2016

Bind Me More Tightly Still: Voluntary Restraint against Gun Suicide

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ARTICLE

"BIND ME MORE TIGHTLY STILL": VOLUNTARY RESTRAINT AGAINST GUN SUICIDE

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Individuals ought to be able to protect themselves from gun suicide by making it more difficult for them to buy guns. This Article examines the constitutionality of two robust, voluntary restraints on gun purchase. A person who selected the first option would be able to purchase a gun only after receiving judicial approval. Under the second option, the ban on purchase would be irrevocable. The Article concludes that neither option violates the Second Amendment, but that a contrary holding is possible with respect to the irrevocable purchase ban.

I. INTRODUCTION

Ulysses did not escape the Sirens' deadly song on his own. He relied on his crew to tie him to the mast and, crucially, instructed them if he begged for release too soon to "bind me more tightly still."[1] Ulysses understood that self-imposed restrictions may not be effective if too easily undone. This Article translates Ulysses's wisdom into the context of firearm suicide.

Suicide claimed 41,149 lives in the United States in 2013.[2] It was the tenth-leading cause of death overall and among the top five causes of death for people between the ages of 10 and 54.[3] Most suicide attempts are impulsive.[4] Rather than successfully re-attempt suicide, the vast majority of suicide attempt survivors go on to die of natural causes.[5] But those who attempt suicide with a firearm almost never get a second chance. One study found that between 80% and 90% of suicide attempts using firearms are fatal,[6] making guns the most lethal common method.[7] As a result, half of com-

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[1] HOMER, THE ODYSSEY, BOOK XII (Samuel Butler trans.) (800 B.C.E.), http://classics.mit.edu/Homer/odyssey.12.xii.html [https://perma.cc/K44D-USGE].

[2] NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, 10 LEADING CAUSES OF DEATH BY AGE GROUP, UNITED STATES – 2013, http://www.cdc.gov/injury/images/lc-charts/leading_causes_of_death_by_age_group_2013-a.gif [https://perma.cc/MDK8-K3EZ].

[3] *Id.*

[4] *See* Linda G. Peterson et al., *Self-Inflicted Gunshot Wounds: Lethality of Method Versus Intent*, 142 AM. J. PSYCHIATRY 228, 230 (1985) (finding that the time between a decision to commit suicide with a firearm and an attempt was usually less than a day).

[5] David Owens, Judith Horrocks & Allan House, *Fatal and Non-Fatal Repetition of Self-Harm: Systematic Review*, 181 BRIT. J. PSYCHOL. 193, 193 (2002).

[6] Matthew Miller et al., *The Epidemiology of Case Fatality Rates for Suicide in the Northeast*, 43(6) ANNALS EMERGENCY MED. 723, 723, 726 (2004) [hereinafter *Epidemiology*]; Rebecca S. Spicer & Ted R. Miller, *Suicide Acts in 8 States: Incidence and Case Fatality Rates by Demographics and Method*, 90 AM. J. PUB. HEALTH 1885, 1887 (2000).

[7] Spicer & Miller, *supra* note 6, at 1888 tbl.2.

pleted suicides involve firearms.[8] Given these statistics, it should not be surprising that studies show reducing access to firearms reduces suicide.[9]

Reducing access to firearms is, however, controversial. Debates over gun control generally involve a trade-off between saving lives[10] and preserving the right to bear arms.[11] The two sides are entrenched and common ground is vanishingly slim. As long as the focus is on mandatory restrictions of gun rights, the trench warfare seems likely to continue for decades to come. But a new paradigm is possible—one that bridges the gap by simultaneously promoting safety *and* liberty. Allow people who fear suicide to voluntarily restrict their own gun purchase rights.

One of the authors has previously proposed allowing individuals to prevent their own future gun purchases by confidentially submitting their names to the federal background check system.[12] Once in the system—the National Instant Criminal Background Check, or "NICS"—participants would not be able to purchase firearms from licensed dealers. Participants could have their names removed by making a request and simply waiting seven days (Option One). This proposal is termed "Precommitment Against Suicide," or "PAS." PAS is designed to stop individuals from purchasing a firearm in an impulsive suicide attempt.

A one-week delay, however, would not be enough to prevent all gun suicide attempts. Joseph Braman waited the statutorily required fifteen days for delivery of a new handgun in California:

> Three days later, Braman was sitting in the bedroom of his Oakland home with his wife, Michele, who is blind. The couple were making out a grocery shopping list and Braman, who had just taken a shower, got up and went into the bathroom.

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[8] Matthew Miller et al., *Firearms and Suicide in the United States: Is Risk Independent of Underlying Suicidal Behavior?*, 178 AM. J. EPIDEMIOLOGY 946, 946 (2013) [hereinafter *Firearms and Suicide*] (citing *Injury Prevention & Control: Data & Statistics*, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/injury/wisqars/index.html [https://perma.cc/86XP-7MRR] (last updated Dec. 8, 2015)).

[9] Andrew Anglemyer, Tara Horvath & George Rutherford, *The Accessibility of Firearms and Risk for Suicide and Homicide Victimization among Household Members: A Systematic Review and Meta-analysis*, 160 ANNALS INTERNAL MED. 101, 105 (2014).

[10] The website of the advocacy group Everytown for Gun Safety in May 2015 featured stories on child gun deaths, mass shootings, violence against women, and school shootings. *See* EVERYTOWN FOR GUN SAFETY, http://everytown.org/ [https://perma.cc/FD96-M6TW].

[11] The NRA Institute for Legislative Action website states: "Established in 1975, the Institute for Legislative Action (ILA) is the 'lobbying' arm of the National Rifle Association of America. ILA is responsible for preserving the right of all law-abiding individuals in the legislative, political, and legal arenas, to purchase, possess and use firearms for legitimate purposes as guaranteed by the Second Amendment to the U.S. Constitution." NRA-ILA, https://www.nraila.org/gun-laws.aspx [https://perma.cc/JRR4-7858]. *See generally* District of Columbia v. Heller, 554 U.S. 570 (2008).

[12] Fredrick E. Vars, *Self-Defense Against Gun Suicide*, 56 B.C. L. REV. 1465, 1465 (2015).

> Michele Braman heard what she thought was a car backfire. Then she heard what sounded like water splashing against the shower curtain and wondered why Braman was bathing again.
>
> "And then I thought I smelled gunpowder," she said. "Because I don't see, my other senses are so acutely developed that I hear and smell and sense things to a great degree.
>
> "I screamed for him and I ran into the bathroom."
>
> Braman was slumped over the bathtub as blood from his head sprayed against the shower curtain.[13]

Joseph Braman is not alone: Notwithstanding the state's waiting period, a person's risk of suicide in California in the first week after a gun purchase is fifty-seven times the rate in the general population.[14] Braman and his wife knew he was at high risk of suicide. He had twice been involuntarily committed to mental hospitals and had even attempted suicide that winter.[15]

The present Article would significantly improve PAS by adding a second and third removal option to the sign-up form, in addition to the originally proposed seven-day delay option (Option One).[16] Option Two would require a judicial hearing where the burden would be on the individual seeking removal from NICS to show that he or she is not at elevated risk of suicide.[17] Under Option Three, a person could not remove his or her name from the list—in other words, a person could opt for a permanent lifetime bar on gun purchases.

Providing Option Two will prevent more suicides than Option One alone. Individuals with a relatively high lifetime risk of suicide may have extended periods when they feel fine and do not fully appreciate their long-term risk.[18] A seven-day delay to restore gun-purchase rights may not be a strong enough deterrent to protect such individuals from themselves. They need a crew like that of Ulysses to bind them more tightly still.[19]

Of course, Option Two will only work if people at relatively high risk of suicide sign up for it. One review of seventy-six studies found that the

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[13] John Hurst, *Error Limits Gun Buyer Checks: Firearms: Assemblyman Vows to Amend Law Intended to Encourage People to seek Mental Help by not Forbidding Them to Buy Weapons. A Widow Says the Measure Allowed Her Husband to Kill Himself*, L.A. TIMES (May 21, 1993), http://articles.latimes.com/1993-05-21/news/mn-38185_1_mental-patient [https://perma.cc/6NA5-JU59].

[14] Garen J. Wintemute et al., *Mortality Among Recent Purchasers of Handguns*, 341 NEW ENGL. J. MED. 1583, 1583 (1999).

[15] Hurst, *supra* note 13.

[16] The details, merits, and constitutionality of Option One are described at length elsewhere, *see generally* Vars, *supra* note 12, and will not be repeated here.

[17] Alternatively, the individual could obtain removal by showing that the initial waiver was invalid.

[18] Erkki Isometsä, *Suicidal Behaviour in Mood Disorders—Who, When, and Why?*, 59 CAN. J. PSYCHIATRY 120, 126 (2014) (reporting relatively low risk of suicide during partial remission for patients with major depressive disorder as compared with very high risk during depressive episodes).

[19] HOMER, *supra* note 1.

median percentage of suicides involving mental disorder was around 90%.[20] Roughly half of suicide victims during their lifetimes had contact with a mental health professional.[21] If even a modest percentage of these individuals could be persuaded to sign up for PAS, millions at high risk would be putting very significant distance between themselves and gun suicide.

Requiring an individual at the Option Two hearing to show no elevated risk of suicide obviously tracks the goal of the proposal: suicide prevention. It also echoes the current federal standard for relief from other firearm disqualifications, like the prohibition on firearm purchases by convicted felons. To have gun rights restored, such prohibited individuals must show that they "will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."[22] The danger to safety here is suicide and the public interest is preventing it. Evaluating the risk of suicide is exactly what the judge should be doing.

Option Three is the furthest extension of PAS. A permanent restriction on gun purchase would have the greatest impact on suicide, if people would be willing to sign up. And while the attractiveness of Option Three is untested, it seems plausible that at least some individuals at high risk of suicide would want the peace of mind of putting guns permanently out of reach.

Thus, Options Two and Three would prevent suicide. This Article examines their constitutionality. These options arguably impose more substantial burdens than Option One on the constitutional right to bear arms. Part II argues that intermediate scrutiny is more appropriate, and more likely to apply, than strict scrutiny. Because there is residual uncertainty as to the applicable level of scrutiny, this Article examines each option under both levels. Part III steps back to outline the scope and implications of potential challenges under either test. Part IV applies strict scrutiny to both options. It concludes that Option Two should pass, but that the outcome on Option Three is uncertain. Of greatest practical import, Part V establishes that both options would easily clear intermediate scrutiny, which is the standard that should apply.

II. Level of Scrutiny

The Supreme Court recognized an individual right to keep and bear arms under the Second Amendment in *District of Columbia v. Heller*[23] and held that the right applies against the states in *McDonald v. City of Chi-*

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[20] J.T.O. Cavanagh et al., *Psychological Autopsy Studies of Suicide: A Systematic Review*, 33 Psychol. Med. 395, 399 (2003).

[21] Jason B. Luoma, Catherine E. Martin & Jane L. Pearson, *Contact with Mental Health and Primary Care Providers before Suicide: A Review of the Evidence*, 159 Am. J. Psychiatry 909, 912 (2002).

[22] 18 U.S.C. § 925(c) (2012).

[23] District of Columbia v. Heller, 554 U.S. 570 (2008).

cago.[24] However, the Court did not identify the level of scrutiny courts should use to evaluate constitutional challenges based on the newly recognized individual right.[25] Thus, the Supreme Court left uncertainty about the appropriate level of scrutiny in the lower federal and state courts.

In response, the Courts of Appeals have adopted a two-part test for evaluating Second Amendment challenges.[26] The courts first ask "whether the challenged law burdens conduct protected by the Second Amendment."[27] If the law does not burden conduct protected by the Second Amendment, there is no Second Amendment violation.[28] If the challenged law does burden such conduct, the courts then evaluate whether the law passes constitutional scrutiny.[29] The appropriate level of scrutiny depends on "the nature of the conduct being regulated and the degree to which the challenged law burdens the right."[30] There are three potential standards of constitutional means-ends scrutiny: rationality review, intermediate scrutiny, and strict scrutiny.[31] In *Heller*, the Court expressly rejected rationality review.[32] Therefore, either strict or intermediate scrutiny will apply to any Second Amendment challenge against PAS that passes the first judicial inquiry.

A. Options Two and Three May Not Burden Conduct Protected by the Second Amendment

PAS imposes the same restriction on participants—the inability to purchase a gun from a licensed dealer—under both Option Two and Option Three. It is unclear whether this restriction burdens conduct protected by the Second Amendment.

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[24] McDonald v. City of Chicago, 561 U.S. 742 (2010).

[25] *See Heller*, 554 U.S. at 628 (finding instead that the D.C. firearm restrictions were unconstitutional "[u]nder any of the standards of [constitutional] scrutiny").

[26] *See, e.g.*, United States v. Chovan, 735 F.3d 1127, 1136–37 (9th Cir. 2013); Kachalsky v. County of Westchester, 701 F.3d 81, 93 (2d Cir. 2012); Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (*NRA v. BATFE*), 700 F.3d 185, 194–95 (5th Cir. 2012); GeorgiaCarry.org, Inc. v. Georgia, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1252 (D.C. Cir. 2011); Ezell v. City of Chicago, 651 F.3d 684, 701–04 (7th Cir. 2011); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

[27] *Chovan*, 735 F.3d at 1136.

[28] Some circuits have indicated that "even if a regulated activity presumably falls outside the scope of the Second Amendment right, a regulation may still be subject to an as-applied challenge." *Greeno*, 679 F.3d at 520–21.

[29] *Chovan*, 735 F.3d at 1136.

[30] *Id.* (quoting *Chester*, 628 F.3d at 682). *But see* Tyler v. Hillsdale Cty. Sheriff's Dep't, 775 F.3d 308, 331 (6th Cir. 2014) (applying strict scrutiny categorically to all Second Amendment challenges), *reh'g granted*, No. 13-1876, 2015 U.S. App. LEXIS 6638 (6th Cir. Apr. 21, 2015), *argued* Oct. 14, 2015.

[31] *Tyler*, 775 F.3d at 322.

[32] *See* District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008) (stating that rational basis review "could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right," including "the right to keep and bear arms").

To determine whether particular conduct is protected by the Second Amendment, *Heller* instructs courts to analyze the historical understanding of the amendment.[33] Because of this historical framework, some "longstanding prohibitions," including "prohibitions on the possession of firearms by felons and the mentally ill," are "presumptively lawful" and are not protected by the Second Amendment.[34] The categories enumerated in *Heller* indicate that historically unprotected conduct falls outside the scope of the Second Amendment's current protection.

Because the Court included longstanding prohibitions on firearm possession by the mentally ill in the category of presumptively lawful restrictions,[35] if all PAS participants are mentally ill,[36] PAS may not implicate Second Amendment concerns. However, it is impossible to say that all PAS participants will be mentally ill. Therefore, it is unlikely that this analogy will conclusively end any Second Amendment challenge. Nevertheless, the analogy suggests that Options Two and Three may not burden conduct protected by the Second Amendment.

A regulation may also fall outside the scope of the Second Amendment's protection if the regulation is justified based on the same reasoning used to justify historical regulations on unprotected groups.[37] For example, in *United States v. Seay*, the Eighth Circuit held that the federal prohibition on firearm possession by substance abusers does not violate the Second Amendment.[38] The court noted that Congress, in passing the legislation, intended to keep firearms from "a dangerous class of individuals."[39] As a result, the prohibition "is the type of 'longstanding prohibition[ ] on the possession of firearms' that *Heller* declared presumptively lawful."[40]

Following this reasoning, a second analogy emerges. Options Two and Three may not burden conduct protected by the Second Amendment because PAS can be justified following the same reasoning that underlies longstand-

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[33] *Id.*; *see also NRA v. BATFE*, 700 F.3d 185, 194 (5th Cir. 2012) ("[W]e look to whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee."); Ezell v. City of Chicago, 651 F.3d 684, 702 (7th Cir. 2011) ("[A] wider historical lens is required if we are to follow the Court's lead in resolving questions about the scope of the Second Amendment by consulting its original public meaning as both a starting point and an important constraint on the analysis.").

[34] *Heller*, 554 U.S. at 626–27 & n.26.

[35] *Id.*

[36] *See infra* text accompanying notes 137–143.

[37] *See* United States v. Marzzarella, 614 F.3d 85, 93 (3d Cir. 2010) (questioning whether the federal prohibition on possession of firearms by substance abusers may be presumptively lawful because "it presumably serves the same purpose as restrictions on possession by felons").

[38] United States v. Seay, 620 F.3d 919, 925 (8th Cir. 2010).

[39] *Id.* (quoting United States v. Cheeseman, 600 F.3d 270, 280 (3d Cir. 2010)).

[40] *Id.* (alteration in original) (quoting *Heller*, 554 U.S. at 626). Judge Easterbrook expressed a similar understanding in the Seventh Circuit's en banc opinion in United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010). He explained that the original meaning of the Second Amendment encompassed the idea that "*some* categorical limits" on firearms set by the legislature are proper. *Id.*

ing, presumptively lawful regulations. Just as prohibitions of firearm possession from felons and substance abusers exist to curb violence by targeting particularly dangerous groups, PAS would seek to prevent suicide by targeting a high-risk population. In fact, research indicates that the group most likely to sign up for PAS—those with a psychiatric diagnosis—are just as, if not more, dangerous than past violent offenders.[41] For example, one meta-analysis found that, on average, 87.3% of individuals who commit suicide have some form of psychiatric disorder.[42] In comparison, a study of Swedish crime data found that only 63% of violent offenders in the country were repeat offenders (2–11 prior violent offenses).[43] Given the consistently high rates of suicide amongst potential participants, PAS is analogous to the felon-in-possession ban upheld in *Heller*. As the Eighth Circuit reasoned in *Seay*, this analogy may prevent PAS from burdening conduct protected by the Second Amendment.

However, not all courts follow *Seay*'s reasoning.[44] Rather than exploring the historical implications of gun regulations, several circuits simply reason that if a law makes it more difficult for a person to lawfully acquire a firearm, then the law easily burdens a right within the scope of the Second Amendment.[45] For example, one court of appeals held that a novel firearm registration scheme burdened Second Amendment rights simply because it made it more difficult for a person to acquire and keep a gun for self-defense in the home.[46] Following this reasoning, both Options Two and Three would burden a right within the scope of the Second Amendment because each would bar otherwise legal firearm purchases.

Given these divergent approaches, it is unclear whether PAS implicates the Second Amendment at all. Options Two and Three may be analogous enough to longstanding prohibitions on the mentally ill to be considered presumptively lawful. If PAS does not burden conduct protected by the Second Amendment, any constitutional challenge would fail. On the other hand, PAS arguably burdens the Second Amendment by restricting access to firearms. Some Courts of Appeals might find this burden sufficient to trigger constitutional scrutiny. If PAS burdens conduct protected by the Second Amendment, it becomes necessary to determine whether Options Two and Three will be evaluated under strict or intermediate scrutiny.

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[41] *See infra* notes 142–143 and accompanying text. There is an important difference. The primary risk posed by people with mental illness is self-harm, whereas violent offenders prey on others.

[42] Geneviève Arsenault-Lapierre et al., *Psychiatric Diagnoses in 3275 Suicides: A Meta-Analysis*, 4 BMC PSYCHIATRY 37, 37 (2004).

[43] Orjan Falk et al., *The 1% of the Population Accountable for 63% of All Violent Crime Convictions*, 49 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 559, 564–65 (2014).

[44] One concurring circuit judge rejected the status-based analogy of felons to misdemeanants. *See* United States v. Chovan, 735 F.3d 1127, 1145 (9th Cir. 2013) (Bea, J., concurring).

[45] *See Heller II*, 670 F.3d 1244, 1255 (D.C. Cir. 2011); United States v. Reese, 627 F.3d 792, 801 (10th Cir. 2010).

[46] *Heller II*, 670 F.3d at 1255.

B. PAS Will Likely Be Evaluated Under Intermediate Scrutiny

The next relevant inquiry under the two-part framework is whether Options Two and Three would be evaluated under strict or intermediate scrutiny.[47] To determine the appropriate level of scrutiny, courts generally ask whether the regulation substantially burdens individual rights and how close the regulation comes to burdening the core of the Second Amendment.[48] What follows from the answers to these questions varies somewhat across circuits, as explained below.

As to the first part of the question, courts employ various methods to determine whether a law substantially burdens Second Amendment rights. For example, the Second Circuit asks whether "adequate alternatives remain for law-abiding citizens to acquire a firearm" to determine whether a law imposes a substantial burden.[49] In one case, the Second Circuit held that § 922(a)(3), which prohibits an unlicensed individual from transferring a gun into his state of residence from out of state, does not substantially burden Second Amendment rights.[50] The court reasoned that the law left open ample alternatives for acquiring a firearm: purchasing in-state or purchasing from out of state if the weapon is first transferred to a licensed dealer.[51] PAS leaves open fewer alternative avenues for acquiring a gun to use for self-defense than § 922(a)(3) leaves open, because participants are prohibited from purchasing a gun from any federally licensed dealer, in-state or out-of-state. Nevertheless, PAS leaves open some alternatives. For example, in most states participants will be able to purchase firearms through intrastate private sales.[52] Additionally, there is no restriction on access to guns through friends and family, because the proposal does not prohibit possession. These alternatives may be enough to prevent PAS from imposing a substantial burden on Second Amendment rights.

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[47] *See Chovan*, 735 F.3d at 1138.

[48] *Id.* This approach has been adopted by the Second Circuit, Kachalsky v. County of Westchester, 701 F.3d 81, 93 (2d Cir. 2012); the Fifth Circuit, *NRA v. BATFE*, 700 F.3d 185, 195 (5th Cir. 2012); the Seventh Circuit, Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011); the Ninth Circuit, Peruta v. County of San Diego, 742 F.3d 1144, 1168 n.15 (9th Cir. 2014); and the D.C. Circuit, *Heller II*, 670 F.3d at 1257.

[49] United States v. Decastro, 682 F.3d 160, 168 (2d Cir. 2012); *see also* New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 259 (2d Cir. 2015) ("The scope of the legislative restriction and the availability of alternatives factor into our analysis . . . .").

[50] *Decastro*, 682 F.3d at 168.

[51] *Id.*

[52] Intrastate private sales are generally exempt from the formal background check requirements. Michael P. O'Shea, *The Steepness of the Slippery Slope: Second Amendment Litigation in the Lower Federal Courts and What It Has To Do With Background Recordkeeping Legislation*, 46 CONN. L. REV. 1381, 1391 (2014). Eight states—California, Colorado, Connecticut, Delaware, New York, Oregon, Rhode Island, and Washington State—and the District of Columbia require universal background checks for all gun sales. *Universal Background Checks & the Private Sale Loophole Policy Summary*, L. CTR. TO PREVENT GUN VIOLENCE (Sept. 10, 2015), http://smartgunlaws.org/universal-gun-background-checks-policy-summary/ [https://perma.cc/DQ9G-L64B].

Furthermore, several courts distinguish between laws that regulate and laws that totally restrict Second Amendment rights when determining how severe a burden a challenged law imposes.[53] Courts have reasoned that some form of review beyond intermediate scrutiny is required when a law imposes a complete bar on exercising a certain right.[54] For example, one circuit evaluated a city ordinance that required a handgun to be either carried on one's person, stored in a locked container, or kept trigger-locked. The court noted that the ordinance does not impose a substantial burden because it is a "manner" restriction.[55] The court reasoned that, even though a law makes it significantly more difficult for a person to acquire and keep a gun, there is no substantial burden when the law does not prevent firearm possession in the home.[56]

Although at first glance PAS, particularly Option Three, appears to impose a complete ban, the proposal is essentially a time, place, and manner restriction. PAS prevents purchase from federally licensed dealers but does not eviscerate participants' potential access to or possession of guns. Therefore, the proposal does not completely ban firearm possession or use in the home and likely does not impose a substantial burden on Second Amendment rights. In the Second Circuit, a substantial burden is required for a Second Amendment violation, so PAS would be upheld with no further inquiry.[57] Other Courts of Appeals move on to the second part of the question—whether the law burdens the Second Amendment's core.[58]

Under the second part, both Options Two and Three arguably burden the core of the Second Amendment. This inquiry necessarily turns on what the core of the Second Amendment is. After *Heller* and *McDonald*, there can be no dispute that the core of the Amendment includes a right to self-defense in the home.[59] What is still disputed is whether the core extends to self-

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[53] *See Ezell*, 651 F.3d at 708; New York State Rifle & Pistol Ass'n v. New York City, 86 F. Supp. 3d 249, 260 (S.D.N.Y. 2015).

[54] *See* Jackson v. City & County of San Francisco, 746 F.3d 953, 961 (9th Cir. 2014); *Ezell*, 651 F.3d at 708–09; *cf.* United States v. Marzzarella, 614 F.3d 85, 97 (3d Cir. 2010) (applying intermediate scrutiny because a law was merely regulatory and did not totally constrain the exercise of Second Amendment rights).

[55] *Jackson*, 746 F.3d at 964. Under First Amendment jurisprudence, laws that only burden the time, place, or manner of speech are subject to lower constitutional scrutiny than laws that prohibit speech. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Similarly, the Ninth Circuit recognizes that laws that merely regulate the manner of gun use rather than prevent gun use do not severely burden the Second Amendment. *See Jackson*, 746 F.3d at 964. Under the court's rationale, the city ordinance at issue, by requiring guns to be securely stored or disabled, only regulates the manner of gun use. *See id.*

[56] *Jackson*, 746 F.3d at 964–65.

[57] Kachalsky v. County of Westchester, 701 F.3d 81, 93 (2d Cir. 2012).

[58] *See, e.g.*, *Jackson*, 746 F.3d at 965; United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010).

[59] McDonald v. City of Chicago, 561 U.S. 742, 749–50 (2010); District of Columbia v. Heller, 554 U.S. 570, 630 (2008); David B. Kopel, *The Natural Right of Self-Defense:* Heller's *Lesson for the World*, 59 SYRACUSE L. REV. 235, 237–38 (2008) (asserting that *Heller* recognizes self-defense as a "natural right").

defense outside the home.[60] Either way, PAS will hinder participants' ability to defend themselves against others using a gun, both inside and outside their homes. Options Two and Three therefore likely implicate the core of the Second Amendment by affecting participants' abilities to access guns for self-defense.

One scholar has proposed a creative, functional approach to the Second Amendment that suggests the opposite result. Accepting self-defense in the home as the core function, Joseph Blocher argues that the Second Amendment also encompasses a right to decide not to keep and bear arms.[61] Under this conception, a law like PAS allowing individuals to prevent themselves from purchasing firearms would promote, rather than burden, the core of the Second Amendment by facilitating self-defense against suicide. This theory has some appeal, but to our knowledge, no court has yet adopted it.

Intermediate scrutiny is likely when a law burdens the core of the Second Amendment, but does not substantially burden Second Amendment rights.[62] Therefore, PAS would likely be evaluated under intermediate scrutiny. This conclusion is consistent with the trend among courts post-*Heller* and *McDonald*. The courts have overwhelmingly applied intermediate scrutiny to Second Amendment challenges.[63] For example, out of the eighteen cases that have evaluated the federal ban on firearm possession by domestic violence misdemeanants post-*Heller*, ten have applied intermediate scrutiny,[64] and only one has applied strict scrutiny.[65]

Courts have applied intermediate scrutiny even when a regulation substantially burdens the core of the Second Amendment. For example, one court of appeals reviewed the federal ban on handgun sales to individuals under the age of 21 and on general firearm sales to individuals under the age of 18.[66] The court was not willing to declare the rights of 18-to-20-year-olds to be historically outside the scope of the Second Amendment.[67] However,

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[60] *See generally* Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012).

[61] *See* Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 6 (2012).

[62] *See, e.g.*, *Jackson*, 746 F.3d at 965; *Chester*, 628 F.3d at 683. In dicta, the Fifth Circuit has suggested that any infringement at the core of the Second Amendment, whether substantial or not, triggers strict scrutiny. *NRA v. BATFE*, 700 F.3d 185, 195 (5th Cir. 2012).

[63] *See* Stephen Kiehl, *In Search of a Standard: Gun Regulations after* Heller *and* McDonald, 70 MD. L. REV. 1131, 1145 (2011); Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 752 (2012).

[64] *See* United States v. Carter, 752 F.3d 8, 13 (1st Cir. 2014); United States v. Chester (*Chester II*), 514 F. App'x 393, 394 (4th Cir. 2013); United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013); United States v. Tooley, 468 F. App'x 357, 359 (4th Cir. 2012); United States v. Booker, 644 F.3d 12, 25 (1st Cir. 2011); United States v. Staten, 666 F.3d 154, 160 (4th Cir. 2011); United States v. Skoien, 614 F.3d 638, 641–42 (7th Cir. 2010); United States v. Smith, 742 F. Supp. 2d 855, 864 (S.D. W.Va. 2010); United States v. Walker, 709 F. Supp. 2d 460, 466 (E.D. Va. 2010); United States v. Pettengill, 682 F. Supp. 2d 49, 55 (D. Me. 2010). This is a persuasive analogy because domestic violence misdemeanants, like PAS participants, are a high-risk population not specifically mentioned in *Heller*.

[65] *See* United States v. Engstrum, 609 F. Supp. 2d 1227, 1231–32 (D. Utah 2009).

[66] *NRA v. BATFE*, 700 F.3d at 185.

[67] *Id.* at 204.

because the regulation was "an outgrowth of an American tradition of regulating certain groups' access to arms for the sake of public safety,"[68] the court applied intermediate scrutiny.[69] The regulation's resemblance to historical, presumptively valid bans on possession by felons and the mentally ill led the court to apply less stringent scrutiny. Similarly, PAS may be analogous enough to longstanding bans that are intended to protect public safety to warrant intermediate scrutiny.[70]

There was a break in this trend, however, in a recent Sixth Circuit case.[71] In *Tyler v. Hillsdale County Sheriff's Department*, a panel applied strict scrutiny to strike down the federal ban on firearm possession by one who has been previously committed to a mental institution.[72] The opinion points out that, while generally the Courts of Appeals have applied intermediate scrutiny, "the circuits' actual approaches are less neat—and far less consistent—than that."[73] While *Tyler* was the first case out of the courts of appeals to categorically adopt strict scrutiny, it is uncertain whether this result will survive. The concurring judge in the case would have applied intermediate scrutiny.[74] Furthermore, the Sixth Circuit in April 2015 granted a rehearing en banc, which had the immediate effect of vacating the panel's opinion.

While intermediate scrutiny is more likely, the framework for constitutional challenges under the Second Amendment is evolving, as illustrated by *Tyler*. The circuit courts developed the two-part framework with uncertainty because the Supreme Court provided little guidance on analyzing Second Amendment challenges in *Heller* and *McDonald*.[75] Thus, the choice of appropriate constitutional scrutiny is not certain and is subject to change. Due to this ambiguity, we evaluate Options Two and Three under both strict and intermediate scrutiny.

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[68] *Id.* at 205.

[69] *Id.* at 206.

[70] The Fifth Circuit has asserted that "a longstanding measure which harmonizes with the history and tradition of arms regulation in this country would not threaten the core of the Second Amendment guarantee," and therefore warrants intermediate scrutiny. *Id.* at 196.

[71] Tyler v. Hillsdale Cty. Sheriff's Dep't, 775 F.3d 308, 331 (6th Cir. 2014), *reh'g granted*, No. 13-1876, 2015 U.S. App. LEXIS 6638 (6th Cir. Apr. 21, 2015), *argued* Oct. 14, 2015.

[72] *Id.*

[73] *Id.* at 324.

[74] *See id.* at 344 (Gibbons, J., concurring).

[75] Some have suggested that *Heller* and *McDonald* do not contemplate judicial interest-balancing at all. Rather, these commentators suggest that the cases dictate strict categorical protections and exceptions based on history, text, and tradition. *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. Rev. 375, 405–11 (2009); E. Garret Barlow, Note, United States v. Reese *and Post-*Heller *Second Amendment Interpretation*, 2012 B.Y.U. L. Rev. 391, 400–02 (2012).

III. The Scope of the Challenge

Before analyzing whether Options Two and Three pass strict and intermediate scrutiny, this section evaluates the scope of the constitutional challenge that participants can bring against PAS. The proposal rests on the theory of precommitment, which assumes that a participant may change his mind about purchasing a firearm in the future.[76] Some participants may challenge the law when they change their minds, rather than accept their precommitments. This section parses out which participants are most likely to bring a successful challenge, recognizing that most participants will execute a valid waiver of their Second Amendment rights when signing up for PAS. A constitutional challenge brought by a participant who has executed a valid waiver will fail because the individual will have given up constitutional protection.

To be effective, waivers of constitutional rights must be voluntary, "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[77] A notarized form containing an express, written waiver "is usually strong proof of the validity of that waiver," but is not conclusive.[78]

Most participants' waivers will be voluntary because they will not be impacted by any improper government influence.[79] The U.S. Supreme Court has held that, for a confession to be an involuntary waiver and thus inadmissible in court under the Fourteenth Amendment's Due Process Clause, there must have been some coercive state action.[80] The defendant's "mental condition, by itself and apart from its relation to official coercion," does not create an involuntary waiver.[81] Similarly, official coercion may be required for a waiver of Second Amendment rights to be involuntary. Official coercion will not often arise under PAS because participants will execute the waivers themselves. Thus, there is little opportunity for coercive state action; the state is not involved.[82]

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[76] *See* Vars, *supra* note 12, at 1467.

[77] Brady v. United States, 397 U.S. 742, 748 (1970).

[78] North Carolina v. Butler, 441 U.S. 369, 373 (1979).

[79] Vars, *supra* note 12, at 1495–96.

[80] Colorado v. Connelly, 479 U.S. 157, 164 (1986). The Court also held official coercion is required for an individual's waiver of his *Miranda* rights to be deemed involuntary under the Fifth Amendment. *See id.* at 170–71.

[81] *Id.* at 164. This reasoning is reinforced by Rule 11 of the Federal Rules of Criminal Procedure. Under Rule 11, to ensure a plea is entered voluntarily, the judge must ensure the plea "did not result from force, threats, or promises." Fed. R. Crim. P. 11(b)(2). These considerations speak to potential inappropriate official action.

[82] The government may be involved when people in state facilities sign up for PAS. If participants are coerced while in state custody, they will not have executed a valid waiver. While this potential for abuse exists, it will be limited, and most participants will not experience coercive state action.

Participants' waivers will likely also be knowing and intelligent because the form will include "[c]lear waiver language."[83] For example, the form might read:

> By signing this form, I hereby request that my name be added to the federal background check system (NICS).
>
> As long as my name is in the system, no one who is required to run a federal background check before transferring a firearm will be able to transfer a firearm to me.
>
> I understand that by signing this form I may be waiving some of my rights under the Second Amendment and I do so knowingly, intelligently, and voluntarily.

The Supreme Court has held that the standard for mental competency to stand trial also requires that a criminal defendant's guilty plea and waiver of the right to an attorney be intelligent.[84] The test is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[85] Presumably, this test (adjusted to apply outside a criminal proceeding) would also apply to determine whether a participant is competent to waive his Second Amendment rights. Under this standard, a case in which the participant does not understand the waiver based on the clear statement will be rare. Thus, the form will ordinarily constitute a voluntary, knowing, and intelligent waiver of participants' Second Amendment rights.

Because most participants will have executed a valid waiver, a facial challenge to PAS will likely fail. To succeed on a facial challenge, a plaintiff must prove "that no set of circumstances exists under which the [a]ct would be valid."[86] This standard will be impossible to meet. PAS is validly applied when participants have waived their Second Amendment rights. Therefore, there will always be a set of circumstances under which PAS is valid.

As a result, participants will only be able to bring as-applied challenges. As-applied challenges are the standard way to question a law's constitutionality.[87] For example, in *Gonzales v. Carhart*, the Court considered a facial

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[83] Vars, *supra* note 12, at 1496. To ensure confessions are "knowing and intelligent," Rule 11 requires judges, before entering a plea, to determine that the criminal defendant understands his rights and the potential consequences of waiving the rights. FED. R. CRIM. P. 11(b)(1). Similarly, one commentator has suggested adding a clear statement to Washington's advance psychiatric directive form to meet the "knowing" and "intelligent" requirements. Nick Anderson, Note, *Dr. Jekyll's Waiver of Mr. Hyde's Right to Refuse Medical Treatment*, 78 WASH. L. REV. 795, 815, 825–27 (2003). The statement would make clear that the signing individual may be waiving her fundamental right to refuse medical treatment. *Id.* at 827.

[84] *See* Godinez v. Moran, 509 U.S. 389, 396 (1993).

[85] Dusky v. United States, 362 U.S. 402, 402 (1960).

[86] United States v. Salerno, 481 U.S. 739, 745 (1987).

[87] Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1328 (2000) ("As-applied challenges are the basic building blocks of constitutional adjudication.").

challenge to federal legislation banning partial-birth abortions.[88] The statute did not contain an exception for maternal health.[89] Nevertheless, the Court upheld the law and asserted that the proper way for women to challenge the act's constitutionality based on the need for a maternal health exception was through as-applied challenges.[90] Similarly, the proper way for participants who have not executed a valid waiver to question PAS's constitutionality is through as-applied challenges.

It is possible that an as-applied challenge could effectively invalidate PAS. Under the typical as-applied challenge, an individual argues that a law cannot be constitutionally applied to her particular circumstances. However, as-applied challenges do not always result in holdings that are specific to the parties before the court.[91] Rather, as-applied challenges can produce holdings and reasoning that effectively invalidate an entire piece of legislation.[92] For example, a criminal defendant may argue that he cannot be constitutionally sentenced to death, although his crime warrants execution, because he is less than eighteen years old.[93] Although the defendant's argument rests on his particular circumstances, the court's holding will apply more broadly. Instead of holding that "the defendant cannot be executed," the court will hold that "individuals under eighteen cannot be executed." Therefore, the holding will invalidate the law as it applies to a large group of people, not just the particular criminal defendant.[94]

In particular, means-ends scrutiny—of which intermediate and strict scrutiny are two versions—can lead to broad findings of invalidity through as-applied challenges.[95] Instead of requiring a court to determine how a challenged law fits a particular challenger, means-ends analysis requires a court to ask how the law fits the public more generally.[96] For example, in *United States v. Edge Broadcasting Co.*, the Court stated that analyzing whether a law directly advances the government's interest "cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity."[97] To defend a challenged regulation, the government is not required to prove that the particular plaintiff "trenched on

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[88] *See generally* Gonzales v. Carhart, 550 U.S. 124 (2007).

[89] *Id.* at 161.

[90] *See id.* at 167–68.

[91] *See* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 924–25 (2011); *see also* Doe v. Reed, 561 U.S. 186, 194 (2010) (discussing an as-applied challenge that is not confined to the plaintiffs' particular circumstances).

[92] *See* Fallon, *supra* note 87, at 1337.

[93] *Roper v. Simmons* held that executing juvenile criminal defendants violates the Eighth and Fourth Amendments. *See* 543 U.S. 551, 578 (2005).

[94] *See* Fallon, *supra* note 91, at 924–25 (advancing this argument).

[95] *See* Fallon, *supra* note 87, at 1338.

[96] *See* United States v. Edge Broad. Co., 509 U.S. 418, 430–31 (1993); Fallon, *supra* note 91, at 944. Fallon also asserts similar reasoning concerning intermediate scrutiny. *See* Fallon, *supra* note 91, at 944.

[97] *Edge Broad. Co.*, 509 U.S. at 427.

the interests that the regulation sought to protect."[98] Rather, it is enough for the government to show that the law, as it is generally applied, supports its interest.[99]

Along the same lines, a statute can constitutionally apply to a particular plaintiff yet still fail means-ends scrutiny based on broader structural flaws. For example, in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, a publishing company challenged New York's "Son of Sam" law, which requires the profits from any book in which a convicted criminal discusses his crimes to be distributed to the crime's victims.[100] Under the law, the publishing company was required to transfer all profits from an organized crime figure's biography to the state Crime Victims Board.[101] Instead of questioning the challenged law in light of these particular facts, the Court invalidated the entire scheme.[102] Even if the law constitutionally applied to the publishing company, the statute, considering all possible applications, was overbroad.[103] Thus, an as-applied challenge invalidated the whole statute.

Similarly, even if the plaintiff in an as-applied challenge to PAS presents a high risk of suicide such that the government's interest in suicide prevention is promoted by the proposal's application to the particular participant, a court's analysis of the proposal's general applicability could reveal that either Option Two or Three sweeps too broadly to pass strict or intermediate scrutiny. With this scope of the constitutional challenge to PAS in mind, the remainder of the Article analyzes Options Two and Three under strict and intermediate scrutiny.

IV. Strict Scrutiny

This section analyzes Options Two and Three under strict scrutiny. It is helpful to first apply strict scrutiny because it is the more stringent constitutional standard. Thus, if either option passes strict scrutiny, it is certain to pass intermediate scrutiny. Furthermore, based on the uncertainties in Second Amendment jurisprudence, a court may choose to apply strict scrutiny to a constitutional challenge against PAS.

To survive strict scrutiny, a law must be narrowly tailored to further a compelling government interest.[104] Suicide prevention is part of the compelling government interest in public safety, which the government frequently

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[98] *Id.* at 431.

[99] *Id.*

[100] *See generally* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991).

[101] *Id.* at 108.

[102] *See id.* at 121, 123.

[103] *Id.*

[104] Johnson v. California, 543 U.S. 499, 505–06 (2005).

asserts to justify gun control laws.[105] Preventing suicide has itself been held to constitute a compelling government interest.[106] So both options are easily justified by a compelling interest.[107] Whether each option is narrowly tailored to prevent suicide is a closer question.

A. The Narrow Tailoring Framework

Having established that Options Two and Three could be challenged as unconstitutional, this section defines the narrow tailoring framework to analyze PAS. The definition of strict scrutiny is constant for any constitutional question, but what narrow tailoring actually requires can change based on the nature of the challenge.[108] Thus, narrow tailoring analysis in Second Amendment challenges may be unique from narrow tailoring analysis in challenges asserting other constitutional rights.

There is limited post-*Heller* and *McDonald* case law applying strict scrutiny to Second Amendment challenges. The Sixth Circuit's *Tyler* case, discussed above, provides the most comprehensive narrow tailoring analysis. Aside from *Tyler*, the closest example of strict scrutiny analysis in a federal court of appeals is the Tenth Circuit's review of 18 U.S.C. § 922(g)(8)[109] in *United States v. Reese*.[110] In *Reese*, the Tenth Circuit applied intermediate scrutiny but stated in dicta that the government, based on the evidence it presented to justify the challenged law under intermediate scrutiny, would also satisfy strict scrutiny.[111] Otherwise, only three cases have applied strict scrutiny in Second Amendment challenges.[112] Furthermore, four cases have applied strict scrutiny in the alternative,[113] reasoning that a law is constitu-

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[105] *See* Tyler v. Hillsdale Cty. Sheriff's Dep't, 775 F.3d 308, 331 (6th Cir. 2014), *reh'g granted*, No. 13-1876, 2015 U.S. App. LEXIS 6638 (6th Cir. Apr. 21, 2015), *argued* Oct. 14, 2015; *see also* Grand Jury Subpoena, John Doe v. United States, 150 F.3d 170, 172 (2d Cir. 1998) (per curiam).

[106] Fredrick E. Vars & Amanda Adcock Young, *Do the Mentally Ill Have a Right to Bear Arms?*, 48 WAKE FOREST L. REV. 1, 23 (2013).

[107] It could also be argued that PAS advances the compelling government interest in promoting autonomous decision-making. *Cf.* Blocher, *supra* note 61, at 18, 26–27 (arguing that the Second Amendment creates a "choice right" that includes decision not to keep and bear arms).

[108] *See generally* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007) (discussing the Supreme Court's range of approaches to strict scrutiny).

[109] This code section contains the federal prohibition on firearm possession by individuals who are subject to a domestic protection order.

[110] United States v. Reese, 627 F.3d 792, 794 (10th Cir. 2010).

[111] *Id.* at 804.

[112] *See* Bateman v. Perdue, 881 F. Supp. 2d 709, 716 (E.D.N.C. 2012) (finding that North Carolina's emergency declaration statutes' limitations on firearm possession were not narrowly tailored to promote public safety); United States v. Engstrum, 609 F. Supp. 2d 1227, 1232–35 (D. Utah 2009) (finding that the federal prohibition on firearm possession by domestic violence misdemeanants was narrowly tailored to promote safety); People v. Taylor, 3 N.E.3d 288, 295–97 (Ill. App. Ct. 2013) (finding that Illinois's requirement that people have identification cards when they carry concealed weapons survived strict scrutiny).

[113] Gowder v. City of Chicago, 923 F. Supp. 2d 1110, 1123–25 (N.D. Ill. 2012).

tional "even if strict scrutiny applies,"[114] or reasoning that a law is unconstitutional "under either strict or intermediate scrutiny."[115]

While limited in scope, the case law reveals two general rules about what Second Amendment narrow tailoring entails. First, the government must prove that the challenged regulation actually promotes the asserted compelling government interest.[116] Second, to overcome strict scrutiny based on an interest in public safety,[117] the government must show that a regulation is specifically formulated to prevent firearm access from individuals who pose a risk of danger to themselves or others.[118] Furthermore, *Tyler* recognizes that a narrowly tailored law cannot be overbroad or underinclusive.[119]

Scientific conclusiveness, however, is not necessary to establish narrow tailoring. The Sixth Circuit notes in *Tyler* that "[t]he government can carry its burden even under strict scrutiny (or at least a lenient version of it) 'based solely on history, consensus, and simple common sense.'"[120] Furthermore, one commentator has suggested that *Heller* dictates a deferential form of strict scrutiny.[121] Under this deferential strict scrutiny, "a reviewing court would make a subjective determination as to the necessity of the challenged regulation to further public safety" and would refer to empirical evidence only when the court "is skeptical of the law's necessity to public safety."[122]

Similarly, in the First Amendment context,[123] logical assertions that a challenged regulation will actually promote the government's compelling interest need not be scientifically conclusive.[124] Rather, "a sufficiently persuasive common-sense foundation is enough" to establish this connection.[125] For example, in *Burson v. Freeman*, the Supreme Court reviewed Tennes-

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[114] United States v. Luedtke, 589 F. Supp. 2d 1018, 1024–25 (E.D. Wis. 2008); State v. Curtiss, No. 102,604, 2010 WL 4977222, at *3 (Kan. Ct. App. Nov. 24, 2010).

[115] Fotoudis v. City & County of Honolulu, 54 F. Supp. 3d 1136, 1137, 1144 (D. Haw. 2014).

[116] *See infra* Part IV.B.i.

[117] Suicide prevention is part of the government's compelling interest in public safety. *See supra* note 104 and accompanying text.

[118] *See infra* Part IV.B.ii.

[119] Tyler v. Hillsdale Cty. Sheriff's Dep't, 775 F.3d 308, 331 (6th Cir. 2014), *reh'g granted*, No. 13-1876, 2015 U.S. App. LEXIS 6638 (6th Cir. Apr. 21, 2015), *argued* Oct. 14, 2015. This articulation of the narrow tailoring standard is consistent with generalizations taken from strict scrutiny surveys. *See* Fallon, *supra* note 108, at 1326–30; Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2422–24 (1996).

[120] *Tyler*, 775 F.3d at 331 (quoting Fla. Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995)).

[121] *See* Andrew R. Gould, *The Hidden Second Amendment Framework Within* D.C. v. Heller, 62 VAND. L. REV. 1535, 1571 (2009).

[122] *Id.*

[123] First Amendment strict scrutiny analysis presents a good comparison because courts have already used First Amendment rules by analogy in formulating post-*Heller* and *McDonald* Second Amendment analysis. *See, e.g.*, Ezell v. City of Chicago, 651 F.3d 684, 702–09 (7th Cir. 2011); United States v. Marzzarella, 614 F.3d 85, 96 (3d Cir. 2010); United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010).

[124] *See* Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion).

[125] Volokh, *supra* note 119, at 2422; *see also Burson*, 504 U.S. at 211–12.

see's restriction on campaign speech within 100 feet of a polling site.[126] The Court reasoned that it was "simple common sense" that the restricted zone was necessary to protect voters' right to cast their ballots "free from the taint of intimidation and fraud."[127] The Court further reasoned that it has never held the state "to the burden of demonstrating empirically the objective effects" of the challenged restriction.[128]

Following this framework, the next two subsections analyze Options Two and Three. While both options present potential overbreadth and underinclusiveness pitfalls, Option Two would ultimately survive strict scrutiny, while Option Three might fail.

B. Option Two Is Narrowly Tailored

1. Option Two Will Prevent Suicide

To be narrowly tailored, Option Two must actually prevent suicide, the asserted government interest. Option Two aims to prevent suicide by allowing at-risk individuals to voluntarily place their names in NICS and giving participants the ability to regain their rights through a judicial hearing. The government can likely prove, to the extent necessary to overcome strict scrutiny, that this approach will prevent suicide.

The case law analyzing two federal statutes—18 U.S.C. §§ 922(g)(8) and 922(g)(9)—demonstrates the ways in which the government can prove that a gun control regulation actually promotes its interest. Two of the five Second Amendment strict scrutiny cases evaluate either § 922(g)(8), the federal prohibition on firearm possession by individuals under a domestic protective order, or § 922(g)(9), the federal prohibition on firearm possession by domestic violence misdemeanants.[129] Additionally, a large number of Second Amendment intermediate scrutiny cases involve these provisions.[130] In these cases, the government has proven that §§ 922(g)(8) and 922(g)(9) actually promote the government's compelling interest in public safety by showing three things[131]: first, domestic abusers use guns; second, domestic assaults with firearms are more deadly than domestic assaults with other weapons; and third, there are high recidivism rates among domestic violence

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[126] *Burson*, 504 U.S. at 193.

[127] *Id.* at 211.

[128] *Id.* at 208.

[129] *See generally* United States v. Reese, 627 F.3d 792 (10th Cir. 2010); United States v. Engstrum, 609 F. Supp. 2d 1227 (D. Utah 2009).

[130] *See generally* United States v. Chovan, 735 F.3d 1127 (9th Cir. 2013); United States v. Booker, 644 F.3d 12 (1st Cir. 2011); United States v. Skoien, 614 F.3d 638 (7th Cir. 2010); United States v. Chester, 628 F.3d 673 (4th Cir. 2010); *Reese*, 627 F.3d at 792.

[131] Though this line of reasoning has only been expressly applied in intermediate scrutiny cases, the Tenth Circuit has stated that the same evidence would satisfy strict scrutiny narrow tailoring analysis. *See Reese*, 627 F.3d at 804 n.4.

offenders.[132] Following an analogous line of reasoning, the government can prove that Option Two will actually prevent suicide.

a. People Use Guns to Commit Suicide

First, just as the government has shown in the domestic violence cases that domestic abusers use guns, the government can show that people use guns to commit suicide. Around 5–6% of self-imposed injuries are inflicted using firearms.[133] While 5–6% seems like a small percentage, individuals use guns in over 50% of completed suicides in the United States.[134] Thus, firearms may not account for a large amount of self-harm incidents, but firearms account for the majority of suicides in the United States.

b. Suicide Attempts Using Guns Are More Deadly than Other Attempts

Second, as the government has shown in the domestic violence cases that domestic assaults with firearms are more deadly than assaults with other weapons, the government can show that suicide attempts using guns are more deadly than attempts using other methods. Between 80% and 90% of suicide attempts using firearms are fatal.[135] Suicide attempts using drugs and cutting—the second and third most common methods of suicide—are fatal 1–3% of the time.[136] The extreme mortality associated with suicide attempts using firearms likely compensates, in terms of preventing suicide, for the fact that only 5–6% of self-inflicted injuries are inflicted by firearms. For example, denying access to a gun from just one out of every ten of the roughly 22,000 individuals who attempted suicide by firearm in the United States in 2010 would have resulted in approximately 1,900 fewer deaths for the year.[137]

c. Participants Pose a Danger to Themselves

Finally, in the domestic violence cases, the government has relied on the high recidivism rates among offenders to prove that a past domestic violence offense is indicative of future violence. Similarly, the government can show that a self-identified high risk of suicide is accurate, which in turn will prove that PAS participants pose a risk of future self-harm.

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[132] *See Chovan*, 735 F.3d at 1140; *Reese*, 627 F.3d at 802–04; *Skoien*, 614 F.3d at 643–45.

[133] *Epidemiology*, *supra* note 6, at 726 tbl.; Spicer & Miller, *supra* note 6, at 1887 tbl.1.

[134] Spicer & Miller, *supra* note 6, at 1887 tbl.1.

[135] *Epidemiology*, *supra* note 6, at 726 tbl.; Spicer & Miller, *supra* note 6, at 1888 tbl.2. These data are consistent across the two multi-state studies. Together, the studies covered fourteen states: California, Connecticut, Maine, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, New York, Rhode Island, South Carolina, Utah, Vermont, and Washington.

[136] *Epidemiology*, *supra* note 6, at 726 tbl.; Spicer & Miller, *supra* note 6, at 1888 tbl.2.

[137] *Firearms and Suicide*, *supra* note 8, at 951. This figure assumes substitution of drugs or cutting to attempt suicide.

While it is logical to conclude that individuals who restrict their own access to firearms based on self-assessed suicide risk actually have a high risk of suicide, it is not scientifically proven that self-assessment accurately predicts suicide risk. However, while limited, there are data to support the position. The Joiner study compares physician assessment to self-assessment of suicide risk.[138] Only one individual, representing 0.3% of the study, assessed himself as high-risk when the clinicians assessed him as low-risk.[139] The remaining 126 individuals who assessed themselves as high-risk were also assessed by clinicians as high-risk.[140] These results indicate that individuals are not likely to erroneously find themselves to be at high risk of suicide, at least compared to physician diagnosis. Furthermore, participants in the study who self-assessed as low-risk but were assessed by clinicians as high-risk had decreased suicidal symptoms at a six-month check in compared to patients who had both an original self-assessment and clinician assessment of high risk.[141] This indicates that the individuals were more accurate than clinicians in assessing their own low risk of suicide.[142] This further supports the accuracy of individuals' self-diagnoses.

There are good reasons to think that participants will pose a future risk of self-harm. Mentally ill individuals are over ten times more likely to commit suicide than individuals without mental illness.[143] One study estimated the lifetime suicide risk among patients with mood disorders to be between 6% and 7%, as compared with the general population's age-adjusted annual death rate of 12.6 per 100,000.[144] PAS will almost certainly be most popular among populations like this with greatly increased risk of suicide.

The conclusion that participants will pose a danger to themselves, together with the established facts that people use guns to commit suicide and suicide attempts using guns are more deadly than attempts using other methods, is likely sufficient to prove that Option Two will actually prevent sui-

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[138] *See generally* Thomas E. Joiner et al., *Agreement Between Self- and Clinician-Rated Suicidal Symptoms in a Clinical Sample of Young Adults: Explaining Discrepancies*, 67 J. CONSULTING & CLINICAL PSYCHOL. 171 (1999). Patients evaluated themselves using the Suicide Probability Scale. *Id.* at 172. Physicians evaluated the patients using the Modified Scale for Suicide Ideation. *Id.* Both scales have established reliability. *Id.*

[139] *Id.* The self-assessment in this study was based on a clinically developed questionnaire. Self-assessment in PAS will be based on individuals' independent judgment, without the use of a systematic rating scale. Thus, the self-assessment in PAS may be less reliable than the self-assessment in the study.

[140] *Id.*

[141] *Id.* at 173.

[142] Because PAS is voluntary, it is tailored to exclude individuals who recognize their own low risk of suicide. The fact that self-assessment of low risk is more accurate than clinician assessment makes the proposal less overinclusive than a program based on clinician assessment of suicide risk would be. This feature of the proposal is relevant to narrow tailoring, because a regulation can be unconstitutional under strict scrutiny if it is too overinclusive.

[143] Vars & Young, *supra* note 106, at 21.

[144] Isometsä, *supra* note 18, at 120; JIAQUAN XU ET AL., NAT'L CTR. FOR HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL & PREVENTION, DEATHS: FINAL DATA FOR 2013, at 35 tbl.9 (Feb. 16, 2016), http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_02.pdf [https://perma.cc/G4UP-MPFS].

cide. Therefore, Option Two satisfies the first general requirement under the narrow tailoring framework.

2. *Option Two Is Specifically Formulated to Prevent Possession by Individuals who Pose a Risk of Danger to Themselves*

Under the narrow tailoring framework, Option Two must also target dangerous individuals. For example, courts have found that 18 U.S.C. §§ 922(g)(8) and 922(g)(9) are narrowly tailored because the provisions require past violent or threatening behavior before individuals lose their Second Amendment rights.[145] Section 922(g)(8), which prohibits individuals under domestic protective orders from possessing firearms, has been upheld by the Northern District of New York.[146] The court relied on the fact that the domestic protective order must have been predicated on past dangerous conduct and must have been accompanied by a finding of threat to physical safety or an express prohibition on the individual's use of force.[147] Similarly, § 922(g)(9), which prohibits domestic violence misdemeanants from possessing firearms, has also been upheld based on the misdemeanants' proclivity towards violence. In upholding the statute, the District of Utah reasoned that although the regulation does not expressly require a "prospective risk of violence," it effectively does because an element of the underlying misdemeanor is "use or attempted use of physical force, or the threatened use of a deadly weapon."[148]

Following similar reasoning, a federal district court struck down North Carolina's emergency declaration statute.[149] The statute prohibited possession of dangerous weapons off of one's own property during a state of emergency.[150] The court reasoned that the statute was not narrowly tailored because the ban was not limited to particular "dangerous individuals or dangerous conduct."[151] Similarly, in *Tyler*, the Sixth Circuit struck down the

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[145] *See* United States v. Erwin, No. 07-CR-556, 2008 WL 4534058, at *2 (N.D.N.Y. Oct. 6, 2008); United States v. Engstrum, 609 F. Supp. 2d 1227, 1235 (D. Utah 2009) ("Congress and the Tenth Circuit have sufficiently narrowed the scope of § 922(g)(9)'s deprivation of Second Amendment rights, so that it may be presumed that those included within the scope of § 922(g)(9) pose a prospective risk of violence to an intimate partner or child.").

[146] *See Erwin*, 2008 WL 4534058, at *2.

[147] *See id.*

[148] *Engstrum*, 609 F. Supp. 2d at 1234–35.

[149] Bateman v. Perdue, 881 F. Supp. 2d 709, 716 (E.D.N.C. 2012).

[150] *Id.* at 711.

[151] *Id.* at 716. This requirement that targeted individuals specifically pose a risk of danger is consistent with gun regulations in other areas of the law. For example, under certain circumstances, Indiana law allows law enforcement to seize guns from individuals deemed "dangerous." IND. CODE § 35-47-14-1 (2015). Under the statute, an individual is dangerous if he "presents an imminent risk of personal injury to [himself] or to another individual" or if he "may present a risk of personal injury to [himself] or to another individual in the future." *Id.* An Indiana state court of appeals upheld this statutory structure against a claim that it violates Indiana's constitutional right to bear arms for self-defense. Redington v. State, 992 N.E.2d 823, 835 (Ind. Ct. App. 2013).

federal ban on firearm possession by individuals who have been committed to a mental institution.[152] Contrasting the provision to other, federal constitutional provisions, the court noted that the law targets "a class that is potentially non-violent and law-abiding."[153]

Participation in PAS is not predicated on any past dangerous conduct. However, the purpose of requiring previous dangerous conduct is ordinarily to establish that there is some future risk of danger.[154] In PAS, self-assessment takes the place of past violent behavior to establish a high likelihood of future suicide risk. Therefore, Option Two will reach individuals who pose a risk of self-harm. Nevertheless, narrow tailoring requires more; it is still possible that Option Two is overbroad by affecting individuals who do not have a high suicide risk, or underinclusive by not reaching far enough. The next two subsections examine these possibilities.

a. Option Two Is Not Overinclusive Based on Uncertainty Over Whether Participants Present a High Suicide Risk

As discussed above,[155] only participants who do not execute a valid waiver can successfully challenge Option Two. Among that group, Option Two will have a constitutional effect on participants who pose a high risk of suicide because those participants further the government's compelling interest in suicide prevention. However, Option Two may still overreach to affect participants who have not executed a valid waiver and do not present a high suicide risk.

While the Supreme Court has stated that a law cannot "burn the house to roast the pig,"[156] strict scrutiny does not require that every instance of restricted conduct "have a provable, identifiable harmful effect."[157] Rather, a legislature "may cast a wider net than is necessary to perfectly remove the harm" of firearms in the hands of the mentally ill.[158] But the net cannot be cast too wide.[159]

Typically, a law fails strict scrutiny based on overinclusiveness when the law is not intentionally limited in scope to cover the problem being ad-

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[152] Tyler v. Hillsdale Cty. Sheriff's Dep't, 775 F.3d 308, 331 (6th Cir. 2014), *reh'g granted*, No. 13-1876, 2015 U.S. App. LEXIS 6638 (6th Cir. Apr. 21, 2015), *argued* Oct. 14, 2015.

[153] *Id.* at 342; *see also* Binderup v. Holder, No. 13-cv-06750, 2014 WL 4764424, at *21–31 (E.D. Pa. Sept. 25, 2014) (reasoning that the federal felon-in-possession ban was unconstitutional as applied to the plaintiff because he demonstrated no proclivity for violence).

[154] *See* United States v. Engstrum, 609 F. Supp. 2d 1227, 1235 (D. Utah 2009); *see also* United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010) ("The belief underpinning § 922(g)(9) is that people who have been convicted of violence once . . . are likely to use violence again.").

[155] *See supra* text accompanying notes 76–83.

[156] Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 127 (1989) (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

[157] Volokh, *supra* note 119, at 2430.

[158] Tyler v. Hillsdale Cty. Sheriff's Dep't, 775 F.3d 308, 332 (6th Cir. 2014), *reh'g granted*, No. 13-1876, 2015 U.S. App. LEXIS 6638 (6th Cir. Apr. 21, 2015), *argued* Oct. 14, 2015.

[159] *Id.*

dressed as narrowly as possible.[160] For example, in *Dunn v. Blumstein*, the Supreme Court evaluated Tennessee's requirement that residents live in the state for one year before registering to vote.[161] The Court overturned the durational residency requirement.[162] It reasoned that the requirement was overbroad in promoting the government's interest in ensuring voters were knowledgeable about local political issues, because the restriction excluded not only new residents who were not informed, but also new residents who were fully informed.[163]

In contrast, Option Two prevents overreaching by allowing participants to regain their Second Amendment rights through a judicial hearing. Option Two gives the participants who do not actually pose a future risk of self-harm a way out of the program. Furthermore, by requiring participants to show that they no longer pose a heightened risk of self-harm to get their rights back, Option Two remains tailored towards the goal of suicide prevention. Option Two will neither keep participants who do not pose a suicide risk in the program nor allow participants out of the program if they still pose a risk.

Courts have held that similar rights-restoration regimes are indicative of narrow tailoring. For example, Indiana allows officers to seize firearms from dangerous individuals.[164] After officers take a firearm, the court must affirm that the firearm should be retained.[165] One hundred and eighty days after the initial hearing, the individual may petition the court to return his weapon, and the state must return the weapon if the individual proves through a preponderance of the evidence that he is no longer dangerous.[166] The Indiana Court of Appeals evaluated this scheme's conformity with Indiana's constitutional right to bear arms in *Redington v. State*.[167] While concluding that the scheme does not impose a substantial obstacle on the right to bear arms, the court noted "that the Act provides a mechanism whereby [affected individu-

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[160] *See* FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 501 (1985); Dunn v. Blumstein, 405 U.S. 330, 357–60 (1972).

[161] *Blumstein*, 405 U.S. at 330.

[162] *Id.* at 360.

[163] *Id.*; *see also Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500–01 (holding that the section of the Presidential Election Campaign Fund Act prohibiting political committees from spending over $1000 on a candidate's campaign was overbroad and not narrowly tailored to combat against election fraud because it applied to small organizations that posed no threat of corruption).

[164] IND. CODE §§ 35-47-14-1 to -10 (2015). Under the statute, an individual is "dangerous" if: "(1) the individual presents an imminent risk of personal injury to the individual or to another individual; or (2) the individual may present a risk of personal injury to the individual or to another individual in the future and the individual: (A) has a mental illness . . . that may be controlled by medication, and has not demonstrated a pattern of voluntarily and consistently taking the individual's medication while not under supervision; or (B) is the subject of documented evidence that would give rise to a reasonable belief that the individual has a propensity for violent or emotionally unstable conduct." IND. CODE § 35-41-14-1 (2015).

[165] IND. CODE § 35-47-14-6 (2015).

[166] IND. CODE § 35-47-14-8 (2015).

[167] *See generally* Redington v. State, 992 N.E.2d 823 (Ind. Ct. App. 2013).

als] may regain both [their] right to carry a handgun as well as recover [their] seized firearms."[168] Following similar reasoning, Option Two is not impermissibly overinclusive because it provides a rights-restoration process for participants who are not at elevated suicide risk.

b. Option Two's Voluntariness Does Not Make It Unconstitutionally Underinclusive

Although Option Two is not unconstitutionally overinclusive, it also presents a risk of unconstitutional underinclusiveness. Unlike the firearm regulations that have passed constitutional muster, PAS is not mandatory. Because PAS is voluntary, targeted individuals are not forced to comply. Thus, there is no certainty that targeted, high-risk individuals will participate. This uncertainty makes PAS potentially underinclusive, should it fail to impact a significant number of high-risk individuals.

An attack based on underinclusiveness will likely fail. Underinclusiveness is relevant in narrow tailoring analysis because it often reveals that a challenged law seeks to promote an impermissible interest, rather than the asserted compelling government interest.[169] For example, courts are concerned about underinclusiveness in challenges to content-based speech restrictions because of the possibility that the restrictions impermissibly attack specific content.[170] In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, a Florida city made animal sacrifice and slaughter illegal.[171] The city's asserted interests were preventing animal cruelty and public health.[172] The Court found that the ordinances were underinclusive.[173] The Court noted that the city council had repeatedly stated that the ordinances' actual purpose was to attack Santerian religious practices.[174]

Similarly, in *First National Bank of Boston v. Bellotti*, corporations challenged a state law that prohibited them from spending to support referendums that did not materially affect their business assets.[175] The Court found that the statute was underinclusive in promoting the government's asserted interest in protecting corporate shareholder rights.[176] The statute prohibited spending on referendums while still allowing corporations to lobby

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[168] *Id.* at 834.

[169] *See* Republican Party of Minn. v. White, 416 F.3d 738, 757 (8th Cir. 2005) ("Underinclusiveness in a regulation may reveal that motives entirely inconsistent with the stated interest actually lie behind its enactment."); Fallon, *supra* note 108, at 1327 ("Underinclusive regulations . . . generate suspicion that the selective targeting betrays an impermissible motive.").

[170] *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2740 (2011) (holding that a California statute prohibiting children from buying violent video games was underinclusive because it did not prohibit other forms of violent media, indicating that the legislature was more concerned about video games themselves than about curbing violence among children).

[171] 508 U.S. 520 (1993).

[172] *See id.* at 538.

[173] *See id.* at 547.

[174] *See id.* at 526.

[175] *See generally* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978).

[176] *Id.* at 793.

for legislation.[177] The statute's underinclusiveness indicated that the legislature was concerned with "silencing corporations on a particular subject," instead of shareholder protection.[178]

The case law indicates that underinclusiveness is not determinative when there is no suggestion that the challenged law seeks to promote an impermissible government motive.[179] Courts have upheld underinclusive laws under strict scrutiny. For example, the Supreme Court has not "suggested that a state cannot forbid parents to withhold medical care from their children, thereby trenching on parents' constitutional rights to control their children's upbringing, unless it also regulates all other conduct that threatens children's health."[180] Furthermore, many courts have upheld the federal ban on firearm possession by domestic violence misdemeanants without finding the regulation to be underinclusive because it does not ban firearm possession from all violent misdemeanants.[181]

With PAS, there is no impermissible motivation for regulating guns to reduce suicide, but not taking all possible measures to eliminate suicide. Rather, allowing voluntarily restricted access to guns is just a particularly effective mechanism to promote the government's interest in suicide prevention. Based on this lack of hidden motive and data indicating a high level of participation among high-risk individuals, Option Two is not unconstitutionally underinclusive. This conclusion is underscored by the fact that any underinclusiveness here exists precisely to avoid infringing on the Second Amendment rights of those who choose not to participate.

This section's narrow tailoring analysis of Option Two reveals that it would very likely survive strict scrutiny. First, the government will be able to establish that Option Two actually prevents suicide. Second, the government can show that Option Two is specifically tailored to target dangerous individuals; Option Two is neither over- nor underinclusive. The next section will apply the same narrow tailoring analysis to Option Three.

C. Option Three May Not Be Narrowly Tailored

Much of the Option Two strict scrutiny analysis applies equally to Option Three. Just as Option Two will actually prevent suicide, Option Three will prevent suicide. In fact, Option Three has the potential to save more

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[177] *See id.*

[178] *Id.*

[179] *See* Sanjour v. EPA, 984 F.2d 434, 449 (D.C. Cir.) ("Where the underinclusiveness does not clearly imply a censorial motive, we must reject the underinclusiveness claim as long as the statute or regulation actually furthers the proffered speech-neutral governmental interest."), *vacated*, 997 F.2d 1584 (D.C. Cir. 1993); Fallon, *supra* note 108, at 1327 ("It is far from clear . . . that every underinclusive statute is therefore necessarily unconstitutional.").

[180] Fallon, *supra* note 108, at 1327 (citations omitted). Similarly, statutes that regulate abortions based on maternal health are not held unconstitutional just because they do not address "other threats to maternal health such as those posed by smoking or drinking." *Id.*

[181] *See supra* notes 129–132.

lives than Option Two because it creates an irrevocable ban. Also, the same doubts about whether Option Two targets individuals who pose a risk of self-harm are relevant to Option Three. However, the Joiner study discussed above[182] likely provides enough evidence that self-assessment of a high risk of suicide is accurate. That finding and common sense, at least under *Tyler*'s relatively lenient version of strict scrutiny, adequately demonstrate that the vast majority of Option Three participants will pose a suicide risk.

Still, Option Three presents more potential constitutional pitfalls than does Option Two, because Option Three imposes an irrevocable ban. There is some indication in the Second Amendment jurisprudence that a restriction's revocability contributes to the restriction's narrow tailoring. Thus, an irrevocable restriction could be too broad to overcome strict scrutiny. For example, in *United States v. Skoien*, the plaintiff argued that 18 U.S.C. § 922(g)(9), which prevents firearm possession by domestic violence misdemeanants, was unconstitutional because it overreaches "by creating a 'perpetual' disqualification" for people who may not pose a future risk of violence.[183] The Seventh Circuit ultimately concluded that the plaintiff was a recidivist who posed a future risk of violence, so he could not challenge § 922(g)(9) based on overbreadth.[184] However, the court took the time to analyze the plaintiff's argument,[185] indicating that, if the statute were irrevocable, it may be unconstitutional.[186] Similarly, a court upheld 18 U.S.C. § 922(g)(8), which prevents individuals under a domestic protective order from possessing firearms, under strict scrutiny.[187] The court noted that the statute does not impose an irrevocable ban.[188] Rather, § 922(g)(8)'s restriction is limited to when the protective order is in effect.[189]

Though no firearm regulations have failed constitutional muster because they are irrevocable,[190] Option Three's irrevocability is relevant to narrow tailoring analysis. The rest of this section addresses how irrevocability affects PAS's constitutionality. As a preliminary matter, the success of a constitutional challenge to Option Three depends, in part, on the scope of the

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[182] *See supra* note 138.

[183] United States v. Skoien, 614 F.3d 638, 644 (7th Cir. 2010).

[184] *See id.* at 645.

[185] *See id.* at 644–45. The court expressed doubt that § 922(g)(9) imposes a perpetual prohibition because expungement, pardon, or restoration of civil rights can restore a domestic violence misdemeanant's Second Amendment rights under the statute. *See id.*

[186] *But see* United States v. Chester, 847 F. Supp. 2d 902, 911 (S.D. W.Va. 2012) (noting that the fact that § 922(g)(9) "might be seen as a lifetime ban" is of no consequence because the law is otherwise narrowly tailored to target dangerous individuals).

[187] United States v. Erwin, No. 07-CR-556, 2008 WL 4534058, at *3 (N.D.N.Y. Oct. 6, 2008).

[188] *See id.* at *2.

[189] *See id.*

[190] Although, plaintiffs have succeeded in as-applied challenges against irrevocable bans. *See, e.g.*, Binderup v. Holder, No. 13-cv-06750, 2014 WL 4764424, at *21–31 (E.D. Pa. Sept. 25, 2014) (finding for plaintiff who brought as-applied challenge against federal felon-in-possession ban because, despite plaintiff's conviction for corruption of minors, he demonstrated no proclivity for violence).

challenge that may be brought. As noted above,[191] Option Three will have a constitutional effect on most participants, because most will have waived their right to purchase a firearm. Furthermore, Option Three will also have a constitutional effect on participants who pose a long-term high risk of suicide. The government's compelling interest in suicide prevention will clearly be served by irrevocably preventing these individuals from purchasing a firearm. Thus, there are two groups of participants Option Three may unconstitutionally reach: first, those who do not effectively waive their Second Amendment rights and no longer pose a high risk of suicide; second, those who do not effectively waive their Second Amendment rights and never posed a high risk of suicide. The next two subsections discuss the constitutional implications of these two categories.

1. Option Three Is Not Overinclusive by Covering Participants Who No Longer Pose a High Suicide Risk

The first group of participants to whom Option Three may overreach had a high suicide risk when they signed up for the proposal but do not maintain a high long-term suicide risk. A lifetime ban is unnecessary to prevent suicide if a substantial number of participants do not maintain a long-term suicide risk. In contrast, if most high-risk participants face long-term suicide risk, Option Three's irrevocability is narrowly tailored to prevent suicide among the high-risk population.

The data, though not scientifically conclusive, indicate that high-risk participants likely remain a long-term risk. It is important to recognize that the overall suicide rate is small, so relative, not absolute, risk should control. Most people who have a high suicide risk at any given time do not actually commit suicide or even go on to make a plan or attempt.[192] Similarly, 21% of respondents who reported a lifetime history of suicide planning to begin the study reported instances of planning during the follow-up period, and 15% of respondents who reported a suicide attempt in their history reported an attempt during the follow-up.[193] Similarly, 21% of respondents who reported a lifetime history of suicide planning to begin the study reported instances of planning during the follow-up period, and 15% of respondents who reported a suicide attempt in their lifetime history reported another attempt during the follow-up.[194] In another study conducted in Great Britain, of 11,583 individ-

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[191] *See supra* notes 77–83.

[192] *See generally* Guilherme Borges et al., *Risk Factors for the Incidence and Persistence of Suicide-Related Outcomes*, 105 J. AFFECTIVE DISORDERS 25 (2008); Keith Hawton et al., *Suicide Following Deliberate Self-Harm: Long-Term Follow-Up of Patients who Presented to a General Hospital*, 182 BRIT. J. PSYCHIATRY 537 (2003); E.H. Høyer et al., *Suicide Risk in Patients Hospitalized Because of an Affective Disorder: A Follow-Up Study, 1973-1993*, 78 J. AFFECTIVE DISORDERS 209 (2004).

[193] Borges et al., *supra* note 192, at 28. The study defined "ideation" as serious thoughts about committing suicide. *See id.* at 26.

[194] *Id.*

uals who reported a deliberate self-harm incident from 1978 to 1997, 2.6% had died from suicide by 2000.[195] Similarly, in a study from Denmark, 6% of a sample of patients admitted to psychiatric care for a mood disorder between 1973 and 1993 eventually died from suicide.[196]

Although there are low rates of follow-through for high-risk people, the percentage of completed suicides and recurrent attempts in the high-risk population is astronomical compared to the general population's rates. For example, in one study, the overall risk of suicide for self-harm patients in the year following their self-harm incident was sixty-six times that of the average population in England and Wales.[197] In the Borges study, 35% of individuals with a lifetime history of suicidal ideation reported continued ideation during a ten-year follow-up period,[198] while only 3.9% of adults in the United States report having suicidal thoughts in a typical year.[199] In the same study, 15% of individuals with a lifetime history of suicide attempt reported an attempt during the ten-year follow-up period.[200] In contrast, from 2004 to 2013, an average of 0.14% of the United States population had a reported self-harm incident.[201] The number of suicide attempts from 2004 to 2013 is likely even lower than 0.14% because only a portion of self-harm incidents are suicide attempts. Furthermore, given the severity of the risk associated with suicidal ideation and attempt, 35% and 15% figures still present a large risk of death that Option Three would help eliminate.

Additionally, at least for individuals with relatively permanent risk factors like untreated mood disorders, studies have shown that suicide risk is consistent over time.[202] This group is particularly relevant to PAS, because individuals with psychiatric diagnoses are most likely to sign up for the proposal. While these participants may be in treatment when they sign up, there is no guarantee that they will remain in treatment. Thus, there is always a possibility that these participants' suicidal symptoms can recur. In a study of 310 patients with mood disorders untreated by medication, 38.6% had at least one suicide attempt in their history.[203] The study found no significant correlation between age and rates of suicide attempts.[204] The lack of correla-

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[195] Hawton et al., *supra* note 192, at 538.

[196] Høyer et al., *supra* note 192, at 212.

[197] Hawton et al., *supra* note 192, at 540.

[198] Borges et al., *supra* note 192, at 28.

[199] *See* NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, SUICIDE FACTS AT A GLANCE (2015), http://www.cdc.gov/violenceprevention/pdf/suicide-datasheet-a.pdf [https://perma.cc/XS85-JHCB].

[200] Borges et al., *supra* note 192, at 28.

[201] To retrieve this data, see *Nonfatal Injury Reports, 2001-2013*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html [https://perma.cc/5Y74-VMNK], and then select "self-harm" and the year range 2001–2013.

[202] *See* Bernd Ahrens et al., *Suicide Attempts, Age and Duration of Illness in Recurrent Affective Disorders*, 36 J. AFFECTIVE DISORDERS 43, 45 (1995).

[203] *Id.*

[204] *Id.* at 46.

tion suggests that the risk of suicide does not decline as patients age.[205] Further, the study found a "highly significant positive correlation" between rates of psychiatric episodes and rates of suicide attempts in all age groups (≤40, 40–55, ≥55).[206] This correlation also indicates that the patients' suicide risk did not change over time.[207]

While other studies have also found that there is no connection between suicide risk and age in individuals with mood disorders,[208] some studies, using different methodologies, have found a negative correlation between suicide risk and age.[209] However, such disagreement among the scientific community is not automatically fatal under strict scrutiny.[210] Again, strict scrutiny requires narrow tailoring, but "[i]t does not demand a perfect fit."[211]

Although Option Three may reach some participants who posed a high suicide risk when they signed up but do not maintain a long-term suicide risk, the government can likely overcome a constitutional challenge based on this overbreadth. First, the assertion that a significant number of high-risk participants will pose a long-term suicide risk is scientifically supported. Second, the individuals most likely to sign up for PAS, those with mental illness, maintain a consistently elevated suicide risk. Finally, most of these participants will have executed a valid waiver, regardless of their lack of long-term risk.[212] Therefore, Option Three is likely not unconstitutional based on potential overreach to participants who signed up with a high risk, but do not maintain an elevated risk long-term.[213]

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[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *See id.* at 47.

[209] *See id.* (citing M.T. Tsuang & R.T. Woolson, *Excess Mortality in Schizophrenia and Affective Disorders*, 35 ARCHIVES GEN. PSYCHIATRY 1181 (1978)). The long-term suicide rate amongst the group with mood disorders was still greater than the general population's suicide rate. Tsuang & Woolson, *supra*, at 1182 (reporting rates of 10.1% among schizophrenics, 11.1% among manics, and 9.3% among depressives over a long-term follow up period as compared to 1.9% among the control group).

[210] *See supra* Part IV.A. (discussing the government's ability to rely on a direct and supported logical conclusion when enacting policy).

[211] *See* Tyler v. Hillsdale Cty. Sheriff's Dep't, 775 F.3d 308, 331 (6th Cir. 2014), *reh'g granted*, No. 13-1876, 2015 U.S. App. LEXIS 6638 (6th Cir. Apr. 21, 2015), *argued* Oct. 14, 2015.

[212] *See supra* text accompanying notes 77–83.

[213] The fact that most high-risk PAS participants experience a lifetime elevated risk of suicide means that, under Option Two, few will be able to regain their right to purchase a gun through the judicial hearing. This revelation is not detrimental to Option Two's narrow tailoring, however. Few is not zero; the judicial hearing will ensure that only participants who truly pose no elevated risk of suicide can regain their rights. Thus, the judicial hearing is narrowly drawn to promote the government's compelling interest in suicide prevention.

2. *Option Three May Be Overinclusive by Covering Participants Who Never Posed a High Suicide Risk*

The second group of participants to whom Option Three may overreach did not have a high suicide risk when they signed up for PAS, and did not execute a valid waiver. The government's compelling interest in suicide prevention is not furthered when this group signs up for PAS. Whereas Option Two presents an out for these participants through the judicial hearing, Option Three will burden these participants' Second Amendment rights perpetually.

This overreach is only justified if it is a "necessary evil" in realizing Option Three's heightened ability to prevent suicide in comparison to Options One and Two by themselves. The Supreme Court often frames this inquiry as the "least restrictive alternative" component of strict scrutiny.[214] A challenged restriction is not narrowly tailored if a less-restrictive method serves the government's interests at least as effectively as the challenged method.[215]

There is a good reason to think providing Option Three will save additional lives. Some people at high suicide risk who sign up for Option Two may convince a judge that they are not actually at elevated risk, and then purchase a gun to commit suicide. Option Three eliminates this possibility. If even one life is saved this way, then Options One and Two alone are not as effective in achieving PAS's full suicide prevention potential. There is no less restrictive alternative that is at least equally effective, so Option Three would survive strict scrutiny.

This rationale and conclusion are consistent with the *Heller* Court's express rejection of interest balancing,[216] but they may not accurately reflect the state of the law. One constitutional scholar asserts that "the . . . question becomes whether a particular, incremental reduction in risk justifies a particular infringement of protected rights in light of other reasonably available, more or less costly and more or less effective, alternatives."[217] Thus, the analysis weighs the marginal benefits gained by Option Three against the additional constitutional rights burdened, as compared to Option Two. A cer-

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[214] *See, e.g.*, Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

[215] *See, e.g.*, Reno v. Am. Civil Liberties Union, 521 U.S. 844, 874 (1997) (holding that the burden on protected speech is "unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve"); Rutan v. Republican Party of Ill., 497 U.S. 62, 74–75 (1990) (invalidating a law because a less-burdensome alternative promoted the government's interests just as effectively as the challenged law).

[216] *See* District of Columbia v. Heller, 554 U.S. 570, 634 (2008) ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach.").

[217] Fallon, *supra* note 108, at 1331.

tain amount of interest balancing is inherent in strict scrutiny.[218] Indeed, one commentator claims that lower federal courts have "essentially wound up embracing the sort of interest balancing that Justice Breyer recommended in his dissenting opinion in *Heller*.[219]

Under this approach, Option Three may be more effective at preventing suicide than Option Two, but the difference may not be enough to justify Option Three overreaching to participants who never posed a high suicide risk and did not waive their rights. If Option Two operates as it should, it will be nearly as effective at preventing suicide as Option Three. Any participant who signs up for Option Two and continues to have an elevated suicide risk for the rest of her life will essentially have signed up for a lifetime ban. The only Option Two participants who will not have a lifetime ban are those who can prove they no longer pose an elevated suicide risk at the judicial hearing. Although participants can regain their rights through a judicial hearing under Option Two, but not under Option Three, the effect should be the same; participants with no elevated suicide risk are not likely to commit suicide, whether they regain the right to purchase a gun under Option Two or remain restricted under Option Three.

Of course, as suggested above, the judicial hearing will not be perfect. Even assuming no decision-making errors, under the preponderance of the evidence standard, some participants who regain their right to purchase a gun will, in reality, have an elevated suicide risk. Furthermore, some of these participants may go on to commit suicide after regaining their rights. However, as articulated above, only a small group will be able to regain their rights through Option Two's judicial hearing. Even still, a limited number of the already small group of participants who regain their rights may go on to commit suicide. Option Three will protect this group against suicide, while Option Two will not. But Option Three's slight advantage in effectiveness over Option Two may or may not be deemed substantial enough to justify Option Three's perpetual overreach to low-risk participants who do not execute a valid waiver.

The uncertainty of this conclusion reflects uncertainty in the inputs of the balancing test. Option Three will probably save a small number of additional lives, but that number is unknown. Option Three will erroneously and permanently deprive some number of people of their right to purchase a firearm. That number is also unknown but is also quite likely to be small. As explained above, most PAS participants will execute a valid waiver of their rights. Indeed, intelligent design of the sign-up mechanism could ensure that nearly every participant knows what he or she is doing. But even if more

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[218] *See* Jud Mathews & Alec Stone Sweet, *All Things In Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 812 (2011). Mathews and Sweet assert that strict scrutiny actually started as a balancing test in First Amendment jurisprudence in the 1950s and 1960s. *See id.* at 826–27.

[219] *See* Rostron, *supra* note 63, at 757; *cf. Heller*, 554 U.S. at 689 (Breyer, J., dissenting) ("I would simply adopt such an interest-balancing inquiry explicitly.").

people are wrongly deprived than saved, the stakes are asymmetric. Surely, one life saved is worth a great deal more than one erroneous deprivation of one avenue to acquire a firearm.[220]

When all is said and done, though, there is a possibility that Option Three could fail narrow tailoring.[221]

V. INTERMEDIATE SCRUTINY

As established in Section II, a court should, and likely would, apply intermediate scrutiny to a Second Amendment challenge of PAS. This does not make the strict scrutiny analysis of PAS moot, however. Because intermediate scrutiny is a more lenient standard than strict scrutiny, the schemes that likely pass strict scrutiny are even more likely to survive intermediate scrutiny. Additionally, because both standards involve a means-ends type of analysis, most of the discussion in Section IV will be relevant in this section.

Intermediate scrutiny requires a regulation to be "substantially related to an important governmental objective."[222] Federal courts have applied a particularly lenient version of intermediate scrutiny to most Second Amendment challenges following *Heller* and *McDonald*.[223] A survey of the Second Amendment intermediate scrutiny jurisprudence reveals the following differences between strict and intermediate scrutiny analyses: first, instead of requiring significant empirical support, intermediate scrutiny requires only a reasonable inference that a law is effective; second, courts give deference to legislative policy-making; third, courts give deference when legislatures balance the need for public safety and individuals' interest in self-defense; and fourth, a regulation does not need to be the least restrictive alternative to be

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[220] "I'll give you my gun when you take it from my cold, dead hands" is a dramatic slogan, not necessarily a belief sincerely held by many. *See generally* Robert Berkvist, *Charlton Heston, Epic Film Star and Voice of N.R.A., Dies at 84*, N.Y. TIMES (Apr. 6, 2008), http://www.nytimes.com/2008/04/06/movies/06heston.html?_r=0 [https://perma.cc/US2V-6CMU].

[221] As discussed above in Section II, it may not take a facial challenge to Option Three to invalidate the entire proposal. For example, a plaintiff who did not execute a valid waiver, presented a high suicide risk when he signed up for Option Three, and presents a long-term suicide risk may challenge the proposal. Option Three constitutionally reaches this participant, because the government's compelling interest in suicide prevention is served by the individual's participation in Option Three. Nevertheless, because the proposal is subject to means-ends scrutiny, the court will evaluate Option Three's overall tailoring, not just how Option Three applies to the plaintiff. Therefore, the overinclusiveness inquiry will reveal Option Three's flaw—overreach to participants who never posed a high suicide risk. Under strict scrutiny, this flaw may be fatal and may invalidate the law.

[222] Clark v. Jeter, 486 U.S. 456, 461 (1988).

[223] Rostron, *supra* note 63, at 752. However, intermediate scrutiny, unlike rationality review, has not been an "automatic pass" in the lower courts post-*Heller*. *Compare* Heller v. District of Columbia (*Heller IV*), 801 F.3d 264 (D.C. Cir. 2015) (striking down four provisions of D.C.'s Firearms Registration Amendment Act under intermediate scrutiny), *with id.* at 281–83 (Henderson, J., concurring in part and dissenting in part) (explaining that she would uphold each challenged provision and urging the court to give more deference to the legislature).

reasonably tailored. The remainder of this section discusses these general rules and how they impact PAS.

A. The Intermediate Scrutiny Framework

There are four general differences between intermediate scrutiny's substantial relationship requirement and strict scrutiny's narrow tailoring. First, under intermediate scrutiny, a challenged law's effectiveness at promoting the asserted government interest does not need to be substantiated by certain empirical evidence to pass constitutional muster.[224] For example, the Ninth Circuit upheld San Francisco's safe gun storage laws under intermediate scrutiny.[225] The court relied on the city's "reasonable inference" that requiring weapons in the home to be in a locked container would reduce firearm-related injuries.[226] The court also recognized the importance of giving the city "a reasonable opportunity to experiment with solutions to admittedly serious problems."[227]

Second, courts applying intermediate scrutiny have consistently given deference to the legislative policy judgments underlying gun regulations.[228] As part of this deference, courts allow legislatures to rely on uncertain, or even contradictory, empirical evidence to fashion a reasonably tailored rule.[229] For example, a court of appeals upheld a ban on hollow-point ammunition.[230] The court noted that "a municipality may rely on evidence 'reasonably believed to be relevant' to substantiate its important interest."[231] The legislature's evidence "fairly support[ed]" the finding that hollow-point bullets are more lethal than regular bullets.[232] The existence of contradictory

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[224] *See* Jackson v. City & County of San Francisco, 746 F.3d 953, 966 (9th Cir. 2014); Woollard v. Gallagher, 712 F.3d 865, 879, 882 (4th Cir. 2013); *see also* Heller v. District of Columbia *(Heller III)*, 45 F. Supp. 3d 35, 45 (D.D.C. 2014), *aff'd in part, rev'd in part*, 801 F.3d 264 (D.C. Cir. 2015) ("[T]he Supreme Court has stated explicitly that the government satisfies intermediate scrutiny if its predictions about the effect of a challenged law are rational and based on substantial evidence—it need not establish with certitude that the law will actually achieve its desired end."); *cf.* United States v. Marzzarella, 614 F.3d 85, 98 (3d Cir. 2010) (explaining that intermediate scrutiny requires "the fit between the challenged regulation and the asserted objective to be reasonable, not perfect").

[225] *Jackson*, 746 F.3d at 966.

[226] *See id.*

[227] *Id.* (quoting Renton v. Playtime Theatres, 475 U.S. 41, 52 (1986) (quoting Young v. Am. Mini Theatres, 427 U.S. 50, 75 (1976))).

[228] *See, e.g.*, Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665 (1994)) ("In the context of firearm regulation, the legislature is 'far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks."); *see also* New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 261 (2d Cir. 2015) (reiterating the Second Circuit's deference to legislative judgment when applying intermediate scrutiny to Second Amendment challenges).

[229] *See, e.g.*, *Jackson*, 746 F.3d at 969.

[230] *Id.* at 970.

[231] *Id.* at 969 (quoting *Renton*, 475 U.S. at 51–52).

[232] *Id.* (quoting City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438 (2002)).

evidence did not defeat the legislature's "reasonable conclusions" that banning the ammunition would decrease the injury and death caused by firearms.[233] Similarly, another court of appeals reviewing a handgun permit requirement noted that "reports, statistical information, and other studies" were unnecessary.[234] Instead, the court deferred to the state legislature's "reasonable inference that given the obviously dangerous and deadly nature of handguns, requiring a showing of particularized need for a permit to carry one publicly serves the State's interests in public safety."[235]

Third, a law is more likely to pass intermediate scrutiny under a Second Amendment challenge when the legislature considered individuals' interest in self-defense when fashioning the law.[236] For example, a federal district court upheld Colorado's ban on large-capacity magazines.[237] The court noted that Colorado's legislature had balanced the government's interest in public safety with individuals' interest in self-defense because the legislature had considered a more restrictive limit of twelve rounds, but ultimately adopted a less restrictive limit of fifteen rounds.[238] Similarly, three cases have made note of state legislatures' balancing of public safety and self-defense concerns in upholding the states' ability to require individuals to justify their need for a concealed carry permit.[239]

This point is significant for Options Two and Three. PAS incorporates both the government's interest in public safety and individuals' interest in self-defense. The proposal essentially merges the two considerations, because suicide prevention is part of the government's interest in public safety,[240] and participants will be exercising self-defense by limiting their access to guns in order to keep themselves safe.

Finally, intermediate scrutiny does not require a law to be the least restrictive means of achieving the government's interest.[241] Thus, to survive

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[233] *Id.*

[234] Drake v. Filko, 724 F.3d 426, 437 (3d Cir. 2013).

[235] *Id.* at 438; *see also Heller IV*, 801 F.3d 264, 279 (D.C. Cir. 2015) (noting that studies showing gun-safety training reduces firearm-related accidents are unnecessary to justify a training requirement because "the Supreme Court has 'permitted litigants to justify . . . restrictions . . . based . . . on history, consensus, and simple common sense' when the three are conjoined" (quoting Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001))).

[236] *See, e.g.*, *Filko*, 724 F.3d at 437.

[237] *See* Colorado Outfitters Ass'n v. Hickenlooper, 24 F. Supp. 3d 1050, 1074 (D. Colo. 2014).

[238] *Id.* at 1073.

[239] *See Filko*, 724 F.3d at 439 ("New Jersey's schema takes into account the individual's right to protect himself from violence as well as the community at large's interest in self-protection."); Woollard v. Gallagher, 712 F.3d 865, 881 (4th Cir. 2013); Kachalsky v. County of Westchester, 701 F.3d 81, 97–98 (2d Cir. 2012).

[240] *See Heller III*, 45 F. Supp. 3d 35, 49 (D.D.C. 2014), *aff'd in part, rev'd in part*, 801 F.3d 264 (D.C. Cir. 2015).

[241] New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 261 (2d Cir. 2015) ("Unlike strict scrutiny analysis, we need not ensure that the statute is 'narrowly tailored' or the 'least restrictive available means to serve the stated governmental interest.'" (quoting *Kachalsky*, 701 F.3d at 97)); Nat'l Rifle Ass'n of Am. v. McCraw, 719 F.3d 338, 349 (5th Cir. 2013) (upholding Texas's prohibition on 18-to-20-year-olds carrying handguns in public and

intermediate scrutiny, a regulation does not need to be the most effective means available. So long as it is substantially related to the government's objective, it will pass constitutional muster.

For example, courts reject the argument that a gun restriction is not reasonably tailored when the restriction leaves open the possibility of individuals obtaining guns through some alternative source.[242] The district court, in upholding Colorado's ban on large-capacity magazines, reasoned that, even though people may be able to get large-capacity magazines through illegal means, it is "reasonable to infer" that Colorado's large-capacity magazine ban will limit the number of available magazines overall and thus reduce violent crime.[243] And a court of appeals in another case upheld the federal ban on handgun sales to individuals under 21 years old by federally licensed firearms dealers.[244] The court rejected the argument that the prohibition failed intermediate scrutiny because people under 21 could still purchase a handgun through a private sale.[245] The court asserted that "'a statute is not invalid under the Constitution because it might have gone farther than it did.'"[246]

B. Option Two Passes Intermediate Scrutiny

Option Two almost certainly passes intermediate scrutiny, given that Option Two very likely survives strict scrutiny. The biggest potential uncertainty surrounding Option Two is the assertion that participants will pose a high risk of self-harm, based on the suggestion that self-assessed suicide risk is accurate. While Section IV points out that this assertion has not been scientifically proven, the available empirical evidence is certainly enough to satisfy intermediate scrutiny. Instead of requiring substantial scientific support, intermediate scrutiny defers to the legislature's reasonable inferences and policy judgment that voluntary participation will lead to high-risk participants.

Applying strict scrutiny, Option Two was subject to challenge based on possible underinclusiveness, given its voluntary nature. This basis for challenge is unavailable under intermediate scrutiny. Intermediate scrutiny does not require a law to be the least restrictive means available to accomplish the government's objective.[247] Furthermore, the court can defer to the legislature's judgment that a significant amount of high-risk individuals will sign

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denying that Texas should have taken a less restrictive approach by allowing particularly proficient 18-to-20-year-olds to get a license to carry, noting that "Texas need not employ the least restrictive means to achieve its goal").

[242] *See Hickenlooper*, 24 F. Supp. 3d at 1073; *NRA v. BATFE*, 700 F.3d 185, 211 (5th Cir. 2012).

[243] *Hickenlooper*, 24 F. Supp. 3d at 1073.

[244] *See NRA v. BATFE*, 700 F.3d at 211.

[245] *See id.*

[246] *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 105 (1976)).

[247] Nat'l Rifle Ass'n of Am. v. McCraw, 719 F.3d 338, 349 (5th Cir. 2013).

up for Option Two. And, again, the underinclusiveness reflects deference to the Second Amendment rights of non-participants. Therefore, there is little question that Option Two is constitutional, should a court apply intermediate scrutiny.

C. Option Three Passes Intermediate Scrutiny

Intermediate scrutiny also cures any residual uncertainties surrounding the constitutionality of Option Three under strict scrutiny. While overinclusiveness based on participants who do not pose a long-term high suicide risk was likely not detrimental under strict scrutiny, the potential flaw is certainly not detrimental under intermediate scrutiny. The limited scientific support for the assertion that a significant amount of high-risk participants will pose a long-term risk is not an obstacle under intermediate scrutiny, because substantial empirical support is unnecessary. Instead, a court will defer to the legislature's reasonable judgment that high-risk individuals will be well served by an irrevocable waiver.

Furthermore, under strict scrutiny, the fact that a less restrictive but nearly equally effective alternative to Option Three exists posed a genuine obstacle. Intermediate scrutiny removes this obstacle because intermediate scrutiny does not require a law to be the least-restrictive means available to achieve the government's interest. Option Three's irrevocability is substantially related to suicide prevention by eliminating the possibility that a participant will regain his rights through the judicial hearing and then go on to purchase a gun to commit suicide. Absent the least-restrictive means requirement, this effectiveness is enough to satisfy intermediate scrutiny.

VI. Conclusion

Allowing individuals to opt for a waiting period to purchase a firearm (Option One) would save many lives and is constitutional.[248] But a simple delay will not deter every gun suicide, as the tragic case of Joseph Braman illustrates.[249] This Article proposes two stronger, voluntary restraints against suicide. Option Two would allow gun purchases only after a judge found the participant not to be at elevated suicide risk. Under Option Three, the gun purchase ban would be irrevocable. Providing these options would prevent more suicides, but present more difficult constitutional questions than would Option One.

Both options are constitutional, with one potential exception. Option Two would withstand a Second Amendment challenge; it survives even strict scrutiny and easily passes the more likely and more appropriate standard of intermediate scrutiny. Option Three also ought to be subject to intermediate

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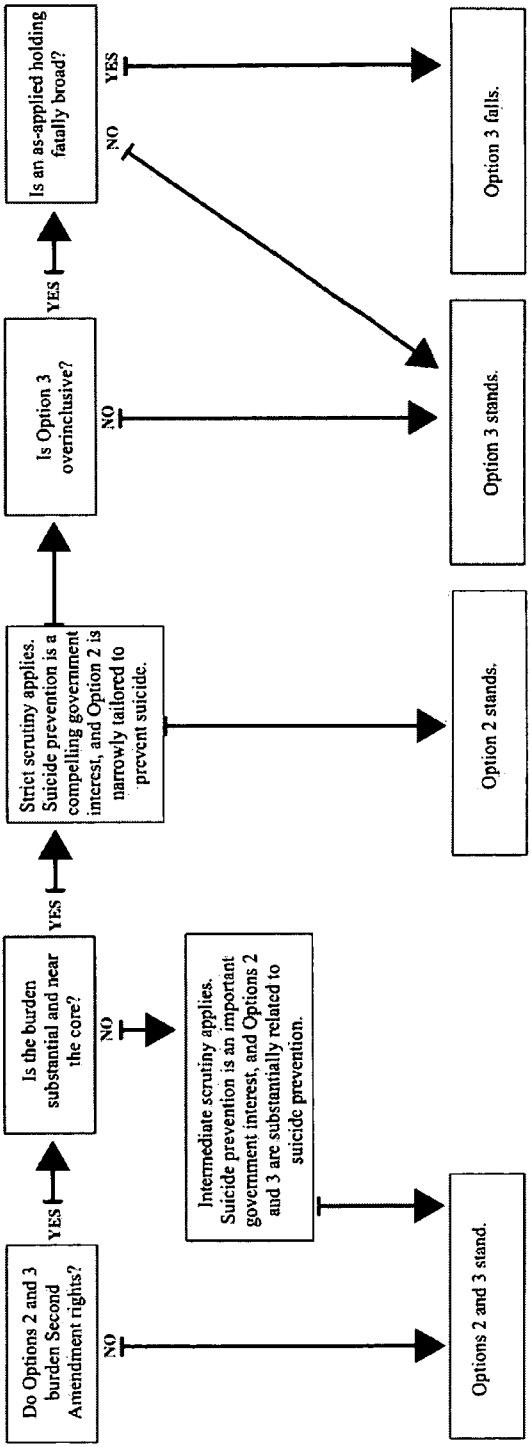
[248] Vars, *supra* note 12, at 1487–97.

[249] *See supra* notes 13–15 and accompanying text.

scrutiny and ought to pass. However, if a court selected strict scrutiny, Option Three could fail. The Figure below provides a simplified diagram of the multiple pathways to constitutionality and the one circuitous route to partial unconstitutionality.

The policy argument for Option Two is particularly compelling and Option Two is perfectly consistent with the Second Amendment. This leaves the legislature considering adoption of PAS with a choice: retain all three options or drop Option Three. To be sure, a cautious legislature could likely capture most of the benefits of PAS without Option Three. But a more aggressive legislature might decide to also offer Option Three if it concludes that the additional lives saved would outweigh the small risk of a finding of unconstitutionality. With tens of thousands of lives lost each year to gun suicide, the only bad choice is to do nothing.


Do Options 2 and 3 burden Second Amendment rights?
YES
NO
Options 2 and 3 stand.
Is the burden substantial and near the core?
YES
NO
Intermediate scrutiny applies. Suicide prevention is an important government interest, and Options 2 and 3 are substantially related to suicide prevention.
Strict scrutiny applies. Suicide prevention is a compelling government interest, and Option 2 is narrowly tailored to prevent suicide.
Option 2 stands.
Is Option 3 overinclusive?
YES
NO
Option 3 stands.
Is an as-applied holding fatally broad?
YES
NO
Option 3 falls.