

United States Senate

WASHINGTON, DC 20510

November 1, 2022

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

The Honorable Christopher Wray
Director
Federal Bureau of Investigation
935 Pennsylvania Ave NW
Washington, DC 20535

The Honorable Steven M. Dettlback
Director
Bureau of Alcohol, Tobacco, Firearms and Explosives
99 New York Ave NE
Washington, DC 20226

Dear Attorney General Garland, Director Wray, and Director Dettlback,

In the wake of the mass shootings in Uvalde, Texas, and Buffalo, New York, we passed bipartisan, common-sense legislation—called the Bipartisan Safer Communities Act (“BSCA”)—to protect America’s children, keep our schools safe, and reduce the threat of violence across our country. The BSCA will save lives while not infringing on any law-abiding American’s Second Amendment rights. We write to urge the Department of Justice (“DOJ”), the Federal Bureau of Investigation (“FBI”), and the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) to implement the law consistent with congressional intent and the statute’s plain language.

Crisis Intervention Programs:

The BSCA provides for formula-based, grant funding of state-administered, crisis intervention programs. Crisis intervention programs include mental health courts, crisis response teams, drug treatment courts, veterans courts, and other programs aimed at reducing the risk of violence.

Additionally, the BSCA permits funding of extreme risk protection programs (“ERPPs”) **only** if they meet robust Constitutional protections at every stage. Indeed, the BSCA’s text prevents funding ERPPs if they do not provide for timely “pre-deprivation and post-deprivation due process rights that prevent any violation or infringement of the Constitution. . .”

The BSCA’s plain, unambiguous text prevents funding for ERPPs that do not provide robust Constitutional protections. The BSCA specifies particular procedures and rights that, at a minimum, must be provided during the pre-deprivation and post-deprivation stages. These include “the right to an in-person hearing, an unbiased adjudicator, the right to know opposing evidence, the right to present evidence, and the right to confront adverse witnesses.” In other words, if an existing ERPP does not provide these protections and rights at each and every stage, then it cannot be funded under the BSCA’s formula-grant program.

The BSCA’s text further limits the funding of ERPPs if they do not provide “pre-deprivation and post-deprivation heightened evidentiary standards and proof which mean not less than the protections afforded to a similarly situated litigant in Federal court or promulgated by the State’s evidentiary body.” Heightened evidentiary standards are more than the preponderance of the evidence standard, which is the lowest standard of proof in state or federal courts. Therefore, the formula grant funding may not fund ERPPs that allow for deprivation of a firearm with a standard of proof at or lower than preponderance of the evidence.

Finally, the BSCA provides that ERPPs may not be funded unless they comport with an exhaustive list of rights, including, but not limited to, the rights enshrined in our “Constitution . . . the Bill of Rights, and the substantive or procedural due process rights guaranteed under the Fifth and Fourteenth Amendments to the Constitution of the United States, as applied to the States, and as interpreted by State courts and United States courts (including the Supreme Court of the United States).” This, of course, includes the Supreme Court’s rulings in *District of Columbia v. Heller*, *McDonald v. Chicago*, and *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*. Should the DOJ decide to fund an ERPP, the undersigned request a detailed analysis of how the ERPP comports with all the procedures and rights explicitly provided and incorporated by reference in the BSCA’s text.

Defining “Engaged in the Business”:

The law requires those engaged in the business of dealing firearms to have or obtain a federal firearms dealers license.¹ The BSCA provides more clarity to the industry for when someone must obtain a federal firearms dealers license. In Midland and Odessa, Texas, for example, the shooter—who at the time was prohibited from possessing or owning a firearm under federal law—purchased a firearm from an

¹ Pub. L. 117–159, div. A, title II, § 12002.

unlicensed firearms dealer. This shooter had previously attempted to buy from a licensed firearms dealer, but was rejected by the licensed firearms dealer because the National Instant Criminal Background Check System ("NICS") flagged he was a prohibited person. Through a detailed investigation, federal prosecutors convicted the unlicensed firearm dealer of a federal crime, and he was sentenced to two years in federal prison. Our legislation aims at preventing someone who is disqualified from owning or possessing a firearm from shopping around for an unlicensed firearm dealer.

The "engaged in the business" provision in the BSCA does not provide for a specific number of firearms, transactions, or amount of profit that would trigger the requirement for someone to have or obtain a federal firearms dealers license. This would lead to absurd results and structuring of transactions to skirt the law. Implementation and enforcement of the law should not be on how the sale was conducted—through the internet, for example—but on the underlying substance of the sale as it relates to a series of transactions over a period of time to determine if someone is engaged in the business of dealing firearms.

As the legislation spells out, it does not require those who engage in occasional sales, the liquidation of firearms, or those who buy and sell firearms to support their firearm-related hobbies to obtain a federal firearms license. It is critical that any agency interpretation and enforcement of this law provide substantial protections and clarity to folks who are merely hobbyists, choose to liquidate firearms, or want to buy and sell firearms to improve and replenish their own personal collections. This is also not a way to target anyone and everyone who shows up at a gun show to sell his or her firearms. Again, it is critical to look at the substance of the transactions over an extended period of time and the underlying profit motive to determine if someone is engaged in the business of dealing firearms.

While it is our understanding that this law will encourage an incremental number of folks to obtain a federal firearms dealers license, it is imperative that agency regulations and implementation do not overstep the statute's text to attempt to control all commercial sales. Given the BSCA bill changed existing law, it is critical that agencies account for innocent mistakes, provide clear education and notice to federal firearms dealers and others connected to the industry, and apply heightened evidentiary standards, including a heightened *mens rea* element of willfulness, when evaluating compliance. Under its new leadership, the ATF must focus its resources on stopping legitimate threats to public safety – the trigger pullers – and not on driving honest licensees out of business for paperwork errors and mistakes that do not truly or legitimately threaten public safety. Unfortunately, that is what is happening now under this Administration's so-called "zero tolerance" policy. Indeed, federal firearms dealers report that the ATF is reopening up old investigations and issuing Notice of Revocations after they were previously closed or

resolved with a warning letter due to lack of evidence or an insufficient basis to revoke.

Juvenile Records:

The BSCA provides for an enhanced background check for firearms purchases under the age of 21. Under the text, the FBI should do this enhanced check “immediately,” and in no case, should this check take more than three business days, which is consistent with existing law. The BSCA’s text explicitly directs the FBI to finish the enhanced background check for purchasers under the age of 21 as close in time to the point of sale as possible.

To be clear, the text did not provide for a *de facto* waiting period at any stage. During negotiations, that was considered and rejected. It would be well beyond the scope of the text if the FBI as a matter of course takes 3 business days to conduct the enhanced background checks for those firearms purchasers under the age of 21. It is only if “cause exists to further investigate a possibly disqualifying juvenile record” that the FBI may take up to an additional 7 days to complete the enhanced background check with respect to the specific juvenile record. The “cause” must be specific to that purchaser. The BSCA does not provide for a blanket “waiting period” for firearms purchasers under the age of 21. The BSCA provides the FBI funding and state grants to upload juvenile records so that law-abiding citizens are able to get their firearms “immediately,” and firearms are kept out of the hands of criminals and those with mental health adjudications.

Indeed, the BSCA text provides that it is only a “possibly disqualifying juvenile record” that allows for an additional background check. In other words, the FBI, with respect to firearms transactions for those under the age of 21, does not get additional time to investigate adult records or any “possibly disqualifying” record. The language ties the additional investigation to a “possibly disqualifying juvenile record.”²

If, and only if, NICS notifies the FBI that a juvenile record requires additional investigation beyond the three business days, the FBI is to conduct this investigation into the juvenile record “as soon as possible,” but in no case more than ten business days from the initial point of sale. It would violate the plain language of the statute if the FBI, as a matter of course, consistently takes an additional seven days to complete the investigation in situations where a specific juvenile record requires additional investigation.

Furthermore, the BSCA does not give the FBI “cause” to extend the investigatory period into a specific juvenile record because the agency generally needs more time, has not received a response from the specific record repository, or just deems more time necessary. If a state privacy law precludes the uploading of records, for

² Pub. L. 117–159, div. A, title II, § 12001(3).

example, that also does not constitute a finding of “cause” for further investigation into a juvenile record. A state’s decision to fail to upload juvenile records or provide an untimely response does not constitute “cause” to continue the investigation into the specific juvenile record. States should amend their laws to allow disqualifying records to be submitted to NICS so that the background check system is accurate and lawful firearms purchasers under the age of 21 can receive their firearms “immediately.” The undersigned encourage the FBI to keep a record of its “cause” findings for government transparency purposes and to avoid false denials of firearms to law-abiding citizens.

Misdemeanor Crime of Domestic Violence:

Under existing law, an individual convicted of a misdemeanor crime of domestic violence is prohibited from possessing a firearm. The statute, in its current form, protects “those similarly situated to a spouse.”³ The BSCA updated the law to reflect the reality that dating relationships in the modern age can be as committed, meaningful, and serious as cohabitating or spousal relationships.

The belief underpinning the statute was that people who have been convicted of violence once—toward a spouse, child, or someone similarly situated to a spouse—are likely to use violence again. This has been the justification for keeping firearms out of their hands, and it remains the justification today.

My colleague suggests that the law covers those in “dating relationships.” While the law now covers some “dating relationships,” there are several limiting factors of the types of “dating relationships” covered. Indeed, the “dating relationships” need to be (1) continuing, (2) current or recent, (3) intimate or romantic in nature, and (4) serious. All of these factors need to be present for the firearms prohibition to come into effect. Given this is a criminal provision, the undersigned urges the Administration to exercise extreme caution and honor the plain language in interpreting the provision very narrowly.

Finally, as provided in the BSCA’s text, persons convicted of a misdemeanor crime of violence against a person with whom they have (or have had) a current or recent continuing serious relationship of a romantic or intimate nature would have their right to purchase and possess firearms automatically restored after 5 years elapsed from the end of their criminal sentence if they had committed no further crimes of violence. No paperwork or government approval would be required for restoration of rights and their records would be automatically purged from NICS. We urge the Administration to prioritize restoration of individuals’ Second Amendment rights consistent with this new provision.

³ 18 USC § 921(a)

Sincerely,

A handwritten signature in black ink that reads "John Cornyn". The signature is fluid and cursive, with the first name and last name clearly distinguishable.

John Cornyn
U.S. Senator

A handwritten signature in blue ink that reads "Thom Tillis". The signature is fluid and cursive, with the first name and last name clearly distinguishable.

Thom Tillis
U.S. Senator