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Legislative Testimony

The Urgent Need to Address the Gun Violence Epidemic
Hearing before the U.S. House of Representatives Committee on Oversight and Reform
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Chairwoman Maloney, Ranking Member Comer, and distinguished Members of Congress,

My name is Amy Swearer, and I am a Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at the Heritage Foundation.¹ My areas of scholarship and study include, among other things, the Second Amendment, school safety, and the intersection of gun violence and mental health. I help run the Heritage Foundation’s Defensive Gun Use Database and am heavily involved in the organization’s School Safety Initiative, which was developed after the tragic 2018 school shooting in Parkland, Florida, to ensure that conservative voices played a prominent role in national conversations on gun control and student safety. I have testified on firearms policy at both the state and federal level, including before the House Judiciary Committee in 2019 on a bill to ban so-called “assault weapons,” the Virginia State Crime Commission on the heels of the 2019 Virginia Beach mass shooting, and the Texas House Committee on Mass Violence and Community Safety following the 2019 mass shooting in an El Paso Walmart. I have more recently testified before the Senate Judiciary Committee on an array of proposed gun control measures, and on the recent nationwide spikes in violent crime.

In the aftermath of horrific events like those recently experienced in Uvalde, Texas, and Buffalo, New York, there is an unfortunate tendency on the part of some people to reflexively—almost compulsively—demand that Congress pass a whole host of extreme gun control measures, all of which suffer from serious constitutional and practical defects. Then, should anyone dare question the constitutionality, practicality, or effectiveness of these policies, their legitimate concerns are brushed aside, their viable alternatives are castigated as frivolous, and their opposition is immediately framed as callousness or cowardice.

This is not the foundation of good public policy.

We do not base public policy decisions on emotion. We do not base it on the laws or constitutional systems of other nations. We do not base it on pre-conceived notions of what ought to be done regardless of whether those notions withstand basic scrutiny.

Good public policy starts from an accurate and comprehensive understanding of the scope and nature of a particular problem. It accounts for the constitutional and practical limitations. It thinks through the unintended consequences of any particular plan of action. It carefully considers the criticisms and critiques of other stakeholders, especially when those stakeholders are also equally devastated by the problem. And especially when the criticisms are that the policy

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causes more problems than it solves, and that there are other, more practical and more effective ways of addressing the problem.

I. Commonly Proposed Gun Control Policies that are Unconstitutional, Impractical, and Ineffective

There are three primary gun control policies that are routinely called for in the wake of high-profile mass public shootings: banning so-called “assault weapons,” banning magazines capable of holding more than 10 rounds, and raising the age at which individuals may purchase or possess firearms. All of these suffer from serious constitutional and practical defects. None of them would have meaningful impacts on gun violence in general, or on the frequency or lethality of mass shootings, in particular.

A. Banning Commonly Owned Semi-Automatic Rifles

On the heels of high-profile mass public shootings, almost without fail come calls to ban the civilian purchase or possession of certain semi-automatic firearms (mostly rifles) inappropriately mislabeled as “assault weapons.” These firearms are not—despite intentional attempts to frame them as such—fully automatic machine guns or “assault rifles” with select-fire capabilities, both of which are heavily regulated under the National Firearms Act. The features that separate “assault weapons” from “non-assault weapons” are not functional, and do not affect any meaningful measure of lethality, such as rate of fire, caliber, or muzzle velocity. No, the differences between semi-automatic “assault weapons” and semi-automatic “non-assault weapons” essentially boil down to cosmetic features like pistol grips, collapsing stocks, or barrel shrouds.

These features exist for the purpose of making the firearm safer to operate and easier to fire in a more accurate manner. For instance, barrel shrouds are a component of “assault weapons” that protect the operator’s hand by partially or completely covering the rifle barrel, which can often become hot enough to cause serious burns after as little usage as shooting through one standard magazine at a range.² The protective function of the barrel shroud is so fundamental to its existence that recently proposed legislation to ban its use defined the feature as: “a shroud that is attached to, or partially or completely encircles, the barrel of a firearm so that the shroud protects the user of the firearm from heat generated by the barrel.”³ And yet, despite the fact that the entire function of a barrel shroud is to protect lawful users from injury during lawful use, gun control advocates routinely point to this feature as something that must be banned because it also protects unlawful users from injury.⁴

² See Dennis P. Chapman, *Features and Lawful Common Uses of Semi-Automatic Rifles*, Working Paper, at 63–68 (last revised Aug. 29, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3436512.

³ Assault Weapons Ban of 2013, S. 150, 113th Cong. § 2(b)(38) (2013).

⁴ See Chapman, *supra* note 2, at 37–38; E. Gregory Wallace, “Assault Weapons” Myths, 43 S. Ill. U. L.J. 193, 211–212 (2018).

Any ban on these firearms would suffer from a host of constitutional and practical problems. Semi-automatic rifles, with or without these cosmetic features, are the exact type of bearable small arm whose civilian possession is protected by the Second Amendment. They are the type of firearm least often used to perpetuate gun-related violence in the United States. In fact, they play such a minimal role in gun-related violence that, even if their prohibition could be immediately implemented with 100 percent effectiveness and no other firearms were ever substituted in their place, the law would fail to have a meaningful impact on overall rates of gun violence.

The Supreme Court has never reviewed a challenge to these types of prohibitions, including the federal prohibition on “assault weapon” sales between 1994 and 2004, and it is difficult to see how a post-*Heller* Court could uphold these laws while also remaining faithful to *Heller* and *McDonald*. Some lower courts have upheld challenges to these laws, but they have done so in ways that blatantly undermine core elements of *Heller* and *McDonald*.

From a practical perspective, these bans are also fraught with challenges. Without a doubt, the type of firearm most commonly used in suicides (which account for nearly two-thirds of annual gun deaths) is the handgun, and even where semi-automatic rifles are used to commit suicide, the nature of suicide renders the type of firearm irrelevant. Far from being the weapon of choice for would-be criminals, semi-automatic rifles are statistically the type of firearm least likely to be used for unlawful purposes, particularly compared to handguns. Over the last decade, rifles of any kind were definitively used in only 3-4 percent of gun homicides, and it is not clear how many of those deaths actually involved the use of “assault weapons” compared to other types of rifles.⁵ The average American is, in fact, several times more likely to be stabbed to death than he or she is to be shot to death with a rifle of any kind.⁶

Even where semi-automatic rifles were used to commit homicide, it is nearly impossible to determine how many of those homicides would not have been successfully committed if the perpetrator had relied on a different type of firearm. This same low estimate of rifle usage holds true across non-fatal firearm crimes, where 90 percent are attributable to handguns and only 10

⁵ Federal Bureau of Investigation, *Crime in the United States 2019, Expanded Homicide Data Table 8*, Federal Bureau of Investigation: Uniform Crime Reports (Last Reviewed June 6, 2022) <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/expanded-homicide-data-table-8.xls>; Federal Bureau of Investigation, *Crime in the United States 2014, Expanded Homicide Data Table 8*, Federal Bureau of Investigation: Uniform Crime Reports (Last Reviewed June 6, 2022), [https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/expanded-homicide-data/expanded homicide data table 8 murder victims by weapon 2010-2014.xls](https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/expanded-homicide-data/expanded%20homicide%20data%20table%208%20murder%20victims%20by%20weapon%202010-2014.xls).

⁶ Federal Bureau of Investigation, *Crime in the United States 2019, Expanded Homicide Data Table 8*, Federal Bureau of Investigation: Uniform Crime Reports (Last Reviewed June 6, 2022) <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/expanded-homicide-data-table-8.xls>; Federal Bureau of Investigation, *Crime in the United States 2014, Expanded Homicide Data Table 8*, Federal Bureau of Investigation: Uniform Crime Reports (Last Reviewed June 6, 2022), [https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/expanded-homicide-data/expanded homicide data table 8 murder victims by weapon 2010-2014.xls](https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/expanded-homicide-data/expanded%20homicide%20data%20table%208%20murder%20victims%20by%20weapon%202010-2014.xls).

percent are attributable to long guns of any kind.⁷ The official analysis of the 1994 federal assault weapons ban only underscores the reality that the prohibition of firearms least likely to be used in violent crime is an ineffective way of combating that violent crime. It concluded that “[s]hould it be renewed, the ban’s effects on gun violence are likely to be small at best and perhaps too small for reliable measurement. [Assault weapons] were rarely used in gun crimes even before the ban.”⁸

Gun control advocates, politicians, and the media routinely characterize semi-automatic rifles, specifically the AR-15, as the “weapon of choice” for mass public shooters. This is far from an accurate depiction of the facts. Many mass shooters over the last decade have used handguns alone, and most in fact bring several different types of firearms.⁹ To the extent that semi-automatic rifles are utilized by mass shooters, it is because they are popular among all Americans, the vast majority of whom will never use them for unlawful purposes.

The reality is that, even if all would-be mass public shooters were successfully diverted to the use of “non-assault weapons,” it would likely have no meaningful impact on their ability to kill large numbers of unarmed civilians. With only a few notable exceptions, such as the Las Vegas shooting in 2018, the type of firearm was simply not a major factor in the ability of mass shooters to cause significant casualties, particularly compared to other important factors such the time the shooter remained unopposed by an armed response.¹⁰ While it is deeply unsettling to consider, when individuals intent on evil have several minutes to hunt down and kill unarmed civilians confined together as “soft targets,” it does not matter whether the person has a shotgun, a handgun, or a rifle. It certainly does not matter whether he has straight, fixed stock instead of a pistol grip and collapsing stock. As the nation saw just last month in Buffalo, New York, “non-assault weapons” can be used to great effect by mass shooters precisely because those cosmetic features make little difference in those contexts.¹¹

⁷ Michael Planty & Jennifer L. Truman, *Firearm Violence, 1993–2011*, Bureau of Justice Statistics NCJ 241730 (May 2013), <https://www.bjs.gov/content/pub/pdf/fv9311.pdf>.

⁸ Christopher S. Koper, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994–2003* (June 2004), <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf>

⁹ See John R. Lott, Jr., & Rebekah C. Riley, *The Myths About Mass Public Shootings: Analysis*, Crime Research Prevention Center (Sept. 30, 2014), <https://crimeresearch.org/wp-content/uploads/2014/10/CPRC-Mass-Shooting-Analysis-Bloomberg1.pdf>. More recent data compiled by the Mother Jones mass public shooting database for the 62 mass shootings between January 1, 2014, and June 6, 2022, shows that handguns continue to be the firearm of choice for mass public shooters, with the data showing 28 cases where the shooter used handguns alone but only 18 where the shooter used rifles alone. Mother Jones Mass Public Shooting Database, 1982–2019 <https://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/>. The remaining shooters used some combination of handguns, shotguns, and rifles.

¹⁰ Consider, for example, that just weeks after the shooter at Marjory Stoneman Douglas High School in Parkland, Florida, killed 17 people over the span of six minutes with a semi-automatic rifle, a shooter at Santa Fe High School, in Santa Fe, Texas, was able to kill 10 people in under four minutes with a shotgun and revolver. See *Unprepared and Overwhelmed*, SUN SENTINEL (Dec. 28, 2018), <https://projects.sun-sentinel.com/2018/sfl-parkland-school-shooting-critical-moments/#nt=oft09a-2gp1>; Jack Healy and Manny Fernandez, *Police Confronted Texas School Gunman Within 4 Minutes, Sheriff Says*, N.Y. TIMES (May 21, 2018), <https://www.nytimes.com/2018/05/21/us/santa-fe-officer-wounded-john-barnes.html>.

¹¹ The Buffalo shooter used a semi-automatic rifle that he legally purchased and that was compliant with New York’s ban on “assault weapons.” Without the slightest hint of irony, media outlets nonetheless referred to the

Some of the deadliest mass public shootings in United States history have been carried out with nothing more than handguns. This includes the worst school shooting in U.S. history, at Virginia Tech in 2006, where the shooter was able to fire 174 rounds in roughly 11 minutes, killing 30 people and wounding 17 others with nothing more than common, relatively low-caliber handguns.¹² Similarly, in 1991, a shooter at a Luby's Cafeteria in Killeen, Texas, fatally shot 23 and wounded another 19 with two handguns.¹³

All of this must be factored in light of the incredibly small role mass public shootings play in the overall number of firearm-related violence, accounting for only a fraction of a percent of all gun deaths every year.¹⁴ This is not to minimize the devastating impact such events can have on the families and communities impacted by them, and these acts certainly affect important public perceptions of overall safety from gun-related violence. It is, rather, to give important perspective to a policy proposal that, even if perfectly implemented without any risk of shooters substituting other firearms, would have a statistically insignificant impact on gun violence rates in this country.

B. Placing Limits on Standard Capacity Magazines

A second commonly proposed gun control measure in the wake of many high-profile mass shootings is the implementation of bans on so-called “high capacity magazines,” or magazines capable of holding more than 10 rounds. As with bans on so-called “assault weapons,” any bans would suffer from serious constitutional and practical problems.

Magazines capable of holding more than 10 rounds are not “high capacity” in any meaningful sense. They are, rather, factory-standard components for the majority of firearms manufactured and sold in this country, and their common use by American civilians predates the ratification of

weapon as an “assault-style rifle,” despite the fact that this firearm was, according to New York law, a “non-assault weapon.” The only illegal modification made was to the 10-round magazine—the shooter removed a device known as a “magazine block” that initially been used to make the standard 30-round magazine compliant with state law. Sarah Taddeo, *What Kind of Gun Was Used in the Buffalo Shooting? What We Know*, Democrat & Chronicle (Updated May 16, 2022), <https://www.democratandchronicle.com/story/news/2022/05/15/buffalo-shooting-gun-used-ar-15-suspect-payton-gendron-purchased-vintage-firearms-endicott/9786647002/>; Craig Whitlock et al., *Massacre Suspect Said He Modified Bushmaster Rifle to Hold More Ammunition*, WASHINGTON POST (May 15, 2022), <https://www.washingtonpost.com/investigations/2022/05/15/buffalo-shooting-gun-bought-bushmaster/>.

¹² The shooter used a .22 caliber Walther P22 and a 9mm Glock 10. TriData Division, MASS SHOOTINGS AT VIRGINIA TECH: ADDENDUM TO THE REPORT OF THE REVIEW PANEL, at 30-A (Nov. 2009), <https://scholar.lib.vt.edu/prevail/docs/April16ReportRev20091204.pdf>.

¹³ See Thomas C. Hayes, *Gunman Kills 22 and Himself in Texas Cafeteria*, N.Y. TIMES (Oct. 17, 1991), <https://www.nytimes.com/1991/10/17/us/gunman-kills-22-and-himself-in-texas-cafeteria.html>; Paula Chin, *A Texas Massacre*, PEOPLE MAGAZINE (Nov. 4, 1991), <https://people.com/archive/a-texas-massacre-vol-36-no-17/>.

¹⁴ See Amy Swearer, *Testimony before the U.S. House of Representatives “Protecting America from Assault Weapons,”* Appendix A, Heritage Found (Sept. 28, 2019) (breaking down the number of annual gun deaths attributable to mass public shootings and analyzing those numbers as a percent of total firearm deaths every year from 2010 through 2017). Since that time, mass public shooting deaths accounted for 0.203 percent of total firearm deaths in 2018, 0.180 percent in 2019, and 0.018 percent in 2020 (the last year for which complete data is available).

the 14th Amendment. Like the semi-automatic rifles and handguns with which they are designed to work, these magazines are commonly possessed by law-abiding citizens for lawful purposes.

Most firearm-related deaths in the United States are suicides, where a firearm’s magazine capacity is effectively a moot point—one round is all that is necessary. The policy therefore fails to meaningfully address the major driving force behind American gun violence. As for the impact of these bans on overall rates of violent crime or gun homicide rates, few methodologically sound studies exist, and a recent review of that literature by RAND found that the evidence is, at best, inconclusive as to whether the bans have any effect whatsoever.¹⁵

Indeed, the primary concern raised by advocates of banning these factory-standard magazines is related to the least common type of firearm violence—mass public shootings. The argument is that standard capacity magazines may increase the ability of would-be mass public shooters to inflict high numbers of casualties by decreasing the number of times they need to reload during the shootings. Even assuming that it is practical as a matter of policy to confiscate the tens of millions of these magazines already owned by law-abiding citizens, without any means of replacement for would-be criminals, limiting magazine capacity is still not likely to meaningfully lower casualty rates for mass public shootings. First, shooters can (and routinely do) side-step these laws by bringing several firearms and extra loaded magazines, easily replacing expended magazines within seconds. Second, at least one study has shown that mass public shooters typically do not fire at a fast enough rate for casualty counts to be attributed to magazine capacity. This conclusion is supported by the findings of various panels analyzing the effect of magazine capacity for individual mass shootings, as well as by the reality that high casualty counts have occurred during shootings where only “limited-capacity” magazines were used.

But, even beyond this, we simply do not live in a world where we can or should reasonably expect Americans to widely comply with these laws,¹⁶ that the laws will be meaningfully enforced in a non-police state, or that widespread enforcement against even a fraction of non-compliant citizens would not have devastating consequences from a criminal justice perspective. Additionally, many “acceptable” low-capacity magazines can be illegally modified within a matter of minutes by anybody with access to the internet and a screwdriver—a reality that we saw had horrific effect in Buffalo, New York, where the shooter easily modified his magazines.

C. Raising the Minimum Firearm Purchase or Possession Age to 21

A third commonly proposed policy on the heels of mass public shootings is some variation on the idea that those under the age of 21 should have their access to firearms restricted, either by prohibiting future purchases of some or all long guns, or by outright banning the possession of most firearms for most young adults under most circumstances.

¹⁵ RAND Corporation, *Effects of Assault Weapon and High-Capacity Magazine Bans on Violent Crime* (Updated April 22, 2020), <https://www.rand.org/research/gun-policy/analysis/ban-assault-weapons/violent-crime.html>.

¹⁶ See, e.g., Jacob Sullum, *Gun Owners Don’t Seem Eager to Comply With New Jersey’s New Magazine Capacity Ban*, REASON (Dec, 20, 2018), <https://reason.com/2018/12/20/new-jerseys-gun-owners-do-not-seem-eager/>.

These individuals are in all other respects legal adults who, as full-fledged members of the American public, are endowed with all the rights and duties of citizenship.¹⁷ They can vote, serve on juries, sign legally binding contracts, and marry without permission. They may be drafted into the armed forces or called upon for state militia service. They are held fully accountable before the law for criminal actions, up to and including execution. There is, quite simply, little constitutional basis for divesting all law-abiding young adults of a fundamental constitutional right (or even for limiting their exercise of that right), solely because a small minority of their peers might commit crimes with those firearms.

Moreover, from a practical perspective, while young adults are statistically more likely than older adults to engage in criminal behaviors, they are also more likely to be victims of violent crime.¹⁸ To the extent that such laws limit the ability of young adults to engage in criminal behavior, they also limit the ability of the most vulnerable population of adults to engage in the core exercise of the Second Amendment—self-defense.¹⁹ And it seems far from likely that young adults bent on crime would be meaningfully prevented from accessing firearms, given the prevalence of handgun-related homicides committed by young offenders despite federal prohibitions on handgun sales to those under 21.

It appears, once again, that the primary motivation behind this prohibition is the shocking nature of a handful of mass public shootings carried out by young adults in recent years, including two in just the last month. Put aside, once again, the fact that these shootings account for a fraction of a percent of all gun deaths. Even if the goal is simply to address mass public shootings due to their outsized impact on the national psyche, most of those shootings are not carried out by individuals under the age of 21. The Mother Jones Mass Shooting Database records 31 mass public shootings since Parkland in 2018. Of those, only six were carried out by individuals under the age of 21. In two of those cases, the individual was under 18, could not legally buy any firearms, and stole the weapons from his parents. In two more cases, the individual showed clear signs of being a danger to self or others and should have been rendered legally prohibited from purchasing firearms under existing laws, but those legal mechanisms were never pursued.

II. Methods of Addressing Gun Violence that are Problematic in Practice

¹⁷ A common retort here is that young adults under the age of 21 may not legally purchase or consume alcohol in public. Alcohol consumption, unlike jury service, voting, and militia service, has never been considered a fundamental right or duty of citizenship. It is certainly not an enumerated individual right explicitly protected by constitutional amendment.

¹⁸ See, e.g., FBI Crime Data Explorer, All Violent Crime Offender v. Victim Demographics (last accessed June 6, 2022), <https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/crime-trend>.

¹⁹ See Craig A. Perkins, *Age Patterns of Victims in Serious Violent Crime*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT NCJ-162031 (July 1997), <https://www.bjs.gov/content/pub/pdf/apvsvc.pdf>; Sofi Sinozich & Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT NCJ 248471 (Dec. 2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>.

There are, additionally, several types of laws that could, in theory, be constitutional and effective, but that routinely suffer from serious flaws in practice. Among these are federal “red flag laws,” and laws requiring background checks on intrastate private gun sales.

A. Federal Red Flag Laws

Red flag laws—also known as extreme risk protection orders—have come into the national spotlight over the last four years as a potential method of addressing a real and serious concern with respect to mass public shooters. With perhaps one notable exception, every mass public shooter in recent history passed a background check and legally procured firearms, often despite showing very alarming signs of being a danger to self or others.²⁰ This is also unfortunately the case for many people who commit suicide with a firearm, which accounts for nearly 6 in 10 gun deaths every year.

Perpetrators of mass public violence in particular pass background checks largely because federal law provides only a limited number of ways in which individuals lose their Second Amendment rights, most commonly by conviction of a felony or domestic violence misdemeanor, or by involuntary commitment to an inpatient mental health facility. People who have their Second Amendment rights revoked in this manner face a real likelihood of never having them restored, and these are, therefore, severe measures requiring that very high legal thresholds be met. Involuntary commitment, in particular, is often reserved for only the most serious of mental health crises, a problem often compounded by a lack of adequate inpatient mental health infrastructure in many states.

There are, at least in theory, constitutional ways of temporarily restricting gun ownership for individuals who are clearly a danger to themselves or others, regardless of whether they suffer from a diagnosable mental illness or have yet to commit a disqualifying felony. That said, the right to keep and bear arms is a fundamental constitutional right, and any deprivation of that right—even temporarily and for compelling reasons—requires the highest standards of due process. The closest corollary to red flag laws is the civil mental health commitment process for individuals alleged to be mentally ill and dangerous. While red flag laws raise additional concerns and aren’t perfectly analogous, the civil commitment process provides at least a starting point for bare minimum due process standards—the right to an attorney, to cross-examine witnesses, and to testify on one’s own behalf; the burden of the state to continually prove its case

²⁰ The one possible exception is the individual who fatally shot seven people and wounded two dozen others during a shooting spree in Odessa, Texas, in August of 2019. That individual had, in fact, previously failed a background check and utilized an intrastate private sale to acquire his weapon. Dan Frosch & Sadie Gurman, *Texas Shooter Had Been Banned From Buying Firearms Because He Was Mentally Unfit*, Wall St. J. (Sept. 4, 2019). Of note, however, is the fact that the private seller from which he purchased the gun later pled guilty to violating federal law, and should have been required under the circumstances to obtain a Federal Firearms License and conduct a background check on prospective purchasers. Associated Press, *Seller of Gun Used in 2019 Texas Mass Shooting Gets 2 Years* (Jan. 7, 2021), <https://apnews.com/article/seth-aaron-ator-shootings-lubbock-texas-odessa-c18dce36fe8a5df583bdf5505ee8509b>.

by clear and convincing evidence; ex parte or emergency orders limited only to serious threats of imminent harm; and principles limiting deprivations to the least restrictive means necessary.

Moreover, from the perspective of sound public policy, any red flag law should include comprehensive and detailed practical considerations, like specifying the methods for notifying defendants of the allegations and their rights, for storing seized firearms and returning them to their owners, for immediately remedying clear mistakes (such as cases of mistaken identity), and for promptly restoring a person's Second Amendment rights after orders expire. Just as importantly, any palatable law should be fully integrated with existing mental health, domestic violence, and addiction treatment infrastructures, and otherwise ensure that the process adequately addresses the underlying problems that led a person to be dangerous in the first place. It should never be about simply disarming people, but about restoring them to a point where they are no longer dangerous.

These are very important aspects of the theory behind red flag laws. Unfortunately, of the more than 20 red flag laws already on the books at the state level, not one adequately addresses all of the very real concerns that come with deprivations of a fundamental right. Some states have admittedly done a better job addressing these concerns than others—for example, Colorado's law is far less objectionable than New Mexico's—but all of them come up short in key areas, such as authorizing the use of low burdens of proof or failing to provide any mechanism for ensuring those deemed dangerous receive help. In short, states have proven themselves either unable or unwilling to ensure that red flag laws pass constitutional muster in practice, undermining the theory as a whole.

Worse, as advocates push for these laws at a federal level, there are even greater concerns about the federal government's role. There are two methods regularly floated by advocates of federal intervention on red flag laws: a "true" federal red flag law and a federal law that financially incentivizes states to adopt red flag laws that meet certain minimum standards outlined by Congress. Both ideas suffer from serious theoretical and practical problems.

Any "true" federal red flag law—one that enables red flag petitions to be filed through the federal court system—would likely suffer from a serious constitutional flaw. The federal government, unlike state governments, lacks general "police powers" and cannot broadly regulate the public safety, except in those limited scenarios specified by the Constitution. While courts have broadly construed the federal government's ability to regulate "interstate commerce," they have also drawn a line at comparable laws criminalizing gun possession on school grounds. This is part of the reason why similar restraining orders based on violent behavior are exclusively issued at a state level. Additionally, there is no widely available mental health or addiction treatment framework at a federal level, nor is there a true federal equivalent of a local police force authorized to enforce federal red flag orders. That creates substantial practical barriers that all but ensure a "true" federal red flag law falls short.

As for a federal bill that attaches federal funding to the adoption of state red flag laws, that raises its own concerns. It's very unlikely that any set of minimal federal standards would compel

states to provide either adequate due process protections or the sort of comprehensive, detailed approach necessary to avoid objection. That’s especially true if the Justice Department’s recently issued “model red flag law” is any indication of where federal advocates stand on this issue. The model law contains numerous nonstarters, including allowing a defendant’s rights to be revoked at one-sided, ex parte hearings based on nothing more than “reasonable cause,” an incredibly low burden of proof when dealing with fundamental constitutional rights.

The federal government shouldn’t bribe states into adopting a bare-bones framework for red flag laws, especially when states thus far have a less-than-stellar track record of writing and implementing them on their own. There is, frankly, no reason to believe that states desiring this federal funding would go through the rigorous process of fleshing out the federal minimum standards with sufficient safeguards. Any red flag laws would have to be much better than they are in states that have already taken a swing at them. The federal government in all likelihood won’t improve upon laws passed at the state level and has other constitutional restraints on its ability to legislate in this area.

B. “Universal” Background Checks

Most people agree that it is both constitutional and reasonable to prohibit certain individuals from possessing firearms because they have demonstrated a high risk of danger to themselves or others.²¹ Federal law reflects this consensus by barring convicted felons and those with histories of serious mental health problems from legally purchasing or possessing firearms unless their civil rights have been restored.²² In 1993, Congress strengthened the means of enforcing these prohibitions by establishing the National Instant Criminal Background Check System (NICS index) and requiring that Federal Firearms Licensees (FFLs) request FBI background checks through this index on all prospective firearm purchasers. Moreover, any person or entity “engaged in the business of dealing firearms” must go through the arduous process of obtaining a federal firearms license.²³

Under current federal law, then, it does not matter whether the gun sale or transfer takes place at a gun show, in a brick-and-mortar store, or over the internet. The vast majority of lawful gun transfers require a background check. The only time federal law does not mandate a background check is when a non-FFL sells or transfers a gun to a resident of the same state. Even then, it is unlawful for a person to sell or transfer a gun to anyone he or she “know[s] or [has] reasonable

²¹ This general agreement does not necessarily extend to laws that permanently disarm non-violent felons or fail to restore the rights of individuals who previously suffered from serious mental health issues but have been of sound mind for many years. See Amy Swearer, *Long-standing and Presumptively Lawful? Heller’s Dicta vs. History and Dicta*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 238 (Nov. 5, 2018), <https://www.heritage.org/sites/default/files/2018-11/LM-238.pdf>.

²² See 18 U.S.C. § 922(g).

²³ See generally FEDERAL BUREAU OF INVESTIGATION, ABOUT NICS (last accessed Mar. 20, 2021), <https://www.fbi.gov/services/cjis/nics/about-nics>; Amy Swearer, *Let Us Reason Together: A More Effective, Less Partisan Approach to Gun-Related Violence*, 44 SIU L. J. 1, 18–19 (2019), <https://law.siu.edu/common/documents/law-journal/articles%20-%202019/fall-2019/1---Swearer-jr.pdf>.

cause to believe” is prohibited from possessing that firearm.²⁴ Importantly, part of the reason for this limited exception for the background check mandate is that only FFLs can request NICS background checks. Private citizens cannot simply call up the FBI and easily determine the status of prospective buyers.

Nevertheless, universal background checks are centered on a legitimate concern: would-be criminals can plausibly use private intrastate sales by non-FFLs to circumvent background checks that would catch their prohibited status. Recent decades have given rise to online gun advertising platforms for stranger-to-stranger sales—situations where the seller is unlikely to have sufficient knowledge of the buyer to believe he or she is anything other than a law-abiding citizen. It is not inherently unreasonable to be concerned about how criminals in general might abuse these types of publicly advertised private gun sales.

The problem is that, in practice, bills put forward to address this legitimate concern have been poorly written and routinely suffer from far more problems than they could ever hope to address. Requiring background checks on private intrastate gun sales is, at best, a low-reward endeavor. Even in a best-case scenario where everyone willing to abide by the law does so, universal background checks fail to meaningfully address the primary ways in which would-be criminals obtain firearms. Most would-be criminals do not get their firearms through legitimate or formal sources but through black market gun sales, straw purchases, and informal transfers by friends or family members who likely already know the gun could be used for criminal purposes.²⁵ When would-be criminals do go through licensed dealers, it is presumably because they do not have disqualifying criminal or mental health histories and can pass a background check.²⁶ To whatever extent universal background checks may make it more difficult for prohibited people to obtain guns from strangers, they do nothing to address the plethora of other avenues available for the same purpose. There is a reason why studies routinely show that universal background checks, in and of themselves, have no effect on crime or suicide rates.²⁷

²⁴ For a more in-depth analysis of the fact-specific tests determining who does or does not require a federal firearms permit, see BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, DO I NEED A LICENSE TO BUY AND SELL FIREARMS?, ATF Publication 5310.2 (Jan. 2016), <https://www.atf.gov/file/100871/download>.

²⁵ See, e.g., Mariel Alper & Lauren Glaze, *Source and Use of Firearms Involved in Crimes: Survey of Prison Inmates, 2016*, NCJ 251776 (Jan. 2019), <https://www.bjs.gov/content/pub/pdf/suficspi16.pdf> (finding, in a study of over 287,000 prisoners who possessed a firearm during their offense, 43 percent obtained it “off the street or from the underground market,” while 25 percent had “obtained it from a family member or friend, or as a gift”).

²⁶ See *id.* at 8. Only 7 percent of prisoners had purchased their gun under their own name from a licensed dealer, while only 1 percent “purchased a firearm from a licensed dealer at a retail store but did not purchase it under their own name”).

²⁷ See, e.g., Alvaro Castillo-Carniglia et al., *California’s Comprehensive Background Check and Misdemeanor Violence Prohibition Policies and Firearm Mortality*, 30 ANNALS OF EPIDEMIOLOGY 50 (Feb. 2019), <https://www.sciencedirect.com/science/article/abs/pii/S1047279718306161> (concluding that these policies were not associated with changes in firearm homicides in California, that changes in firearm suicides were similar to changes in non-firearm suicides, and that these findings in California are consistent with other recent evaluations of extended background check policies); Rose Kagawa et al., *Repeal of Comprehensive Background Check Policies and Firearm Homicide and Suicide*, 29 EPIDEMIOLOGY 494 (July 2018), <https://pubmed.ncbi.nlm.nih.gov/29613872/> (finding no evidence of an association between the repeal of comprehensive background check policies and firearm homicide and suicide rates in Indiana and Tennessee).

Despite this low-reward reality, universal background check bills—including many of the ones considered by this very body in recent years—seemingly go out of their way to impose heavy burdens on law-abiding gun owners making common, low-risk transfers, or temporary transfers. Perhaps worse, they have been written in ways that deter gun owners from taking some of the most commonsense, responsible, and even life-saving measures with their firearms. The fact that these bills keep getting traction without these very real concerns being addressed only underscores a very real fear by many gun owners that universal background checks will be used as the gateway to a de facto national gun registry.

If Congress wants to pursue background checks for intrastate private sales, it should do so only with bills that are narrowly tailored to address the underlying problem without creating new and more significant problems. Instead of expanding the background check mandate to a variety of low-risk or temporary transfers, expansion could be limited to all publicly advertised sales regardless of the seller's FFL status. Congress could also consider modifying the existing background check system to allow non-FFLs some means of accessing the NICS system when conducting publicly advertised sales. Finally, the language for the “danger” exemptions could be significantly broadened to ensure the bill does not create needless and irrational barriers to potentially life-saving gun transfers.²⁸

III. Constitutional, Practical, and Federally Appropriate Methods of Combatting Gun Violence

A. Take Violent Crime Seriously Under Existing Laws

On the surface, enforcing existing laws may seem like an easy solution. After all, it is already illegal to traffic in firearms, to sell or lend guns to prohibited persons, or for violent felons to possess firearms. It does not necessitate new laws. But to meaningfully enforce laws, many cities do need to change their policy approaches when it comes to law enforcement. Unfortunately, much of this task falls to states and local governments. It is shameful that so many of the federal government's state and local counterparts have singled out the rights of peaceable gun owners while at same time refusing to hold violent criminals—including those who unlawfully use firearms to harm innocent people—fully accountable for their actions.

But the federal government, for its part, is not left without recourse. It can encourage and even help states re-fund and re-invigorate local police departments after several years of morale-devastating cuts. It can continue cracking down on illegal gun trafficking and ensure that, at least at the federal level, those who are caught illegally trafficking firearms face swift, certain, and severe punishment. And while it cannot force rogue “progressive” prosecutors to fully enforce

²⁸ See also David B. Kopel, *Background Checks for Firearms Sales and Loans: Law, History, and Policy*, 53 HARV. J. LEGISLATION 303 (2016); David B. Kopel, *Textual Analysis of H.R. 8, Bill to “Require A Background Check for Every Firearm Sale”*, REASON (Jan. 9, 2019), <https://reason.com/volokh/2019/01/09/textual-analysis-of-hr8-bill-to-requi/>.

laws at a state or local level, it can publicly promote best practices for the prosecution of violent offenders that reflect an attitude of taking violence crime seriously.

B. Allow Schools to Shift Unused COVID Funds to School Security

Congress allocated \$122 billion in COVID-19 relief to K-12 schools, and over 90 percent of it remains unused. Schools should be permitted to shift these remaining funds to cover investments in school security.

Yes, that means “talking about doors.” Most of us who walked into this building today did so through a limited set of secure public access points, or through a set of one-way locking doors that could only be opened by those with the proper credentials and security passes. We have no doubt that those basic security measures would not prevent us from evacuating in an emergency. And this is not unique to Congress—these are fully in line with existing best practices. It’s the primary security feature of many of the apartment complexes we will go home to this evening. It’s a common security feature of many of the commercial buildings where we go to work every day.

Perhaps most importantly, had a certain door in Uvalde properly locked when a teacher closed it at the sound of gunfire, there is a strong likelihood that 21 people would still be alive today because law enforcement would have confronted the shooter outside of the school building instead of while he was barricading himself inside a classroom.

It also means talking about armed responses to violent threats. In recent years, armed school resource officers and other staff members have successfully protected students from serious threats of violence in a way that too few Americans fully appreciate.²⁹ They also often serve as a

²⁹ Just five weeks after Parkland, an armed SRO at Great Mills High School, in Maryland, immediately confronted an armed student who opened fire on classmates. His exchange of gunfire with the shooter resulted in the shooter quickly committing suicide, saving countless students who otherwise would have been at risk. Amy Rock, *SRO Praised for Stopping Great Mills High School Gunman*, CAMPUS SAFETY MAGAZINE (March 21, 2018), <https://www.campussafetymagazine.com/safety/shooting-great-mills-high-school/>; An armed SRO in Olathe, Kansas, was called into a meeting between a school administrator and a student over suspicions that the student had a gun. After the student began shooting, the SRO—though injured—returned fire and quickly subdued the student. Juan Cisneros et al., *School Resource Officer Injured in Olathe East School Shooting Identified*, FOX4 KANSAS CITY (Updated Mar. 7, 2022), <https://fox4kc.com/news/school-resource-officer-injured-in-olathe-east-school-shooting-identified/>; An armed school employee in Ogden, Utah, prevented a student from being kidnapped from a school playground. After the suspect tried to force his way inside the school building where other students were located, the employee held him at gunpoint until police arrived. *Police: Armed School Worker Stops Attempted Kidnap Suspect*, ABC News (May 27, 2021), <https://abcnews.go.com/US/wireStory/police-armed-school-worker-stops-attempted-kidnap-suspect-77944017>; An armed police officer working inside a Waukesha, Wisconsin, school responded to a report of a student suspected of possessing a firearm in a classroom. The SRO secured the room, allowed students to get to safety, and tried to deescalate the situation with the armed student. The student was eventually shot and injured by the SRO after making gestures as though he would open fire. Cristopher Kuhagen & Bill Glauber, *Wisconsin Police Officer Shoots Student Who Pulled Gun, Refused to Drop It, Officials Say*, USA Today (Updated Dec. 2, 2019), <https://www.usatoday.com/story/news/nation/2019/12/02/waukesha-south-high-school-gunshots-exchanged-wisconsin/2586995001/>; Two months after Parkland, an armed SRO fatally shot a would-be mass shooter who opened fire on a high school graduation rehearsal in Dixon, Illinois. His actions prevent

vital link in the threat reporting chain and have been instrumental in many successful threat interventions.

Beyond measures to increase a school's physical security, the funds could be used to hire (and retain) the licensed mental health professionals that are currently few and far between in many districts. Although schools have seen considerable increases in nonteaching staff over the past five decades, many schools either do not have a full-time nurse, psychologist, or counselor or share one with other schools. Too often, students with mental health concerns have difficulty accessing counseling or treatment because their school districts have not allocated adequate resources to provide mental health support. This is a problem for student flourishing in general, but also for violence intervention in schools.

C. Genuine Risk Assessment Training

Successful interventions to stop acts of targeted mass violations occur far more often than many people realize, largely because these successful interventions rarely make national headlines. We know that the difference between successful intervention and horrific violence is often a single breakdown in a chain of reporting: either someone did not recognize or report clear signs of a potential threat to those in a position to intervene, the report was not taken seriously or properly acted upon by those with the authority to intervene, or those in a position to intervene lacked an adequate legal mechanism to do so.

Help communities prevent acts of targeted and mass public violence by better equipping state and local law enforcement, educators, school personnel, and others to assess and handle the threatening scenarios they already deal with on a regular basis. Review how federal, state, and local agencies currently collaborate on potential and active threats and develop best practices for enhancing that collaboration. Take the strategies that we know work at a federal level to prevent targeted mass violence and retool them in a way that makes sense for state and local entities.

Encourage behavioral threat assessment training in local communities, so that individuals know how to recognize warnings signs and feel empowered to report, so that those in a position to intervene better understand what actions to take under what circumstances, and have a plan in place to effectively intervene.

Unlike with red flag laws, this is truly a place for the federal government to act. Many federal agencies have become experts with behavioral threat assessment, and regularly use it for purposes of national security. For example, the Secret Service may use it to determine whether someone who posts a social media comment about killing the president is merely “joking” or instead poses a genuine threat. Similarly, the FBI may use it to assess whether someone

a single student from being injured. Aamer Madhani, *Police: 'Heroic' Officer Thwarts Mass Shooting at High School in Dixon, Illinois*, USA TODAY (Updated May 17, 2018), <https://www.usatoday.com/story/news/2018/05/16/dixon-illinois-school-resource-officer-thwarts-mass-shooting/615519002/>.

researching pipe bombs is doing a science project, plotting an imminent terrorist attack, or has an unhealthy obsession with explosives that may become a serious threat to public safety at some point down the road.

While these federal agencies have decades of training and experience with behavioral threat assessment, very few state and local agencies have a coherent system for analyzing threats in their own communities. Moreover, most state and local law enforcement officers lack extensive training in threat assessment. That can present major problems when it comes to protecting our communities. Even though state and local police aren't often on the front lines of the fight against domestic terrorism, they routinely interact with individuals who may or may not pose threats of other types of targeted violence, such as school shootings or nonideologically motivated mass public shootings.

The same is true for educators and school officials, who (for better or worse) have some of the most extensive and sustained personal interactions with American youths. Consider the following scenarios likely to be encountered by cops and teachers across the country today:

- A concerned parent calls a school administrator because her teenage son told her his friend has begun committing acts of self-harm and shared rape fantasies involving his classmates.
- Over the past week, local cops have been called to the same office building several times to deal with an enraged former employee who will not stop walking into the reception area, demanding to speak to his former boss. Today, the former employee wore a very visible, but empty, handgun holster on his hip and warned that “they’d regret this.”
- A man accuses his MAGA hat-wearing neighbor of posing a direct threat to his life. When pressed, the man complains that the neighbor has a gun rack on his truck, supports candidates critical of illegal immigration, and his bumper sticker reads “If it’s tourist season, why can’t we shoot them?” He wants law enforcement to take the neighbor’s guns away.
- A student confides in a school resource officer that he overheard a classmate talking about a knife in his backpack. He knows this classmate has a longstanding interpersonal dispute with several other students that has recently come to a head.
- A parent reports to school officials that his child’s teenage classmate regularly posts videos on social media that show him firing semi-automatic rifles at a gun range. While this target practice takes place under the direct supervision of adults and in full compliance with state law and the parent does not personally know the classmate or his family, he believes this is dangerous behavior and the classmate is a “gun-crazed ticking time bomb.”

We should absolutely want law enforcement officers and educators in these scenarios to have the best idea possible of how to analyze these potential or alleged threats—and know what actions to take.

Perhaps just as importantly, training in behavioral threat assessment would help these individuals know which actions not to take. When law enforcement officers and school officials are properly able to distinguish true threats from nonthreats, they are less likely to pursue inappropriate interventions that wrongly infringe on the rights of people who aren't dangerous. We should ensure that—regardless of whatever laws already exist at a state or local level—law enforcement officers and educators can make better decisions about potential threats to public safety.

D. Additional Avenues for Reducing Gun Violence

In addition to the alternative solutions detailed above, Congress should also consider:

- Funding anti-gang violence and other community initiatives that have proven to be incredibly effective at lowering rates of gun crime;³⁰
- Removing unnecessary barriers to the exercise of Second Amendment rights by law-abiding citizens, who use their firearms in lawful defense of self or others somewhere between 500,000 to 3,000,000 times every year;³¹
- Promoting safe storage and responsible gun ownership without simultaneously imposing financial burdens on gun owners or hindering their ability to immediately respond to violent threats;

³⁰ For example, initiatives like Operation Ceasefire have not only been incredibly successful at reducing rates of gun crime, but that success has been replicated across a number of very diverse cities. See Anthony A. Braga et al., *Problem-Oriented Policing, Deterrence, and Youth Violence: An Evaluation of Boston's Operation Ceasefire*, 38 J. Research in Crime & Delinquency 195 (2001),

https://www.d.umn.edu/~jmaahs/Correctional%20Assessment/Articles/Braga_problem_oriented%20policing_deterrence.pdf; Operation Ceasefire and the Safe Community Partnership, U.S. Attorney's Office for the Northern District of California (Dec. 29, 2014), <https://www.justice.gov/usao-ndca/operation-ceasefire-and-safe-community-partnership>. On the other hand, initial data on acute 2020 crime spikes suggest that declines in “proactive policing” can play a major factor in violent crime increases. See Paul Cassell, *Explaining the Great 2020 Homicide Spike*, REASON (Feb. 1, 2021), <https://reason.com/volokh/2021/02/01/explaining-the-great-2020-homicide-spike/>.

³¹ A 2013 report by the Centers for Disease Control and Prevention concluded that “almost all national survey estimates indicate that defensive gun uses by victims are at least as common as offensive uses by criminals, with estimates of annual uses ranging from about 500,000 to more than 3 million.” CENTERS FOR DISEASE CONTROL AND PREVENTION, PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE, at 15 (2013), <https://www.nap.edu/read/18319/chapter/3#15>. Importantly, “Studies that directly assessed the effect of actual defensive uses of guns (i.e., incidents in which a gun was “used” by the crime victim in the sense of attacking or threatening an offender) have found consistently lower injury rates among gun-using crime victims compared with victims who used other self-protective strategies.” *Id.* at 15–16. Last year, The Heritage Foundation created an interactive Defensive Gun Use Database to highlight just a fraction of the times Americans rely on the Second Amendment to protect their inalienable rights every year. *Defensive Gun Uses in the U.S.*, HERITAGE FOUND. (Updated May 9, 2022), <https://www.heritage.org/data-visualizations/firearms/defensive-gun-uses-in-the-us/>.

- Investing in the nation’s mental health infrastructure—two-thirds of gun deaths every year are suicides, and the intersection of mental health and gun violence provides meaningful avenues for addressing root causes of gun violence.

Conclusion

What happened in Uvalde and in Buffalo is horrifying. No one should ever have to experience that type of unfathomably traumatic event, and I cannot imagine what those families are going through right now. Everybody with a soul is shattered over their pain. We have been shattered every single time, from Columbine to Parkland to Uvalde. It did not somehow get easier. We did not, somewhere along the way, grow numb.

When we oppose certain policies in the wake of unspeakable tragedy, it is not because gun control advocates have a monopoly on outrage or because we are somehow insensitive to the suffering of our neighbors.

We oppose these policies precisely because the lives of these victims mattered, because the grief of their loved ones is real, and because we all want thriving communities where families are flourishing instead of burying their children.

The opposition to certain policies in the wake these tragedies has always been a genuine concern that those policies suffer from serious constitutional and practical defects. We have always proposed alternatives that are more effective and less constitutionally suspect. What we have rarely been met with are open ears.

I hope for the nation’s sake that today is different.