

**Questions for the record from Senator Charles E. Grassley
Hearing on “Protecting America’s Children from Gun Violence”
June 15, 2022**

Amy Swearer
Legal Fellow
The Heritage Foundation
Washington, D.C.

- 1. In your written testimony, you state “Unfortunately, of the more than 20 red flag laws already on the books at the state level, not one adequately addresses all of the very real concerns that come with deprivations of a fundamental right.” Can you provide further details on the current state level red flag laws on how each of those laws fails to adequately address the due process rights and the practical considerations you laid out in your written testimony?**

While not presenting an exhaustive list of areas where state red flag laws fail to adequately address real constitutional and policy concerns, problems universally arise in the following key areas: protections afforded during ex parte proceedings, protections afforded during final order proceedings, and evidence that the law is founded on comprehensive, well-considered principles of public policy.

Ex parte orders, where defendants are not given notice or the opportunity to defend themselves, should be limited to scenarios where there is substantial evidence of a true emergency, and the risk of danger is so serious and imminent that due process cannot reasonably be afforded in the interest of protecting life. At the very least, states should require, by a heightened standard of proof, a finding that the defendant poses a substantial or significant risk. They should also require evidence of urgency, such as that the substantial or significant risk is imminent or “in the near future.” Finally, the length of time between the issuance of an ex parte order and full hearing in which the defendant has the full panoply of due process protections should be roughly equivalent to the time frame in which states may hold an individual for an emergency mental health evaluation without a hearing or additional forms of due process, such as an in-person evaluation by a medical professional. In all but four states, this additional hearing or evaluation must take place within 72 hours of the emergency hold being initiated.¹

Unfortunately, fourteen states allow ex parte orders to be issued based on the low standard of probable or reasonable cause. Seven states fail to require a finding of substantial or significant risk for ex parte orders. Six states fail to require any finding that the risk be imminent or in the near future for ex parte orders.

Only six states—New Jersey, New York, Maryland, Massachusetts, Nevada, and New Mexico—have time frames between ex parte orders and full hearings that are even arguably on par with

¹ See Leslie C. Hedman et al., *State Laws on Emergency Holds for Mental Health Stabilization*, 67 PSYCHIATRIC SERVS. 529, Table 1 (May 1, 2016), <https://ps.psychiatryonline.org/doi/10.1176/appi.ps.201500205>; John P. Pettila et al., *Short-Term Emergency Commitment Laws*, THE POLICY SURVEILLANCE PROGRAM (Updated Feb. 1, 2016), <https://www.lawatlas.org/datasets/short-term-civil-commitment>.

those constructed under emergency mental health evaluation laws.² Even then, their *ex parte* timeframes are on par only with a small number of outlier state emergency mental health hold laws, and none are consistent with the time frames of *their own* emergency mental health hold laws. Most of the remaining states allow up to fourteen days between the issuance of *ex parte* orders and hearings where the defendant is afforded any semblance of due process. California permits *ex parte* orders to last up to 21 days, while in Oregon, a hearing must be held within 21 days of the respondent's request for a hearing. If the respondent does not actively request a hearing within 30 days, the *ex parte* order lasts for one year.

With respect to final orders, states should use “clear and convincing evidence” as their burden of proof, which is the same burden of proof constitutionally required in civil commitment proceedings.³ And yet, six states allow a person's Second Amendment rights to be fully rescinded for a significant period of time based on a preponderance of the evidence—a standard that many legal scholars and jurists have explained means little more than a “coin flip” of probability that a person is dangerous. While a state need not necessarily require for a final order that the threat be imminent or in the near future, the risk of potential threat should be heightened (i.e., substantial or significant). Six states do not require this showing of heightened risk, while another two (Indiana and New York) use language of heightened risk that is ambiguous and may not, in practice, be the equivalent of a showing of substantial or significant risk. Red flag orders are supposed to be temporary measures and should not last more than one year before the government must once again show by clear and convincing evidence that the person remains dangerous. However, Indiana and New Jersey essentially issue indefinite orders where the person must actively petition to have his or her rights restored (in some cases with the burden of proof falling on them to show they are no longer dangerous). California allows final orders to be issued for up to five years.

Shockingly, it appears that only Colorado's statute explicitly guarantees that respondents have a right to an attorney, to present evidence on their own behalf, and to cross-examine witnesses.⁴ A majority of states allow courts to rely on inappropriate factors, such as the lawful acquisition of firearms or arrest records where the arrest did not result in a plea or conviction, as evidence of dangerousness. Only seven states protect against potential abuse of the system by making it a crime to knowingly file petitions containing false information or with the intention of harassing the respondent.

² Two states (Alabama and New Mexico) allow emergency mental health holds to last up to seven days, while an additional two states (New Hampshire and Rhode Island) allow them to last up to ten days. With respect to red flag laws, New York's final order hearing must be held between three and six days after service of the temporary order, or within 10 days if no temporary order was issued. In Nevada and Maryland, *ex parte* or temporary orders generally expire after seven days, while in Massachusetts, New Jersey, and New Mexico, respondents are entitled to a hearing within 10 days.

³ See *Addington v. Texas*, 441 US 418 (1979).

⁴ A fair number of states include information telling respondents that they should seek the advice of an attorney, but do not otherwise guarantee that the attorney may be present or that they have certain rights within the hearing itself. Worse, Indiana's statute in particular only guarantees the right to an attorney at hearings where a respondent petitions to have his or her firearms returned, but not at the initial hearing to determine in the first place whether the respondent is dangerous and may have his or her firearms seized. Delaware specifies a right “to be heard,” to present evidence, and to cross-examine witnesses, but state statutes say nothing about the right to an attorney. While it is certainly possible that, in practice, these states permit individuals to be represented by legal counsel or afford rights to cross-examination, etc., this should be explicitly laid out in the law.

With respect to statutes showing evidence of well-considered public policy principles, only five states explicitly integrate mental health services or addiction resources, either by automatically providing information on those resources to respondents or by mandating evaluations where appropriate.⁵ Only three states explicitly provide protections against these records becoming permanently weaponized against respondents, either by declaring them confidential records, expunging records of ex parte orders where final orders are not granted, or by sealing records after a set period. Most states fail to ensure some basic level of protection for firearms while in police custody, such as by imposing a duty of reasonable care or specifying standards for storage.

The failings above do not provide a full accounting of the ways in which states fail to protect due process rights or show evidence of well-considered policy principles. But they are sufficient to show that no state meets bare minimum requirements for making these laws constitutionally palatable.

- 2. There is data suggesting that in many cities a bulk of the homicides are committed by a small population of criminal offenders, often a few hundred per city. Many of the offenders have been arrested about 12 times on average. Therefore it seems particularly important in deterring gun violence to make sure that we incapacitate these repeat violent offenders. What is the effect of bail reform policies in major cities across the United States to deterring and incapacitating these offenders?**

The assertion that small numbers of serial offenders are responsible for a majority of violent crimes is well-supported by the available evidence.⁶ With respect to bail reform policies in particular, there is substantial evidence that these policies have served to increase violent crime

⁵ Colorado requires courts to consider whether the respondent meets the standard for a court-ordered mental health evaluation or emergency commitment, and also requires clerks of the court to create community resource lists that are made available to respondents. Florida similar requires courts to consider whether mental health or chemical dependency evaluations are appropriate. Maryland requires courts to refer individuals for emergency mental health evaluations if probable cause exists to believe they meet the statutory requirements. Connecticut requires courts to notify the Department of Mental Health and Addiction Services to take appropriate action once a person has been found to pose a risk of imminent personal injury. Massachusetts requires clerks of the court to provide respondents and their family members with informational resource guides that must be annually updated in consultation with the department of mental health. In one additional state—Washington—the statute says that courts may compile and provide this information, but it is not required. I do not have information on whether this is routinely done in practice.

⁶ United States Sentencing Commission, *Recidivism Among Federal Firearm Offenders* (June 2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190627_Recidivism_Firearms.pdf; Philip J. Cook, et al., *Criminal Records of Homicide Offenders*, 294 JAMA 598 (2005), <https://jamanetwork.com/journals/jama/fullarticle/201308>; Keith Daniels, *Vicious Cycle of Repeat Offenders Fueling Crime in Baltimore*, FOX 5 NEWS (Mar. 11, 2022), <https://foxbaltimore.com/news/local/vicious-cycle-of-repeat-offenders-fueling-crime-in-baltimore-attorney-suggests-solution>.

precisely because they fail to incapacitate repeat offenders. As I testified before the Senate Judiciary Committee in December of 2021,⁷ with respect to Chicago's bail reform policies:

Defenders of Cook County's 2017 bail reform measures only succeed if they are permitted to fudge the numbers and mischaracterize reality.⁸ A comprehensive February 2020 study took a harder look at the actual numbers and found that the changes 'appear to have led to a substantial increase in crimes committed by pretrial releasees in Cook County.' After the new bail policies were implemented, 45 percent more released defendants were charged with committing new crimes, and 33 percent more were charged with committing new violent crimes.⁹

On the whole, poorly implemented bail policies put the public safety at risk by failing to ensure that violent, recidivist offenders are either deterred from or incapable of committing violent crimes while on bail. While a majority of individuals on bail may not commit additional crimes, the small minority who do re-offend have a substantial impact on violent crime and public safety.

3. Do rates of lawful gun ownership or legal gun acquisition correlate with violent crime rates across different states?

It is actually quite difficult, if not impossible, to reliably calculate rates of lawful gun ownership in most states. But there are nonetheless several indications that broad measures of lawful gun ownership are not causally related to violent crime rates. For example, violent crime and homicide rates plummeted during the 1990s and early 2000s, despite the fact that the number of guns per capita increased by about 50 percent during that time. Moreover, to whatever extent violent crime and lawful gun ownership rates are correlated, it is exceedingly difficult to show how a causal connection is possible given the evidence that most gun crimes are committed by individuals who are not in lawful possession of their firearms.

4. Is there any evidence or implication that lawful gun owners contribute to rising rates of violence in major cities across the United States?

While a small minority of gun owners will, at some point, commit crimes with their lawfully possessed firearms, they are not a substantial driving force behind either gun crime generally or the acute spike in gun violence seen over the last two years.

⁷ Amy Swearer, *No Quick Fixes: Debunking the Illusion of Easy Answers and Simple Solutions to Recent, Unprecedented Spikes in Gun Violence*, Heritage Found. (Dec. 13, 2021), <https://www.heritage.org/testimony/no-quick-fixes-debunking-the-illusion-easy-answers-and-simple-solutions-recent>.

⁸ See David Jackson, Todd Lighty, & Gary Marx, *Bail Reform Analysis By Cook County Chief Judge Based on Flawed Data, Undercounts New Murder Charges*, CHI. TRIBUNE (Feb. 13, 2020), <https://www.chicagotribune.com/investigations/ct-cook-county-bail-bond-reform-tim-evans-20200213-tkodxevlyvcp7k66q2v2ahboi4-story.html>.

⁹ Paul Cassell & Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois*, S.J. QUINNEY COLLEGE OF LAW RESEARCH PAPER NO. 349 (Feb. 19, 2020), <https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1189&context=scholarship>.

5. Would changes in police staffing or proactivity have an effect on violent crime in major cities in the United States?

Violent crime is a very complex problem, and there is no “silver bullet” for addressing it. But certainly one important aspect of any comprehensive approach to violent crime is ensuring that police departments are adequately staffed and that officers take a proactive approach to their jobs.¹⁰

6. In your testimony you state “Our kids are suffering from a decades-long downward spiral of mental and emotional un-wellness that is leading them to take their own lives at increasing rates.” In your view, what are the best strategies to combatting this rise in mental health issues and what can Congress do to further this effort?

Many of the policies and practices that would best help the nation’s children are not necessarily things that can or should be implemented at a federal level. However, Congress is not powerless. The best strategies come from giving parents more choices, including when it comes to the education of their children. School choice promotes student safety by helping students escape communities where bullying, gang-related violence, and other forms of school violence is common. It also lowers the risk of students participating in the types of criminal behaviors that are most associated with violent outcomes, including gun-related deaths and injuries.¹¹ The ability of parents to more easily remove their children from schools where they are bullied or face violent threats also helps alleviate the increased risks of suicide that come with those realities.¹²

¹⁰ Aaron Chafflin et al., *When Cities Add Cops, Black Residents Could Have The Most To Gain – And The Most To Lose*, NISKANEN CENTER (May 18, 2021), https://www.nber.org/papers/w28202?utm_source=npr_newsletter&utm_medium=email&utm_content=20210419&utm_term=5326149&utm_campaign=money&utm_id=49355949&orgid=&utm_attl=money; Aaron Chalfin & Justin McCrary, *Are U.S. Cities Underpoliced? Theory and Evidence*, 167 *Rev. of Econ. & Stats.* (2018), <https://direct.mit.edu/rest/article-abstract/100/1/167/58429/Are-U-S-Cities-Underpoliced-Theory-and-Evidence?redirectedFrom=fulltext>; Peter Moskos, *The Murder Spike of 2020: When Police Pull Back*, WSJ (Updated July 23, 2021), <https://www.wsj.com/articles/the-murder-spike-of-2020-when-police-pull-back-11626969547>; Paul G. Cassell, *Explaining the Recent Homicide Spikes in U.S. Cities: The ‘Minneapolis Effect’ and the Decline in Proactive Policing*, 33 *FED. SENT’G REP.* 83 (Dec. 2020) (last revised May 4, 2021, as University of Utah College of Law Research Paper No. 377).

¹¹ Corey DeAngelis & Patrick J. Wolf, *The School Choice Voucher: A “Get Out of Jail Free” Card?*, EDRE Working Paper 2016-03 (Mar. 8, 2016), <http://www.uaedreform.org/downloads/2016/03/the-school-choice-voucher-a-get-out-of-jail-card.pdf>; M. Danish Shakeel, *Can Private Schools Improve School Climate? Evidence From A Nationally Representative Sample*, 12 *J. OF SCHOOL CHOICE* 426 (Aug. 8, 2018), <https://www.tandfonline.com/doi/abs/10.1080/15582159.2018.1490383>; Andrew McEachin et al., *Social Returns to Private Choice? Effects of Charter Schools on Behavioral Outcomes, Arrests, and Civic Participation*, EDWORKING PAPER NO. 19-90 (2020), <https://www.edworkingpapers.com/ai19-90>.

¹² Jonathan Butcher & Chloe Shoemaker, *Youth Mental Health Crisis Gives More Urgency To School Choice Movement*, HERITAGE FOUNDATION (Mar. 31, 2021), <https://www.heritage.org/education/commentary/youth-mental-health-crisis-gives-more-urgency-school-choice-movement>; Corey A. DeAngelis & Angela K. Dills, *The Effects of School Choice on Mental Health*, 32 *SCHOOL EFFECTIVENESS & SCHOOL IMPROVEMENT* 326 (Dec. 3, 2020), <https://www.tandfonline.com/doi/abs/10.1080/09243453.2020.1846569?journalCode=nses20>; Editorial

The bulk of school choice initiatives should be conducted at the state level.¹³ That said, the federal government is not without means to act in support of this crucial aspect of combating violence. Congress can put the D.C. Opportunity Scholarship Program on a permanent and expanded footing, instead of perpetually trying to phase it out.¹⁴ It can also expand school choice to military families and children attending Bureau of Indian Education schools, the latter routinely being deemed some of the worst-performing schools in the nation.¹⁵ Congress can also use its bully pulpit to promote these initiatives in a more high-profile manner, bringing attention to the positive impacts they have on the nation's young people.

Congress can also expand access to alternative healthcare options and give low-income Americans a choice in their own healthcare—including their mental healthcare.¹⁶ It can also refuse to underwrite anti-competitive state healthcare policies that raise the costs of healthcare—including mental healthcare—and reduce options for patients.¹⁷

Finally, Congress can and should address and mitigate the detrimental effects of Big Tech and social media in the lives of American teenagers, while being aware of the shortcomings of some current efforts to accomplish this important goal.¹⁸

Board, *School Choice: Better Than Prozac*, WSJ (Dec. 17, 2020), <https://www.wsj.com/articles/school-choice-better-than-prozac-11608248279>.

¹³ Lindsey Burke, *Why A Federal Tax-Credit Scholarship Program Will Not Advance School Choice In America*, HERITAGE FOUNDATION BACKGROUNDER NO. 3395 (Mar. 13, 2019), <https://www.heritage.org/education/report/why-federal-tax-credit-scholarship-program-will-not-advance-school-choice-america>.

¹⁴ Jude Schwallbach, *D.C.'s Opportunity Scholarship Program Giving Students Access to In-Class Education*, HERITAGE FOUNDATION (Sept. 9, 2020), <https://www.heritage.org/education/commentary/dcs-opportunity-scholarship-program-giving-students-access-class-education>; Jude Schwallbach, *Military Families Deserve Flexible Education Options*, HERITAGE FOUNDATION (Apr. 14, 2021), <https://www.heritage.org/education/commentary/military-families-deserve-flexible-education-options>; Lindsey M. Burke, *School Choice for Military Families Will Save DOD Money*, HERITAGE FOUNDATION (Mar. 1, 2018), <https://www.heritage.org/education/commentary/school-choice-military-families-will-save-dod-money>.

¹⁵ Native American youths are also at an elevated risk of violent victimization, and are overrepresented in the criminal justice system. Preventing delinquency and increasing educational outcomes is a vital component of lowering violent crime, violent victimization, and suicide rates for this often-overlooked population.

¹⁶ Nina Owcharenko Schaeffer, *Health Care: Time to Go on Offense*, HERITAGE FOUNDATION ISSUE BRIEF NO. 5271 (May 31, 2022), <https://www.heritage.org/health-care-reform/report/health-care-time-go-offense>; Nina Owcharenko Schaefer, *Medicaid at 55: Understanding the Design, Trends and Reforms Needed to Improve the Health Care Safety Net*, HERITAGE FOUNDATION BACKGROUNDER NO. 3604, (Apr. 14, 2021), https://www.heritage.org/sites/default/files/2021-04/BG3604_0.pdf.

¹⁷ Robert E. Moffit, *State Certificate-of-Need Laws Deserve A Federal Response*, HERITAGE FOUNDATION (Jan. 12, 2022), <https://www.heritage.org/health-care-reform/commentary/state-certificate-need-laws-deserve-federal-response>.

¹⁸ Kara Frederick, *Social Media Is Hurting Kids, But A Fix May Be On Horizon*, HERITAGE FOUNDATION (June 1, 2022), <https://www.heritage.org/technology/commentary/social-media-hurting-kids-fix-may-be-horizon>; Jay W. Richards & Jared Eckert, *How Not To Keep Children Safe Online*, HERITAGE FOUNDATION (Mar. 21, 2022), <https://www.heritage.org/technology/commentary/how-not-keep-children-safe-online>.

7. What data have you identified regarding firearms utilized in criminal activity?

Most acts of criminal gun violence are committed with handguns, and rifles of any kind (whether semi-automatic, bolt-action, “assault weapon,” or “non-assault weapon”) are used in only 3 to 4 percent of gun-related homicides every year. The majority of firearms used in gun crimes were both illegally possessed by the individuals who used them and obtained through illegal or informal channels that are unlikely to be impacted by universal background check requirements.¹⁹

8. Are the firearms seized by law enforcement legally purchased?

The best available evidence suggests that most guns used in crime are not legally possessed by the individuals who used them in a criminal manner. For example, in a recent study of Chicago crime guns, in 95 percent of cases where the Chicago Police Department was able to identify the possessor of the crime gun, “that individual was not the original, lawful possessor of the firearm based upon the ATF record at the initial point of purchase.”²⁰ Other studies analyzing trace report data have similarly found that crime guns are most typically not possessed by the initial lawful purchase at the time they are used in crimes.²¹

9. Are the individuals who commit firearms crimes legal possessors of firearms?

There is ample evidence that the majority of individuals who commit crimes with firearms are not in legal possession of the firearms they use. The exception to this is for mass public shooters, who, with very few exceptions, were in lawful possession of their firearms despite showing serious signs of being a danger to themselves or others.

10. As our nation suffers from a sudden spike in violent crime which began approximately in June of 2020, the Centers for Disease Control and Prevention has released data showing firearms fatalities are the leading cause of death in children. What types of crime are the major contributing factors in firearms deaths and what can Congress do to address these types of deaths?

Acute rises in three particular types of crime appear to be major contributing factors to the overall spike in gun deaths—gang-related violence, juvenile-driven violence, and domestic violence. Officials in many major cities have noted a marked increase in gang-related violence

¹⁹ See generally Amy Swearer, *Constitutional and Commonsense Steps to Reduce Gun Violence*, Heritage Found. (Mar. 31, 2021), <https://www.heritage.org/testimony/constitutional-and-commonsense-steps-reduce-gun-violence>.

²⁰ City of Chicago Office of the Mayor, Gun Trace Report (2017), <https://www.chicago.gov/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2017/October/GTR2017.pdf>;

²¹ See generally, Megan E. Collins et al., *A Comparative Analysis of Crime Guns*, 5 RSF 96 (2017), <https://ccjs.umd.edu/sites/ccjs.umd.edu/files/pubs/COMPLIANT2-Megan%20E.%20Collins%2C%20Susan%20T.%20Parker%2C%20Thomas%20L.%20Scott%2C%20and%20Charles%20F.%20Wellford.%20A%20Comparative%20Analysis%20of%20Crime%20Guns.pdf>

over the past two years, including cities like Portland that have experienced some of the worst homicide spikes.²² Gang-related violence is particularly notable for its tendency to self-perpetuate in a vicious cycle of retaliation, and to result in injuries to innocent bystanders (including children). In the same way, juvenile-driven violence is soaring in many cities, leading to a reality in which these juveniles are both more likely to victimize others and become victims of violence themselves.²³ Domestic violence homicides, while typically accounting for a smaller percentage of annual homicides, are nonetheless occurring much more frequently during this current crime spike than they did prior to the pandemic. Because domestic violence situations often involve the presence of children, these acts of violence are also of particular concern when it comes to keeping the nation's children safe.

Many of the policies and practices most capable of successfully lowering these rates of violent crime must be implemented at a state and local level. However, Congress can encourage and even help states re-fund and re-invigorate local police departments after several years of morale-devastating cuts. It can continue cracking down on illegal gun trafficking and ensure that, at least at the federal level, those who are caught illegally trafficking firearms face swift, certain, and severe punishment. And while it cannot force rogue "progressive" prosecutors to fully enforce laws at a state or local level, it can publicly promote best practices for the prosecution of violent offenders that reflect an attitude of taking violence crime seriously.

²² Zusha Elinson, *Gang Violence Drives Rise in Murder Rates in Some U.S. Cities*, WSJ (Aug. 20, 2021), <https://www.wsj.com/articles/gang-violence-drives-rise-in-murder-rates-in-some-u-s-cities-11629486712>; Stephen Stock et al., *Number of Bay Area Freeway Shootings Spiking Due to Gang 'Hits'*, NBC BAY AREA (Feb. 8, 2022), <https://www.nbcbayarea.com/investigations/number-of-bay-area-freeway-shootings-spiking-due-to-gang-hits-investigators/2804020/>; Sara Cline, *Shootings Rise in Portland, as Police Blame Gang Violence* (June 11, 2021), <https://www.opb.org/article/2021/06/11/police-say-gang-activity-fuels-portland-violence/>.

²³ Damali Keith, *Domestic Violence Murders on the Rise in Houston*, FOX 26 HOUSTON (June 7, 2022), <https://www.fox26houston.com/news/domestic-violence-murders-on-the-rise-in-houston>; Felicia Jordan, *Homicide Rates in Cincinnati Remain on the Rise Since the Beginning of the Pandemic*, WCPO (Apr. 20, 2022), <https://www.wcpo.com/news/local-news/hamilton-county/cincinnati/homicide-rates-in-cincinnati-remain-on-the-rise-since-the-beginning-of-the-pandemic>; The Crime Report, *Domestic Violence Deaths in Miami-Dade Rise to Pre-Pandemic Levels* (Apr. 21, 2022), <https://thecrimereport.org/2022/04/21/domestic-violence-deaths-in-miami-dade-rise-to-pre-pandemic-levels/>; <https://www.king5.com/article/news/local/tacoma/domestic-violence-rising-homicide-rate-pierce-county/281-19a60ddc-2c1e-43bd-8b59-e3f0b6d98317>.

**Questions from Senator Thom Tillis
for Amy Swearer Witness for the Senate Judiciary Committee Hearing “Protecting America’s
Children From Gun Violence”**

1. What are the most important steps we can take to address mental health crises faced by students in our schools?

The most important steps Congress can take in addressing the mental health crisis faced by students in our schools is to use its bully pulpit to promote school choice and act within its appropriate sphere to ensure school choice for residents in D.C., for military families, and for children attending Bureau of Indian Education schools. School choice promotes student safety by helping students escape communities where bullying, gang-related violence, and other forms of school violence is common. It also lowers the risk of students participating in the types of criminal behaviors that are most associated with violent outcomes, including gun-related deaths and injuries.¹ The ability of parents to more easily remove their children from schools where they are bullied or face violent threats also helps alleviate the increased risks of suicide that come with those realities.²

Additionally, Congress should address and mitigate the detrimental effects of Big Tech and social media in the lives of American teenagers, while being aware of the shortcomings of some current efforts to accomplish this important goal.³ Along with this, Congress should expand access to alternative healthcare options and give low-income Americans a choice in their own healthcare—including their mental healthcare.⁴ At the same time, it should refuse to underwrite anti-competitive state healthcare policies that raise the costs of healthcare—including mental healthcare—and reduce options for patients.⁵

¹ Corey DeAngelis & Patrick J. Wolf, *The School Choice Voucher: A “Get Out of Jail Free” Card?*, EDRE Working Paper 2016-03 (Mar. 8, 2016), <http://www.uaedreform.org/downloads/2016/03/the-school-choice-voucher-a-get-out-of-jail-card.pdf>; M. Danish Shakeel, *Can Private Schools Improve School Climate? Evidence From A Nationally Representative Sample*, 12 J. OF SCHOOL CHOICE 426 (Aug. 8, 2018), <https://www.tandfonline.com/doi/abs/10.1080/15582159.2018.1490383>; Andrew McEachin et al., *Social Returns to Private Choice? Effects of Charter Schools on Behavioral Outcomes, Arrests, and Civic Participation*, EDWORKING PAPER NO. 19-90 (2020), <https://www.edworkingpapers.com/ai19-90>.

² Jonathan Butcher & Chloe Shoemaker, *Youth Mental Health Crisis Gives More Urgency To School Choice Movement*, HERITAGE FOUNDATION (Mar. 31, 2021), <https://www.heritage.org/education/commentary/youth-mental-health-crisis-gives-more-urgency-school-choice-movement>; Corey A. DeAngelis & Angela K. Dills, *The Effects of School Choice on Mental Health*, 32 SCHOOL EFFECTIVENESS & SCHOOL IMPROVEMENT 326 (Dec. 3, 2020), <https://www.tandfonline.com/doi/abs/10.1080/09243453.2020.1846569?journalCode=nses20>; Editorial Board, *School Choice: Better Than Prozac*, WSJ (Dec. 17, 2020), <https://www.wsj.com/articles/school-choice-better-than-prozac-11608248279>.

³ Kara Frederick, *Social Media Is Hurting Kids, But A Fix May Be On Horizon*, HERITAGE FOUNDATION (June 1, 2022), <https://www.heritage.org/technology/commentary/social-media-hurting-kids-fix-may-be-horizon>; Jay W. Richards & Jared Eckert, *How Not To Keep Children Safe Online*, HERITAGE FOUNDATION (Mar. 21, 2022), <https://www.heritage.org/technology/commentary/how-not-keep-children-safe-online>.

⁴ Nina Owcharenko Schaeffer, *Health Care: Time to Go on Offense*, HERITAGE FOUNDATION ISSUE BRIEF NO. 5271 (May 31, 2022), <https://www.heritage.org/health-care-reform/report/health-care-time-go-offense>; Nina Owcharenko Schaefer, *Medicaid at 55: Understanding the Design, Trends and Reforms Needed to Improve the Health Care Safety Net*, HERITAGE FOUNDATION BACKGROUNDER NO. 3604, (Apr. 14, 2021), https://www.heritage.org/sites/default/files/2021-04/BG3604_0.pdf.

⁵ Robert E. Moffit, *State Certificate-of-Need Laws Deserve A Federal Response*, HERITAGE FOUNDATION (Jan. 12, 2022), <https://www.heritage.org/health-care-reform/commentary/state-certificate-need-laws-deserve-federal-response>.

2. To your knowledge, what are the most frequent factors which point to an individual who is likely to commit gun violence in schools?

The answer depends on whether this question refers to individuals who are likely to commit mass school shootings, or individuals who are likely to commit more general acts of interpersonal gun violence. Regardless, it is important to keep in mind that the vast majority of students will never commit an act of gun violence on school property, and we should generally guard against any attempt to brand individuals as potential school shooters based on anything other than objective evidence of dangerousness or plans to commit an act of school violence. That said, many mass school shooters have shared similar characteristics. Many come from broken homes, have histories of experiencing trauma (such as being abused, bullied, or losing a parent), and have a longstanding pattern of behavioral problems (including, often, violent or aggressive tendencies). While many may not be mentally ill in a clinical sense, over half had some history of psychological problems and are very often mentally unwell in a practical, readily identifiable sense. However, the clearest indication that a person is likely to commit a school shooting is that he or she evidences a desire to commit that type of shooting. As the National Association of School Psychologists has noted, consistent with the best available data and my own analysis, “most students who pose a substantive threat indicate their intentions in some way” including by telling friends, making drawings, posting threats of harm on social media, or expressing their desires to commit harm in some form of written work.⁶

3. What are the most effective interventions to address underlying mental health and social issues faced by school children today?

Two of the most effective interventions would be to enable parents to more easily remove their children from schools where they are bullied or otherwise subject to unsafe environments, and to address the serious role that social media and Big Tech play in facilitating this ongoing mental health crisis for juveniles.

4. Do you agree that considering juvenile records and mental health evaluations when conducting background checks will improve our ability to identify those who may be a risk to the community? Why or why not?

Any improvement in identifying those at risk of violence would depend on the type of juvenile record or mental health evaluation in question. Importantly, any such investigation into a juvenile’s record must be balanced with other core constitutional principles implemented for adults. For example, prohibited status should not be based on subjective or vague assessments of potential risk, but on objective and concrete measures. This is why we currently only prohibit firearm possession for adults convicted of certain crimes, subjected to final restraining orders, or with past involuntary commitments. These provide much clearer, concrete lines for determining who is or is not dangerous and require more specific due process protections than, say, assessments of ‘character,’ trustworthiness, financial or job stability, or opinions of one’s peers.

⁶ National Association of School Psychologists, *Threat Assessment at School* (last visited July 3, 2022), <https://www.nasponline.org/resources-and-publications/resources-and-podcasts/school-safety-and-crisis/systems-level-prevention/threat-assessment-at-school>.

It makes sense that a juvenile who is adjudicated as delinquent for a serious offense similar in nature to a violent felony or misdemeanor should be considered as evidence of future violence, just as it is for adults. For example, if an 18-year-old seeking to purchase a firearm was adjudicated as a delinquent for violent actions at the age of 16, it may be a good idea to delay his ability to legally possess firearms even if he is not “convicted” of a felony in criminal court. But at the same time, juvenile offenders are unique in that many of them will “grow out” of crime as they mature and the best available evidence shows that they have a much greater capacity to be rehabilitated than adult offenders. We should not, as a general rule, hold all juvenile mistakes against adults in perpetuity, even as we should reasonably assess whether a young adult seeking to purchase firearms has a recent juvenile record indicating that he or she is dangerous.