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LEGISLATIVE TESTIMONY

“Constitutional and Commonsense Steps to Reduce Gun Violence”

Testimony before the U.S. Senate Committee on the Judiciary
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Amy E. Swearer
Legal Fellow, Edwin Meese III Center for Legal and Judicial Studies
The Heritage Foundation

Chairman Durbin, Ranking Member Grassley, and distinguished Senators,

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 was heavily involved in Heritage’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 Virginia State Crime Commission on the heels of the 2019 Virginia Beach mass shooting, the Texas House Committee on Mass Violence and Community Safety following the 2019 El Paso Walmart shooting, and the House Judiciary Committee with respect to a proposed ban on so-called “assault weapons.”

I did not set out from law school with the intention of working on gun policy. It is a role that I grew into, almost by accident, but that I have never regretted taking on. This is Washington, D.C., and I am fully aware of just how divisive politics can be. Yet, the more I work in the Second Amendment space, the more convinced I become that there is so much we can agree on if we would just get out of our own way. There are no “sides” to gun violence. As I have repeatedly said to anyone who will listen, we are all on the same team.² Every single person in this room today showed up to work with the same goal—preventing needless death and suffering without infringing on the rights of law-abiding Americans. We are all here because we are invested in saving lives. And I fully believe there are many policies this body can pursue that would, in fact, save lives and promote safer communities without assaulting the Constitution or common sense.

Unfortunately, most of the gun-related bills now pending before Congress do just the opposite—they present significant constitutional problems while failing to provide meaningful ways of addressing gun-related violence. And in that, they are far from “commonsense” solutions to anything.

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² See Testimony of Amy E. Swearer before the Virginia State Crime Commission, *Same Team, Different Diagnosis: Tackling Gun Violence Without Trampling Liberty* (Aug. 20, 2019), <https://www.heritage.org/testimony/same-team-different-diagnosis-tackling-gun-violence-without-trampling-liberty>.

Imagine a patient going to his primary care physician for a check-up because he does not feel particularly well. Both the man and his doctor know that he has an underlying condition for which he will eventually need a kidney transplant. He suffers from depression and is having trouble sleeping. He woke up this morning with a sore throat and a cough, and he feels like an elephant is sitting on his chest. Then the man also notes that the other day he sprained his ankle during a pick-up basketball game.

Now, is that man's sprained ankle a true physical ailment that presents a problem to his overall health? Of course. Would any sane doctor walk into the room, look at that patient, and decide the most prudent course of action is to order an immediate amputation of the man's leg because he has a sprained ankle? Absolutely not.

Far too many gun control bills are nothing more than the public policy version of seeing a man with complex health problems and cutting off his leg because of a twisted ankle. At their core, the bills identify some legitimate concerns with current federal gun laws and the ways in which they are enforced. The concerns play a comparatively minor role in the overall problem of American gun violence yet are nonetheless worth addressing with the understanding that they can attain, at most, limited benefits. But instead of using appropriately tailored methods, the bills create "solutions" that are so problematic as to outweigh any of the minor benefits society could have otherwise enjoyed.

In short, they would cut off the patient's leg to "fix" his comparatively minor ankle problem and claim that this complete overkill of a treatment plan left the patient better off in the long run. We cannot do public policy this way. This is especially true when it touches on fundamental constitutional rights, like the right to keep and bear arms. We can and should recognize the minor problems with current law, and take appropriate steps to address them. But those steps must be appropriate.

While this metaphor could extend to many gun control bills introduced in any given Congressional term, there are two bills in particular that just passed the House of Representatives and are now before the Senate that really underscore the point—H.R. 8 on universal background checks, and H.R. 1446 on extending the time for which the FBI can delay gun sales while processing background checks.

I. H.R. 8: A Low-Reward Policy With High-Risk Problems

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.³ Federal law reflects this consensus by barring convicted felons and those with histories

³ 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*

of serious mental health problems from legally purchasing or possessing firearms unless their civil rights have been restored.⁴ 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.⁵

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 cause to believe” is prohibited from possessing that firearm.⁶ 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.

H.R. 8 begins by identifying a fairly small but nevertheless legitimate concern: would-be criminals could plausibly use these private intrastate sales by non-FFLs to elude 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 these types of publicly advertised private sales.

Unfortunately, instead of addressing this concern in a reasonable and limited way, H.R. 8 quickly morphs into an incredibly overbearing policy whose risks to and burdens on law-abiding gun owners far outweigh any limited potential to stop gun crime. It does not stop with regulating these higher-risk publicly advertised intrastate sales, but purports to criminalize an array of very low-risk transfers commonly made between gun owners unless those gun owners first jump through a variety of bureaucratic hoops.

Universal Background Checks Are, At Best, A Low-Reward Policy

Dicta, HERITAGE FOUND. LEGAL MEMORANDUM NO. 238 (Nov. 5, 2018), <https://www.heritage.org/sites/default/files/2018-11/LM-238.pdf>.

⁴ See 18 U.S.C. § 922(g).

⁵ 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.

⁶ 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>.

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.⁷ 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.⁸ 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.⁹

H.R. 8 Nevertheless Imposes Substantial Burdens On Low-Risk Transfers

Does it still make sense to better close one avenue by which criminals can obtain firearms, even while recognizing many other avenues exist? Perhaps. But because expanding background checks in this way is a very low-reward endeavor, it should be obvious that the law ought to avoid imposing heavy burdens on law-abiding gun owners making common, low-risk transfers, or temporary transfers. H.R. 8 almost goes out of its way to do the opposite. In short, it is far more likely to make criminals out of well-intentioned gun owners than it is to stop actual criminals from obtaining guns.

The bill creates a blanket presumption that every civilian firearm sale or transfer must be conducted through an FFL. It then creates a narrow list of exemptions for certain types of transfers. The problem is that these exemptions are based on irrational distinctions unrelated to the transfer's relative level of risk. For example, it exempts "bona fide gifts" between certain specified family members, but not sales or temporary transfers between those same family members. It makes no sense to single out the exact same transfer for a background check and all the ensuing bureaucracy simply because the relative wanted something of value in return. That is

⁷ 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").

⁸ 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").

⁹ 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).

not how transfer risk is reasonably determined. Similarly, the law imposes a background check burden on low-risk transfers between non-family members, regardless of how well the non-family members may know each other’s respective legal capacity to possess firearms. This leads to equally absurd scenarios: an uncle who just married into the family could give a gun to a nephew he only met once without a background check, while a man traveling overseas for six months could not have the neighbor he has known for 20 years store his firearms without effectively surrendering legal title to them.

Additionally, H.R. 8 requires background checks (and, therefore, in reality, the complete transfer of legal title) for a whole host of temporary, low-risk transfers, simply because the original firearm owner is not present for the duration of the time that someone else possesses the firearm. As Second Amendment scholar David Kopel has noted, there are numerous scenarios in which law-abiding and responsible gun owners make temporary, low-risk transfers, and it is impractical or impossible for them to remain “present” with the transferee.¹⁰ Just look at the hypothetical neighbor above—his choices are to leave his firearms in an unoccupied home for an extended period of time, legally cede them to his neighbor, or turn his neighbor into a felon. Now, of course, the immediate retort is often that no cop would ever arrest the neighbor under these circumstances, and no district attorney would ever prosecute him. Why? Well, because it would be completely unjust! If that is the case—and indeed it is—then such transfers should not be unlawful in the first place.

Barriers to Common Life-Saving Transfers

Even more concerning is the way in which H.R. 8 limits the exemption for temporary firearm transfers to situations where it is “necessary to prevent imminent death or great bodily harm.”¹¹ These emergency transfers are lawful without a background check “only as long as immediately necessary to prevent imminent death or great bodily harm.”¹² The language for this carve-out is clearly a well-intentioned attempt to address a very real concern often raised by gun owners—it is categorically unjust to criminalize temporary gun transfers that may well save lives, either by removing a gun from a dangerous situation or providing a gun to someone who is likely to use it in lawful self-defense. Unfortunately, the language the bill uses for the exemption is far too narrow to offer any meaningful legal protection to gun owners who take completely reasonable life-saving actions.

¹⁰ David B. Kopel, *Background Checks for Firearms Sales and Loans: Law, History, and Policy*, 53 HARV. J. LEGISLATION 303, 313–30 (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-to-requi/>.

¹¹ Bipartisan Background Checks Act of 2021, H.R. 8, 117th Cong. § 2(D) (as passed by the House of Representatives), <https://www.govtrack.us/congress/bills/117/hr8/text>.

¹² *Id.*

The bill itself does not define “imminent death,” but other related legal definitions imply that this is an extremely narrow set of extraordinary circumstances.¹³ In the context of self-defense or uses of lethal force, “imminent danger” is sometimes defined as “the immediate or instantaneous danger of death or serious physical injury.”¹⁴ Apply this commonly accepted definition to a scenario in which a woman fears the abusive boyfriend she just broke up with earlier that week, and it is easy to see how the language is problematic. In order for the terrified woman to accept a temporary transfer of a firearm without going through a background check, she must essentially wait to ask for the gun until the moment she is legally authorized to use deadly force. In other words, the bill as written prevents her borrowing a gun until the danger is quite literally at her doorstep, instead of permitting her a reasonable timeline in which to arm herself in advance. If she is caught arming herself in the interim, she is left to the mercy and discretion of the police and a prosecutor.

The limiting language is even more concerning with respect to the barriers it places between gun owners and commonsense, responsible actions that are prevalent in the gun community for addressing suicide.

Most Americans will struggle with some degree of mental health problems at some point in their lives.¹⁵ Importantly, for most people, serious mental illness is very transient. They will go through times when external stressors put them at greater risk for suicide, and then those stressors will be resolved and they are longer at a heightened risk of harming themselves. One of the most vital missions within the gun community is helping gun owners recognize that mental health awareness should be uniquely important to us, and normalizing the idea that sometimes the best course of action is to temporarily give up control of our firearms.

This is a very difficult conversation. There is a very real fear within the gun community that the government and gun control activists are out to find any possible way of punishing gun owners, and that if we seek help, we will be met with crushing, long-term consequences for our Second Amendment rights. To be perfectly honest, that fear is well-founded and perfectly reasonable in light of laws like New York’s SAFE Act, and the failure of Congress and many states to offer mechanisms to restore the gun rights of people who had a very bad year a decade ago but are perfectly stable now.¹⁶

¹³ Legal dictionaries provide helpful insight, defining “imminent” as “impending; menacingly close at hand,” and “imminent peril” as “danger that is certain, immediate, and impending.” Imminent, West’s Encyclopedia of American Law, edition 2 (accessed Mar. 20, 2021), <https://legal-dictionary.thefreedictionary.com/imminent>.

¹⁴ See JOHN MICHAEL CALLAHAN, JR., DEADLY FORCE: CONSTITUTIONAL STANDARDS, FEDERAL GUIDELINES AND OFFICER STANDARDS (2003).

¹⁵ See generally John Malcolm & Amy Swearer, *Part I: Mental Illness, Firearms, and Violence*, HERITAGE FOUND. LEGAL MEMORANDUM No. 239 (Jan. 31, 2019), <https://www.heritage.org/civil-society/report/part-i-mental-illness-firearms-and-violence>.

¹⁶ For an analysis of the SAFE Act and various federal and state laws with respect to the restoration of rights, see John Malcolm & Amy Swearer, *Part III: The Current State of Laws Regarding Mental Illness and Guns*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 241 (Feb. 13, 2019), <https://www.heritage.org/civil-society/report/part-iii-the-current-state-laws-regarding-mental-illness-and-guns>.

One common solution, therefore, is to seek informal help within the gun community itself, and temporarily leave firearms with trusted friends. I cannot stress how important of a mechanism this is for suicide prevention, and how often it occurs precisely because it is an informal option. Many gun owners who might otherwise agree to temporarily transfer their firearms to a trusted friend or family member are likely to balk at that same suggestion if it involves having to traipse down to gun store with that person, wait around for a background check, and legally [perhaps, in their mind, permanently] relinquishing ownership. When people reach a point where they are considering removing guns from their home for their own good, they are, almost by definition, not in a good place. When you struggle to get out of bed in the morning, you are not going out in public to a gun store to go through the very embarrassing process of formally transferring your guns to someone else.

At the same time, not everyone who recognizes they are going through a rough time is necessarily an “imminent danger.” By limiting the exemption to scenarios where a person is on the cusp of actively committing suicide, the law inadvertently discourages gun owners from taking preventative steps before they reach a complete crises. We should not force gun owners to choose between formally surrendering their guns, risking the commission of a felony, or waiting until they are imminent dangers to themselves before they take informal steps to keep themselves safe. Rather, we should encourage them to take these informal steps the moment they or someone close to them recognizes that they are struggling. We certainly should not place significant mental, emotional, and practical barriers in the way of these commonsense actions, and then make criminals of those who ignore those barriers in order to do the right thing, anyway.

Workable Solutions To H.R. 8

Unlike a number of other gun bills, H.R. 8 is at least premised on a kernel of underlying legitimacy. It is therefore still worth assessing how the law might be more 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.¹⁷

II. H.R. 1446 “Charleston Loophole”

A second bill passed by the House and currently pending before the Senate is H.R. 1446, designed to address the so-called “Charleston Loophole.” Under current federal law, if the FBI takes more than three days to process a prospective gun purchaser’s background check, the FFL

¹⁷ See also Kopel, *supra* n.10, at 362–64.

can complete the gun transfer.¹⁸ The overwhelming majority of background checks are processed within that three-day time frame, and the FBI does not simply stop processing background checks after the time frame has elapsed. When guns are transferred to individuals the FBI later determines are prohibited persons, the information is forwarded to the ATF so that federal agents can take various steps to seize the guns.¹⁹ Like H.R. 8, H.R. 1446 begins with an underlying kernel of legitimacy before cutting off a lot of legs to help a twisted ankle.

First, it is important to recognize that despite the common moniker of “Charleston Loophole,” the existing three-day limitation played no role whatsoever in the tragic 2015 mass shooting at Emanuel African Methodist Episcopal Church in Charleston, South Carolina. The problem was not that the FBI ran up against the three-day limitation, discovered the shooter was a prohibited person, and then had no recourse for disarming him. Rather, the shooter erroneously passed that background check because the FBI never saw a relevant drug arrest record that arguably should have flagged him as a disqualified person.²⁰

In fact, even though extending the three-day limit is often touted as a means of combating mass public shootings, H.R. 1446 would not have prevented a single mass public shooting in recent memory. This is in large part because most mass public shooters are not prohibited from owning firearms, and the minority that were likely prohibited—like the Charleston shooter—obtained firearms for reasons other than the three-day time limit.²¹

Second, there is little (if any) statistical support for a conclusion that the current limitation, even with all its flaws, is a significant driving force behind other, more common forms of gun-related violence. Certainly, gun control advocates can and do point to several high-profile instances in the last decade where prohibited persons inadvertently obtained a firearm because of the

¹⁸ See Dan Frosch & Zusha Elinson, *Armed and Dangerous: How the ATF Retrieves Guns From Banned Buyers*, WSJ (Feb. 19, 2019), <https://www.wsj.com/articles/thousands-of-guns-are-mistakenly-sold-to-banned-buyers-its-the-atfs-job-to-get-them-back-11550591324>.

¹⁹ *Id.*

²⁰ See Press Release. James Comey, Director of the FBI, Statement by FBI Director James Comey Regarding Dylann Roof Gun Purchase (July 10, 2015), <https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-comey-regarding-dylann-roof-gun-purchase>.

²¹ For example, the 2017 Sutherland Springs, Texas, church shooter was able to purchase several firearms—despite his lengthy history of disqualifying criminal and mental health records—solely because the military never forwarded these records to the NICS database. Alex Horton, *The Air Force Says It Failed to Follow Procedures, Allowing Texas Church Shooter to Obtain Firearms*, WASH. POST (Nov. 7, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/11/06/the-air-force-says-it-failed-to-follow-procedures-allowing-texas-church-shooter-to-obtain-firearms/?utm_term=.fbbefc309fac. Meanwhile, the 2009 Virginia Tech shooter was disqualified under federal law because of an adjudication that he was “mentally ill and in need of hospitalization” because he was “an imminent danger,” but the shooter nevertheless passed a background check because of technicalities related to Virginia’s forms for involuntary outpatient forms. See Ned Potter & David Schoetz, *Va. Tech Killer Ruled Mentally Ill by Court; Let Go After Hospital Visit*, ABC News (Apr. 18, 2007), <https://abcnews.go.com/US/story?id=3052278&page=1>; Brigid Schulte & Chris L. Jenkins, *Cho Didn’t Get Court-Ordered Treatment*, Wash. Post (May 7, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/06/AR2007050601403.html>; Brigid Schulte & Tom Jackman, *Va. Gunman’s Records Reveal Disorganized Mental Health System*, Wash. Post (Aug. 20, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/19/AR2009081902380.html>.

limitation and went on to commit acts of gun violence with that weapon before the ATF or local police could seize it.²² And, certainly, everyone basically agrees that it is much better if an FBI background check properly catches and prevents prohibited people from possessing guns in the first place. But the vast majority of prospective purchasers whose background checks take longer than three days are not prohibited persons. Meanwhile, of those who are later determined to be prohibited, many simply may not have realized that they were prohibited and had no intentions of using the gun for criminal purposes. After all, why would a prospective purchaser who knows he or she is prohibited from owning a gun go through an official channel on the off chance the background check takes longer than three days? That is an incredibly risky option, especially when compared to much more prevalent avenues like finding a straw purchaser.

The ultimate question, then, is whether H.R. 1446 provides an appropriate solution to a minimal factor in gun crime. Does it address the problem of FBI background check backlogs without burdening the rights of law-abiding prospective gun owners in a comparatively severe way? It does not.

To begin with, one would think that any good faith attempt to assist an FBI that is apparently too overwhelmed and overworked to complete background checks in three days would involve additional funding and manpower for the agency. Such a move would directly address the problem without furthering burdening prospective purchasers. Indeed, providing the FBI with additional resources for the background check system would likely benefit prospective gun owners, as these resources could also be used to ensure the system remains updated and accurate to avoid wrongful denials.²³

Even if serious attempts at additional funding and manpower prove insufficient at making the current three-day time limit practical, H.R. 1146 provides a drastic expansion that provides no incentive for efficiency. The law effectively gives the FBI 20 business days to complete the check. Sure, a purchaser can “submit a petition for a final firearms eligibility determination” after 10 business days, but nothing in the text of the bill compels the FBI to “get a move on” just because someone submitted a petition.

This is particularly problematic given that the prospective purchaser’s request for a NICS background check is only valid for 30 total days. Would-be gun owners who run into a bureaucratic nightmare under this scenario could do every single thing in their power to hurry the FBI along and still find themselves with only a couple of days to actually complete the purchase

²² See Frosch & Elinson, *supra* n.18.

²³ Every year, thousands of background checks conducted on prospective purchasers by the FBI and state or local authorities are wrongfully denied and overturned on appeal. Between 1999 and 2008, over 86,000 appeals resulted in reversal. Almost 30,000 of these erroneous denials were conducted under the NICS system by the FBI. Ronald J. Frandsen et al., *Trends for Background Checks for Firearm Transfers, 1999–2008*, at 3, Table 8 (July 2010), <https://www.ojp.gov/pdffiles1/bjs/grants/231187.pdf>. This continues to be a problem, and “the majority of overturned denials were due to misidentifications.” William J. Krouse, *Gun Control: National Instant Background Check System (NICS) Operations and Related Legislation*, at 18 (Oct. 17, 2019), <https://fas.org/sgp/crs/misc/R45970.pdf>.

before the initial request lapses. All of this is compounded by the fact that, in a good number of states, the prospective purchaser is already subjected to weeks or months of processing waits for purchase permits or similar state-issued firearm owner permits.

Again, keep in mind that the majority of those who will inevitably find themselves wallowing in the depths of this bureaucratic nightmare will be law-abiding citizens wishing to exercise a fundamental right. As written, H.R. 1446 will impose these burdens without any real evidence that it will provide a corresponding mechanism for seriously addressing criminal gun violence.

III. Better Ways of Addressing Gun Violence

H.R. 8 and H.R. 1446 are two examples of a broader problem with the national conversation on gun policy. These problems exist to an even greater degree with, for example, bills that would ban sales of certain commonly owned semi-automatic firearms, prohibit the possession of factory-standard magazines over a certain arbitrary capacity, or extinguish the Second Amendment rights of young adults.²⁴ Fortunately, just because many commonly proposed pieces of gun control legislation suffer from serious problems does not mean we are left without any viable alternatives. This is not a choice between “thoughts and prayers” and “just doing something,” regardless of how poorly that “something” works in practice. Besides working to more appropriately tailor proposals that, like H.R. 8 and H.R. 1446, address legitimate but minor problems, Congress should consider policy solutions that are both aimed at major root causes of gun violence and avoid unnecessary burdens on law-abiding Americans. In general, a framework for productive and bipartisan work on gun violence should abide by the following broad principles:

- A focus on targeted interventions that temporarily remove firearms from high-risk situations;
- An emphasis on addressing the many underlying factors that create heightened risks for gun violence in the first, in both a preventative and restorative manner;
- Restoring trust with the broader community of gun owners by listening to their legitimate concerns and adapting policy proposals to accommodate common low-risk and responsible actions.

More specifically, policymakers should consider:

- 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;²⁵

²⁴ See generally Swearer, *supra* note 6, <https://law.siu.edu/common/documents/law-journal/articles%20-%202019/fall-2019/1---Swearer-jr.pdf>.

²⁵ See *id.*, at 17–25; Malcolm & Swearer, *supra* note 16.

- Training students, family members, and communities to recognize warning signs that someone is a danger to themselves or others, and to take appropriate action. This is important not just for suicide prevention, but for the prevention of high-profile shooting tragedies. Every year, far more school shootings and mass public shootings are thwarted than many people realize.²⁶ Often, the difference between thwarted shootings and tragedy is that someone recognized warning signs and were taken seriously when they reported it. It is rarely the case that mass public shootings happen without any warnings or opportunities for intervention.
- Better enforcing existing gun laws and, in particular, combating straw purchases and the black market for gun sales;
- Incentivizing states to adopt “gap-filling” measures like Gun Violence Restraining Orders, as long as those targeted interventions abide by adequate standards of due process and integrate existing mental health and addiction resources;²⁷
- Funding anti-gang violence and other community initiatives that have proved incredibly effective at lowering rates of gun crime;²⁸
- 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.²⁹

²⁶ My own analysis of thwarted school mass shootings—where the would-be shooter had both a concrete plan and either current possession of firearms or a reasonably achievable plan to obtain firearms—resulted in at least 39 such instances between 2006 and 2020. *See also* Testimony of Amy Swearer before the Texas House Select Committee on Mass Public Violence and Community Safety (January 9, 2020), <https://www.heritage.org/testimony/protecting-the-public-acts-mass-violence>.

²⁷ *See Swearer, supra* note 6, at 23–25; Malcolm & Swearer, *supra* note 16, at 6–8; Amy Swearer, *Answers to Common Questions About “Red Flag” Gun Laws*, HERITAGE FOUND. (Aug. 16, 2019), <https://www.heritage.org/firearms/commentary/answers-common-questions-about-red-flag-gun-laws>; *Red Flag Laws: Examining Guidelines for State Action Before the U.S. S. Judiciary Comm.*, 116th Cong. (2019) (written testimony of David B. Kopel, Research Director, Independence Institute), <https://object.cato.org/sites/cato.org/files/pubs/pdf/kopel-sen-judiciary-gun-confiscation-orders.pdf>.

²⁸ 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/>.

²⁹ 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

Unlike like H.R. 8 and H.R. 1446, these types of measures are aimed at the root causes of gun violence and can be appropriately tailored to avoid creating more problems than they solve. But at the very least, if H.R. 8 and H.R. 1446 are to go forward, they ought to be made far more sensible. The Senate is often referred to as “the world’s greatest deliberative body.” I come before you today on behalf of millions of American gun owners asking you to actually deliberate the merits of these bills instead of blindly passing them for political purposes. Because there is little doubt that true, good-faith assessments of these bills lead to one conclusion: As written, they would cut off the leg to treat a sprained ankle.

And that? That’s just bad policy.

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 March 11, 2021), <https://www.heritage.org/data-visualizations/firearms/defensive-gun-uses-in-the-us/>.