

# SELF-DEFENSE AGAINST GUN SUICIDE

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**Abstract:** Around twenty-thousand Americans each year commit suicide using a gun. Many would survive if it were more difficult to obtain the gun. The proposal here is not for gun control, but self control. Specifically, this article proposes allowing individuals to confidentially put their names into the existing federal background check system to prevent or delay their own future firearm purchases. Empowering people to restrict their own access to guns has the potential to save many lives, is supported by other self-binding regimes, and poses no serious constitutional concerns.

*It is always thus, impelled by a state of mind which is destined not to last, that we make our irrevocable decisions.*

—Marcel Proust<sup>1</sup>

## INTRODUCTION

Suicide is a largely ignored public health crisis. Mass shootings usually dominate the news, but firearm suicide is a much larger killer. In recent years, an average of one hundred and thirty-three people have died annually in mass shootings in the United States.<sup>2</sup> Around twenty-thousand people each year commit suicide with a firearm.<sup>3</sup>

This article proposes empowering people to erect for themselves a barrier against suicide. Specifically, an individual could voluntarily add his or her own name to the list of those already prohibited from purchasing a firearm in the current federal background check system. The individual could then have his or her name removed after a seven-day waiting period.

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<sup>1</sup> WITHIN A BUDDING GROVE, PART ONE 215 (C.K. Scott Moncrieff trans., 1951).

<sup>2</sup> Kevin A. Kepple et al., *Mass Shootings Toll Exceeds 900 in Past Seven Years*, USA TODAY (Dec. 3, 2013), <http://www.usatoday.com/story/news/nation/2013/02/21/mass-shootings-domestic-violence-nra/1937041/1> [<http://perma.cc/JA9H-SG5J>].

<sup>3</sup> DONNA L. HOYERT & JIAQUAN XU, NAT'L VITAL STATISTICS REPORTS, DEATHS: PRELIMINARY DATA FOR 2011, at 19 (2012).

There are good reasons to think that this modest proposal could significantly reduce suicide. Most suicides are impulsive. The time period between a decision to commit suicide and an attempt is usually less than a day.<sup>4</sup> The overwhelming majority of people who survive a suicide attempt die at a later date from a cause other than suicide, suggesting that suicidal impulses usually dissipate with time.<sup>5</sup> Firearms have a much higher fatality rate than nearly every other suicide method.<sup>6</sup> Waiting periods, however, have been shown to reduce suicide for some groups of people.<sup>7</sup> The present proposal seeks to prevent suicide by allowing people essentially to opt for a waiting period to purchase a firearm.

An actual case illustrates the utility of this proposal. Jonathan Jacoves was described by his father as a “happy-go-lucky, pro tennis player.”<sup>8</sup> That was before Jonathan’s mental health deteriorated. At age twenty, he attempted suicide by overdosing on nonprescription medication and was diagnosed with “major depressive disorder, recurrent in a schizoid paranoid personality with suicidal potential and ideation.”<sup>9</sup> Before being discharged from the hospital, Jonathan entered into a contract with his parents through which he agreed not to commit suicide for four months.<sup>10</sup> Jonathan told a psychiatric aide about the agreement and that “he hoped he meant it, but doubted it.”<sup>11</sup> Eleven days after his release from the hospital, Jonathan purchased a rifle from a sporting goods store and, the same day, used it to commit suicide.<sup>12</sup>

The present proposal could well have saved Jonathan’s life. His elevated risk of suicide was apparent to everyone, including himself. Jonathan did not want to commit suicide, and even pledged not to, but he did not trust his own willpower. Had Jonathan been able to put his name into the federal background check database upon his discharge from the hospital, he would not have been able to purchase the deadly rifle less than two weeks later. He could have used an alternative method to commit suicide, to be sure, but

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<sup>4</sup> Linda G. Peterson et al., *Self-Inflicted Gunshot Wounds: Lethality of Method Versus Intent*, 142 AM. J. PSYCHIATRY 228, 228–31 (1985).

<sup>5</sup> Matthew Miller & David Hemenway, *Guns and Suicide in the United States*, 359 NEW ENG. J. MED. 989, 989 (2008).

<sup>6</sup> Matthew Miller et al., *Suicide Mortality in the United States: The Importance of Attending to Method in Understanding Population-Level Disparities in the Burden of Suicide*, 33 ANN. REV. PUB. HEALTH 393, 397 tbl.1 (2012) [hereinafter Miller et al., *Suicide Mortality*].

<sup>7</sup> Jens Ludwig & Philip J. Cook, *Homicide and Suicide Rates Associated with Implementation of the Brady Handgun Violence Prevention Act*, 284 JAMA 585, 585 (2000) (reporting a decrease in gun suicides for victims aged fifty-five years or older after the enactment of the Brady Handgun Violence Prevention Act).

<sup>8</sup> RITA ROBINSON, SURVIVORS OF SUICIDE 55 (1989).

<sup>9</sup> *Jacoves v. United Merch. Corp.*, 11 Cal. Rptr. 2d 468, 472–73 (Cal. Ct. App. 1992).

<sup>10</sup> *Id.* at 474.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

probably not one as lethal as a firearm. Under the proposed approach, Jonathan would have had to submit new paperwork and wait an additional seven days before he could purchase a firearm. One cannot know whether Jonathan's resolve to commit suicide would have faded in that time, but, as noted above, most suicide attempts are impulsive, not deliberative.

Jonathan made a commitment to his parents, which he then broke. This article's proposal would allow for something stronger: an enforceable "pre-commitment" not to buy a gun in the future, which this article refers to as Precommitment Against Suicide or "PAS." One scholar, Jon Elster, has aptly described the general structure of precommitment thusly:

At time 1 an individual wants to do A at time 2, but anticipates that when time 2 arrives he [or she] may or will do B unless prevented from doing so. In such cases, rational behavior at time 1 may involve precautionary measures to prevent the choice of B at time 2, or at least to make that choice less likely.<sup>13</sup>

The classic example is Ulysses ordering his men to tie him to the mast so that he would not succumb to the otherwise irresistible Sirens' song.<sup>14</sup> Guarding against a foreseeable impulse or defect in reason is a compelling justification for precommitment and one that applied to both Ulysses and Jonathan.

Precommitment has been a successful deterrent in two analogous contexts: (1) psychiatric advance directives and (2) self-exclusion from gambling. In the former, a potential patient gives instructions regarding medical care during an anticipated period of incapacity. In the latter, a person puts him or herself on a list of people prohibited from gambling. In both contexts some commentators worry that the precommitment itself may reflect passion, not reason. The same concern applies to PAS, but there are two fundamental differences that outweigh it. First, suicide is irreversible; the other results are not. Second, a seven-day waiting period to undo the PAS is a relatively small obstacle that helps to ensure deliberation.<sup>15</sup>

Importantly, PAS is constitutional.<sup>16</sup> Even assuming, arguendo, that PAS infringes upon the right to bear arms or the right to die, it still passes strict scrutiny. Allowing individuals who fear suicide to delay their own gun pur-

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<sup>13</sup> JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 5 (2000) [hereinafter ELSTER, *ULYSSES UNBOUND*].

<sup>14</sup> HOMER, *THE ODYSSEY*, Book XII (Samuel Butler trans., 2013), available at <http://classics.mit.edu/Homer/odyssey.12.xii.html> [<http://perma.cc/MRG3-QCXH>]; see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1113 (1972) (describing Ulysses's order as "self paternalism").

<sup>15</sup> See Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211, 1238–40 (2003) (explaining the so-called "cooling off" period).

<sup>16</sup> See *infra* notes 158–232 and accompanying text.

chases is narrowly tailored to the compelling government interest in preventing suicide. The do-not-call list—which allows individuals to opt-out of receiving telemarketing calls—is a close analog. There, courts applying strict scrutiny have upheld the list because it is narrowly tailored to the compelling government interest in protecting privacy.<sup>17</sup> Like the do-not-call list, PAS is limited to volunteers, which ensures that it is no broader than necessary.

This article proceeds in five sections. Part I situates and outlines the PAS proposal.<sup>18</sup> Drawing on research about suicide, Part II argues that PAS would likely save many lives at relatively little cost.<sup>19</sup> Part III then explains the theory of precommitment and argues that firearm purchase is an almost ideal situation for it.<sup>20</sup> That conclusion is then supported by analogy to two comparable precommitment regimes. Finally, Part IV establishes that PAS is constitutional<sup>21</sup> and Part V discusses counter-arguments from the left and right.<sup>22</sup> A brief conclusion follows.

### I. THE PAS PROPOSAL

PAS is a modest proposal. It can be characterized as an opt-in waiting period for firearms purchases. There is no federal waiting period to purchase firearms, though eleven states have them.<sup>23</sup> A few additional states have license or permit requirements that include some delay, at least for first firearm purchases.<sup>24</sup>

Purchase delays under federal law are also possible but rare. All purchases from Federal Firearms Licensees, which include, in effect, all commercial sellers, require a background check through the National Instant Criminal Background Check System (“NICS”).<sup>25</sup> Certain categories of individuals (e.g., convicted felons) are thereby prevented from purchasing fire-

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<sup>17</sup> *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm’n*, 358 F.3d 1228, 1242 (10th Cir. 2004).

<sup>18</sup> See *infra* notes 23–33 and accompanying text.

<sup>19</sup> See *infra* notes 34–102 and accompanying text.

<sup>20</sup> See *infra* notes 103–157 and accompanying text.

<sup>21</sup> See *infra* notes 158–232 and accompanying text.

<sup>22</sup> See *infra* notes 233–238 and accompanying text.

<sup>23</sup> Brian Burns, Note,  *Holding Fire: Why Long Waiting Periods to Buy a Gun Violate the Second Amendment*, 7 CHARLESTON L. REV. 379, 399–400 (2013). Six states have waiting periods for all firearms, four states have waiting periods for handguns only, and one state has a waiting period solely for long guns. *Id.* Of the six states with waiting periods for all firearms, two states have periods longer than seven days and three have seven-day waiting periods. *Id.* at 399. Illinois has two waiting periods: a seventy-two hour waiting period for handguns and a twenty-four hour waiting period for long guns. *Id.*

<sup>24</sup> See *id.* at 400 n.165 (citing HAW. REV. STAT. § 134-2(e) (2008)).

<sup>25</sup> FED. BUREAU OF INVESTIGATION, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS 2012, <http://www.fbi.gov/about-us/cjis/nics/reports/2012-operations-report> [<http://perma.cc/DQP4-HT4K>] [hereinafter NICS OPERATIONS].

arms.<sup>26</sup> If NICS cannot clear a person within three days, the transaction can go forward without a completed check.<sup>27</sup> Over ninety percent of NICS determinations are made while the dealer is still on the phone.<sup>28</sup>

Against this backdrop, PAS would work in the following way. A simple form asking to be put on the “No-Guns List” would be made widely available at gun shops, health care provider locations, and on the internet.<sup>29</sup> An individual could sign the form, have it notarized, and send it to the administrator of the federal background check system, who would enter the individual’s name into the system.<sup>30</sup> As soon as the form is received and processed, the individual would be prohibited from purchasing a firearm from a licensed dealer.<sup>31</sup> The process would be the same to be removed from the list, except that removal would take place seven days after receipt of the notarized form. Whether a person was prohibited from purchasing a gun would remain confidential to everyone but a dealer undertaking a required background check, and not even such a dealer would know why an individual was in the system.<sup>32</sup> Outside of background checks, these records may only be accessed by governmental agencies in connection with the issuance of a firearm or explosives-related permit or license, and by the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) in connection with law enforcement activity related to a firearm offense.<sup>33</sup>

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<sup>26</sup> 18 U.S.C. § 922(g)(1) (2012).

<sup>27</sup> NICS OPERATIONS, *supra* note 25.

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

<sup>29</sup> A government mandate may or may not be needed. *See* Associated Press, *N.H. Suicide Prevention [sic] Project Focuses on Gun Shops*, USA TODAY (Apr. 20, 2013), <http://www.usatoday.com/story/news/nation/2013/04/20/nh-suicide-prevention-guns/2099175/> [<http://perma.cc/7UEC-YX88>] (reporting that half of contacted gun shops were voluntarily using suicide prevention materials).

<sup>30</sup> It may be possible to design the program to allow for completely online transactions. *See NotaryCam: Sign It for Sure*, <https://www.notarycam.com/> [<http://perma.cc/67MG-KB93>] (offering webcam notarization valid in all states for twenty-five dollars per notarization).

<sup>31</sup> PAS would restrict purchase, not possession. The goal is prevention, not punishment. This differs from current federal law. *See* 18 U.S.C. § 922(g) (prohibiting possession of a firearm by certain classes of people); *see also* David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578, 2595–97 (2013) (describing federal prosecution for illegal gun possession, not purchase, by a mentally ill man who had used a gun in a failed suicide attempt).

<sup>32</sup> *See* 28 C.F.R. § 25.6(C)(2) (2015) (explaining precautions in place to maintain confidentiality).

<sup>33</sup> *Id.* § 25.6(j). Not even a criminal defendant would have a constitutional right of access to PAS information, because confidentiality is not “disproportionate” to the goal of encouraging PAS participation. *Cf.* *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006) (explaining that evidentiary rules disproportionate to the ends that they are asserted to promote are not constitutional). Although this article proposes a federal program, state level versions are also possible. Some states already perform their own background checks, which could be expanded at relatively low cost.

## II. RATIONALE SUPPORTING PAS

PAS is a new method of reducing access to firearms and empowering people at risk for suicide to protect themselves. There are at least three ways PAS might reduce suicide. The first and most direct pathway is by preventing the purchase of a firearm for quick use in a suicide attempt, as with Jonathan Jacoves.<sup>34</sup> As described below, research shows that waiting periods reduce gun prevalence, and that lower gun prevalence reduces suicides.<sup>35</sup> This will reduce the chances that there will be a gun in the home should suicidal thoughts arise in the future.

Second, introducing and advertising PAS may reduce gun access even among people who do not participate. Suicide prevention efforts already advise putting firearms out of reach of people at high risk.<sup>36</sup> Launching a new federal program to reduce suicide by voluntarily curbing access to firearms will help disseminate well-established findings showing the benefits of getting existing firearms out of the house.<sup>37</sup> Some people and their families may decide to remove or lock up firearms even if they do not opt for PAS.

Third, providing a relatively easy avenue for people concerned about suicide to reduce their own risk of self harm may help alleviate the despair and anxiety that pushes them toward suicide in the first place. PAS would be a new method of restricting access to lethal means, which is already a component of certain safety protocols employed by the U.S. Department of Veterans Affairs with high-risk veterans.<sup>38</sup> Like other aspects of safety planning fo-

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<sup>34</sup> See *supra* notes 8–12 and accompanying text.

<sup>35</sup> Gary Kleck & E. Britt Patterson, *The Impact of Gun Control and Gun Ownership Levels on Violence Rates*, 9 J. QUANTITATIVE CRIMINOLOGY 249, 271 (1993). It should be noted that an individual who has volunteered for PAS may be less likely to purchase a firearm at all, even during non-suicidal periods.

<sup>36</sup> See *Suicide Prevention*, HEALTH NET FED. SERVS., [https://www.hnfs.com/content/dam/hnfs/tn/common/pdf/wellness\\_newsletter/PF0614x033%20suicide%20prevent.pdf](https://www.hnfs.com/content/dam/hnfs/tn/common/pdf/wellness_newsletter/PF0614x033%20suicide%20prevent.pdf) [<http://perma.cc/NLV8-EYYL>] (“If you sense an individual is in immediate danger . . . [r]emove any firearms, drugs or sharp objects that could be used in a suicide attempt.”); *Suicide Risk Factors*, NAT’L SUICIDE PREVENTION LIFELINE, <http://www.suicidepreventionlifeline.org/learn/riskfactors.aspx> [<http://perma.cc/4TH8-VJRN>] (listing as risk factor “[e]asy access to lethal means”). Massachusetts passed a bill to prevent suicide by reducing access to lethal means. See H.B. 4278, 188th Gen. Court (Mass. 2014), available at <https://malegislature.gov/Bills/188/House/H4278> [<http://perma.cc/9H9C-JWGF>].

<sup>37</sup> E. Michael Lewiecki & Sara A. Miller, *Suicide, Guns and Policy*, 103 AM. J. PUB. HEALTH 27, 28 (2013) (“[T]here is now a large body of evidence suggesting that [firearm access] restriction not only reduces suicides by that method but also reduces overall suicide rates.”); Miller & Hemenway, *supra* note 5, at 990 (reporting an almost double overall suicide rate in high gun ownership states as compared with low gun ownership states).

<sup>38</sup> U.S. DEP’T OF VETERANS AFFAIRS, SAFETY PLAN QUICK GUIDE FOR CLINICIANS (2012), <http://www.mentalhealth.va.gov/docs/VASafetyPlanColor.pdf> [<http://perma.cc/CVC4-JAVN>] (explaining safety planning, which involves a series of concrete steps taken to reduce suicide risk and remains the standard of care for patients at high risk of suicide).

cused on self-help, PAS would “enhance patients’ self-efficacy and can help to create a sense that suicidal urges can be mastered,” which in turn “may help [patients] feel less vulnerable and less at the mercy of their suicidal thoughts.”<sup>39</sup> In short, allowing people to protect themselves in this way may give them back a sense of control over their lives. Relatedly, hopelessness is a significant risk factor for suicide.<sup>40</sup> Providing an opportunity for distressed individuals to take one concrete step to prevent suicide may itself mitigate feelings of hopelessness.<sup>41</sup> This could reduce non-firearm suicides as well.

There is compelling evidence to support the argument that PAS will reduce suicides through these pathways. The remainder of this part summarizes that evidence in four sections. Section A establishes that most suicides are impulsive. This means that even a one-week delay can deter many suicide attempts. Section B next shows how restricting access to firearms can reduce suicide. Section C then examines waiting periods. Finally, section D argues that a significant number of people would in fact elect to participate in PAS.

### A. Impulsivity of Suicide

Many suicides are impulsive—estimates range from one-third to four-fifths.<sup>42</sup> One commentator concluded that for most people, the period of real risk for suicide is “relatively brief,” lasting minutes, hours, or days, “but rarely longer.”<sup>43</sup> One study of suicide attempt survivors (various means) found that for nearly all, the period between the decision to attempt suicide and the attempt was less than one week.<sup>44</sup> The most directly applicable data come

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<sup>39</sup> Barbara Stanley & Gregory K. Brown, *Safety Planning Intervention: A Brief Intervention to Mitigate Suicide Risk*, 19 COGNITIVE & BEHAV. PRAC. 256, 259 (2012).

<sup>40</sup> Dean McMillan et al., *Can We Predict Suicide and Non-Fatal Self-Harm with the Beck Hopelessness Scale? A Meta-Analysis*, 37 PSYCHOL. MED. 769, 777 (2007) (“This systematic review confirms that hopelessness . . . is a risk factor for suicide . . .”); see also Aaron T. Beck et al., *Relationship Between Hopelessness and Ultimate Suicide: A Replication with Psychiatric Outpatients*, 147 AM. J. PSYCHIATRY 190, 190 (1990) (arguing that hopelessness leads to suicide because patients view their problems as unsolvable).

<sup>41</sup> See Beck, *supra* note 40, at 194 (reporting that clinical interventions can mitigate hopelessness).

<sup>42</sup> See Miller & Hemenway, *supra* note 5, at 989.

<sup>43</sup> Keith Hawton, *Restricting Access to Methods of Suicide: Rationale and Evaluation of This Approach to Suicide Prevention*, 28 CRISIS: J. CRISIS INTERVENTION & SUICIDE PREVENTION (Supp. 1) 4, 5 (2007).

<sup>44</sup> Eberhard A. Deisenhammer et al., *The Duration of the Suicidal Process: How Much Time Is Left for Intervention Between Consideration and Accomplishment of a Suicide Attempt?*, 70 J. CLIN. PSYCHIATRY 19, 21 (2009). For roughly 75%, the period was ten minutes or less, which is obviously insufficient time to purchase a firearm. *Id.*; accord Thomas R. Simon et al., *Characteristics of Impulsive Suicide Attempts and Attempters*, 32 SUICIDE & LIFE-THREATENING BEHAV. 49, 52 (2001).

from a study of thirty survivors of firearm suicide attempts, which found that more than half had suicidal thoughts for less than a day.<sup>45</sup>

The suicidal impulse is very often fleeting and non-recurring. More than ninety percent of suicide attempt survivors go on to die from something other than suicide.<sup>46</sup> In other words, they do not attempt suicide again and again until they are successful. The short deliberation period and post-attempt decision to live make sense given what we know about the motivations for suicide.

Although certain categories of people are at an elevated baseline risk level, suicide is very typically motivated by transitory causes. One review of seventy-six studies found that the median proportion of suicides involving a mental disorder was around ninety percent.<sup>47</sup> One meta-analysis concluded that “virtually all mental disorders have an increased risk of suicide.”<sup>48</sup> The high suicide risk phases of most disorders are temporary,<sup>49</sup> and there are effective pharmacological and psychological interventions.<sup>50</sup> Mental illness may not be curable, but people do generally get better with time and treatment.<sup>51</sup>

Firearm suicide in particular is often driven by life crises within the past week, relationship problems, and alcohol use.<sup>52</sup> “The choice of a firearm as a

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<sup>45</sup> Peterson et al., *supra* note 4, at 5; *see also* Miller et al., *Suicide Mortality*, *supra* note 6, at 402 (describing a study in which 70% of survivors of near-lethal suicide attempts deliberated for less than one hour); Megan Spokas et al., *Characteristics of Individuals Who Make Impulsive Suicide Attempts*, 136 J. AFFECTIVE DISORDERS 1121, 1123 (2012) (finding that only 36.1% of people contemplated suicide for three or more hours before an attempt).

<sup>46</sup> Miller & Hemenway, *supra* note 5, at 989.

<sup>47</sup> José Manoel Bertolote et al., *Psychiatric Diagnoses and Suicide: Revisiting the Evidence*, 25 CRISIS: J. CRISIS INTERVENTION & SUICIDE PREVENTION 147, 149 tbl.2 (2004) (reporting in a narrower review an even higher percentage with mental illness); Jonathan T.O. Cavanagh et al., *Psychological Autopsy Studies of Suicide: A Systematic Review*, 33 PSYCHOL. MED. 395, 399 (2003). The primary diagnosis in the largest number of these cases was depression, though also common were other mood disorders, substance-abuse disorders, schizophrenia, and personality disorders. *See* Bertolote et al., *supra*, at 149; Cavanagh et al., *supra*, at 399.

<sup>48</sup> E. Clare Harris & Brian Barraclough, *Suicide as an Outcome for Mental Illness: A Meta-Analysis*, 170 BRIT. J. PSYCHIATRY 205, 222 (1997).

<sup>49</sup> Mark Olfson et al., *Focusing Suicide Prevention on Periods of High Risk*, 311 JAMA 1107, 1107 (2014).

<sup>50</sup> Cavanagh et al., *supra* note 47, at 401–02 (“[B]etween a half and three quarters of suicides could be avoided were it possible to have completely effective treatment, or prevention, of mental disorders.”).

<sup>51</sup> U.S. DEP’T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 64–65 (1999), available at <http://profiles.nlm.nih.gov/ps/access/NNBBHS.pdf> [<http://perma.cc/D57H-SUUZ>].

<sup>52</sup> Mark S. Kaplan et al., *Characteristics of Adult Male and Female Firearm Suicide Decedents: Findings from the National Violent Death Reporting System*, 15 INJ. PREVENTION 322, 325 (2009); *see also* Charles C. Branas et al., *Acute Alcohol Consumption, Alcohol Outlets, and Gun Suicide*, 46 SUBSTANCE USE & MISUSE 1592, 1598 (2011) (“Our findings suggest a strong connection between acute alcohol consumption and intentionally self-inflicted gun injury and gun



suicide method appears to be precipitated by stressful life events.”<sup>53</sup> Because such causes are less constant than mental illness, firearm suicide “appears far more unpredictable and impulsive” than suicide by other means.<sup>54</sup> But importantly, these causes can be addressed with time. The effects of alcohol are generally temporary, and strategies such as telephone crisis lines have been effective in reducing suicide.<sup>55</sup> The likelihood of committing suicide decreases as the temporal distance from the trigger event increases.

### B. Restricting Firearm Access<sup>56</sup>

Surviving the suicidal moment usually avoids suicide altogether.<sup>57</sup> The chance of survival goes up dramatically if there is no readily available firearm. Firearm suicide attempts succeed in 85% of cases, as compared with an overall fatality rate for all methods of only 9%.<sup>58</sup> The evidence is overwhelming that a firearm at home increases suicide risk.<sup>59</sup>

This association is not just the product of individuals without firearms using less deadly methods. In fact, restricting access to firearms appears to deter many suicide attempts altogether.<sup>60</sup> One real-world example bears a close resemblance to PAS: reducing Israel Defense Forces soldiers’ access to firearms on weekends led to a forty percent reduction in suicide.<sup>61</sup> Weekend

suicide.”); Hawton, *supra* note 43, at 5 (“The most frequent reason given by the [survivor of self-inflicted firearm injury] was interpersonal conflict with a partner or family member.”); Peterson et al., *supra* note 4, at 4–5 (“Fifteen of the [thirty self-inflicted gunshot] patients had used drugs or alcohol within twenty-four hours before the wounding, and eighteen patients had experienced an interpersonal conflict during that period.”).

<sup>53</sup> Kaplan et al., *supra* note 52, at 325.

<sup>54</sup> *Id.* at 326.

<sup>55</sup> See U.S. DEP’T OF HEALTH & HUMAN SERVS. OFFICE OF THE SURGEON GEN. & NAT’L ACTION ALLIANCE FOR SUICIDE PREVENTION, 2012 NATIONAL STRATEGY FOR SUICIDE PREVENTION: GOALS AND OBJECTIVES FOR ACTION 21 (2012), [http://www.surgeongeneral.gov/library/reports/national-strategy-suicide-prevention/full\\_report-rev.pdf](http://www.surgeongeneral.gov/library/reports/national-strategy-suicide-prevention/full_report-rev.pdf) [<http://perma.cc/YWQ2-6B8D>] [hereinafter NATIONAL STRATEGY FOR SUICIDE PREVENTION].

<sup>56</sup> “Means restriction” is the umbrella term used to describe any restriction on access to means of committing suicide. PAS, by limiting access to firearms, obviously qualifies as “means restriction.” For an engaging introduction to “means restriction,” see generally Scott Anderson, *The Urge to End It All*, N.Y. TIMES MAG., July 6, 2008, at 38–43, available at [http://www.nytimes.com/2008/07/06/magazine/06suicide-t.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/07/06/magazine/06suicide-t.html?pagewanted=all&_r=0) [<https://perma.cc/P8CL-ABGZ>].

<sup>57</sup> Miller & Hemenway, *supra* note 5, at 989.

<sup>58</sup> Miller et al., *Suicide Mortality*, *supra* note 6, at 397 tbl.1.

<sup>59</sup> *Id.* at 401; see Matthew Miller et al., *Firearms and Suicide in the United States: Is Risk Independent of Underlying Suicidal Behavior?*, 178 AM. J. EPIDEMIOLOGY 946, 948 (2013).

<sup>60</sup> Miller et al., *Suicide Mortality*, *supra* note 6, at 399–400.

<sup>61</sup> *Id.* at 402. For a similar example with a similar reduction in suicide, see Thomas Reisch et al., *Change in Suicide Rates in Switzerland Before and After Firearm Restriction Resulting from the 2003 “Army XXI” Reform*, 170 AM. J. PSYCHIATRY 977, 981 (2013). More broadly, one literature review concluded that “the risk of substitution or displacement towards other methods seems small.” Marc S. Daigle, *Suicide Prevention Through Means Restriction: Assessing the Risk of*

firearm suicides declined with no significant uptick in weekday or non-firearm suicides. In that case, what essentially amounted to a two-day waiting period for firearm access substantially reduced suicide; it did not merely delay firearm suicide or shift individuals to other means.

The evidence overwhelmingly shows that keeping firearms altogether out of reach of individuals at high risk of suicide saves lives.<sup>62</sup> But would a restriction limited to immediate *purchase* have a significant effect? Very likely yes. The National Research Council (“NRC”), citing two studies, has stated that “a small but significant fraction of gun suicides are committed within days to weeks after the purchase of a handgun.”<sup>63</sup>

The first of those studies concluded that “[s]ome persons may purposely buy a handgun to commit suicide.”<sup>64</sup> The basis for this conclusion was the finding that suicide risk was highest during the first year after handgun purchase.<sup>65</sup> The second study found that the rate of firearm suicide in the first week after the purchase of a handgun was fifty-seven times as high as the rate in the general population.<sup>66</sup> More closely on point, a study of firearm suicides in Wisconsin found a sharp increase in risk of suicide within one week of gun purchase.<sup>67</sup> At the time of the study, Wisconsin’s waiting period for handguns was just forty-eight hours.<sup>68</sup>

The NRC report and these three studies are consistent with two additional studies. A recent review of state medical examiner records in New Hampshire, which had no waiting period for gun purchases, revealed that during a two-year period “nearly one in ten [firearm suicides] were committed with a gun that was purchased or rented within a week of the suicide (usually within hours).”<sup>69</sup> An older, two-site Tennessee-Washington study found a

*Substitution: A Critical Review and Synthesis*, 37 ACCIDENT ANALYSIS & PREVENTION 625, 630 (2005).

<sup>62</sup> Miller et al., *Suicide Mortality*, *supra* note 6, at 399–400.

<sup>63</sup> NAT’L RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 181 (Charles F. Wellford et al. eds., 2004).

<sup>64</sup> Peter Cummings et al., *The Association Between the Purchase of a Handgun and Homicide or Suicide*, 87 AM. J. PUBLIC HEALTH 974, 977 (1997).

<sup>65</sup> *Id.* at 976. It must be conceded that the shortest period between purchase and handgun suicide in that study was eleven days, which is of course longer than the seven-day waiting period proposed here.

<sup>66</sup> Garen J. Wintemute et al., *Mortality Among Recent Purchasers of Handguns*, 341 NEW ENG. J. MED. 1583, 1585 (1999). It should be noted, however, that the study used data from California, which, at the time, had a ten-day waiting period for handgun purchase.

<sup>67</sup> Stephen W. Hargarten et al., *Suicide Guns: Why Collect This Information?*, 6 INJ. PREVENTION 245, 245 (2000).

<sup>68</sup> See WIS. STAT. § 175.35(2)(d) (1998).

<sup>69</sup> *Suicide Prevention: A Role for Firearm Dealers and Ranges*, CONNECT, <http://www.theconnectprogram.org/firearms-safety-coalitions-role-nh-suicide-prevention> [<http://perma.cc/6BFP-Q9RU>] [hereinafter *Suicide Prevention*]. Two-thirds of the reports failed to disclose when the gun was obtained, which suggests that the figure could be an underestimate. *Id.*

lower figure: three percent of suicide victims used a firearm obtained within two weeks.<sup>70</sup> This study is also significant because it showed that six percent of suicides by people who lived in homes without guns were nonetheless committed with a firearm.<sup>71</sup> Signing up for PAS would make it more difficult for such people to obtain firearms.

There were 19,766 firearm suicides nationwide in 2011.<sup>72</sup> The New Hampshire and Tennessee-Washington studies suggest that between 600 (3%) and 2000 (10%) of them may have been committed with guns obtained shortly before the suicide.<sup>73</sup> Clearly, the potential direct effect of PAS is substantial.

### C. Waiting Periods for Firearm Purchase

PAS, like a waiting period, delays gun purchase. It is therefore logical in evaluating the potential effectiveness of PAS to look to studies assessing waiting periods that require all purchasers to wait some number of days before taking possession of the gun. Although evidence from other countries supports the view that waiting periods can reduce suicide,<sup>74</sup> there are surprisingly few domestic studies and their conclusions are mixed.

The first major American study found that waiting periods reduced gun prevalence in 1979 and 1980 but had no significant effect on total suicide.<sup>75</sup> This is puzzling given that the study also concluded that “gun prevalence rates *may* increase total suicide rates.”<sup>76</sup> If waiting periods reduce gun prevalence and lower gun prevalence reduces suicide, then why would waiting periods not reduce suicide? They probably do, and the study’s failure to find statistical significance may be the product of specification: including the waiting period and gun prevalence variables in the same regression predicting suicide.<sup>77</sup> Doing so may have led to an underestimation of the overall effect

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<sup>70</sup> Arthur Kellerman et al., *Suicide in the Home in Relation to Gun Ownership*, 327 NEW ENG. J. MED. 467, 470 (1992).

<sup>71</sup> *Id.*

<sup>72</sup> HOYERT & XU, *supra* note 3, at 19 tbl.2. This number rose slightly between 2011 and 2013. See *Fatal Injury Reports, National and Regional, 1999–2013*, CTRS. FOR DISEASE CONTROL & PREVENTION, [http://webappa.cdc.gov/sasweb/ncipc/mortrate10\\_us.html](http://webappa.cdc.gov/sasweb/ncipc/mortrate10_us.html) [<http://perma.cc/266C-RTBT>] (reporting 21,175 firearm suicides in 2013).

<sup>73</sup> See Kellerman et al., *supra* note 70; *Suicide Prevention*, *supra* note 69.

<sup>74</sup> See Joan Ozanne-Smith et al., *Firearm Related Deaths: The Impact of Regulatory Reform*, 10 INJ. PREVENTION 280, 283–85 (2004); Christopher H. Cantor & Penelope J. Slater, *The Impact of Firearm Control Legislation on Suicide in Queensland: Preliminary Findings*, 162 MED. J. AUSTRALIA 583, 584–85 (1995); ELISABETH SCARFF, EVALUATION OF THE CANADIAN GUN CONTROL LEGISLATION 5, 29 (1983). See also Wintemute et al., *supra* note 66, at 1588 (summarizing international findings).

<sup>75</sup> Kleck & Patterson, *supra* note 35, at 271 tbl.III(E).

<sup>76</sup> *Id.* at 272.

<sup>77</sup> See *id.* at 271.

of waiting periods on suicide by shifting some of that effect to the gun prevalence variable. In other words, the researchers stacked the deck against waiting periods. A second very important limitation of the study was its unit of analysis: mid- to large-sized cities. Some cities appeared to have waiting periods whereas their states did not.<sup>78</sup> Such restrictions are easily avoided by simply driving outside the city limits.<sup>79</sup> That the study found no significant effect on suicide may have reflected the fact that, in some places, the effective waiting period was merely a short drive.

A second major American study similarly found no significant overall effect of gun purchase waiting periods on suicide, but did find a significant reduction in firearm suicide among people aged fifty-five years and older.<sup>80</sup> That is an important and encouraging result, especially in light of a limitation of this study: the unit of observation was the state.<sup>81</sup> Thus, if the Brady Handgun Violence Protection Act mandated a change in the statewide waiting period, the whole state was lumped together as changing even though cities or counties may have already had similar or even longer waiting periods and experienced no relevant changes. Waiting periods appear promising, but more research is needed.<sup>82</sup>

These two U.S. waiting period studies, particularly when combined with the foreign studies cited above, provide some support for PAS. In addition, there is an important reason to think PAS will actually be more effective in reducing suicide than an actual waiting period. For the purposes of this article, “actual waiting period” means only a mandatory delay, rather than putting one’s name in NICS with a delayed revocation option. PAS, the latter, is the default more likely to stick. Having added one’s name to NICS, people will be less likely to make the effort to remove it. This “status quo bias” has been observed across a wide variety of contexts.<sup>83</sup> The additional costs of no-

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<sup>78</sup> See *id.* at 259 (reporting that 44% of cities in study had waiting periods). *But see* Burns, *supra* note 23, at 399–400 (noting that eleven states have waiting periods).

<sup>79</sup> Kleck & Patterson, *supra* note 35, at 282 (conceding the importance of such “leakage,” although not specifically with respect to waiting periods).

<sup>80</sup> Ludwig & Cook, *supra* note 7, at 589 tbl.2.

<sup>81</sup> See *id.* at 586.

<sup>82</sup> With colleagues, the present author is currently undertaking such research. Permit requirements also impose delays. Several studies have found that permit requirements are associated with lower suicide rates. Michael D. Anestis et al., *The Association Between State Laws Regulating Handgun Ownership and Statewide Suicide Rates*, 105 AM. J. PUB. HEALTH 2059, 2064 (2015), <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2014.302465> [http://perma.cc/ZU2W-WQEZ]; Antonio Rodríguez Andrés & Katherine Hempstead, *Gun Control and Suicide: The Impact of State Firearm Regulations in the United States, 1995–2004*, 101 HEALTH POL’Y 95, 101 tbl.3 (2011); Myron Boor & Jeffrey H. Bair, *Suicide Rates, Handgun Control Laws, and Socio-demographic Variables*, 66 PSYCHOL. REPS. 923, 926 tbl.1 (1990).

<sup>83</sup> RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 7–8 (2008).

tarization and mailing will add to inertia.<sup>84</sup> Actual waiting periods, in contrast, impose only a delay.

#### D. Would Anyone Sign Up for PAS?

The optional nature of PAS can be both a virtue and a vice. PAS, unlike a mandatory waiting period, does not impose a default on everyone. PAS merely creates a revocable option to forgo firearm purchase. Only if people choose to sign up would PAS directly prevent impulsive firearm purchases and suicides. Recruiting participants is a two-step process. First, one must identify people at high risk for suicide. Second, one must convince them to sign up. Both steps are achievable.

Predicting an individual suicide may be impossible, but identifying people at high risk is not. There are warning signs in many cases that could trigger identification by doctors, friends, family, and individuals themselves. In addition to mental illness, life crises, and alcohol use (as discussed above), the biggest and most obvious warning sign is a prior suicide attempt, although in most cases suicidal urges abate with time. A prior suicide attempt is the single strongest predictor of suicide. Other risk factors include hopelessness, a family history of suicide, childhood sexual abuse, identifying as LGBT, social isolation, and unemployment.<sup>85</sup> People with one or more of these risk factors, especially a prior suicide attempt, should be more likely to acknowledge their risk of suicide and act to prevent it.

But would high-risk individuals actually sign up for PAS? The evidence suggests that many would. PAS is just the kind of self-restriction that suicide prevention experts advocate and believe will be appealing. One Wyoming coroner who lectures on suicide prevention argues that gun owners, not the government, will reduce suicide rates.<sup>86</sup> Government-imposed restrictions only turn people off: “You have to use an approach that’s palatable to people,” he said. “You’re not victimizing, you’re empowering.”<sup>87</sup>

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<sup>84</sup> See Elizabeth D. McLean, Comment, *Living Will Statutes in Light of Cruzan v. Director, Missouri Department of Health: Ensuring That Patient’s Wishes Will Prevail*, 40 EMORY L.J. 1305, 1335 (1991) (“The term notary is sufficiently daunting to some, in and of itself, to discourage them from drafting living wills. In small towns and rural areas, the inconvenience of finding a notary, or of having to go to a local courthouse, provides an additional disincentive.”). *But see NotaryCam, supra* note 30 (offering webcam notarization valid in all states for twenty-five dollars per notarization).

<sup>85</sup> WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE AND HEALTH 193–97 (Etienne G. Krug et al. eds., 2002).

<sup>86</sup> Sabrina Tavernise, *To Reduce Suicide Rates, New Focus Turns to Guns*, N.Y. TIMES (Feb. 13, 2013), [http://www.nytimes.com/2013/02/14/us/to-lower-suicide-rates-new-focus-turns-to-guns.html?\\_r=0](http://www.nytimes.com/2013/02/14/us/to-lower-suicide-rates-new-focus-turns-to-guns.html?_r=0) [http://perma.cc/N6YP-U8HA].

<sup>87</sup> *Id.* Another frontline responder in rural Pennsylvania put it this way: “In an area where hunting and gun ownership are such strong traditions, you [don’t] dare say, ‘Don’t have any guns.’ That’s just not realistic. But how about keeping the guns locked up in a safe?” Chris Kelly, *Thera-*

Many people who fear suicide already voluntarily restrict their own access to guns. Seventy-five percent of police chiefs in a large Illinois sample reported having a firearm turn-in policy.<sup>88</sup> Of those, forty-four percent reported suicide-related turn-ins during one year.<sup>89</sup> The police in Elgin, Illinois, receive “dozens” of firearms each year, even though they, like most police, offer no compensation.<sup>90</sup>

Experimental studies demonstrate that people respond to suicide risk by voluntarily limiting access to firearms, through police turn-ins and other means. In one study of emergency department visits for mental health assessment or treatment of a minor, parental education persuaded five of eight adults with firearms to take new action to limit access, whereas none of the seven households that did not receive such education restricted access.<sup>91</sup> Of the five who took action, three (38%) locked up firearms and two (25%) disposed of them.<sup>92</sup> In a second study involving civilly committed psychiatric inpatients, an intensive firearm risk management program eliminated firearm access for all fourteen patients who previously had access.<sup>93</sup> Eight patients (57%) relinquished control of firearms to a family member or significant other, four (29%) to law enforcement officials, and two (14%) to a case manager.<sup>94</sup>

These two studies show that voluntary firearm access restrictions can be effective.<sup>95</sup> Both, however, involved counseling by mental health profession-

*pist on Front Lines of Suicide*, TIMES-TRIB. (SCRANTON) (Mar. 6, 2011), <http://thetimes-tribune.com/news/therapist-on-front-lines-of-suicide-1.1114896> [<http://perma.cc/24JN-DV7G>].

<sup>88</sup> Michael Fendrich et al., *Police Collection of Firearms to Prevent Suicide: Correlates of Recent Turn-In Experience*, 21 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 8, 13 tbl.1 (1998).

<sup>89</sup> *Id.*

<sup>90</sup> *Elgin Police to Hold Voluntary Gun Turn-In Program Saturday*, FOX 32 NEWS (CHI.) (Apr. 2, 2013), <http://www.myfoxchicago.com/story/21857460/elgin-police-to-hold-voluntary-gun-turn-in-program-saturday-april-6> [<http://perma.cc/N4VS-ZCL6>]. At the same time as the 1996–97 Australian buyback of over 600,000 newly prohibited firearms, it was reported that “[t]ens of thousands of gun owners also voluntarily surrendered non-prohibited firearms without compensation.” Simon Chapman & Philip Alpers, *Tight Gun Controls [sic] the Most Powerful Weapon*, SYDNEY MORNING HERALD (Apr. 27, 2006), <http://www.smh.com.au/news/opinion/tight-gun-controls-the-most-powerful-weapon/2006/04/26/1145861416502.html> [<http://perma.cc/MTW4-WL2F>].

<sup>91</sup> Markus J.P. Kruesi et al., *Suicide and Violence Prevention: Parent Education in the Emergency Department*, 38 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 250, 252 (1999).

<sup>92</sup> *Id.* at 253 tbl.1.

<sup>93</sup> Marion E. Sherman et al., *Firearms Risk Management in Psychiatric Care*, 52 PSYCHIATRIC SERV. 1057, 1060 tbl.3 (2001). Federal law prohibits firearm possession by people who have been civilly committed (although not by others in the same household). See 18 U.S.C. § 922(g)(4) (2012). Therefore, one can question whether the elimination of firearm access was “voluntary” for all subjects in this study. See *id.*

<sup>94</sup> Sherman et al., *supra* note 93, at 1060 tbl.3.

<sup>95</sup> See Kruesi et al., *supra* note 91, at 252; Sherman et al., *supra* note 93, at 1060; see also Nancy Montgomery, *Experts: Restricting Troops’ Access to Firearms Is Necessary to Reduce Rate of Suicides*, STARS & STRIPES (Dec. 3, 2012), <http://www.stripes.com/news/experts-restricting-troops->

als to restrict firearm access, which is not a built-in component of PAS. Still, PAS could be a useful additional means restriction measure offered by professionals in emergency departments, psychiatric wards, or elsewhere. Primary care providers could play an important role: one review of forty separate studies found that 45% of those who died by suicide had seen a primary care provider within the month before their death, and 77% had such contact within the past year.<sup>96</sup> If primary care providers give information about PAS, many of those who might become suicidal will be made aware of the precommitment option. In addition, a public education campaign may be able to provide additional awareness if personal involvement by health care professionals is unavailable, as it apparently does for firearm turn-in programs.<sup>97</sup> The interventions in both studies also expressly involved friends and family.<sup>98</sup> Participation by loved ones and their encouragement to further restrict access to firearms would likely be critical to the success of PAS.

Convincing someone to sign up for PAS should be easier than convincing them to give up their gun.<sup>99</sup> Restricting future purchases only makes sense for someone who has already eliminated access to existing firearms. The initial decision to go gun-free is difficult, but binding oneself to that decision should be easier. And the fact that the decision is revocable after a short waiting period should appeal to many. One public opinion poll showed that a general five-day waiting period for gun purchases is very popular among non-

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access-to-firearms-is-necessary-to-reduce-rate-of-suicides-1.199216 [http://perma.cc/2UQ9-XS25] (citing study in which “voluntary means restriction in a group of people with an extremely high suicide risk had reduced the suicide rate—to zero”). A more recent study, however, suggests that current efforts are failing to reduce firearm access among adolescents at high risk for suicide in the overall population. See Joseph A. Simonetti et al., *Psychiatric Comorbidity, Suicidality, and In-Home Firearm Access Among a Nationally Representative Sample of Adolescents*, 72 JAMA PSYCHIATRY 152, 157 (2015).

<sup>96</sup> 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).

<sup>97</sup> MAINE DEP'T OF HEALTH & HUMAN SERVS., *Questions About Removing Firearms*, [http://www.maine.gov/suicide/about/lethal\\_questions.htm](http://www.maine.gov/suicide/about/lethal_questions.htm) [http://perma.cc/V93X-GQH2]; CEASE-FIRE OR. EDUC. FOUND., *Year-Round Gun Turn-In*, <http://coef.ceasefireoregon.org/yearroundturnin> [http://perma.cc/Y4N4-2B4Q].

<sup>98</sup> See Kruesi, *supra* note 91, at 251; Sherman et al., *supra* note 93, at 1060.

<sup>99</sup> See Jennifer Harper, *Two-Thirds of U.S. Weapons Owners Would 'Defy' a Federal Gun Ban*, WASH. TIMES BLOG (Jan. 20, 2013), <http://www.washingtontimes.com/blog/watercooler/2013/jan/20/two-thirds-us-weapons-owners-would-defy-federal-gu/> [http://perma.cc/HA2U-QKBB] (noting that gun owners value their firearms so highly that two-thirds claim they would keep them even if it violated federal law). There is good reason to think signing up for PAS would be significantly more appealing. Psychological research shows that out-of-pocket losses are weighed more heavily than foregone gains. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1483–84 (1998). Giving up a gun is almost certainly encoded as a loss, whereas giving up purchase rights is foregoing a prospective gain and therefore less painful psychologically.

gun owners (with seventy-four percent approval) and is even supported by half of National Rifle Association (“NRA”) members.<sup>100</sup>

It is very likely that a significant number of people would sign up for PAS. Of course, one cannot know in advance precisely how many would. The only way to know for sure is to adopt the proposal and evaluate the results.<sup>101</sup> This uncertainty, however, is not a significant argument against action, because PAS will be so inexpensive to implement. The NICS system is already up and running, so the only substantial ongoing expense will be processing PAS forms. To be sure, there would also be the start-up costs of producing and distributing forms, creating and maintaining an online interface, and educating the public, gun dealers, and mental health care providers. These costs are small given the real potential of PAS to save many lives.<sup>102</sup>

### III. PRINCIPLES AND PRECEDENTS

PAS has strong theoretical support, which is bolstered by analogy to two successful precommitment regimes. Section A outlines the theory of precommitment and shows that firearm purchase is an almost ideal context for it. Sections B and C highlight similarities between PAS and psychiatric advance directives and self-exclusion from gambling, respectively. As such, PAS is grounded in principle and precedent.

#### A. Theory of Precommitment

Precommitment is self-restraint projected over time. By one definition, “[p]recommitment, or self-binding, is a self-limiting act carried out by an agent for the purpose of achieving a better outcome, as assessed by his [or her] preferences at the time of action, than what would occur had he [or she] retained his [or her] full freedom of action.”<sup>103</sup> “[D]elay devices can be effec-

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<sup>100</sup> John Sides, *Gun Owners vs. the NRA: What the Polling Shows*, WASH. POST WONKBLOG (Dec. 23, 2012), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/23/gun-owners-vs-the-nra-what-the-polling-shows/> [<http://perma.cc/2WHV-TY3N>].

<sup>101</sup> The next best thing is simply to ask people at relatively high risk for suicide. The present author and two colleagues are currently working on a project to do just that.

<sup>102</sup> Proponents of individual liberty should support PAS even if it saves no lives. It gives individuals the freedom to exercise a new option: a binding contract with the government regarding firearm purchase. See Andrew S. Gold, *A Property Theory of Contract*, 103 NW. U. L. REV. 1, 21 (2009) (“Enforcement of promises arguably increases autonomy because it permits individuals to precommit themselves in certain contexts. Enforceable contracts add an option for promisors.”). On why autonomy at time 1 might trump autonomy at time 2, see *infra* notes 103–122 and accompanying text. For present purposes, it is enough to observe that no one is forced to precommit.

<sup>103</sup> Jon Elster, *Don’t Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1783 (2003) [hereinafter Elster, *Complexities of Precommitment*].



tive forms of precommitment.”<sup>104</sup> In our case, living is preferred to dying at time 1, so the agent at time 1 opts out of future firearm purchases. If he or she does not, he or she might on an impulse at time 2 buy and use a firearm to commit suicide. Full freedom would have led to a worse result.<sup>105</sup>

But why favor a preference to live at time 1 over a preference to die at time 2? People are free to change their minds.<sup>106</sup> But the traditional and most common answer is that “precommitment is an instrument to protect us against passion.”<sup>107</sup> Passion includes “visceral” feelings,<sup>108</sup> like depression.<sup>109</sup> Even if not driven by depression, the suicidal impulse is usually the product of passion, not reason.<sup>110</sup> Reason should trump passion because reason is a truer expression of autonomy. Passion is one way “in which the rational self’s ability to deliberate, make decisions, and effectively exercise [one’s] will can be compromised.”<sup>111</sup> One skeptic of precommitment concludes that it should be allowed only where the future self has a substantial defect in reason, giving as an example a psychiatric advance directive authorizing treatment of a bipolar man who, in disastrous manic states, refuses medical attention.<sup>112</sup>

Suicidal thoughts, no less than mental health treatment refusals, are often the product of passion. Recall that most firearm suicides involve mental illness, life crises, relationship problems, or alcohol.<sup>113</sup> Even a skeptic should concede that when passions like these overwhelm reason, precommitment is justified.

This justification, however, does not apply when the precommitment itself is motivated by passion. Some people who volunteer for PAS will do so

<sup>104</sup> ELSTER, ULYSSES UNBOUND, *supra* note 13, at 12–13, 275.

<sup>105</sup> See *id.* at 14 (stating that *mandatory* firearm purchase waiting periods protect against “fits of murderous passion” and are not “instances of intentional precommitment”).

<sup>106</sup> See Dan W. Brock, *Precommitment in Bioethics: Some Theoretical Issues*, 81 TEX. L. REV. 1805, 1815 (2003).

<sup>107</sup> ELSTER, ULYSSES UNBOUND, *supra* note 13, at 6.

<sup>108</sup> *Id.* at 7.

<sup>109</sup> See George Loewenstein, *Out of Control: Visceral Influences on Behavior*, 65 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 272, 285 (1996) (“[W]hile he was depressed [William] Styron experienced an almost overwhelming desire to commit suicide, but recognized that this was not in his self-interest.”). The text follows others in classifying depression as a “passion.” One commenter objected and argued that depression is a defect in reason, but not a passion like anger or intoxication. This author agrees with that argument as a descriptive matter, but for ease of exposition, uses “passion” more broadly to mean “not reason.”

<sup>110</sup> See *supra* notes 42–55 and accompanying text.

<sup>111</sup> Brock, *supra* note 106, at 1817.

<sup>112</sup> *Id.* at 1805–06, 1817, 1821; accord Kristian O.R. Myrseth & Conny E. Wollbrant, *A Theory of Self-Control and Naïveté: The Blights of Willpower and Blessings of Temptation*, 34 J. ECON. PSYCHOL. 8, 13 fig.4, 14 fig.5. (2013) (showing that where willpower is very low or where visceral influence is very high, precommitment is welfare-enhancing). See generally *infra* note 124 and accompanying text (discussing psychiatric advance directives).

<sup>113</sup> See *supra* note 52 and accompanying text.

not out of cold deliberation, but out of a present fear of self-harm.<sup>114</sup> Having to obtain the form, have it notarized, and mail it in would reduce the likelihood of impulsive precommitment, but it is nonetheless possible. The idea that precommitment itself is a product of passion may be a valid criticism of precommitment generally,<sup>115</sup> but not Precommitment Against Suicide. Executing the waiver form demonstrates that at one moment in time, out of passion or reason, that person preferred life to death. Suicide eliminates the possibility that the person will ever enjoy such moments in the future.<sup>116</sup>

To be sure, one's moments of hopeless pain may outweigh the positive moments to such an extent that a rational agent may choose suicide. That may be a valid argument against *irrevocable* precommitment, but it is an argument *in favor* of the delay device proposed herein.<sup>117</sup> A seven-day waiting period helps to ensure that a decision to commit firearm suicide reflects a weighing of costs and benefits, not an impulse. Because suicide cannot be undone, even impaired agents ought to be able to opt for a period of reflection.<sup>118</sup>

To ensure deliberation, Oregon has a mandatory waiting period for physician-assisted suicide.<sup>119</sup> A lethal prescription may be written only fifteen days after an oral request and forty-eight hours after a written request.<sup>120</sup> Oregon goes further, requiring counseling if the patient "may be suffering from a psychiatric or psychological disorder or depression."<sup>121</sup> The irreversibility of suicide justifies such mandatory safeguards, and certainly optional ones like PAS.<sup>122</sup>

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<sup>114</sup> See ELSTER, ULYSSES UNBOUND, *supra* note 13, at 19–20 (discussing the general problem of precommitment motivated by passion, not reason).

<sup>115</sup> See Brock, *supra* note 106, at 1821 ("Precommitment is justified when the defect is in the future, *but not the present, self.*" (emphasis added)).

<sup>116</sup> See ELSTER, ULYSSES UNBOUND, *supra* note 13, at 274 ("[D]elays can be an effective means of resisting . . . excessive focus on the present . . .").

<sup>117</sup> Some judges have advocated for delay in imposing the death penalty for the same reason. See *Rouse v. Lee*, 339 F.3d 238, 262–65 (4th Cir. 2003) (en banc) (Motz, J., dissenting) (arguing that statute of limitations on filing a habeas petition should have been equitably tolled in part because the sentence was death).

<sup>118</sup> See *Woodson v. North Carolina*, 428 U.S. 280, 323 (1976) (Rehnquist, J., dissenting) ("One of the principal reasons why death is different is because it is irreversible . . .").

<sup>119</sup> John A. Robertson, "Paying the Alligator": *Precommitment in Law, Bioethics, and Constitutions*, 81 TEX. L. REV. 1729, 1738 (2003).

<sup>120</sup> OR. REV. STAT. § 127.850 (2013).

<sup>121</sup> *Id.* at § 127.825.

<sup>122</sup> The physician-assisted suicide comparison is significant for another reason. As a matter of logic and policy, supporters of physician-assisted suicide should support PAS. If someone may seek help to end his or her life, certainly that person should be allowed to seek help to extend his or her life. That is what PAS does. With PAS, an individual asks the government to block one pathway to self-destruction. Another objection to precommitment, however, is that it sends a bad signal to others: if you do not trust yourself, why should anyone else? See ELSTER, ULYSSES UNBOUND, *supra* note 13, at 80. This objection does not apply to the present proposal. No one but a licensed firearms dealer performing a required background check would know that an individual is

### B. Psychiatric Advance Directives

Suicide is strongly associated with mental illness.<sup>123</sup> A popular precommitment device for the mentally ill already exists: the psychiatric advance directive (“PAD”). The PAD has been defined as “a legally enforceable document that sets forth a person’s wishes concerning psychiatric treatment in anticipation of the event that he or she may later become incompetent to make informed health care decisions.”<sup>124</sup> The present proposal provides many of the same advantages as PADs and avoids several of their pitfalls.

A primary goal of PADs is to avoid the need for coercive treatment. One early advocate of PADs asserted that “[a]cting and being treated as self-determining individuals with a significant measure of authority over their own fate, instead of as powerless and incompetent victims of forces beyond their understanding and control, can be therapeutically advantageous to mentally ill patients.”<sup>125</sup> That prediction has been validated through research. One recent study found that people with PADs were significantly less likely to experience coercive crisis interventions, such as forced medication and hospitalization.<sup>126</sup> Giving individuals control over their own access to firearms is similarly empowering and may itself counter the feelings of helplessness at the root of many suicides.

A major concern with PADs is the capacity of individuals with mental illness to execute them. Some scholars have gone so far as to suggest that there should be a formal hearing at the time of execution.<sup>127</sup> Others would require a psychiatric evaluation.<sup>128</sup> Few dare state the rationale this openly:

The psychiatric patient is not a self-sufficient individual directing [his or] her own life. [He or s]he is a person in distress, and in need of care. This is not only apparent when the patient is in crisis. The

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barred from purchase. Furthermore, the dealer would not know why the individual is barred, as there are many reasons for an individual to end up on the prohibited purchaser list. *See* 18 U.S.C. § 922(g) (2012).

<sup>123</sup> *See* NATIONAL STRATEGY FOR SUICIDE PREVENTION, *supra* note 55, at 11.

<sup>124</sup> Elizabeth M. Gallagher, *Advance Directives for Psychiatric Care: A Theoretical and Practical Overview for Legal Professionals*, 4 PSYCHOL. PUB. POL’Y & L. 746, 746 (1998).

<sup>125</sup> Bruce J. Winick, *Advance Directive Instruments for Those with Mental Illness*, 51 U. MICH. L. REV. 57, 83 (1996).

<sup>126</sup> Jeffrey W. Swanson et al., *Psychiatric Advance Directives and Reduction of Coercive Crisis Interventions*, 17 J. MENTAL HEALTH 255, 259–63 (2008); *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) [hereinafter Elbogen et al., *Self-Determination*] (“PADs may help empower people with mental illness [who are] among racial minorities . . .”).

<sup>127</sup> Robert D. Miller, *Advance Directives for Psychiatric Treatment: A View from the Trenches*, 4 PSYCHOL. PUB. POL’Y & L. 728, 738 (1998).

<sup>128</sup> *Id.* at 745.

danger of future psychosis is always lingering, and induces the patient to seek help.<sup>129</sup>

That position is incorrect, as well as deeply offensive. The law assumes that the mentally ill, like all people, are competent.<sup>130</sup> To presume otherwise based on a psychiatric diagnosis alone is discriminatory.<sup>131</sup> It also happens to be largely groundless: research suggests that “patients are generally able to understand, appreciate, and reason adequately with respect to PADs.”<sup>132</sup> Of course, this is not to say that every patient has the capacity to complete a PAD without assistance or that such assistance cannot be beneficial.<sup>133</sup> Regardless, requiring a psychiatric evaluation before allowing the revocable waiver of gun purchase rights would be incongruous. Capacity is task-specific.<sup>134</sup> One might reasonably question whether a typical person with mental illness is capable of making in advance the complex, high stakes treatment decisions covered by PADs: confinement to a locked space, risky psychotropic medication, and electroconvulsive therapy. But there can be little doubt that the vast majority of people, with or without mental illness, are perfectly capable of deciding whether they want to give up the right to immediately purchase a firearm.<sup>135</sup>

If anything, the PAD analogy may suggest that requiring notarization of a PAS with a witness present is too much, not too little, formality. Some jurisdictions require that PADs be both witnessed and notarized.<sup>136</sup> Yet “[r]esearch indicates that although approximately 70% of patients with mental illness would want a PAD if offered assistance in completing one, less than 10% have actually completed a PAD.”<sup>137</sup> One reason patients give for not completing a PAD is “trouble notarizing the document while obtaining appropriate witnesses.”<sup>138</sup> Hopefully, omitting the witness requirement for the present proposal will encourage greater participation. Notarization, however, seems indispensable here given the potential for fraud inherent in a mail-in PAS form.

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<sup>129</sup> Guy Widdershoven & Ron Berghmans, *Advance Directives in Psychiatric Care: A Narrative Approach*, 27 J. MED. ETHICS 92, 93 (2001).

<sup>130</sup> Eric B. Elbogen et al., *Competence to Complete Psychiatric Advance Directives: Effects of Facilitated Decision Making*, 31 L. & HUM. BEHAV. 275, 288 (2007) [hereinafter Elbogen et al., *Competence*]; Winick, *supra* note 125, at 68 n. 39.

<sup>131</sup> Elbogen et al., *Self-Determination*, *supra* note 126, at 288.

<sup>132</sup> *Id.* at 286.

<sup>133</sup> *Id.* at 282, 286.

<sup>134</sup> See Paul S. Appelbaum & Thomas Grisso, *The MacArthur Treatment Competence Study I: Mental Illness and Competence to Consent to Treatment*, 19 L. & HUM. BEHAV. 105, 119 (1995).

<sup>135</sup> The present proposal is analogous to locking the door and hiding the key, not throwing it away. See Winick, *supra* note 125, at 87.

<sup>136</sup> See N.C. GEN. STAT. § 122C-72(1) (2013).

<sup>137</sup> Elbogen et al., *Competence*, *supra* note 130, at 276.

<sup>138</sup> *Id.*

### C. Self-Exclusion from Gambling

Under so-called “self-exclusion” programs, individuals precommit not to gamble, usually for a set period of time. “[T]he vast majority of jurisdictions with legalized commercial casinos . . . have mandatory state-prescribed self-exclusion regulations.”<sup>139</sup> Tens of thousands of people have signed up.<sup>140</sup> This widespread participation in a similar self-binding regime suggests that many people would participate in PAS.

Self-exclusion programs work as follows. To get on the gambling self-exclusion list in New Jersey, for example, an individual must complete a form and appear in person at the New Jersey Division of Gaming Enforcement with photo identification.<sup>141</sup> He or she may opt for a one-year, five-year, or lifetime ban.<sup>142</sup> Even after the temporary period expires, removal from the list is not automatic. “A person who has chosen the one or five year exclusion must also make a request for removal, however it also must be accompanied by a letter from a mental health professional certifying that the individual is not suffering from a gambling problem.”<sup>143</sup> There is no provision to revoke a lifetime self-exclusion.<sup>144</sup> Casinos may refuse to accept wagers from listed persons and may ask the person to leave the gaming area.<sup>145</sup> If someone slips through the cracks and does gamble, that person is prohibited from collecting winnings.<sup>146</sup>

The primary goal of self-exclusion is obvious: to stop problem gambling. Research suggests that such programs have made significant strides toward that goal, but have not achieved it completely. Most participants in Missouri’s lifetime self-exclusion program did not abstain permanently from gambling after enrolling, but did experience positive effects.<sup>147</sup> Nearly 80% exhibited “probable pathological gambling” in the six months before enroll-

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<sup>139</sup> Irina Slavina, Note, *Don’t Bet on It: Casinos’ Contractual Duty to Stop Compulsive Gamblers from Gambling*, 85 CHI.-KENT L. REV. 369, 369–70 (2010).

<sup>140</sup> IAN AYRES, CARROTS AND STICKS: UNLOCK THE POWER OF INCENTIVES TO GET THINGS DONE 143 (2010).

<sup>141</sup> Darren Gelber, *The Reach of New Jersey’s Voluntary Self-Exclusion List*, 281 N.J. LAW. 32, 33 (2013); see also *New Jersey Casino Gambling Self-Exclusion Program*, ST. N.J. OFF. ATT’Y GEN. DIVISION OF GAMING ENFORCEMENT, <http://www.nj.gov/oag/ge/selfexclusion.html> [<http://perma.cc/UR8F-AZN8>].

<sup>142</sup> Gelber, *supra* note 141, at 32. One-year, five-year, and lifetime options could certainly be added to PAS, although the findings above suggest that most of the suicide prevention benefit can be achieved with much shorter periods.

<sup>143</sup> Andy Rhea, *Voluntary Self Exclusion Lists: How They Work and Potential Problems*, 9 GAMING L. REV. 462, 465 (2005).

<sup>144</sup> Gelber, *supra* note 141, at 33.

<sup>145</sup> *Id.* at 32–33.

<sup>146</sup> *Id.* at 33.

<sup>147</sup> Sarah E. Nelson et al., *One Decade of Self Exclusion: Missouri Casino Self-Excluders Four to Ten Years After Enrollment*, 26 J. GAMBLING STUD. 129, 142 (2010).

ment, as compared with just 15% in the six months after.<sup>148</sup> A recent review reported a reduction in problem-gambling-related “psychological difficulties including depression and anxiety” and that enrollees “feel they have more control of their circumstances.”<sup>149</sup> These findings support the view that PAS may similarly reduce stress and increase feelings of efficacy.

Given the successes of gambling self-exclusion programs, some lament that enrollment is not greater. Because most problem gamblers do not sign up,<sup>150</sup> one reviewer urges programs to remove “unnecessary complexities” and “legal jargon.”<sup>151</sup> The same reviewer and others also advocate broadening programs to cover more gambling venues.<sup>152</sup> Others seek improvements within programs, as “[a]ccess to after-care and relapse prevention programs constitute important adjuncts to self exclusion.”<sup>153</sup>

The dual goals of providing supplemental services and maximizing enrollment can be in tension if those services consist of a pre-enrollment evaluation:

A significant proportion of individuals initiating self-exclusion often do so spontaneously in a state of emotional distress in response to heavy losses sustained during a gambling session. Such decisions may be considered ‘spur of the moment’ reactions that are subsequently regretted in the ‘cooling off’ period. . . . Thus there is an imperative need for competent and comprehensive clinical assessment complementing the formal administrative/legal requirements to be conducted at the point of initiating self-exclusion.<sup>154</sup>

One might seize upon this prescription to argue for clinical assessment before individuals are allowed to sign up for PAS, because there is more than superficial similarity between gambling impulses and suicidal impulses. Problem gambling is an addiction and a type of mental illness, and the emotional distress from a large gambling loss could certainly qualify as a pas-

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<sup>148</sup> *Id.* at 137 tbl.2.

<sup>149</sup> Sally M. Gainsbury, *Review of Self-Exclusion from Gambling Venues as an Intervention for Problem Gambling*, 30 J. GAMBLING STUD. 229, 246 (2014).

<sup>150</sup> *See id.*

<sup>151</sup> *Id.* at 247.

<sup>152</sup> AYRES, *supra* note 140, at 144; Gainsbury, *supra* note 149, at 247.

<sup>153</sup> Nelson et al., *supra* note 147, at 143. *See also* Nicole Tremblay et al., *Improved Self-Exclusion Program: Preliminary Results*, 24 J. GAMBLING STUD. 505, 509–15 (2008) (reporting results of a self-exclusion program that included a mandatory meeting); Alex Blaszczyński et al., *Self-Exclusion: A Proposed Gateway to Treatment Model*, 7 INT’L GAMBLING STUD. 59, 67 (2007) (proposing more integrated treatment options).

<sup>154</sup> Blaszczyński et al., *supra* note 153, at 64–65; *see also* Tremblay et al., *supra* note 153, at 516 (“During registration, most people are in emotional turmoil and just want to complete the process as quickly as possible.” (citation omitted)).

sion.<sup>155</sup> As with suicidal thoughts, the compulsion to gamble ebbs and flows.<sup>156</sup>

But despite these similarities, even if one supports requiring an assessment before self-exclusion from gambling, no such assessment should be required for PAS. The key differences, as suggested above, are the permanence of suicide, the short period of delay to purchase a firearm, and the relatively easy revocability of the firearm purchase waiver. If an individual regrets a spur-of-the-moment decision to waive their gun purchase rights, they can simply reverse it with a notarized form and a week-long wait.

The gambling and suicide analogy is imperfect,<sup>157</sup> but nonetheless generally supports PAS. Perhaps most significantly, although many problem gamblers have not signed up for self-exclusion, thousands have, voluntarily self-binding against self-destructive behavior. The effect of self-exclusion programs on gambling behavior obviously depends upon enforcement, but the positive psychological effects of self-exclusion suggest comparable advantages for PAS in terms of reducing anxiety and depression and increasing feelings of control. With PAS, one simple form will prevent gun purchases in all fifty states, a significant improvement over casino-specific or state-specific self-exclusion programs.

The self-exclusion from gambling analogy also supports using the PAS gun program to target other suicide prevention services. New Jersey's requirement for assessment by a mental health professional in order to be *removed* from the self-exclusion list suggests that modifying the PAS proposal to include a similar requirement for removal from the no-guns list could save additional lives. Given the life-and-death stakes associated with reinstatement of gun purchase rights, reinstatement could even require judicial approval. Such a requirement could be an option available on the sign-up form.

#### IV. CONSTITUTIONALITY

Constitutionality arguments against PAS may be raised, but none withstand careful analysis, as demonstrated below. Section A first considers whether PAS constitutes state action. Section B addresses the Second Amendment and illustrates how PAS would satisfy both intermediate and strict scrutiny. Section C rejects right-to-die challenges. Finally, section D argues that to the extent PAS theoretically violates constitutional rights, requiring notarization should constitute a valid waiver of those rights.

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<sup>155</sup> Justin E. Bauer, Comment, *Self-Exclusion and the Compulsive Gambler: The House Shouldn't Always Win*, 27 N. ILL. U. L. REV. 63, 76–77 (2006).

<sup>156</sup> See Gainsbury, *supra* note 149, at 230.

<sup>157</sup> There is no constitutional right to gamble, but there may arguably be a right to die in some states. See *infra* notes 195–201 and accompanying text.

### A. State Action

A threshold question in determining the constitutionality of PAS is whether PAS involves state action. PAS is analogous to locking one's firearms in a safe, which on its face does not implicate the Constitution. But this analogy is incomplete: a closer analogy would be locking one's firearms in a safe, then entrusting the key to the government. This makes the government a joint participant or venturer in the private activity.<sup>158</sup> Indeed, the government merely setting up the statutory scheme that enables self-restrictions on gun purchases may be sufficient to clear this state action hurdle.<sup>159</sup> Accordingly, the remainder of this Part assumes that PAS constitutes state action.<sup>160</sup>

Even if there is state action, it is action to enhance private decision-making. And the decision being made with PAS is to confidentially give up one's gun purchase rights in order to prevent one's own suicide. At the most basic level, the Constitution protects "the right to be let alone."<sup>161</sup> Surely, a personal choice to forgo the deadliest method of committing suicide is included in this right and, more specifically, in one's rights to life, liberty, and privacy. The Constitution should protect, not prohibit, this choice.

### B. The Right to Bear Arms

PAS does not violate the Second Amendment because it functions much like an optional waiting period, and even mandatory waiting periods do not necessarily violate the Second Amendment.<sup>162</sup> Impeding access to firearms

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<sup>158</sup> Gregory D. Malaska, Note, *American Manufacturers Mutual Insurance Company v. Sullivan: "Meta-Analysis" as a Tool to Navigate Through the Supreme Court's "State Action" Maze*, 17 J. CONTEMP. HEALTH L. & POL'Y 619, 652–53 (2001). *But see* Price v. Int'l Union, 795 F.2d 1128 (2d Cir. 1986) ("[W]hen a private party makes the ultimate choice within a range of options offered by the government, state action generally is not implicated."); Jack Gravelle, Note, *Hold the Phone: Making the Call for "Personal Exceptions" to the Do-Not-Call Registry*, 65 OHIO ST. L.J. 991, 1019 (2004) (arguing that a government do-not-call-registry that allows for personal exceptions does not constitute state action because the government is merely "enforcing the decisions made by the individual").

<sup>159</sup> See Malaska, *supra* note 158 at 653; see also Hargrave v. Vermont, 340 F.3d 27, 38 (2d Cir. 2003) (holding that a state statute authorizing durable powers of attorney for health care decisions was a program or activity provided by a public entity).

<sup>160</sup> This article also assumes that the underlying NICS system is functional and constitutional. Recent court decisions support that assumption. See *Abramski v. United States*, 134 S. Ct. 2259, 2264–66 (2014) (affirming that the actual buyer of a firearm must pass a federal background check); *Colo. Outfitters Ass'n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1075–76 (D. Colo. 2014) (holding that the state's expansion of mandatory background checks to some private transfers did not violate the Second Amendment).

<sup>161</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

<sup>162</sup> See *McDonald v. City of Chicago*, 561 U.S. 742, 777–78 (2010) (affirming that the Second Amendment gives individuals the right to bear arms, which is incorporated against states and municipalities as well); *District of Columbia v. Heller*, 554 U.S. 570, 575 (2008) (stating that the individual's right to bear arms is not unlimited).



arguably burdens conduct and implicates the Second Amendment.<sup>163</sup> This does not end the inquiry, however; courts have held that such a burden does not violate the Second Amendment if it meets intermediate scrutiny—i.e., if it is substantially related to an important government interest.<sup>164</sup>

Mandatory waiting periods to buy firearms withstand intermediate scrutiny. First of all, preventing suicide is plainly important.<sup>165</sup> Further, the research cited above establishes that a waiting period is substantially related to the goal of preventing suicide: the best study to date found that a five-day waiting period significantly reduced firearm suicide for older people.<sup>166</sup> To be sure, more research is needed.<sup>167</sup> But the legislature need not wait for scientific consensus to act in order for its actions to pass intermediate scrutiny.<sup>168</sup>

What researchers and legislatures do know about suicide further supports the theory that a waiting period to buy guns will likely reduce suicides.<sup>169</sup> As described above, suicide is very often impulsive and tied to mental illness, life crises, relationship problems, and alcohol. Guns are particularly lethal as compared with other methods of suicide, and a significant portion of suicides involve recently purchased guns. In light of these findings, it

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<sup>163</sup> See *Silvester v. Harris*, No. 1:11-CV-2137, 2013 WL 6415670, at \*5 (E.D. Cal. Dec. 9, 2013) (concluding that the California law imposing a ten-day cooling off period on gun purchases burdens Second Amendment rights).

<sup>164</sup> See *United States v. Chovan*, 735 F.3d 1127, 1136–38 (describing a two-step framework for analyzing laws that restrict firearm access: “(1) ask[] whether the challenged law burdens conduct protected by the Second Amendment and (2) if so . . . apply an appropriate level of scrutiny”). Intermediate scrutiny is the standard most often used. See *id.* at 1138, 1138 n. 5 (noting that Second Amendment challenges are subject to either intermediate or strict scrutiny, and that most courts have applied intermediate scrutiny); Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What’s a Court to Do Post-McDonald?*, 21 CORNELL J.L. & PUB. POL’Y 489, 513 (2012) (reporting that intermediate scrutiny is most frequently used); see also Stephen Kiehl, Comment, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1155–63 (2011) (arguing that intermediate scrutiny should be the most frequently used standard).

<sup>165</sup> Fredrick E. Vars & Amanda Adcock Young, *Do the Mentally Ill Have a Right to Bear Arms?*, 48 WAKE FOREST L. REV. 1, 23 (2013).

<sup>166</sup> See Ludwig & Cook, *supra* note 7, 588. The only other domestic study found no significant effect, but was methodologically flawed. See *supra* notes 75–82 and accompanying text (discussing American studies).

<sup>167</sup> See Robert A. Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREVENTATIVE MED. 40, 52 (2005) (calling for more research on the efficacy of waiting periods).

<sup>168</sup> See *Kachalsky v. County of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012) (“It is the legislature’s job, not ours, to weigh conflicting evidence and make policy judgments.”); see also *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) (“The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.”); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 300 (2009) (arguing that courts lack capacity “to sift through complicated data”). But see *Silvester*, 2013 WL 6415670, at \*6 (finding that the government did not meet its burden to justify the ten-day waiting period where it offered “no evidence” that the period would advance the stated goal of reducing gun violence).

<sup>169</sup> See *supra* notes 62–71 and accompanying text.

would be very surprising if waiting periods did not reduce the number of suicides.

One commentator has argued that any waiting period longer than twenty-four hours would violate the Second Amendment.<sup>170</sup> The rationale was that the research on the effectiveness of waiting periods on murder and suicide was inconclusive, and that twenty-four hours was roughly where courts drew the line for constitutional abortion waiting periods.<sup>171</sup> But the suicide-specific research summarized above, particularly when combined with foreign studies, suggests that waiting periods probably do reduce suicide.<sup>172</sup>

Moreover, the United States Supreme Court decision upholding the twenty-four-hour waiting period for abortion did not apply intermediate scrutiny and did not suggest that there was anything magical about the number.<sup>173</sup> To the contrary, it held that the waiting period was not an “undue burden” on the right to abortion even though “the practical effect [for women at some distance to an abortion provider] will often be a delay of much more than a day.”<sup>174</sup> This suggests that a formal delay of seven days in the context of PAS would not be an undue burden on the Second Amendment right.<sup>175</sup>

To be sure, one federal district court has held that a ten-day waiting period did not pass intermediate scrutiny.<sup>176</sup> But this holding was expressly limited to would-be gun purchasers who already owned other guns.<sup>177</sup> The court explained: “A waiting period for a newly purchased firearm will not deter an individual from committing impulsive acts of violence with a separate firearm that is already in his or her possession.”<sup>178</sup> Only individuals without access to a firearm are likely to volunteer for PAS. And should such individuals later acquire a gun (through means other than a federally licensed dealer), they need only submit a notarized form and wait a week before future gun purchases from licensed dealers will be unimpeded.

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<sup>170</sup> Burns, *supra* note 23, at 408.

<sup>171</sup> *Id.* at 407–08, 410. *But see* Wilkinson, *supra* note 168, at 300 (predicting that after the Supreme Court’s 2008 decision in *Heller*, “courts may be able to find an unreasonable limitation on gun ownership ‘simply by selectively string-citing the right social science articles’” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 991 n.6 (1992) (Scalia, J., concurring in the judgment and dissenting in part))).

<sup>172</sup> See *supra* notes 62–71 and accompanying text.

<sup>173</sup> *Planned Parenthood*, 505 U.S. at 885–86.

<sup>174</sup> *Id.*

<sup>175</sup> Eugene Volokh has leveled another criticism against waiting periods that applies only to handguns: “It’s as easy to commit suicide with a shotgun as with a handgun . . .” Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1538 (2009). That criticism does not entirely apply to the present proposal, which covers all firearms.

<sup>176</sup> *Silvester*, 41 F. Supp. 3d at 964–68.

<sup>177</sup> *Id.* at 934.

<sup>178</sup> *Id.* at 966.

Some courts have applied strict rather than intermediate scrutiny to substantial burdens on Second Amendment rights. The Ninth Circuit for the U.S. Court of Appeals stated that “severe restrictions on the ‘core’ right have been thought to trigger a kind of strict scrutiny.”<sup>179</sup> One can question whether that view accords with the United States Supreme Court’s 2008 decision in *District of Columbia v. Heller*.<sup>180</sup> But even assuming that it does, a seven-day waiting period is not a substantial or severe enough burden to justify strict scrutiny. On remand in *Heller*, the U.S. Court of Appeals for the District of Columbia Circuit held that a thirty-day waiting period to register a second pistol imposed only a “modest burden[.]” on Second Amendment rights and would therefore be judged under intermediate scrutiny.<sup>181</sup> Likewise, in 2011, in *United States v. Laurent*, Judge Weinstein of the U.S. District Court for the Eastern District of New York held that a temporary restriction on the shipping, transportation, and receipt—but not possession—of firearms merited intermediate, not strict, scrutiny.<sup>182</sup>

If strict scrutiny does apply to PAS, it will require the government to show that its policy is “narrowly tailored to serve a compelling state interest.”<sup>183</sup> Undoubtedly, preventing suicide is compelling.<sup>184</sup> Whether the research above establishes that a mandatory waiting period is narrowly tailored to serve that goal is a closer question.<sup>185</sup> What is not a close question is that a firearm purchase waiting period limited to those who opt in based on their own perceived risk of suicide is narrowly tailored to prevent suicide. The fit is every bit as tight as optional do-not-call lists are in protecting privacy, which courts have found to be narrowly tailored when such lists have been

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<sup>179</sup> *Peruta v. County of San Diego*, 742 F.3d 1144, 1167 (9th Cir. 2014).

<sup>180</sup> In *District of Columbia v. Heller*, Justice Breyer stated:

[T]he majority implicitly, and appropriately, rejects [strict scrutiny] by broadly approving a set of laws—prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on fire arms in certain locales, and governmental regulation of commercial fire arm sales—whose constitutionality under a strict scrutiny standard would be far from clear.

554 U.S. at 688 (Breyer, J., dissenting).

<sup>181</sup> *Heller v. District of Columbia*, 670 F.3d 1244, 1248, 1262 (D.C. Cir. 2011).

<sup>182</sup> 861 F. Supp. 2d 71, 104 (E.D.N.Y. 2011); *see also* *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (applying intermediate scrutiny to content-neutral time, place, and manner restrictions on speech).

<sup>183</sup> *United States v. Marzzarella*, 614 F.3d 85, 99 (3d Cir. 2010) (quoting *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 55 U.S. 449, 465 (2007)).

<sup>184</sup> *Vars & Young*, *supra* note 165, at 23.

<sup>185</sup> *Compare* *Nunez v. City of San Diego*, 114 F.3d 935, 947–49 (9th Cir. 1997) (holding that a juvenile curfew was not narrowly tailored to the compelling interest of reducing juvenile crime and victimization, notwithstanding protestation that the court would “not dismiss the City’s legislative conclusion that the curfew [would] have a salutary effect”), *with* *Qutb v. Strauss*, 11 F.3d 488, 493 n.7 (5th Cir. 1993) (stating, in the course of upholding juvenile curfew, that even under strict scrutiny courts “do not demand of legislatures scientifically certain criteria of legislation”).

challenged under the First Amendment.<sup>186</sup> Self-reported suicide risk assessment tools have been shown to be reliable and valid.<sup>187</sup> One leading tool asks directly “[h]ow likely is it that you will attempt suicide someday?” and assigns more points to that question than to any other.<sup>188</sup> Courts may not owe legislatures much deference under strict scrutiny, but courts should defer to an individual’s assessment of their own suicide risk.<sup>189</sup>

An alternative argument builds on Joseph Blocher’s assertion that “the 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>190</sup> PAS can be viewed as a tool to strengthen this right not to bear arms—by binding oneself against too hastily bearing arms in the future. The animating principle of the Second Amendment right is self-defense.<sup>191</sup> One such threat to personal safety is firearm suicide.<sup>192</sup> Blocher writes:

[I]t seems odd that self-defense decisions should only be constitutionally protected when they are effectuated with a gun, rather than threatened by one. In either case, the goal of the person making the decision is to limit a risk of future harm. Indeed, even the affirmative Second Amendment right does not directly involve acts of self-

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<sup>186</sup> See *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm’n*, 358 F.3d 1228, 1242 (10th Cir. 2004) (holding that the national do-not-call registry is narrowly tailored because “it restricts only calls that are targeted at unwilling recipients”); *Nat’l Coalition of Prayer, Inc. v. Carter*, No. 02-0536-C B/S, 2005 WL 2253601, at \*10–11 (S.D. Ind. Sept. 2, 2005) (holding that a voluntary opt-in do-not-call list was narrowly tailored to protect residential privacy because it was limited to individuals who expressed desire not to be called).

<sup>187</sup> See GREGORY K. BROWN, A REVIEW OF SUICIDE ASSESSMENT MEASURES FOR INTERVENTION RESEARCH WITH ADULTS AND OLDER ADULTS 8–9, 12–14, 18–20, 25–27 (2004), <http://www.sprc.org/sites/sprc.org/files/library/BrownReviewAssessmentMeasuresAdultsOlderAdults.pdf> [<http://perma.cc/TT8L-RPMU>] (reviewing suicide assessment measures for the National Institute of Mental Health).

<sup>188</sup> Augustine Osman et al., *The Suicide Behaviors Questionnaire-Revised (SBQ-R) - Overview*, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN. (1999), <http://www.integration.samhsa.gov/images/res/SBQ.pdf> [<http://perma.cc/4C4F-LZ6S>]. See generally Augustine Osman et al., *The Suicidal Behaviors Questionnaire-Revised (SBQ-R): Validation with Clinical and Non-clinical Samples*, 8 ASSESSMENT 443 (2001) (reporting on the validation of the SBQ-R).

<sup>189</sup> This conclusion, however, rests on the adequacy of the self-selection process, which relates to the validity of the waiver discussed in section D of this Part. See *infra* notes 202–231 and accompanying text.

<sup>190</sup> Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 4 (2012).

<sup>191</sup> See *McDonald*, 561 U.S. at 767 (explaining that “individual self-defense is ‘the central component’ of the Second Amendment right” (emphasis added)); see also Fredrick E. Vars, *Symptom-Based Gun Control*, 46 CONN. L. REV. 1633, 1643–45 (2014) (arguing that the state may constitutionally take firearms away from people suffering from delusions because they are incapable of using guns with the objective reasonableness required for a valid claim of self-defense).

<sup>192</sup> See generally FRANCIS MARK MONDIMORE, BIPOLAR DISORDER: A GUIDE FOR PATIENTS AND FAMILIES (2d ed. 2006) (explaining that approximately 15% of people with bipolar disorder commit suicide).

defense, but rather the freedom to have certain means available to protect oneself against certain kinds of harm.<sup>193</sup>

PAS gives individuals another means to protect themselves from future harm and is therefore wholly consonant with the motivating spirit of the Second Amendment.<sup>194</sup>

### C. *The Right to Die?*

There is no constitutional right to commit suicide. Although there is a right to refuse life-saving medical treatment,<sup>195</sup> the Federal Constitution, for better or worse, does not protect a general right to die. In 1997, in *Washington v. Glucksberg*, the United States Supreme Court held that there was no constitutional right to *assisted* suicide.<sup>196</sup> The holding was narrow, but a majority of the justices declined to protect a right to *unassisted* suicide either.<sup>197</sup> This confirmed an earlier Michigan Supreme Court holding that “the Due Process Clause of the [F]ederal [C]onstitution does not encompass a fundamental right to commit suicide, with or without assistance.”<sup>198</sup>

Even if there were a constitutional right to commit suicide in some circumstances, PAS would not violate it.<sup>199</sup> A state trial court recently held that the New Mexico Constitution recognizes a patient’s choice of assistance in dying as a fundamental right, protected by strict scrutiny.<sup>200</sup> The burden of

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<sup>193</sup> Blocher, *supra* note 190, at 26.

<sup>194</sup> The right not to bear arms may seem novel, but the idea that an affirmative constitutional right implies a reciprocal negative right is not new. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492 (1995) (“The First Amendment generally protects the right not to speak as well as the right to speak.”).

<sup>195</sup> *Cruzan v. Dir. Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990).

<sup>196</sup> 521 U.S. 702, 728 (1997).

<sup>197</sup> See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT, at ix (1999) (“A majority of five Justices [in *Glucksberg*] merely said that there is no general right to suicide, assisted or otherwise, and it left open the possibility that under special circumstances, people might have a right to physician-assisted suicide after all.”); see also *Glucksberg*, 521 U.S. at 730 (“The State has an interest in preventing suicide, and in studying, identifying, and treating its causes.”).

<sup>198</sup> *People v. Kevorkian*, 527 N.W.2d 714, 733 (Mich. 1994). For further discussion of right-to-die laws, see generally David Orentlicher, *The Legalization of Physician Assisted Suicide*, 38 B.C. L. REV. 443 (1997) (discussing the evolution of the right to die, including physician-assisted suicide and the withdrawal of life-sustaining treatment).

<sup>199</sup> See Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1225 (1996) (arguing that even if the right to privacy protects suicide, the state may discourage it).

<sup>200</sup> *Morris v. Brandenburg*, No. D-202-CV 2012-02909, slip op. at 13 (N.M. 2d Jud. Dist. Ct. Jan. 13, 2014), available at [http://www.patientsrightscouncil.org/site/wp-content/uploads/2014/01/Morris\\_v\\_NM\\_Decision\\_01\\_13\\_14.pdf](http://www.patientsrightscouncil.org/site/wp-content/uploads/2014/01/Morris_v_NM_Decision_01_13_14.pdf) [<http://perma.cc/A594-U3QW>]. See generally Adam Lamparello, *Suicide: A Legal, Constitutional, and Human Right*, 18 TEX. WESLEYAN L. REV. 797 (2012) (arguing for unconditional right to commit suicide).

PAS on the right to die is slight: it restricts access to just one lethal means and allows for revocation of the restriction with just a one-week delay. Only those with merely fleeting suicidal intent will be prevented from taking their own lives. PAS is narrowly tailored to the compelling interest of preventing *impulsive* suicide.<sup>201</sup>

#### D. Waiver of Rights

The right to bear arms and any right to die are both waivable; thus, PAS does not violate either. PAS requires execution and notarization of a brief form explaining that the individual is making a revocable waiver of their right to purchase a firearm. This is substantially greater formality than is typically required for a waiver of Second Amendment rights. One waives the right to bear arms simply by walking into certain restaurants.<sup>202</sup> One can waive the right to bear arms even in one's home by signing a lease, with notice.<sup>203</sup> And though the result has been criticized, one can even waive the right to bear arms retroactively by having pled guilty to a disqualifying offense.<sup>204</sup>

The following principles generally govern waiver. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."<sup>205</sup> The validity of a waiver depends on "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the [rights-holder]."<sup>206</sup> Waivers of constitutional rights "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."<sup>207</sup> The presumption is against waiver.<sup>208</sup>

Notarization of a signed form is strong evidence of a valid waiver, though not a guarantee.<sup>209</sup> Notaries attest to the identity of the signatory, not

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<sup>201</sup> Recall that Oregon has a longer mandatory waiting period for physician-assisted suicide. OR. REV. STAT. § 127.850 § 3.08 (2013). The strict-scrutiny discussion above regarding the right to bear arms is applicable and further substantiates this point.

<sup>202</sup> See Fla. Retail Fed'n v. Att'y Gen. of Fla., 576 F. Supp. 2d 1281, 1295 (N.D. Fla. 2008) ("[A] private business's banning of guns on its own property plainly is not unconstitutional; there is no constitutional right to bear arms on private property against the owner's wishes.").

<sup>203</sup> Firearms, Vehicle Towing, Guests, and Security Deposits on Leased Property, Tenn. Op. Att'y Gen. No. 09-170, 2009 WL 3666436, at \*3 (Oct. 26, 2009).

<sup>204</sup> Miguel E. Larios, *To Heller and Back: Why Many Second Amendment Questions Remain Unanswered After United States v. Hayes*, 56 FED. LAW. 58, 61 (2009).

<sup>205</sup> Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

<sup>206</sup> *Id.*

<sup>207</sup> Brady v. United States, 397 U.S. 742, 748 (1970); see also Schriro v. Landrigan, 550 U.S. 465, 484 (2007).

<sup>208</sup> Tague v. Louisiana, 444 U.S. 469, 471 (1980).

<sup>209</sup> See North Carolina v. Butler, 441 U.S. 369, 373 (1979) ("An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver.").

to the signatory's level of understanding.<sup>210</sup> It is therefore possible that someone could opt into a firearm waiting period without knowledge or intelligence. This is very unlikely under the circumstances proposed here. The form will explain clearly that the signer is giving up the right to purchase firearms. Further, the form will explain the simple process to restore that right. Unlike with the right to silence or right to counsel, the consequences of waiver here are obvious, narrow, and revocable with a slight delay as the only penalty.<sup>211</sup>

More fundamentally, in its 1986 opinion in *Colorado v. Connelly*, the United States Supreme Court made clear that lack of understanding not produced by state action does not undermine the validity of waiver.<sup>212</sup> In *Connelly*, the defendant Connelly approached a police officer and immediately confessed to murder.<sup>213</sup> The officer advised him of his right to remain silent and right to an attorney.<sup>214</sup> To the officer's bewilderment, Connelly continued his confession, stating that he had not been drinking but had been a patient in several mental hospitals.<sup>215</sup> Expert testimony accepted by the Colorado Supreme Court established that Connelly was schizophrenic, hearing voices, and "clearly" unable to make an "intelligent" decision.<sup>216</sup> The United States Supreme Court reversed the lower courts' exclusion of Connelly's confession, holding that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."<sup>217</sup> Similarly, because the state is not involved in executing and notarizing the PAS form, the waiver is valid.<sup>218</sup>

One might observe that at least Connelly received an oral warning. But the oral warning had no effect: "Connelly's illness destroyed his volition and compelled him to confess."<sup>219</sup> Although a verbal explanation of the form could be valuable or helpful for people who are not actively psychotic, it is not required; even the right to counsel during a custodial interrogation, where

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<sup>210</sup> See generally Klint L. Bruno, Comment, *To Notarize, or Not to Notarize . . . Is Not a Question of Judging Competence or Willingness of Document Signers*, 31 J. MARSHALL L. REV. 1013 (1998) (explaining the role of notaries).

<sup>211</sup> Cf. *Indiana v. Edwards*, 554 U.S. 164, 174–78 (2008) (requiring a higher level of capacity to waive the right to an attorney when a defendant intends to proceed pro se to trial than when a defendant plans to plead guilty). Though residential leases are not notarized, "[a] public housing lease [restricting gun rights] will not be invalidated on voluntariness grounds." Jamie L. Wershale, *The Second Amendment Under a Government Landlord: Is There a Right to Keep and Bear Legal Firearms in Public Housing?*, 84 ST. JOHN'S L. REV. 995, 1035 (2010).

<sup>212</sup> 479 U.S. 157, 164 (1986).

<sup>213</sup> *Id.* at 160.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 188 (Brennan, J., dissenting).

<sup>217</sup> *Id.* at 167.

<sup>218</sup> One could say that a notary represents the state, but the notary's duties are basically ministerial and certainly not coercive. See Bruno, *supra* note 210, at 1022.

<sup>219</sup> *Connelly*, 479 U.S. at 162.

police coercion is always a concern, may be waived by a written document with no verbal admonition.<sup>220</sup>

Another waiver analogy supports PAS: a deathbed gift of all real and personal property, which effectively waives the constitutional right of descent and devise.<sup>221</sup> A gift of personal property can be oral, but a gift of real property must comply with the applicable statute of frauds.<sup>222</sup> Most jurisdictions require only a signed writing,<sup>223</sup> though use of a notary is common in New York at least.<sup>224</sup> PAS adopts this high level of formality which, if adequate to give away all of one's property, should be adequate to delay purchase of one very specific item of personal property—viz., firearms.

A perhaps closer analogy is the psychiatric advance directive, or PAD, discussed above. One commentator has argued that because psychiatric advance directives can waive the fundamental right to refuse treatment, execution must be knowing, voluntary, and intelligent.<sup>225</sup> The commentator contended that two witnesses could adequately ensure voluntariness, but clearer waiver language and an independent “rights advocate” are needed for informed consent.<sup>226</sup> Clear waiver language would be included in the PAS form, but a “rights advocate” is not needed here because the decision is straightforward and revocable.<sup>227</sup> As with the execution of a will, notarization is an ade-

<sup>220</sup> *People v. Elagnaf*, 829 P.2d 484, 488 (Colo. App. 1991); accord *United States v. Springer*, 460 F.2d 1344, 1353 (7th Cir. 1972); WILLIAM E. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 26:5 (2d ed. 2015).

<sup>221</sup> *Hodel v. Irving*, 481 U.S. 704, 716–17 (1987).

<sup>222</sup> RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS §§ 31.4, 32.3 (AM. LAW. INST. 1992).

<sup>223</sup> Dale A. Whitman, *Are We There Yet? The Case for a Uniform Electronic Recording Act*, 24 W. NEW ENG. L. REV. 245, 250 (2002); accord William H. Danne, Jr. & Romualdo P. Eclavea, 38A CORPUS JURIS SECUNDUM GIFTS § 24 (2015) (“[T]he execution and delivery of a deed to land is a completed execution of a gift of the land.”).

<sup>224</sup> See *In re Will of D’Elia*, 964 N.Y.S. 2d 877, 881 (Surrogate’s Ct. Apr. 10, 2013) (“The formalities for recording a deed are set by RPL Sec. 291 et seq., and are most commonly satisfied by due acknowledgment before a notary public . . .” (citation omitted)).

<sup>225</sup> Nick Anderson, Note, *Dr. Jekyll’s Waiver of Mr. Hyde’s Right to Refuse Medical Treatment: Washington’s New Law Authorizing Mental Health Care Advance Directives Needs Additional Protections*, 78 WASH. L. REV. 795, 806 (2003); see also Fredrick E. Vars, *Illusory Consent: When an Incapacitated Patient Agrees to Treatment*, 87 OR. L. REV. 353, 366–91 (2008) (outlining proposal to maximize voluntariness of voluntary admissions for inpatient psychiatric care).

<sup>226</sup> Anderson, *supra* note 225, at 822–23, 825; see also Thaddeus Mason Pope, *The Maladaptation of Miranda to Advance Directives: A Critique of the Implementation of the Patient Self-Determination Act*, 9 HEALTH MATRIX 139, 180–86, 199–200 (1999) (arguing that the touchstone for advance directives should be informed consent and suggesting an interactive computer-based tool).

<sup>227</sup> Anderson, *supra* note 225, at 825 (“If the patient retains the right to revoke the directive at any time, the fundamental right to refuse medical treatment is not waived and a ‘rights advocate’ is not needed.”); cf. Robertson, *supra* note 119, at 1745 (“[B]ecause of their irrevocability at Time



quate substitute for two witnesses and, in fact, better in a very important way.<sup>228</sup> A mail-in form has greater forgery potential than a will or advance directive, and a notary's seal is harder to fake than a few witness signatures.<sup>229</sup>

A notarized form should constitute valid waiver in the PAS circumstance, but there may be room for confused or coerced individuals to subsequently object to the precommitment. Such exceptional cases, however, do not undermine the constitutionality of the proposal. The process does not have to be flawless; rather, it need only sort individuals well enough so that the proposal, as a whole, is substantially related (or perhaps narrowly tailored) to the compelling goal of preventing suicide.<sup>230</sup> Allowing those who fear impulsive firearm suicide to opt for a firearm purchase waiting period plainly meets that test.<sup>231</sup> Thus, PAS does not violate the Constitution.

## V. TWO COUNTER-ARGUMENTS TO PAS

PAS can be criticized by both liberals and conservatives, but these criticisms are not persuasive. Opponents on the left might argue that PAS is not restrictive enough; indeed, a significant limitation of PAS is that it will not prevent purchases from sellers who are not licensed dealers.<sup>232</sup> Federal law does not require a background check for these so-called private sales, which have been estimated to constitute as many as forty percent of firearm transfers.<sup>233</sup> Because PAS piggybacks onto NICS, it would not impede private firearm transactions. Closing this so-called “gun show” or “private sale” loophole federally would be the best solution, but this appears unlikely given the current political climate (despite strong popular support).<sup>234</sup>

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2, preemptive precommitments may need extensive front-end protections to make sure that they are freely and knowingly made.”).

<sup>228</sup> Lawrence W. Waggoner, *The UPC Authorizes Notarized Wills*, 34 AM. C. TR. & EST. COUNS. L.J. 83, 84 (2008).

<sup>229</sup> *Id.* at 84–85.

<sup>230</sup> See *supra* notes 162–194 and accompanying text.

<sup>231</sup> See *supra* notes 162–194 and accompanying text.

<sup>232</sup> See *Universal Background Checks & the Private Sale Loophole Policy Summary*, L. CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/universal-gun-background-checks-policy-summary/> [<http://perma.cc/J3FM-HTKA>] (arguing that private sales are a dangerous “loophole” in federal gun regulation).

<sup>233</sup> PHILIP J. COOK & JENS LUDWIG, U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE RESEARCH IN BRIEF, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND USE OF FIREARMS 6–7 (1997), <https://www.ncjrs.gov/pdffiles/165476.pdf> [<https://perma.cc/AEP4-FK3Y>].

<sup>234</sup> Colleen L. Barry et al., *Perspective: After Newtown—Public Opinion on Gun Policy and Mental Illness*, 368 NEW ENG. J. MED. 1077, 1077 (2013) (reporting that over 90% of Americans, including 74% of NRA members, support universal background checks); Jonathan Weisman, *Senate Blocks Drive for Gun Control*, N.Y. TIMES (Apr. 17, 2013), [http://www.nytimes.com/2013/04/18/us/politics/senate-obama-gun-control.html?\\_r=0](http://www.nytimes.com/2013/04/18/us/politics/senate-obama-gun-control.html?_r=0) [<https://perma.cc/9XHB->

There is another response (although not entirely satisfying) to the criticism that PAS will not suffice given the private sale loophole: private sales tend to have a built-in time delay. Internet purchases and old-fashioned classified ads require some period of time for delivery or pickup. Furthermore, gun shows are ephemeral. Only if there happens to be one nearby at the moment an individual decides to commit suicide will he or she be able to quickly buy a gun through that avenue. Therefore, the licensed dealer with regular business hours and a known and fixed location will remain the preferred purchase venue for suicidal individuals. PAS may not prevent every sale, but it will prevent many.

On the opposite side of the political spectrum, some opponents on the right will argue that seven days is too long to wait for a gun should an unanticipated need for self-defense arise.<sup>235</sup> In such a case, “[t]he suicide prevention device may turn into a suicide pact.”<sup>236</sup> However, such circumstances are probably very rare, and not unique; there is likewise no time to run to a gun store during a robbery or assault. And if the threat warranting the purchase of a gun for self-defense is less immediate—e.g., when moving to a new neighborhood or working the night shift—waiting a week for a gun is no great burden.

More fundamentally, the likelihood of needing a gun for self-defense not instantly but in less than a week must be balanced against the risk of impulsive suicide by firearm. PAS allows individuals to decide for themselves how to strike that balance. It is roughly the same calculus people undertake when deciding whether to keep a gun in their home. No one should be forced to own a gun,<sup>237</sup> so no one should be prevented from making it slightly harder for him or herself to purchase one.

#### CONCLUSION

People ought to be allowed to make it more difficult to take their own lives. The specific proposal here—voluntarily preventing one’s own firearm purchases for a period of at least a week—has the potential to save many lives. Between six hundred and two thousand people each year commit suicide with a recently obtained firearm. And restricting access to firearms has been demonstrated to reduce suicide.

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ZG5C] (reporting Senate’s failure to pass bipartisan gun control measures after the Newtown tragedy).

<sup>235</sup> See JAMES B. JACOBS, CAN GUN CONTROL WORK? 218 (2002) (“[T]he NRA has a point in noting that, in some cases, a waiting period could deny a firearm to a person under immediate threat who has no other viable means of self-defense.”).

<sup>236</sup> Elster, *Complexities of Precommitment*, *supra* note 103, at 1787.

<sup>237</sup> See Blocher, *supra* note 190, at 1.

Allowing individuals to add their own names to the list of prohibited firearm purchasers is strongly supported by precommitment theory and practice. Self-binding against passionate, impulsive suicide is the ideal situation for precommitment. This conclusion is bolstered by analogies to two existing precommitment regimes: psychiatric advance directives and self-exclusion from gambling programs. These programs have proven successful; PAS has the potential to be an even greater success.

Importantly, PAS would not run afoul of the Constitution. People who believe that they are at high risk for suicide would have the option to restrict their own access to guns. This is narrowly tailored to the compelling government interest in preventing suicide.<sup>238</sup>

Finally, it should be emphasized again that PAS has the potential to save lives at a very low cost. After initial start-up expenses, the most significant ongoing expense will be processing PAS forms. These costs are small in comparison to the cost of suicide—just ask Jonathan Jacoves's parents.<sup>239</sup> If PAS saves even one life, as seems very likely, it will have been a good investment.

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<sup>238</sup> It should be noted that a genuine constitutional challenge to PAS by a volunteer would be unlikely. Sending in a notarized removal form would provide complete redress in a much faster and less expensive way than a lawsuit.

<sup>239</sup> See Kelly, *supra* note 87 (“It is the worst thing in the world to lose a child,” said one trauma specialist. “It is even worse when it is by his or her own hand.”).

