing state court *civil proceedings* justifies a federal court from abstaining on *Younger* like grounds, stating that the three "exceptional" circumstances justifying abstention include only situations where the state court case involves: [1] "state criminal prosecutions," (not at issue here) [2] "civil enforcement proceedings," (not at issue here) and [3] "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." (not at issue here) *NPOSI*, 491 U.S., at 367–368.

In *Sprint Communications v. Jacobs*, 571 U.S. 69 (2013) this Court reaffirmed the very limited availability of *Younger* abstention in the civil context and quasi-criminal, reaffirming the principle that:

> ... even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the "exception, not the rule." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984) (quoting *Colorado River*, 424 U. S., at 813). In short, to guide other federal courts, we today clarify and affrm that *Younger* extends to the three "exceptional circumstances" identified in NOPSI, but no further. (Emphasis added). [*Sprint Communications, supra,* at 81-82].

Here, none of the three enumerated *NPOSI* "exceptional" circumstances remotely applies such that federal court abstention is appropriate.

Moreover, as previously noted Justice Black, the author of the majority opinion in *Younger*, specifically

recognized and held that a state statute that is "…. *flagrantly and patently violative of express constitutional prohibitions...*" would qualify as an "... *extraordinary circumstance* ..." that would therefore exempt a given case from the *Younger* rule of abstention when there is a parallel ongoing state court *criminal* case. *Younger, supra,* at 53-54. Here there is no question that the challenged portions of New Jersey's ERPO Act are "... *flagrantly and patently violative* ..." of the Fourth Amendment, so even if this were a case involving a parallel state criminal proceeding (it is not), abstention would still be inappropriate.

PARTIES TO THE PROCEEDING

David L Greco is the petitioner here and was the plaintiff-appellant below.

Matthew J. Platkin, in his official capacity as Acting Attorney General of the State of New Jersey, is a respondent here and was a defendant-appellee below.[1]

Laurie R. Doran, in her official capacity as Director of the New Jersey Office of Homeland Security and Preparedness, is a respondent here and was a defendant-appellee below.[2]

New Jersey Office of Homeland Security and Preparedness is a respondent here and was a defendant-appellee below.

Camden County Prosecutor's Office is a respondent here and was a defendant-appellee below.

Grace C. MacAulay, in her official capacity as Camden County Prosecutor is a respondent here and was a defendant-appellee below.[3]

Nevan Soumails, in her official capacity as an Assistant Camden County Prosecutor is is a respondent here and was a defendant-appellee below.

Gloucester Township Police Department is a respondent here and was a defendant-appellee below.

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[1] Gurbir S. Grewal was Attorney General at the time this case was filed and was later replaced by Andrew J. Bruck, who in turn has now been replaced by Mr. Platkin.

[2] Jared M. Maples was Director of the New Jersey Office of Homeland Security and Preparedness when this case was filed and has since been replaced by Ms. Doran.

[3] Jill S. Mayer was Acting Camden County Prosecutor at the time this lawsuit was filed and has since been replaced by Ms. MacAulay.

Bernard John Dougherty is a respondent here and was a defendant-appellee below.

Nicholas C. Aumendo is a respondent here and was a defendant-appellee below.

Donald B. Gansky is a respondent here and was a defendant-appellee below.

William Daniel Rapp is a respondent here and was a defendant-appellee below.

Brian Anthony Turchi is a respondent here and was a defendant-appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioner David L. Greco is an individual person.

STATEMENT OF RELATED PROCEEDINGS

Greco v. Bruck et al, No. 21-1035 (3rd Circuit) (Order issued May 13, 2022 granting Panel Rehearing and Superseding Panel Opinion and Judgment affirming District Court's dismissal based upon *Younger* abstention (also issued May 13, 2022).

Greco v. Bruck et al, No. 21-1035 (3rd Circuit) Initial Panel Opinion and Judgment affirming District Court's dismissal based upon *Younger* abstention (issued November 12, 2021).

Greco v. Grewal, et al, No. 3:19-cv-19145 (District of New Jersey) Opinion and Order dismissing case on *Younger* abstention grounds. (issued December 11, 2020).

Greco v. Grewal, et al, No. 3:19-cv-19145 (District of New Jersey) Opinion and Order denying plaintiff's second motion for Class Certification (issued September 29, 2020).

Greco v. Grewal, et al, No. 3:19-cv-19145 (District of New Jersey) Opinion and Order denying plaintiff's motion for a preliminary injunction (issued February 21, 2020.

Greco v. Grewal, et al, No. 3:19-cv-19145 (District of New Jersey) Order Administratively Terminating Plaintiff's First Motion for Class Certification and requiring further briefing on the issue of Article III standing of the plaintiff (issued January 17, 2020)

In the Matter of: David M. Greco, Petition Number 0415-XTR-2019-000001 (TERPO issued September 6, 2019, still pending final hearing in the Superior Court of New Jersey, Law Division, Criminal Part, Camden County, as the State Court has indefinitely stayed that hearing until the Federal Court rules on the Constitutional Issues.

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PETITION FOR WRIT OF CERTIORARI

This case involves two parallel ongoing civil proceedings, one pending in New Jersey state court, the other pending in the United States District Court for the District of New Jersey. Both proceedings involve application of an admittedly unconstitutional New Jersey state statute, New Jersey's version of a "Red Flag Gun Law", the *New Jersey Extreme Risk Protective Order Act of 2018* ("ERPO Act"), New Jersey *Public Law* 2018, Chapter 35, now codified at *N.J.S.A.* 2C:58-20 through -32 (Appendix G, Appendix pages 111-128).

Petitioner Greco had a secrete *ex parte* "Temporary Extreme Risk Protection Order" ("TERPO") and the mandatory accompanying civil Search Warrant and Seizure Order (Greco's was actually issued as a "no knock civil warrant") issued against him by a Superior Court Judge in New Jersey after a secrete two day hearing. Law enforcement then went to Greco's home, forcibly entered the home, and seized Greco's lawfully owned (licensed and registered) rifle and some ammunition. Before the final hearing date where a state court judge would determine whether to convert the TERPO into a Final Extreme Risk Protection Order" ("FERPO") Greco, through counsel, filed a federal civil rights lawsuit, filed as a proposed Class Action and brought pursuant to 42 U.S.C. §1983, in the United States District Court for the District of New Jersey. In the federal lawsuit Greco challenging provisions of the ERPO Act as being in violation of various provisions of the United States Constitution. Greco's claimed that the ERPO Act, both facially and as applied, violated his rights under the First, Second, Fourth and Fourteenth Amendments, and also his right to a jury trial as (Greco claimed) that the results flowing from a FERPO constituted a "consequence of

magnitude" within the meaning of this Court's precedent in *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989). Greco sought an order granting and certifying the case as a Class Action, along with various claims for declaratory and injunctive relief, damages and attorney's fees and costs. Greco specifically brought his federal claims in a separate lawsuit in federal court because the state court statutory FERPO hearing process does not provide any mechanism or vehicle to raise his constitutional claims.

In *Camara v. Municipal Court*, 387 U.S. 523 (1967) the United States Supreme Court made it clear that the "probable cause" legal standard and requirement of the United States Constitution's Fourth Amendment applies not only to criminal searches but equally applies to all civil and administrative searches conducted under the authority of a State. The ERPO Act, specifically N.J.S.A. 2C:58-23(f), mandates that a civil search and seizure warrant be issued on a much lesser "good cause" legal standard. As such, the ERPO Act fails to satisfy the mandatory requirements of the Fourth Amendment and is *per se* facially unconstitutional. This is not just Greco's view: It is literally the view of all parties to this litigation, and it was the view of the District Court Judge below! Otherwise stated, "everyone" agrees that the ERPO Act, specifically the portion now codified at N.J.S.A. 2C:58-23(f), is *per se* facially unconstitutional.

Because the undisputable reality that the literal text of the ERPO Act so clearly violates the Fourth Amendment, the remainder of Greco's claims – while very important and legitimate – were essentially cumulative as surely no fair court would sit by quietly and permit such a flagrantly unconstitutional state statute to remain active and undisturbed. As such, Greco immediately moved

upon filing for a preliminary injunction prohibiting implementation of the ERPO Act because there was no question that the ERPO Act violated the Fourth Amendment. Indeed, Greco's position that the ERPO Act was unconstitutional and violated the Fourth Amendment was supported by a formal MEMO from the defendant New Jersey Attorney General's Office themselves! Again, to be absolutely clear, all parties agree – and the District Cout below agreed – that the challenged portion of New Jersey's ERPO Act is *per se* facially unconstitutional and as written clearly violates the Fourth Amendment.

The state court voluntarily indefinitely stayed their civil proceeding (the FERPO hearing) so as to allow the federal court to be the forum for the parties to litigate and address the issue that the challenged ERPO Act is unconstitutional, and to determine a remedy. The limited nature of what remains of the state court proceeding (where determination is ultimately to be made as to whether to make temporary *ex parte* order a final order) does not permit a forum, or a meaningful adequate forum, for petitioner Greco to raise his constitutional challenge to a state statute that "everyone" already agrees as a matter of fact and law, as written, is unconstitutional and violates the Fourth Amendment.

As described in more detail *infra*, the District Court ultimately denied the application for a preliminary injunction on a technicality, but in so doing also stated at page 13 of the Opinion as follows: "Here, Plaintiff has established a reasonable probability of success on the merits, because the plain language of the ERPO Act is violative of the Fourth Amendment." (Emphasis added) (*See* APPENDIX E, Appendix page 90).

Ultimately (and frankly quite unexpectedly), fourteen months after the case was filed in federal court,

after the district court had rejected time and time again the state's *Younger* abstention request, after a series of substantive decisions on the merits – *including a finding and ruling that the literal text of the ERPO Act was unconstitutional and violated the Fourth Amendment* – on December 11, 2020 the district court suddenly and inexplicably took a literal "about face" and denied plaintiff Greco's motion for partial summary judgment and a permanent injunction (the technicality that prevented the issuance of a preliminary injunction being overcome) and granted the defendant's motion to dismiss the federal case without prejudice on *Younger* abstention grounds. (*See* APPENDIX C, Appendix pages 29-52). Petitioner Greco immediately appealed.

On appeal, the Third Circuit, in an initial "NOT PRECEDENTIAL" panel opinion (*See* APPENDIX B, Appendix Pages 16-28) , and later in a superseding "NOT PRECEDENTIAL" panel opinion on reconsideration (the only difference between the two opinions being an added footnote to the later superseding Opinion) (*See* APPENDIX A, Appendix pages 1-15) affirmed the district court. Petitioner Greco now seeks from this Court for a writ of certiorari to the United States Court of Appeals for the Third Circuit reversing their affirmance of the district courts abstention under *Younger*.

Here, Greco claims that the district court, and the Third Circuit on appeal, demonstrably misapplied Younger and that the matter should be reversed for Greco to proceed with his federal claims in federal court where they belong.

In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction. Abstention is not in order simply because a pending state court proceeding involves the same subject matter. In *Younger*

v. Harris, 401 U. S. 37 (1971) this Court ruled that the United States federal courts were required to abstain from hearing any civil rights tort claims brought by a person currently being *criminally prosecuted* in state court for matters arising from that same factual claim. However, Justice Black, the author of the majority opinion in Younger, specifically recognized and held that a state statute that is "…. *flagrantly and patently violative of express constitutional prohibitions*..." would qualify as an "... *extraordinary circumstance* ..." that would therefore exempt a given case from the *Younger* rule of abstention when there is a parallel ongoing state court *criminal* case. *Id.* at 53-54.

Originally the *Younger* abstention rule applied only when there were ongoing parallel state *criminal* proceedings. However, eventually over time this Court extended *Younger* abstention from the criminal only context so as to also apply to certain unique particular state *civil proceedings* that are akin to criminal prosecutions, *see Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), and also later extended the doctrine to also apply to certain unique *civil proceedings* that implicate a State's interest in enforcing the orders and judgments of its courts, *see Pennzoil Company v. Texaco Inc.*, 481 U.S. 1 (1987).

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criminal prosecutions," (not at issue here) [2] "civil enforcement proceedings," (not at issue here) and [3] "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." (not at issue here) *NPOSI*, 491 U.S., at 367–368.

In *Sprint Communications v. Jacobs*, 571 U.S. 69 (2013) this Court reaffirmed the very limited availability of *Younger* abstention in the civil, quasi-criminal and administrative context, reaffirming the principle that:

> ... even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the "exception, not the rule." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984) (quoting *Colorado River*, 424 U. S., at 813). In short, to guide other federal courts, we today clarify and affrm that *Younger* extends to the three "exceptional circumstances" identified in NOPSI, but no further. [*Sprint Communications, supra*, at 81-82].

Here, the none of the three enumerated *NPOSI* "exceptional" circumstances applies such that federal court abstention is appropriate.

Moreover, as previously noted Justice Black, the author of the majority opinion in *Younger*, specifically recognized and held that a state statute that is "*.... flagrantly and patently violative of express constitutional prohibitions...*" would qualify as an "*... extraordinary circumstance ...*" that would therefore exempt a given case from the *Younger* rule of abstention when there is a parallel ongoing state court *criminal* case. *Younger*,

supra, at 53-54. Here there is no question that the challenged portions of New Jersey's ERPO Act are "... *flagrantly and patently violative* ..." of the Fourth Amendment, so even if this were a criminal case (it is not), abstention is inappropriate.

For these reasons, and for the reasons stated herein, Greco herby seeks a writ of certiorari to the Third Circuit reversing the May 13, 2022 Opinion and Judgment. (*See* APPENDIX A, Appendix pages 1-15).

OPINIONS BELOW

The Third Circuit's superseding panel opinion on rehearing was specifically designated as "NOT PRECEDENTIAL" and was not published and is reproduced at Appendix pages 1-15. The Third Circuits original panel opinion was specifically designated as "NOT PRECEDENTIAL" and was not published and is reproduced at Appendix pages 16-28. The district court's opinion dismissing the case on *Younger* grounds was therefore not published and was specifically designated as "NOT FOR PUBLICATION" and is reproduced at Appendix 29-52. The district court's opinion denying plaintiff's second motion for Class Certification was not published and was specifically designated as "NOT FOR PUBLICATION" and is reproduced at Appendix pages 53-72. The district court's opinion denying plaintiff's motion for a preliminary injunction was not published and was specifically designated as "NOT FOR PUBLICATION" and is reproduced at Appendix pages 73-107. The district court's Order administratively terminating plaintiff's first motion for Class Certification and requiring the parties to further brief the issue of plaintiff's Article III standing is reproduced at pages 108-110.

JURISDICTION

The Third Circuit issued its superseding panel opinion on May 13, 2022. This Court has jurisdiction under 29 U.S.C. §1254(q).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." [United States Constitution, amend. I].

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[United States Constitution, amend. II].

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." [United States Constitution, amend. IV].

The Fourteenth Amendment provides in relevant part: "*** ... No State shall make or enforce any law which shall ... deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction toe equal protection of the laws. ... ***" [United States Constitution, amend. XIV].

42 U.S.C. §1983 provides as follows: "Every person, who, under color of any statute, ordinance, regulation,

custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person in the jurisdiction thereof to be deprived of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section any act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia." [42 U.S.C. §1983].

Article I, paragraph 7 of the New Jersey State Constitution (1947) provides: "7. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized." [New Jersey State Constitution, Article I, paragraph 7].

The "*New Jersey Extreme Risk Protective Order Act of 2018*", New Jersey Public Law 2018, Chapter 35, now codifies at N.J.S.A. 2C:58-20 through -32 is reproduced at APPENDIX G, Appendix page 111-128.

STATEMENT OF THE CASE

A. Factual Background:

On June 13, 2018 New Jersey's version of a "Red Flag Gun Law"[1], the "*New Jersey Extreme Risk Protective*

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[1] A "Red Flag Gun Law" generally refers to a state *civil* gun control law that permits police or family members to petition a state court in a *civil* legal proceeding for an Order directing the temporary turn over by the subject, or physical removal by the police, of any and all firearms owned by the subject or firearms otherwise located in the home of the subject who is alleged to present a danger to themselves

Order Act of 2018" ("ERPO Act"), New Jersey *Public Law* 2018, Chapter 35, now codified at *N.J.S.A.* 2C:58-20 through -32 (Appendix G, Appendix pages 111-128), was passed into law by the New Jersey State Legislature and signed into law by the New Jersey Governor. At least seventeen other states have enacted some version of a "Red Flag Gun Law" to date.[2]

Typically in other states where law enforcement is proceeding under that state's version of a Red Flag Gun Law, a court is presented with preliminary information in a civil complaint or petition alleging that a person who lawfully owns guns[3], the "subject", may be a danger to themselves or others. If the state court is satisfied the allegations may be true the state court in turn merely enters an initial court order directing the subject to show cause at a hearing or otherwise to voluntarily turn over his or her weapons to law enforcement upon demand – with monitoring and later use of the contempt power to enforce if the turn over order is not promptly and voluntarily complied with. Generally the subject has the right to advance notice and the right to object and have their position heard by the state court before circumstances escalate to forcible government entry into a

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or to others. Generally in this *civil* proceeding a state judge makes the preliminary determination whether to issue a temporary order based upon evidence submitted regarding statements and actions of the subject. A later hearing is held to determine whether to make the weapons seizure final and permanent.

[2] Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Maryland, Massachusetts, New Mexico, Nevada, New York, Oregon, Rhode Island, Vermont, Virginia, Washington.

[3] Many states through their regulatory licensing and permit function have comprehensive lists of every handgun, rifle or shotgun that is lawfully owned. New Jersey is just such a state.

subject's home and seizure of their lawfully owned weapons and ammunition. And consistent with the Fourth Amendment, any search and seizure order that may ultimately have to be issue by the state court is only issued on a specific judicial finding that the high "*probable cause*" legal standard has been satisfied and that (1) there is *probable cause* to believe that subject is a danger to themselves or others, (2) that there is *probable cause* to believe that a search for and seizure of the subjects lawfully owned weapons is necessary to protect the safety and wellbeing of the subject or others, and (3) that there is *probable cause* to believe that the lawfully owned weapons of the subject are that moment located in the particular location and place to be searched.

New Jersey's version of a Red Flag Gun Law, however, goes much *much* further and is by far the most far reaching and draconian of all "Red Flag Gun Laws" enacted to date. New Jersey's Red Flag Gun Law – the ERPO Act – by the terms and conditions in the literal text of the statute itself blatantly violates the United States Constitution and New Jersey State Constitution in many and various ways. However, the most blatant and obvious way that the ERPO Act violates the federal and New Jersey State Constitution – what immediately separates the ERPO Act from those enacted in other states – is that at the initial complaint / petition stage of the proceedings the statute directs that the much lesser "*good cause*" legal standard be used by the state court when determining whether to issue a "Temporary Emergency Risk Protection Order" ("TERPO") and the statutorily mandated automatic accompanying search warrant and seizure order that authorizes law enforcement to kick in the front door to a subject's home and authorizes law

enforcement to forcibly seize a subject's lawfully owned guns and ammunition.

No other state's Red Flag Gun Law operates this way. And for good and simple and obvious reasons: Such a procedure is without any reasonable question clearly prohibited by literal text of the Fourth Amendment to the United States Constitution (and in this case also by the New Jersey State Constitution's related parallel Article I, paragraph 7) which unambiguously requires the government to satisfy the much heightened "*probable cause*" legal standard before a state court may issue a search warrant and seizure order. Moreover, it is not just petitioner Greco that maintains that the literal and governing text of New Jersey's ERPO Act is *per se* unconstitutional and facially violates the "*probable cause*" standard of the Fourth Amendment to the United States Constitution. After initial passage of the ERPO Act on June 13, 2018 and before the Act actually went into legal force and effect on September 1, 2019, as circumstances developed, on July 24, 2019, New Jersey Supreme Court issued their decision in the unrelated case of *State v. Hemenway*, 239 N.J. 111, 216 A.3d. 118 (2019) which addressed another New Jersey civil statute, the "New Jersey Prevention of Domestic Violence Act of 1991", N.J.S.A. 2C:25-17 et seq., and addressed the question of "... whether the *reasonable cause standard* for the issuance of a domestic violence search warrant for weapons [that is used in the DV Act] is incompatible with the Fourth Amendment and Article 1 paragraph 7 of our State Constitution." (Emphasis added). The New Jersey Supreme Court quickly concluded that it did and ruled that: "... Before issuing a search warrant for weapons as part of a TRO under the Domestic Violence Act, a court must find that there is (1) probable cause to believe that

an act of domestic violence has been committed by the defendant..., (2) probable cause to believe that a search for and seizure of weapons is 'necessary to protect the life, health or well-being of a victim or on whose behalf the relief is sought,' ... and (3) probable cause to believe that the weapons are located in the place to be searched." (citations omitted). [*Id.* at 136].

In light of the *Hemenway* decision, on August 12, 2019 the New Jersey Administrative Office of the Courts issued *Directive* #19-19 – MEMO on "Guidelines for Extreme Risk Protective Orders" (hereinafter AOC Directive 19-19") where at page 6 it was openly acknowledged that the literal text of the ERPO Act as enacted by the Governor and Legislature that was about to go into effect on September 1, 2019 that required issuance of a search warrant on a "good cause" legal standard (found at N.J.S.A. 2C:58-26(b)) was in fact unconstitutional and a clear violation of the Fourth Amendment to the United States Constitution and Article 1, paragraph 7 of the New Jersey State Constitution (1947). Similarly, on August 15, 2019 the defendant New Jersey Attorney General's Office too issued a formal MEMO entitled "Attorney General Directive Pursuant to the Extreme Risk Protective Act of 2018" which itself cited to and acknowledge the AOC Directive 1919 and which MEMO agreed also independently concluded that the literal text of the ERPO Act that required issuance of a search warrant on a "good cause" legal standard (found at N.J.S.A. 2C:58-26(b)) was in fact a clear violation of the Fourth Amendment to the United States Constitution and Article 1, paragraph 7 of the New Jersey State Constitution (1947) rendering the statute unconstitutional. Again, this was weeks *before* the ERPO Act was set to go into effect on September 1, 2019.

Indeed, after September 6, 2019 when the *ex parte* TERPO was issued against Greco resulting in Greco filing this action in the Federal District Court, on November 20, 2019 when Greco's application for a preliminary injunction was orally argued in the Federal District Court below, even the District Court Judge immediately agreed that the ERPO Act's use of the "good cause" legal standard rather than the heightened "probable cause" standard specifically required by the Fourth Amendment rendered at least that portion of the ERPO Act clearly and without reasonable question unconstitutional. The relevant colloquy between the District Court Judge and the defendant Attorney General at oral argument was as follows:

> THE COURT: [To the State] Okay. You could all be seated.
>
> Before we get started, could we agree for purposes of this hearing that on its face this law is unconstitutional?
>
> MR. FANAROFF: [For the State] That's quite an opener, your Honor....
>
> [Transcript of Proceedings of November 20, 2019 at Page 3 Line 19 through Line 22].
>
> ***
>
> THE COURT: Okay. The part of the law that's before the Court, would it be fair to say, is, as written, unconstitutional?
>
> [Transcript of Proceedings of November 20, 2019 at Page 4 Line 7 through Line 9].
>
> ***
>
> THE COURT: [To the State, visibly laughing] You're not going to say it, are you?
>
> [Transcript of Proceedings of November 20, 2019 at Page 5 Line 1].

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> THE COURT: Can we say then - - can we agree that the standard that's written into this act has the same issues that the Court found in *Hemminway*? Where the act was found unconstitutional?
> MR. FARNOFF: Right. ...
> [Transcript of Proceedings of November 20, 2019 at Page 5 Line 9 through Line 12].
>
> ***
>
> THE COURT: [to the State] *And what would you suggest, aside from the Younger abstention doctrine, assuming this Court does not abstain, how would this be handled?* (Emphasis added).
> [Transcript of Proceedings of November 20, 2019 at Page 7 Line 5 through Line 7].

Later, when denying Greco's motion for a preliminary injunction on the merits[4], the district court in a written Opinion once again reaffirmed that the part of the act requiring use of a "good cause" legal standard rather than the required "probable cause" legal standard required by the Fourth Amendment rendered the ERPO Act unconstitutional. The district court stated at page 13 of the Opinion as follows: "Here, Plaintiff has established a reasonable probability of success on the merits, because the plain language of the ERPO Act is violative of the

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[4] The district court openly agreed that the ERPO Act was unconstitutional. However, based upon the preliminary injunction factors, the district court concluded that Greco was not "irreparably harmed" because Greco could move at any time in the state court for return of his weapons. Point in fact, Greco had an agreement in good faith not to move for return of his weapons so that the legal issues could be litigated fairly. Then this was unfairly used against him as a basis to deny his request for a preliminary injunction.

Fourth Amendment." (*See* APPENDIX E, Appendix page 90).

There were essentially two "defenses" asserted by the defendant Attorney General at oral argument on the preliminary injunction application. The first was that – despite the literal ERPO Act being clearly *per se* facially unconstitutional – that nevertheless the federal district court should abstain under *Younger v. Harris*, 401 *U.S.* 37 (1971). In the District Court's February 21, 2020 Opinion the Court seemingly rejected this argument out of hand, and never once mentioned *Younger* or abstention. Petitioner Greco believed that the issue had been rejected by the district court out of hand at oral argument based upon the Court's own comments.[5] The second "defense" was that while the challenged portion of the literal text of the ERPO Act was unconstitutional, that the Attorney General had applied a "Memo Fix" in that the State Executive Branch Attorney General and the State Judicial Branch Administrative Office of the Courts had both issued "Memos" directing law enforcement and state courts to ignore the actual literal text of the unconstitutional ERPO Act and to use a "probable cause" standard rather than a "good cause" legal standard. This absurdity is no fix at all and may not be accepted by the federal courts. *See infra.*

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[5] Indeed, the after oral argument the Court entered an Order directing the parties to further brief the issue of plaintiff Greco's Article III standing before the Court would rule. No request was made from the Court for further briefing on the issue of *Younger* abstention. (*See* January 17, 2020 Order at APPENDIX E, Appendix pages 108-110).

B. Procedural History:

On September 5, 2019 application was made to the New Jersey State Courts by New Jersey Law Enforcement seeking a TERPO against Greco. It was not looked at until the next day on September 6, 2019 after which a secrete *ex parte* hearing was held, the "good cause" legal standard was used[6], and a State Court Judge issued a TERPO with the mandatory accompanying (here, "no knock") Search Warrant and Seizure Order. That same September 6, 2019 Law Enforcement used their search warrant and seizure order to gain access to Greco's home and to confiscate Greco's lawfully owned his guns and ammunition.

Before the final hearing date where a state court judge would determine whether to convert the TERPO into a Final Extreme Risk Protection Order" ("FERPO") Greco, through counsel, filed a federal civil rights lawsuit, filed as a proposed Class Action and brought pursuant to 42 U.S.C. §1983, in the United States District Court for the District of New Jersey. In the federal lawsuit Greco challenging many and various provisions of the ERPO Act as being in violation of various provisions of the United States Constitution. Greco's claims that the ERPO Act, both facially and as applied, violated his rights under the First, Second, Fourth and Fourteenth Amendments, and also his right to a jury trial as (Greco claimed) that the results flowing from a FERPO constituted a "consequence of magnitude" within the meaning of this Court's

---

[6] The Attorney General claims that their "Memo Fix" resulted in the State Court using a "probable cause" legal standard rather than the statutory "good cause" legal standard. The record indicates otherwise, but since the challenged statute is *per se* facially unconstitutional this is not really a material dispute.

precedent in *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989). Greco sought an order granting and certifying the case as a Class Action, along with various claims for declaratory and injunctive relief, damages and attorney's fees and costs. Greco specifically brought his federal claims in a separate lawsuit in federal court because the state court statutory FERPO hearing process does not provide any mechanism or vehicle to raise his constitutional claims.

Greco first moved for a preliminary injunction. The defendant Attorney General asserted that the District Court should abstain under *Younger*, and cumulatively argued that in any event their bizarre and extralegal "Memo Fix" cured the Fourth Amendment unconstitutionality in the literal text of the ERPO Act.

After oral argument before a decision was rendered the District Court directed the parties to further brief the issue of Greco's "Article III Standing", there was no request for any further briefing on the issue of *Younger* abstention which the district court has rejected out of hand at oral argument. (*See* January 17, 2020 Order at APPENDIX F, Appendix page 108-110).[7]

As described more detail *supra* (*see* Footnote 4, supra) the District Court ultimately denied Greco's application for a preliminary injunction on a "technicality", but in so doing stated at page 13 of the Opinion as follows: "Here, Plaintiff has established a reasonable probability of success on the merits, because the plain language of the ERPO Act is violative of the

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[7] The January 17, 2020 Order also "administratively terminated" without prejudice Greco's first motion for Class Certification without addressing the substance of such motion.

Fourth Amendment." (Emphasis added) (*See* APPENDIX E, Appendix page 90).

Greco filed a second motion for Class Certification and also a motion for Partial Summary Judgment on the Fourth Amendment claim seeking declaratory judgment and now permanent injunctive relief. The Defendants filed responsive pleadings, specifically motions to dismiss on *Younger* abstention grounds, and argument already rejected by the district court.

On September 29, 2020 the Court denied Greco's second motion for Class Certification, this time on the merits, and without prejudice. (*See* APPENDIX D, Appendix page 53-72)

Ultimately (and frankly quite unexpectedly), fourteen months after the case was filed in federal court, after the district court had rejected time and time again the state's *Younger* abstention request, after a series of substantive decisions on the merits – *including a finding and ruling that the literal text of the ERPO Act was unconstitutional and violated the Fourth Amendment* – on December 11, 2020 the district court suddenly and inexplicably took a literal "about face" and denied plaintiff Greco's motion for partial summary judgment and a permanent injunction (the technicality that prevented the issuance of a preliminary injunction being overcome) and granted the defendant's motion to dismiss the federal case without prejudice on *Younger* abstention grounds. Petitioner Greco immediately appealed. (*See* APPENDIX C, Appendix pages 29-52).

On appeal, the Third Circuit, in an initial "NOT PRECEDENTIAL" panel opinion (*See* APPENDIX B, Appendix Pages 16-28), and later in a superseding "NOT PRECEDENTIAL" panel opinion on reconsideration (the only difference between the two opinions being an added

footnote to the later superseding Opinion) (*See* APPENDIX A, Appendix pages 1-15) affirmed the district court dismissal on *Younger* grounds clearly misapplying the law.

Petitioner Greco now seeks from this Court for a writ of certiorari to the United States Court of Appeals for the Third Circuit reversing their affirmance of the district courts abstention under *Younger*.

REASONS FOR GRANTING THE PETITION

I. Under Existing Precedents *Younger* Abstention Does Not Apply Here And This Court Should Reaffirm The Very Limited Circumstances Under Which *Younger* Abstention May Apply To Justify A Federal Court Declining To Exercise Jurisdiction When There Are Related State Civil, Quasi-Criminal, Or Administrative Cases Pending

A. Article III Subject Matter Jurisdiction Generally

This case requires consideration of the most basic of principles regarding Article III subject matter jurisdiction of the federal courts. To recount, although the text of the Constitution's Article III defines the maximum extent of judicial power, the Constitution also gives Congress the authority, "[w]ithin constitutional bounds, [to] decide[] what cases the federal courts have jurisdiction to consider." *Bowles v. Russell*, 551 U.S. 205, 212 (2007). A federal court always has the authority to determine whether it has jurisdiction to hear a particular case. *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (citing *United States v. Mine Workers of America*, 330 U.S.

258, 291 (1947)). In this regard, in all cases a federal court is presumed to lack subject matter jurisdiction and the party invoking federal jurisdiction bears the burden of persuasion on jurisdiction. "It is to be presumed that a cause lies outside [of a federal courts'] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375, 377 (1994) (citations omitted). Moreover, at all times all Federal Courts have a continuing and "... independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corporation*, 546 U.S. 500, 514 (2006) (citing *Ruhgras AG v. Marathon Oil Company*, 526 U.S. 574, 583 (1999)). A federal court must generally determine whether it has jurisdiction at the outset of litigation and must always make this determination before deciding the merits of a particular case. A court "generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in the suit (subject-matter jurisdiction) ...[.]" *Sinochem International Company, Ltd. v. Malaysia International Shipping Corporation*, 549 U.S. 422, 430-431 (2007).

B. *Younger* Abstention In The Civil, Quasi-Criminal and Administrative Context Is The Exception, Not The Rule

In *Younger v. Harris*, 401 U. S. 37 (1971) this Court ruled that the United States federal courts were required to abstain from hearing any civil rights tort claims brought by a person currently being *criminally prosecuted* in state court for matter arising from that same factual claim. However, Justice Black, the author of the majority

opinion in Younger, specifically recognized and held that a state statute that is "*.... flagrantly and patently violative of express constitutional prohibitions...*" would qualify as an "*... extraordinary circumstance ...*" that would therefore exempt a given case from the *Younger* rule of abstention when there is a parallel ongoing state court *criminal* case. *Id.* at 53-54.

Originally the *Younger* abstention rule applied only when there were ongoing parallel state *criminal* proceedings. However, eventually over time this Court extended *Younger* abstention from the criminal only context so as to also apply to certain unique particular state *civil proceedings* that are akin to criminal prosecutions, *see Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), and also later extended the doctrine to also apply to certain unique *civil proceedings* that implicate a State's interest in enforcing the orders and judgments of its courts, *see Pennzoil Company v. Texaco Inc.*, 481 U.S. 1 (1987).

Next in time, in *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*") this Court recognized that there are only three "exceptional" instances in which the prospect of undue interference with ongoing state court *civil proceedings* justifies a federal court from abstaining on *Younger* like grounds, stating that the three "exceptional" circumstances justifying abstention include only situations where the state court case involves: [1] "state criminal prosecutions," (not at issue here) [2] "civil enforcement proceedings," (not at issue here) and [3] "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." (not at issue here) *NPOSI*, 491 U.S., at 367–368.

In *Sprint Communications v. Jacobs*, 571 U.S. 69, 81-82 (2013) this Court reaffirmed the very limited availability of *Younger* abstention in the civil context and quasi-criminal, reaffirming the principle that:

> ... even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the "exception, not the rule." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984) (quoting *Colorado River*, 424 U. S., at 813). In short, to guide other federal courts, we today clarify and affrm that *Younger* extends to the three "exceptional circumstances" identified in NOPSI, but no further.

Here, the none of the three enumerated *NPOSI* "exceptional" circumstances remotely applies, and therefore abstention was in error.

C. Cumulatively, The *"Flagrantly And Patently Unconstitutional"* Exception Bars *Younger* Abstention in this Case

Cumulatively, as previously noted Justice Black, the author of the majority opinion in *Younger*, specifically recognized and held that a state statute that is "*.... flagrantly and patently violative of express constitutional prohibitions...*" would qualify as an "*... extraordinary circumstance ...*" that would therefore exempt a given case from the *Younger* rule of abstention when there is a parallel ongoing state court *criminal* case. *Younger, supra,* at 53-54. Here there is no question that the challenged portions of New Jersey's ERPO Act are "*... flagrantly and patently violative ...*" of the Fourth

Amendment, so even if this were a criminal case (it is not), abstention is unavailable.

II. This Court Should Protect Greco's Fourth Amendment Rights From Blatant Government Violation As the "Memo Fix" Is Not Valid Nor Is It A "Cure" That This Federal Court May Accept:

Unlike many other sister states, in New Jersey, simply utter the word "gun" in the halls of the State Legislature, and suddenly all common sense and reason goes out the window. Guns, intimate objects, are somehow seen by the temporary majority in power at the moment as inherently "bad", and in the effort to protect (perceived) "good" from "bad", a statute was passed – the ERPO Act – which literally ignored many of the most basic constitutional rights that our forefathers literally fought wars over. The ERPO Act is hardly the first politically controversial and constitutionally defective New Jersey state legislation that was passed into law during a moment of emotion that sought to legislatively address a perceived problem, but did so in a way that was unconstitutional and simply not permissible. Separate from the inapplicability of *Younger* abstention in this case, directly at issue in this case as a secondary issue is the propriety (or actually *impropriety*) of the actions of New Jersey government officials who are faced with the square reality that a statute they are charged with enforcing is clearly and undisputable unconstitutional. Where the Attorney General himself has conceded in writing that the challenged statute is unconstitutional! The "Memo Fix" is not valid and must be declared so.

There are proper ways for the New Jersey State Government Officials to responsibly and legally deal with

a blatantly facially *per se* unconstitutional statute. Here, because of the political polarization caused in New Jersey to literally "anything that pertains to guns and the Second Amendment", a bizarre (the Attorney General might argue "creative") response has come out of the New Jersey Government as to how to deal with a blatantly facially *per se* unconstitutional statute. But as described in more detail, infra., this nonsensical "Memo Fix" is not something that this Court may accept as a legitimate remedy and it simply is not valid.

Before proceeding, it is important to note that there is a wealth of historical – and *legal* - precedent to rely upon as examples where controversial politics and legal realities have been properly harmonized. The rights enshrouded in our Constitution are for the ages, not to be ignored as politically inconvenient in a moment of hysteria.

For example, the New Jersey Attorney General in the past literally refused and declined to "defend" a *per se* facially unconstitutional statute against a legal challenge in Court. *See Planned Parenthood of Central New Jersey v. Verniero*, 41 F.Supp.2d 478 (D.N.J. 1998) (Thompson), *aff'd sub nom Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127 (2000) (Alito, Barry & Garth) (where the New Jersey Attorney General declined to defend a Federal Court challenge to the constitutionality of the "New Jersey Partial-Birth Abortion Ban Act of 1997", *N.J.S.A.* 2A:65A-6(e), passed into law by the legislature overriding the Governor's veto) because the law was clearly *per se* facially unconstitutional.). Yet that path was not chosen here. There is also historical and legal precedent in New Jersey jurisprudence on how to *properly* "fix" an unconstitutional statute or a questionably constitutional statute, which simply requires

either the State Legislature and Governor to act and enact completely new amending and revising or repealing statutory law. *See* and compare *State v. Breakiron*, 108 *N.J.* 591, 522 A.2d 199 (1987) with *Humanik v. Beyer*, 871 *F.2d* 432 (3d. Cir.), *cert* denied 493 *U.S.* 812 (1989) (resulting in the curative enactment of Law 1990, Chapter 63, sec. 1).[8] Another precedent and example of a reasonable *and legal* remedy is the State Legislature proposing a State Constitutional Amendment to the People. *See* Emergent Orders in *Save Our Shore District v. New Jersey Redistricting Commission*, 131 N.J. 159, 619 A2d 1005 (1992) and *Brady v. New Jersey Redistricting Commission* 131 N.J. 160, 619 A2d 1005 (1992) (Supreme Court agreeing with *Save our Shore District* and declaring portion of Law 1991, Chapter 510, N.J.S.A. 19:46-6 to -14 unconstitutional, but then severing the unconstitutional portion), later (consolidated) full Court Opinion at 131 *N.J.* 594, 622 A.2d 843 (1992)) (resulting in Amendment to the New Jersey State Constitution (1947), now found at Article II, Section II (Added effective December 7, 1995)). In the case of *In re: Wheeler*, 433 N.J.Super. 560, 81 A.3d 728 (App. Div. 2013), a "gun control case", a Second Amendment case was brought challenging a New Jersey statutory

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[8] Indeed, after the Third Circuit declared *N.J.S.A.* 2C:4-2 (the "Diminished Capacity Defense Statute") unconstitutional in *Humanik v. Beyer*, then New Jersey Chief Justice Wilentz immediately took prophylactic measures by issuing a *temporary* directive instructing trial courts that, going forward, they were no longer to follow the literal wording of the statute and require a defendant raising the diminished capacity defense to prove the asserted disease or defect by a preponderance of the evidence. Chief Justice Wilentz simultaneously officially requested that the Governor and State Legislature take action to repeal the unconstitutional portion of that statute. *See* "Court Asks Legislature to Review Refuted Law," 124 N.J.L.J. 1133 (November 2, 1989), which was promptly done in Law 1990, Chapter 63, sec. 1, bringing *N.J.S.A.* 2C:4-2 into compliance with the Federal Constitution.

prohibition on retired police officers continuing to carry weapons after they retired. The law was defended at the Trial Level, but the Governor directed the Attorney General not to oppose or participate in the appeal. And in *Garden State Equality v. Dow*, 434 N.J.Super. 163, 82 A.2d 336 (Ch. Div. 2013), commonly known as the "Same Sex Marriage Case", a legal challenge was brought to a New Jersey state statute that allowed only members of the opposite sex to marry each other. The Attorney General (half heartedly) defended the law in the Trial Court which ruled that New Jersey's same sex marriage ban violated the New Jersey State Constitution. The Governor then directed that the Attorney General not pursue Appellate review thereby letting the Trial Court ruling stand.

Most relevant here is the *Garden State Equality v. Davis* case. The Attorney General in that case knew that they needed an actual Court Ruling in an actual Case or Controversy to decide the issue so that there would be a governing and legitimate judicial order. That case was not decided on a "MEMO Fix", because there was no authority to do so there, and there is no authority to do so here. And the Attorney General defendant here fill well knows that this bizarre "Memo Fix" is simply nonsense.

A. The Attorney General's Unilateral "Memo Fix" Is Not A Substitute for A Valid Court Order Issued In A Case And Controversy:

Irrespective of good or bad intentions, the Executive Branch New Jersey Attorney General has no legal right whatsoever to ignore the literal text of a substantive statute passed into law by the State Legislature and Governor. The New Jersey Attorney

General has the right *not to defend* an unconstitutional ***law in court***. *See Planned Parenthood of Central New Jersey, supra* (declining to defend unconstitutional law in court); *see also Garden State Equity, supra* (declining to appeal adverse ruling letting trial court ruling stand as the law); *In re: Wheeler* (same). But the Attorney General does not have any authority to unilaterally issue an administrative Memo and create superseding substantive law. Substantive law – statutes – are is only made by the elected State Legislature and Governor. The State Executive Branch, whether acting through the Governor or his or her Attorney General has no authority to make substantive law on their own. This limitation is highlighted by Article III of the New Jersey State Constitution (1947) which quite clearly and quite literally and directly states the contours of the "separation of powers doctrine" in New Jersey State Government as follows:

> 1. The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

The defendant Attorney General also has the right to defend a clearly unconstitutional law ***in court*** as they recently did in *State v. Hemenway*, 239 N.J. 111, 216 A.3d. 118 (2019) where they lost in the New Jersey Supreme Court, or as they did in the past in *State v. Breakiron*, 108 N.J. 591, 522 A.2d 199 (1987) where they won in the New Jersey Supreme Court but later lost in

Federal Court. *See Humanik v. Beyer*, 871 *F.2d* 432 (3d. Cir.), *cert* denied 493 *U.S.* 812 (1989). After losing in Court, the Court Order governs, the Legislature may voluntarily pass corrective legislation, or the Legislature may propose a state Constitutional Amendment to the people to vote on. *See Save Our Shore District, supra.*

B. The AOC Directive #19-19 Is Not Substantive Law That May Supplant A Statute

Similarly, the AOC Directive #19-19 is not substantive law that may supplant a statute. Like the Federal Courts, the New Jersey Courts are prohibited from issuing advisory opinions[9] and may only issue a judgment or order in the context of a case or controversy.

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[9] An "advisory opinion" is a nonbinding statement by a court or an administrator interpreting the law on a matter submitted for that purpose. *See* Black's Law Dictionary 1119 (7th ed. 1999). The issuance of advisory opinions by Federal Courts has always been prohibited because such matters do not meet the "case or controversy" requirements contained in United States Constitution's Article III, §2, cl.1. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, (1792); *Muskrat v. United States*, 219 U.S. 346 (1911); *Massachusetts v. Environmental Protection Agency*, 549 U.S 497 (2007). Similarly regarding the prohibition against New Jersey State Courts issuing advisory opinions, notwithstanding the absence of a case or controversy standard in the New Jersey State Constitution (1947) itself it has long been clearly established hornbook law that State of New Jersey Courts may "... not render advisory opinions or function in the abstract..." and that an actual case and controversy is required before the State Court may act. *Crescent Park Tenants Association v. Realty Equities Corporation*, 58 N.J. 98, 107, 275 A.2d 433(1971); *see also In re: Advisory Opinion by the Office of the Attorney General, Department of Law and Public Safety*, 392 N.J.Super. 577, 921 A.2d 1159 (App. Div. 2007) (same).

In *Winberry v. Salsbury*, 5 N.J. 240, 74 A.2d 406 (1950) it was reaffirmed that the Supreme Court has State Constitutional Authority to make *procedural rules* for the practice and procedure in the State Superior Courts, and which Court Rules are in a sense treated as "laws". But clearly the State Court has no authority to make substantive law, or overrule a statute, by unilateral memo, as such is prohibited by Article III of the New Jersey State Constitution and the Separation of Powers Doctrine.

C. The Rule In *Stevens*: Relying Upon Discretion of Public Officials Is Not A Basis To Allow An Unconstitutional Statute to Stand

Greco cites the Court to the following passage from its decision in *United States v. Stevens*, 559 U.S. 460 (2010) which summarily rejected this identical "Memo Fix / Trust Us With Discretion" argument in a very similar set of circumstances, and which holding should be dispositive here causing this Court to reject the State's Memo Fix argument:

> Not to worry, the Government says: The Executive Branch construes §48 to reach only "extreme" cruelty, Brief for United States 8, and it "neither has brought nor will bring a prosecution for anything less," Reply Brief 6–7. The Government hits this theme hard, invoking its prosecutorial discretion several times. See id., at 6–7, 10, and n. 6, 19, 22. But the First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. [Footnote

> Omitted] We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly. *Cf. Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 473 (2001). (Emphasis added). [United States v. Stevens, 559 U.S. at 479].

To the same effect is the Supreme Court's holding in *McDonnell v. United States*, 579 U.S. 550, 576 (2016) (noting that "we cannot construe a criminal statute on the assumption that the Government will 'use it responsibly'", quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)) and *Lewis v. Alexander*, 685 F.3d 325, 341 (3d Cir. 2012) ("[T]o the extent the agency is pleading for a chance to interpret the statute more leniently than the statute's text might suggest, we question whether we can credit such an interpretation").

Therefore, aside from the fact that there is no such thing as a lawful "Memo Fix" because of Article III of the New Jersey State Constitution and the Separation of Powers Doctrine, even if there were this Court has made clear that it will not uphold an unconstitutional statute merely because the Government promises to, in their ostensible discretion, use it responsibly. That is exactly what is occurring here in this case. And it must be stopped.

CONCLUSION

For the foregoing reason, this Court should grant the petition for certiorari.

Respectfully submitted,

s/ Albert J. Rescinio
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Counsel for Petitioners

August 10, 2022

*Admission Pending

CERTIFICATE OF COMPLIANCE

No. ____

DAVID M. GRECO, individually and on behalf of others similarly situated,

Petitioner,

v.

MATTHEW J. PLATKIN, in his official capacity as Acting Attorney General of the State of New Jersey, et al,

Respondents.

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 8594 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(s).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 10, 2022.

s/ Albert J. Rescinio
ALBERT J. RESCINIO*
Counsel of Record

*Admission Pending

APPENDIX

APPENDIX
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APPENDIX A:
Order Granting Rehearing, Second Superseding Opinion, and Judgment for the Third Circuit, *Greco v. Bruck* et al, No. 21-1035 (May 13, 2022)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1035

DAVID M. GRECO,
Appellant

v.

ANDREW J. BRUCK, New Jersey Attorney General, et al

(D.N.J. No. 3-19-cv-19145)

SUR PETITION FOR PANEL REHEARING

Present: CHARGARES, Chief Judge, McKEE, AMBRO, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY and PHIPPS, Circuit Judges.

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court, it is hereby

[Page 2]

ORDERED that the petition for rehearing by the panel is granted. The Clerk is directed to filed the amended opinion and judgment contemporaneously with this order.

BY THE COURT,

S/ Peter J. Phipps
Circuit Judge

Date: May 13, 2022
cc: Albert J. Rescinio, Esq.
Bryan E. Lucas, Esq.
Robert J. McGuire, Esq.
Alec Schierenbeck, Esq.
Howard L. Goldberg, Esq.
Kerri E. Chewining, Esq.
Daniel J. DeFiglio, Esq.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1035

DAVID M. GRECO,
Appellant

v.

ANDREW J. BRUCK, New Jersey Attorney General, et al

On Appeal from the United States District Court
Fir the District of New Jersey
(D.C. Civ. No. 3-19-cv-19145
Distruct judge: Honorable Brian R. Martinotti

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
October 29, 2021

Before: GREENAWAY, JR., KRAUSE, AND PHIPPS,
Circuit Judges.

(Filed: May 13. 2022)

[Page 2]

OPINION*

Phipps, *Circuit Judge.*

This case involves an instance when, under *Younger v. Harris*, 401 U.S. 37 (1971), a federal court must refrain from hearing a case properly within its limited jurisdiction. David Greco filed this suit in federal court during the pendency of a concurrent state-court civil enforcement action initiated by a New Jersey law enforcement agency. The District Court determined that the state-court proceedings satisfy the criteria for *Younger* abstention and dismiss this federal case on that basis. We will affirm that order for the reasons below.

I.

The state-court proceedings relevant to this case arose under New Jersey's red-flag law, the Extreme Risk Protective Order Act of 2018. That law, the ERPO Act, took effect on September 1, 2019, and it authorizes certain persons, including law enforcement officers, to seek a court order and a search warrant to temporarily remove lawfully owned firearms from persons who pose an immediate and present danger to others. *See* N.J. Stat. Ann. §§2C:58-23, 26; *see also* 2018 N.J. Sess. Serv. Ch. 35 §17 (West) (setting the effective date for the Act and permitting "the Attorney General and the Administrative

Director of the Courts [to] take any anticipatory action as shall be

*This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

necessary to effectuation the purposes of this act"). After investigating David Greco for several months beforehand, on September 5, 2019, the New Jersey Office of Homeland Security and Preparedness, known as 'OHSP,' sought a temporary order against Greco under the ERPO Act. In its petition to a state court in Camden County, OHSP provided several reasons for its request. Greco had displayed a pattern of antiemetic social media activity; he contacted the Pittsburgh synagogue shooter before the mass shooting in October 2018; he believed that "force or violence is necessary to realign society"; that Jews are raping our women and children." Petition for Temp. Extreme Risk Protective Ord. (App. 114). On those facts, OHSP argued that Greco posed "an immediate and present danger" to others by owning or possessing firearms. *Id.*

The next day, the New Jersey State Court held an ex parte hearing and granted the petition. The court determined that Greco posed an immediate and present danger, and it then issue the temporary order and a 'no knock' search warrant for a handgun, a rifle, and "any other unregistered weapons, ammunition, and/or shotguns" at Greco's residence. Temp. Extreme Risk Protective Ord. (App. 120). Later that day, local law enforcement officers executed the search warrant and temporarily seized Greco's New Jersey Firearms Purchaser ID Card, rifle, and ammunition for that rifle.

That seizure has not exactly been temporary – OHSP still has possession of Greco's rifle and ammunition. But through a series of uncontested state-court procedural rulings, Greco has contributed to the continued operation of the temporary order. The

[Page 4]

ERPO Act provides an expedited process for converting a temporary order into a final order: the state court must hold a hearing that a respondent has a right to attend, and the court must find that the respondent poses a significant danger to others by owning or possession firearms. *See* N.J. Stat. Ann. §2C:58-24. In Greco's case, the state court scheduled such a hearing five days later, but it was rescheduled multiple times, and it remains pending. Thus, without being formally converted to a final order, that temporary order has remained in effect until the present.

On October 21, 2019, while those state-court proceedings were pending, Greco filed this suit to challenge the constitutionality of the ERPO Act. He argued that the ERPO Act violated the First, Second, Fourth, and Fourteenth Amendments, and he sought a preliminary injunction to prevent its enforcement – not just as applied to him, but as a putative class of persons. As a civil action arising under the Constitution, Greco's suit presented a federal question within the District Court's subject matter jurisdiction. *See* 28 U.S.C. §1331. The District Court denied Greco's motions for a preliminary injunction and class certification, and it later dismissed the entire action without prejudice on *Younger* abstention grounds.

That dismissal constitutes a final appealable order. *See Liu v. Comm'n on Adult Ent. Establishments*, 369 F.3d 319, 325 (3d Cir. 2004) (holding that "a district court's *Younger* abstention order constitutes a final appealable order under 28 U.S.C. §1291 because . . . the effect of such an order is surrender jurisdiction of the federal action to

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a state court"). By timely appeal and that order, Greco invoked this Court's appellate jurisdiction. *See* 28 U.S.C. §1291.

In reviewing *de novo* the District Court's analysis of the legal elements of *Younger* abstention, *see PDXN, Inc. v. Comm'r N.J. Dep't of Lab & Workforce Dev.*, 978 *F.3d* 871, 881 n.11 (3d Cir. 2020), we will affirm, and that obviates the need to evaluate Greco's challenges to the orders denying his preliminary injunction and class certification motions.

II.

Younger abstention presents one of the limited exceptions to a federal court's "virtually unflagging obligation" to hear and decide cases within the scope of its jurisdiction. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *see also New Orleans Pub. Serv., Inc. v. Council of New Orleans (NOPSI)*, 491 U.S. 350, 368 (1989). The doctrine prevents federal courts from hearing cases related to certain ongoing state-court proceedings. *See Sprint Commc'ns, Inc Jacobs*, 571 U.S. 69, 72 (2013) ("*Younger* exemplifies one class of cases in which federal-court abstention is

required ...." (emphasis added); *PDX*, 978 F.3d at 881 n.11. But in so doing, *Younger* abstention effectuates principles of federalism and comity by respecting concurrent state-court proceedings. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 (1975) ("*Younger* turned on considerations of comity and federalism peculiar to the fact that state proceedings were pending[.]" (alteration added)); *Younger*, 401 U.S. at 44 (justifying the doctrine based on "sensitivity to the legitimate interests of both State and

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The *Younger* abstention analysis proceeds in two sequential stages. The first examines whether the underlying state-court litigation falls within one of three specific categories of cases. *See Sprint*, 571 U.S. at 78 (identifying three categories of cases that may qualify for *Younger abstention*); *ACRA Turf Club, LLC v. Zanzuccki*, 748 F.3d 127, 138 (3d Cir. 2014). The second examines three additional factors – often referred to as the *Middlesex* factors. *See Sprint*, 571 U.S. at 81-82 (discussing the factors from *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)).

A. Quasi-Criminal Civil Enforcement Proceedings

One category of cases that may justify *Younger* abstention consist of quasi-criminal state civil enforcement proceedings. *See Sprint*, 571 U.S. at 79; *PDX*, 978 F.3d at 882. To determine whether a civil enforcement proceeding is quasi-criminal, this Circuit makes three inquiries: (i) whether the action was commenced by a state in its sovereign capacity; (ii) whether the action sought to sanction the federal plaintiff for a wrongful act; and (iii) whether the state court action has other similarities with criminal actions, including whether the state-court could have pursued enforcement proceedings through a parallel criminal statute. *See PDX*, 978 F.3d at 882-883 (citing *ACRA*, 748 F.3d at 138).

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Under that analysis, the state-court proceeding here is quasi-criminal. For the first inquiry, the state-court proceeding was initiated by a state law enforcement agency, OHSP. The second inquiry similarly indicates that the state court proceeding was quasi-criminal because, through that litigation, OSHP so to temporarily seize Greco's firearms as a sanction for posting an immediate and present danger to others. *See ACRA*, 748 F.3d at 140 (citing *Sprint*, 571 U.S. at 79). Finally, under the third inquiry, although New Jersey does not identify an alternative criminal enforcement mechanism, the state court civil action has two other similarities with criminal proceedings: it resulted from a law-enforcement investigation, and it issued a 'no knock' search warrant rather than a subpoena or some other traditional means of civil discovery.

B. The *Middlesex* Factors.

The second stage of the *Younger* abstention analysis examines the three *Middlesex* factors. Those factors ask whether (i) there is an ongoing state judicial proceeding (ii) that implicates important state interests and (iii) provides an adequate opportunity to raise constitutional challenges. *Sprint*, 571 U.S. at 81-82 (discussing the *Middlesex* factors). Each is satisfied here.

First, the state-court proceeding is ongoing and judicial in nature. To be ongoing for purposes of *Younger* abstention, a state proceeding must have been pending - even if it were stayed - when the federal complaint was filed. *See PDX*, 978 F.3d at 885. Here, the state-court action began with the temporary order petition on September 5, 2019, and, through a series of states, has been ongoing ever since. Greco filed his federal complaint

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on October 21, 2019, during the pendency of the state-court proceeding, which is indisputably "judicial in nature." *NOPSI*, 491 U.S. at 370; *see also Gonzalez v. Waterfront Comm'n of N.Y. Harbor*, 755 F.3d 176, 183 (3d Cir. 2014).

Second, the state-court proceedings "implicate an important state interest." *PDX*, 978 F.3d at 885. The ERPO Act seeks to protect New Jersey residents from persons posing "an immediate and present danger." N.J. Stat. Ann. §2C:58-23(e). That is an important state interest. See Drake v. Filko, 724 F.3d 426, 437 (3d Cir. 2013) ("New Jersey has, undoubtedly, a significant, substantial and important interest in protecting its citizens' safety.").

Third, the state court proceedings offer Greco an "adequate opportunity ... to raise constitutional

challenges." *Middlesex*, 457 U.S. at 432. Greco bears the burden of showing the that state procedural law barred presentation of [his] claims." *Penzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987) (quoting *Moore v. Sims*, 442 U.S. 415, 432 (1979)). Although an indefinite stay of proceedings after a 'temporary' seizure of firearms could - under other circumstances - operate as a procedural bar to the presentation of constitutional claims, Greco does not make that showing here. Nor does anything in the ERPO Act prevent Greco from raising constitutional challenges. To the contrary, the ERPO Act provides for a hearing before the issuance of a final order, *see* N.J. Stat. Ann. §§2C:58-24(a), a right to petition to terminate a final order at any time, *see id.* §2C:58-25, and a right to appeal a final order within 45 days, *see* N.J. Ct. R. 2:2-3(a)(1), 2:4-1(a).

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C. The Necessity of Abstention is Not Overcome Here

For these reasons, the state-court proceeding is a quasi-criminal civil enforcement action that meets the *Middlesex* factors. That satisfies both stages of the *Younger* abstention analysis, and therefore the District Court correctly dismissed this case on that basis. *See Sprint*, 571 U.S. at 72; *PDX*, 978 F.3d at 882-82.

Nothing about this ruling prevents Greco from pursuing his constitutional challenges in state court. To the contrary, if he could not bring his claims in state court, than *Younger* abstention would be inappropriate.1

1 The state-court proceedings offer Greco an "adequate opportunity ... To raise constitutional challenges" *Middlesex*, 457 U.S. at 432. Greco bears the burden of showing " ' that state

> procedural law barred presentation of[his] claims.' " *Penzoil*, 481 U.S. at 14 (quoting *Moore*, 442 U.S. at 432). Although an indefinite stay of proceedings after a 'temporary' seizure of firearms could - under other circumstances- operate as a procedural bar to the presentation of constitutional claims, Greco does not make that showing here. *Cf. Gibson v. Berryhill*, 411 U.S. 564, 577-79 (1973) (affirming the district court's decision not to abstain because the state tribunal was constitutionally disqualified to adjudicate the dispute due to bias). Nor does anything in the ERPO Act prevent Greco from raising constitutional challenges. To the contrary, the ERPO Act provides for a hearing before the issuance of a final order, *see* N.J. Stat. Ann. 2C:58-24(a), a right to petition to terminate a final order at any time, *see id.* 2C:58-25, and a right to appeal a final order within 45 days, *see* N.J. Ct. R. 2:2-3(a)(1), 2:4-1(a). Greco therefore does not dispute that he has the ability to pursue his constitutional challenges in state court.

See Moore, 442 U.S. at 425-26 (explaining that abstention is inappropriate if "state law clearly bars the interposition of the constitutional claims"); *Gibson v. Berryhill*, 411 U.S. 564, 577-79 (1973) (affirming district court's decision not to abstain because the state tribunal was constitutionally disqualified to adjudicate the dispute due to bias). Rather than dispute's ability to

[Page 10]

pursue his constitutional challenges in state court, Greco raises to other challenges to younger abstention. Neither succeeds.

Greco first contends that the District Court violated law-of-the-case principles by abstaining under *Younger* after it had ruled on his preliminary injunction and class certification motions. But law-of-the-case principles apply only "when a court *decides* upon a rule of law." *ACLU v. Mukasey*, 534 F.3d 181, 187 (3d Cir. 2008) (emphasis

added) (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988)). And in denying Greco's preliminary injunction and class certification motions, the District Court did not address *Younger*. Such silence was not a decision that the District Court was later bound to follow.

Greco next argues that *Younger* abstention was improper because he brings a facial challenge to the ERPO Act under the Fourth Amendment. Although some "extraordinary circumstances" may permit a federal court to enjoin an ongoing state proceeding, that limited exception to *Younger* abstention does not include facial challenges to the constitutionality of a state law. *Younger*, 401 U.S. at 53-54. A facial constitutional challenges requires establishing "that no set of circumstances exists under which the [law] would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). Such a challenge that is not present and extraordinary circumstance in the context of *Younger* abstention: state courts can identify and enjoin state laws that have no lawful application under the federal constitution. *See Huffman*, 420 U.S. at 610-11 (rejecting an

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argument in effect "urging [the Court] two Basie rule on the assumption that state judges will not be faithful to their constitutional responsibilities").

***

Because the concurrent state-court proceedings of satisfy the requirements for *Younger* abstention, we will affirm the order of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1035

DAVID M. GRECO,
Appellant

v.

ANDREW J. BRUCK, New Jersey Attorney General, et al

On Appeal from the United States District Court
Fir the District of New Jersey
(D.C. Civ. No: 3-19-cv-19145
Distruct judge: Honorable Brian R. Martinotti

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
October 29, 2021

Before: GREENAWAY, JR., KRAUSE, AND PHIPPS,
Circuit Judges.

JUDGMENT

This cause came to be considered on the record on appeal from the United States District Court for the District of New Jersey and was submitted on October 29, 2021. On consideration whereof, it is no hereby

ORDERED and ADJUDGED by this Court that the judgment of the United States District Court for the District of New Jersey entered on December 13, 2020, be and the same is hereby AFFIRMED.

Costs will be taxes against Appellant. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: May 13, 2022

APPENDIX B:
Initial Opinion and Judgment for the Third Circuit, *Greco v. Bruck* et al, No. 21-1035 (November 12, 2022)

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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OPINION*

Phipps, *Circuit Judge.*

This case involves an instance when, under *Younger v. Harris*, 401 U.S. 37 (1971), a federal court must refrain from hearing a case properly within its limited jurisdiction. David Greco filed this suit in federal court during the pendency of a concurrent state-court civil enforcement action initiated by a New Jersey law enforcement agency. The District Court determined that the state-court proceedings satisfy the criteria for *Younger* abstention and dismiss this federal case on that basis. We will affirm that order for the reasons below.

I.

The state-court proceedings relevant to this case arose under New Jersey's red-flag law, the Extreme Risk Protective Order Act of 2018. That law, the ERPO Act, took effect on September 1, 2019, and it authorizes certain persons, including law enforcement officers, to seek a

court order and a search warrant to temporarily remove lawfully owned firearms from persons who pose an immediate and present danger to others. *See* N.J. Stat. Ann. §§2C:58-23, 26; *see also* 2018 N.J. Sess. Serv. Ch. 35 §17 (West) (setting the effective date for the Act and permitting "the Attorney General and the Administrative Director of the Courts [to] take any anticipatory action as shall be

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*This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

[Page 3]

necessary to effectuation the purposes of this act"). After investigating David Greco for several months beforehand, on September 5, 2019, the New Jersey Office of Homeland Security and Preparedness, known as 'OHSP,' sought a temporary order against Greco under the ERPO Act. In its petition to a state court in Camden County, OHSP provided several reasons for its request. Greco had displayed a pattern of antiemetic social media activity; he contacted the Pittsburgh synagogue shooter before the mass shooting in October 2018; he believed that "force or violence is necessary to realign society"; that Jews are raping our women and children." Petition for Temp. Extreme Risk Protective Ord. (App. 114). On those facts, OHSP argued that Greco posed "an immediate and present danger" to others by owning or possessing firearms. *Id.*

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danger, and it then issue the temporary order and a 'no knock' search warrant for a handgun, a rifle, and "any other unregistered weapons, ammunition, and/or shotguns" at Greco's residence. Temp. Extreme Risk Protective Ord. (App. 120). Later that day, local law enforcement officers executed the search warrant and temporarily seized Greco's New Jersey Firearms Purchaser ID Card, rifle, and ammunition for that rifle.

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ERPO Act provides an expedited process for converting a temporary order into a final order: the state court must hold a hearing that a respondent has a right to attend, and the court must find that the respondent poses a significant danger to others by owning or possession firearms. *See* N.J. Stat. Ann. §2C:58-24. In Greco's case, the state court scheduled such a hearing five days later, but it was rescheduled multiple times, and it remains pending. Thus, without being formally converted to a final order, that temporary order has remained in effect until the present.

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As a civil action arising under the Constitution, Greco's suit presented a federal question within the District Court's subject matter jurisdiction. *See* 28 U.S.C. §1331. The District Court denied Greco's motions for a preliminary injunction and class certification, and it later dismissed the entire action without prejudice on *Younger* abstention grounds.

That dismissal constitutes a final appealable order. *See Liu v. Comm'n on Adult Ent. Establishments*, 369 F.3d 319, 325 (3d Cir. 2004) (holding that "a district court's *Younger* abstention order constitutes a final appealable order under 28 U.S.C. §1291 because . . . the effect of such an order is surrender jurisdiction of the federal action to

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a state court"). By timely appeal and that order, Greco invoked this Court's appellate jurisdiction. *See* 28 U.S.C. §1291.

In reviewing *de novo* the District Court's analysis of the legal elements of *Younger* abstention, *see PDXN, Inc. v. Comm'r N.J. Dep't of Lab & Workforce Dev.*, 978 *F.3d* 871, 881 n.11 (3d Cir. 2020), we will affirm, and that obviates the need to evaluate Greco's challenges to the orders denying his preliminary injunction and class certification motions.

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[Page 9]

C. The Necessity of Abstention is Not Overcome Here

For these reasons, the state-court proceeding is a quasi-criminal civil enforcement action that meets the *Middlesex* factors. That satisfies both stages of the *Younger* abstention analysis, and therefore the District Court correctly dismissed this case on that basis. *See Sprint*, 571 U.S. at 72; *PDX*, 978 F.3d at 882-82.

Nothing about this ruling prevents Greco from pursuing his constitutional challenges in state court. To

the contrary, if he could not bring his claims in state court, than *Younger* abstention would be inappropriate. *See Moore*, 442 U.S. at 425-26 (explaining that abstention is inappropriate if "state law clearly bars the interposition of the constitutional claims"); *Gibson v. Berryhill*, 411 U.S. 564, 577-79 (1973) (affirming district court's decision not to abstain because the state tribunal was constitutionally disqualified to adjudicate the dispute due to bias). Rather than dispute's ability to pursue his constitutional challenges in state court, Greco raises to other challenges to younger abstention. Neither succeeds.

Greco first contends that the District Court violated law-of-the-case principles by abstaining under *Younger* after it had ruled on his preliminary injunction and class certification motions. But law-of-the-case principles apply only "when a court *decides* upon a rule of law." *ACLU v. Mukasey*, 534 F.3d 181, 187 (3d Cir. 2008) (emphasis added) (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988)). And in denying Greco's preliminary injunction and class certification motions, the

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District Court did not address *Younger*. Such silence was not a decision that the District Court was later bound to follow.

Greco next argues that *Younger* abstention was improper because he brings a facial challenge to the ERPO Act under the Fourth Amendment. Although some "extraordinary circumstances" may permit a federal court to enjoin an ongoing state proceeding, that limited exception to *Younger* abstention does not include facial challenges to the constitutionality of a state law. *Younger*, 401 U.S. at 53-54. A facial constitutional

challenges requires establishing "that no set of circumstances exists under which the [law] would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). Such a challenge that is not present and extraordinary circumstance in the context of *Younger* abstention: state courts can identify and enjoin state laws that have no lawful application under the federal constitution. *See Huffman*, 420 U.S. at 610-11 (rejecting an argument in effect "urging [the Court] two Basie rule on the assumption that state judges will not be faithful to their constitutional responsibilities").

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Because the concurrent state-court proceedings of satisfy the requirements for *Younger* abstention, we will affirm the order of the District Court.

UNITED STATES COURT OF APPEALS
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No. 21-1035

DAVID M. GRECO,
Appellant

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Circuit Judges.

JUDGMENT

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ORDERED and ADJUDGED by this Court that the judgment of the United States District Court for the District of New Jersey entered on December 13, 2020, be and the same is hereby AFFIRMED.

Costs will be taxes against Appellant. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: November 12, 2021

APPENDIX C:
Opinion and Order Granting Dismissal on *Younger* Abstention grounds, United States District Court, District of New Jersey, *Greco v. Grewal*, et al, No. 3:19-cv-19145 (December 11, 2020)

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DAVID M. GRECO,	**Case No. 3:19-cv-19145 (BRM) (TJB)**
Plaintiff,	
v.	**OPINION**
GURBIR S. GREWAL, et al.,	
Defendants.	

MARTINOTTI, DISTRICT JUDGE

Before the Court are three Motions: (1) Defendants New Jersey Attorney General Gubir S. Grewal ("Attorney General Grewal"), Jared M. Maples, and the New Jersey Office of Homeland Security and Preparedness ("New Jersey OHSP") (collectively, the "State Defendants"), and the Camden County Prosecutor's Office, Jill S. Mayer, and Nevan Soumails' (collectively, the "County Defendants") Motion to Dismiss Plaintiff's Complaint under the *Younger* **[Footnote 1]** doctrine pursuant to Federal Rule

12(b)(1) and for failure to state a claim for which relief could be granted pursuant to Rule 12(b)(6) (ECF No. 65); (2) Defendants Gloucester Township Police Department, Bernard John Dougherty, Nicholas C. Aumendo, Donald B. Gansky, William Daniel Rapp, and Brian Anthony Turchi's (collectively, the "Township Defendants" and with State and County Defendants, "Defendants") Motion to Dismiss for failure to state a claim for which relief could be

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1 Younger v. Harris, 401 U.S. 37 (1971).

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granted pursuant to Rule 12(b)(6) **[Footnote 2]** (ECF No. 66); and (3) Plaintiff David M. Greco's ("Plaintiff") Cross Motion for Partial Summary Judgment Pursuant to Federal Rule of Civil Procedure 56. (ECF No. 69.) Plaintiff opposes both of Defendants' Motions. (ECF No. 69.) The State and County Defendants filed a Reply (ECF No. 75), as did the Township Defendants (ECF No. 78). Having reviewed all of the filings submitted in connection with the Motions and having declined to hear oral argument pursuant to Federal Rule of Civil Procedure 78(b), for the reasons set forth below and for good cause shown, Defendants' Motions to Dismiss are **GRANTED** and Plaintiff's Cross Motion for Partial Summary Judgment is **DENIED.**

I. FACTUAL AND PROCEDURAL BACKGROUND [Footnote 3]

Plaintiff filed a three-count class action Complaint in this Court on October 21, 2019, challenging the constitutionality of the Extreme Risk Protection Order

("EPRO") Act, alleging a cause of action pursuant to 42 U.S.C. § 1983 for violations of the First, Second, Fourth, and Fourteenth Amendments, and moving for preliminary injunctive relief. (See generally ECF No. 1.) On November 8, 2019, the State and County Defendants jointly opposed Plaintiff's motion. (ECF No. 32.) On the same day, the Township Defendants filed correspondence joining and adopting the legal arguments advanced by State and County Defendants but declining to provide any additional briefing of their own. (ECF No. 33.) The Court heard oral argument on the Motion on November 20, 2019. (ECF No. 39.) Per the Court's Order (ECF No. 51), the parties submitted

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2 The Township Defendants clarify in their brief that they "repeat and incorporate the legal argument set forth in Point 1 of the State Defendants' brief as if set forth more fully herein and respectfully request this Court abstain from considering this case." (ECF No. 66-1 at 7 n.3.)

3 The underlying facts are set forth at length in this Court's February 21, 2020 Opinion (ECF No. 57) and its September 29, 2020 Opinion (ECF No. 84). In the interest of judicial economy, the Court refers the parties to those opinions for a full recitation of the factual background of this dispute, as well as its procedural history.

supplemental briefs on the issue of standing. (ECF Nos. 52, 53, 55.) On February 21, 2020, the Court denied Plaintiff's Motion for Preliminary Injunction. (ECF No. 57.) Plaintiff then filed a Second Motion for Class Certification on February 24, 2020 (ECF No. 59), which the Court denied on September 29, 2020. (ECF No. 84.)

On May 11, 2020, the Township Defendants filed a Motion to Dismiss Greco's Complaint. (ECF No. 66.) Also

on May 11, 2020, the State and County Defendants filed a Motion to Dismiss Greco's Complaint. (ECF No. 65.) On June 1, 2020, Plaintiff filed a Cross Motion for Partial Summary Judgment. (ECF No. 69.) The State and County Defendants filed their Reply on July 6, 2020. (ECF No. 75.) On July 7, 2020, the Township Defendants filed their Reply. (ECF No. 78.) **[Footnote 4]**

II. LEGAL STANDARD

The Defendants move to dismiss Greco's complaint for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6). "When a motion under Rule 12 is based on more than one ground, the court should consider the 12(b)(1) challenge first because if it must dismiss the complaint for lack of subject matter jurisdiction, all other defenses and objections become moot." Dickerson v. Bank of Am., N.A., No. CIV. 12-03922 RBK, 2013 WL 1163483, at *1 (D.N.J. Mar. 19, 2013) (citing In re Corestates Trust Fee Litig., 837 F. Supp. 104, 105 (E.D. Pa. 1993)). Because the Court finds that Younger abstention applies and requires dismissal, it will not recite the Rule 12(b)(6) standard or the Rule 56 summary judgment standard.

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4 On December 10, the Court received an email sent directly from Greco. This email was forwarded to Greco's attorney. However, the Court will not consider any part of the email since it is an unauthorized ex parte communication. 28 C.F.R. § 76.15(a) ("No party or attorney representing a party shall communicate in any instance with the Judge on any matter at issue in a case, unless notice and opportunity has been afforded for the other party to participate.").

In considering dismissal for lack of subject-matter jurisdiction, a district court's focus is not on whether the factual allegations entitle a plaintiff to relief but rather on whether the court has jurisdiction to hear the claim and grant relief. Maertin v. Armstrong World Industries, Inc., 241 F. Supp. 2d 434 (D.N.J. 2002).

"A challenge to subject matter jurisdiction under Rule 12(b)(1) may be either a facial or a factual attack." Davis, 824 F.3d at 346. A facial attack "challenges the subject matter jurisdiction without disputing the facts alleged in the complaint, and it requires the court to 'consider the allegations of the complaint as true.'" Id. (citing Petruska v. Gannon Univ., 462 F.3d 294, 302 n.3 (3d Cir. 2006)). A factual attack, on the other hand, "attacks the factual allegations underlying the complaint's assertion of jurisdiction, either through the filing of an answer or 'otherwise present[ing] competing facts.'" Id. (quoting Constitution Party of Pa. v. Aichele, 757 F.3d 347, 358 (3d Cir. 2014)). A "factual challenge allows a court [to] weigh and consider evidence outside the pleadings." Id. (citation omitted). Thus, when a factual challenge is made, "no presumptive truthfulness attaches to [the] plaintiff's allegations." Id. (citing Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)). Rather, "the plaintiff will have the burden of proof that jurisdiction does in fact exist," and the court "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." Id.

The Third Circuit has "repeatedly cautioned against allowing a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction to be turned into an attack on the merits." Davis, 824 F.3d at 348-49 (collecting cases). "[D]ismissal for lack of jurisdiction is not appropriate merely because the legal theory alleged is

probably false, but only because the right claimed is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" Id. at 350 (quoting Kulick v. Pocono

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Downs Racing Ass'n, Inc., 816 F.2d 895, 899 (3d Cir. 1987)). "In this vein, when a case raises a disputed factual issue that goes both to the merits and jurisdiction, district courts must 'demand less in the way of jurisdictional proof than would be appropriate at a trial stage.'" Id. (citing Mortensen, 549 F.2d at 892 (holding that dismissal under Rule 12(b)(1) would be "unusual" when the facts necessary to succeed on the merits are at least in part the same as must be alleged or proven to withstand jurisdictional attacks)). These cases make clear that "dismissal via a Rule 12(b)(1) factual challenge to standing should be granted sparingly." Id.

Defendants do not challenge the facts in Greco's complaint (see generally ECF No. 65), so this Court finds Defendants are making a facial 12(b)(1) challenge to this Court's subject matter jurisdiction. Therefore, the Court considers this facial 12(b)(1) challenge before reaching the merits of the pending motions and considers the allegations in the light most favorable to Plaintiff. Gould Elecs., Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000); Mortensen, 549 F.2d at 891.

III. DECISION

There are two components to the Younger analysis: (1) Defendants' argument in favor of abstention and (2)

Greco's argument in favor of this Court's application of the law-of-the-case doctrine.

A. *Younger* Abstention

The State and County Defendants argue this Court should abstain from this action under Younger because there is an ongoing state proceeding. (ECF No. 65-1 at 12.) The Township Defendants "repeat and incorporate" State and County Defendants' abstention argument. (ECF No. 66-1 at 7 n.3.) Greco argues the issue of Younger abstention was already decided in his favor, and re-litigation of that issue is barred by the law-of-the-case doctrine. (ECF No. 69-2 at 12.) In

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their Reply, State and County Defendants contend the law-of-the-case doctrine does not apply, since the doctrine only applies "when a court decides upon a rule of law, which then governs the same issues in subsequent stages in the same case." (ECF No. 75 at 4 (citing Farina v. Nokia, Inc., 625 F.3d 97, 117 n.21 (3d. Cir. 2010)).) The Township Defendants' Reply does not include further argument on the issue of abstention. (See generally ECF No. 78.)

The Younger abstention doctrine gives a federal court the "discretion to abstain from exercising jurisdiction over a particular claim where resolution of that claim in federal court would offend the principles of comity by interfering with an ongoing state proceeding." Addiction Specialists, Inc. v. Twp. of Hampton, 411 F.3d 399, 408 (3d Cir. 2005) (citing Younger v. Harris, 401 U.S. 37 (1971)). However, "abstention rarely should be

invoked," Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992), and is only appropriate "in a few carefully defined situations." Gwynedd Properties, Inc. v. Lower Gwynedd Twp., 970 F.2d 1195, 1199 (3d Cir. 1992). Younger abstention is only appropriate where the following three requirements are satisfied: (1) there are ongoing state proceedings that are judicial in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise the federal claims. Id. at 1200 (citing Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982); Schall v. Joyce, 885 F.2d 101, 106 (3d Cir. 1989)).

In Sprint Comms., Inc. v. Jacobs, 571 U.S. 69 (2013), the Supreme Court "narrowed Younger's domain." Malhan v. Sec'y of U.S. Dep't of State, 938 F.3d 453, 462 (3d Cir. 2019). Consequently, a court must first determine whether the parallel state action falls within one of "three exceptional categories": (1) criminal prosecutions, (2) "certain civil enforcement proceedings," and (3) "civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions." Sprint, 571 U.S. at 78

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In light of these threshold factors, Defendants **[Footnote 5]** argue in favor of Younger abstention because "[p]roceedings under the EPRO Act are the kind of civil enforcement suits that require abstention, because all three of the hallmarks the Supreme Court and Third Circuit described are present." (ECF No. 65-1 at 14.) The Court will first analyze Defendants' arguments regarding these threshold factors. Then the Court will assess

whether Defendants meet the three additional requirements set forth in Younger.

Under Sprint, to be considered a "civil enforcement proceeding," the state proceeding must generally be "akin to a criminal prosecution" and, if it is, is therefore said to be "quasi-criminal" in nature. Sprint, 571 U.S. at 78. In determining whether underlying proceedings are quasi-criminal in nature, the Court considers whether:

> (1) the action was commenced by the State in its sovereign capacity, (2) the proceeding was initiated to sanction the federal plaintiff for some wrongful act, and (3) there are other similarities to criminal actions, such as a preliminary investigation that culminated with the filing of formal charges. ... We also consider whether the State could have alternatively sought to enforce a parallel criminal statute.

PDX N., Inc. v. Comm'r New Jersey Dep't of Labor & Workforce Dev., 978 F.3d 871, 882–83 (3d Cir. 2020) (citing ACRA Turf Club, LLC v. Zanzuccki, 748 F.3d 127, 138 (3d Cir. 2014)). As this Court has previously noted, "[t]hese factors are not a mandatory checklist for quasi-criminal proceedings; instead, a court determining a state proceeding's quasi criminal character weighs the factors above; no single factor is dispositive." PDX N., Inc. v. Asaro-Angelo, No. 3:15-CV-7011- BRM-TJB, 2019 WL

3416836, at *4 n.5 (D.N.J. July 29, 2019) (citing Sprint Commc'ns, 571 U.S.

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5 The arguments in favor of Younger abstention are set forth in the State and County Defendants' brief (ECF No. 65-1), but since the Township Defendants incorporate the State and County Defendants' brief into their own, the Court will collectively refer to the arguments in State and County Defendants' brief as arguments on behalf of "Defendants."

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at 79-81), aff'd in part, rev'd in part and remanded sub nom. PDX N., Inc. v. Comm'r New Jersey Dep't of Labor & Workforce Dev., 978 F.3d 871 (3d Cir. 2020).

Under the first threshold factor, "a state actor [will] routinely [be] a party to the state proceeding and often initiates the action." Sprint, 571 U.S. at 79. "To be sure, the Supreme Court has not directly held that Younger applies only when a state actor files a complaint or formal charges." ACRA Turf Club, 748 F.3d at 140. However, "the state's 'initiation' procedure must proceed with greater formality than merely sending a targeted advisory notice to a class of people that may be affected by new legislation." Id.

Defendants argue a state actor will routinely be a party to the proceeding under the ERPO Act because the Act "establishes that petitions will regularly filed by law enforcement officers" and "makes clear that law enforcement officers have a duty to take over or join in any petition filed by a family or household member when the officer has probable cause to believe the temporary extreme risk protection order ("TERPO") standard is met." (ECF No. 65-1 at 14.) According to Defendants, "[i]t is impossible to separate the role of state actors from the ERPO process." (Id. at 15.) **[Footnote 6]**

Under the EPRO Act, the proceedings for a TERPO are initiated by a "petitioner" which is "a family or household member or law enforcement officer." N.J. Stat. Ann. § 2C:58-21. While a law enforcement officer, a state actor, may initiate the proceedings, that is not always the case. But even if the proceeding is initiated by a "family or household member" state actors are readily involved at each stage of the proceeding. See N.J. Stat. Ann. § 2C: 58-23(a). Specifically, "[p]rior

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6 Greco does not raise any counterarguments in response to Defendants' arguments about the threshold factors or Middlesex factors. Instead, Greco relies exclusively on his arguments in favor of the application of the law-of-the-case doctrine and emphasizes abstention as "the rare exception and not the usual rule." (ECF No. 69 at 12-21.)

to filing a petition with the court, a family or household member may request assistance from a State, county, or municipal law enforcement agency which shall advise the petitioner of the procedure" for completing the petition for the TERPO. Id. Additionally, "[a] law enforcement officer from the agency may assist the family or household member in preparing or filing the petition." Id. The Act clarifies this assistance can include "joining in the petition, referring the matter to another law enforcement agency for additional assistance, or filing the officer's own petition with the court." Id. While the statute permits, but does not require, initiation or involvement by a state actor, the proceeding against Greco was initiated by the New Jersey Department of Homeland Security, a state actor. (See ECF No. 1, Ex. D at 1.) Accordingly, the Court finds the TERPO proceeding was initiated by New Jersey in its sovereign capacity, for the purposes of Younger.

For the second threshold factor, the Court will consider "whether the proceeding sanctions wrongful conduct." PDX N., Inc., 978 F.3d at 883. Defendants contend the EPRO Act "involves imposition of a 'sanction' as the term has been understood for purposes of Younger abstention" because, in response to a determination that a person presents threat of danger to themselves or others, the court temporarily prohibits that person from possessing firearms and requires their surrender. (ECF No. 65-1 at 16.)

"[Q]uasi-criminal proceedings of this ilk share several distinguishing features." Gonzalez v. Waterfront Comm'n of N.Y. Harbor, 755 F.3d 176, 181 (3d Cir. 2014). For instance, the proceeding will "characteristically [be] initiated to sanction the federal plaintiff, i.e., the party challenging the state action, for some wrongful act." Sprint, 571 U.S. at 79. This is more than simply "negative consequences." ACRA Turf Club, LLC v. Zanzuccki, 748 F.3d 127, 140 (3d Cir. 2014). "Sanctions are retributive in nature and are typically imposed to punish the sanctioned party

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'for some wrongful act.'" Id. (quoting Sprint, 571 U.S. at 79). Sanctions must be more than the mere "cost of doing business, with the choice of whether to make such payment resting entirely with Plaintiffs." Id.

After a judge finds the respondent poses "an immediate and present danger of causing bodily injury" to themselves or others "by having custody or control of, owning, possessing, purchasing, or receiving a firearm" the judge must issue the TERPO. N.J. Stat. Ann. § 2C:58-23(e). The TERPO prohibits the respondent from possessing firearms and "during the period the protective

order is in effect" the respondent must "surrender firearms and ammunition in the respondent's custody or control . . . and any firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun." Id. § 2C:58-23(g). Additionally, violation of any order issued under the ERPO Act "shall constitute an offense under N.J. Stat. Ann. § 2C:29- 9(e). Id. § 2C: 58-29. In Gonzalez v. Waterfront Comm'n of N.Y. Harbor, the Third Circuit found a disciplinary hearing and potential termination of employment sanctions for the "wrongful conduct" of making false statements. 755 F.3d 176, 182 (3d Cir. 2014). The Court clarified "the 'sanction' is clear; if the charges were sustained, Gonzales faced termination of his employment." Id. Here, Greco's "wrongful conduct" is posing an "immediate and present danger of causing bodily injury" to himself or others. See N.J. Stat. Ann. § 2C:58-23(e). The New Jersey Department of Homeland Security's petition referenced Greco's online Anti-Semitism, contact with the Pittsburgh synagogue shooter before the mass shooting, Greco's beliefs that "force or violence is necessary to realign society," and his disdain "for the Jewish Talmud and how he believes that Jews are raping our women and children." (ECF No. 1, Ex. D at 2.) Upon this information, the Superior Court granted the petition, and the Township Defendants seized Greco's New Jersey Firearms Purchaser ID Card, Greco's rifle, and ammunition for the rifle. (ECF No. 1 ¶¶ 53-54.)

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Because the removal of firearms was "imposed to punish" Greco for the "wrongful act" of posing an immediate and present danger to himself or others, the Court finds this

factor weighs in favor of finding the proceedings against Greco were quasi-criminal in nature.

For the last threshold factor, the Court must consider "whether there is also a criminal analog to this action." PDX N., Inc., 978 F.3d at 884. Here, Defendants note "the EPRO Act is housed in the state's criminal code; that the proceedings occur in the Criminal Part; and that violations of EPROs are 'offenses'" under N.J. Stat. Ann. § 2C:58-29. (ECF No. 65-1 at 17.) Additionally, Defendants contend the ERPO Act features an investigation before the proceeding, since the Act "demands submission of an affidavit by law enforcement . . . which can only come from a pre-initiation investigation." (Id. at 15 (citing N.J. Stat. Ann. § 2C:58-23(a)-(b)).) Defendants also note "the petition and the TERPO in this case . . . demonstrate that an investigation preceded OHSP's filing, and as part of the investigation, officers even interviewed Plaintiff." (Id. at 16 n.4.)

Often, "the proceeding [will be] both in aid of and closely related to criminal statutes." Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975). A proceeding is more likely to be quasicriminal if "the State could have alternatively sought to enforce a parallel criminal statute" that "vindicates similar interests." ACRA Turf Club, 748 F.3d at 138; see also Trainor v. Hernandez, 431 U.S. 434, 444 (1977); Gonzalez, 755 F.3d at 182. For that reason, "[i]nvestigations are commonly involved, often culminating in the filing of a formal complaint or charges." Sprint, 571 U.S. at 79-80; see also Gonzalez, 755 F.3d at 182.

As Defendants note, the ERPO Act is part of New Jersey's Criminal Code and prosecutors are charged with providing evidence to court in support of a TERPO, based on a set of factors.

N.J. Stat. Ann. § 2C: 58-23(f). Here, there is no "parallel criminal statute" [Footnote 7] the State could have enforced that would "vindicate similar interests," since the Act created a procedure that had not existed prior to its enactment. New Jersey Senate Committee Statement, S.B. 2259, 6/4/2018 (stating the bill "establishes a process and procedures for obtaining a protective order against persons who pose a significant danger of bodily injury to themselves or others by possessing or purchasing a firearm"). However, the proceedings under the Act are investigatory and "culminate in the filing of a formal complaint." See Sprint, 571 U.S. at 79-80. Under the Act, the petition must include an "affidavit setting forth the facts tending to establish the grounds of the petition . . . and to the extent available, the number, types, physical description, and locations of any firearms and ammunition" believed to be in the respondent's possession. N.J. Stat. Ann. § 2C: 58-23(b). The petition is then filed with the court, which must "examine under oath the petitioner and any witness the petitioner may produce" but may "in lieu of examining the petitioner . . . rely on an affidavit submitted in support of the petition." Id. § 2C: 58-23(d). In this case, law enforcement monitored Greco's social media posts for months, received evidence from a member of Greco's household that he possessed a firearm at home, and interviewed Greco at his home as part of their investigation. (ECF No. 1, Ex. D at 1-2.) After this investigation, the New Jersey Department of Homeland Security filed a petition against Greco. (See ECF No. 1, Ex. D.) Because the proceedings in this case featured an investigation that "culminat[ed] in the filing of a formal complaint," this last factor weighs in favor of

finding the action was quasi-criminal. In view of all three factors,

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7 The Act specifies "[f]iling a petition pursuant to this section shall not prevent a petitioner from filing a criminal complaint or applying for a restraining order pursuant to the 'Prevention of Domestic Violence Act of 1991.'" N.J. Stat. Ann. § 2C: 58-23(a). To the extent that Act qualifies as a criminal statute, there may indeed be a criminal analog.

this Court finds the ERPO Act proceeding against Greco is quasi-criminal in nature. See PDX N., Inc., 978 F.3d at 884.

Because the Court finds that Defendants have satisfied the threshold requirements, it will now assess whether Defendants meet the Middlesex factors. First, the Court considers whether there are ongoing state judicial proceedings. Defendants argue there "clearly are ongoing state judicial proceedings" because the Complaint was commenced in the New Jersey Superior Court and "the state court continues holding status conferences." (ECF No. 65-1 at 18.) The Department of Homeland Security's TERPO petition was initiated on September 5, 2019. (ECF No. 1, Ex. D.) Greco filed this action before this Court on October 21, 2019. (See id.) Because the TERPO proceeding was initiated before Greco filed his Complaint in federal court, there is an "ongoing state judicial proceeding." This would remain true even if the state court proceeding was stayed. PDX N., Inc., 978 F.3d at 885 (noting "state court proceedings 'are "ongoing" for Younger abstention purposes, notwithstanding a state court's stay of proceedings' if the state proceeding 'was pending at the time the plaintiff filed its initial complaint

in federal court'" (quoting Addiction Specialists, Inc., 411 F.3d at 408-09)). Therefore, this factor weighs in favor of abstention under Younger.

Second, the Court must consider whether the EPRO Act proceedings implicate an important state interest. For this factor, Defendants argue the state judicial proceedings implicate important state interests because the Act seeks to protect New Jersey residents "from the threat of injury at the hands of a person found to present an immediate and present danger." (ECF No. 65- 1 at 18.) "The State of New Jersey has, undoubtedly, a significant, substantial and important interest in its citizens' safety." Drake v. Filko, 724 F.3d 426, 437 (3d Cir. 2013). The main function of the EPRO Act's procedure is to ensure those deemed a danger to themselves or others do not

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have ready access to firearms. Because the Act furthers the state's "interest in its citizens' safety," the Court finds the Act's proceedings implicate important state interests.

Lastly, the Court considers whether Greco has an adequate opportunity to raise his federal claims though the state proceedings. Defendants contend Greco could make his constitutional arguments at his final extreme risk protection order ("FERPO") hearing and on appeal at the state court level. (ECF No. 65-1 at 18.) "It is sufficient under Middlesex, that constitutional claims may be raised in state-court judicial review of the administrative proceeding." Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 629 (1986). Not only would Greco be able to raise his constitutional claims in state court, but as this Court has previously noted, "the

ERPO Act allows Plaintiff to seek the return of his property at a FERPO hearing where he would be permitted to raise constitutional arguments." (ECF No. 57 at 15.) Accordingly, based on all the factors presented above, the Court will abstain under Younger.

B. The Law-of-the-Case Doctrine

Greco states he is "specifically relying upon the earlier ruling made by this Court at an earlier stage—the preliminary injunction stage—of this very same litigation." (ECF No. 69-2 at 13-14.) Because the Court decided to hear—and ultimately deny—Greco's prior Motion for Preliminary Injunction, Greco argues this Court has already chosen not to abstain and is bound by that decision. Greco also identifies three exceptions to the "law of the case" doctrine: (1) the availability of new evidence, (2) the announcement of a supervening new law; and (3) a clearly erroneous decision that would create manifest injustice, and contends none of them apply to this action. (ECF No. 69-2 at 14 (citing Pub. Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 116-17 (3d Cir. 1997)).) In addition, Greco argues "Defendants have

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Already briefed, argued, and lost the literally identical 'Abstention Doctrine' argument at the preliminary injunction phase." (ECF No. 69-2 at 15.)

In their Reply, Defendants highlight "findings at the preliminary relief stage should have binding effect only if 'circumstances make it likely that the findings are "sufficiently firm" to persuade the court that there is no

compelling reason for permitting them to be litigated again.'" (ECF No. 75 at 4-5 (citing Hawksbill Sea Turtle v. FEMA, 126 F.3d 461, 474 n. 11 (3d Cir. 1997)).) Defendants also note this Court did not say anything regarding Younger in its previous opinion, and argue "Plaintiff cannot identify any language in any opinion in this case that mentions, let alone decides, application of Younger to this suit." (ECF No. 75 at 5.)

The Court is not persuaded by Greco's argument that the law-of-the-case doctrine applies. "Under the law-of-the-case doctrine, 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" Am. Civil Liberties Union v. Mukasey, 534 F.3d 181, 187 (3d Cir. 2008) (citing Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988)). However, a court "may reconsider issues that we previously resolved if any of the following 'extraordinary circumstances' are present: (1) there has been an intervening change in the law; (2) new evidence has become available; or (3) reconsideration is necessary to prevent clear error or a manifest injustice." Id. at 188 (citation omitted) (internal quotation marks omitted).

Greco's reliance on the law-of-the-case doctrine is improper because "while the law of the case doctrine bars courts from reconsidering matters actually decided, it does not prohibit courts from revisiting matters that are avowedly preliminary or tentative." Council of Alternative Political Parties v. Hooks, 179 F.3d 64, 69 (3d Cir.1999) (quotation omitted); see R.R. Yardmasters of Am. v. Pennsylvania R.R. Co., 224 F.2d 226, 229 (3d Cir.1955)

("Preliminary injunctions are, by their nature, tentative and impermanent."); see also Bowers v. City of Philadelphia, No. CIV.A. 06-3229, 2008 WL 5234357, at *3 (E.D. Pa. Dec. 12, 2008) ("Courts generally do not apply the law-of-the-case doctrine to matters decided in the context of a motion for a preliminary injunction."). Further, the Third Circuit has rejected the same argument Greco is making before the Court. In Ocean Grove Camp Meeting Ass'n of United Methodist Church v. Vespa-Papaleo, the Association argued the District Court "[could not] apply Younger after electing to rule on the Association's preliminary injunction motion." 339 F. App'x 232, 240 (3d Cir. 2009). The Third Circuit disagreed because "[t]he District Court's denial of a preliminary injunction motion in this case was not a proceeding of substance on the merits." Id. For these reasons, the Court will not apply the "law of the case" doctrine to its denial of Greco's Motion for Preliminary Injunction. Because the Court rejects Greco's law-of-the-case argument and finds abstention proper **[Footnote 8]** under Younger, Greco's complaint is dismissed for lack of subject matter

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8 This Court previously issued an opinion denying Plaintiff's Motion for Class Certification (ECF No. 84) without ruling on abstention. "The abstention doctrine of Younger v. Harris, 401 U.S. 37, 91 (1971) . . . represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction."). Tenet v. Doe, 544 U.S. 1, 6 n.4 (2005). Additionally, "the issue of abstention is a threshold matter that should be resolved before proceeding to the merits of a claim." Mancilla-Coello v. McIntosh, No. 607CV1446ORL19UAM, 2007 WL 4115293, at *1 (M.D. Fla. Nov. 16, 2007) (citing Tenet v. Doe, 544 U.S. 1, 6 n. 4 (2005)); see Ford Motor Co. v. Ins. Comm'r of Pennsylvania, 874 F.2d 926, 931 (3d Cir. 1989) (deciding abstention issues before reaching merits of constitutional claims); see also Belloti v. Baird, 428 U.S. 132, 143 n. 10 (1976) (determining that abstention may be raised by the court sua sponte).

Based on the above, abstention need not be decided at the outset of an action, so long as it is decided before the merits of the case. In deciding motions for class certification, a court's analysis of Rule 23's prerequisites "will entail some overlap with the merits of the plaintiff's underlying claim." Wal–Mart Inc. v. Dukes, 564 U.S. 338, 351 (2011). Here, the Court's analysis in its opinion denying Greco's Motion contained no such overlap. Greco argued in favor of class certification because "the reality is that the statute is indeed facially unconstitutional." (ECF No. 84 at 8.) In ruling on Greco's Motion, the Court did not analyze the merits of Greco's claim—that New Jersey's EPRO statute was facially unconstitutional—at any point. Instead, the Court noted Greco's argument regarding commonality was only a paragraph long and emphasized "[o]ther than a single citation to Dukes, Plaintiff's briefing on the issue of commonality is devoid of any **[*footnote continues on bottom of page 17]**

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jurisdiction. Dickerson v. Bank of Am., N.A., No. CIV. 12-03922 RBK, 2013 WL 1163483, at *2 (D.N.J. Mar. 19, 2013). As a result of abstention, the Court will also deny Greco's Cross Motion for Partial Summary Judgment.

IV. CONCLUSION

For the reasons set forth above, Defendants' Motions to Dismiss are **GRANTED**. Plaintiff's Complaint is **DISMISSED WITHOUT PREJUDICE** **[Footnote 9]** and Plaintiff's Cross Motion for Partial Summary Judgment is **DENIED**. An appropriate Order follows

Date: December 11, 2020

s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

[*footnote continued from prior page 16] reference to Third Circuit or District of New Jersey caselaw." (Id. at 11 n.12.) After highlighting the deficiency of Greco's Motion, it proceeded to note "although the legal issue of whether the ERPO Act is constitutional would be common to all members of the putative class, the individualized factual circumstances of each potential class member vitiates the feasibility of class certification." (Id. at 12.) Because the Court only addressed the logistical issues associated with a potential class action, and did not engage in the kind of "overlap" that Dukes envisioned for most cases, this Court did not decide the merits of Greco's case in denying class certification. Since the Court has not yet "proceeded to the merits" of Greco's claim, it may still rule on abstention in this matter.

9 The Third Circuit has clarified when there is no merits-based decision, dismissal of a federal case "does not implicate claim preclusion or otherwise prevent [a plaintiff] from returning to federal court if [their] ongoing state prosecution concludes without a resolution of [their] federal claims." Eldakroury v. Attorney Gen. of New Jersey, 601 F. App'x 156, 158 (3d Cir. 2015). "Such a nonmerits dismissal is by definition without prejudice." Id. (citing Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505–06 (2001)). As the Court has not made a merits-based decision here, it will dismiss Greco's Complaint without prejudice. See Zahl v. Warhaftig, 655 F. App'x 66, 70-71 (3d Cir. 2016) (stating District Court's finding that Younger abstention operated as a dismissal with prejudice was "incorrect" and an "overly broad reading of our Younger abstention precedent").

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DAVID M. GRECO,

Plaintiff,

v.

GURBIR S. GREWAL, et al.,

Defendants.

Case No. 3:19-cv-19145 (BRM) (TJB)

ORDER

THIS MATTER is opened to this Court by three Motions: (1) Defendants New Jersey Attorney General Gubir S. Grewal, Jared M. Maples, and the New Jersey Office of Homeland Security and Preparedness (collectively, the "State Defendants"), and the Camden County Prosecutor's Office, Jill S. Mayer, and Nevan Soumails' (collectively, the "County Defendants") Motion to Dismiss Plaintiff's Complaint under the Younger doctrine pursuant to Federal Rule 12(b)(1) and for failure to state a claim for which relief could be granted pursuant to Rule 12(b)(6) (ECF No. 65); (2) Defendants Gloucester Township Police Department, Bernard John Dougherty, Nicholas C. Aumendo, Donald B. Gansky, William Daniel Rapp, and Brian Anthony Turchi's (collectively, the "Township Defendants" and with State and County Defendants, "Defendants") Motion to Dismiss for failure to state a claim for which relief could be granted pursuant to Rule 12(b)(6) (ECF No. 66); and (3) Plaintiff David M. Greco's ("Plaintiff") Cross Motion for Partial Summary Judgment Pursuant to Federal Rule of Civil Procedure 56. (ECF No.

69.) Plaintiff opposes both of Defendants' Motions to Dismiss. (ECF No. 69.) Having reviewed the submissions filed in connection with the Motions and having declined to hold oral argument pursuant to Federal

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Rule of Civil Procedure 78(b), for the reasons set forth in the accompanying Opinion and for good cause shown,

IT IS on this 7th of December 2020,

ORDERED that Defendants' Motions to Dismiss (ECF No. 65) and (ECF No. 66) are **GRANTED**; and it is further

ORDERED that Plaintiff's Cross Motion for Partial Summary Judgment (ECF No. 69) is **DENIED**; and it is further

ORDERED that Plaintiff's Complaint (ECF No. 1) is **DISMISSED WITHOUT PREJUDICE** in its entirety; and it is further

ORDERED that the clerk shall mark this matter **CLOSED.**

s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

APPENDIX D:
Opinion and Order Denying plaintiff's second motion for Class Certification, United States District Court, District of New Jersey, *Greco v. Grewal*, et al, No. 3:19-cv-19145 (September 29, 2020)

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DAVID M. GRECO,

Plaintiff,

v.

GURBIR S. GREWAL, et al.,

Defendants.

Case No. 3:19-cv-19145 (BRM) (TJB)

OPINION

MARTINOTTI, DISTRICT JUDGE

Before the Court is Plaintiff David M. Greco's ("Plaintiff") Second Motion for Class Certification. (ECF No. 59.) Defendants New Jersey Attorney General Gubir S. Grewal, Jared M. Maples, and the New Jersey Office of Homeland Security and Preparedness ("New Jersey OHSP") (collectively, the "State Defendants"), and the Camden County Prosecutor's Office, Jill S. Mayer, and Nevan Soumails (collectively, the "County Defendants")

opposed the Motion. (ECF No. 67.) Defendants Gloucester Township Police Department, Bernard John Dougherty, Nicholas C. Aumendo, Donald B. Gansky, William Daniel Rapp, and Brian Anthony Turchi (collectively, the "Township Defendants" and with State and County Defendants, "Defendants") **[Footnote 1]** filed letter correspondence joining and adopting the legal arguments advanced by the State and

1. Plaintiff also names John Doe Nos. 1–10 as Defendants. (ECF No. 1 at 2.) John Doe No. 1 is described as, "a name for the yet to be identified person(s) who anonymously identified themselves on September 5, 2019 only with the pseudonym(s) 'NEW JERSEY HOMELAND SECURITY' and 'PDPACE2.'" (Id. at 9) (capitalization in original). John Does Nos. 2–10 are identified as, "fictious names for yet to be identified persons or entities that participated and/or conspired with the other named Defendants to violate Plaintiff[']s Federal Constitutional Rights." (Id. at 10.)

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County Defendants and providing limited briefing of their own. (ECF No. 68.) Plaintiff replied to Defendants' oppositions in a single filing. (ECF No. 70.)

The Court has carefully considered the parties' submissions and decides this matter without oral argument pursuant to Local Civil Rule 78.1. For the reasons set forth below and for good cause appearing, Plaintiff's Second Motion for Class Certification is **DENIED.**

I. BACKGROUND A

A. Factual Background [Footnote 2]

The New Jersey Extreme Risk Protective Order Act of 2018 (the "ERPO Act"), N.J. Stat. Ann. §§ 2C:58-20 et seq., was signed into law on June 13, 2018. (ECF No. 1 at 10.) The ERPO Act allows a qualified petitioner to request that a state court issue a Temporary Extreme Risk Protection Order ("TERPO") preventing a respondent from, inter alia, possessing firearms and ammunition for a limited period of time. § 2C:58-23(g). In their filing with the court, a petitioner must allege "the respondent poses a significant danger of bodily injury to self or others by having custody or control of, owning, possessing, purchasing, or receiving a firearm." Id. § 2C:58-23(a). Under the statute, a family member, household member, or law enforcement officer are the only individuals qualified to petition for the entry of a TERPO. Id. § 2C:58-21. A TERPO shall be issued if the court finds "good cause to believe that the respondent poses an immediate and present danger of causing bodily injury to [themselves] or others" because they own or possess a firearm. Id. § 2C:58-23(e) (emphasis added). A TERPO prohibits the respondent from "having custody or control of, owning, purchasing, possessing, or receiving firearms or ammunition" for the duration of the order. Id. § 2C:58-23(g). It further requires a respondent to surrender any firearms and

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2 The Court incorporates, in large part, its recitation of the facts contained its February 21, 2020 Opinion. (ECF No. 57.)

ammunition they own or otherwise possess to law enforcement officers. Id. If a TERPO is entered, the issuing court forwards a copy of the order to the

appropriate law enforcement agency which serves it upon the respondent "immediately, or as soon as practicable." Id. § 2C:58-23(i)(2). If the petition indicated the respondent owns or possesses firearms, "the court shall issue a search warrant" contemporaneously with the TERPO. Id. § 2C:58-26(b). Within 10 days of the filing of the petition, the court will hold a hearing to decide whether to issue a Final Extreme Risk Protective Order ("FERPO"). Id. § 2C:58-24(a). After its issuance, a FERPO may be terminated at any time if the respondent shows by a preponderance of the evidence that they "no longer pose[] a significant danger of causing bodily injury" to themselves or others. Id. § 2C:58-25. On August 12, 2019, the New Jersey Administrative Office of the Courts issued "Directive #19-19" (the "AOC Directive"), **[Footnote 3]** promulgating guidelines for the issuance of TERPOs. (ECF No. 1, Ex. B.) The AOC Directive noted that while the statutory language of the ERPO Act uses the phrase "good cause," a TERPO can only be issued upon a showing of probable cause. (Id. at 6.) Similarly, on August 15, 2019, Attorney General Grewal issued "Law Enforcement Directive

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3 Directives from the New Jersey Administrative Office of the Courts have the force of law. See S.M. v. K.M., 81 A.3d 723, 728 n.2 (N.J. Super. Ct. App. Div. 2013); see also State v. Morales, 915 A.2d 1090, 1091 (N.J. Super. Ct. App. Div. 2007); N.J. Ct. R. 1:33-3.

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No. 2019-2" (the "AG Directive") **[Footnote 4]** which reiterated that the probable cause standard determines whether a search warrant can be issued in conjunction with a TERPO. (ECF No. 1, Ex. C.) **[Footnote 5], [Footnote 6]**

By the plain language of the statute, the ERPO Act was effective as of September 1, 2019. Id. § 2C:58-20. On September 5, 2019, a petition for a TERPO (the "Petition") was filed against Plaintiff. (ECF No. 1 ¶ 41.) The Petition identified "New Jersey Department of Homeland Security" as the petitioner. (ECF No. 1, Ex. D at 1.) No named individual was listed under the heading "Petitioner's Information" and the field under "Relationship to Respondent" was filled in with, "PEPD – PETITIONER LAW-ENFORCEMENT OFFICER." [**Footnote 7**] (Id.) On the petitioner's

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4 Directives from the Attorney General have "the force of law for police entities" and are "binding and enforceable on local law enforcement agencies." O'Shea v. Twp. of W. Milford, 982 A.2d 459, 465–466 (N.J. Super. Ct. App. Div. 2009); see also Seidle v. Neptune Twp., No. 17-4428, 2019 WL 5685731, at *18 (D.N.J. Oct. 31, 2019).

5 The AG Directive further states that in instances where law enforcement officers only have good cause to believe that the respondent poses an immediate risk of causing bodily injury, they "may still seek a TERPO petition and order, but not a search warrant." (ECF No. 1, Ex. C at 5) (emphasis added).

6 The AOC Directive and AG Directive were issued in response to the New Jersey State Supreme Court's holding in State v. Hemenway, 216 A.3d 118 (N.J. 2019). In Hemenway, law enforcement officers executed a search warrant on Hemenway's home stemming from a temporary restraining order issued under the Prevention of Domestic Violence Act ("PDVA"), N.J. Stat. Ann. §§ 2C:25-17 et seq. Id. at 121. The PDVA "empowers a judge . . . to enter an order authorizing the police to search for and seize . . . weapons that may pose a threat to the victim." Id. at 120. Much like the ERPO Act, the statutory text of the PDVA allows a search warrant to be issued upon a showing of "good cause." Id. at 128. During their search of Hemenway's home, law enforcement officers recovered various quantities of illegal narcotics and Hemenway was subsequently charged with drug offenses. Id. The New Jersey Supreme Court reversed the Superior Court's denial of Hemenway's motion to

suppress the fruits of the search. Id. at 121. The court held the "good cause" standard upon which the search warrant was issued was impermissibly lesser than the constitutionally required standard of "probable cause." Id.

7 State Defendants identify the petitioner as "a law enforcement officer with the New Jersey OHSP." (ECF No. 32 at 10.)

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signature line, "NEW JERSEY HOMELAND SECURITY" was typed in. (Id. at 2.) The Petition referenced several of Plaintiff's previous arrests and included the following:

> Information was recently obtained, through FBI contacts, that David Greco is involved in online anti-Semitism. Greco was found to be in contact with the Pittsburgh synagogue shooter, before the mass shooting that took place in October 2018. After the recent August 2019 mass shootings in both Ohio and El Paso, precautions were taken and contact was made with Greco. In coordination with the FBI, officers reached out to Greco in regards to recent posts on the social media site Gab.com. All previous social media accounts were blocked due to the nature of the content. While talking to Greco, he appeared extremely intelligent to officers and did

> not mention acting on any violent behavior toward Jews. His behavior was methodical and focused on facts, specifically from Nazi Germany. Greco believes that force or violence is necessary to realign society. Greco frequently mentioned his disdained [sic] for the Jewish Talmud and how he believes that Jews are raping our women and children.

(*Id.*) **[Footnote 8]**

An ex parte TERPO hearing was held before the Hon. Edward McBride, J.S.C., on September 6, 2019. (ECF No. 1 ¶ 50.) In addition to the Petition, Judge McBride considered the live testimony of an New Jersey OHSP Agent, "copies of social media posts from 'Gab.com,' reports from [the] FBI and GTPD" printouts of other social media posts made by Plaintiff. (ECF No. 1, Ex. E at 1.) The court found Plaintiff had previously "threatened, advocated, and celebrated the killing of Jewish people and has celebrated the mass shootings in Pittsburgh and New Zealand" in public social media posts. (Id.) The court further noted Plaintiff was "extremely agitated and angry" when law enforcement officers went to speak with him about the posts and that he had a history of "threats or acts of violence directed towards self or others." (Id. at 3.) On this record, the court granted the Petition and issued a "no-knock" search warrant for Plaintiff's residence. (Id.

8 The Petition and several other relevant exhibits contain fields where text has been typed in all caps. For ease of reading, the Court has converted the text to sentence case when quoting from these exhibits. For brevity, future alterations of the same kind are not noted.

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at 3–4.) Later that day, Township Defendants served Plaintiff with a TERPO and executed the search warrant, seizing: (1) Plaintiff's New Jersey Firearms Purchaser ID Card, (2) Plaintiff's rifle, and (3) ammunition for the rifle. (ECF No. 1 ¶¶ 53–54.) Plaintiff's FERPO hearing was initially scheduled for September 11, 2019 but was later moved to December 9, 2019. (ECF No. 32 at 13.) The FERPO hearing was subsequently adjourned until January 27, 2020, "in part to allow the State to respond to several motions" filed by Plaintiff in his State Court proceeding. (ECF No. 44 at 1.)

B. Procedural History

On October 21, 2019, Plaintiff filed a three-count class action Complaint in this Court challenging the constitutionality of the ERPO Act, alleging a cause of action pursuant to 42 U.S.C. § 1983 for violations of the First, Second, Fourth, and Fourteenth Amendments, and moving for preliminary injunctive relief. (See generally ECF No. 1.) The Court heard oral argument on Plaintiff's motion for a preliminary injunction on November 20, 2019. (ECF No. 39.) On January 17, 2019, the Court ordered the parties to provide supplemental briefing on the issue of standing. (ECF No. 51.) On February 21, 2020, the Court denied Plaintiff's motion for a preliminary injunction, finding he had failed to

demonstrate irreparable injury would occur in the absence of an injunction. (See generally ECF No. 57.)

On February 24, 2020, Plaintiff filed the present Motion. (ECF No. 59.) On May 21, 2020, after several adjournments, Defendants opposed Plaintiff's Motion. (ECF Nos. 67, 68.) On June 3, 2020, Plaintiff replied. (ECF No. 70.)

II. LEGAL STANDARD

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Wal-Mart Stores v. Dukes, 564 U.S. 338, 348 (2011). "To invoke this exception, every putative class action must satisfy the four requirements of

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Rule 23(a) and the requirements of either Rule 23(b)(1), (2), or (3)." Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 590 (3d Cir. 2012). A class may be certified pursuant to Rule 23(a) of the Federal Rules of Civil Procedure **[Footnote 9]** when:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).[9] These four requirements are customarily referred to as: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. Dukes, 564 U.S. at 349. In addition, Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). These requirements are known as "predominance" and "superiority," respectively. See In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008). Additionally, when certification is sought under Rule 23(b)(3), the Third Circuit has found that a prerequisite to an analysis of the Rule 23(a) requirements is the determination of ascertainability of the proposed class. See Marcus, 687 F.3d at 592–93.

"[T]he requirements set out in Rule 23 are not mere pleading rules." In re Hydrogen Peroxide, 552 F.3d at 316. The burden is on the plaintiff "of establishing each element of Rule 23 by a preponderance of the evidence." Marcus, 687 F.3d at 591. This requires "actual" not "presumed" conformance with Rule 23's requirements. Id. "Class certification is proper only 'if

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9 All references to a "Rule" or "Rules" refer to the Federal Rules of Civil Procedure unless otherwise noted.

the trial court is satisfied, after a rigorous analysis, that the prerequisites' of Rule 23 are met." In re Hydrogen Peroxide, 552 F.3d at 309 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982)).

III. THE PARTIES' POSITIONS

A. Plaintiff's Position

Despite acknowledging that Defendants have yet to file responsive pleadings, **[Footnote 10]** Plaintiff argues that the Court has sufficient information to certify the proposed class because "the reality is that the statute is indeed facially unconstitutional and the reality is that the only defense asserted to date (that [Defendants] will follow an Administrative Judicial memo rather than the literal text of the actual law) is no legitimate defense at all." (ECF No. 59-3 at 15 (citing Winberry v. Salisbury, 74 A.2d 406 (N.J. 1950)).)

Plaintiff further contends that all Rule 23(a) factors are satisfied in the present matter and, accordingly, the Court should certify the proposed class. (Id. at 16.) As to numerosity, Plaintiff argues that joinder is impracticable because: (1) the number of members of the proposed class is beyond what other courts have found sufficient; (2) "Plaintiffs could not join the future stream of class members because their number changes every day as more TERPOs and search warrants are issued"; (3) the majority of potential plaintiffs will lack the resources to bring suit on their own; and (4) adjudicating this matter through a class action would conserve judicial resources. (Id. at 19.) As to commonality, Plaintiff contends that the requirement is satisfied "because the legal and factual questions arising from Defendants' procedures and practices do not vary from one [c]lass member to the next." (Id. at 20 (citation omitted).) Plaintiff further asserts that "although

10 The present Motion was filed on February 24, 2020. (ECF No. 59.) Defendants ultimately filed Motions to Dismiss on May 11, 2020. (ECF Nos. 66, 69.) Plaintiff also filed a previous motion for class certification on January 10, 2020. (ECF No. 48.)

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different members may have entered the system through different factual contexts and suffered different degrees of harm, that does not diminish the commonality among them with respect to the uniform policies and practices applied to them." (Id.) As to typicality, Plaintiff argues his claims "are typical of—indeed identical to—the claims of the [other] members of the proposed [c]lass." (Id. at 21.) Finally, as to adequacy, Plaintiff asserts that he has no potential conflicts of interest with other proposed class members and that he and his counsel will vigorously prosecute this action on the behalf of the proposed class. (Id. at 21–22.) In addition to satisfying the four Rule 23(a) factors, Plaintiff contends requirements of Rule 23(b)(2) [Footnote 11] are also satisfied and, accordingly, class certification is proper. (Id. at 23.)

B. Defendants' Position

Defendants advance multiple arguments in opposition. As a preliminary matter, Defendants argue the Motion should be denied because this Court should abstain from hearing the case and because Plaintiff's complaint fails to state a claim, rendering the issue of class certification moot. (ECF No. 67 at 3.)

Alternatively, Defendants argue that Plaintiff's Motion cannot withstand the rigorous analysis required under Rule 23. (Id. at 7.) As to numerosity, Defendants argue that Plaintiff has not met his burden of establishing

that joinder of the prospective class is impracticable because "Plaintiff . . . seemingly relies primarily on his presumption that TERPOs and search warrants have been issued to 'well over 200 persons to date'" and that this "blanket assertion" is insufficient.

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11 Although Plaintiff states that "[f]or the reasons discussed below, the [c]lass satisfies Rule 23(b)(3)[,]" Plaintiff's briefing only discusses Rule 23(b)(2). (ECF 59-3 at 23.) This assertion is in further conflict with the opening pages of Plaintiff's Moving Brief where he states he is seeking "[a]n Order certifying the matter as a 'Rule 23(b)(3) [c]lass [a]ction,'" (id. at 2), and the beginning of his legal argument section, which reads "Plaintiff seeks an Order pursuant to [Rule] 23(b)(3) certifying this matter a s a 'Rule 23(b)(3) [c]lass [a]ction'" (id. at 16).

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(Id. at 27.) Defendants further assert that Plaintiff cannot satisfy the commonality requirement because "each potential class member's Fourth Amendment claim will rise or fall almost entirely based on highly-individualized factors regarding the contents of that member's search warrant, and the state-court evidentiary record leading up to the issuance of the warrant." (Id. at 13.) According to Defendants, Plaintiff's arguments regarding typicality are deficient for similar reasons. (Id. at 15.) Finally, Defendants argue that "Plaintiff's application for class certification does not account for the significant privacy interests of non-parties . . . that render it impossible to ascertain the identities of class members." (Id. at 33.)

IV. DECISION

Plaintiff moves to certify the following proposed class:

> Any person who has had a [TERPO] entered against them by the Superior Court of New Jersey under the authority of the "New Jersey Extreme Risk Protective Order Act of 2018", New Jersey Public Law 2018, Chapter 35, now codified at [N.J. Stat. Ann §§] 2C:58-20 through -32, from the date of September 1, 2019 and on any date thereafter."

(ECF No. 59-3 at 16.) The four Rule 23(a) requirements are customarily referred to as: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. Dukes, 564 U.S. at 349. The burden is on the plaintiff to "establish[] each element of Rule 23 by a preponderance of the evidence." Marcus, 687 F.3d at 591.

The Court begins by analyzing whether Plaintiff has carried his burden of establishing the commonality requirement by a preponderance of the evidence. After reviewing the record and argument currently before it, the Court concludes that he has not.

"Commonality does not require perfect identity of questions of law or fact among all class members." Reyes v. Netdeposit, LLC, 802 F.3d 469, 486 (3d Cir. 2015). "[E]ven a single common question will do." Id. Indeed, "the focus of the commonality inquiry is not on the strength of each

plaintiff's claim, but instead is on whether the defendant's conduct was common as to all of the class members." Rodriguez v. Nat'l City Bank, 726 F.3d 372, 382 (3d Cir. 2013) (internal quotation omitted) (citation omitted); see also Sullivan v. DB Investments, Inc., 667 F.3d 273, 298 (3d Cir. 2011). The bar of satisfying Rule 23(a)(2) "is not a high one." Id. However, the language of Rule 23(a)(2) "is easy to misread, since [a]ny competently crafted class complaint literally raises common 'questions.'" Dukes, 564 U.S. at 349 (citing Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 131–32 (2009)) (internal quotation omitted). The mere recital of common questions, however, is "not sufficient to obtain class certification." Id. (noting that, "Do all of us plaintiffs indeed work for Wal–Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get?" were examples of insufficient common questions); see also Nagareda, supra at 132 ("What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.")

Here, Plaintiff's entire argument regarding commonality, apart from a recitation of the basic legal standard, [**Footnote 12**] is rather summary:

> The commonality requirement is satisfied here because the legal and factual questions arising from Defendants'

> procedures and practices do not vary from one Class member to the next. See Adamson, 855 F.2d at 676 (application of common policy to all class members suffices to meet commonality requirement). Defendants enforce the facially unconstiotutional [sic] ERPO Act in a routine and consistent way, despite knowing they are acting unlawfully, and all [c]lass members were (and future [c]lass [m]embers will be) similarly subjected to Defendants' policies and procedures. And although

12 Other than a single citation to Dukes, Plaintiff's briefing on the issue of commonality is devoid of any reference to Third Circuit or District of New Jersey caselaw. (See ECF No. 59-3 at 19–20.)

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the TERPO hearing—including transcripts, exhibits, and other evidence [the State court judge] considered when issuing his ruling (ECF No. 22)—effectively preventing this Court from analyzing Plaintiff's own claim that a standard lesser than probable cause was used." (ECF No. 57 at 14.)

The Court would be required to perform or, at least attempt to perform, a similar analysis for all putative members of the proposed class. Because of the highly individualized nature of this inquiry, the Court finds that

it is likely, if not nearly certain, that each putative plaintiff would come to this case with a unique set of factual circumstances undergirding their claim. Moreover, the analysis and resolution of each plaintiff's factual contentions—i.e. whether the TERPO in their case was issued upon a finding of probable cause—would not resolve any issues for the other plaintiffs because the Defendants' conduct would be materially different as to each plaintiff. See Rodriguez, 726 F.3d at 382 ("[T]he focus of the commonality inquiry is not on the strength of each plaintiff's claim, but instead is on whether the defendant's conduct was common as to all of the class members."). The bald assertion that all putative plaintiffs suffered a violation of the same law is also generally insufficient to satisfy the commonality requirement. See, e.g., Dukes, 564 U.S. at 349–50 ("Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury' . . . [but t]his does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for

example, the assertion of discriminatory bias on the part of the same supervisor. That common contention,

moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.").

A class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." Falcon, 457 U.S. at 161. "[A]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable." Dukes, 564 U.S. at 351 (citation omitted). Here, the Court is not satisfied that Plaintiff has met his burden by proving by a preponderance of the evidence that the Rule 23 factors for class certification are satisfied. Plaintiff's Second Motion for Class Certification, accordingly, is **DENIED.** **[Footnote 13]**

V. CONCLUSION

For the reasons set forth above, Plaintiff's Second Motion for Class is **DENIED.** An accompanying Order will follow.

Date: September 29, 2020

s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

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13 Because the Court finds Plaintiff has failed to establish commonality, it does not reach the merits of the parties' remaining arguments.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DAVID M. GRECO,

Plaintiff,

v.

GURBIR S. GREWAL, et al.,

Defendants.

Case No. 3:19-cv-19145 (BRM) (TJB)

ORDER

THIS MATTER is opened to the Court by Plaintiff David M. Greco's ("Plaintiff") Second Motion for Class Certification. (ECF No. 59.) Defendants New Jersey Attorney General Gubir S. Grewal, Jared M. Maples, and the New Jersey Office of Homeland Security and Preparedness (collectively, the "State Defendants"), and the Camden County Prosecutor's Office, Jill S. Mayer, and Nevan Soumails (collectively, the "County Defendants") opposed the Motion. (ECF No. 67.) Defendants Gloucester Township Police Department, Bernard John Dougherty, Nicholas C. Aumendo, Donald B. Gansky, William Daniel Rapp, and Brian Anthony Turchi (collectively, the "Township Defendants" and with State and County Defendants, "Defendants") filed letter correspondence joining and adopting the legal arguments advanced by the State and County Defendants and providing limited briefing of their own. (ECF No. 68.) Plaintiff replied to Defendants' opposition briefs in a single filing. (ECF No. 70.)

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The Court has carefully considered the parties' submissions and decides this matter without oral argument pursuant to Local Civil Rule 78.1. For the reasons set forth in the accompanying Opinion and for good cause shown,

IT IS on this 29th day of September 2020, **ORDERED** that Plaintiff's Second Motion for Class Certification (ECF No. 59) is **DENIED.**

s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

APPENDIX E:
Opinion and Order Denying plaintiff's motion for a Preliminary Injunction, United States District Court, District of New Jersey, *Greco v. Grewal*, et al, No. 3:19-cv-19145 (February 21, 2020)

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DAVID M. GRECO,

Plaintiff,

v.

GURBIR S. GREWAL, et al.,

Defendants.

Case No. 3:19-cv-19145 (BRM) (TJB)

OPINION

MARTINOTTI, DISTRICT JUDGE

Before the Court is Plaintiff David M. Greco's ("Plaintiff") Motion for a Preliminary Injunction Pursuant to Federal Rule [**Footnote 1**] of Civil Procedure 65. (ECF No. 1.) Defendants New Jersey Attorney General Gubir S. Grewal ("Attorney General Grewal"), Jared M. Maples, and the New Jersey Office of Homeland Security and Preparedness ("New Jersey OHSP") (collectively, the "State Defendants"), and the Camden County Prosecutor's Office, Jill S. Mayer, and Nevan Soumails (collectively, the "County Defendants") opposed the Motion. (ECF No.

32.) Defendants Gloucester Township Police Department, Bernard John Dougherty, Nicholas C. Aumendo, Donald B. Gansky, William Daniel Rapp, and Brian Anthony Turchi (collectively, the "Township

1 Hereinafter, all references to a "Rule" or Rules" refer to the Federal Rules of Civil Procedure, unless otherwise noted.

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Defendants" and with State and County Defendants, "Defendants") **[Footnote 2]** filed correspondence joining and adopting the legal arguments advanced by the State and County Defendants but declining to provide any briefing of their own. (ECF No. 33.)

The Court held oral argument on November 20, 2019. (ECF No. 39.) On December 5, 2019, Plaintiff submitted a supplemental letter brief. (ECF No. 44.) On January 10, 2020, Plaintiff filed a Motion for Class Certification ("Class Certification Motion") pursuant to Rule 23(b). (ECF No. 48.) State and County Defendants submitted joint correspondence opposing the Class Certification Motion (ECF No. 49), and Plaintiff replied (ECF No. 50). On January 17, 2020, the Court entered an Order granting the State and County Defendants' request, administratively terminating Plaintiff's Class Certification Motion without prejudice, and requesting further briefing from the parties on the issue of standing. (ECF No. 51.) On January 24, 2020, Plaintiff submitted his initial brief (ECF No. 52) to which the State and County Defendants responded (ECF No. 53.) On January 31, 2020, the Township Defendants submitted correspondence joining and adopting the legal arguments advanced by the State and County Defendants but declining to provide any briefing of their own. (ECF No.

54.) On February 3, 2020, Plaintiff filed his reply brief. (ECF No. 55.) Having reviewed the submissions filed in connection with the Motion and having considered the arguments raised at the preliminary hearing, for the reasons set forth below and for good cause appearing, Plaintiff's Motion for a Preliminary Injunction is DENIED.

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2 Plaintiff also names John Doe Nos. 1–10 as Defendants. (ECF No. 1 at 2.) John Doe No. 1 is described as, "a name for the yet to be identified person(s) who anonymously identified themselves on September 5, 2019 only with the pseudonym(s) 'NEW JERSEY HOMELAND SECURITY' and 'PDPACE2.'" (Id. at 9) (capitalization in original). John Does Nos. 2–10 are identified as, "fictious names for yet to be identified persons or entities that participated and/or conspired with the other named Defendants to violate Plaintiff[']s Federal Constitutional Rights." (Id. at 10.)

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I. BACKGROUND

A. Factual Background

The New Jersey Extreme Risk Protective Order Act of 2018 (the "ERPO Act"), N.J. Stat. Ann. §§ 2C:58-20 et seq., was signed into law on June 13, 2018. (ECF No. 1 at 10.) The ERPO Act allows a qualified petitioner to request that a state court issue a Temporary Extreme Risk Protection Order ("TERPO") preventing a respondent from, inter alia, possessing firearms and ammunition for a limited period of time. § 2C:58-23(g). In their filing with the court, a petitioner must allege "the respondent poses a significant danger of bodily injury to self or others by having custody or control of, owning, possessing, purchasing, or receiving a firearm." Id. § 2C:58-23(a).

Under the statute, a family member, household member, or law enforcement officer are the only individuals qualified to petition for the entry of a TERPO. Id. § 2C:58-21. A TERPO shall be issued if the court finds "good cause to believe that the respondent poses an immediate and present danger of causing bodily injury to [themselves] or others" because they own or possess a firearm. Id. § 2C:58-23(e) (emphasis added). A TERPO prohibits the respondent from "having custody or control of, owning, purchasing, possessing, or receiving firearms or ammunition" for the duration of the order. Id. § 2C:58-23(g). It further requires a respondent to surrender any firearms and ammunition they own or otherwise possess to law enforcement officers. Id. If a TERPO is entered, the issuing court forwards a copy of the order to the appropriate law enforcement agency which serves it upon the respondent "immediately, or as soon as practicable." Id. § 2C:58-23(i)(2). If the petition indicated the respondent owns or possesses firearms, "the court shall issue a search warrant" contemporaneously with the TERPO. Id. § 2C:58-26(b). Within 10 days of the filing of the petition, the court will hold a hearing to decide whether to issue a Final Extreme Risk Protective Order ("FERPO"). Id. § 2C:58-24(a). After its issuance, a FERPO may be terminated at any time

if the respondent shows by a preponderance of the evidence that they "no longer pose[] a significant danger of causing bodily injury" to themselves or others. Id. § 2C:58-25.

On August 12, 2019, the New Jersey Administrative Office of the Courts issued "Directive #19-

19" (the "AOC Directive"), **[Footnote 3]** promulgating guidelines for the issuance of TERPOs. (ECF No. 1, Ex. B.) The AOC Directive noted that while the statutory language of the ERPO Act uses the phrase "good cause," a TERPO can only be issued upon a showing of probable cause. (Id. at 6.) Similarly, on August 15, 2019, Attorney General Grewal issued "Law Enforcement Directive No. 2019-2" (the "AG Directive") **[Footnote 4]** which reiterated that the probable cause standard determines whether a search warrant can be issued in conjunction with a TERPO. (ECF No. 1, Ex. C.) **[Footnote 5]**, **[Footnote 6]**

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3 Directives from the New Jersey Administrative Office of the Courts have the force of law. See S.M. v. K.M., 81 A.3d 723, 728 n.2 (N.J. Super. Ct. App. Div. 2013); see also State v. Morales, 915 A.2d 1090, 1091 (App. Div. 2007); see also N.J. Ct. R. 1:33-3.

4 Directives from the Attorney General have "the force of law for police entities" and are "binding and enforceable on local law enforcement agencies." O'Shea v. Twp. of W. Milford, 982 A.2d 459, 465–466 (N.J. Super. Ct. App. Div. 2009); see also Seidle v. Neptune Twp., No. 17-4428, 2019 WL 5685731, at *18 (D.N.J. Oct. 31, 2019)

5 The AG Directive further states that in instances where law enforcement officers only have good cause to believe that the respondent poses an immediate risk of causing bodily injury, they "may still seek a TERPO petition and order, but not a search warrant." (ECF No. 1, Ex. C at 5) (emphasis added).

6 The AOC Directive and AG Directive were issued in response to the New Jersey State Supreme Court's holding in State v. Hemenway. 216 A.3d 118 (N.J. 2019). In Hemenway, law enforcement officers executed a search warrant on Hemenway's home stemming from a temporary restraining order issued under the Prevention

of Domestic Violence Act ("PDVA"), N.J. Stat. Ann. §§ 2C:25- 17 et seq. Id. at 121. The PDVA "empowers a judge . . . to enter an order authorizing the police to search for and seize . . . weapons that may pose a threat to the victim." Id. at 120. Much like the ERPO Act, the statutory text of the PDVA allows a search warrant to be issued upon a showing of "good cause." Id. at 128. During their search of Hemenway's home, law enforcement officers recovered various quantities of illegal narcotics and Hemenway was subsequently charged with drug offenses. Id. The New Jersey Supreme Court reversed the Superior Court's denial of Hemenway's motion to suppress the fruits of the search. Id. at 121. The court held the "good cause" standard upon which the search warrant was issued was impermissibly lesser than the constitutionally required standard of "probable cause." Id.

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By the plain language of the statute, the ERPO Act was effective as of September 1, 2019. Id. § 2C:58-20. On September 5, 2019, a petition for a TERPO (the "Petition") was filed against Plaintiff. (ECF No. 1 ¶ 41.) The Petition identified "New Jersey Department of Homeland Security" as the petitioner. (ECF No. 1, Ex. D at 1.) No named individual was listed under the heading "Petitioner's Information" and the field under "Relationship to Respondent" was filled in with, "PEPD – PETITIONER LAW-ENFORCEMENT OFFICER." **[Footnote 7]** (Id.) On the petitioner's signature line, "NEW JERSEY HOMELAND SECURITY" was typed in. (Id. at 2.) The Petition referenced several of Plaintiff's previous arrests and included the following:

Information was recently obtained, through FBI contacts, that David Greco is involved in online anti-Semitism. Greco was found to be in contact with the Pittsburgh synagogue shooter, before the mass shooting that took place in October 2018. After the recent August 2019 mass shootings in both Ohio and El Paso, precautions were taken and contact was made with Greco. In coordination with the FBI, officers reached out to Greco in regards to recent posts on the social media site Gab.com. All previous social media accounts were blocked due to the nature of the content. While talking to Greco, he appeared extremely intelligent to officers and did not mention acting on any violent behavior toward Jews. His behavior was methodical and focused on facts, specifically from Nazi Germany. Greco believes that force or violence is necessary to realign society. Greco frequently mentioned his disdained [sic] for the Jewish Talmud and how he believes that Jews are raping our women and children.

(*Id.*) **[Footnote 8]**

An *ex parte* TERPO hearing was held before the Hon. Edward McBride, J.S.C., on September 6, 2019. (ECF No. 1 ¶ 50.) In addition to the Petition, Judge McBride considered the

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7 State Defendants identify the petitioner as "a law enforcement officer with the New Jersey OHSP." (ECF No. 32 at 10.)

8 The Petition and several other relevant exhibits contain fields where text has been typed in all caps. For ease of reading, the Court has converted the text to sentence case when quoting from these exhibits. For brevity, future alterations of the same kind are not noted.

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live testimony of an New Jersey OHSP Agent, "copies of social media posts from 'Gab.com,' reports from [the] FBI and GTPD" printouts of other social media posts made by Plaintiff. (ECF No. 1, Ex. E at 1.) The court found Plaintiff had previously "threatened, advocated, and celebrated the killing of Jewish people and has celebrated the mass shootings in Pittsburgh and New Zealand" in public social media posts. (Id.) The court further noted Plaintiff was "extremely agitated and angry" when law enforcement officers went to speak with him about the posts and that he had a history of "threats or acts of violence directed towards self or others." (Id. at 3.) On this record, the court granted the Petition and issued a "no-knock" search warrant for Plaintiff's residence. (Id. at 3–4.) Later that day, Township Defendants served Plaintiff with a TERPO and executed the search warrant, seizing: (1) Plaintiff's New Jersey Firearms Purchaser ID Card,

(2) Plaintiff's rifle, and (3) ammunition for the rifle. (ECF No. 1 ¶¶ 53–54.) Plaintiff's FERPO hearing was initially scheduled for September 11, 2019 but was later moved to December 9, 2019. (ECF No. 32 at 13.) The FERPO hearing was subsequently adjourned until January 27, 2020, "in part to allow the State to respond to several motions" filed by Plaintiff in his State Court proceeding. (ECF No. 44 at 1.)

B. Procedural History

Plaintiff filed a three-count class action Complaint in this Court on October 21, 2019, challenging the constitutionality of the ERPO Act, alleging a cause of action pursuant to 42 U.S.C. § 1983 for violations of the First, Second, Fourth, and Fourteenth Amendments, and moving for preliminary injunctive relief. (See generally ECF No. 1.) On November 8, 2019, the State and County Defendants jointly opposed Plaintiff's Motion. (ECF No. 32.) On the same day, the Township Defendants filed correspondence joining and adopting the legal arguments advanced by State and County Defendants but declining to provide any additional briefing of their own. (ECF No. 33.) The Court heard oral argument on the Motion on November 20, 2019. (ECF No. 39.) Per

the Court's Order, (ECF No. 51), the parties submitted dueling briefs on the issue of standing. (ECF Nos. 52, 53, 55.)

II. LEGAL STANDARD

"Preliminary injunctive relief is an 'extraordinary remedy, which should be granted only in limited circumstances.'" Ferring Pharms., Inc. v. Watson Pharms., Inc., 765 F.3d 205, 210 (3d Cir. 2014) (quoting Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co., 290 F.3d 578, 586 (3d Cir. 2002)). The primary purpose of preliminary injunctive relief is to maintain "the status quo until a decision on the merits of a case is rendered." Acierno v. New Castle Cty., 40 F.3d 645, 647 (3d Cir. 1994). In order to obtain a temporary restraining order or preliminary injunction, the moving party must show:

> (1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured . . . if relief is not granted . . . . [In addition,] the district court, in considering whether to grant a preliminary injunction, should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.

Reilly v. City of Harrisburg, 858 F.3d 173, 176 (3d Cir. 2017) (quoting Del. River Port Auth. v. Transamerican Trailer Transport, Inc., 501 F.2d 917, 919–20 (3d Cir. 1974)). The movant bears the burden of "meet[ing] the threshold for the first two 'most critical' factors: . . . that [they] can win on the merits . . . and that it is more likely

than not [they will] suffer irreparable harm in the absence of preliminary relief." Id. at 179. "If these gateway factors are met, a court then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." Id.

A party asserting a statute is facially unconstitutional "must establish that no set of circumstances exists under which the [statute] would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). A facial attack, therefore, is the "most difficult challenge to mount successfully."

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Id. Alternatively, "[a]n as-applied attack . . . does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right." United States v. Marcavage, 609 F.3d 264, 273 (3d Cir. 2010).

III. DECISION

A. Standing

As a threshold matter, the Court addresses whether Plaintiff has standing to pursue his claims. Standing is a justiciability doctrine that limits a court's "jurisdiction to cases and controversies in which a plaintiff has a concrete stake." Freedom from Religion Found. Inc v. New Kensington Arnold Sch. Dist., 832 F.3d 469, 476 (3d Cir. 2016). To establish standing:

> [A] plaintiff must show (1) [he] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000)). The Plaintiff bears the burden of establishing standing. Id. When a plaintiff asserts multiple claims, standing must be established separately for each claim. Friends of the Earth, Inc., 528 U.S. at 185.

Section 1983 creates a civil remedy for individuals who are "depriv[ed] of any rights, privileges, or immunities secured by the Constitution and its laws" by a state actor. 42 U.S.C § 1983; see also McFadden v. Apple Inc., 785 F. App'x 86, 88 (3d Cir. 2019) ("Section 1983 provides a cause of action to redress federal constitutional violations caused by officials acting under color of state law." (citation omitted)). Plaintiff brings a three-count Complaint pursuant to 42 U.S.C § 1983—Count One, for violations of the Fourth Amendment; Count Two, for violations of the Second and Fourteenth Amendments; and Count Three, for violations of the First

Amendment. (ECF No. 1 ¶¶ 56–71.) As noted, supra, Plaintiff must establish he has standing to pursue each count individually.

Here, the Court finds that Plaintiff's assertions satisfy the second and third elements of a standing analysis. The injuries that Plaintiff alleges are all directly linked to the issuance of the TERPO against him and, therefore, fairly traceable to the actions of Defendants. Similarly, an order from this Court enjoining the enforcement of the ERPO Act and ordering the return of Plaintiff's property would provide Plaintiff relief from the Constitutional violations he alleges. The critical inquiry, therefore, is whether Plaintiff has suffered an injury-in-fact for each of his claimed Constitutional deprivations.

An "injury-in-fact" is "an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Reilly v. Ceridian Corp., 664 F.3d 38, 41 (3d Cir. 2011) (internal quotations and citation omitted). "[A]llegations of a future injury, or the mere possibility of a future injury, will not establish standing." Hindermyer v. B. Braun Med. Inc., No. CV 19-6585, 2019 WL 5881073, at *12 (D.N.J. Oct. 30, 2019).

I. Plaintiff's Fourth Amendment Claim

The Fourth Amendment codifies the right of citizens to be free from "unreasonable searches and seizures" and further provides, in relevant part, that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. In contrast, the plain text of the ERPO Act states, "[a] judge shall issue the [TERPO

and search warrant] if the court finds good cause to believe that the respondent poses an immediate and present danger." N.J. Stat. Ann. § 2C:58-23(e) (emphasis added).

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"In the context of a claim for unlawful entry or search, the capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Badillo v. Amato, No. 13-1553, 2014 WL 314727, at *4 (D.N.J. Jan. 28, 2014) (internal quotation and citation omitted). "One's home is sacrosanct, and unreasonable government intrusion into the home is 'the chief evil against which the wording of the Fourth Amendment is directed.'" United States v. Zimmerman, 277 F.3d 426, 431 (3d Cir. 2002) (quoting Payton v. New York, 445 U.S. 573, 585 (1980)).

Here, the parties do not dispute that Defendants obtained a search warrant, entered Plaintiff's home and seized Plaintiff's rifle, rifle ammunition, and Firearms Purchaser ID card. (ECF No. 1 ¶¶ 53–55; ECF No. 32 at 12.) The dispute is whether the warrant was issued upon a proper finding of probable cause. Plaintiff argues the search warrant in his case was issued only upon a showing of "good cause," which deprived him of his Constitutional rights and entitles him to injunctive relief. (ECF No. 1 ¶¶ 56–64.) Defendants counter by asserting that the judge made an explicit finding of probable cause and, therefore, the warrant was proper. (ECF No. 32 at 12.)

Here, the Court finds Plaintiff has sufficiently alleged an injury for standing purposes. Whether the

warrant was properly issued is not relevant at this stage of the analysis. It is undisputed that Plaintiff's home was searched and his property was seized. Plaintiff, therefore, has standing to assert a Fourth Amendment claim.

II. Plaintiff's Second and Fourteenth Amendment Claims

Plaintiff contends his Second and Fourteenth Amendment rights were violated when his rifle and ammunition were seized without a pre-deprivation hearing. (ECF No. 1-3 at 2.) Defendants do not contest Plaintiff's standing to assert this claim, but merely contend that his

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claim lacks merit. (ECF No. 32 at 30.) **[Footnote 9]** It is undisputed that Plaintiff's rifle and ammunition were seized without a pre-deprivation hearing. The Court, accordingly, finds Plaintiff has sufficiently alleged a Fourteenth Amendment injury for Article III standing purposes. As to his Second Amendment claim, the arguments presented by the parties are less clear. However, because Plaintiff's rifle and ammunition were seized, at this time, based on the current record, the Court finds Plaintiff has sufficiently alleged Second and Fourteenth Amendment injuries for standing purposes.

III. Plaintiff's First Amendment Claim

Finally, Plaintiff contends he was "punished by the State for exercising his fundamental First Amendment Constitutional rights." (ECF No. 1-3 at 2.) He further argues he is entitled to "exercise his right to freedom of

opinion and speech without interference or retaliation from the State." (ECF No. 1 ¶¶ 69–71.) Defendants do not articulate an opposition to Plaintiff's argument, noting instead "since [Plaintiff's First Amendment] claim is an 'as-applied' challenge [it] is not part of Plaintiff's 'facial' challenge to the ERPO Act." (ECF No. 32 at 15 n.3) This, however, is a misstatement of Plaintiff's argument. Plaintiff specifically articulates, at least as to his First Amendment claim, he is challenging "the ERPO Act and the actions of the Defendants, as applied." (ECF No. 1 ¶ 71) (emphasis added). Plaintiff's argument, nevertheless, lacks specificity as to how exactly he was punished for his speech. As noted in exhibits to Plaintiff's own Complaint, Judge McBride considered not only Plaintiff's social media posts, but also Plaintiff's "history of threats or acts of violence directed towards self or others." (Ex. E to Compl.) It is clear, however, that Plaintiff's posts on Gab.com—ostensibly his speech—was at least

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9 In fact, Defendants acknowledge Plaintiff's standing to bring his Second Amendment claim. (ECF No. 32 at 25 n.7).

somewhat of a factor in the decision to issue the TERPO. At this time, based on the current record, the Court finds that Plaintiff has standing to assert his First Amendment claim.

B. Preliminary Injunction Analysis

Having found the Plaintiff has standing to assert his claims, the Court turns to the merits of Plaintiff's Motion for a preliminary injunction. As noted above, in

order to obtain a temporary restraining order or preliminary injunction, the moving party must show:

> (1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured . . . if relief is not granted . . . . [In addition,] the district court, in considering whether to grant a preliminary injunction, should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.

Reilly, 858 F.3d at 176.

The first two factors in a preliminary injunction analysis—a reasonable probability of success on the merits, and irreparable harm—are "gateway factors" that must be satisfied before a court considers the rest of the analytical framework. Reilly, 858 F.3d at 179. A reasonable probability of success on the merits requires a showing "significantly better than negligible but not necessarily more likely than not." Id. (citing Singer Mgmt. Consultants, Inc. v. Milgram, 650 F.3d 223, 229 (3d Cir. 2011) (en banc). "A plaintiff seeking a preliminary injunction must prove irreparable harm is 'likely' in the absence of relief." Issa v. Sch. Dist. of Lancaster, 847 F.3d 121, 142 (3d Cir. 2017) (citing Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008)). Irreparable harm has

been defined in this District and Circuit as, "potential harm which cannot be redressed by a legal or an equitable remedy following a trial." Trico Equip., Inc. v. Manor, No. 08-5561, 2009 WL 1687391, at *8 (D.N.J. June 15, 2009) (quoting Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801 (3d Cir.1989)). Such a harm "must be of a peculiar nature, so that compensation in money cannot atone for it." Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86,

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92 (3d Cir. 1992) (quoting ECRI v. McGraw–Hill, Inc., 809 F.2d 223, 226 (3d Cir.1987)). The Court addresses each of Plaintiff's Constitutional claims in turn.

I. Plaintiff's Fourth Amendment Claim

Here, Plaintiff has established a reasonably probability of success on the merits, because the plain language of the ERPO Act is violative of the Fourth Amendment. Plaintiff, however, has failed to demonstrate he will suffer irreparable harm in the absence of a preliminary injunction.

In support of his irreparable harm argument, Plaintiff cites Elrod v. Burns where the Supreme Court held, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." 427 U.S. 347, 373 (1976) (citing New York Times Co. v. United States, 403 U.S. 713 (1971)). Plaintiff argues that "[t]he law is well[-]settled that for injunctive relief purposes a Plaintiff satisfies the 'irreparable harm' prong of the inquiry if they can demonstrate constitutional injury." (ECF No. 1-3 at 6)

(emphasis added). [Footnote 10] The holding in Elrod, however, was not nearly as broad as Plaintiff asserts, as the Court's ruling was

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10 The Court notes that Plaintiff dedicates only two sentences to a discussion of whether he has satisfied the "irreparable harm" prong of a preliminary injunction analysis. (See ECF No. 1-3 at 6.) Moreover, Plaintiff does not distinguish between the different constitutional violations he alleges and instead avers that, under Elrod, he has "clearly alleged and proves violations of the First, Second[,] and Fourth Amendments, and thus satisfies the 'irreparable harm' prong as a matter of law." (Id.)

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circumscribed to the First Amendment. [Footnote 11] Moreover, Plaintiff cites no cases in this Circuit or District where courts have applied this per se rule to violations of the Fourth Amendment. Nor does he advance any substantive argument to that effect. (See generally ECF No. 1-3.)

"The movant bears the burden" of establishing he or she has suffered irreparable harm. Reilly, 858 F.3d at 177. In this case, Plaintiff has failed to meet this burden for several reasons. First, the plain text of the search warrant issued in conjunction with the TERPO, and attached to Plaintiff's own Complaint, indicates the court found "probable cause exists to believe . . . respondent poses an immediate and present danger of bodily injury to self or others by owning or possessing any such firearms or ammunition." (ECF No. 1, Ex. E at 4.) Additionally, Plaintiff opposed Defendants' letter request (ECF No. 19) to admit records from the TERPO hearing— including transcripts, exhibits, and other evidence Judge McBride considered when issuing his ruling (ECF No. 22)—

effectively preventing this Court from analyzing Plaintiff's own claim that a standard lesser than probable cause was used. **[Footnote 12]** While the language of the ERPO Act may be facially unconstitutional, based on the record before the Court, the warrant for Plaintiff's rifle and

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11 In Elrod, the Supreme Court considered a class action suit brought by non-civil-service employees of the Cook County Sheriff's Office, who claimed they had been fired or threatened with discharge because of their political affiliation. Elrod, 427 U.S. at 349. The Elrod plaintiffs sought, inter alia, injunctive relief for violations of the First and Fourteenth Amendments. Id. The district court denied the plaintiffs' motion for a preliminary injunction, finding they had "failed to make an adequate showing of irreparable injury." Id. at 350. The Seventh Circuit reversed and held "[i]nasmuch as this case involves First Amendment rights of association which must be carefully guarded against infringement by public office holders, we judge that injunctive relief is clearly appropriate in these cases." Id. at 373. The Supreme Court affirmed this ruling and further noted that members of the putative class had agreed to change their political support to prevent discharge. Id. The Court also noted the specific importance of political speech and stated, "[t]he timeliness of political speech is particularly important. Id. at 374 n. 29.

12 The Court notes that in one of Plaintiff's reply briefs he includes a five-page excerpt from the transcript of the TERPO hearing with a select block of text redacted and other portions highlighted in yellow. (ECF No. 37, Ex. A.)

ammunition was issued upon a finding of probable cause, and, as such, the warrant was issued in a constitutional manner.

Second, and most critically, the ERPO Act allows Plaintiff to seek the return of his property at a FERPO hearing where he would be permitted to raise

constitutional arguments. By the plain text of the statute, a FERPO hearing "shall be held . . . within 10 days of the filing of a [TERPO] petition." N.J. Stat. Ann. § 2C:58-24. **[Footnote 13]**

Finally, the Court notes, sua sponte, that several courts in other states and districts have found that Elrod's presumption of irreparable harm does not extend to cases involving alleged Fourth Amendment injuries. See Rodriguez as next friend of Rodriguez v. Heitman Properties of New Mexico, Ltd., No. 98-1545, 1999 WL 35808391, at *4 (D.N.M. Oct. 26, 1999) ("Elrod does not stand for the proposition that irreparable injury will be presumed whenever a constitutional injury of any sort is alleged. Certainly there may be cases where Fourth Amendment violations give rise to findings of irreparable injury; however, this is not such a case"); Loder v. City of Glendale, 216 Cal. App. 3d 777, 784 (Ct. App. 1989), modified (Jan. 4, 1990) ("Nowhere did the Elrod court suggest that constitutional violations other than those offending the First Amendment automatically amount to irreparable injury."); B.J. Alan Co., CT v. State, No. 084038297, 2008 WL 4853628, at *2 (Conn. Super. Ct. Oct. 22, 2008) ("The plaintiff alleges no first amendment violations and this court declines to extend the per se rule beyond the first amendment realm."); but see Ramirez v. Webb, 787 F.2d 592, 1986 WL 16752 at *2 (6th Cir. 1986) (holding that the Elrod holding is "likewise applicable when Fourth Amendment rights are at stake").

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13 Plaintiff's FERPO hearing was initially scheduled for September 11, 2019, but was later moved to December 9, 2019. (ECF No. 32 at 13.) The FERPO hearing was subsequently adjourned until January 27, 2020, "in part to allow the State to respond to

several motions" filed by Plaintiff in his State Court proceeding. (ECF No. 44 at 1.)

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Moreover, in Constructors Association of Western Pennsylvania v. Kreps, the Third Circuit affirmed the denial of a motion for a preliminary injunction and declined to extend Elrod's per se rule to violations of the Fifth Amendment. 573 F.2d 811, 820 (3d Cir. 1978) ("It should be noted that, unlike First Amendment rights whose deprivation even for minimal periods of time constitutes irreparable injury, a denial of [Fifth Amendment] equal protection rights may be more or less serious depending on the other injuries which accompany such deprivation." (internal citation omitted)).

The Court finds these arguments persuasive and, like the district court in Rodriguez, **[Footnote 14]** declines to extend Elrod's presumption of irreparable harm to the specific Fourth Amendment violations alleged by Plaintiff here. Based on the unique factual circumstances of the present issue, the Court finds Plaintiff has failed to demonstrate he would suffer irreparable harm in the absence of injunctive relief. Plaintiff's Motion for a Preliminary Injunction, as to his Fourth Amendment claim, therefore, fails.

2. Plaintiff's Second and Fourteenth Amendment Claims [Footnote 15]

The Second Amendment provides, "A well[-]regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. Plaintiff argues

his Second Amendment rights were violated and that he suffered irreparable harm when his rifle and ammunition were seized pursuant to the TERPO. (ECF No. 1 ¶¶ 65–68.)

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14 1999 WL 35808391, at *4.

15 Plaintiff incorporates the Fourteenth Amendment into his more substantive Second Amendment arguments. First, he argues he had a Fourteenth Amendment property interest in the items seized pursuant to the TERPO. (ECF No. 1 ¶ 68.) He similarly argues his due process rights were violated because the property was taken without a pre-deprivation hearing. (Id.) The Court finds Plaintiff's Fourteenth Amendment arguments fail for the same reasons as his Second Amendment arguments.

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Here, Plaintiff has failed to meet his burden to establish he would suffer irreparable harm in the absence of injunctive relief. See Reilly, 858 F.3d at 177. Plaintiff almost exclusively relies on District of Columbia v. Heller in support of his arguments. 554 U.S. 570 (2008). Heller, inter alia, stood for the proposition that the Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. Much like his other arguments, Plaintiff cites no case law from this District or Circuit to support his contention that the seizure of his rifle and ammunition violates the Second Amendment and requires a finding of irreparable harm. (See generally ECF No. 1-3.) In fact, Heller is the only case Plaintiff cites in support of his Second Amendment argument. (Id.) As with Elrod,

Plaintiff's singular reliance on Heller is misplaced. Critically, Heller does not create the unlimited right to possess firearms that Plaintiff implies. The Heller Court held that the protections of the Second Amendment are "not unlimited" and do not confer "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Heller, 554 U.S. at 626. The Court also explicitly stated that its holding did not "cast doubt on longstanding prohibitions on the possession of firearms." Id. **[Footnote 16]**

Moreover, the type of statute at issue in Heller is easily distinguishable from the ERPO Act. In Heller, petitioners brought a challenge to a series of District of Columbia laws that effectively outlawed the possession of handguns. Id at 574. Local statutes made it a crime to carry an unregistered handgun while, at the same time, prohibited the registration of handguns. Id. By contrast, the ERPO Act does not seek to prohibit or inhibit gun possession or ownership writ large. Rather, it requires a respondent to temporarily "surrender firearms and ammunition in [their]

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16 The Court noted that the list of "presumptively lawful regulatory measures" included in the opinion "[did] not purport to be exhaustive." Heller, 554 U.S. at 626 n.26.

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custody or control" only if a judge finds good cause to believe the respondent "poses an immediate and present danger of causing bodily injury to [themselves] or others." N.J. Stat. Ann. § 2C:58-23(e). Within ten days of such an order, the court is required to hold a FERPO hearing where it will extend the TERPO only if it finds that such "immediate and present danger" still exists. N.J. Stat.

Ann. § 2C:58-24. Even if a FERPO issued, a petitioner may, at any time, regain possession of their firearms and ammunition, provided they are able to prove they no longer pose a "significant danger" to themselves or others. N.J. Stat. Ann. § 2C:58-25. The procedural posture of Heller further attenuates its connection to the instant case. Heller involved the review of a motion to dismiss and in no way addresses whether the seizure of firearms constitutes an irreparable harm, nor does Plaintiff cite any case law to that effect.

While not cited by either party, the Court is aware of several cases from other districts and circuits that have found a violation of the Second Amendment is a per se irreparable harm. Much like Heller, the Court finds the facts of these out-of-jurisdiction cases easily distinguishable from

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the current case as they involved statutes with blanket restrictions on gun ownership or laws that effectively made legal gun ownership impossible. **[Footnote 17]**

Moreover, the unique facts of the present case belie the notion that Plaintiff will suffer irreparable harm—harm that "must be of a peculiar nature, so that compensation in money cannot atone for it," Campbell Soup Co., 977 F.2d at 92—in the absence of injunctive relief. In fact, Plaintiff's counsel has repeatedly represented to the Court his willingness to allow Plaintiff's

17 In Wiese v. Becerra, the district court considered a challenge to California laws regarding large capacity magazines ("LCMs"). 263 F. Supp. 3d 986, 994 (E.D. Cal. 2017). Since 2000, California had banned the "purchase, sale, transfer, receipt, or manufacture" of

LCMs. Id. Under this law, citizens were permitted to possess existing LCMs, but no one was allowed to obtain new ones. Id. at 990. In 2016, the state legislature passed a bill amending that law and criminalizing the possession of LCMs. (Id.) In 2017, California voters approved Proposition 63, which required anyone possessing an LCM to "remove the magazine from the state, sell the magazine to a licensed firearms dealer, or surrender the magazine to a law enforcement agency for destruction." Id. The Wiese court granted plaintiffs' motion for a preliminary injunction, finding they would suffer irreparable harm. Id. at 994. Specifically, the court noted that the mandate that LCMs had to be surrendered to law enforcement for destruction or transferred out of state had rendered the LCMs "irreplaceable." Id. See also See Duncan v. Becerra, 265 F. Supp. 3d 1106, 1135 (S.D. Cal. 2017), aff'd, 742 F. App'x 218 (9th Cir. 2018) (finding that elements of the jurisprudence of the First and Second Amendments are analogous and, therefore like the First Amendment, a Second Amendment violation constitutes irreparable injury).

In Grace v. D.C., the district court considered a challenge to a District of Columbia law regarding the issuance of permits to carry a concealed firearm. 187 F. Supp. 3d 129 (D.D.C. 2016). The law contained a provision whereby the Chief of the Metropolitan Police Department "'may' issue otherwise suitable applicants a license to carry a concealed firearm only if 'it appears that the applicant has good reason to fear injury to his or her person or property or has any other proper reason for carrying a pistol.'" Id. at 130. The court ultimately found that this violated the Second Amendment and that such a was within the scope of Elrod's per se irreparable injury rule. Id. at 149.

In Ezell City of Chicago, the Seventh Circuit considered a challenge to a city ordinance that required individuals to undergo one hour of firearms training at a gun range as a prerequisite for owning a gun. 651 F.3d 684, 689–90 (7th Cir. 2011). However, at the same time, the law prohibited firing ranges from operating within the city. Id. at 690. The court found this violated the Second Amendment and constituted an irreparable harm because like the First Amendment, the Second Amendment protects "intangible and unquantifiable interests" and therefore violations cannot be compensated by damages. Id. at 699.

TERPO to remain in effect and for Defendants to remain in possession of Plaintiff's rifle and ammunition for the duration of the present litigation.

In an October 29, 2019 letter to the Court, Plaintiff's counsel wrote, "[m]y client, David Greco, does not object to the continuance of the TERPO during the pendency of the [f]ederal matter so long as the Camden County Prosecutor's Office and the Gloucester Township Police Department safeguard my client's firearm." (ECF No. 9 at 2.) In a November 15, 2019 response to an order to show cause, Plaintiff's counsel wrote:

> First, plaintiff is not asking this Court at this juncture to undo or set aside any action of any law enforcement agency at this juncture. All the Plaintiff is asking the Court to do is stay all current actions and prevent any further harm by use of this unconstitutional statute pending a full and final decision. All those TERPOs and any FERPOs already entered and currently in effect will remain in effect, including Plaintiff's, pending the Court's ultimate resolution of the matter.

(ECF No. 37 at 23.) Plaintiff's counsel made similar representations at oral argument on November 20, 2019:

> We've offered to keep—the fact that we've offered not to take the firearms back at this point is a conciliatory measure. My client will happily take his one gun back because it's one gun. He'll happily take it back if Your Honor will give it to us in the injunction. But we're willing to say ["]stay the law, stay the lower courts, let's decide this up here, figure out what's going on, and then, in an orderly fashion, based on what happens from Your Honor's decision, we can move forward from that."

(ECF No. 39, Tr. 43:3–11.)

The Court finds that Plaintiff's apparent consent to the continuation of the TERPO and the retention of his property during the pendency of this litigation vitiates the idea that a failure to enter an injunction would result in irreparable harm. Plaintiff's Motion for a Preliminary Injunction, as to his Second Amendment claim, therefore, fails.

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As to Plaintiff's Fourteenth Amendment claim, Plaintiff's assertion that he was entitled to "advance notice and a pre-deprivation hearing to challenge the State's intentions [before] any [s]earch [w]arrant was issued" (ECF No. 1 ¶ 68) is unconvincing. The very nature of a search warrant belies any notion that the subject of

the warrant is entitled to contest its validity before it is issued. See, e.g., Matter of Leopold to Unseal Certain Elec. Surveillance Applications & Orders, 300 F. Supp. 3d 61, 88 (D.D.C.), reconsideration denied sub nom. Matter of Leopold, 327 F. Supp. 3d 1 (D.D.C. 2018) (holding that the target of a search warrant "has no opportunity to challenge a search warrant 'before the warrant issues'—a judicial probable cause determination is the only pre-execution check on the government's ability to obtain information via a warrant.") As discussed in the Court's Fourth Amendment analysis, supra, Plaintiff can recover his property at the upcoming FERPO hearing. Plaintiff, accordingly, has failed to establish he would suffer irreparable harm in the absence of injunctive relief. Plaintiff's Motion for a Preliminary Injunction, as to his Fourteenth Amendment claim, therefore, fails.

3. Plaintiff's First Amendment Claim

Finally, Plaintiff argues he has suffered irreparable harm because his First Amendment rights have been infringed. As the Court noted above, Elrod and its progeny, clearly stand for the proposition that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." 427 U.S. at 373; see also K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist., 710 F.3d 99, 113 (3d Cir. 2013); Stilp v. Contino, 613 F.3d 405, 409 (3d Cir. 2010); Americans for Prosperity v. Grewal, No. 19-14228, 2019 WL 4855853, at *6 (D.N.J. Oct. 2, 2019). "One reason for such stringent protection of First Amendment rights certainly is the intangible nature or the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if

imperceptibly, from exercising those rights in the future." Newsom v. Norris, 888 F.2d 371, 378 (6th Cir. 1989). But "the assertion of First Amendment rights does not automatically require a finding of irreparable injury." Conchatta, Inc. v. Evanko, 83 F. App'x 437, 442 (3d Cir. 2003) (quoting Hohe v. Casey, 868 F.2d 69, 72–73 (3d Cir. 1989)); see also N. Jersey Vineyard Church v. Twp. of S. Hackensack, No. 15-8869, 2016 WL 1365997, at *3 (D.N.J. Apr. 6, 2016) (same): "Rather the [plaintiff] must show a chilling effect on free expression," and "it is the direct penalization, as opposed to incidental inhibition, of First Amendment rights [which] constitutes irreparable injury." Hohe, 868 F.2d at 73 (internal quotations omitted). Here, Plaintiff contends he was "punished by the State for exercising his fundamental First Amendment Constitutional rights." (ECF 1-3 at 2.) While Plaintiff acknowledges that his opinions may seem "misguided" or "repugnant" to others, he argues he is entitled to "exercise his right to freedom of opinion and speech without interference or retaliation from the State." (ECF 1-3 at 3; ECF No. 1 ¶¶ 69-71.) While Plaintiff's assertion is undoubtedly correct, the record before the Court has not established that Plaintiff's rifle and ammunition were seized because of the opinions he expressed. As demonstrated in exhibits to Plaintiff's own Complaint, Judge McBride considered not only Plaintiff's social media posts, but also Plaintiff's "history of threats or acts of violence directed towards self or others." (ECF No. 1, Ex. E at 1–2.) Furthermore, as noted above, Plaintiff's briefing offers no details as to the what specific instances of speech he is claiming the TERPO is

impermissibly punishing him for. Plaintiff opposed Defendants' letter request (ECF No. 19) to admit records from the TERPO hearing, including transcripts, exhibits, and other evidence Judge McBride considered when issuing his ruling (ECF No. 22).

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Given Plaintiff's briefing on the issue and the Plaintiff's objection to the Court reviewing the information Judge McBride considered, this Court cannot conclude, on the record before it, that Plaintiff was penalized because of his lawful speech. Plaintiff's Motion for a Preliminary Injunction, as to his First Amendment claim, therefore, fails.

"[A] failure to show a likelihood of success or a failure to demonstrate irreparable injury, must necessarily result in the denial of a preliminary injunction." Vignola v. Twp. of Edison, No. 06-630, 2006 WL 8457642, at *6 (D.N.J. Sept. 7, 2006) (quoting In re Arthur Treacher's Franchisee Litig., 689 F.2d 1137, 1143 (3d Cir. 1982)). Plaintiff has failed to establish he would suffer irreparable injury in the absence of an injunction. Plaintiff's Motion for a Preliminary Injunction, accordingly, is DENIED. Because the Court resolves the Motion on the "irreparable harm" prong, it does not reach a decision on the merits of Plaintiff's arguments as to the other prongs of the preliminary injunction analysis.

IV. CONCLUSION

For the reasons set forth above, Plaintiff's Motion for a Preliminary Injunction is DENIED. An appropriate Order follows. [Footnote 18]

Date: February 21, 2020

s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

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18 The Court notes, however, although the ERPO Act, as it is currently being enforced, is constitutional, this does not cure the long-term facial defect of the statute. The AOC and AG Directives are not permanent orders and can be rescinded or altered in a similar summary manner to which they were promulgated.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DAVID M. GRECO,

Plaintiff,

v.

GURBIR S. GREWAL, et al.,

Defendants.

Case No. 3:19-cv-19145 (BRM) (TJB)

ORDER

THIS MATTER is opened to the Court on Plaintiff David M. Greco's ("Plaintiff") Motion for a Preliminary Injunction Pursuant to Federal Rule of Civil Procedure 65. (ECF No. 1.) Defendants New Jersey Attorney General Gubir S. Grewal, Jared M. Maples, and the New Jersey Office of Homeland Security and Preparedness (collectively, the "State Defendants"), and the Camden County Prosecutor's Office, Jill S. Mayer, and Nevan Soumails (collectively, the "County Defendants") opposed the Motion. (ECF No. 32.) Defendants Gloucester Township Police Department, Bernard John Dougherty, Nicholas C. Aumendo, Donald B. Gansky, William Daniel Rapp, and Brian Anthony Turchi (collectively, the "Township Defendants" and with State and County Defendants, "Defendants") filed correspondence joining and adopting the legal arguments advanced by the State and County Defendants but declining to provide any briefing of their own. (ECF No. 33.)

The Court held oral argument on November 20, 2019. (ECF No. 39.) On December 5, 2019, Plaintiff submitted a supplemental letter brief. (ECF No. 44.) On January 10, 2020, Plaintiff filed a Motion for Class Certification ("Class Certification Motion") pursuant to Rule 23(b). (ECF No. 48.) State and County Defendants submitted joint correspondence opposing the Class Certification Motion (ECF No. 49), and Plaintiff replied (ECF No. 50). On January 17, 2020, the

[Page 2]

Court entered an Order granting the State and County Defendants' request, administratively terminating Plaintiff's Class Certification Motion without prejudice, and requesting further briefing from the parties on the issue of standing. (ECF No. 51.) On January 24, 2020, Plaintiff submitted his initial brief (ECF No. 52) to which the State and County Defendants responded (ECF No. 53.) On January 31, 2020, the Township Defendants submitted correspondence joining and adopting the legal arguments advanced by the State and County Defendants but declining to provide any briefing of their own. (ECF No. 54.) On February 3, 2020, Plaintiff filed his reply brief. (ECF No. 55.)

Having reviewed the submissions filed in connection with the Motion and having considered the arguments raised at the preliminary hearing, for the reasons set forth in the accompanying opinion and for good cause appearing,

IT IS on this 21st day of February 2020,

ORDERED that Plaintiff's Motion for a Preliminary Injunction (ECF No. 1) is **DENIED**; and it is further

ORDERED that, pursuant to the Court's November 25, 2019 Order (ECF No. 42), Defendants shall answer, move, or otherwise respond to the Complaint no later than **March 12, 2020.**

s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

APPENDIX F:
Order Administratively Terminating Plaintiff's First Motion for Class Certification and requiring further briefing on the issue of Article III standing of the plaintiff, United States District Court, District of New Jersey, *Greco v. Grewal*, et al, No. 3:19-cv-19145 (January 17, 2020)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DAVID M. GRECO,	Case No. 3:19-cv-19145 (BRM) (TJB)
Plaintiff,	
v.	ORDER
GURBIR S. GREWAL, et al.,	
Defendants.	

THIS MATTER is before the Court upon Plaintiff David M. Greco's ("Plaintiff") Motion for a Preliminary Injunction (ECF No. 1) and Motion for Class Certification (ECF No. 48). Defendants New Jersey Attorney General Gubir S. Grewal, Jared M. Maples, and the New Jersey Office of Homeland Security and Preparedness (collectively, the "State Defendants"), and the Camden County Prosecutor's Office, Jill S. Mayer, and Nevan Soumails (collectively, the "County Defendants") [Footnote 1] opposed Plaintiff's Motion for a Preliminary

Injunction arguing, inter alia, Plaintiff lacked standing to assert his claims. (ECF No. 32.) The Court held oral argument on November 20, 2019. (ECF No. 39.) On January 15, 2020, Defendants filed a Letter Request asking the Court to stay Plaintiff's Motion for Class Certification, pending the Court's ruling on Plaintiff's Motion for a Preliminary Injunction. (ECF No. 49.) Plaintiff opposed Defendants' Letter Request on January 16, 2020. (ECF No. 50.) Having reviewed the parties' submissions filed in connection with the motions and for good cause appearing,

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1 Defendants Gloucester Township Police Department, Bernard John Dougherty, Nicholas C. Aumendo, Donald B. Gansky, William Daniel Rapp, and Brian Anthony Turchi (collectively, the "Township Defendants") filed correspondence joining and adopting the legal arguments advanced by the State and County Defendants in opposition to Plaintiff's Motion for a Preliminary Injunction, but declining to provide any briefing of their own. (ECF No. 38.) The Township Defendants did not make any filings relating to Plaintiff's Motion for Class Certification.

IT IS on this 17th day of January 2020, **ORDERED** that the parties are to submit additional briefing, limited to 8 pages each, on Plaintiff's standing to bring a facial challenge to the ERPO Act.2 Plaintiff will submit his initial brief by no later than January 24, 2020. Defendants will submit their responsive brief by no later than January 31, 2020. Plaintiff, if he so chooses, will submit his reply brief by no later than February 3, 2020; and it is further

ORDERED that to the extent Plaintiff contends he is bringing an as-applied challenge to the ERPO Act, Plaintiff shall address standing with respect to the as-

applied challenge, and the parties are permitted an additional 8 pages to address this argument; and it is further

ORDERED that Defendants' Letter Request (ECF No. 49) is **GRANTED**; and it is finally

ORDERED that Plaintiff's Motion for Class Certification (ECF No. 48) is **ADMINISTRATIVELY TERMINATED WITHOUT PREJUDICE** and may be refiled, if appropriate, following the Court's decision on Plaintiff's Motion for a Preliminary Injunction.

s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

APPENDIX G:

The New Jersey "Extreme Risk Protective Order Act of 2018", Laws of New Jersey 2018, Chapter 35, section 1, et al, now codified at *N.J.S.A.* 2C:58-20 et seq.

***N.J.S.A.* 2C:58-20 (Short Title):**

This act shall be known and may be cited as the "Extreme Risk Protective Order Act of 2018."

[*Added by L. 2018, c. 35, s.1, eff. 9/1/2019].

***N.J.S.A.* 2C:58-21 (Definitions Relative to Extreme Risk Protective Orders):**

"Ammunition" means ammunition or cartridge cases, primers, bullets, or propellant powder designed for use in any firearm, but does not include any shotgun shot or pellet not designed for use as the single, complete projectile load for one shotgun hull or casing or any unloaded, non-metallic shotgun hull or casing not having a primer.

"Deadly weapon" shall have the same meaning as in subsection c. of N.J.S.2C:11-1.

"Family or household member" means a spouse, domestic partner as defined in section 3 of P.L.2003, c.246 (C.26:8A-3), partner in a civil union couple as defined in section 2 of P.L.2006, c.103 (C.37:1-29), or former spouse, former domestic partner, or former partner in a civil union couple, or any other person who is a present household member or was at any time a household

member; a person with whom the respondent has a child in common, or with whom the respondent anticipates having a child in common if one of the parties is pregnant; or a current or former dating partner.

"Firearm" shall have the same meaning as in N.J.S.2C:39-1.

"Law enforcement agency" means a department, division, bureau, commission, board or other authority of the State or of any political subdivision thereof which employs law enforcement officers.

"Law enforcement officer" means a person whose public duties include the power to act as an officer for the detection, apprehension, arrest, and conviction of offenders against the laws of this State.

"Petitioner" means a family or household member or law enforcement officer.

"Recent" means within six months prior to the date the petition was filed.

[*Added by L. 2018, c. 35, s.2, eff. 9/1/2019].

***N.J.S.A.* 2C:58-22 (Immunity From Liability for Law Enforcement):**

a. A law enforcement officer who, in good faith, does not file a petition for an extreme risk protective order or temporary extreme risk protective order shall be immune from criminal or civil liability.

b. A law enforcement agency shall be immune from civil or criminal liability for any damage or deterioration of firearms or ammunition stored or transported pursuant to section 7 or 8 of P.L 2018, c 35 (C.2C:58-26 or C.2C:58-27) unless the damage or deterioration resulted from recklessness, gross negligence, or intentional misconduct by the law enforcement agency.

c. The immunity provided in subsections a. and b. of this section shall be in addition to any privileges or immunities provided pursuant to any other law.

[*Added by L. 2018, c. 35,s. 3, eff. 9/1/2019].

***N.J.S.A.* 2C:58-23 (Filing of Temporary Extreme Risk Protection Order)**

a. Except as provided in subsection l. of this section, a petitioner may file a petition, as prescribed by the Administrative Director of the Courts, for a temporary extreme risk protective order in the court in accordance with the Rules of Court alleging that the respondent poses a significant danger of bodily injury to self or others by having custody or control of, owning, possessing, purchasing, or receiving a firearm. The petition shall be heard by the court in an expedited manner.

Petition forms shall be readily available at the courts, and at State, county, and municipal law enforcement agencies.

Prior to filing a petition with the court, a family or household member may request assistance from a State, county, or municipal law enforcement agency which shall advise the petitioner of the procedure for completing and signing a petition for a temporary extreme risk protective order. A law enforcement officer from the agency may assist the family or household member in preparing or

filing the petition. This assistance may include, but not be limited to, providing information related to the factors set forth in subsection f. of this section, joining in the petition, referring the matter to another law enforcement agency for additional assistance, or filing the officer's own petition with the court.

Filing a petition pursuant to this section shall not prevent a petitioner from filing a criminal complaint or applying for a restraining order pursuant to the "Prevention of Domestic Violence Act of 1991," P.L. 1991, c. 261 (C.2C:25-17 et seq.) or prevent any person from taking any action authorized pursuant to P.L. 1987, c.116 (C.30:4-27.1 et seq.) based on the circumstances forming the basis of the petition.

A petitioner may apply for relief under this section in accordance with the Rules of Court.

b. A petition for a temporary extreme risk protective order shall include an affidavit setting forth the facts tending to establish the grounds of the petition, or the reason for believing that they exist, and, to the extent available, the number, types, physical description, and locations of any firearms and ammunition currently believed by the petitioner to be controlled or possessed by the respondent.

c. The court shall not charge a fee to file the petition.

d. The court, before issuing a temporary extreme risk protective order, shall examine under oath the petitioner and any witness the petitioner may produce. The court, in lieu of examining the petitioner and any witness, may rely on an affidavit submitted in support of the petition.

e. A judge shall issue the order if the court finds good cause to believe that the respondent poses an immediate

and present danger of causing bodily injury to the respondent or others by having custody or control of, owning, possessing, purchasing, or receiving a firearm.

f. The county prosecutor or a designee of the county prosecutor shall produce in an expedited manner any available evidence including, but not limited to, available evidence related to the factors set forth in this section, and the court shall consider whether the respondent:

(1) has any history of threats or acts of violence by the respondent directed toward self or others;

(2) has any history of use, attempted use, or threatened use of physical force by the respondent against another person;

(3) is the subject of a temporary or final restraining order or has violated a temporary or final restraining order issued pursuant to the "Prevention of Domestic Violence Act of 1991," P.L. 1991, c.261 (C.2C:25-17 et seq.);

(4) is the subject of a temporary or final protective order or has violated a temporary or final protective order issued pursuant to the "Sexual Assault Survivor Protection Act of 2015," P.L 2015, c 147 (C.2C:14-13 et al.);

(5) has any prior arrests, pending charges, or convictions for a violent indictable crime or disorderly persons offense, stalking offense pursuant to section 1 of P.L. 1992, c.209 (C.2C:12-10), or domestic violence offense enumerated in section 3 of P.L. 1991, c.261 (C.2C:25-19);

(6) has any prior arrests, pending charges, or convictions for any offense involving cruelty to animals or any history of acts involving cruelty to animals;

(7) has any history of drug or alcohol abuse and recovery from this abuse; or

(8) has recently acquired a firearm, ammunition, or other deadly weapon.

g. The temporary extreme risk protective order shall prohibit the respondent from having custody or control of, owning, purchasing, possessing, or receiving firearms or ammunition, and from securing or holding a firearms purchaser identification card or permit to purchase a handgun pursuant to N.J.S.2C:58-3, or a permit to carry a handgun pursuant to N.J.S.2C:58-4 during the period the protective order is in effect and shall order the respondent to surrender firearms and ammunition in the respondent's custody or control, or which the respondent possesses or owns, and any firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun held by the respondent in accordance with sections 7ofP.L 2018, c 35 (C.2C:58-26). Any card or permit issued to the respondent shall be immediately revoked pursuant to subsection f. of N.J.S.2C:58-3.

h. A temporary extreme risk protective order issued under this section shall remain in effect until a court issues a further order.

i. The court that issues the temporary extreme risk protective order shall immediately forward:

(1) a copy of the order to the petitioner and county prosecutor in the county in which the respondent resides; and

(2) a copy of the order and the petition to the appropriate law enforcement agency in the municipality in which the respondent resides, which shall immediately, or as soon as practicable, serve it on the respondent.

If personal service cannot be effected upon the respondent, the court may order other appropriate substituted service. At no time shall a petitioner who is a family or household member be asked or required to serve any order on the respondent. The law enforcement agency serving the order shall not charge a fee or seek reimbursement from the petitioner for service of the order.

j. Notice of temporary extreme risk protective orders issued pursuant to this section shall be sent by the county prosecutor to the appropriate chiefs of police, members of the State Police, and any other appropriate law enforcement agency or court.

k. Any temporary extreme risk protective order issued pursuant to this section shall be in effect throughout the State, and shall be enforced by all law enforcement officers.

l.

(1) A petition for a temporary extreme risk protective order filed against a law enforcement officer shall be filed in the law enforcement agency in which the officer is employed. The law enforcement officer or employee receiving the petition shall advise the petitioner of the procedure for completing and signing a petition.

(2) Upon receipt of the petition, the law enforcement officer's employer shall immediately initiate an internal affairs investigation.

(3) The disposition of the internal affairs investigation shall immediately be served upon the county prosecutor who shall make a determination whether to refer the matter to the courts.

(4) The law enforcement officer's employer shall take appropriate steps to implement any findings

set forth in the disposition of the internal affairs investigation.

The law enforcement officer shall not be terminated during the pendency of the internal affairs investigation.

[*Added by L. 2018, c. 35, s.4, eff. 9/1/2019].

***N.J.S.A.* 2C:58-24 (Final Extreme Risk Protective Order):**

a. A hearing for a final extreme risk protective order shall be held in the Superior Court in accordance with the Rules of Court within 10 days of the filing of a petition pursuant to subsection a. of sections 4 of P.L 2018, c 35 (C.2C:58-23). A copy of the petition shall be served on the respondent in accordance with the Rules of Court.

b. The county prosecutor shall produce in an expedited manner any available evidence including, but not limited to, evidence related to the factors enumerated in subsection f. of sections 4 of P.L 2018, c 35 (C.2C:58-23). If the court finds by a preponderance of the evidence at the hearing that the respondent poses a significant danger of bodily injury to the respondent's self or others by having custody or control of, owning, possessing, purchasing, or receiving a firearm, the court shall issue an extreme risk protective order.

c. When deciding whether to issue the order, the court shall consider the factors enumerated in subsection f. of sections 4 of P.L 2018, c 35 (C.2C:58-23), as well as any other relevant evidence.

d. An extreme risk protective order issued pursuant to this section shall prohibit the respondent from having custody or control of, owning, purchasing, possessing, or receiving a firearm. A respondent who is a law

enforcement officer shall be subject to the provisions of subsection l. of sections 4ofP.L 2018, c 35 (C.2C:58-23).
[*Added by L. 2018, c. 35, s.5, eff. 9/1/2019].

***N.J.S.A.* 2C:58-25 (Termination of Final Extreme Risk Protective Order)**

Upon request of the petitioner or respondent, in a form prescribed by the Administrative Office of the Courts, the court may terminate a final extreme risk protective order issued pursuant to sections 5 of P.L 2018, c 35 (C.2C:58-24) if:

a. the petitioner or respondent, as the case may be, has received notice in accordance with the Rules of Court;

b. the appropriate law enforcement agency and the county prosecutor have been notified; and

c. a hearing has been held by the court.

The petition for termination of the order may be filed at any time following the issuance of the order. During the hearing, the court shall consider the factors enumerated in subsection f. of sections 4ofP.L 2018, c 35 (C.2C:58-23), as well as any other relevant evidence including, but not limited to, whether the respondent has received, or is receiving, mental health treatment.

If the respondent petitioned for termination, the respondent shall bear the burden at the hearing of proving by a preponderance of the evidence that the respondent no longer poses a significant danger of causing bodily injury to the respondent's self or to other persons by having custody or control of, owning, possessing, purchasing, or receiving a firearm.
[Added by L. 2018, c. 35, s.6, eff. 9/1/2019].

N.J.S.A. 2C:58-26 [*Effective Until 8/1/2022] (Surrender of Firearms Upon Issuance of Order)

a. When a temporary or final extreme risk protective order is issued pursuant to section 4 or 5 of P.L 2018, c 35 (C.2C:58-23 or C.2C:58-24), the court shall order the respondent to surrender to the local law enforcement agency all firearms and ammunition in the respondent's custody or control, or which the respondent owns or possesses, and any firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun held by the respondent. The court also shall notify the respondent that the respondent is prohibited from purchasing firearms or ammunition or applying for a firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun.

b. If the petition for the temporary extreme risk protective order indicates that the respondent owns or possesses any firearms or ammunition, the court shall issue a search warrant with the temporary or final extreme risk protective order and the law enforcement officer who serves the order shall request that all firearms and ammunition immediately be surrendered.

(1) The respondent immediately shall surrender, in a safe manner, all firearms and ammunition in the respondent's custody or control, or which the respondent owns or possesses, and any firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun held by the respondent to the control of the law enforcement officer.

(2) The respondent may request that the law enforcement agency sell all firearms and

ammunition in a safe manner to a federally licensed firearms dealer pursuant to sections 8ofP.L 2018, c 35 (C.2C:58-27).

(3) The law enforcement officer or licensed firearms dealer taking possession of any firearms or ammunition pursuant to this subsèction shall issue a receipt identifying all firearms and ammunition that have been surrendered by the respondent. The officer or dealer shall provide a copy of the receipt to the respondent at the time of surrender.

(4) If the respondent surrenders firearms and ammunition to a law enforcement officer pursuant to paragraph (1) of this subsection or surrenders or sells firearms and ammunition to a licensed dealer pursuant to paragraph (2) of this subsection, the respondent shall, within 48 hours after being served with the order, file the receipt with the county prosecutor. Failure to timely file the receipt or copy of the receipt shall constitute contempt of the order.

c. The court which issued the protective order may issue a search warrant for a firearm or ammunition that is in the custody or control of, owned, or possessed by a respondent who is subject to a temporary or final protective order issued pursuant to section 4 or 5 of P.L 2018, c 35 (C.2C:58-23 or C.2C:58-24) if the respondent has lawfully been served with that order and has failed to surrender the firearm or ammunition as required by this section.

d. The respondent may petition the agency for the return of any surrendered firearms or ammunition upon termination of an order pursuant to sections 6 of P.L 2018, c 35 (C.2C:58-25). Within 30 days of receiving a petition for the return of surrendered firearms or

ammunition and after the termination of the order, the agency shall return the firearm or ammunition unless:

(1) the firearm has been reported as stolen; or

(2) the respondent is prohibited from possessing a firearm under State or federal law.

Nothing in this act shall prohibit revocation and seizure of a person's firearms purchaser identification card, permit to purchase a handgun, permit to carry a handgun, and weapons as authorized pursuant to applicable law.

e. If a person other than the respondent claims title to any firearm or ammunition surrendered pursuant to this section, and the law enforcement agency determines that the person is the lawful owner of the firearm or ammunition, the firearm or ammunition shall be returned to that person.

f. If the respondent has surrendered a firearm or ammunition to a federally licensed firearms dealer, after termination of the order, the respondent may request the law enforcement agency, in writing, to authorize the return of the firearm or ammunition from the dealer. The dealer shall transfer the firearm or ammunition to the respondent in accordance with procedures required when a firearm or ammunition is being sold from the dealer's inventory in accordance with N.J.S. 2C:58-2.

[*Added by L. 2018, c. 35, s.7, eff. 9/1/2019].

***N.J.S.A.* 2C:58-26 [New Superseding -26 Effective 8/1/2022] (Surrender of Firearms Upon Issuance of Order)**

a. When a temporary or final extreme risk protective order is issued pursuant to section 4 or 5 of P.L.2018, c.35 (C.2C:58-23 or C.2C:58-24), the court shall order the

respondent to surrender to the local law enforcement agency all firearms and ammunition in the respondent's custody or control, or which the respondent owns or possesses, and any firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun held by the respondent. The court also shall notify the respondent that the respondent is prohibited from purchasing firearms or ammunition or applying for a firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun.

b. If the petition for the temporary extreme risk protective order indicates that the respondent owns or possesses any firearms or ammunition, the court shall issue a search warrant with the temporary or final extreme risk protective order and the law enforcement officer who serves the order shall request that all firearms and ammunition immediately be surrendered.

(1) The respondent immediately shall surrender, in a safe manner, all firearms and ammunition in the respondent's custody or control, or which the respondent owns or possesses, and any firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun held by the respondent to the control of the law enforcement officer.

(2) The respondent may request that the law enforcement agency sell all firearms and ammunition in a safe manner to a federally licensed firearms dealer pursuant to section 8 of P.L.2018, c.35 (C.2C:58-27).

(3) The law enforcement officer or licensed firearms dealer taking possession of any firearms or ammunition pursuant to this subsection shall issue a receipt identifying all firearms and ammunition

that have been surrendered by the respondent. The officer or dealer shall provide a copy of the receipt to the respondent at the time of surrender.

(4) If the respondent surrenders firearms and ammunition to a law enforcement officer pursuant to paragraph (1) of this subsection or surrenders or sells firearms and ammunition to a licensed dealer pursuant to paragraph (2) of this subsection, the respondent shall, within 48 hours after being served with the order, file the receipt with the county prosecutor. Failure to timely file the receipt or copy of the receipt shall constitute contempt of the order.

c. The court which issued the protective order may issue a search warrant for a firearm or ammunition that is in the custody or control of, owned, or possessed by a respondent who is subject to a temporary or final protective order issued pursuant to section 4 or 5 of P.L.2018, c.35 (C.2C:58-23 or C.2C:58-24) if the respondent has lawfully been served with that order and has failed to surrender the firearm or ammunition as required by this section.

d. The respondent may petition the agency for the return of any surrendered firearms or ammunition upon termination of an order pursuant to section 6 of P.L.2018, c.35 (C.2C:58-25). Within 30 days of receiving a petition for the return of surrendered firearms or ammunition and after the termination of the order, the agency shall return the firearm or ammunition unless:

(1) the firearm has been reported as stolen; or

(2) the respondent is prohibited from possessing a firearm under State or federal law.

At least 10 days prior to returning the firearms or ammunition, the local law enforcement agency shall notify the family or household member that

the firearms or ammunition will be returned to the owner. If the firearms or ammunition were seized by the State Police, the county prosecutor's office where the protective order is venued shall notify the family or household member that the firearms or ammunition will be returned to the owner. Nothing in this act shall prohibit revocation and seizure of a person's firearms purchaser identification card, permit to purchase a handgun, permit to carry a handgun, and weapons as authorized pursuant to applicable law.

e. If a person other than the respondent claims title to any firearm or ammunition surrendered pursuant to this section, and the law enforcement agency determines that the person is the lawful owner of the firearm or ammunition, the firearm or ammunition shall be returned to that person.

f. If the respondent has surrendered a firearm or ammunition to a federally licensed firearms dealer, after termination of the order, the respondent may request the law enforcement agency, in writing, to authorize the return of the firearm or ammunition from the dealer. The dealer shall transfer the firearm or ammunition to the respondent in accordance with procedures required when a firearm or ammunition is being sold from the dealer's inventory in accordance with N.J.S.2C:58-2.

[*Amended by L. 2021, c. 358, s.2, eff. 8/1/2022. Added by L. 2018, c. 35,s. 7, eff. 9/1/2019].

***N.J.S.A.* 2C:58-27 (Transfer, Sale of Surrendered Firearms):**

A respondent who has surrendered any firearm or ammunition to a law enforcement agency pursuant to P.L 2018, c 35 (C.2C:58-20 et al.) who does not want the

firearm or ammunition returned or is no longer eligible to own or possess a firearm or ammunition may sell or transfer title of the firearm or ammunition to a federally licensed firearms dealer. The agency shall transfer possession of the firearm or ammunition to a licensed dealer only after the dealer has displayed written proof of transfer of the firearm or ammunition from the respondent to the dealer and the agency has verified the transfer with the respondent.
[*Added by L. 2018, c. 35, s.8, eff. 9/1/2019].

***N.J.S.A.* 2C:58-28 (Destruction of Firearms Permitted):**
A law enforcement agency holding any firearm or ammunition surrendered pursuant to P.L 2018, c 35 (C.2C:58-20 et al.) for more than one year after the termination of the extreme risk protective order may destroy the firearm or ammunition in accordance with the policies and procedures of the agency for destruction of firearms or ammunition.
[*Added by L. 2018, c. 35, s.9, eff. 9/1/2019].

***N.J.S.A.* 2C:58-29 (Violations Considered Offense; Contempt Proceedings):**
A violation by the respondent of an order issued pursuant to section 4 or 5 of P.L 2018, c 35 (C.2C:58-23 or C.2C:58-24) shall constitute an offense under subsection e. of N.J.S.2C:29-9 and each order shall so state. All contempt proceedings conducted pursuant to N.J.S.2C:29-9 involving an extreme risk protective order shall be heard by the Superior Court. All contempt proceedings brought pursuant to P.L 2018, c 35 (C.2C:58-20 et al.) shall be made in accordance with the Rules of Court.
[*Added by L. 2018, c. 35, s.10, eff. 9/1/2019].

N.J.S.A. **2C:58-30 (Electronic Central Registry):**
a. The Administrative Office of the Courts shall include all persons who have had a final extreme risk protective order entered against them pursuant to sections 5 of P.L 2018, c 35 (C.2C:58-24), and all persons who have been charged with a violation of a temporary or final extreme risk protective order issued pursuant to section 4 or 5 of P.L 2018, c 35 (C.2C:58-23 or C.2C:58-24), in an electronic central registry created and maintained by the Administrative Office of the Courts. All records made pursuant to this section shall be kept confidential and shall be released only to a police or other law enforcement agency investigating a report of a crime, offense, or act of domestic violence, or conducting a background investigation involving a person's application for a firearms purchaser identification card or permit to purchase a handgun or employment as a police or law enforcement officer, or for any other purpose authorized by law or the Supreme Court of the State of New Jersey. A respondent's information, other than information related to a violation of a temporary or final order issued pursuant to section 4 or 5 of P.L 2018, c 35 (C.2C:58-23 or C.2C:58-24), shall be removed from the registry upon the termination of the extreme risk protective order.
b. Any person who disseminates or discloses a record or report of the central registry for a purpose other than the purposes authorized in this section or as otherwise authorized by law or the Supreme Court of the State of New Jersey is guilty of a crime of the fourth degree.
[*Added by L. 2018, c. 35,s. 11, eff. 9/1/2019].

***N.J.S.A.* 2C:58-31 (Rules of Court):**
The Supreme Court may promulgate Rules of Court to effectuate the purposes of the "Extreme Risk Protective Order Act of 2018," P.L 2018, c 35 (C.2C:58-20 et al.).
[*Added by L. 2018, c. 35, s.15, eff. 9/1/2019].

***N.J.S.A.* 2C:58-32 (Rules, Regulations):**
The Attorney General may adopt, pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C.52:14B-1 et seq.), rules and regulations necessary to implement the provisions of the "Extreme Risk Protective Order Act of 2018," P.L 2018, c 35 (C.2C:58-20 et al.).
[*Added by L. 2018, c. 35, s. 16, eff. 9/1/2019].