



October 17, 2022

Honorable Carlton W. Reeves
Chair, United States Sentencing Commission
One Columbus Circle N.E.
Suite 2-500
Washington, D.C. 20002-8002

Re: Proposed Priorities for the 2022-23 Amendment Cycle

Dear Judge Reeves:

We the undersigned are a coalition of researchers, policymakers, lawyers, and advocates who focus on gun violence prevention, federal sentencing reform, or have experience prosecuting federal firearms offenses. We write to provide comments on the United States Sentencing Commission's Proposed Priorities for the 2022-2023 amendment cycle. In particular, we urge the Commission to keep Priority #3 to amend § 2K2.1 of the United States Sentencing Guidelines ("USSG") to implement the Bipartisan Safer Communities Act ("BSCA").

Our comments address Priority #3 in detail and are focused on ensuring that the amendment is tailored to Congress' desire to (i) target supply-side enforcement, (ii) ensure mitigating factors for people with lesser culpability, and (iii) avoid exacerbating existing racial disparities in federal firearms sentences. We also wish to provide subject matter expertise in furtherance of preventing gun violence through the enforcement of federal gun laws. While these federal criminal statutes give law enforcement new ways to combat gun violence, there is a risk that they can be misapplied in a manner that will thwart Congressional intent to target rogue gun dealers and large-scale traffickers, increase the racial disparities that already exist in federal sentences for firearms offenses, and fail to measurably impact gun violence.

Congress and the Executive Endorsed a “Supply-Side” Approach¹ in Combatting Gun Violence

In enacting the BSCA, we note that Congress evinced a clear intent to focus on disrupting the supply pipeline that has led to an influx of illegal firearms in cities, usually from states with lax gun laws, and not to continue the trend of federal prosecutions targeting prohibited persons who possess firearms. For instance, Senator Martin Heinrich of New Mexico described the straw purchasing statute as giving law enforcement the ability to disrupt “every link in the illegal chain of purchases to take down the entire ring, not just the vulnerable individuals these rings sometimes rely on to make the initial purchase.”² Senator Susan Collins of Maine described the new legislation as targeting traffickers and straw purchasers who supply firearms to “violent criminals, gangs, and drug trafficking groups,” noting in particular the role that straw purchasers play as the “linchpin of most firearms trafficking operations.”³

Other members of Congress spoke of the role that states with weak gun laws play in enabling gun violence in states with stronger gun laws. Representative Robin Kelly of Illinois noted that the BSCA would target gun trafficking and straw purchasing acts that “bring[] guns into communities,” and emphasized that guns are flowing from states with weaker gun laws into cities like Chicago.⁴ Senator Richard Blumenthal of Connecticut cited the “iron pipeline⁵ of crime guns, lost guns, [and] stolen guns from a bunch of states” and

¹ A “supply-side approach” is focused on the supply of crime guns and encourages elected officials, community members, and law enforcement to address not just the shooter, but also the source or supplier of the gun. See Brady United, *Combating Crime Guns: A Supply-Side Approach* at 2, available at <https://brady-static.s3.amazonaws.com/SUPPLYSIDEv5.pdf> (last visited Oct. 10, 2022).

² Press Conference, Remarks from Sen. Martin Heinrich, June 23, 2022, available at <https://www.heinrich.senate.gov/newsroom/press-releases/heinrich-holds-virtual-press-conference-on-bipartisan-safer-communities-act> (last visited Oct. 7, 2022).

³ Remarks from Sen. Susan Collins, June 23, 2022, available at https://www.collins.senate.gov/imo/media/doc/senator_collins_statement_on_gun_safety_bill.pdf (last visited Oct. 7, 2022).

⁴ Remarks from Rep. Robin Kelly, June 24, 2022, available at https://archive.org/details/CSPAN_20220625_020200_U.S._House_of_Representatives_House_Debates_Gun_Violence_Legislation/start/3180/end/3240 (last visited Oct. 7, 2022).

⁵ The “iron pipeline” describes the channel by which illegal firearms are smuggled from the Southern United States to Mid-Atlantic and New England, particularly to states with strict gun laws. See Wikipedia, *Iron Pipeline*, available at https://en.wikipedia.org/wiki/Iron_Pipeline (last visited Oct. 11, 2022).

described Connecticut as being “at the mercy of that iron pipeline.”⁶ Senator Chris Murphy, also of Connecticut, emphasized the BSCA’s new criminal provisions as giving law enforcement greater flexibility to pursue dangerous, armed criminals and to “stem the flow of illegal guns from states and cities with lax gun laws into states and cities struggling with rising gun violence.”⁷

The Biden Administration, including the Department of Justice (“DOJ”), has similarly endorsed this “supply-side” focus. Even before the BSCA was passed, the Administration argued for a multi-prong approach to preventing and responding to gun violence that included targeting the “illegal flow of firearms across state lines” and urging the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) to adopt a “zero tolerance” approach to rogue gun dealers.⁸ In June 2021, the Administration and the DOJ announced the creation of firearms trafficking task forces to target “illegal gun trafficking in the corridors” supplying weapons to big cities.⁹ In their public remarks, both President Biden and Attorney General Garland emphasized targeting “rogue gun dealers” and “gun traffickers” in order to stop the flow of guns across state lines.¹⁰ Attorney General Garland also committed to increasing the ATF’s ability to conduct dealer inspections and directed ATF to consider, in their inspection of gun dealers, the “extent to which firearms sold by a dealer are later used in criminal activity.”¹¹

⁶ Hugh McQuaid, “Senate Gun Compromise Could Reduce Illegal Guns in Connecticut,” CT News Junkie, June 13, 2022, available at <https://ctnewsjunkie.com/2022/06/13/senate-gun-compromise-could-reduce-illegal-guns-in-connecticut/> (last visited Oct. 7, 2022).

⁷ Ltr. from Sen. Chris Murphy to Att’y Gen. Merrick Garland, Sept. 12, 2022 at 3, available at <https://www.politico.com/f/?id=00000183-332d-d5bc-a997-fbed0b7b0000> (last visited Sept. 26, 2022). (emphasis added).

⁸ The White House, *Fact Sheet: Biden-Harris Administration Announces Comprehensive Strategy to Prevent and Respond to Gun Crime and Ensure Public Safety*, June 23, 2021, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/23/fact-sheet-biden-harris-administration-announces-comprehensive-strategy-to-prevent-and-respond-to-gun-crime-and-ensure-public-safety/> (last visited Oct. 13, 2022); The White House, *Fact Sheet: Highlights From the Biden Administration’s Historic Efforts to Reduce Gun Violence*, Dec. 14, 2021, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/14/fact-sheet-highlights-from-the-biden-administrations-historic-efforts-to-reduce-gun-violence/> (last visited Oct. 13, 2022).

⁹ President Joseph R. Biden, *Remarks by President Biden and Attorney General Garland on Gun Crime Prevention Strategy*, June 23, 2021, available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/23/remarks-by-president-biden-and-attorney-general-garland-on-gun-crime-prevention-strategy/> (last visited Oct. 11, 2022).

¹⁰ *Id.*

¹¹ *Id.*

In public remarks about the task forces made in early 2022, the Biden Administration reiterated its commitment to stopping the “flow of firearms” and the trafficking of guns “across state lines,” noting that guns used to kill people in cities like New York City often come from out-of-state.¹² In announcing his nominee to head the ATF, the President reiterated his commitment to targeting the Iron Pipeline, going after rogue gun dealers, and disrupting illegal gun trafficking.¹³

In short, the legislative history and the Administration’s actions make clear that, whatever final priorities, amendments, commentary, and/or policy statements the Commission issues, the proper focus should be on gun dealers and larger-scale gun traffickers—and not primarily on end users who come to possess a firearm.

A “Supply-Side” Approach to Gun Violence Will Be More Effective Than “End User” Enforcement Alone

It is no coincidence that the BSCA’s new criminal provisions target prolific straw purchasers and gun traffickers: straw purchasing is the most common channel identified in gun trafficking investigations, and corrupt gun retailers account for a higher volume of guns diverted into the illegal market than any other single trafficking channel.¹⁴ For instance, a report from the City of Chicago found that ten gun dealers contribute to nearly a quarter of the crime guns recovered in Chicago.¹⁵ Researchers have also found that gun dealers appear willing to make gun sales “under conditions that suggest straw purchases,” and in one investigation, one in five gun sellers was willing to sell firearms to people “explicitly asking to buy firearms on behalf of someone else.”¹⁶ Notably, research also suggests that when gun dealers are held

¹² President Joseph R. Biden, *Remarks by President Biden at a Gun Violent Prevention Task Force Meeting*, Feb. 3, 2022, available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/03/remarks-by-president-biden-at-a-gun-violence-prevention-task-force-meeting/> (last visited Oct. 11, 2022).

¹³ President Joseph R. Biden, *Remarks by President Biden Announcing Actions to Fight Gun Crime and His Nominee for ATF Director, Steve Dettelbach*, Apr. 11, 2022, available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/04/11/press-briefing-by-press-secretary-jen-psaki-april-11-2022/> (last visited Oct. 11, 2022).

¹⁴ Giffords Law Center to Prevent Gun Violence, *Trafficking and Straw Purchasing*, available at <https://giffords.org/lawcenter/gun-laws/policy-areas/crime-guns/trafficking-straw-purchasing/> (last visited Oct. 11, 2022).

¹⁵ City of Chicago Office of the Mayor, *Gun Trace Report 2017* at 4, available at <https://www.chicago.gov/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2017/October/GTR2017.pdf> (last visited Oct. 17, 2022).

¹⁶ *Trafficking and Straw Purchasing*, *supra* note 14.

accountable, the flow of guns into the illegal market often decreases “significantly.”¹⁷

Although the ATF has not provided the public with aggregate statistical analysis on crime guns traced to particular dealers in over 20 years,¹⁸ an ATF report from 2000 found that 90 percent of guns recovered by law enforcement are traced back to just five percent of licensed firearms dealers.¹⁹ The ATF has released some data²⁰ on the 1.4 million crime guns traced between 2017 and 2021, and analysis of this data shows more than 45 percent—642,306 guns—were likely purchased with the intent to use them in a crime.²¹ This analysis further shows that 78 percent of likely trafficked traced guns that crossed state lines came from states without background check laws.²²

Data also suggests that focusing solely on illegal possession of firearms will not effectively address gun violence. A study by the Center for Criminal Justice Research, Policy, and Practice at Loyola University Chicago found that nearly two-thirds of convictions involving a firearm in the state of Illinois over the past

¹⁷ *Id.* (citing research). See also Johns Hopkins University Bloomberg School of Public Health, *Reforms to Sales Practices of Licensed Gun Dealers Reduced Supply of New Guns to Criminals*, Sept. 27, 2006, available at <https://publichealth.jhu.edu/2006/webster-gun-dealer> (last visited Oct. 15, 2022).

¹⁸ In 2003, at the urging of the NRA, Congress passed the Tiahrt Amendments, which prevents ATF from sharing information about guns it has traced with the public—ATF’s 2000 report on gun tracing was the most recent information disseminated. See Allison Graves, *Do 1 Percent of Gun Sellers Supply More Than Half of All the Guns Used in Crimes?* Politifact, Mar. 16, 2018, available at <https://www.politifact.com/factchecks/2018/mar/16/cory-booker/are-1-percent-gun-retailers-responsible-more-half/> (last visited Oct. 15, 2022).

¹⁹ *Combating Crime Guns*, *supra* note 1. See also *Remarks by President Biden and Attorney General Garland on Gun Crime Prevention Strategy*, *supra* note 9 (citing this statistic).

²⁰ The Commission should be aware that in April 2021, the Biden Administration directed the DOJ to issue a new, comprehensive report on firearms trafficking so that policymakers have access to current, much-needed information with which to address firearms trafficking. In May 2022, the DOJ issued the first volume of the report on commerce in firearms with the second volume related to gun trafficking expected before the end of the year. See The White House, *Fact Sheet: Biden-Harris Administration Announces Initial Actions to Address the Gun Violence Public Health Epidemic*, Apr. 7, 2021, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/07/fact-sheet-biden-harris-administration-announces-initial-actions-to-address-the-gun-violence-public-health-epidemic/> (last visited Oct. 17, 2022); Dep’t of Justice, Office of Public Affairs, *Justice Department Announces Publication of the First Volume of the National Firearms In Commerce and Trafficking Assessment*, May 17, 2022, available at <https://www.justice.gov/opa/pr/justice-department-announces-publication-first-volume-national-firearms-commerce-and> (last visited Oct. 17, 2022).

²¹ Everytown Research and Policy, *Five Things to Know About Crime Guns, Gun Trafficking, and Background Checks*, Oct. 10, 2022, available at <https://everytownresearch.org/report/five-things-to-know-about-crime-guns/> (last visited Oct. 17, 2022).

²² *Id.*

decade were for nonviolent possession of a firearm, and that Black men were disproportionately convicted.²³ Moreover, even as prison admissions for gun possession increased 27 percent during the study period while admissions for all other crimes decreased by 38 percent, gun homicides did not drop—instead, they increased nearly 29 percent.²⁴

At the federal level, research on DOJ initiatives like Project Exile—a program that originated in the Eastern District of Virginia and targeted “felons in possession” for federal prosecution—has shown similar lackluster results. A 2003 study of Project Exile, “generally considered the most rigorous statistical analysis” of the project, found that prosecutions initiated from the program “likely had no impact”²⁵ on crime rates.²⁶ Likewise, the Commission’s own data acknowledges that the emphasis on prosecuting end users for illegal possession of firearms has not resulted in fewer federal firearms offenses: the number of people sentenced for this offense has increased over time.²⁷

In short, the BSCA is best understood as a deliberate attempt to shift the enforcement focus—to target the upstream suppliers of guns and the supply network that enables the flow of guns across state lines. As discussed below, federal prosecutions have historically targeted end users who illegally possess a firearm. While these prosecutions have a role to play, they cannot and should not be the only means of addressing gun violence, especially when it comes at the expense of focusing further upstream in the pipeline of illegal firearms. The

²³ David E. Olson, *et al.*, Center for Criminal Justice Research, Policy, and Practice, *Sentences Imposed on Those Convicted of Felony Illegal Possession of a Firearm in Illinois* at 1-2, July 2021, available at

<https://www.luc.edu/media/lucedu/ccj/pdfs/firearmpossessionsentencinginillinois.pdf> (last visited Oct. 13, 2022).

²⁴ Giffords Law Center to Prevent Gun Violence, *A Second Chance: The Case for Gun Diversion Programs*, Dec. 7, 2021, available at https://giffords.org/lawcenter/report/a-second-chance-the-case-for-gun-diversion-programs/#footnote_34_49363 (last visited Oct. 13, 2022).

²⁵ David E. Patton, *Criminal Justice Reform: The Irresistible Movement Meets the Immovable Object*, 69 *Emory L. J.* 1011, 1020-21 (2020).

²⁶ On some level, this is not surprising: research shows that it is the certainty of getting caught, not the severity of the punishment, which is likely to deter future misconduct. *See Id.* at 1031-32; Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, Vera Institute, 2017, available at https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf (last visited Oct. 11, 2022); National Institute of Justice, *Five Things About Deterrence*, May 2016, available at <https://www.ojp.gov/pdffiles1/nij/247350.pdf> (last visited Oct. 11, 2022).

²⁷ Matthew J. Iaconetti, *et al.*, United States Sentencing Commission, *What Do Federal Firearms Offenses Really Look Like?* at 9, (July 2022), available at <https://www.ussc.gov/research/research-reports/what-do-federal-firearms-offenses-really-look> (last visited Oct. 10, 2022).

Commission's role in articulating the proper application of the Guidelines can help ensure that the Congress' intent in enacting the BSCA is properly fulfilled.

Proposed Priority #3 Will Substantially Impact Federal Prosecutions

We encourage the Commission to keep Priority #3 because its own data suggests that historical prosecutions are not aligned with Congress' and the Executive's current intent to target rogue gun dealers and gun traffickers through the BSCA. The Commission's report, *What Do Federal Firearms Offenses Really Look Like?*, analyzed fiscal year 2021 sentencing data and found that 88.8 percent of people sentenced under this Guideline were convicted of being a "prohibited person" under 18 U.S.C. § 922(g), which lists specific classes of people who are prohibited from possessing, receiving, or transporting firearms.²⁸ Of these "prohibited person" offenses, 79 percent were convictions for being a "felon in possession," *i.e.*, for possessing a firearm after having been convicted of a felony.²⁹ The Commission also noted that while some of these prohibited persons had prior violent convictions, the most common prior conviction was for a public order crime (65.4 percent).³⁰ Moreover, roughly 50 percent of these prohibited persons did not engage in additional aggravated conduct during the offense—their conviction and Guideline calculation was due solely to their status as a prohibited person.³¹

In contrast, only 11 percent of people were convicted and sentenced under § 2K2.1 for offenses that did not include being a "prohibited person."³² Of this 11 percent, most people were convicted for straw purchases/making a false statement in the purchase of a firearm, followed by offenses involving stolen firearms, firearms trafficking and/or exporting, and offenses involving prohibited weapons.³³ The sentencing outcomes for people in this group were less punitive than for those who were sentenced for being a "prohibited person": the average guideline minimum was 30 months, compared to 49 months for prohibited persons.³⁴ In addition, offenses involving firearms trafficking and straw purchases or false statements were sentenced below the Guideline range at a higher rate than "prohibited persons" offenses.³⁵

²⁸ *Id.* at 4, 24-28.

²⁹ *Id.* at 24.

³⁰ *Id.* at 20.

³¹ *Id.* at 25.

³² *Id.* at 28.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 27.

The Commission’s report tells a clear enforcement story: federal prosecutors focused their resources on prosecuting prohibited persons and in particular targeted those who were “felons in possession” of a firearm, most of whom were also Black. Conversely, federal prosecutors did not prioritize the prosecutions of straw purchasers or others who made false statements in connection with the purchase of a firearm, gun traffickers, or those engaged in the unlawful sales of firearms.³⁶ In the rare instances these offenses were prosecuted, the people sentenced were almost always sentenced to lower Guideline ranges and/or were given below Guideline ranges at greater rates.

It is possible that the stark differences in the mix of offenses are due to resource limitations and unique practices within each federal district. For instance, some federal districts might have a practice of automatically adopting for federal prosecution all illegal firearms possession cases from local law enforcement. This practice would require little to no federal resource expenditures, which could in turn contribute to the abundance of federal “felon-in-possession” convictions. In contrast, arresting and prosecuting straw purchasers and rogue dealers requires comparatively longer-term investigations and a greater output of law enforcement resources. The larger point, though, is that inter-district differences in resources and local practices creates the risk that there will not be a uniform approach to enforcement of the BSCA.³⁷

Considering these disparities in the mix of federal firearms offenses that were prosecuted, it seems logical to ask whether the Guideline ranges associated with these offenses were driving or otherwise influencing prosecutorial decisions about what crimes they were willing to expend limited resources on to investigate and prosecute. Put differently, it seems possible that federal

³⁶ See Hansi Lo Wang, ‘Straw Buyers’ Of Guns Break The Law—And Often Get Away With It, NPR, Dec. 9, 2015, available at <https://www.npr.org/2015/12/09/459053141/straw-buyers-of-guns-break-the-law-and-often-get-away-with-it> (last visited Oct. 11, 2022) (according to retired ATF Assistant Director Michael Bouchard, “charging straw buyers falls towards the bottom of federal prosecutors’ priority lists”).

³⁷ The concern that U.S. Attorney’s Offices will apply criminal statutes beyond the bounds of what Congress initially intended and create sentencing disparities across districts, can be seen in the federal drug context. As has been detailed, sentencing penalties reserved for leaders, organizers, and/or managers of drug-trafficking organizations were applied differently across districts. More generally, the federal statutory scheme was applied to people who were not themselves affiliated with drug-trafficking organizations or cartels, resulting in harsh sentences. See, e.g., United States Sentencing Commission, *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders*, 2018, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf (last visited Oct. 11, 2022); Benjamin Levin, *Guns and Drugs*, 84 *Fordham L. Rev.* 2173 (2016).

prosecutors have been motivated by the Guideline ranges for firearms offenses, and that until the passage of the BSCA, few wanted to “pursue...charges [for straw purchasers and gun traffickers] and spend their valuable resources on what amounted to a paperwork violation...”³⁸ These historical prosecution and sentencing priorities do not reflect current congressional or executive intent.

Setting aside the impact it will have on congressional intent, Priority #3 is important because it impacts a substantial number of federal prosecutions. The Commission’s data shows that firearms offenses are one of the most common offenses prosecuted and sentenced in federal court: § 2K2.1 was the third most frequently applied guideline in 2021,³⁹ and these cases have increased by 45 percent since 2015.⁴⁰ In five districts, firearms offenses sentenced under § 2K2.1 comprised 40 percent or more of the caseload.⁴¹ One district—the Eastern District of Missouri—had the highest number of § 2K2.1 cases, as well as the greatest percentage of cases by caseload (45.7 percent).⁴²

Section 2K2.1 is also a particularly powerful guideline, exerting a “strong anchoring effect” on sentences imposed in federal firearms offenses.⁴³ Half of the people sentenced for firearms offenses received a within-guidelines range sentence during fiscal year 2021, compared to people sentenced in the “other offenses” category who received a within-range sentence only 40 percent of the time.⁴⁴ For all these aforementioned reasons, Priority #3 is important and should be kept.

Gang Affiliation is Often Predicated on Inaccurate or Misleading Data

We recognize that Congress has directed the Commission to amend the Guidelines such that a person convicted of gun trafficking or straw purchasing who is affiliated with a “gang, cartel, organized crime ring, or other such enterprise” is subject to higher penalties than an “otherwise unaffiliated individual.”⁴⁵ Priority #3 is important and should be kept because the

³⁸ See Phil McCausland, *Little-Known Provisions of Bipartisan Gun Law Gives Feds “Teeth” to Target Illegal Guns*, NBC News, June 30, 2022 available at <https://www.nbcnews.com/politics/congress/little-known-provision-bipartisan-gun-law-give-feds-teeth-target-illeg-rcna36162> (last visited Oct. 12, 2022) (noting difficulty in convincing federal prosecutors to expend resources on what was “a paperwork violation”).

³⁹ *What Do Federal Firearms Offenses Really Look Like* at 2, *supra* note 27.

⁴⁰ *Id.*

⁴¹ *Id.* at 11.

⁴² *Id.*

⁴³ *Id.* at 17.

⁴⁴ *Id.* at 15.

⁴⁵ “Directive to Sentencing Commission,” *Bipartisan Safer Communities Act* at 43 (2022).

Commission can carry out its directive under the BSCA while ensuring that any enhancement does not exacerbate racial disparities.

It is important to note that while gang membership and gang-affiliated gun trafficking is properly a target of the BSCA, not all young people who carry firearms do so because they are gang-affiliated. In a study by the Center for Court Innovation (“CCI”) examining youths with a high risk for gun violence, CCI found that the majority of youth carrying guns did so out of a desire for personal safety and a fear of victimization or retaliation, as well as a history of being victimized.⁴⁶ In fact, one study, which surveyed people incarcerated for a gun-related crime to understand how they acquired their guns, found that only 13 percent of respondents obtained the gun from a “gang member.”⁴⁷

Separately, gang membership and affiliation with a gang often rests on unreliable data.⁴⁸ There is no universal definition of who gets counted as a “gang member” versus someone who is “associated with” but not in a gang.⁴⁹ Accordingly, when law enforcement collects data on gang members and decides whether to include someone in a gang database, this decision is discretionary and can vary widely across jurisdictions. For instance, Immigrations and Customs Enforcement (“ICE”) designates a person as a gang member if they meet at least two criteria from a list that includes “having gang tattoos,” “frequenting an area notorious for gangs,” and “wearing gang apparel.”⁵⁰ In at least one case, ICE designated a sixteen-year-old U.S. citizen as a gang member because her name was mentioned in a dossier on a non-citizen they sought to deport. However, the citizen was not in a gang—she was a victim of the gang, having been kidnapped and assaulted by them.⁵¹ But because her

⁴⁶ Basia Lopez and Haskins, Paul A., *The Fight Against Rampant Gun Violence: Data-Driven Scientific Research Will Light the Way*, National Institute of Justice, available at <https://nij.ojp.gov/topics/articles/fight-against-rampant-gun-violence-data-driven-scientific-research-will-light-way#motivations-for-gun-possession-and-use-in-nyc>, Dec. 2, 2021 (last visited Oct. 11, 2022) (citing Center for Court Innovation research); *Illegal Firearm Possession*, *supra* note 23 (citing Urban Institute survey finding that most respondents carried a gun for “self-protection or to protect friends/family members”).

⁴⁷ *Combating Crime Guns*, *supra* note 1.

⁴⁸ Jeff Asher, *Gang Stats Aren’t Remotely Reliable, But Voters Keep Hearing About Them Anyway*, FiveThirtyEight, Nov. 3, 2017, available at <https://fivethirtyeight.com/features/gang-stats-arent-remotely-reliable-but-voters-keep-hearing-about-them-anyway/> (last visited Oct. 12, 2022).

⁴⁹ *Id.*

⁵⁰ Jonathan Blitzer, *How Gang Victims Are Labelled as Gang Suspects*, The New Yorker, Jan. 23, 2018, available at <https://www.newyorker.com/news/news-desk/how-gang-victims-are-labelled-as-gang-suspects> (last visited Oct. 12, 2022).

⁵¹ *Id.*

name was mentioned, ICE decided she was a gang member, and that her non-citizen boyfriend was a gang member, too.⁵²

Local law enforcement has similar accuracy problems in how it determines who is a gang member. For instance, the Chicago Police Department can list someone in its gang database simply by “suspicion or association,” and the person listed often has no knowledge and no opportunity to contest this designation.⁵³ This information is often shared with federal authorities, who in turn use it to target people for arrest. Even in instances where the information has been shown to be inaccurate, the Chicago Police Department has not revisited the policies that govern who gets placed into its database.⁵⁴ Aside from Portland, Oregon, whose Police Bureau decided to stop using its gang database and to purge the names contained therein, no other major law enforcement agency has followed suit.⁵⁵

These gang databases are also racially biased and are almost overwhelmingly comprised of people of color. For instance, California’s gang database was 20 percent Black and 66 percent Latinx.⁵⁶ In New York City, the NYPD’s gang database is nearly entirely composed of people of color—only 1.1 percent are White.⁵⁷ It also appears that law enforcement ignores White gangs: Chicago’s database has less than 1,100 people listed as members of historically White gangs, and even when these gangs appear, the person affiliated with them is a person of color.⁵⁸ Likewise, as recently as 2019 the NYPD’s database did not include the Proud Boys,⁵⁹ even though two members were prosecuted that

⁵² *Id.*

⁵³ Emmanuel Felton, *Gang Databases are a Life Sentence for Black and Latino Communities*, Pacific Standard, Mar. 15, 2018, available at <https://psmag.com/social-justice/gang-databases-life-sentence-for-black-and-latino-communities> (last visited Oct. 12, 2022).

⁵⁴ *Id.*

⁵⁵ Carimah Townes, *Portland is Saying Goodbye to its Controversial Gang Database*, The Appeal, Sept. 12, 2017, available at <https://theappeal.org/portland-is-saying-goodbye-to-its-controversial-gang-database-e88e6c05262c/> (last visited Oct. 12, 2022).

⁵⁶ Youth Justice Coalition, *Tracked and Trapped: Youth of Color, Gang Databases, and Gang Injunctions* at 8, Dec. 2012, available at <https://www.youth4justice.org/wp-content/uploads/2012/12/TrackedandTrapped.pdf> (last visited Oct. 12, 2022).

⁵⁷ Nick Pinto, *NYPD Added Nearly 2,500 New People to its Gang Database in the Last Year*, The Intercept, June 28, 2019, available at <https://theintercept.com/2019/06/28/nypd-gang-database-additions/> (last visited Oct. 12, 2022).

⁵⁸ UIC Policing in Chicago Research Group, *Expansive and Focused Surveillance: New Findings on Chicago’s Gang Database* at 1, June 2018, available at http://erasethedatabase.com/wp-content/uploads/2018/07/Expansive-and-Focused-Surveillance-June-2018_final.pdf (last visited Oct. 12, 2022).

⁵⁹ *NYPD Added Nearly 2,500 New People to its Gang Database in the Last Year*, *supra* note 73.

same year for a violent “gang assault” in which their membership in the gang was used as evidence of motive.⁶⁰

In some prosecutions, there may well be sufficient proof that a given individual was affiliated with a gang or other such enterprise. However, given the many links in the illegal firearms supply chain, it seems reasonable that, as federal prosecutors begin to enforce the straw purchasing and gun trafficking statutes, issues of proof may arise. As such, the Commission should keep Priority #3 in order to provide clarity as to how any enhancement should be applied.

Race Disparities in Gun Violence and the Enforcement of Federal Firearms Offenses

Gun violence, and the enforcement of federal firearms laws, are impacted by racial disparities, and we believe it is imperative that the Commission understand this context when pursuing the congressional directive under the BSCA. Gun violence does not impact Americans equally: Black people are twice as likely as White people to die from gun violence and 14 times more likely to be wounded,⁶¹ while Black children and teens are 14 times more likely to die from gun violence than their White counterparts.⁶² In 2020, Black Americans were the victims in 61 percent of gun homicides, despite making up only 12.5 percent of the United States population.⁶³ Gun violence is also not geographically constant: roughly half of all gun homicides occur in 127 cities totaling less than a quarter of the United States population.⁶⁴ Priority #3 is therefore important to address a problem with such disparate impacts.

Contrary to some outdated notions, the disparities in gun homicides do not arise from cultural deficiencies, a greater propensity toward violence, or moral decay. Rather, structural factors, such as systemic racism, discriminatory

⁶⁰ Molly Crane-Newman, *Manhattan Jurors Hear Closing Arguments in Proud Boys Gang Assault Case*, New York Daily News, Aug. 14, 2019, available at <https://www.nydailynews.com/new-york/manhattan/ny-proud-boys-closing-arguments-20190814-wlkfz7kfkzao5kc3efbfjet5ge-story.html> (last visited Oct. 12, 2022).

⁶¹ Brady United, *Gun Violence is a Racial Justice Issue*, available at <https://www.bradyunited.org/issue/gun-violence-is-a-racial-justice-issue> (last visited Oct. 10, 2022).

⁶² *Id.*

⁶³ Marissa Edmund, Center for American Progress, *Gun Violence Disproportionately and Overwhelmingly Affects Communities of Color* (June 30, 2022), available at <https://www.americanprogress.org/article/gun-violence-disproportionately-and-overwhelmingly-hurts-communities-of-color/> (last visited Oct. 10, 2022).

⁶⁴ Giffords Law Center to Prevent Gun Violence, *Statistics*, available at <https://giffords.org/lawcenter/gun-violence-statistics/> (last visited Oct. 10, 2022).

policy, and prolonged disinvestment in communities, disproportionately subject Black and Brown communities to the root causes of violence.⁶⁵

Federal firearms sentences similarly result in disparate outcomes. In its 2022 report, the Commission found stark contrasts in people sentenced under § 2K2.1 when compared to the general population of people sentenced under the other guidelines: 54.5 percent of those sentenced for firearms offenses were Black compared to 16.9 percent of “other offenders,” *i.e.*, those sentenced pursuant to 18 U.S.C. 924(c), the career offender guideline, and the Armed Career Criminal Act.⁶⁶

The Commission also noted existing race disparities in the arrests that led to these federal sentences. In its study, the Commission found that 27.5 percent of people charged with federal firearms offenses were initially arrested during a routine patrol or traffic stop.⁶⁷ For firearms offenses stemming from a routine street patrol, 73 percent of those sentenced were Black. For firearms offenses stemming from a traffic stop, 66.9 percent of those sentenced were Black.⁶⁸

The sentencing data for the Eastern and Western Districts of Missouri—two districts that have some of the highest percentages of § 2K2.1 offenses as part of their overall caseload—is consistent with the racial disparities identified in the Commission’s report: 81 percent of people convicted of being a “felon-in-possession” in the Eastern District of Missouri were Black, and in the Western District of Missouri, 54 percent of people convicted of being a “felon-in-possession” were Black.⁶⁹ Moreover, Black people sentenced in the Western District of Missouri were more than twice as likely to receive above-Guidelines sentences compared to White people.⁷⁰ This sentencing data is in contrast to Missouri’s population, which is 12 percent Black.⁷¹ Together, these two districts cover the entire state.⁷²

⁶⁵ Office of Policy Development and Research, Housing and Urban Development, available at <https://www.huduser.gov/portal/periodicals/em/summer16/highlight2.html> (last visited Oct. 15, 2022).

⁶⁶ *What Do Federal Firearms Offenses Really Look Like?* at 10, *supra* note 27.

⁶⁷ *Id.* at 32.

⁶⁸ *Id.*

⁶⁹ Humera Lodhi, *There’s a Large Racial Disparity in Federal Gun Prosecutions in Missouri, Data Shows*, The Kansas City Star, July 1, 2022, available at <https://www.kansascity.com/news/state/missouri/gun-violence-missouri/article258304878.html> (last visited Oct. 6, 2022).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

In enacting the BSCA, Congress was concerned with precisely these existing racial disparities. In a letter to Attorney General Merrick Garland, written after the BSCA was passed, Senator Chris Murphy of Connecticut, one of the BSCA’s chief sponsors, requested information on DOJ’s progress in implementing the BSCA and asked how the DOJ intends to implement the new criminal statutes to “prevent gun violence and illegal gun sales while *preventing a disparate impact on historically marginalized communities.*”⁷³ The Biden Administration has similarly expressed concern over racial disparities, acknowledging that gun violence disproportionately impacts minority communities and highlighting increasing funding for community violence intervention initiatives to address these impacts.⁷⁴ Taken together, this suggests that Priority #3 is important, and that the Commission should be cognizant of and try to avoid exacerbating race disparities when it considers amendments to § 2K2.1.

The Commission Should Consider Reduced Culpability for Certain Straw Purchasers

Priority #3 is important and should be kept in light of the congressional directive to consider amending the Guidelines to consider a person’s role and culpability, or any coercion, domestic violence survivor history, or other mitigating factors. Women in particular are thought to “figure disproportionately among straw purchasers.”⁷⁵ A study by the University of Chicago Crime Lab on sources of crime guns in Chicago found that while most gang members tended to use guns that were very old, when new guns were confiscated from them, 15 percent of these new guns were first purchased by a woman—a factor that the study deemed as “suggestive of a straw purchase.”⁷⁶ This is in line with data from the ATF that 18 percent of straw purchasers were girlfriends or spouses.⁷⁷

⁷³ Sen. Murphy Ltr., *supra* note 7 (emphasis added). We also note that this concern—about racial disparities in policing and prosecution—was also noted by AG Garland during his confirmation hearing. *See id.*

⁷⁴ President Joseph R. Biden, *Remarks by President Biden on Gun Violence Prevention*, Apr. 8, 2021, available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/08/remarks-by-president-biden-on-gun-violence-prevention/> (last visited Oct. 13, 2022); The White House, *Fact Sheet*, *supra* note 18.

⁷⁵ Garen Wintemute, *Firearm Retailers’ Willingness to Participate in an Illegal Gun Purchase*, J. Urban Health (Sept. 2010), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2937134/> (last visited Oct. 11, 2022).

⁷⁶ Philip J. Cook, *et al.*, *Some Sources Of Crime Guns in Chicago: Dirty Dealers, Straw Purchasers, and Traffickers*, 104 J. Crim. L. and Criminology 717, 744 (2015), available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7538&context=jlc> (last visited Oct. 12, 2022).

⁷⁷ *See* Dina Kraft, *Women: The Newest Weapon in the Fight Against Gun Violence*, The Atlantic, Oct. 30, 2013, available at <https://www.theatlantic.com/national/archive/2013/10/women->

A study by Ladies Involved in Putting a Stop to Inner-City Killings (“LIPSTICK”) compiled media reporting on women who engaged in straw purchases and identified seven common themes about the crimes, many of which suggest that women are exploited or coerced into these purchases, and that they do not understand the ramifications of their actions.⁷⁸ For instance, the majority of the straw purchases were “relationship-based crimes”—women bought guns for their boyfriends, relatives, or friends.⁷⁹ Many of the women who were profiled for their crimes struggled with substance abuse and accepted payment in the form of drugs or used the cash to support their addiction.⁸⁰ The LIPSTICK report mirrors law enforcement investigation findings that “attempted illegal purchases and theft were related to sales to women,”⁸¹ and that “straw purchasers are not traffickers. They are pawns of the traffickers” who are frequently “desperate for money or drugs.”⁸² Given the dynamics of these situations and the various roles of the actors involved, the Commission should ensure that the Guidelines reflect the actual culpability of the individuals involved.

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[the-newest-weapon-in-the-fight-against-gun-violence/280986/](#) (last visited Oct. 12, 2022) (citing ATF study).

⁷⁸ LIPSTICK, *Women and Crime Guns: Stories Lifted From the Headlines*, available at <https://www.thetrace.org/2015/09/operation-lipstick-gun-straw-purchase/> (last visited Oct. 13, 2022).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Garen J. Wintemute, *Frequency of and Responses to Illegal Activity Related to Commerce in Firearms: Findings From the Firearms Licensee Survey* at 417, *Inj. Prev.*, Mar. 11, 2013, available at <https://injuryprevention.bmj.com/content/injuryprev/19/6/412.full.pdf> (last visited Oct. 12, 2022).

⁸² Mark Kraft, *Firearms Trafficking 101 or Where Do Crime Guns Come From?* at 7, *United States Attorneys’ Bulletin* Jan. 2002, available at <https://www.justice.gov/sites/default/files/usao/legacy/2006/06/30/usab5001.pdf> (last visited Oct. 12, 2022).



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Conclusion

The straw purchaser and gun trafficking provisions in the BSCA give federal prosecutor new tools to fight gun violence. However, these tools should be used precisely and accurately to target the upstream drivers of gun violence, and not simply added as additional charges to “prohibited persons” who possess a firearm in violation of federal law. Targeted application of these new laws is necessary to fulfill Congressional intent and to avoid exacerbating racial disparities.

We thank you for the opportunity to provide comment on the Commission’s proposed priorities for the upcoming 2022-2023 amendment cycle, and we remain committed to working with you and the Commission staff on this priority. If you have any questions about these comments, please contact Courtney M. Oliva at courtney.oliva@nyu.edu.

Sincerely,

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