

HOUSE BILL 751¹: ANTI-RED FLAG - SECOND AMENDMENT CONSERVATION ACT

Amending O.C.G.A. § 16-11-173

First Signature: Representative Pullin (131st)

Co-Sponsors: Representative Cooke (18th), Representative Gurtler (8th), Representative Singleton (71st), Representative Moore (1st), Representative Gullet (19th)

Summary: This Bill “amend[s] Code Section 16-11-173 of the Official Code of Georgia Annotated, relating to legislative findings, preemption of local regulation and lawsuits, and exceptions, so as to occupy and preempt the entire field of legislation in this state involving extreme risk protection orders; to provide for a definition; to prohibit the enforcement of federal and other extreme risk protection orders in this state; to provide for a criminal offense; to provide for a short title; to provide for legislative findings; to provide for related matters; to repeal conflicting laws; and for other purposes.”²

Status: House Second Readers January 15, 2020, sent to Judiciary Committee.³

TEXT OF HOUSE BILL 751⁴

SECTION 1.

This Act shall be known and may be cited as the “Anti-Red Flag - Second Amendment Conservation Act.”

SECTION 2.

The General Assembly finds that:

(1) The Second Amendment to the Constitution of the United States reads “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.”

(2) The Fourth Amendment to the Constitution of the United States reads “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.”

(3) The Fifth Amendment to the Constitution of the United States reads “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in

¹ H.B. 751, 155th Gen. Assemb., 2nd Reg. Sess. (Ga. 2020), available at <http://www.legis.ga.gov/Legislation/20192020/187857.pdf> (last visited May 12, 2021).

² *Id.*

³ 2019-2020 Regular Session – HB 751, Anti-Red Flag – Second Amendment Conservation Act., GA. GEN. ASSEMB., <http://www.legis.ga.gov/Legislation/en-US/display/20192020/HB/751> (last visited Dec. 15th, 2018) [hereinafter House Bill 751 Status Sheet].

⁴ H.B. 751.

jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

(4) Red Flag legislation that has been introduced in the United States House of Representatives and the Georgia House of Representatives violates the Second, Fourth, and Fifth Amendments to the United States Constitution.

(5) It is the responsibility of the General Assembly to protect the people of Georgia when unconstitutional legislation is passed and signed into law or executive orders are issued by the United States Federal Government that infringes upon or interferes with people’s preexisting rights and liberties guaranteed by the United States Constitution.

SECTION 3.

Code Section 16-11-173 of the Official Code of Georgia Annotated, relating to legislative findings, preemption of local regulation and lawsuits, and exceptions, is amended by adding a new subsection to read as follows:

“(b.1)(1) As used in this subsection, the term ‘extreme risk protection order’ means an executive order or written order or warrant issued by a federal or state court or signed by a judge or comparable officer of the court, for which the primary purpose is to reduce the risk of firearm related death or injury by doing one or more of the following:

(A) Prohibiting a named individual from having under his or her custody or control the ownership, possession, or receipt of a firearm; or

(B) Removing a firearm or requiring the surrender of firearms from a named individual.

(2) Pursuant to paragraph (1) of subsection (a) of this Code section, the General Assembly hereby occupies and preempts the entire field of legislation in this state that in any way touches upon federal or state extreme risk protection orders against or upon a citizen of Georgia.

(3) Any federal statute, rule, or executive order; federal or state judicial order; or judicial findings that would have the effect of enforcing an extreme risk protection order or ex parte extreme risk protection order against or upon a citizen of Georgia, which would infringe upon a citizen's constitutionally protected rights, including, but not limited to, the right to due process, the right to keep and bear arms, and the right to free speech, shall be null, void, unenforceable, and of no effect in this state.

(4) Any state department, agency, board, bureau, office, commission, public corporation, authority, or political subdivision of this state shall be prohibited from accepting any federal grants to implement any federal statute, rule, or executive order; federal or state judicial order; or judicial findings that would have the effect of enforcing an extreme risk protection order against or upon a citizen of Georgia.

(5) Any individual, including, but not limited to, a law enforcement officer, who attempts to enforce an extreme risk protection order upon a citizen of Georgia shall be guilty of a felony and shall be punished by imprisonment for not less than one year nor more than three years or by a fine of not less than \$1,000.00 nor more than \$5,000.00, or both.”

SECTION 4.

All laws and parts of laws in conflict with this Act are repealed.

SPONSOR'S RATIONALE

House Bill 751, also known as the Anti-Red Flag Bill⁵, aims to protect the 2nd, 4th, and 5th Amendment rights under the United States Constitution.⁶ House Bill 751 “would block any future red flag laws requiring those who are found to be a threat to themselves to turn over their guns.”⁷ The idea is to have a law on the books in Georgia that would supersede any Georgia, or federal, law which would require such a forfeiture without citizens first having a hearing before a magistrate.⁸ Representative Colton Moore a co-sponsor of the Bill, states “[t]his legislation would prevent Georgia from taking part in federal law if it were to be passed. It would also restrict funds for anyone trying to enforce it.”⁹ The penalty for trying to enforce a red flag law, according to the bill, would consist of being charged with a felony, serving up to three years in jail, and facing a fine of up to \$5,000.¹⁰

The sponsor of House Bill 751, Representative Ken Pullin, is a first term representative from Georgia House District 131.¹¹ In sponsoring House Bill 751, Representative Pullin seeks to protect the citizens of Georgia and their right to bear arms under the 2nd amendment, their protection against unlawful search and seizure under the 4th amendment, and their right to due process of law under the 5th amendment of the United States Constitution.¹²

In Georgia, it is currently possible to obtain a protective order in less than 24 hours¹³. These orders, according to Representative Pullin, are already capable of accomplishing everything that is desired under a red flag extreme protective order (House Bill 435 as proposed to the Georgia General Assembly).¹⁴ Protective orders under existing Georgia law allows either an individual or

⁵ GPB Lawmakers, *Legislative Day 8*, YOUTUBE (Jan. 30, 2020) (beginning at 7:20), *available at* <https://www.gpb.org/television/show/lawmakers/season/50/legislative-day-8-1302020> (last visited May 12, 2021) [hereinafter GPB Lawmakers].

⁶ Patrick Filbin, *Georgia pro-gun bill would block future red flag*, CHATTANOOGA TIMES FREE PRESS (Jan. 16, 2020), <https://www.timesfreepress.com/news/local/story/2020/jan/16/georgipro-gun-bill-would-block-future-red-fla/513179/>.

⁷ *Id.*

⁸ *Id.*

⁹ Filbin, *supra* note 6.

¹⁰ *Id.*

¹¹ Georgia General Assembly, *Representative Ken Pullin*, GEORGIA GENERAL ASSEMBLY, <https://www.legis.ga.gov/members/house/4957?session=27> (last visited May 12, 2021).

¹² GPB Lawmakers, *supra* note 5.

¹³ Three methods by which a protective order may be granted in Georgia. *See*, GA. CODE ANN. § 19-13-3 (2019) (granting a protective order for victims of family violence); GA. CODE ANN. § 17-17-16 (2019) (granting a protective order for victims or witnesses in a criminal case); GA. CODE ANN. § 16-5-94 (2019) (granting a protective order for a person alleging conduct constituting stalking).

¹⁴ *See* GPB Lawmakers, *supra* note 5; *Contra* H.B. 435, 155th Gen. Assemb., 2nd Reg. Sess. (Ga. 2020), *available at* <http://www.legis.ga.gov/Legislation/20192020/182461.pdf> (last visited May 12, 2021); *2019-2020 Regular Session-HB 435 Georgia Red Flag Protective Order Act; enact*, GA. GEN. ASSEMB., <http://www.legis.ga.gov/legislation/55318> (last visited May 12, 2021) [hereinafter House Bill 435 Status Sheet].

a prosecuting attorney to file a petition with the court to obtain a restraining order.¹⁵¹⁶ For an individual to obtain a protective order, they must file a petition with the court alleging one or more acts of family violence or stalking.¹⁸ If the specific facts of the petition support that probable cause exists for family violence, or stalking to have occurred in the past and is likely to happen in the future, the court may issue an order to protect the petitioner.¹⁹ The difference between the proposed House Bill 435 and the current available protective orders is that House Bill 435 would allow for law enforcement officers, as well as individuals, to apply for protective orders.²⁰ Further, Representative Pullin is concerned for law enforcement officers that would be sent to residences to facilitate the confiscation of firearms from an individual subject to a red flag extreme protective order.²¹ These confrontations between citizens and law enforcement would needlessly put the lives of law enforcement in danger.²²

House Bill 751 would be the second anti-red flag bill to pass nationally were it to be enacted. The nation's first anti-red flag law was passed by the Oklahoma legislature and signed into law by Governor Kevin Stitt on May 19th, 2020.²³ The Oklahoma law originated as Oklahoma Senate Bill 1081, and was authored by Senator Nathan Dahm, R-Broken Arrow.²⁴ The Oklahoma law addresses two means by which red flag laws will be dealt with. The first is by occupying the field of legislation in Oklahoma concerning extreme risk protection orders against or upon a citizen of Oklahoma. That occupation preempts any order, ordinance, or regulation by any municipality, or other political subdivision of the state concerning extreme risk protective orders.²⁵ The second is by prohibition of any agency of Oklahoma or any political subdivision of Oklahoma from accepting any grants or funding to implement any statute, rule, or executive order, judicial order or judicial findings, that would have the effect of forcing an extreme risk protection order against or upon a citizen of Oklahoma.²⁶ Unlike the statute proposed under House Bill 751, the Oklahoma statute does not prohibit the enforcement of federal statute by federal law enforcement, provides no penalty for violation, nor does it attempt to nullify federal law.²⁷

The nation's only other proposed anti-red flag law is Texas House Bill 336.²⁸ The proposed Texas statute is more in line with House Bill 751 as it prohibits the enforcement of any potential federal red flag extreme protective orders within Texas. Further Texas House Bill 336 restricts the passage of any such rule, ordinance, order, policy, or other similar measure relating to an extreme

¹⁵ GA. CODE ANN. § 19-13-3 (2019).

¹⁶ GA. CODE ANN. § 17-17-16 (2019).

¹⁷ GA. CODE ANN. § 16-5-94 (2019).

¹⁸ GA. CODE ANN. § 19-13-3 (2019).

¹⁹ Requirements to issue a protective order. *Id.*; see also GA. CODE ANN. § 16-5-94 (2019).

²⁰ House Bill 435 Status Sheet, *supra* note 14.

²¹ GPB Lawmakers, *supra* note 5.

²² *Id.*

²³ Press Release, Oklahoma Senate, *Nation's first anti-red flag law now on the books*, OKLAHOMA SENATE (May 21, 2020) available at <https://oksenate.gov/press-releases/nations-first-anti-red-flag-law-now-books> (last visited May 12, 2021).

²⁴ *Id.*

²⁵ OKL. STAT. Title 21 § 1289.24c (2020).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Texas House Bill 336, 87th Legislature, 2021-2022 (Tx. 2021) available at <https://legiscan.com/TX/text/HB336/2021> (last visited May 12, 2021) [hereinafter Texas House Bill 336].

risk protective order; and also prohibits the acceptance of any federal grant funds for the implementation or enforcement of a federal statute, order, rule, or regulation purporting to implement or enforce an extreme risk protective order against a person in Texas.²⁹ The proposed Texas statute establishes an offense for any individual who enforces or attempts to enforce an extreme risk protective order against a person in Texas, unless the order was issued under the laws of Texas.³⁰ Any offense under the statute is a state jail felony.³¹ A state jail felony in Texas is punishable by confinement in a state jail for any term not more than two years or less than 180 days, and a fine of not more than \$10,000.³² The clear difference between this bill and the legislation proposed by House Bill 751 lies in the lack of any prohibition against any future laws being passed by the Texas legislature addressing extreme risk protective orders.³³

OPPOSITIONS RATIONALE

Representative Matthew Wilson is a first term representative for House District 80 who sponsors House Bill 435, Georgia Red Flag Protective Order Act.³⁴ Representative Wilson, in authoring and sponsoring House Bill 435, states that typically, red flag protective orders do not violate due process as stated by Representative Pullin.³⁵ Representative Wilson points out that in order to satisfy due process under the constitution, an individual must be given notice and a chance to be heard whenever a state is taking an action to deprive them of life, liberty or property.³⁶

The states that have adopted red flag protective order acts all provide notice to the affected party and an opportunity for that party to be heard, typically a court hearing.^{37,38} Commonly red flag protective order acts have two processes, the long process, which clearly satisfies due process, and a short process, used in emergency situations. The short process is quite similar to an emergency removal order for child protective services, which have been found to also satisfy due process.³⁹ Representative Wilson is of the opinion that House Bill 751 is a bad faith argument against red flag protective orders. Representative Wilson also believes House Bill 751 is

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² TEX. PENAL CODE ANN. § 12.35 (2017).

³³ Texas House Bill 336, *supra* note 28.

³⁴ House Bill 435, *supra* note 14.

³⁵ Telephone Interview with Matthew Wilson, Representative, Georgia House District 80 (Oct. 2, 2020) (Notes on file with the author) [hereinafter Wilson Interview].

³⁶ *Id.*

³⁷ *Extreme Risk Protection Orders*, GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, <http://www.giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/> (last visited May 5, 2021). Nineteen states and the District of Columbia have enacted some form of Red Flag law. *Id.* As of April, 2020 those states are, in order of adoption: Connecticut (1999) Sec. 29-38c; Indiana (2005) Jake Laird's Law; California (2014) AB1014; Washington (2016) SB5027; Oregon (2017) SB719; Florida (2018) SB7026; Vermont (2018) S221, Maryland (2018) HB1302; Rhode Island (2018) H7688; New Jersey(2018) A1217; Delaware (2018) HB222; Massachusetts (2018) HB4670; Illinois(2018) HB2354; District of Columbia (2018); New York (2019) S02451; Colorado (2019) HB19-1177; Nevada (2019) AB291; Hawaii (2019) SB1466; New Mexico (2020) SB 5; Virginia (2020) SB240. *Id.*

³⁸ Wilson Interview, *supra* note 35.

³⁹ *Id.*

unconstitutional on its face and would likely not survive a challenge to the Supreme Court.⁴⁰ Representative Wilson did not elaborate on the unconstitutionality of the bill but indicated that Legislative Counsel would have issued an opinion on the constitutionality of the bill when it was submitted by Representative Pullin.⁴¹

According to Representative Wilson, a more effective approach would be for Georgia to rely on current Supreme Court interpretation of the Anti-commandeering doctrine, which allows states to ignore federal statutes they believe are unconstitutional, without the forced confrontation between state and federal law enforcement that results from strong nullification laws.⁴²

IMPLICATIONS IN GEORGIA

House Bill 751 falls into a category of law referred to as strong nullification laws. Strong nullification laws are laws which result in the arrest of federal officers during their attempt to enforce a law which a state has deemed to be unconstitutional.⁴³ When the federal officer is arrested and brought before a state superior court judge, the federal government will likely request removal to federal court.⁴⁴ Once removed to federal court, a federal officer enforcing a federal statute will likely be released, and the arresting officers will likely face federal charges.⁴⁵

House Bill 751 also ties the hands of Georgia lawmakers to pass any future bill which may be construed as a red flag extreme protection order whether it was constructed to protect the rights of citizens or not.⁴⁶

It does not appear that House Bill 751 will return to the floor of the General Assembly.⁴⁷ Representative Pullin is not currently in a favorable light with the Speaker of the House David Ralston after proposing a resolution calling for the speaker to step down and resign from the General Assembly.⁴⁸ A likely result of this proposal is House Bill 751 remaining in committee and not returning to the floor for a vote.⁴⁹ Representative Pullin did not apply to run for reelection for the 2020 election cycle.⁵⁰

LEGISLATIVE GENEALOGY

This is House Bill 751's first iteration in the General Assembly. It was first filed with the Clerk of the House on January 13, 2020, it was first read on January 14th, 2020 and was assigned

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ TJ Martinell, *Local Police CAN Arrest Federal Agents: It just happened in Salt Lake City*, TENTH AMENDMENT CENTER (Nov. 7, 2014), <https://tenthamendmentcenter.com/2014/11/07/local-police-can-arrest-federal-agents-it-just-happened-in-salt-lake-city/>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Wilson Interview, *supra* note 35.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Ken Pullin – Legislator Profile*, BALLOTPEDIA, available at https://ballotpedia.org/Ken_Pullin (last visited May 12, 2021).

by the Speaker of the House to the Judiciary Committee.⁵¹ On January 15th, 2020, the bill was read for the second time and remained in committee until the close of the session.⁵²

Prepared by: Joseph E. Bush

⁵¹ House Bill 751 Status Sheet, *supra* note 3.

⁵² *Id.*