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## ARTICLE

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### LIBERTARIAN GUN CONTROL

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*Individuals should have the option to waive their Second Amendment rights to keep and bear arms by adding their names to the National Instant Criminal Background Check System. Every year, over 20,000 Americans kill themselves with firearms. We present a low-cost and constitutional system that could, in just a few years, easily save thousands of lives as people with mental health or other recurring problems, during moments of clarity, rationally opt to restrain their future selves. Moreover, our system, which includes the option of providing email notifications of an individual's waiver to third parties, can promote a marketplace of informed association. Just as Heller emphasizes the Second Amendment right to keep and bear arms as furthering the "core" individual right to self-defense, credibly communicated waiver of Second Amendment rights can facilitate the self-defense choices of individuals to limit association with those who may possess weapons. Forcing Second Amendment interests to contend with First Amendment associational interests can thus enhance the joint liberty of those seeking to best defend themselves. We provide the results of two surveys showing that close to a third of the general population and more than forty percent of those with previously diagnosed mental health concerns indicated that they would be willing to add their name to a "No Guns" list.*

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## INTRODUCTION

Two-and-a-half years ago, Cheryl Hanna had many reasons to be happy.<sup>1</sup> At forty-eight, she was a tenured professor at Vermont Law School beloved by students and colleagues alike. She was married with two adorable children, Samira and Elias, ages eleven and eight. She had achieved much professionally with publication in elite journals and was an acknowledged expert on violence against women. But Hanna was privately battling severe depression. She had twice voluntarily admitted herself to a hospital for psychiatric treatment. Shortly after her second hospitalization, she legally bought a handgun and used it the next day to kill herself.<sup>2</sup>

People at risk for suicide, like Hanna, should have the option to make it more difficult for themselves to buy a gun during a suicidal crisis. A simple change to state law would give individuals the ability to add their own names into the existing federal background check system and thereby prevent themselves from buying a gun from a licensed dealer. This legal possibility is not a pipe dream. During the time that this Article has been in draft, the ideas advanced here have gained legislative traction across the country. Several states have drafted legislation. And six states—Alabama, California, Massachusetts, Tennessee, Washington, and Wisconsin—have introduced

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<sup>1</sup> Fredrick Vars, *A Gun Registry That Could Prevent Suicide*, WASH. POST, Jan. 18, 2017, at A24 [<https://perma.cc/CUJ8-CZ2G>].

<sup>2</sup> *Id.*

legislation that would create registries that would give residents the ability to exercise their right not to bear arms.<sup>3</sup> Indeed, this liberty-enhancing proposal has attracted support from politically diverse constituencies. On January 26, 2018, the Washington State Senate voted unanimously—Republicans and Democrats alike—in favor of a voluntary firearm waiver bill (on which we consulted) that went on to become law effective January 1, 2019.<sup>4</sup>

The individual right to keep and bear arms includes the right of individuals to make choices about how best to defend themselves—for some people that means choosing not to keep and bear arms. While we will often describe our proposal as giving individuals the option to waive their Second Amendment rights, it can more formally be seen as giving the individuals an additional way to exercise their constitutional right to not bear arms.<sup>5</sup> Government should give individuals the right to commit not to purchase and possess guns and give them the additional right to credibly communicate that commitment to others. Just as it is constitutional for individuals to contract to bear arms,<sup>6</sup> it is constitutional for government to allow individual commitment not to bear arms.

While we will discuss giving individuals a variety of waiver choices, we will focus attention on an Internet platform that gives individuals: (1) an all-or-nothing option of registering to cede their right to purchase or possess firearms, (2) the option to automatically rescind any prior registration after a 21-day waiting period, and (3) the option of providing email addresses that will be automatically notified of an individual's waiver or its subsequent rescission. Because our proposed system would give waiving individuals the option of automatically regaining full rights to purchase and possess firearms after 21 days, our proposal is equivalent to giving individuals the right of opting into a waiting period, a fully constitutional commitment technique already employed in a number of states.<sup>7</sup> In a sense, our proposal provides individuals with a virtual gun safe:

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<sup>3</sup> See S.B. 5553, 65th Leg., Reg. Sess. (Wash. 2017); A.B. 1927 (Cal. 2018); H.R. 3611, 190th Sess. (Mass. 2017); S.B. 0671, 109th Gen. Assemb. (Tenn. 2017); Assemb. B. 579 (Wis. 2017).

<sup>4</sup> S.B. 5553, 65th Leg., Reg. Sess. (Wash. 2017).

<sup>5</sup> See generally Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1 (2012). Even if a positive constitutional right not to bear arms does not exist, states can still offer this option without running afoul of Second Amendment rights.

<sup>6</sup> See, e.g., *id.* at 4; see also *Kansas Community Requires Households to Have Guns*, USA TODAY (Nov. 23, 2003), [https://www.usatoday.com/news/nation/2003-11-23-kansas-guns\\_x.htm](https://www.usatoday.com/news/nation/2003-11-23-kansas-guns_x.htm) [<https://perma.cc/835C-6UK4>] (“Residents of this tiny south-central Kansas community have passed an ordinance requiring most households to have guns and ammunition”); *Town in Utah Requires Owning Guns*, ABC NEWS (Nov. 5, 2000), <https://abcnews.go.com/US/story?id=95092&page=1> [<https://perma.cc/NJ99-BTLE>] (“A tiny southern Utah town has passed an ordinance that requires every household to own a gun and ammunition so residents can protect themselves against aggressors.”).

<sup>7</sup> Many states require a waiting period before couples may finalize a no-fault divorce. See, e.g., MICH. COMP. LAWS ANN. § 552.9f (West 2018); 23 PA.CONS. STAT. ANN. § 3301(c) (West 2018);

by registering for self-exclusion, they can commit to safely being dispossessed of firearms with the waiting period representing the time needed to reopen the legal lockbox. Indeed, the state might give registering individuals a more literal lockbox, by offering to store any firearms with local police while a registration is in effect. The state routinely creates “sticky” rights—such as marriage—where reversing an initial exercise requires time or effort.<sup>8</sup>

This Article details how modest changes to state law could create these new rights by allowing individuals to add their names to the existing National Instant Criminal Background Check System (NICS).<sup>9</sup> The NICS “No Guns” list already prevents certain individuals (like convicted felons) who are prohibited from possessing guns from purchasing firearms.<sup>10</sup> The NICS statute gives states the option of adding new categories of its residents to the federal “No Guns” list (and states have already exercised this option by passing statutes which have added more than 1,000,000 new individuals to the federal list). By passing a statute that prohibits voluntary registrants from purchasing and possessing guns (and forwarding the registrants’ names to NICS), states can create a credible system whereby registrants will be incapacitated from purchasing a firearm from gun dealers not only in their state of registry but throughout the country. Far from creating a huge new federal bureaucracy, our proposal imposes no additional burdens on gun dealers and merely requires a credible mechanism for registration—something that has been accomplished by hundreds of online finance and commerce websites as well as several online government portals administered by the IRS and the Social Security Administration.<sup>11</sup>

Facilitating these options to waive and to communicate such waiver is likely to produce three social benefits: (1) self-exclusion, (2) negotiated exclusion, and (3) political expression. First, the waiver right will reduce gun violence as those who rationally want to limit their future selves from misusing guns will be able

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S.D. CODIFIED LAWS § 25-4-34 (West 2018). These waiting periods have been enforced by courts. *See Hood v. Hood*, 397 N.W.2d 557, 559 (Mich. Ct. App. 1986); *Jopling v. Jopling*, 526 N.W.2d 712, 714 (S.D. 1995).

<sup>8</sup> *See* Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2084 (2012) (discussing testing prerequisites to contracting).

<sup>9</sup> U.S. DEP’T OF JUST., NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS (2017), <https://www.fbi.gov/file-repository/2017-nics-operations-report.pdf> [hereinafter F.B.I.]. Alternatively, states with their own existing background check system could use those systems rather than NICS. The big downside of using state databases is that they will not have extraterritorial effect. In other words, a resident of Vancouver, Washington, could effectively “rescind” the waiver and immediately purchase a firearm simply by driving across the border to Portland, Oregon.

<sup>10</sup> *Id.* at 15.

<sup>11</sup> *See infra* text accompanying notes 24–25 (discussing these government portals).

to tie their hands against future misuse. Just as state gambling self-exclusion registries allow individuals to commit not to gamble at casinos in the future,<sup>12</sup> a “No Guns” registry allows people to self-exclude from the dangers of gun ownership. The “No Guns” registry would be particularly attractive to people with mental health problems that put them at heightened risk of suicide. The story of Ulysses tying his hands to the mast is a frequent metaphor for precommitment proposals,<sup>13</sup> but the analogy is especially close because Ulysses’ present self was worried that his future self would become delusional and do harm to himself or others. There are hundreds of thousands of people in the United States suffering from mental health illnesses who realize during moments of clarity that their future selves are at risk of misusing firearms. In this Article, we detail the results of a new survey in which more than forty percent of people who self-reported that they had been previously “diagnosed with a mental disorder” indicate that they would be willing to waive their rights to bear arms.<sup>14</sup> Over 20,000 Americans kill themselves each year with firearms.<sup>15</sup> One study estimated that a person’s risk of suicide in California in the first week after a gun purchase is fifty-seven times the rate in the general population.<sup>16</sup> This proposal would not only incapacitate registrants from purchasing firearms, but also expose registrants to the risk of prosecution, further deterring firearm purchase or possession.<sup>17</sup> Based on our surveys and ancillary empiricism, we conservatively estimate that a self-exclusion registry would annually save hundreds of lives.

Second, the right to credibly communicate one’s waiver can facilitate negotiated-exclusion and thereby enhance libertarian autonomy. Our proposal would also give individuals registering for the “No Guns” list the option of including email addresses of individuals or entities that the participants want to receive notice of waiver and of any subsequent rescission.

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<sup>12</sup> IAN AYRES, CARROTS AND STICKS: UNLOCK THE POWER OF INCENTIVES TO GET THINGS DONE 142-43 (2010).

<sup>13</sup> JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS (2000); see also Gharad Bryan, Dean Karlan & Scott Nelson, *Commitment Devices*, 2 ANN. REV. ECON. 671, 674-75 (2010) (providing contemporary examples of precommitment).

<sup>14</sup> See *infra* Figure 2.

<sup>15</sup> See *Suicide and Self-Inflicted Injury*, CTR. DISEASE CONTROL, <http://www.cdc.gov/nchs/fastats/suicide.htm>. [<https://perma.cc/QUV3-9WF3>] (last visited Feb. 6, 2019).

<sup>16</sup> See Garen J. Wintemute et al., *Mortality Among Recent Purchasers of Handguns*, 341 NEW ENG. J. MED. 1583, 1583 (1999).

<sup>17</sup> Based on rough estimates, the federal mental health prohibition on both purchase and possession prevents significantly more suicides than the effective prevention of purchase alone. See Fredrick E. Vars & Amanda Adcock Young, *Do the Mentally Ill Have a Right to Bear Arms?*, 48 WAKE FOREST L. REV. 1, 22 (2013) (reporting figures implying over one thousand lives saved from the purchase and possession restriction); Fredrick E. Vars & Griffin Edwards, *Slipping Through the Cracks? The Impact of Reporting Mental Health Records to the National Firearm Background Check System* (unpublished manuscript at 15) (on file with author) (estimating 750 lives saved from purchase-only aspect of restriction).

Providing the email address of a healthcare professional can not only provide immediate information about a patient's risk profile, but also alert the professional if the patient subsequently chooses to rescind his waiver. The health care professional would have twenty-one days to inquire whether the rescinding patient was likely to be a danger to himself or others.<sup>18</sup>

This option to credibly communicate whether one has waived can also facilitate informed association. Currently, the association marketplace is skewed because it is far easier to demonstrate that one is exercising the right to bear arms than that one is exercising the right not to bear arms. A condo association that wants to require gun possession—because the association believes gun ownership deters crime in common areas, for example—can require that residents physically reveal to management the presence of a firearm in their unit.<sup>19</sup> But without a registry it would be more difficult for an association to verify that residents do not possess firearms. Our proposed registry evens the evidentiary terrain.

The Article describes why covenants, landlords and homeowners' associations, as well as life and property insurers, have legitimate self-defense interests in conditioning their association on other people's waiver of the right to purchase and possess firearms. Individuals who by themselves would not be willing to self-exclude from gun ownership may voluntarily opt to waive their firearm rights in order to secure particular associational opportunities. Just as citizens routinely waive their First Amendment free speech rights in order to associate with the government,<sup>20</sup> a government sponsored "No Guns" registry with optional email notices to third parties can promote social welfare by forcing Second Amendment rights to compete with the First Amendment. This Article's notion of gun control is "libertarian" not only in that it gives the individual enhanced rights to durably commit to not bear arms, but also in that it allows others to condition their association on such waiver. Opening up the individual's arming decision to the associational marketplace might save annually not hundreds, but thousands of lives lost to gun violence.

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<sup>18</sup> One might imagine over time that the standard of care for physicians might be not only to offer registration options for at-risk patients, see *infra* note 41 (quoting the Massachusetts registry bill), but also for physicians to inquire about an at-risk patient's mental health after receiving registry notice that such a patient had begun the process to rescind his waiver (or had attempted, while registered, to purchase a gun). See Matt M. Longjohn & Katherine K. Christoffel, *Are Medical Societies Developing a Standard for Gun Injury Prevention?*, 10 INJURY PREVENTION 169, 172 (2004) (detailing evolving standards of care of fourteen societies regarding gun injury prevention).

<sup>19</sup> Discrimination based on firearm ownership or nonownership is not prohibited under federal law. 42 U.S.C. § 3604(a) (2012).

<sup>20</sup> Such free speech waivers occur for example when individuals sign nondisclosure agreements as a condition of employment or coventuring. See *Nat'l Fed'n of Fed. Emps. v. United States*, 695 F. Supp. 1196, 1201 (D.D.C. 1988) ("While all governmental employees enjoy First Amendment rights, those with access to classified information must accept a different application of free speech protections.").

Third, and finally, the right to credibly communicate one's waiver can also facilitate political expression. The option to register to waive one's rights publicly might be used to send a signal to fellow citizens and to representatives the registrants' support of legislative action to limit gun violence. By disclosing the total number of waivers, the registry could publicly signal aggregate support while preserving individual anonymity. Moreover, a registering individual could also provide the email address of private gun control groups and, by registering for the "No Guns" list, simultaneously add their name to a private petition. The "No Guns" list could thus become a particularly powerful way to publicly show support by signaling the number of people who were willing to waive their Second Amendment rights. We present below results of an Amazon MTurk survey indicating that close to a third of respondents were willing to add their name to their state's "No Guns" list. Mass shootings predictably lead some segments of the population to purchase weapons. But after Newtown or Las Vegas, other segments of the population want to be able to *do* something to express their support for gun control laws. The ability to give up your right to bear arms could thus be a way for like-minded Americans to make common cause and express solidarity with one another.

While our proposal would allow a waiving party to credibly communicate his or her waiver to any and all recipients, we simultaneously recognize that allowing some third parties to condition their willingness to associate (including economically associate via contracting) raises constitutional concerns. Specifically, unfettered associational waiver discrimination facilitated by the state action of credible communication might unduly burden an individual's Second Amendment rights. We therefore propose banning economic associational discrimination based on whether or not a person has waived—except for explicitly predefined individuals who have plausible self-defense interests in refusing to associate with someone who hasn't waived.

The remainder of this Article is divided into four parts. Part I describes the details of the proposal. This Part will describe how an Internet platform might verify the identity and secure the assent of waiving individuals as well as discuss different ways of structuring choice. We will also detail the variations found to date in the six different state bills proposing waiver registries. The history of this drafting process supports the notion that this laboratory of democracy is a place of remarkable invention—as lawmakers, like Washington Senator Jamie Pedersen, conjured new implementations that had not occurred to us (or other academics across several seminars).

Part II presents the theoretical case for why people might willingly volunteer to waive their rights to bear arms and provides the results of two different surveys estimating the potential demand for waiver. Part III then considers constitutional

and policy concerns raised by our proposal— including, *inter alia*, whether and when a laissez-faire associational marketplace would unconstitutionally burden Second Amendment rights, and whether private associational choices even trigger Second Amendment analysis. Part IV discusses implementation of our proposal using states' existing option of adding "No Guns" registrants as an additional "state prohibitor" category to the NICS list.

Our registry gives new meaning to the term "self-defense": instead of thinking solely of how we can best protect ourselves from others, our proposal gives individuals a new way to be protected from themselves. The registry thus facilitates what *Heller* identified as the "core" and "central component" undergirding an individual's Second Amendment right by allowing individuals to be better in charge of their self-defense choices.<sup>21</sup>

## I. SCOPE

While the idea of a waiver option as a liberty-enhancing device is readily understandable, important questions remain concerning the scope and specific means of how a waiver option would be implemented. This part describes and defends the structure of the "No Guns Registry" model statute that we have drafted and included in the Appendix. However, as we will see, the process of collaborating with state legislators who have introduced this idea in bills in six different states has led to important variation with regard to the speed of rescission's effectiveness, the duties of mental health professionals to refer patients to the registry and limitations on the email option. This experience underscores both that reasonable people can differ as to logistics and that state legislatures as laboratories of democracy remain substantial sites of innovation.<sup>22</sup>

### A. *Registration Access and Informational Prerequisites*

To begin, it would be essential for waiver procedures to attend to three different informational prerequisites. The registry platform should credibly (i) verify the identity of the person waiving, (ii) prevent unauthorized disclosures, and (iii) inform the individual of the legal effects of waiver.

Verifying the identity of the person waiving is essential to preclude a kind of identity theft where imposters maliciously waive another person's

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<sup>21</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008) (identifying "self-defense" as the "the core lawful purpose" of gun possession); *id.* at 599 ("central component").

<sup>22</sup> See ANDREW KARCH, *DEMOCRATIC LABORATORIES: POLICY DIFFUSION AMONG THE AMERICAN STATES* 13-14 (2007) ("The notion that the states are laboratories of democracy posits that innovative policies can be implemented in the individual states and then disseminated if they prove successful.").

Second Amendment rights. Identity verification is also essential to prevent well-meaning family and friends from registering loved ones in crisis. Credible online verification systems already exist in a variety of other circumstances. For example, the IRS has a mechanism for verifying an individual's identity as a prerequisite for receiving an "Identity Protection Personal Identification Number" that is needed to electronically file tax returns.<sup>23</sup> The IRS verification process requires individuals to respond to a confirmation email and supply their Social Security number, date of birth, filing status, and the mailing address from their most recently filed tax return. In addition, the platform requires individuals to answer personal, financial, and tax related questions to confirm identity.<sup>24</sup> In contrast, the Social Security Administration's online mechanism for verifying identity as a prerequisite for receiving a full benefits statement only requires providing a valid email address, a Social Security number, and a U.S. mailing address.<sup>25</sup> In both settings, the prospect of ex post criminal punishment does some of the work in deterring "spoofing" ex ante.

A third online option is electronic notarization using a webcam. Virginia in 2012 became the first state to provide that the signer and notary could be in different locations.<sup>26</sup> Non-Virginia residents can apparently take advantage of this provision and have the notarization recognized in their home states.<sup>27</sup> We find no case law on point, but state statutes generally recognize out-of-state notarizations, which the Full Faith and Credit Clause of the U.S. Constitution may require.<sup>28</sup> Notarize.com has been operating on this model since 2015.<sup>29</sup> But even if states can and do eschew remote online notarization generally, a state would be free to recognize such notarization for purposes of "No Guns" registration.

The state of Washington's implementation of the registry verifies user identity by requiring registrants to file "a voluntary waiver of firearm rights with the clerk of the court in any county" and requires that the clerk "must

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<sup>23</sup> INTERNAL REVENUE SERV., *The Identity Protection PIN (IP PIN)*, <https://www.irs.gov/identity-theft-fraud-scams/the-identity-protection-pin-ip-pin> [<https://perma.cc/4QSA-ASJN>] (last visited Feb. 6, 2019).

<sup>24</sup> For example, one of us (Ayres) was asked to answer the multiple-choice questions, "Which of the following was the property tax amount for [home residence] for the 2000 tax year?" and "When did you SELL the property at [investment property]?"

<sup>25</sup> U.S. SOC. SEC. ADMIN., *Sign In or Create an Account* (last visited Feb. 6, 2019), <https://secure.ssa.gov/RIR/CatsView.action> [<https://perma.cc/R4EF-NDKW>].

<sup>26</sup> *Virginia Company Launches Online Notarization Service*, 33(10) LAWS. PC 9 (Feb. 15, 2016).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Notarize and Eagle Home Mortgage Join Forces to Complete a Fully-Digital Mortgage Closing in Texas*, BUSINESSWIRE (Aug. 30, 2018), <https://www.businesswire.com/news/home/20180830005796/en/Notarize-Eagle-Home-Mortgage-Join-Forces-Complete> [<https://perma.cc/Z4BJ-DERS>].

request photo identification to verify the person's identity prior to accepting the form."<sup>30</sup> Offline verifications like Washington's, or accepting mailed-in notarized forms,<sup>31</sup> may entail lower risk of registration identity fraud than an online interface. However, a well-designed web-based identity verification system should be able to reduce the risk of fraud to a minimum. And given the reversible nature of sign up, a small risk of fraud may be acceptable. More importantly, a web-based approach has the potential for much higher participation and saving many more lives.

The second information requisite concerns data security. It is important that the waiver platform be adequately secured from cyber attacks and other unauthorized disclosures of information. Without adequate assurance of such security, some individuals will forego registering for fear that their lack of firearm protection will become publicly known, making them targets of crime. While we have become inured to stories of mass disclosure of private information from both government and nongovernment databases,<sup>32</sup> security protocols and encryption algorithms have been developed to reduce the risk of mass publication of the registry.<sup>33</sup> The existing NICS already takes "extensive measures" to ensure the security of system information.<sup>34</sup> To ensure that the NICS is not used to establish a federal registry of those who have purchased a firearm, all information about inquiries resulting in an allowed transfer are destroyed prior to the start of the next NICS operational day.<sup>35</sup> Moreover, under NICS regulations, gun dealers ("Federal Firearms Licensees") are only authorized to query the system for the sole purpose of determining whether the firearm transfer is allowed, and are prohibited from disclosing that bare yes–no information to others.<sup>36</sup>

Third and finally, it is essential that any system securing waiver consent adequately inform the individual of the legal consequences of such waiver. Before signing, individuals should be made aware, not only that waiver will bar them from possessing or purchasing firearms, but also of the definition of "constructive possession;" the potential criminal penalties for possessing or attempting to purchase; the ability of police to query the NICS as part of their enforcement

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30 S.B. 5553, 65th Leg., Reg. Sess. Sec. 1 (Wash. 2018).

31 Offline notarization was the original proposal. See Fredrick E. Vars, *Self-Defense Against Gun Suicide*, 56 B.C. L. REV. 1465, 1484 (2015).

32 See Ian Ayres, *Contracting for Privacy Precaution (and a Laffer Curve for Crime)*, 45 J. LEGAL. STUD. 123, 126 (2016) (providing examples).

33 See, e.g., U.S. NAT'L INST. OF STANDARDS & TECH., *The Security Content Automation Protocol* (2016), <https://scap.nist.gov/> [<https://perma.cc/75FW-KCMM>].

34 Fed. Bureau of Investigation, *NICS Fact Sheet*, <https://ucr.fbi.gov/nics/general-information/fact-sheet> [<https://perma.cc/RM7L-EXMJ>] (last visited Feb. 6, 2019).

35 See 28 C.F.R. pt. 25 (2018) [AG Order No. 2186–98].

36 FED. BUREAU OF INVESTIGATION, NICS FEDERAL FIREARMS LICENSEE MANUAL 17–28 (2011).

efforts;<sup>37</sup> the automatic twenty-one-day waiting period for subsequently rescinding waiver; and the potential legal and nonlegal consequences of providing email addresses to the platform—detailing the purposes to which addressees can and cannot legally use information related to waiver.

To assure that such disclosure is effective, government should undertake ongoing tests of the registry’s users. Just as ad substantiation helps to assure that advertisements do not leave potential consumers with false impressions,<sup>38</sup> “consequence substantiation” could help assure that the registry does not leave registrants with a false impression of legal effect of waiver. The platform might provide specialized warnings about unexpected adverse consequences.<sup>39</sup> One might even imagine forcing registrants to pass a test establishing requisite knowledge of the possible consequences of waiver before allowing a registration to become effective.<sup>40</sup>

While not a formal informational prerequisite, enlightened policymaking should also be attuned to informing both the general public and at-risk subpopulations about the waiver option. Massachusetts has led the nation here and helped us see the value of requiring acute-care hospitals and satellite emergency facilities to provide individuals reasonably believed to be suffering with depression with the opportunity to register.<sup>41</sup> The Commonwealth bill

<sup>37</sup> See 28 C.F.R. § 25.6 (2018):

- (1) Providing information to Federal, state, tribal, or local criminal justice agencies in connection with the issuance of a firearm-related or explosives-related permit or license, including permits or licenses to possess, acquire, or transfer a firearm, or to carry a concealed firearm, or to import, manufacture, deal in, or purchase explosives; or
- (2) Responding to an inquiry from the Bureau of Alcohol, Tobacco, Firearms, and Explosives in connection with a civil or criminal law enforcement activity relating to the Gun Control Act (18 U.S.C. Chapter 44) or the National Firearms Act (26 U.S.C. Chapter 53); or,
- (3) Disposing of firearms in the possession of a Federal, state, tribal, or local criminal justice agency.

<sup>38</sup> See Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 590-91 (2014) (discussing the FTC requirement that “advertisers and ad agencies have a reasonable basis for advertising claims before they are disseminated”).

<sup>39</sup> See *id.* at 595, 601 (proposing “term substantiation” and warnings for unexpectedly adverse contractual terms).

<sup>40</sup> See Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2076-80 (2012) (discussing testing prerequisites to contracting).

<sup>41</sup> Consider the following language:

Chapter 111 of the General Law is hereby amended by adding the following section:  
 Section 237. A person voluntarily presenting in an acute-care hospital or a satellite emergency facility who is reasonably believed by the treating clinician to be suffering from a diagnosis of depression, using standardized definition of such diagnosis as set forth in the Diagnostic and Statistical Manual of Mental Disorders as published by

would also require state-funded suicide hotlines to inform callers about the registration option.<sup>42</sup> We have incorporated these provisions into our model statute<sup>43</sup> and required that Department of Motor Vehicles provide the registration option (just as DMVs have become focal points for organ donation and voter registration and other dimensions of citizen choice).<sup>44</sup>

### B. Choice Architecture

In addition to assuring the information integrity of the platform, it is necessary in designing the platform to decide what kinds of options to provide to individuals.<sup>45</sup> Conceptually, a registration system could provide a dizzying array of choices concerning the types of firearm rights that are being waived,<sup>46</sup> the durability of such waiver, and even whether such waiver is conditioned on the waiver choices of others.<sup>47</sup> As a general matter, we have opted for reducing the number of choices—for example, by providing an all-or-nothing choice to waive purchase and possession rights instead of giving individuals the additional option to waive just the right to purchase. We favor

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the American Psychiatric Association, shall be presented with the form provided for in section 167A of chapter 6.

H.R. 3611 §2, 190th Sess. (Mass. 2017).

<sup>42</sup> H.R. 3611 §5, 190th Sess. (Mass. 2017) (“Notwithstanding any general or special law to the contrary, any suicide hotline maintained or operated by any entity funded in whole or part by the commonwealth shall refer callers to the form provided for in section 1 of this act.”).

<sup>43</sup> The California bill included nearly identical language but described the health provider referrals as a “best practice.” A.B. 1927 § 1, 2017–2018 Gen. Assemb., Reg. Sess. (Cal. 2018).

<sup>44</sup> See Appendix Model Act § 7; see also Hayley Cotter, Note, *Increasing Consent for Organ Donation: Mandated Choice, Individual Autonomy, and Informed Consent*, 21 HEALTH MATRIX 599, 614 (2011) (noting that the DMV is currently the main venue in which organ donation decisions are registered).

<sup>45</sup> Since the no-guns waiver is a kind of commitment device (making it harder for a waiving individual to purchase or possess firearms in the future), it should be surprising that the choice architecture decisions discussed in this section are analogous to many of the choices confronted in the commitment contracting platform, stickK.com (cofounded by Ayres). Just as with stickK contracts, the platform had to confront questions concerning the scope of the commitment and the consequences of breaking the commitment, as well as identify the person who will decide whether the commitment has been achieved, and who will be notified of the commitment’s success or failure. See AYRES, *supra* note 12.

<sup>46</sup> For example, one might allow registrants to choose whether they want to waive their rights to long firearms as well as handguns or whether they wish to waive their rights to concealed as well as open carry or whether they wish to retain the right to rent and use firearms at shooting ranges. While it might seem that shooting ranges could be exempted without risking loss of life, ranges have, as an empirical matter, been a site of many suicides. See e.g., Mark Feldmann, *Officials Struggle with Spate of Suicides at Shooting Range*, THE J. TIMES (May 27, 2016), [http://journaltimes.com/news/local/officials-struggle-with-spate-of-suicides-at-shooting-range/article\\_73b1bce4-a8fc-527a-994e-17a51852fce1.html](http://journaltimes.com/news/local/officials-struggle-with-spate-of-suicides-at-shooting-range/article_73b1bce4-a8fc-527a-994e-17a51852fce1.html) [https://perma.cc/GD7P-MQPW] (reporting that five people at a single gun range in Wisconsin killed themselves with rented guns between 2009 and 2016).

<sup>47</sup> Ian Ayres, *Voluntary Taxation and Beyond: The Promise of Social-Contracting Voting Mechanisms* 19 AM. L. & ECON. REV. 1, 17 (2017).

this *numerus clausus* approach for standard “Paradox of Choice” reasons and because we speculate that allowing more limited options will increase the salience and social meaning of registering.<sup>48</sup> But reasonable people can disagree not only on how many choices to offer, but on which particular choices should be included in the choice menu. In this section, we explore some of these choices and describe our reasons for crafting the choice architecture of our preferred platform (also reflected in the model state statute included in the Appendix).

*Qualifications.* Our model statute would “allow any person residing in the United States” to register on that person’s respective state’s registry. While a state might alternatively restrict registration to its residents, opening registration to out-of-state residents would allow such residents to commit not to purchase or possess firearms in that state and all other states with similar registry laws.<sup>49</sup> Such a commitment might be valuable for nonresidents who regularly vacation in the registry state. In what we view as perhaps the worst example of state innovation, Massachusetts’ bill requires individuals registering to acknowledge that they have “a psychiatric disability and [are] a danger to themselves.”<sup>50</sup> This acknowledgment unreasonably discriminates against individuals who do not fit within these qualifying categories. Moreover, it would needlessly stigmatize registrants and depress registration without any credible offsetting benefit. We certainly don’t mean to suggest that this was the intent of the drafters of the Massachusetts bill. To the contrary, the Massachusetts bill was drafted in response to a horrible tragedy involving both mental illness and extreme suicide risk.

*Purchase and Possession.* We propose giving individuals the all-or-nothing choice to waive their rights to both purchase and possess firearms.<sup>51</sup> There is a plausible case for limiting the scope of waiver to just purchases.<sup>52</sup> Waiving the rights of people to possess as well as purchase guns may deter some people from utilizing the waiver, and it may be difficult for police to effectively enforce a

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<sup>48</sup> See BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS*, 3 (2004) (“[T]he fact that *some* choice is good doesn’t necessarily mean that *more* choice is better . . . [T]here is a cost to having an overload of choice.”); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *YALE L.J.* 1, 5 (2000) (explaining that the “numerus clausus” principle means “property forms are fixed and limited in number”). See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

<sup>49</sup> See *infra* note 169 and accompanying text.

<sup>50</sup> H.R. 3611 § 1, 190th Sess. (Mass. 2017).

<sup>51</sup> Our model statutes include even gratuitous transfers of firearms to waiving individuals within the meaning of “purchase.”

<sup>52</sup> Vars, *supra* note 31, at 1469 n.31.

waiver of the right to possess.<sup>53</sup> To date, only one state registration bill has included a waiver of the right to possess as part of registration.<sup>54</sup> Barring purchase but not possession is novel, but a state can obviously use its own background check system however it likes. The problem with purely state systems is that they apply only within each state. Integrating the state registries with NICS is important, because integration would stop registrants from being able to purchase firearms from any gun dealer in the country.<sup>55</sup> Fortunately, NICS expressly allows states to maintain their own integrated database with names of individuals prohibited from possessing guns for state-law reasons. Most of the state bills, accordingly, use this part of the federal NICS database. There is a wrinkle: NICS prevents purchase only where “receipt” of a firearm is unlawful. Effectuating a purchase-only restriction through NICS requires some finesse: prohibiting taking a gun but not holding it. In contrast, a purchase-plus-possession restriction is straightforward.

Notwithstanding the failure of states to adopt our broader waiver proposal as of yet, there remains a strong policy argument for including possession rights in the waiver decision. Waiving the right to purchase will not by itself produce a safer environment for registrants who already have access to firearms. And waiving the right to possess might give registrants additional ability to bargain with loved ones for reduced access to firearms in their shared homes. Moreover, as discussed below, our experimental survey found no statistical difference in willingness to waive “purchase and possession” rights versus just “purchase” rights. So at least in this initial experiment, there was no reduction in willingness to waive when no possession is included in the waiver provisions.<sup>56</sup>

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<sup>53</sup> If state law enforcement found someone in possession of a firearm and suspected they might be barred under our model statute (or other law), they could report that to ATF. ATF could then inquire whether the person was in NICS. 28 C.F.R. § 25.6(j)(2) (2018). Possession might not be illegal under federal law, but transfer to that individual by a licensed dealer (or other person, 18 U.S.C. § 922(d)) would violate federal law, thus providing adequate foundation for the ATF inquiry.

<sup>54</sup> H.B. 101 Reg. Session 2019 (La.). Compare, e.g., Assemb. B. 1927 § 1, 2017-2018 Gen. Assemb., Reg. Sess. (Cal. 2018) (purchase).

<sup>55</sup> See *infra* text accompanying note 173 (discussing the nationwide effect of registrants as “state prohibitors”).

<sup>56</sup> Notwithstanding these arguments in favor of allowing a possession waiver, one of us has serious reservations. An individual who waives their right to possess a firearm and then acquires one with suicidal intent arguably belongs in treatment, not in prison. Cf. Fredrick E. Vars & Shelby B. Calambokidis, *From Hospitals to Prisons: A New Explanation*, 102 CORNELL L. REV. ONLINE 101, 103 (2017) (“A 2005 study found that 49.2% of inmates in state prisons reported symptoms of major depressive disorder, mania disorder, or psychotic disorder.”). Additionally, “possession” of a firearm has been interpreted broadly, so the waiving individual may not realize the full scope of potential criminal liability. Following the states’ lead in allowing for only a waiver of purchase avoids these problems. Alternatively, allowing an individual to select at sign up either purchase-only or purchase-and-possession could help ensure that the waiver was knowing and informed.

To facilitate the ability of people who currently possess firearms and want to waive the right to purchase and possess, a state might mandate that its police departments offer to take possession of the firearms for periods of registration (and lay out safe harbors for transferring possession to third parties, such as gun dealers, for storage).<sup>57</sup> A more aggressive policy might require registrants as part of registering to grant police permission to search their belongings and confiscate any firearms.<sup>58</sup> But such a provision would likely deter many people from registering and accordingly is contraindicated.

*Rescission.* We also propose that individuals who waive be given the option to rescind their waiver with the rescission automatically taking effect after twenty-one days.<sup>59</sup> Reasonable arguments might be made for making waiver more durable. For example, the Wisconsin waiver bill makes waiver nonrescindable for the first year after registration.<sup>60</sup> Alternatively, a more durable commitment might be accomplished by requiring some other authority to approve before rescission takes effect. For example, the California registry bill at one point required a court to determine by a preponderance of the evidence that the registrant was not at an elevated risk of suicide before granting rescission.<sup>61</sup> To our minds, California might be better served if it emulated the existing criteria for “relief from disability” programs found in the NICS Improvement Amendments Act of 2007.<sup>62</sup> That act makes a state eligible for federal grants if the state has created a mechanism whereby people who have been involuntarily placed on the NICS registry for being “formally adjudicated as . . . mental defective[s] or committed involuntarily to a mental institution” can seek relief from the

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<sup>57</sup> Police departments perform an analogous function when they take temporary possession of weapons when acting pursuant to a Gun Violence Restraining Order. *See infra* note 82.

<sup>58</sup> Ian Ayres & Barry Nalebuff, *Stop, Thief!*, FORBES, <https://www.forbes.com/forbes/2005/0110/088.html> [<https://perma.cc/YS7H-J687>]. (Jan. 10, 2005) (discussing a Combat Auto Theft bumper sticker that grants police permission to stop the vehicle if found being driven between 1 am and 5 am).

<sup>59</sup> *See Vars, supra* note 31, at 1469 (proposing a seven-day delay period), with Angela Selvaggio & Fredrick E. Vars, “*Bind Me More Tightly Still: Voluntary Restraint Against Gun Suicide*,” 53 HARV. J. ON LEGIS. 671, 673 (2016) (“A one-week delay, however, would not be enough to prevent all gun suicide attempts.”); *see also* Selvaggio & Vars, *supra*, at 672 (arguing that more stringent judicial hearing option is constitutional).

<sup>60</sup> Assemb. B. 579 (Wisc. 2017). The bill also gives the would-be registrant the tripartite choice of waiving for one, five, or twenty years. *Id.* As previously stated, we think consumers are more likely to register with a simpler choice (of ongoing registration until opting to rescind).

<sup>61</sup> Assemb. B. 1927 § 1 (Cal. 2018) (“A person registered on the California Do Not Sell List may subsequently file a petition in the Superior Court of the county in which the person resides requesting to have his or her name removed from the registry. The court, after a hearing, shall order removal of the person’s name from the registry if he or she establishes by a preponderance of the evidence that he or she is not at elevated risk of suicide.”)

<sup>62</sup> NICS Improvement Amendments Act of 2007, Pub.L. No. 110–180, § 105, 122 Stat. 2559 (2008).

status and have their names removed from the list.<sup>63</sup> To qualify for removal, the individual must be found not “likely to act in a manner dangerous to the public safety,” and “granting of relief would not be contrary to the public interest.”<sup>64</sup> The Massachusetts registry bill adopts essentially these criteria.<sup>65</sup>

The Wisconsin registry, in contrast, makes mental health professionals the gatekeepers with regard to registrant rescission. After Wisconsin’s year-long irrevocable period, registrants may remove themselves from the database by submitting to the Department of Justice a request for removal and an affidavit from a licensed psychiatrist or psychologist saying that individual would not pose a threat to themselves or others should they possess a firearm.<sup>66</sup>

More durable waivers that can only be removed after third-party (judicial or psychiatric) assessment may be inimical to gun safety by dissuading some individuals from waiving their gun rights in the first instance. Our own survey evidence supports this possibility. Subjects who were given the option of rescinding with an automatic seven-day waiting period were 6.7 percentage points more likely to waive than subjects who were given the option of rescinding only if they could convince a state judge that they were not a risk to themselves or others. Moreover, we find below that subjects who had previously been diagnosed with mental health issues were particularly less likely to waive when only given the option of judicial rescission. Therefore, a subgroup that may be more at risk is more unwilling to initially waive when faced with the potential prospect of later establishing their mental capacity. Just delaying the reacquisition of gun rights may prevent some suicides, as many gun suicides are impulsive decisions completed with only a few minutes or hours of thought.<sup>67</sup> Studies have estimated that mandatory waiting periods

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<sup>63</sup> See Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives, *Certification of Qualifying State Relief from Disabilities Program* (last visited Feb. 7, 2019) <https://www.atf.gov/file/11731/download> [<https://perma.cc/GV5S-EP9L>]; see also 27 C.F.R. § 478.11 (defining terms “[a]djudicated as a mental defective” and “committed to a mental institution”).

<sup>64</sup> Bureau of Justice Statistics, *The NICS Improvement Amendments Act of 2007*, <http://www.bjs.gov/index.cfm?ty=tp&tid=49> [<https://perma.cc/WRX7-ZDQN>] (“As of December 2017, 31 states have enacted relief programs that have been certified by the state and approved by ATF.”); see also Joseph R. Simpson & Kaushal K. Sharma: Firearms and the Mentally Ill: Demographics and Psychiatric Characteristics of Individuals Petitioning for Early Relief from Firearms Prohibition, Presented at the 59th Annual Meeting of the American Academy of Forensic Sciences (February 23, 2007) (“In some states, restoration of the right to possess firearms is dependent on certification by a physician that the individual no longer presents a danger as a result of mental illness.”).

<sup>65</sup> See MASS. GEN. LAWS ch. 123, § 36C(b); H.R. 3611 § 3, 190th Sess. (Mass. 2017).

<sup>66</sup> Assemb. B. 579, 2017-2018 Leg. (Wis. 2017).

<sup>67</sup> See Linda G. Peterson et al., *Self-inflicted Gunshot Wounds: Lethality of Method Versus Intent*, 142 AM. J. PSYCHIATRY 228, 228-31 (1985) (finding that among thirty survivors of firearm suicide attempts more than half had suicidal thoughts for less than a day); Megan Spokas et al., *Characteristics of Individuals Who Make Impulsive Suicide Attempts*, 136 J. AFFECTIVE DISORDERS 1121, 1122-23 (2012) (finding that only 36.1% of people contemplated suicide for three or more hours before an attempt).

have reduced suicide rates by as much as five percent.<sup>68</sup> Many registrants who rescind their waiver because they wish to kill themselves are unlikely to sustain this desire over an enforced waiting period. Accordingly, we have opted here for a less durable, but more transparently reversible rescission standard of a twenty-one-day waiting period to maximize the chance of securing the initial waiver. The Tennessee registry bill has adopted this three-week approach, while the Washington bill mandates only one week before revocation is allowed.<sup>69</sup>

The diversity of approaches seen across the five registry bills regarding waiver durability provides an encouraging example of federalism in action. The differing choices of registry bills largely fall within the realm of plausibility as legislators trade off the ex ante concern of registration incentives with the ex post concern of (re)arming at-risk individuals. These variations are the experiments emanating from the laboratory of democracy that may, if passed, ultimately provide evidence to guide future registry design.

Our model statute also provides registrants the option of immediately having their names removed from the NICS list if they can persuade a judge that they are not a risk to themselves or others. This additional option for immediate judicial bypass would protect registrants whose circumstances change and might, for example, need a gun for self-defense. We also provide registrants an affirmative defense against prosecution for purchase or possession if the individual demonstrates necessity or self-defense. These interventions would maintain the basic durability of a waiting period while easing concerns that might prevent some from registering and allowing registrants to protect themselves from later-arising threats.

*Credible Communication.* We propose that individuals who waive also be given the option to credibly communicate their waiver to others. Accordingly, our model statute calls for the registration platform to give waiving individuals the option of providing email addresses of individuals at institutions that they wish the platform to notify of their waiver. Without this email option, waiving individuals could exercise their free-speech rights by directly telling a third-party that they had waived their right to purchase and possess guns, but the third-party would have trouble verifying whether such waiver had actually taken place. With or without the registry option,

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<sup>68</sup> See Michael D. Anestis & Joye C. Anestis, *Suicide Rates and State Laws Regulating Access and Exposure to Handguns*, 105 AM. J. PUB. HEALTH 2049, 2049, 2051 (2015) (finding “significantly lower firearm suicide rates” in states with a waiting periods for handgun purchases); Griffin Edwards et al., *Looking Down the Barrel of a Loaded Gun: The Effect of Mandatory Handgun Purchase Delays on Homicide and Suicide*, 128 ECON. J. 3117, 3117 (2018) (“[T]he existence of a purchase delay reduces firearm-related suicides by between 2% and 5% with no statistically significant increase in non-firearm suicides.”).

<sup>69</sup> S.B. 5553 § 1, 65th Leg., Reg. Sess. (Wash. 2018); S.B. 0671 § 1(d), 109th Gen. Assemb. (Tenn. 2017). Of course, this need not be an either-or decision. A statute could offer registrants two options: (1) a delay option; or (2) a stickier option like a health care provider affidavit. In the interest of keeping it simple, however, see sources cited *supra* note 48, we settle on the delay-only option.

individuals are free to contractually promise not to possess firearms. But the possibility of contract damages would often be an imperfect substitute for an email from the registry confirming that gun dealers are incapacitated from selling to the registrant and that the registrant has subjected herself to potential criminal penalties for purchase or possession.<sup>70</sup> While any individual may claim (and even promise) to have waived, email notifications from the government platform will more credibly indicate that he or she has committed not to bear arms.

This communication option should be updatable across time in two ways. First, if a waiving individual later rescinds her waiver, the platform should automatically and immediately send emails to all previously designated addresses indicating that such waiver is being rescinded in twenty-one days. Notice of rescission will give recipients notice that the individual will soon regain the right to bear arms and thus give recipients who were relying on the previous waiver the ability to make different associational choices regarding the rescinding individual. Notice of rescission would give recipients a chance to contact the individual and perhaps prevent a suicide attempt or other tragic outcome. This notice of rescission might be particularly valuable for healthcare professionals who, especially with regard to patients who had previously engaged in suicidal ideation, might inquire into the patient's current mental health status.<sup>71</sup>

Second, the platform should allow waiving individuals to log on subsequent to their initial waiver and provide additional email addresses to the platform. The platform would immediately notify these additional addressees that the individual had waived her right to bear arms (and also notify these addressees if that individual subsequently initiated the process of rescinding her waiver). The platform would not, however, allow an individual to log on and remove the name of an addressee because such removal would undermine giving addressees notice of possible subsequent rescission.

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<sup>70</sup> Existing casino self-exclusion programs also subject residents to potential penalties for criminal trespass if they subsequently visit the casino. *See, e.g.*, Missouri Gaming Commission, Voluntary Exclusions Rules, 11 C.S.R. 45.17.010 (2017) ("Each person . . . on the List acknowledges that it is his/her responsibility to refrain from visiting excursion gambling boats in Missouri and that by being placed on the List s/he shall have a criminal complaint filed against him/her for trespassing if s/he is discovered . . ."); JOHN H. KLESCHINSKY ET AL., THE MISSOURI VOLUNTARY EXCLUSION PROGRAM: PARTICIPANT EXPERIENCES ACROSS 10 YEARS 12 (Phase II Report, Nov. 2008) (detailing the frequency of attempts to trespass after enrolling in the Missouri gambling exclusion program and taking note that one participant was arrested while others received a fine or citation).

<sup>71</sup> Email addressees should also be notified should a registrant attempt to purchase a firearm or be found with unauthorized possession of a firearm. Like rescission, an unauthorized attempt to purchase or possess is an event which might trigger addressees to make different associational choices or to inquire into the state of the registrant's health.

Part III below will defend the idea that email notifications from the government can constitutionally facilitate an associational marketplace in which economic actors with plausible self-defense interests might refuse to deal with nonregistrants. Specifically, we imagine that landlords, fellow residents and insurers might condition their willingness to economically associate on receiving registry-confirming emails.<sup>72</sup> And as just mentioned, registrants might willingly provide the registry with the email addresses of their psychiatrists and other mental health care professionals to enhance the ability of these professionals to provide ongoing care.<sup>73</sup>

But as a political matter, the email option has been controversial. One person's informed association can be another person's coercive discrimination. Several of the registry bills to date forgo the email option altogether, and outlaw any attempts to discriminate on registry status in contracting.<sup>74</sup> However, Washington Senator Jamie Pedersen creatively forged an alternative email option which reduces the potential for waiver discrimination while retaining some of the core public health benefits. Pedersen's registry bill allows registrants to designate a third-party contact to be notified "if a voluntary waiver of firearm rights is revoked."<sup>75</sup> The more-recently introduced California bill analogously aimed to allow registrants to "list up to five electronic mail addresses with the registry to be contacted promptly if the person subsequently requests that his or her name be removed from the registry."<sup>76</sup> By restricting registry notifications to the "back end" moment of potential rescission, the Washington and California bills preclude economic

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<sup>72</sup> We also propose that email recipients be prohibited from sharing an individual's waiver status with others unless the addressee receives separate nonplatform authorization from the waiving individual to share that information. But unlike the mandatory duty of confidentiality imposed on gun dealers, *see supra* note 20, it is important that the duty of confidentiality be merely a default, because we want to create an option for citizens who choose to make their waiver public. But to so choose, a waiving individual would need to (i) register for the "No Guns" list, (ii) provide the email address of a third party, and (iii) separately authorize that third party to publicly disclose that waiver information. While cumbersome, we propose this pathway to publicity out of an abundance of concern over waiver privacy.

<sup>73</sup> Mental health professionals can play a crucial role in such interventions because a substantial proportion of people who commit suicide have previously been under the care of a mental health professional. Jason B. Luoma, et al., *Contact with Mental Health and Primary Care Providers Before Suicide: A Review of the Evidence*, 159 AM. J. PSYCHIATRY 909, 912 (2002) (finding that for individuals who had committed suicide, fifty-three percent had contact with mental health professionals in their lifetime). But of course this means that roughly half have not been under the care of a mental health professional.

<sup>74</sup> H.R. 3611, 190th Sess. (Mass. 2017); S.B. 0671, 109th Gen. Assemb. (Tenn. 2017); Assemb. B. 579, 2017-2018 Leg. (Wis. 2017).

<sup>75</sup> S.B. 5553, 65th Leg., Reg. Sess. (Wash. 2017).

<sup>76</sup> Assemb. B. 1927 § 1 (Cal. 2018) (as introduced Jan. 24, 2018). The bill was later passed with the language excluded. These versions can be compared at [https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill\\_id=20170180AB1927&cversion=20170AB192799INT](https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=20170180AB1927&cversion=20170AB192799INT) [<https://perma.cc/U95P-X2Y7>].

and noneconomic actors from conditioning their association on the registry verifying that a waiver is in effect. A Washington landlord might only want to rent to tenants who have registered to waive their firearm rights, but in Washington the landlord will only learn if a registrant attempts to rescind her registration. “Back-end” notifications are still valuable because they can provide friends, family and healthcare professionals with notice that this person was once registered and will soon be capable of again purchasing firearms. Recipients of these back-end notifications have the opportunity to inquire and potentially intervene to save the registrant’s life.

Back-end notifications do not achieve all the benefits of our more fulsome email notification proposal. Front-end notifications sent at the time of initial registration are liberty enhancing options which not only foster informed association, but allow others to better protect themselves. Reasonable parents might, for example, prefer playdates for their children at homes with “no guns” registrants and registration would allow healthcare professionals to ensure that at-risk patients have taken action to reduce their access to firearms. Interim notifications that a registrant has attempted illegally to purchase a firearm, like back-end revocation notices, alert recipients that the registrant may be at risk.

Nonetheless, we take the Washington bill’s use of back-end notice to be a humbling example of legislative creativity. After thinking and writing for years about alternative implementations of our self-exclusion idea, we had never considered the possibility of using an email option exclusively for back-end revocations. The ability of Senator Pedersen to devise a plausible improvement that had never occurred to us (or been mentioned at seminars on this Article given at over a dozen universities) is a success story for federalism. Creative state legislators confronting the necessity of forging a politically feasible coalition have conjured not just different forms of email notification, but different forms of durability and revocation. The state laboratory has succeeded in drafting different experiments far beyond our expectation.

*Third-party Waivers.* It might seem obvious that the default meaning of an individual’s inaction in any waiver scheme should be that the individual retains her full Second Amendment rights. But here we consider two situations where third-parties might be empowered to waive the Second Amendment rights of certain classes of individuals, effectively, changing the individual’s default legal treatment to waiver (with the possibility of rescission twenty-one days after an affected individual moves to rescind his or her waiver). First, we might imagine a regime in which the parents of a minor would be empowered to waive on their child’s behalf.<sup>77</sup> From the child’s perspective, such a parent-initiated waiver would effectively change the

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<sup>77</sup> This is similar to, though of course not the same as, giving a newborn infant a lifetime NRA membership. One of us has a relative who did exactly that.

default. The child, upon turning eighteen, would have to affirmatively ask that the parents' waiver be rescinded and wait an additional twenty-one days before being able to purchase a gun. Parental waiver would thus change the minimum age of purchasing a gun from eighteen years to eighteen years and twenty-one days. But the inertia created by the changed default (and the twenty-one-day delay only starting after an affirmative request to rescind) might still be sufficient, given the impulsive nature of many suicides, to prevent some gun fatalities.

Second, we can also imagine a regime that would empower the police or other state officials to change the default status of some individuals who have displayed erratic behavior that falls short of necessitating involuntary commitment, but which creates probable cause for the official to believe that the individual is not well-suited to purchase or possess firearms. For example, responding to a harassment call at a hotel, police documented Aaron Alexis's paranoid delusions, but did not arrest him or initiate involuntary commitment proceedings.<sup>78</sup> Less than six weeks later, Alexis legally purchased a shotgun and used it to kill twelve people at the Navy Yard in Washington, D.C.<sup>79</sup> Again this third-party waiver would act only as a changed default, because the affected individual would be free to immediately seek to rescind the waiver and regain full Second Amendment rights after twenty-one days.<sup>80</sup> We envision a system where the public official could, after an appropriate finding, place the affected individual on the "No Guns" registry *and* have the state notified if the affected individual later moves to rescind the waiver.<sup>81</sup> So the government would learn of the individual's attempt to acquire weapons and have twenty-one days to investigate whether there would be an independent basis for further action, such as potentially moving to have the person involuntarily committed, and thereby establish a basis for keeping the person on the NICS list notwithstanding his or her registry rescission. As analogous Gun Violence Restraining Orders (GVROs) gain legislative

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<sup>78</sup> See Fredrick E. Vars, *Symptom-Based Gun Control*, 46 CONN. L. REV. 1633, 1635 (2014).

<sup>79</sup> See *id.*

<sup>80</sup> This proposal has precedent. Under Indiana law, a police officer may seize firearms from an individual if the police officer believes that person is "dangerous." IND. CODE § 35-47-14-3 (2006). Similarly, one of us has argued that people experiencing psychotic symptoms should lose their gun rights. Vars, *supra* note 78.

<sup>81</sup> In contrast, parents of individuals who have gained the age of majority should not by default be given notice of any attempt by their child to rescind parental waiver.

traction in many states,<sup>82</sup> this kind of third-party waiver might prove to be not only effective but also politically palatable.<sup>83</sup>

While we are attracted to these two classes of third-party waivers— especially because they only amount to imposing a fairly short waiting period on an affected individual's right to acquire or own firearms—we have resisted the temptation to deviate from the libertarian impulse animating our proposal more generally. Since legislators might constitutionally impose a waiting period on all gun purchases,<sup>84</sup> it is likely that empowering parents and state officials to impose waiting periods on subsets of individuals is likely to pass constitutional muster. Subsequent legislatures might ultimately embrace third-party waiver, but we have opted for a more conservative, freedom-preserving

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82 GVRO statutes allows third parties (including state officials) with documented evidence that another person poses a serious threat to himself or herself or others to petition a court for an order temporarily suspending the respondent's possession of a firearm or ammunition. *See, e.g.*, Jack Linshi, *California Law Allows Family Members to Remove Relative's Guns for Safety*, TIME (Sept. 30, 2014), <http://time.com/3450797/california-gun-violence-restraining-order-law> [https://perma.cc/Z8FW-U4MH] (“California residents can now petition a judge to temporarily remove a close relative's firearms if they fear their family member will commit gun violence . . .”); *see also* Dan Friedman, *The Gun Law Saving Lives in Connecticut*, ATLANTIC (Sept. 9, 2016), <https://www.theatlantic.com/politics/archive/2016/09/new-gun-violence-bills/499199> [https://perma.cc/P95M-2TU6] (mentioning ten states expected to consider GVRO legislation in 2017). Our registry proposal can be seen as allowing a kind of GVRO self-petition—so that individuals could automatically obtain a gun violence restraining order (GVRO) to limit their own ability to purchase or possess firearms by filing a petition (i.e., registering) via the internet platform. An advantage of adding self-petition to existing GVRO legislation is that GVROs often empower police to aid the restricted individuals in dispossessing themselves of firearms. *Id.*

83 Allowing third-parties (including police and other state actors) to petition or negotiate for self-exclusion of individuals who pose an imminent risk of injuring themselves or others can respond to the problem of individuals who are not under the care of mental health professionals and accordingly are less likely to be involuntarily committed:

An estimated nine percent of adults in the United States have problems with impulsive, angry behavior and have access to firearms at home; these are individuals who admit that they “break and smash things” when they get angry, and many of them would meet diagnostic criteria for a mental health problem such as a personality disorder. However, less than ten percent of these angry, impulsive, gun-possessing adults have ever been hospitalized for a mental health problem, and thus would never have lost their gun rights by dint of a mental-health-based restriction.

Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-based Gun Removal Law: Does it Prevent Suicides?*, 80 LAW & CONTEMP. PROBLEMS 179, 184, (2017).

84 *See* *Silvester v. Harris*, 843 F.3d 816, 819 (9th Cir. 2016)(finding that a “10-day waiting period is a reasonable safety precaution for all purchasers of firearms and need not be suspended once a purchaser has been approved”).

position.<sup>85</sup> The Washington state bill passed with strong bipartisan support,<sup>86</sup> which likely would not have been achievable if the measure had included third-party waiver. It is our hope that other states even more strongly protective of gun rights will recognize that our purely voluntary approach does not infringe one iota on lawful gun ownership.

## II. WHO WOULD WAIVE

### A. Theory

Giving citizens the option to waive their Second Amendment rights and to communicate their waiver as a theoretical matter expands personal freedom. Private contracting and promise do not allow individuals to as credibly commit to nonownership or to communicate that status to others. An individual could contractually promise not to purchase or possess guns, but that promise would not subject gun dealers to liability for selling the individual a gun. While breaching the promise would subject the promising individual to potential contractual damages, it would not subject the promisor to criminal liability.<sup>87</sup> Accordingly, learning that an individual had entered into a binding contract not to purchase or possess firearms would not provide as much certainty as an email from a government-sponsored registry that the person in question had opted into potential criminal liability. This is not to say that the waiver registry would be perfectly enforced, it is only to say that the registry option would increase the choice set of Americans and hence expand their liberty.

There are many ways, however, that government might as a formal matter expand our liberty. They might, for example, give us the freedom to subject ourselves to criminal prosecution if we ever uttered the nonsense sentence “An iron exposes her imagined customer.” But this technical expansion of our liberty would have no practical value, because we cannot imagine why a person would ever want to exercise this type of liberty.

The burden of this section, then, is to explain why the “No Guns” registry has practical value; that is, why reasonable people would want to exercise the option to waive their right to bear arms. (And the next section will provide empirical evidence from surveys demonstrating that substantial numbers of Americans are

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<sup>85</sup> We would however allow governments to negotiate for waiver as part of a plea bargain with regard to crimes that by themselves would not qualify the individual to be added to the registry (and governments could revoke parole if the individual who accepted the deal later attempted to rescind their waiver).

<sup>86</sup> See *SB 5553 - 2017-19*, WASH. STATE LEGISLATURE, <http://apps2.leg.wa.gov/billsummary?BillNumber=5553&Year=2017&BillNumber=5553&Year=2017> [<https://perma.cc/G55x-7Y2F>] (last visited May 22, 2019) (detailing legislative history, including final vote tallies).

<sup>87</sup> A rare, possible exception would be if a prosecutor could prove beyond reasonable doubt that the promisor at the time of promising intended not to keep the promise. See generally IAN AYRES & GREG KLASS, *INSINCERE PROMISES: THE LAW OF MISREPRESENTED INTENT* 170-193 (2005).

in fact willing to waive this right.) As mentioned in the introduction, the demand for waiver can be divided into three different components: (1) commitment, (2) negotiated exclusion, and (3) political expression.

First and foremost, the waiver right can be seen as a commitment device for those who rationally want to limit their future selves from misusing guns. People who worry about loss of future control seek out a variety of disabling devices—including bariatric surgery (which makes it painful to overeat) and Antabuse (which makes it painful to drink alcohol).<sup>88</sup> Users of the commitment website, stickK.com, have voluntarily put more than \$35,000,000 at risk to increase the chance that their future selves follow through with contractually set goals. States can and have played important roles in providing citizens with commitment options. Several states have well developed “no gambling” registries that block those who register from using state casinos,<sup>89</sup> and state recognition of marriage can be seen as enhancing individual liberty by facilitating the ability of people to make more durable relationship commitments.

Commitment devices are useful to people who have limited amounts of willpower or self-control *and* are sufficiently self-aware to understand that they have a problem.<sup>90</sup> It is not our claim that everyone who rationally should want to waive their right to bear arms would in fact avail themselves of a “No Guns” registry. But of the hundreds of thousands of people in the United States who suffer from serious mental illnesses, tens of thousands may understand during moments of clarity that their future selves are at risk of misusing firearms and be willing to take a government-sponsored opportunity to limit their future, depressed or even psychotic, selves. The next section will present survey evidence that such waiver demand is more pronounced among people who have been previously diagnosed with mental illness. Many people without mental illness are also at risk of suicide and, our data show, many of them would also sign up.

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<sup>88</sup> See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 179 (1960) (explaining that the reason for constitutions “is that all men in the pursuit of immediate aims are apt—or, because of the limitation of their intellect, in fact bound—to violate rules of conduct which they would nevertheless wish to see generally observed. Because of the restricted capacity of our minds, our immediate purposes will always loom large, and we will tend to sacrifice long-term advantages to them”)

<sup>89</sup> AYRES, *supra* note 12, at 143. One might imagine opening other government registries to voluntary self-inclusion. For example, someone who felt they were at risk for committing sexual offenses might voluntarily add their name to sex offender registries. While the stigma of current public registries suggests that few would volunteer for such registration, one might imagine that some people would volunteer for government GPS monitoring to credibly establish alibis against false claims.

<sup>90</sup> See Ted O’Donoghue & Matthew Rabin, *Doing It Now or Later*, 89 AM. ECON. REV. 103, 104 (1999) (distinguishing “naive” from “sophisticated” persons based on whether they are self-aware of their self-control deficits).

A second category of waiver demand can come from what we term “negotiated exclusion.” Individuals may rationally commit to waive their Second Amendment firearm rights in order to induce others to associate with them. In particular, negotiated exclusion is made possible by the ability to credibly communicate one’s waiver. Some friends, neighbors, and even loved ones may be more willing to associate with individuals who credibly signal that they have foregone the right to bear arms. The potential demand for negotiated exclusion is suggested by analysis of Connecticut’s Gun Violence Restraining Orders (GVROs), where roughly half of the petitions for gun removal come from family and friends.<sup>91</sup> Individuals who by themselves would not be willing to self-exclude from gun ownership may voluntarily opt to waive their firearm rights in order to secure or to continue particular associational opportunities.

Our proposed registry enhances both self-commitment liberty (by letting individuals bind their future selves) and market liberty (by letting individuals better make commitments to others). Our proposal creates a marketplace of informed association where one person’s right to bear arms has to contend, potentially, with other people’s right to not associate. The “No Guns” registry thus creates opportunities for a modern-day version of the central plot device in Aristophanes’ *Lysistrata*, in which some individuals are motivated to yield their right to weapons because of threatened withholding of various forms of interactions by friends and family.<sup>92</sup> In September 2006, dozens of women organized a sex strike in Pereira, Colombia, called *La Huelga de las Piernas Cruzadas* (“the strike of crossed legs”) in an attempt to encourage gang members to turn in their weapons.<sup>93</sup> We are skeptical that mass refusals of this kind could be effectively organized. But friends and family demanding registration as a prerequisite for playdates and family visits is not far-fetched.

The demand for negotiated self-exclusion might also be prompted by the threat of economic entities to withhold various forms of residential association. Homeowners’ associations, coop boards and covenants might

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<sup>91</sup> Rachel Sereix, *Study Shows Connecticut Temporary Gun Removal Law Lowers Suicide Risk*, CHRONICLE (Nov. 29, 2016), <https://www.dukechronicle.com/article/2016/11/study-shows-connecticut-temporary-gun-removal-law-lowers-suicide-risk> [<https://perma.cc/63YF-EJ24>] (stating that forty-nine percent of “gun removal cases were initially reported to the police by an acquaintance”).

<sup>92</sup> ARISTOPHANES, *LYSISTRATA* (Jeffrey Henderson ed. & trans., Clarendon Press 1987) (c. 411 B.C.E.) (telling the fictional story of Lysistrata, who persuades the women of Greece to withhold sexual privileges from their husbands and lovers as a means of forcing the men to end the Peloponnesian War).

<sup>93</sup> See *Colombian Gangsters Face Sex Ban*, BBC NEWS (Sept. 13, 2006) <http://news.bbc.co.uk/2/hi/5341574.stm> [<https://perma.cc/2L4W-X3A5>] (last visited 8/2/2016); see also Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement In Domestic And International Law*, 121 YALE L.J. 252, 258 (2011) (“[O]utcasting involves denying the disobedient the benefits of social cooperation and membership.”).

condition occupancy upon individuals' waiver of their gun rights. Landlords who at times attempt to collect late rent may prefer unarmed tenants.<sup>94</sup>

Our proposed associational marketplace might even exhibit some aspects of a commodified marketplace. Some individuals might offer compensation if others will sign the registry. Alternatively, a tenants' association might mandate a financial forfeiture or eviction if a resident rescinds a required waiver.<sup>95</sup> Life insurers or homeowners (or renter) insurers might give discounts to individuals who credibly signaled that they had ceded the right to bear arms. While many suicides are impulsive, there is also evidence that insureds are more likely to attempt suicide once the initial period of payout exclusion ends. Most states mandate that life insurance pay out when the cause of death is suicide if the death occurs after the first year or two of the policy.<sup>96</sup> Samuel Hsin-yu Tseng found that the "suicide rate quadruples after [this] exclusion period."<sup>97</sup> Life insurance companies, given the opportunity, might offer discounts to insureds who had provided registry verification that they had waived their right to own arms.<sup>98</sup> Similarly, competition might induce renter and homeowner insurance companies to offer discounts to waiving individuals, as there is some evidence that gun ownership increases the probability of burglary.<sup>99</sup> As explained by Philip Cook and Jens Ludwig:

Guns in the home may pose a threat to burglars, but also serve as an inducement, since guns are particularly valuable loot. Other things equal, a gun-rich community provides more lucrative burglary opportunities than one where guns are more sparse . . . . The new empirical results reported here provide no support for a net deterrent effect from widespread gun ownership.

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<sup>94</sup> These actors might be motivated by any of a number of interests, including but not limited to security concerns. See, e.g., Derrick Rose, *Witness: Tenant Shot Landlord Through Window After Attempt to Collect Rent*, WHAS 11 ABC (June 28, 2016), <http://www.whas11.com/news/crime/witness-tenant-shot-landlord-through-window-after-attempt-to-collect-rent/258300179>, [https://perma.cc/N7RB-6N8N] (reporting an incident in which a tenant allegedly shot and killed his landlord).

<sup>95</sup> Such a private commitment contract could be created at the commitment contract website StickK.com, co-founded by one of the authors. STICKK [www.stickk.com](http://www.stickk.com) [https://perma.cc/6SAJ-DWU8] (last visited Oct. 24, 2018).

<sup>96</sup> See Samuel Hsin-yu Tseng, *The Effect of Life Insurance Policy Provisions on Suicide Rates* 2-4 (Dec. 15, 2004) (unpublished manuscript) (on file with authors) (stating that thirty-three states permit a two-year suicide exclusion).

<sup>97</sup> *Id.* at 2; see also Joe Chen, Yun Jeong Choi & Yasuyuki Sawada, *Suicide and Life Insurance* 3 (2008) (unpublished manuscript) (using OECD cross-country data from 1980 to 2002 and finding analogous exemption period effects).

<sup>98</sup> Cf. Steven Yaccino, *Schools Seeking to Arm Employees Hit Hurdle on Insurance*, N.Y. TIMES (July 7, 2013), <https://www.nytimes.com/2013/07/08/us/schools-seeking-to-arm-employees-hit-hurdle-on-insurance.html> [https://perma.cc/8R6V-MA2P] (higher insurance premiums deterred some from allowing permit holders to bring guns onto public school property).

<sup>99</sup> Philip J. Cook & Jens Ludwig, *The Effects of Gun Prevalence on Burglary: Deterrence vs Inducement*, NAT'L BUREAU OF ECON. RESEARCH (Working Paper No. 8926, May 2002), <http://www.nber.org/papers/w8926> [https://perma.cc/D9BD-H7CJ].

Indeed, our analysis concludes that residential burglary rates tend to increase with community gun prevalence.<sup>100</sup>

While the incentive of individual insurance companies to provide waiver discounts may be muted because reducing community gun prevalence lowers the payouts of its rivals, a similar “lowering ‘rivals’ cost” effect has not stopped individual insurers from offering LoJack discounts.<sup>101</sup>

This Article’s notion of gun control is “libertarian” not only in that it gives the individual the enhanced rights to durably commit to not bear arms, but also in that it gives others the liberty to condition their association on such waiver. Of course, facilitating an associational market could, as an analytical matter, lead to equilibrium with greater gun ownership. But the option to condition association on gun ownership already exists and is easily verified.<sup>102</sup> The email verification option as mentioned above just levels the evidentiary playing field by allowing individuals to more feasibly condition association on another person’s waiver. Thus, while particular actors may or may not bring such pressure to bear,<sup>103</sup> the email innovation on net should predictably lead toward less gun ownership.

The set of economic entities that might make waiver a prerequisite for contracting is potentially large and cut across many different consumer and employment arenas. However, as described more in Part III, our proposal would only allow economic entities with residential or insurance self-defense interests to condition willingness to contract on waiver. Employers, for example, have a substantial interest in preventing their employees from bringing guns to the job site and killing themselves or others. There have been numerous instances of employee-instigated workplace violence, including the 2016 San Bernardino shootings, where an employee and his wife killed fourteen others at a workplace holiday party.<sup>104</sup> One federal investigator said the leading theory for motive was a “combination of terrorism and workplace” conflict.<sup>105</sup> And while mass shootings in the workplace are

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<sup>100</sup> *Id.* at 4.

<sup>101</sup> See Ian Ayres & Steven D. Levitt, *Measuring Positive Externalities from Unobservable Victim Precaution: An Empirical Analysis of LoJack*, 113 Q. J. ECON. 43, 73 (1998) (stating that insurance companies continue to offer LoJack discounts even in states where no discount is mandated by law).

<sup>102</sup> See Blocher, *supra* note 5, at 4 (“[T]he Second Amendment’s guarantee of an individual right to keep or bear arms in self-defense should include the freedom not to keep or bear them at all.”).

<sup>103</sup> For example, if people with a higher risk of suicide are more likely to register, life insurers may not be economically motivated to give discounts for registering. But insurers would not be likely to increase the price to registrants because registrants would then not opt to disclose that information (via the registry email) to the insurer.

<sup>104</sup> See James Queally et al., *Motive for Killings a Mystery—Some Think Mix of Work Issues, Extremism Led to Calif. Attack*, CHI. TRIB. Dec. 4, 2015, at 1.

<sup>105</sup> See *id.* at 2.

unusual,<sup>106</sup> attacks involving fewer than four victims are quite common, resulting in 14,770 total workplace homicide victims between 1992 and 2012.<sup>107</sup> But in an abundance of caution, we do not propose authorizing employers to discriminate on the basis of gun waiver.<sup>108</sup>

A third, and final, category of waiver demand might derive from what we term “political expression.” Some people might choose to both waive and credibly communicate their waiver to signal to fellow citizens and to representatives the registrants’ support of legislative action to limit gun violence. After a mass shooting, such as the 2016 Orlando attack at a gay nightclub in which forty-nine people were killed, many people experience a need to do something.<sup>109</sup> Purchases of guns generally, and assault rifles in particular, tend to spike after mass shootings.<sup>110</sup> However, other Americans might instead choose to take action to credibly signal that they are not armed. For example, when registering, an individual might simultaneously have the platform send evidence of their waiver to a “Stop Handgun Violence” organization.<sup>111</sup>

Of course, some people will be reluctant to have their identity as registrants publicly known for fear that they may become targets of home invasions and other crime, as criminals will be able to ascertain that they are not armed. However, even people who choose not to provide *any* email addresses might still be motivated to waive in order to signal their commitment to reducing firearm prevalence. This is because the platform would disclose the aggregate number of people who have volunteered to add their names to the registry. Indeed, this aggregate registry disclosure by category is already done. For

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<sup>106</sup> They account for just four percent of mass shootings. *Analysis of Recent Mass Shootings*, EVERYTOWN FOR GUN SAFETY (Apr. 11, 2017), <https://everytownresearch.org/reports/mass-shootings-analysis> [<https://perma.cc/GW5X-LPKR>].

<sup>107</sup> *Occupational Violence*, CTR. FOR DISEASE CONTROL, <https://www.cdc.gov/niosh/topics/violence> (last visited Feb. 6, 2019) [hereinafter CDC].

<sup>108</sup> We also would prohibit government from purchasing waiver—for example, by requiring waiver as a prerequisite of a gun buyback program—because government purchasing might constitute and unconstitutional condition. Richard Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 7 (1988) (arguing that there are occasions for which “receipt of a benefit to which someone has no constitutional entitlement does not justify” abandoning “rights guaranteed under the Constitution”). However, as argued above, we would allow conditioning plea bargaining (with its independent requirement of wrong doing) upon waiver. See *supra* note 85, at 184.

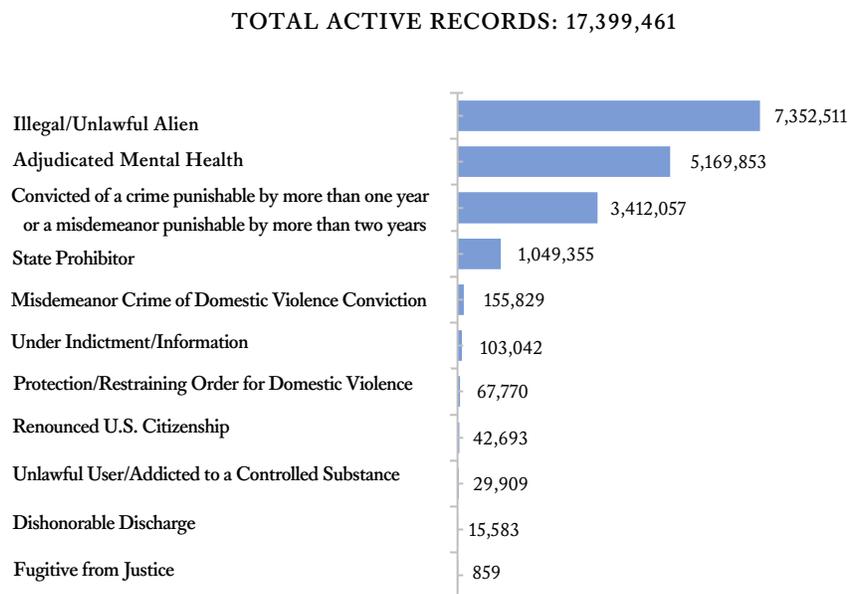
<sup>109</sup> For example, a petition to enact stricter weapon legislation in Orlando garnered 41,618 signatures. Adam Hartnett, *Enact Stricter Weapon Legislation in the City of Orlando*, CHANGE.ORG, [https://www.change.org/p/mayor-buddy-dyer-enact-stricter-weapon-legislation-in-the-city-of-orlando-2?source\\_location=topic\\_page](https://www.change.org/p/mayor-buddy-dyer-enact-stricter-weapon-legislation-in-the-city-of-orlando-2?source_location=topic_page) [<https://perma.cc/G39D-UBFX>] (last visited Jan. 21, 2019).

<sup>110</sup> Lacey N. Wallace, *Responding to Violence with Guns: Mass Shootings and Gun Acquisition*, 52 SOC. SCI. J. 156 (2015); Zachary Crockett, *What Happens After a Mass Shooting? Americans Buy More Guns*, VOX (June 15, 2016, 11:00 A.M.), <http://www.vox.com/2016/6/15/11936494/after-mass-shooting-americans-buy-more-guns> [<https://perma.cc/8Z4T-MMMF>].

<sup>111</sup> See *supra* notes 11 and 20 and accompanying text (describing mechanisms of separately authorizing use of one’s name as evidence of waiver).

example, the FBI reported as of 2017 not just the total number of registrants (17,399,461), but also the number of individuals prohibited from purchasing or possessing guns for particular reasons.

Figure 1: Total Active Records in the NICS Index



All that would be required under our proposal would be to add an additional category of “Voluntary Registrants.”<sup>112</sup>

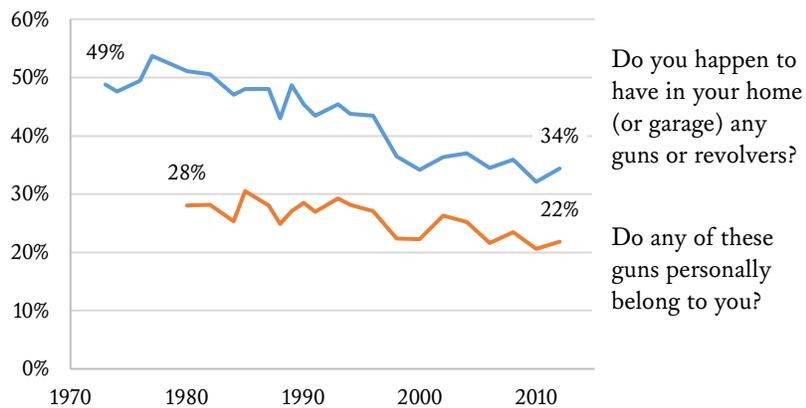
The “No Guns” list could thus become a particularly powerful way to publicly show support by signaling the number of people who are willing to waive their Second Amendment rights. The next section shows that close to a third of our survey respondents indicate that they would be willing to add their name to their state’s “No Gun” list. While some of these respondents are waiving as a self-exclusion/commitment strategy, others are likely waiving as a (small) way to take expressive action against gun violence.

<sup>112</sup> See F.B.I., *supra* note 9, at 27. As described below, if implemented through our model state statute, “voluntary registrants” would be a subcategory of “state prohibitor,” the category created by disqualifying attributes defined by individual states. Our model statute would make people who had voluntarily registered an additional disqualifying category.

### B. Empiricism

This Section goes beyond merely theorizing about potential demand and instead provides initial “proof of concept” evidence that a substantial minority of Americans are in fact willing to waive their Second Amendment rights. As an initial matter, most Americans do not currently own weapons.<sup>113</sup> The exact percentage owning guns is difficult to ascertain, but surveys suggest that the proportion could be as low as just one third and it has been declining in recent decades.<sup>114</sup> For example, Figure 1 shows that the proportion of people saying they had guns or revolvers in their home dropped from 49% in 1973 to just 34% in 2010.<sup>115</sup>

Figure 2: U.S. Gun Ownership Percentage Over Time



Moreover, the Figure shows that the proportion of Americans who personally owned guns in 2010 was, in this University of Chicago survey, just 22%. Accordingly, the registry is asking citizens to waive a right that most are not exercising.

This Section will be reporting survey results that more than thirty percent of respondents are willing to waive their gun rights. But this survey evidence

<sup>113</sup> Kim Parker et al., *America's Complex Relationship with Guns*, PEW RESEARCH CENTER (June 22, 2017), <http://www.pewsocialtrends.org/2017/06/22/americas-complex-relationship-with-guns/> [<https://perma.cc/8DCB-SYVM>] (reporting that thirty percent of Americans own firearms).

<sup>114</sup> See Drew DeSilver, *A Minority of Americans Own Guns, but Just How Many Is Unclear*, PEW RESEARCH CENTER 1 (June 4, 2013), <http://www.pewresearch.org/fact-tank/2013/06/04/a-minority-of-americans-own-guns-but-just-how-many-is-unclear> [<https://perma.cc/7TNS-WKAD>] (“37%, more than a third of Americans say they or someone in their household owns a gun.”).

<sup>115</sup> *Id.* at 1-2.

is likely conservative for two reasons.<sup>116</sup> First, the survey focuses primarily on the potential “self-exclusion” demand for waiver. Because the survey’s description of registration excluded the possibility of credible communication to third parties, we have not measured the derived demand of “negotiated exclusion”, where third parties (friends, family, neighbors, cotenants and insurers) may incentivize waiver by limiting their willingness to associate with nonwaivers. Something as simple as a fifty-dollar annual discount for homeowners or life insurance might be sufficient to dramatically increase the demand for waiver. Second, the willingness-to-waive estimates are conservative because they were elicited without any prior government or private messaging. Public service announcements and other forms of advertisements might increase the salience of the question and the palatability of waiver itself.<sup>117</sup> Of course, advertisements can also be utilized by those trying to discourage waiver. But our finding below that people are more willing to waive when informed that their peers are waiving is at least suggestive that more publicity and deliberation might produce on net even higher waiver rates than reported here. And information provided by an individual’s health care provider may be more persuasive than any public information campaign.

### C. MTurk Survey

1,050 Mechanical Turk respondents completed an online survey on a Thursday, March 3, 2016. The major caveat in using the MTurk worker population as survey respondents is its limited representativeness, raising questions about external validity. While restricted to the United States, the MTurk worker population is not representative of Americans at large.<sup>118</sup>

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<sup>116</sup> Our empiricism, however, does not directly test how people would respond to our proposed twenty-one day waiting period, which as described above was chosen as a compromise between the less durable seven-day waiting period and the more durable state judge options that we test below. Note additionally that there is some evidence that there is often poor take up of advance directives, especially amongst people with mental illness. Jeffrey W. Swanson et al., *Psychiatric Advance Directives and Reduction of Coercive Crisis Interventions*, 17 J. MENTAL HEALTH 255, 259-63 (2008) (discussing a study in which 70% of individuals state that they wish to have an advanced directive but only 30% of individuals follow through); see also Eric B. Elbogen et al., *Effectively Implementing Psychiatric Advance Directives to Promote Self-Determination of Treatment Among People with Mental Illness*, 13 PSYCHOL. PUB. POL’Y & L. 273, 286 (2007).

<sup>117</sup> See, e.g., Sarah Durkin, Emily Brennan & Melanie Wakefield, *Mass Media Campaigns to Promote Smoking Cessation Among Adults: An Integrative Review*, 21 TOBACCO CONTROL 127 (2012).

<sup>118</sup> Berinsky and others argue that MTurk workers are more representative than “convenience samples,” but less so than expensive representative samples like the Current Population Survey. See Adam J. Berinsky, Gregory A. Huber & Gabriel S. Lenz, *Evaluating Online Labor Markets for Experimental Research: Amazon.com’s Mechanical Turk*, 20 POL. ANALYSIS 351, 355-61 (2012). Huff and Tingley extend this analysis. See Connor Huff & Dustin Tingley, “Who Are These People?” *Evaluating the Demographic Characteristics and Political Preferences of MTurk Survey Respondents*, RES. & POL., July-Sept. 2015, at 1, 7-8 (2015).

Table 1: Summary Statistics for Current Population Survey (July 2015) and MTurk Sample<sup>119</sup>

Variable	U.S. Adults Over Age 18 - CPS (July 2015)	MTurk Sample
Gender: Male	0.48	0.63
Gender: Female	0.52	0.37
Gender: Other	-	0.00
Region: West	0.23	0.24
Region: South	0.37	0.35
Region: Midwest	0.21	0.22
Region: Northeast	0.18	0.19
Race: Asian	0.06	0.08
Race: Black	0.12	0.05
Race: Hispanic	0.15	0.06
Race: White	0.65	0.79
Race: Mixed Race	0.01	0.02
Race: Other	0.01	0.00
Age: 18-24	0.11	0.16
Age: 25-34	0.18	0.49
Age: 35-44	0.17	0.21
Age: 45-54	0.18	0.08
Age: 55-64	0.17	0.05
Age: 65+	0.20	0.01
Sexual Orientation: Heterosexual	-	0.91
Sexual Orientation: Homosexual	-	0.05
Sexual Orientation: Bisexual	-	0.01
Sexual Orientation: Other	-	0.00
Income: \$25,000 or less	0.20	0.19
Income: \$25,000-\$49,999	0.25	0.31
Income: \$50,000-\$74,999	0.19	0.24
Income: \$75,000-\$99,999	0.13	0.13
Income: \$100,000-\$149,999	0.13	0.10
Income: \$150,000 or more	0.11	0.03
Marital Status: Single	0.27	0.58
Marital Status: Married	0.54	0.36
Marital Status:		
Divorced/Separated/Widowed	0.19	0.06
Education: Less Than High School	0.11	0.00
Education: High School	0.49	0.29
Education: Associates Degree	0.10	0.17

<sup>119</sup> Only those eighteen and older were allowed to take the MTurk survey, though ages were self-reported. Current Population Survey (CPS) data from July 2015.

Education: Bachelors Degree	0.20	0.42
Education: Graduate Degree	0.11	0.11
Political Party: Democrat	-	0.45
Political Party: Republican	-	0.18
Political Party: Independent	-	0.32
Political Party: Not Registered	-	0.05
Voted in 2012: Obama	-	0.56
Voted in 2012: Romney	-	0.18
Voted in 2012: Other	-	0.07
Voted in 2012: None	-	0.18
Uses the Internet	0.76	-
N	-	1,050

Our sample is 63% male and is younger than average. 65% of the sample is between 18 and 34 years old, compared to 29% in the United States as a whole. The sample is more highly educated and more likely to be single. The sample is also much more liberal than the United States as a whole. Nearly 60% voted for Obama in 2012, and less than 20% voted for Romney, though in reality the voter split was 51% to 47%. 45% in the sample were registered Democrats and only 18% were registered Republicans. Nearly 80% were white, compared to 65% nationwide.<sup>120</sup> We attempt to account for some of these disparities by estimating weighted averages that give heightened weight to the responses from relatively underrepresented respondent demographic groups.<sup>121</sup>

*Method.* Respondents were randomized into eight groups defined by three pairs of treatments ( $2 \times 2 \times 2 = 8$ ). The first treatment pair is “purchase” versus “possess or purchase,” referring to the banned activities for individuals whose names are on the list. Respondents assigned to the “possess or purchase” group were shown following vignette:

The National Instant Criminal Background Check System maintains a “No Guns” list which prevents certain individuals (for example, convicted felons) from possessing firearms and from purchasing firearms from gun dealers. Imagine that your state legislature has just enacted a new program that gives state residents the right to confidentially add their names to this “No Guns” list.” Proponents of the legislation have argued that restricting access to firearms reduces suicides, homicides, and accidental deaths.

Respondents assigned to the “purchase” group were shown a vignette that omits the “from possessing firearms” language, but is otherwise the same.

<sup>120</sup> See Ian Ayres & Fred Vars, *Online Appendix*, YALE U., at 2 tbl.1 (Aug. 8, 2016) [hereinafter *Online Appendix*], [https://ianayres.yale.edu/sites/default/files/files/2016\\_08\\_08%20Online%20Appendix.pdf](https://ianayres.yale.edu/sites/default/files/files/2016_08_08%20Online%20Appendix.pdf).

<sup>121</sup> See *supra* note 85.

The second arm of the experiment randomly assigned respondents into “wait seven days” or “state judge” groups, referring to the manner in which an individual can remove their name from the list. The second pair of treatments states either:

“If you add your name, you can later remove it for any reason by requesting removal and waiting seven days” or

“If you add your name, you can later remove it if a state judge certifies that you are not a danger to yourself or others.”

The third arm of the experiment randomly assigned respondents into “simple ask” v. “more than half” groups, referring to the way respondents were asked about their willingness to register. The third pair of treatments states either:

“Would you be willing to add your name to your state’s ‘No Guns’ list?” or

“Would you be willing to add your name to your state’s ‘No Guns’ list if more than half of other adults in your state also add their names?”

A respondent was randomly assigned to each of the three arms, for a total of 8 (2 x 2 x 2) group combinations. A combination might be, for example, “purchase and possess,” “state judge” and “simple ask.”<sup>122</sup>

*Results.* The eight treatment groups were properly balanced on pretreatment demographic characteristics—suggesting that the randomization successfully assigned similar respondents to the different groups.<sup>123</sup> For our central outcome variable, we find across all vignette types that 30.8% (95% confidence interval: 28.0% to 33.6%) of our 1,050 MTurk subjects responded that they would be willing to add their names to their state’s “No Guns” list.<sup>124</sup> Nearly a third of respondents expressed a willingness to waive some form of their Second Amendment rights.

The treatment effects for our three experimental arms can be seen in Figure 3:

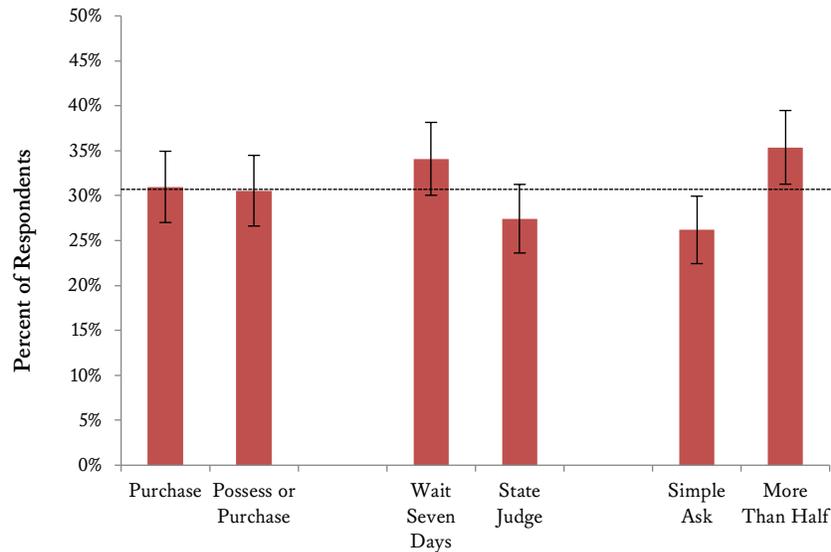
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<sup>122</sup> See Online Appendix, *supra* note 120, at 6-9 figs. 1-8, for screenshots of all eight groups. The underlying data and statistical analysis (including STATA .do and output files) can be found at <https://ianayres.yale.edu/sites/default/files/files/nogunsdata.zip>.

<sup>123</sup> See *id.* tbl.2.

<sup>124</sup> Using the Current Population Survey data, we apply post-stratification weights to the sample based on gender, age group, and region. After reweighting the data to match the CPS data, the percent responding positively dropped slightly to 29.6% (95% confidence interval: 24.0% to 35.1%). There are several drawbacks to this methodology. First, we are forced to place very high weight on people aged over 35 because of their underrepresentation in the data. This introduces volatility (as shown by a large increase in the size of the confidence interval), and places a large emphasis on a relatively small number of respondents. The post-stratification weight, for example, averages 15 for those over 65 and 18 for women over 65. Second, we make the assumption that internet-using citizens (who are able to respond to the survey) would have the same view, on average, as non-Internet-using citizens.

Figure 3: Percent of Respondents Adding Name to “No Guns” List, by Treatment Group<sup>125</sup>



The left-hand columns of Figure 3 show that subjects' willingness to waive was not reduced by increasing the scope of the waiver to include purchase and possession. 31.0% of subjects were willing to add their name to a “No Guns” list which would prohibit them from purchasing weapons, while 30.6% of subjects were willing to add their names to a “No Guns” list which would prohibit both the purchase and the possession of guns. As discussed above, the equal willingness to waive across this dimension suggests that structuring choice to include purchase and possession might not dissuade registration.

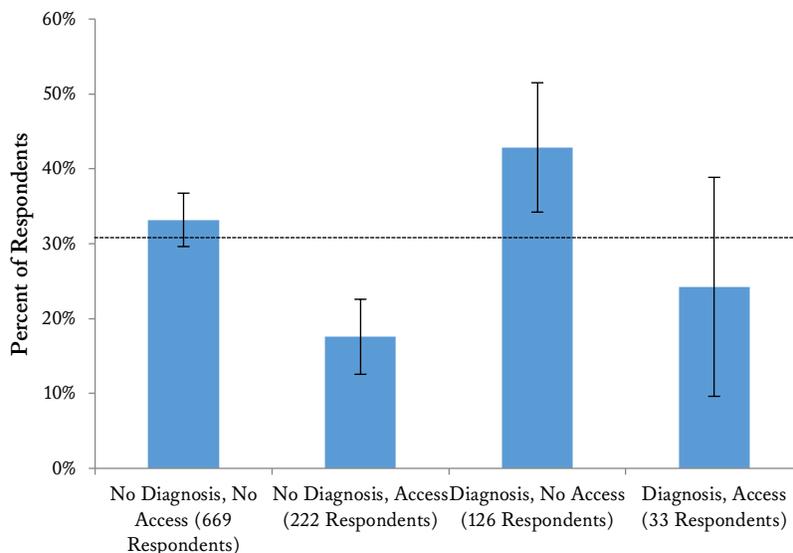
In contrast, both the rescission and peer arms of the test displayed statistically significant treatment effects. Subjects who were told they could automatically rescind their waiver after seven days were 6.7 percentage points more likely to waive than those who were told that they could only rescind their waiver if a state judge found that they were not a risk to themselves or others (34.1% vs. 27.4%). As shown in the right-hand columns of Figure 3, subjects were 9.2 percentage points more likely to waive if more than half of other adults in their state also added their names than if the choices of others were not mentioned (35.4% vs. 26.2%).

We also found substantially different willingness to participate for different types of respondents. Subjects who reported having been previously

<sup>125</sup> The dashed line represents the average response waiver rate (30.8%) across all subjects. N = 1050.

“diagnosed with a mental disorder” (15.1% of the sample) or having “regular access to firearms at home” (24.3% of the sample) displayed highly variable willingness to participate.

Figure 4: Percent of Respondents Adding Name to “No Guns” List, by Mental Disorder Diagnosis and Access to Firearms<sup>126</sup>



As shown in Figure 3, those with no mental health diagnosis and no access to a firearm are close to the sample mean at 33.2%. Subjects with regular access to firearms are (unsurprisingly) less likely to waive their Second Amendment rights: those with “regular access to firearm at home” are 15.6 percentage points less likely to waive. However, respondents with a diagnosed mental disorder are 9.7% more likely to waive their rights. Those who have a diagnosed mental disorder and access to a gun are 8.9% less likely to waive their rights, but the small number of respondents in this category causes the estimate to be imprecise.

Table 2 shows the results of OLS regressions where a dummy for willingness to register is regressed on indicator variables for each of the 3 experimental arms, as well as several respondent (self-reported) characteristics. Model 1 parallels the histogram above (Figure 2) with controls testing whether the “possess or purchase,” the “stage judge,” or the “more than half” groups are statistically different than their paired counterparts. Model 2 adds a dummy for whether or not the respondents scored at or above a 7 on

<sup>126</sup> The dashed line represents the average response rate across all subjects. N = 1050.

the Suicide Behaviors Questionnaire-Revised (SBQ-R), a cutoff that has been shown to indicate being at risk of suicide.<sup>127</sup> Model 3 adds a dummy for whether the respondent self-reports as having been diagnosed with a mental disorder. Model 4 adds interactions with the random treatments. Model 5 adds a dummy indicating whether the respondent has regular access to a firearm, as well as an interaction with the mental disorder dummy. This parallels Figure 3. Model 6 adds dummies indicating if there are children in the home. Model 7 adds more than a dozen demographic controls for respondents' race, gender, sexual orientation, age, region, income, education, and political identification.<sup>128</sup>

Table 2: Regression Results

	1	2	3	4	5	6	7
Possess or Purchase	-0.005 (0.028)	-0.004 (0.028)	-0.003 (0.028)	-0.016 (0.030)	-0.006 (0.028)	-0.005 (0.028)	0.001 (0.028)
State Judge	-0.066** (0.028)	-0.065** (0.028)	-0.066** (0.028)	-0.041 (0.030)	-0.065** (0.028)	-0.064** (0.028)	-0.057** (0.028)
More Than Half of Other Adults	0.092*** (0.028)	0.091*** (0.028)	0.087*** (0.028)	0.098*** (0.031)	0.086*** (0.028)	0.088*** (0.028)	0.085*** (0.028)
SBQ-R Score Greater Than or Equal to 7		0.054 (0.035)					
Diagnosed with a Mental Disorder			0.087** (0.042)	0.142* (0.079)	0.089* (0.047)	0.084** (0.041)	0.077* (0.041)
Diagnosed with a Mental Disorder X Possess or Purchase				0.103 (0.082)			
Diagnosed with a Mental Disorder X State Judge				-0.166** (0.083)			
Diagnosed with a Mental Disorder X More Than Half				-0.037 (0.084)			
Have Regular Access to Firearm					-0.154*** (0.031)	-0.165*** (0.030)	-0.109*** (0.032)
Diagnosed with a Mental Disorder X Regular Access to Firearm					-0.038 (0.093)		
Live with Children Under 18						0.058 (0.041)	0.057 (0.045)
Live with Children Under 5						-0.025 (0.050)	-0.027 (0.052)
Full Demographic Controls							
	NO	NO	NO	NO	NO	NO	YES
Constant	0.0298*** (0.028)	0.285*** (0.029)	0.285*** (0.029)	0.274*** (0.031)	0.326*** (0.031)	0.312*** (0.032)	0.336*** (0.069)
Observations	1,050	1,050	1,050	1,050	1,050	1,050	1,050
R-squared	0.015	0.017	0.020	0.025	0.042	0.044	0.105

<sup>127</sup> See Augustine Osman et al., *The Suicide Behaviors Questionnaire-Revised (SBQ-R)*, 8 ASSESSMENT 443, 452 (2001).

<sup>128</sup> The full regression and list of demographic controls is reported in Online Appendix Table 2.

Model 1 shows the magnitude and statistical significance of the differences shown in Figure 2. Requiring a state judge to certify that you are not a danger to yourself or to others, rather than requesting removal and waiting seven days, lowers support by 6.6 percentage points and is statistically significant ( $p < .05$ ). Conditioning sign up on more than half of other adults in the state signing up statistically increases support by 9.2 percentage points, as compared to simply asking if the respondent would like to sign up. But as suggested by Figure 2, there is no statistical difference in support whether the scope of waiver is framed as “purchase or possess” or merely “purchase.”

Model 2 tests whether having an SBQ-R score above 7 affects sign up, and finds that it does by 5.4 percentage points, but this result is not statistically significant. However, Model 3 suggests that having been diagnosed with a mental disorder in the past is associated with increased support by 8.7 percentage points and is statistically significant ( $p < .05$ ). Model 4 interacts the mental disorder dummy with the three treatment dummy variables. Most notably, the coefficient on “Diagnosed with a Mental Disorder X State Judge” is large, negative, and statistically significant ( $p < .05$ ). This indicates that those who have been diagnosed with a mental disorder are 16.6 percentage points less likely to sign up if required to convince a state judge that they are not a danger to themselves or others (as opposed to simply requesting to take their name off and waiting seven days). Concomitant with this effect is the lack of statistical significance on the uninteracted “State Judge” variable, indicating that those who have not been diagnosed with mental disorders are, statistically, equally willing to add their names even if they must go before a state judge to have it later removed.

Model 5 indicates that those with regular access to a firearm are less willing to voluntarily give up their Second Amendment rights by 15.4 percentage points. This effect is stable for those who have been diagnosed with a mental disorder. Model 6 shows that support does not seem to be affected by the presence of children in the household.

Model 7 adds full demographic controls to Model 6 (see Online Appendix Table 3 for full results). Women are 8.4 percentage points more likely to sign up than men. Asian, Black, and Hispanic respondents were all more than 10 percentage points more likely to sign up than White respondents (11.9, 15.9, and 19.7 percentage points, respectively). Registered Democrats were also statistically much more likely to be willing to waive their Second Amendment rights than Republicans, independents, and those who are not registered to vote.

#### D. *The Alabama Survey*

The high sign-up rates reported above for those diagnosed with a mental disorder (42.9%) are consistent with an independent study assessing the

willingness of individuals to self-restrict firearms.<sup>129</sup> In an anonymous survey administered at an inpatient psychiatric unit and two outpatient psychiatric clinics at an academic medical center, 46% of 200 psychiatric patients in Alabama said they would volunteer for either the seven-day or judicial-hearing versions of the proposal.<sup>130</sup>

A similar proportion (39%) of MTurk respondents who reported being diagnosed with a mental health disorder were willing to self-restrict—even though there were important differences in the subject population and survey methodology. The offline Alabama survey offered a much more extensive rationale for the proposals than did the MTurk survey. Alabama has the seventh highest gun ownership rate in the United States<sup>131</sup> and a strong consensus against gun regulation,<sup>132</sup> and a slightly higher proportion of Alabama respondents relative to MTurk respondents reported access to firearms (26% vs. 24%),<sup>133</sup> so the sign-up rate might be higher in other states with lower rates of gun ownership and less resistance to gun regulation.

The MTurk survey also confirmed several other secondary findings from the Alabama study. Those with current access to a gun were significantly less likely to volunteer (though 18.7% still did).<sup>134</sup> Whites were less likely to sign up for the judicial hearing option in the earlier study, which was also consistent with the MTurk results.<sup>135</sup> The SBQ-R score was not significantly associated with sign-up rates in either study. And the presence of children in the home had no statistically meaningful effect.<sup>136</sup>

#### E. Estimated Lives Saved

The substantial sign-up rates found in both the Alabama and MTurk surveys suggest that the proposal could save hundreds of lives each year. In 2013, there were 23,088 suicides in states without waiting periods.<sup>137</sup> In the MTurk survey, a little over 31% indicated they would sign up for the proposal

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<sup>129</sup> See Fredrick E. Vars et al., *Willingness of Mentally Ill Individuals to Sign Up for a Novel Proposal To Prevent Firearm Suicide*, 47 SUICIDE & LIFE-THREATENING BEHAV. 483, 483 (2017).

<sup>130</sup> *Id.*

<sup>131</sup> See Bindu Kalesan, Marcos D Villarreal, Katherine M. Keyes & Sandro Galea, *Gun Ownership and Social Gun Culture*, 22 INJURY PREVENTION 216, 218 (2015).

<sup>132</sup> See Fredrick E. Vars, *Shooting Blanks: Alabama's New Gun Rights Amendment*, JURIST (Nov. 21, 2014), <https://www.jurist.org/commentary/2014/11/fredrick-vars-alabama-gun/> [<https://perma.cc/N5FH-2T2G>].

<sup>133</sup> See Vars, *supra* note 122, at 485.

<sup>134</sup> *Id.* at 487-488.

<sup>135</sup> *Id.* at 487.

<sup>136</sup> *Id.*

<sup>137</sup> See Griffin Edwards et al., *supra* note 68, at 6-7 tbl.1 (2018); CHRISTOPHER W. DRAPEAU & JOHN L. MCINTOSH, U.S.A. SUICIDE: 2013 OFFICIAL FINAL DATA, AM. ASS'N OF SUICIDOLOGY (2015), <http://www.suicidology.org/Portals/14/docs/Resources/FactSheets/2013datapgs3.pdf> [<https://perma.cc/62V6-WRM8>] (reporting C.D.C. data).

with the seven-day delay removal option.<sup>138</sup> It is unreasonable to think that a 31% waiver rate would translate into a 31% reduction in suicides. Some individuals who waive would access guns by waiting or from other sources.<sup>139</sup> Others would kill themselves by other means. However, a large and sophisticated study found a 2%–5% reduction in suicide for handgun purchase waiting periods seven days or longer.<sup>140</sup> If we assume a 5% reduction in suicide of those who sign up, our proposal could be expected to save approximately 370 lives.<sup>141</sup> At the government's statistical value of human life, this amounts in economic terms to an annual benefit of more than \$3 billion—far outstripping the modest and largely one-time costs of creating the registry platform as a modest addition to the FBI's existing program.<sup>142</sup>

Moreover, as mentioned above, there are good reasons to expect this estimate of lives saved to be a lower bound. It assumes that a 31% registration rate and a 5% decline in suicide rate for registrants in states without waiting periods. But both these assumptions are likely conservative. Negotiated exclusion could substantially increase the population proportion that registers. And those who register may experience more than a 5% decline in suicide both because our surveys suggest that those more at risk are more likely to register, and because those registrants providing emails may trigger productive third-party interventions if registrants later attempt to rescind their waiver.<sup>143</sup> All things considered, one could easily imagine the system saving one or two thousand lives a year.

### III. LIBERTARIAN CONTRACTING AND ITS LIMITS

While giving individuals the unfettered, unilateral discretion to waive their right to bear arms is consonant with the libertarian embrace of self-

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<sup>138</sup> See *supra* fig.2.

<sup>139</sup> See Jeffrey W. Swanson, et. al, *Gun Violence, Mental Illness, And Laws That Prohibit Gun Possession: Evidence From Two Florida Counties*, 35 HEALTH AFF. 1067, 1067 (2016) (“28 percent of gun suicides involved individuals not legally permitted to have a gun at the time.”).

<sup>140</sup> See Griffin Edwards et al., *supra* note 68, at 1, 1.

<sup>141</sup>  $23,845 \times 0.308 \times 0.05 = 367.2$

<sup>142</sup>  $367.2 * \$9,100,000 = \$3,341,520,000$ . See Binyamin Appelbaum, *As U.S. Agencies Put More Value on a Life, Businesses Fret*, N.Y. TIMES, (Feb. 16, 2011), <https://www.nytimes.com/2011/02/17/business/economy/17regulation.html> [<https://perma.cc/75PQ-H2AF>] (reporting that the EPA set the value of a human life at \$9.1 million).

<sup>143</sup> The powerful potential effect of gun removal on suicide is underscored by a recent analysis of Connecticut's Gun Violence Restraining Orders (GVROs), which allow third-party petitions for gun removal where person poses risk of “imminent personal injury to himself or herself or to other individuals.” Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does it Prevent Suicides?*, 80 L. & CONTEMP. PROBS. 179, 180, 203 (2017) (estimating “approximately one averted suicide for every ten to eleven gun seizure cases”).

authorship,<sup>144</sup> the negotiated-exclusion aspect of our proposal created by the email option raises separate concerns about government's burdening of individuals' Second Amendment rights. From one perspective, negotiated exclusion where waiver is induced by the threat of private third parties to withhold commercial or noncommercial association does not raise constitutional concerns because it does not involve any state action. But the email option does involve the government as a facilitator. The government facilitates the associational marketplace by credibly communicating waiver information (if so directed by the registrant) to third parties.

If a state created a similar registry that gave women the option to have the state credibly communicate to third parties whether or not they have had an abortion, merely facilitating an associational marketplace would raise concerns about whether the government's facilitating role would constitute an "undue burden" on the exercise of this fundamental right.<sup>145</sup> On the other hand, a government registry that gave registered voters the option of credibly communicating whether or not they exercised their right to vote would almost certainly be constitutional. This would just be an "I voted" sticker on steroids. Indeed many state governments, without constitutional challenge, already do more than merely give citizens the option of communicating this to others; many states publicize whether specific citizens voted or not in specific elections.<sup>146</sup> The constitutional jurisprudence of whether government can compel disclosure of whether individuals exercise constitutional rights is not well specified, with mandated disclosure of voting allowed, but with mandated disclosure of associational membership, in cases like *NAACP v. Alabama*,<sup>147</sup> prohibited.

But our email option does not concern a government-compelled disclosure. Instead the email option merely involves the government giving private individuals the option of having their registration verified to third parties chosen by the individual. The constitutionality of government merely giving the individual the option of having government disclose the exercise of a constitutional right of has never been addressed (to our knowledge) by a court. The government act of literally sending the email does constitute a kind of state action. The government's action verifies that an individual has registered (or is revoking their registration) and may give particular salience

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<sup>144</sup> The constitutionality of self-exclusion with regard to Second Amendment rights has separately been analyzed. Blocher, *supra* note 5, at 4-5; Selvaggio & Vars, *supra* note 59; Vars, *supra* note 31.

<sup>145</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992) (stating that state restriction is an undue burden if it has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus").

<sup>146</sup> See Alan S. Gerber, Donald P. Green & Christopher W. Larimer, *Social Pressure and Voter Turnout: Evidence from a Large-scale Field Experiment*, 102 AM. POL. SCI. REV. 33, 33 (2008).

<sup>147</sup> *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958). See also *NAACP v. Button*, 371 U.S. 415, 428-29 (1963) (striking down a Virginia statute requiring membership list disclosure).

to this piece of information. The mere fact that the government's action is triggered by, and contingent on, a private option does not immunize the state action from constitutional scrutiny.

Imagine, for example, that the state of Louisiana gave candidates the option of having their race listed on election ballots and the state did this for the purpose of facilitating private discrimination against African-American candidates. In 1964, the Supreme Court in *Anderson v. Martin* struck down an analogous Louisiana statute which compelled the designation of candidate race on ballots.<sup>148</sup> The Court reasoned that “by directing the citizen’s attention to the single consideration of race or color, the State indicates that a candidate’s race or color is an important—perhaps paramount—consideration in the citizen’s choice, which may decisively influence the citizen to cast his ballot along racial lines.”<sup>149</sup> Our hypothetical, which merely gave candidates the option of having the state report their race on ballots, would similarly be constitutionally infirm. The illegitimate purpose of facilitating private discrimination “by directing the citizen’s attention to the single consideration of race” would still likely be impermissible notwithstanding that any discrimination would be the byproduct of state and private action. The Supreme Court in *NAACP v. Alabama*, in striking down a compulsory disclosure statute, emphasized:

It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner’s members may have upon participation by Alabama citizens in petitioner’s activities follows not from *state* action but from *private* community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold.<sup>150</sup>

Similarly, it is the interplay of governmental and private action at play with regard to the email option that raises the question whether “private community pressures” might unconstitutionally burden individuals’ exercise of their Second Amendment rights.

As in other areas, the constitutionality of government merely offering to verify may turn on the government’s underlying purpose.<sup>151</sup> The hypothetical

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<sup>148</sup> *Anderson v. Martin*, 375 U.S. 399, 401-02 (1964).

<sup>149</sup> *Id.* at 402. See also Sonu Bedi, *Online Dating Sites as Public Accommodations: Facilitating Racial Discrimination*, in *FREE SPEECH IN THE DIGITAL AGE* (forthcoming Oxford University Press 2019) (Susan Brison & Katharine Gelber eds.) (manuscript at 17) (on file with authors) (arguing that by offering race filtering options, dating websites facilitate private associational discrimination).

<sup>150</sup> *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958).

<sup>151</sup> See *Washington v. Davis*, 426 U.S. 229, 239-40 (1976) (holding valid laws that were enacted for a facially neutral reason despite having a racially disparate impact).

Louisiana ballot option is unconstitutional because the previously assumed purpose of facilitating private race discrimination is illegitimate. In contrast, a state which gave voters the option of having the state publicly disclose that they had voted is likely not unconstitutional state action even if the state's purpose in granting the option was to cause more people to exercise their right to vote because that government purpose is likely to be deemed legitimate.

The Supreme Court's abortion decisions make clear that government need not passively accept how citizens choose to exercise their constitutional rights. For example, in *Planned Parenthood v. Casey*, the Court held: "[W]e permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion."<sup>152</sup> The purpose of expressing a state "preference for childbirth over abortion" is constitutionally permissible.<sup>153</sup>

Given this jurisprudence, we think it is likely also constitutionally permissible for a state to pass laws that have a purpose of expressing a state's preference for not bearing arms. The public health concerns of gun deaths each year, numbering in the tens of thousands, provide ample evidence to support the legitimacy of a government preference for reducing the prevalence of gun possession. Indeed, it is hard to imagine a court concluding that "protecting the life of the born" would not be as legitimate as "protecting the life of the unborn."

Opponents of the email option might nonetheless argue that the means of pursuing this government purpose by using "private community pressures" may unconstitutionally burden the individual's right to bear arms. In *Buckley v. Valeo*, the Supreme Court, in rejecting a facial constitutional challenge to certain mandated disclosures of campaign contributions, nonetheless carved out a potential exception "where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied."<sup>154</sup> The Court worried that "compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties."<sup>155</sup>

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<sup>152</sup> 505 U.S. 833, 883 (1992).

<sup>153</sup> See also *Gonzales v. Carhart*, 550 U.S. 124, 159-60 (2007) ("The State has an interest in ensuring so grave a choice is well informed . . . It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing . . . late-term abortions.")

<sup>154</sup> 424 U.S. 1, 71 (1976).

<sup>155</sup> *Id.* at 74. Subsequently, the Communist Party provided such evidence and was exempted from disclosing the identity of its contributors. *Fed. Election Comm'n v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416, 417-18 (2d Cir. 1982).

Without offering a definitive normative analysis of the constitutional limits to the government's ability to act as facilitator, several aspects of our email options argue strongly in favor of the constitutionality of our proposal. First, courts have already ruled that compelled public disclosure of gun permits can be constitutional. In *CBS v. Block*, the California Supreme Court upheld the right of "press and public" under the California Public Records Act to obtain information about the identities of those licensed to possess concealed weapons, doing so in the face of a dissent which expressly considered the *NAACP v. Alabama* possibility that disclosure might expose licensees to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."<sup>156</sup> The Nevada Supreme Court held similarly in 2010.<sup>157</sup> While now legislatively repealed, New York state law until 2013 compelled disclosure of the identity of all gun permit holders—thereby identifying all individuals possessing guns.<sup>158</sup> In comparison to this compelled public disclosure of all gun possessors or all people with concealed carry permits, our email proposal only discloses if the person electing not to possess chooses to have the registry send emails to particular addressees. Our registrant-chosen target disclosure emails present a stronger case for being constitutionally permissible than the compelled disclosure regimes that have survived repeated challenge.

Our model statute further tailors the scope of the email option to pass constitutional muster by prohibiting any commercial actor from refusing to contract on the basis of registry status unless the commercial actor has a sufficient self-defense interest in discouraging firearm possession by particular individuals. In *Heller*, the Supreme Court held that individual self-defense was "the *central component*" of the Second Amendment right.<sup>159</sup> The right to disassociate with people who possess arms is constitutionally at its strongest when the person disassociating is also making a decision about

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<sup>156</sup> 725 P.2d 470, 474 (Cal. 1986) ("Defendants' concern that the release of the information to the press would increase the vulnerability of licensees is conjectural at best."); *id.* at 477 (Mosk, J., dissenting) (quoting *NAACP v. Alabama*, 357 U.S. 449, 462 (1985)).

<sup>157</sup> *Reno Newspapers v. Sheriff*, 234 P.3d 922, 927 (Nev. 2010) ("[W]e conclude that Haley has not met his burden to show that the law enforcement or individual privacy concerns outweigh the public's right to access the identity of the permit holder . . . the identity of the permittee and any post-permit records identifying the permittee are not confidential.").

<sup>158</sup> NY Secure Ammunition and Firearms Enforcement (SAFE) Act, S. 2230 § 48(5), 2013-2014 Reg. Sess. (codified as amended in scattered sections) (N.Y. Jan. 15, 2013); *see also* J. David Goodman, *Newspaper Takes Down Map of Gun Permit Holders*, N.Y. TIMES (Jan. 18, 2013), <http://www.nytimes.com/2013/01/19/nyregion/newspaper-takes-down-map-of-gun-permit-holders.html> [<https://perma.cc/62R8-AF2H>].

<sup>159</sup> *District of Columbia v. Heller*, 554 U.S. 570, 599, 628 (2008) (stating that the "inherent right of self-defense has been central to the Second Amendment right"). *See also* *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) ("[I]n *Heller*, we held that individual self-defense is 'the *central component*' of the Second Amendment right.").

how best to defend their home—where, as *Heller* explained, “the need for defense of self, family, and property is most acute.”<sup>160</sup> Thus, our email option does not just make Second Amendment firearm rights contend with First Amendment associational rights, but our associational marketplace makes one person’s self-defense preferences contend with another person’s constitutionally equal self-defense preferences.

In June 2016, Anne Verrill, the owner of two restaurants in Portland, Maine, posted a photo of an AR-15 assault rifle along with the message: “If you own this gun, or you condone the ownership of this gun for private use, you may no longer enter either of my restaurants.”<sup>161</sup> If our email proposal was adopted, one might imagine that this owner would demand credible evidence that patrons had waived their right to possess firearms as a precondition of service. But our self-defense limitation would prohibit such discrimination. While a restaurant owner has a legitimate basis for prohibiting customers (or others) from carrying firearms onto her property,<sup>162</sup> she does not have a sufficient self-defense basis for refusing to serve customers who possess firearms remotely. Just as the *Masterpiece Cakeshop* baker was prohibited from refusing to make a cake for a same-sex wedding,<sup>163</sup> our proposal would prohibit most retail sellers from refusing to sell to gun possessors.

With an abundance of caution, our proposal would only allow those who live with or near the potential registrant or those who have an insurance interest in the potential waiver’s residence or life to condition their willingness to contract on waiver. Thus, our model statute would allow cotenants, landlords, and homeowners’ and condominium associations to condition an individual’s residency upon registering to waive his or her Second Amendment rights.<sup>164</sup> And as argued above, life and property insurers as well as landlords have sufficient property interests in defending the potential waiver’s residence and/or continued life to justify conditioning insurance or its terms on an individual’s waiver status.

A powerful case could be made for also allowing employers to condition employment on workers’ nonpossession of firearms. As mentioned above,

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<sup>160</sup> *Id.* at 628.

<sup>161</sup> Katharine Q. Seelye, *Think AR-15s Are O.K.? You’re Not Welcome Here*, N.Y. TIMES, <https://www.nytimes.com/2016/08/02/us/think-ar-15s-are-ok-this-restaurant-owner-doesnt-want-your-business.html> (Aug. 1, 2016).

<sup>162</sup> *See infra* Part V.

<sup>163</sup> *See* *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 370 P.3d 272, 283 (2016), *vacated*, 138 S. Ct. 1719 (2018) (considering whether Free Speech or Free Exercise of Religion provisions exempt a commercial enterprise from anti-discrimination laws); Jacob Gershman & Tamara Audi, *Court Rules Baker Can’t Refuse to Make Wedding Cake for Gay Couple*, WALL ST. J. (Aug. 13, 2015, 6:51 P.M.), <https://www.wsj.com/articles/court-rules-baker-cant-refuse-to-make-wedding-cake-for-gay-couple-1439506296> [<https://perma.cc/2PVY-R4YJ>].

<sup>164</sup> *See infra* Appendix.

there were 14,770 workplace homicide victims between 1992 and 2012.<sup>165</sup> The very term, “going postal,” derives from “a series of sensational murders at U.S. Postal Service branches” in the late 1980s and early 1990s.<sup>166</sup> A reasonable employer might decide that employee gun possession makes the work place less safe. Nonetheless, our model statute prohibits employment discrimination on the basis of waiver status.

While we limit the ability of some commercial contractors to discriminate on the basis of registry status, we place no such limitation on the noncommercial associational choices. Private citizens under our proposal would be free to withhold love, affection, and friendship to people who failed to register (as signaled by the email option). Neighbors could refuse to fraternize or allow their kids to have play dates or sleepovers on this basis. While the associational First Amendment rights of commercial actors, like their free-speech First Amendment rights, are subject to constitutional restriction,<sup>167</sup> we are chary to restrict the associational rights of noncommercial individuals and organizations.<sup>168</sup> Individuals’ choice not to renounce their Second Amendment rights might limit their ability to interact with others in noneconomic spheres, but they remain free to find their own communities of kindred spirits.

In weighing the burdens of the email option on the self-defense choices of potential registrants, it is essential to also take into account the concomitant benefits that the email option produces with regard to the same constitutional values. For example, consider a potential registrant who only registers because of the associational pressure of losing the right to associate with a neighbor who conditions their association on receiving an email. We can say that the registrant’s self-defense choices were burdened by the email option (and the possibility of associational pressure that it created). But the email option *further*s the associational interests and self-defense interests of the neighbor. The neighbor can make more informed associational choices and thereby further her self-defense preference of being less exposed to potentially armed interactions. A similar analysis applies to those potential registrants who, when faced with association, pressure still choose not to register. We can again say that the nonregistrant’s self-defense choices were burdened by the email option, because the price of bearing arms is forgoing association with the neighbor. But the email option again furthers the association and self-defense of the neighbor who by disassociation can again further her self-defense preference of being less exposed to potentially armed interactions. In both

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<sup>165</sup> See CDC, *supra* note 107.

<sup>166</sup> See LINDA HAMILTON KRIEGER, BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 192 (2010).

<sup>167</sup> Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984); see also Gershman & Audi, *supra* note 163.

<sup>168</sup> Boy Scouts of America v. Dale, 530 U.S. 640, 656 (2000).

these cases, there is a symmetry of constitutional interests. However, there is a final pairing where the email option furthers the associational interests of both the registrant and the (pressuring) neighbor. Without the email option, there may be people who want to register independent of any associational pressure who are still unable to engage in certain forms of association because they are not able to credibly communicate their unarmed status to their neighbor. In this situation, the email option furthers the constitutional interests of both the registrant and the neighbors because the credible signal of registry allows them to achieve association that also comports with their shared self-defense choice that the registrant not be armed. Thus, even if a court were to assess the associational pressure of the neighbor as constitutional burden, it would need to balance the offsetting benefits regarding the same associational and self-defense interests.

Stepping back, we have proposed a system of limited government intervention to promote informed association by reporting registration only when commercial contractors without sufficient self-defense interests—including employers and virtually all retailers of goods and services—would be prohibited from discriminating against someone for failing to waive the rights to purchase or possess firearms.<sup>169</sup> The email option is a modest form of state action where the state in a sense agrees to pass along a registrant message to particular addressees (and by doing so verifies that the registry or revocation has in fact occurred). While the exact contours of any possible constitutional duty on government to refrain from facilitating associational preferences are debatable, we are confident our proposed email option—given (1) the constitutionality of compelled public disclosure of various gun permits and (2) our prohibiting associational discrimination by commercial contractors without sufficient self-defense interests in the firearm choices of others—passes constitutional muster.

#### IV. IMPLEMENTATION

Our proposal could be implemented by a congressional statute adding individuals who registered to waive their purchase and possession rights as an additional NICS category. However, federal firearms legislation has historically been difficult to pass.<sup>170</sup> A more politically viable alternative is for

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<sup>169</sup> With regard to all of these contractors, an individual's right to bear arms would be market-inalienable. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1850 (1987) ("Something that is market-inalienable is not to be sold, which in our economic system means it is not to be traded in the market.").

<sup>170</sup> Jonathan Weisman, *Gun Control Drive Blocked in Senate; Obama, In Defeat, Sees 'Shameful Day'*, N.Y. TIMES, Apr. 18, 2013, at A1. Even lifting the ban on federal funding of gun research is highly contested. David Smith, *Obama Looks to Expand Background Checks for Guns with Executive Action: White House Says It Is Also Exploring So-Called Gun Show Loophole As House Democrats Push To Have Federal Ban on Gun Violence Research Funding Lifted*, THE GUARDIAN

individual states to implement the proposal by exploiting an existing state option to expand NICS coverage. The existing federal background check system already allows states to add categories of covered individuals into the NICS system, because under the federal law, the NICS system prohibits transfer of a firearm where barred by federal *or state* law.<sup>171</sup> Individual states have already taken advantage of this option to expand the class of prohibited individuals. For example, Illinois prohibits people who have voluntarily admitted themselves within the past five years to “a mental institution for mental health treatment.”<sup>172</sup> In effect, Illinois already has a version of our proposed libertarian gun control, because by volunteering to be admitted, an individual waives the right to possess or purchase firearms for the next five years. As of 2017, more than 1,000,000 individuals were included in NICS solely because they were prohibited from possessing firearms under state law (and hence under NICS are categorized as “state prohibitors”).<sup>173</sup>

An individual state could accordingly implement our proposal for “libertarian gun control” by simply creating a state waiver registry and passing legislation making it illegal for residents who register to possess or purchase firearms. This state statute would thereby create a new prohibitor category, and the residents who registered with the state would then automatically qualify for inclusion in the NICS system. The state on an ongoing basis would forward registrant information to the FBI,<sup>174</sup> and the resident registrants would then be barred from purchasing firearms anywhere in the nation.

In fact, by creating a new category of individuals who cannot lawfully possess firearms, a state cannot only prevent its resident registrants from purchasing guns in other states, but it may also prevent nonresidents from purchasing guns in that state. As explained in the FBI’s Federal Firearm Licensee Manual, “The National Instant Criminal Background Check System (NICS) is required to deny the transfer of a firearm to any individual who is found to be prohibited under state law, i.e., under the law of the purchaser’s

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(U.K.) (Dec. 10, 2015), <https://www.theguardian.com/us-news/2015/dec/10/obama-background-checks-guns-executive-action-gun-show-loophole> [<https://perma.cc/C7BZ-SH3V>].

<sup>171</sup> 18 U.S.C. § 922(t)(4), (5) (2018); F.B.I., *supra* note 9.

<sup>172</sup> 720 ILL. COMP. STAT. 5/24-3.1 (2015). Illinois is not alone. *See* DEL. CODE ANN. tit. 11, § 1448(a)(2) (2018); D.C. CODE § 7-2502.03(a)(6) (2015); GA. CODE ANN. § 16-11-129(b)(2)(J); MASS. ANN. LAWS ch. 140, § 131(d)(ii) (2018); *State v. Dunham*, No. 9812012054, 1999 WL 1223767, at \*3 (Del. Super. Ct. Oct. 6, 1999) (“[T]he person’s voluntariness is irrelevant . . .”).

<sup>173</sup> *See supra* note 112 and accompanying text.

<sup>174</sup> The NICS system allows states to choose whether to maintain their own databases for at least some background checks. *See* 28 C.F.R. § 25.2 (providing that state point of contact can “check state and local record systems,” as well as NICS). As of 2013, in 36 states, dealers contacted the FBI directly for all background checks. F.B.I., *supra* note 9, at 3. But all states have the option of passing on names of persons who fall into a prohibited possession category to the FBI, so our proposal would merely be adding a new prohibitor category that could be transmitted. *See* 28 C.F.R. § 25.4 (stating that reporting by states to NICS is voluntary).

state of residence and/or the law of the state where the transfer occurs.”<sup>175</sup> As shown in Table 2, a state’s prohibitor category would not apply only if the person with the prohibitor characteristic was not a resident of the prohibitor state *and* was not attempting to purchase in the prohibitor state. Accordingly, if a single state passed such a “No Guns Registry” statute, it could create a small commitment gift for residents of other states as well, because these residents of other states who registered with the passing states registry would be barred from purchasing guns in the passing state.

**Table 3: Extraterritorial Effect of State Prohibitor  
(including “No Guns” Waiver) Categories**

		Place of Purchase or Possession	
		Prohibiting State	Non-Prohibiting State
Place of Residence	Prohibiting State	Applies	Applies
	Non-Prohibiting State	Applies	Does Not Apply

Moreover, our proposed statute provides for reciprocity that would allow a subset of states to increase the footprint of a registration’s effect. Crucially, the statute provides that “registering in any other state that adopts an analogous ‘No Guns’ registry renders possession of a firearm illegal” in other passing jurisdictions.<sup>176</sup> Thus, if California and Illinois both passed the model statute, then anyone who registered in either state could not then legally possess in either state. We do not anticipate that our model statute would be enacted in

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<sup>175</sup> FED. BUREAU OF INVESTIGATION, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) FEDERAL FIREARMS LICENSEE MANUAL 2 (last visited Feb. 7, 2019), <https://www.fbi.gov/services/cjis/nics> [<https://perma.cc/7G8G-7NGJ>]. *But cf.* *Mance v. Holder*, 74 F. Supp. 3d 795, 814 (N.D. Tex. 2015) (holding interstate handgun transfer ban unconstitutional); 27 C.F.R. § 478.99 (barring interstate handgun transfers and stating that sellers may not sell to buyers who are too young under state law “applicable at the place of sale”). The broadest reading of “State law,” 18 U.S.C. § 922(t)(4), (5), under the federal background check statute would prevent purchase in *every* state by anyone barred by *any* state’s law. Longstanding principles of extraterritoriality and choice-of-law militate against such an interpretation. *See* *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) (“Crimes and offenses against the laws of any state can only be defined, prosecuted, and pardoned by the sovereign authority of that state.”). But they do not preclude it: “[C]oncerns regarding extraterritorial effects of state law are misplaced. We are dealing with a federal statute which has incorporated state law into its application. Upon incorporation, that state law became a part of the federal statutory scheme; so, it is federal law being given effect, not state law.” *In re* *Stockburger*, 192 B.R. 908, 910 (E.D. Tenn. 1996).

<sup>176</sup> *See infra* Appendix, Section 3.

many states at once, but we can easily imagine gradual passage by states that have shown an appetite for various other firearms restrictions.<sup>177</sup>

### CONCLUSION

In this Article, we have laid out a plan for a new kind of gun control that is inexpensive, politically feasible, and likely, within just a few years, to save thousands of lives. Our proposal to allow individuals to waive their Second Amendment rights is inexpensive because it merely calls for an online registry to supplement the existing NICS system. Our proposal does not add any additional burdens on gun dealers who already have to query the NICS system before selling.

The “No Guns Registry” is politically feasible not only because of its libertarian and freedom-enhancing quality, but also because it can be implemented by individual states without requiring Congressional action. Indeed, Delaware, Illinois, Massachusetts, and the District of Columbia have already enacted a version of our proposal by allowing individuals to opt into the NICS system by volunteering to be committed for mental health purposes. There are good reasons why we might be concerned about such waivers via voluntary commitment, as the individuals at the moment of voluntary commitment may have reduced decisional capacity and we worry that the Second Amendment consequences of waiver are not sufficiently disclosed. It is worrisome that people in these states are forced to give up their constitutional right as a pre-condition for receiving mental health care. But our proposal avoids these concerns. The registry does not systematically target people *in extremis* and fully discloses the consequences of waiver, including the process for subsequently rescinding the waiver. Moreover, the option of waiver is not a government required quid pro quo for mental health or any other services. While our email option allows individual neighbors, cotenants, and insurers to require waiver as an associational prerequisite, nonwaiving individuals are free to seek out other associational communities making different self-defense decisions.

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<sup>177</sup> States that are already voluntarily reporting to NICS large numbers of people disqualified by federal mental health restrictions might be the most likely to enact. The top ten reporting states are Pennsylvania, New Jersey, Virginia, Delaware, California, Washington, Michigan, New York, Texas, and Colorado. EVERYTOWN, CLOSING THE GAPS: STRENGTHENING THE BACKGROUND CHECK SYSTEM TO KEEP GUNS AWAY FROM THE DANGEROUSLY MENTALLY ILL 12 (2014).

Under the FBI's current interpretation that “state law” includes either the transaction state or the buyer's state of residence, *see supra* text accompanying note 175, residents of any state that passes the model statute would be barred from purchasing nationwide. But the reciprocity would broaden the scope of resident registrants in the circumstance that the federal government limited NICS to the place of transaction. Under that interpretation, a registrant in California would be barred from purchasing in either California or Illinois. To implement reciprocity, enacting states would need to share registrant information with other each other (as is provided in Section 2 of the model statute). *See* Appendix.

The “No Guns Registry” sees government not simply as a source of mandates and prohibitions but as a platform that can facilitate citizens coming together to make common cause.<sup>178</sup> Instead of traditional state action, the government as platform merely facilitates citizen action. Our registry platform not only facilitates the associational marketplace of those most affected by individual gun-acquisition decisions, it allows millions of geographically dispersed Americans to publicly signal their aggregate willingness to dispense with firearms.

While we have structured our proposal to appeal to people with varying political commitments, reasonable people might nonetheless oppose this enhancement of individual freedom. People might oppose the email option because they predict that a disassociation market place will reduce social cohesion by unhelpfully moving us toward an overly transparent world in which citizens can base their willingness to interact on a host of personal choices that have been largely shrouded. Alternatively, people might oppose the registry more generally out of a fear that it might either facilitate or impede the enactment of other gun-control measures. For example, citizens who would have supported an across-the-board mandatory waiting period as a commitment device may become quiescent once they can opt for their own. Or the legislative energy necessary to enact a waiver registry may divert attention from other gun control initiatives that might have larger impacts on public safety.<sup>179</sup> On the other hand, if the associational marketplace “decides” that a substantial majority of citizens support waiver, this demonstration of support might lead legislators toward imposing a waiting period before all gun sales.

But to condition one’s support crudely on whether our proposal is likely to increase or decrease the prevalence of private possession of firearms continues the divisive trap that has plagued our national debate on gun control. The associational marketplace lets the people decide what kinds of self-defense communities they desire. It acknowledges the varying spillover effects that one person’s decision to possess may have on others and on his or her future self. Giving people the right to waive their gun rights is not a silver-bullet solution to gun violence, but it is a low-cost and pragmatic enhancement of our liberty that can, by garnering the substantial support our two studies demonstrate, predictably save hundreds of lives each year.

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<sup>178</sup> See Ayres, *supra* note 47, at 33 (“[T]he same advances in technology that have made Kickstarter and Groupon possible can be leveraged to allow new sets of similarly-minded citizens to make common cause.”).

<sup>179</sup> Analogous possible demotivating effects of personal freedom can be found in many contexts. Giving retailers the individual option of banning guns in their stores may discourage them from lobbying for mandatory gun control. Giving individual passengers the option of seatbelts may discourage them from lobbying for air bags.

## APPENDIX

## MODEL FIREARM SELF-RESTRICTION ACT

SYNOPSIS: Under current law, people who fear that they may become a risk to themselves or others are not allowed to restrict their legal ability to purchase firearms.

This bill would authorize people to add their own names into the background check system to protect themselves and others against impulsive gun violence.

BE IT ENACTED BY THE LEGISLATURE OF [STATE]:

Section 1. [The STATE AGENCY RESPONSIBLE FOR NICS REPORTING] within one year of the passage of this Act shall develop and launch a secure Internet-based platform to allow any person residing in the United States to register to add their name to the “[STATE] No Guns Registry.”

(a) The [AGENCY] shall ensure that this Internet-based platform credibly (i) verifies the identity of any persons who opt to register, (ii) prevents unauthorized disclosures of any registering persons, and (iii) informs the individual of the legal effects of registration.

(b) In addition, the Internet-based platform shall provide registrants with an email notification option that shall allow registered individuals to identify at the time of registration or thereafter one or more email addresses. The platform will separately ask whether a registrant wishes to provide the email addresses of his or her physician or healthcare provider. The platform shall notify any such email addressees that the individual has registered his or her name with the “[STATE] No Guns Registry” and has thereby waived his or her right to bear arms, and the platform shall also notify any such addressees if the individual subsequently seeks to rescind his or her waiver. Providing email contact information constitutes an express authorization of such use of records.

Section 2. Once the Internet-based platform becomes operative, any person may request via the platform to be added to the “[STATE] No Guns Registry.” The [AGENCY] shall on an ongoing basis forward registry information to the Federal Bureau of Investigation to be entered into the NICS Index Denied Persons File, and to any other state that adopts an analogous “No Guns Registry.”

Section 3. Registering for the “[STATE] No Guns Registry” or registering in any other state that adopts an analogous “No Guns Registry” renders possession of a firearm illegal in [STATE]. If a person is in the NICS

due to registering in [STATE] or in another state, receipt of a firearm from a person or entity required to perform a background check violates [STATE] law. Knowing possession of a firearm by a person validly registered on the “No Guns Registry” is punishable by a fine of up to \$500. Transfer of a firearm to a person on the “[STATE] No Guns Registry” by any person or entity required to perform a background check, either knowingly or due to a failure to perform a background check, is punishable by a fine up to \$10,000 and/or imprisonment for no more than one year.

Section 4. A person who has registered with the “[STATE] No Guns Registry” may subsequently request that his or her name be removed from the registry by a secure method conveyed to the [STATE]’s Internet-based platform. The [AGENCY] shall wait twenty-one days after receipt before notifying the FBI to remove the requesting person from the NICS Index Denied Persons File and then the [AGENCY] shall purge any and all records of the sign up, transactions, and removal. A person who has registered with the [STATE] No Guns Registry may deregister by applying for immediate deregistration to a Superior Court and proving by a preponderance of the evidence that he or she is not likely to act in a manner dangerous to public safety (including danger to self) in a proceeding where any public official or interested party may also present evidence.

Section 5. A person who knowingly makes a false statement regarding their identity on the voluntary waiver of firearm rights form or revocation of waiver of firearm rights form is guilty of false swearing under [cite relevant section].

Section 6. (a) In employment, education, government benefits, and contracting, it shall be illegal to inquire whether an individual under this Section has requested to be added to or removed from the “[STATE] No Guns Registry” and it shall be illegal to take action based such information. However, notwithstanding the foregoing prohibition, it shall not be illegal for an insurer with regard to life, homeowners’ or renter’s insurance to inquire or base the terms, premia, or issuance of insurance on such information. Nor shall it be illegal for a cotenant, landlord, homeowner’s association, or condominium association to condition terms of ownership, tenancy, occupancy, or status as an invitee on such information.

(b) Individuals or organizations who learn, from the “[STATE] No Guns Registry” or otherwise, the identity of someone who has requested to be added to or removed from the registry shall have a duty not to disclose that information to others unless the individual or organization receives separate nonregistry authorization from the waiving individual to share that information. Violation of this section shall be criminally punishable by a fine of up to \$10,000 and/or imprisonment for no more than one year.

Section 7. A person voluntarily presenting in an acute-care hospital or a satellite emergency facility who is reasonably believed by the treating clinician to be suffering from a diagnosis of depression, using standardized definition of such diagnosis as set forth in the Diagnostic and Statistical Manual of Mental Disorders as published by the American Psychiatric Association, shall be presented with the opportunity of registering on the Internet-based “[STATE] No Guns Registry.” Any suicide hotline maintained or operated by any entity funded in whole or part by the state shall inform callers about the opportunity of registering with the registry. All Department of Motor Vehicle offices serving the public shall offer individuals the opportunity of registering on the Internet-based “[STATE] No Guns Registry.”