

## **Task Force on Mass Shootings and Assault Weapons Recommendations**

### **1. Ban the manufacture, sale and possession of assault-style weapons.**

The Task Force recommends that the New York SAFE Act's ban on manufacturing, transporting, disposing of, or possessing assault-style weapons remain in place. The Task Force encourages other state jurisdictions and the federal government to institute similar bans on the manufacture, transport, disposal and possession of assault-style weapons. The Task Force also recommends that the Legislature consider implementing a buyback program encouraging gun owners to voluntarily turn in assault-style weapons in order to reduce the number of such weapons in circulation.

Assault weapons are generally high-powered semiautomatic firearms that are capable of autoloading a new cartridge into the chamber after the gun is discharged, and users then only need to pull the trigger to fire the gun, eliminating additional steps between rounds and speeding up the rapidness of shooting. The power and speed of such weapons inflicts greater damage at a faster speed.

Data indicate that the use of assault-style weapons results in deadlier events.<sup>1</sup> Well known examples of this are the following mass shootings: Sandy Hook Elementary School, Newtown, CT; Pulse Nightclub in Orlando, FL; Las Vegas Country Musical Festival; First Baptist Church in Sutherland Springs, TX; and Marjory Stoneman Douglas High School in Parkland, FL. Versions of the AR-15 assault weapons have been used in many mass shootings, including in the shootings that occurred in Dayton, Ohio; Las Vegas; Parkland and Sandy Hook.

The Federal Assault Weapons Ban, in effect from 1994-2004 (it sunset in 2004) included a prohibition on the manufacture of certain semiautomatic weapons with military-style features, as well as certain large capacity ammunition magazines. It prohibited individuals from manufacturing, owning, or selling a semiautomatic assault weapon. Under the ban, semiautomatic assault weapons, including rifles, were defined as having the ability to accept detachable magazines and two or more of the following features: (1) a folding or telescopic stock; (2) a pistol grip that protrudes conspicuously beneath the action of the weapon; (3) a bayonet mount; (4) a

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<sup>1</sup> See, Policy Brief, "Assault Weapons, Mass Shootings, and Options for Lawmakers," by Jaclyn Schildkraut, published 3-22-19 by the Rockefeller Institute of Government.

flash suppressor or threaded barrel designed to accommodate a flash suppressor; or (5) a grenade launcher. Additional criteria designating semiautomatic pistols and shotguns as assault weapons also were included in the ban. The ban further listed 19 specific firearms, including the AR-15, that were banned from production, and included a prohibition on large-capacity ammunition-feeding devices (magazines) for civilian-owned guns capable of holding more than 10 rounds.<sup>2</sup>

During the ban the relative frequency of assault-style rifles in mass shootings declined.<sup>3</sup>

The precise definition of what constitutes an assault weapon can be challenging since gun manufacturers are very creative in bypassing legal definitions by altering a design. We recognize that many law-abiding individuals hunt with rifles that fall within definitions of an assault-style rifle. Mass shooters are often attracted to assault-style firearms because of “cosmetic” features that give them a military appearance that is often seen in video games and the media. To address this issue, we offer the following definition of an assault weapon. It is largely based on the definition in the Federal Assault Weapons Ban that was in place from 1994 through 2004.

**The term “semiautomatic pistol” means any repeating pistol which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge.**

**The term “semiautomatic rifle” means any repeating rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge.**

**The term “semiautomatic shotgun” means any repeating shotgun which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge.**

**The term ‘semiautomatic assault weapon’ means a semiautomatic pistol, rifle, or shotgun that has an ability to accept a detachable magazine and has at least 2 of the following characteristics:**

- (i) a folding or telescoping stock;**

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<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

- (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;
- (iii) a bayonet mount;
- (iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor;
- (v) a grenade launcher;
- (vi) a ventilated shroud or forend that is attached to, or partially or completely encircles, the barrel or a portion thereof; and
- (vii) in the case of a shotgun, a revolving cylinder through which the cartridges are fed into the action.

The Task Force submits that this definition is a clearer and simpler definition that captures the most common features of assault-style weapons without resulting in an overly broad definition that would include many traditional-style hunting firearms.

**2. Ban large-capacity magazines that can hold more than 10 rounds of ammunition.**

There are no compelling reasons why a law-abiding gun owner would need to use magazines that hold more than ten rounds. In a mass shooting scenario, if the shooter switches magazines, the potential victims have an opportunity – albeit brief -- to either escape or disarm the shooter. It also provides law enforcement with a similar opportunity to disarm the shooter. Accordingly, a ban on magazines capable of holding more than ten rounds makes sense. For example, the shooter in the August 4, 2019 Dayton, Ohio shooting modified his weapon to attach a 100-round drum that allowed him to continuously fire without having to reload. He was able to strike 26 people, 9 of whom were killed, in 32 seconds before police arrived and fatally shot him.<sup>4</sup> New York State already bans the sale and possession of magazines holding more than ten rounds.

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<sup>4</sup> 8-13-19 New York Times article, “Dayton Gunman Shot 26 People in 32 Seconds, Police Timeline Reveals,” by Adeel Hassan.

3. **Ban bump stocks and other devices that effectively permit semi-automatic firearms to be fired in fully-automatic mode.**

As with high capacity magazines, there are no compelling reasons for law-abiding gun owners to possess devices that enable the fully-automatic firing of a firearm. This includes “bump stocks” which effectively transform a semi-automatic rifle into a fully automatic rifle and which were used in the Las Vegas Country Music Festival mass shooting in 2017 where 58 people were killed and 441 people were injured. It is already illegal under federal law to possess a fully-automatic firearm (unless the individual possesses what is known as a Class III license – which requires a very detailed background check and periodic renewal). On March 19, 2019 the federal government revised its interpretation of the limits on fully-automatic weapons to specifically include guns fitted with bump stocks. In other words, it is now illegal under federal law to possess a bump stock (unless the possessor is a Class III license holder) and any bump stocks will have to be destroyed or surrendered to law enforcement officials. This was enacted as a federal administrative regulation. The Task Force recommends that the ban be enacted into law on a federal level, and on each individual state level, and include bump stocks as well as any other device that effectively turns a semi-automatic firearm into a fully-automatic one. In New York, Governor Cuomo signed S. 2448/A. 2684 into law on 7/29/19 which makes the possession of a bump stock and similar devices an A misdemeanor, and the manufacture or shipment of such a device a felony offense.

4. **Ban the possession, sale, transfer, and manufacture of firearms without a serial number (ghost guns)<sup>5</sup> and firearms that are not made by a licensed manufacturer.**

When American gun laws were written, legislators assumed that firearms would either be imported from abroad by dealers or manufactured domestically by professional gun manufacturers. When a firearm is manufactured domestically or imported from abroad, it is engraved with a serial number and markings that identify the manufacturer or importer, make, model, and caliber, and are unique to that firearm. Using this information, the Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF) can track firearms from the manufacturer or importer through the

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<sup>5</sup> Ghost guns are self-assembled firearms built from kits or individual gun components, including 3D printed pieces, that can be purchased without a background check. These firearms do not have serial numbers and are therefore untraceable.

distribution chain to the first retail purchaser. This ability is especially useful in criminal and other investigations where a firearm has been used.

Under federal law only a finished “frame” or “receiver” must have a serial number and a purchaser of these parts is required to undergo a background check.<sup>6</sup> That is because a purchaser can buy the other components necessary to make a complete and operable firearm. Buyers of unfinished gun parts or components, however, are not required to undergo a background check. Sellers of these parts or kits claim they do not need to follow serialization requirements because they are not selling completed firearms. With the advent of 3D printing, however, we are not far from a point where an individual without significant machining skills could use 3D printing to create a lower receiver or frame that could be combined with legally-available parts to create an effective, unlicensed/unregistered and untraceable semi-automatic or fully automatic rifle or firearm. In addition, even without the use of 3D printing, it is already possible for a skilled machinist to create an effective, unlicensed/unregistered and untraceable semi-automatic or fully automatic rifle or firearm using legally-available parts. Furthermore, creative online retailers have devised ways to skirt federal serialization and background check requirements by marketing “unfinished” frames or receivers that can be turned into fully functioning frames or receivers with minimal tools or effort. Pre-programmed milling machines are available online that will produce a fully functional receiver from an unfinished receiver with the press of a button. Sold in this form, these unfinished frames or receivers are not required to carry serial numbers and can be sold without a background check.

An example of a mass shooting committed with a ghost gun occurred on November 14, 2019, when Nathaniel Berhow, aged 16, killed two students, and later himself, and injured 3 others, at his high school in Santa Clarita, California. He used a .45 caliber handgun that was assembled from parts, creating a ghost gun without a serial number. He was too young to purchase a gun legally.

The Undetectable Firearms Act of 1988 (18 U.S.C. § 922) makes it illegal, in effect, to manufacture, import, sell, ship, deliver, possess, transfer or receive any firearm with less than 3.7 oz. of metal (so as to be detectable by a walk-through metal detector) or is not in the traditional

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<sup>6</sup> Sellers of these kits often leave the receivers or frames unfinished to avoid the requirements of federal and state laws that apply to fully finished frames and receivers. It is not difficult to complete the unfinished frames or receivers available in some of these kits and then make the fully functional weapon using the other parts that can be sold without a serial number and background check.

shape of a gun. All major components of the firearm, i.e., the barrel, slide or cylinder, frame or receiver, must be detectable by x-ray machines. This law has been renewed several times, the last time in 2013 by President Obama for another 10 years. Since that time the occurrence of 3D printing of guns has come to the forefront.

Several states have passed legislation to address the issue of ghost guns, including New York, California, Connecticut, New Jersey and Washington. California and Connecticut require that individuals who manufacture or assemble a ghost gun must request a unique serial number from state law enforcement and engrave that serial number on the firearm. They also prohibit the possession by those who are not legally allowed to possess a gun. New Jersey has banned the possession and sale of unserialized frames and receivers. It also requires that major components of a firearm be detectable by security screening devices, and prohibits the use of 3D printers to produce a firearm or its components unless the user is registered or licensed as a firearm manufacturer or dealer. New Jersey further prohibits the distribution of computer code for the manufacture of firearms and components using 3D printers to anyone but a licensed manufacturer.

In 2019 Washington State passed laws making it illegal to manufacture, own, buy, sell, or possess an undetectable firearm or any part designed and intended for use in an undetectable firearm, to assemble or repair undetectable firearms or to manufacture an untraceable firearm (i.e., one without a serial number) with intent to sell it.

In July of 2019 Governor Cuomo signed into law legislation (S.1414-A/A.0763-A) that criminalized the manufacture, sale, transport, exchange and possession with intent to sell of firearms and major components of firearms that are undetectable by a metal detector (including 3D printed guns) after removal of grips, stocks and magazines, or that has a major component that does not generate an image that displays the shape of the component by a security screening device.<sup>7</sup>

There is also federal legislation pending in both the House and Senate to address the issue of ghost guns. Unfortunately this legislation has not been brought to a vote in either house.

Federal bill H.R. 869, called the Undetectable Firearms Modernization Act, was introduced in the House of Representatives on January 30, 2019 by Representative Madeleine Dean of Pennsylvania, and has several co-sponsors. It would prohibit the possession of any firearm that is undetectable

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<sup>7</sup> N.Y. Penal Law § 265.50(A)(2); *id.* § 265.55(A)(2).

by airport-level detection devices, and requires any firearm with all of its major components attached to generate a gun-shaped image in detection systems. It was referred to the Subcommittee on Crime, Terrorism, and Homeland Security by the Committee on the Judiciary on March 25, 2019.

On June 27, 2019 the Untraceable Firearms Act of 2019 (H.R. 3553) was introduced in the House by Representative David Cicilline of Rhode Island, and referred to the House Committee on the Judiciary. On August 15, 2019 it was referred to the House Subcommittee on Crime, Terrorism, and Homeland Security by the Committee on the Judiciary. This legislation would prohibit the manufacture and sale of firearms without serial numbers.

Also, on June 13, 2019 the 3D Printed Gun Safety Act was introduced in the Senate by Senator Edward Markey of Massachusetts, joined by others. The Bill would prohibit the online distribution of blueprints and instructions for the 3D printing of Firearms. It has been referred to the Senate Committee on the Judiciary.

The Task Force supports these legislative efforts. We recommend that the most effective way to address the issue of ghost guns is to pass legislation that prohibits undetectable firearms by requiring that all operable firearms be detectable by standard screening systems, and that all of the components generate an image that displays the shape of the component by a security screening device. Such legislation should also include the following provisions:

- Ban the manufacturing, assembly or sale of firearms and firearm components, including unfinished frames and receivers, and 3D component components and firearms, by those without the appropriate license
- Require that 3D printed firearms and components, and all frames and receivers, finished or unfinished, have serial numbers imprinted on them
- Require a background check before transferring or selling an unfinished frame or receiver, in addition to a finished frame or receiver as the law now requires

##### **5. Enact Universal background checks.**

Background checks should be required for all sales of firearms - by licensed firearms dealers as well as by private individuals, whether in person at gun shows or elsewhere, as well as over the internet. While sales through licensed firearms dealers are subject to a background check of the prospective purchaser, sales between private individuals (including at gun shows) do not

require a background check under federal law, and many state laws. Legislation should be passed making it illegal for anyone to sell or transfer a firearm without a National Instant Criminal Background Check System (“NICS”) check to determine if the prospective purchaser is qualified to purchase the firearm.<sup>8</sup>

Federal legislation that would require background checks for private sales passed in the House of Representatives in February 2019 but has not yet been addressed by the Senate. The bill, H.R. 8, Bipartisan Background Checks Act of 2019, prohibits a firearm transfer between private parties unless a licensed gun dealer, manufacturer, or importer first takes possession of the firearm to conduct a background check. The prohibition does not apply to certain firearm transfers, such as a gift between spouses in good faith.

The New York Safe Act has required universal background checks to be conducted through the NICS for all sellers of firearms and ammunition since 2013, both private and licensed firearm dealers.<sup>9</sup> A private sale must be processed by a federally licensed dealer. Failure to comply is punishable as a class A misdemeanor.

Many mass shootings could have been prevented if this provision were in place on a national level. The following is a recent devastating example:

- On August 31, 2019, Seth Ator opened fire in Odessa, Texas after being pulled over by police for a traffic stop in Midland, Texas. He highjacked a U.S. Postal Service worker, killing her and driving off in her van. At the end of his shooting spree 8 people were killed, including the shooter, and 25 people were injured. He purchased the gun in a private sale, which did not require a background check under Texas law. If a background check had been done he would not have passed due to a criminal record and prior mental health issues.

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<sup>8</sup> NICS is a national system for determining if a prospective firearms or explosives buyer’s name and birth year match those of a person who is not eligible to buy. NICS screens for a wide variety of prohibiting factors that disqualify purchasers from obtaining firearms.

<sup>9</sup> There is an exception for transfers between immediate family members, unless the transferring family member knows the transferee is prohibited by law from possessing a firearm.

**6. Extend the time for background checks to be completed before finalizing the sale of a firearm.**

Under federal law, only people who buy a gun from a federally licensed gun dealer are required to pass a background check. If a background check has not been completed within three days, the sale may go through without waiting for its results. There are occasions when the NICS check cannot be completed within three days, often when there are issues regarding a potential buyer's qualifications. Nonetheless, the federal law requires that the gun must be transferred to the buyer after the three-day period has expired if the NICS results have not been received. This can have devastating effects if the gun gets into the wrong hands.

A fatal and tragic example of why the time period should be lengthened is the shooting that occurred at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina on June 17, 2015. The shooter in that case, who killed 9 people, should not have been allowed to purchase the gun he used in the shooting due to a prior arrest record. The background check was not completed within the three-day period, however, and the sale went through. To avoid this and other tragic mass shootings, the time to complete a background check before a firearm is transferred to the purchaser should be extended.

Additionally, a Government Accountability Office July 2016 report noted: "FBI data also show that during fiscal year 2015, the FBI completed 90 percent of denials that involved MCDV [misdemeanor crime of domestic violence] convictions within 7 business days, which was longer than for any other prohibiting category (e.g., felony convictions). The FBI completed 90 percent of denials that involved domestic violence protection orders in fewer than 3 business days. According to federal and selected state officials GAO contacted, the information needed to determine whether domestic violence records—and in particular MCDV convictions—meet the criteria to prohibit a firearm transfer is not always readily available in NICS databases and can require additional outreach to state agencies to obtain information."<sup>10</sup>

There is legislation in New York State that addresses this problem. In July 2019 Governor Cuomo signed legislation S. 2374/A2690 into law that establishes an extension of time of up to 30 days to obtain results from the NICS before a sale can be finalized.

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<sup>10</sup> United States Government Accountability Office, July 2016, GAO-16-483, "Gun Control, Analyzing Available Data Could Help Improve Background Checks Involving Domestic Violence Records."

A bill has passed the House that also addresses this issue, but it has not been acted upon by the Senate. The Enhanced Background Checks Act of 2019, H.R. 1112, passed by the House on February 28, 2019, extends the window for background checks to 10 days. After the initial 10 business-day period, if a background check has not been completed, a purchaser may petition for an expedited review and must certify that they are not prohibited from purchasing or possessing a firearm. The FBI will have 10 additional business days from the date the petition was submitted to complete the background check before a sale can proceed under federal law. Those individuals who choose not to submit a certified petition will be required to wait until their background check is complete before a transfer can proceed.

The 10-day period in H.R. 1112 is an improvement over the current 3-day requirement, especially with the safety valve language that if a review is not completed within the initial 10 days, a purchaser must certify that he or she is not prohibited from purchasing or possessing a firearm in their petition for an expedited review, and the FBI will have 10 additional business days from the date the petition was submitted to complete the background check before a sale can proceed. New York's 30-day time period should provide sufficient time for a thorough review to be completed and is not an unduly long period of time for a person to wait before a gun sale is finalized. If the background check is finished before the 30-day period, the sale can be concluded sooner.

We recommend that all states pass legislation extending the time period in which a background check must be completed before a sale is finalized and a gun is transferred to the buyer, ideally for at least a 30-day period. The proposed federal legislation is a vast improvement over the current 3-day period, and should be passed by the Senate as soon as possible.

**7. Expand the category of individuals who are prohibited from purchasing or possessing firearms based on evidence-based risk of dangerousness.**

Laws prohibiting categories of people from owning weapons vary from state to state and between federal and state laws. We recommend that the categories of individuals prohibited from purchasing firearms be expanded to reflect evidence-based risk of dangerousness to prevent future killings.

The federal Gun Control Act of 1968 (18 U.S.C. § 922) generally prohibits the sale of firearms to individuals who: are indicted or convicted of a felony; use or are addicted to a controlled substance; have been adjudicated as mentally defective or committed to a mental institution; are unlawfully in the U.S.; are subject to a court order restraining him or her from harassing, stalking or

threatening an “intimate partner,” the individual’s child, or the intimate partner’s child; have been convicted of a misdemeanor offense of domestic violence; among other specifications. Some state laws include additional categories of people. For example, New York expands prohibitions to situations where domestic violence occurs not just between spouses, or people who cohabit or share a child, but also to individuals in a dating relationship, thus closing what’s known as the “boyfriend loophole.” To the extent a law does not prohibit the following categories of people from purchasing and owning a firearm, we recommend that the law be expanded, both on the federal and state level, in order to afford greater protection from individuals who are at a heightened risk of gun violence:

- a. Expand the definition of protected individuals in domestic violence situations to include not only the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person, but also a dating partner and any other person similarly situated to a spouse. Federal bills S. 120 and H.R. 569 are companion bills to close this loophole in the federal law by expanding protections to dating partners and stalkers. HR. 569 was referred to the Subcommittee on Crime, Terrorism and Homeland Security on 2/25/19 by the House, and S. 120 was referred to the Committee on the Judiciary on 1/15/19 by the Senate.
- b. Individuals who have been found liable under abuse and neglect petitions in New York Family Court, and similar courts in the country that deal with such matters, should be prohibited from possessing a firearm.
- c. Individuals convicted of a violent misdemeanor should be precluded from possessing a firearm. Currently federal law prohibits individuals who have convictions for a domestic violence misdemeanor offense from purchasing a gun. This disqualification should be expanded, both on the state and federal level, to misdemeanor convictions that are violent and threatening in nature, such as hate crimes, stalking and lower level gun offenses. It is significant and alarming to note that hate crimes are on the rise in the United States.
- d. Individuals who are on the federal government’s Terrorist Watch List.
- e. Individuals who suffer from mental illness should not possess firearms. Under federal law, individuals adjudicated as mentally defective or

who have been committed to a mental institution cannot possess firearms. This does not include individuals who have been voluntarily committed to a mental hospital. The disqualification regarding mental illness should be expanded to include situations such as voluntary commitments as well as court-ordered outpatient mental health treatment. Corollaries to this recommendation are improved reporting of these situations to NICS, and passage of Extreme Risk Protection laws, a/k/a “Red Flag” laws. The Task Force Report will discuss the importance of court hearings to ensure due process in these situations, in particular, with respect to voluntary commitments. We will discuss provisions for hearings to regain the right to possess a firearm if an individual is subsequently adjudged mentally competent.

**8. The States and the Federal Government should pass Extreme Risk Protection laws, a/k/a “Red Flag” laws.**

Governor Cuomo signed S.2451/A. 2689 into law on February 25, 2019. This legislation establishes extreme risk protection orders as a court-issued order of protection prohibiting a person from purchasing, possessing or attempting to purchase or possess a firearm, rifle or shotgun. The Extreme Risk Protection Order Bill, also known as the Red Flag Bill, allows certain individuals to seek a court order to prevent individuals, who show signs of being a threat to themselves or others, from purchasing or possessing any kind of firearm. It empowers family members, teachers and school administrators to prevent school shootings by pursuing court intervention. Several states and the District of Columbia currently have Extreme Risk Protective Order (“ERPO”) laws.

A federal bill, H.R. 1236, known as the “Extreme Risk Protection Order Act of 2019,” was introduced in the House on February 14, 2019 and sent to the Judiciary Committee on September 10, 2019. This act would establish a program under the Department of Justice to award grants to states to implement extreme risk laws, and sets forth minimum standards that states must meet to be eligible for the grants. The funding will go towards: providing training, personnel and resources to law enforcement; training judges, court personnel and law enforcement to accurately identify individuals at risk of harming themselves or others with a firearm; develop protocols, forms and orders to carry out the extreme risk laws; and raise public awareness regarding extreme risk laws.

The Task Force recommends that all states adopt Red Flag laws. This will enable those who are in a position to observe warning signs about individuals

who might commit mass shootings to prevent that from happening and to obtain the help needed to address their condition.

**9. Require gun owners to have a license to purchase and possess all types of firearms.**

A limited number of states require an individual to obtain a license (or permit) before purchasing a handgun, and fewer jurisdictions require a license in order to purchase a rifle or shotgun. Other states require a license to own a firearm.<sup>11</sup> All fifty states require licenses to hunt with a gun, and some place limits on the number of rounds that may be fired or require gun education and safety training. Federal law does not require licensing of gun owners or purchasers.

Requiring a license (or permit) to purchase or own any type of firearm is an effective way to promote gun safety and discourage guns from getting into the hands of people who should not have them. Even highly protected first amendment activity such as marriage, peaceful marches and protests, and construction of churches are subject to state licensing or permitting and related regulatory requirements. A licensing requirement could include mandatory safety training or the requirement that an applicant pass a written and/or practical test on gun safety. This is a reasonable requirement in order to ensure the public's safety and welfare, just as all states require significant training and education for a driver's license. Many states already require the completion of an NRA training course in order to obtain a license to carry a concealed firearm. Moreover, since firearm safety is a part of any hunter education course (required by most, if not all, states in order to obtain a hunting license) completion of a hunter education course could satisfy this requirement, making it less of a burden for many gun owners.

The specifics of the licensing or permitting requirements can be determined by individual state laws, however, we recommend that the following provisions be included:

- Licensing requirements should apply to the purchase and possession of all types of firearms, including handguns, shotguns and rifles
- A safety training requirement should be imposed
- A thorough background check should be performed prior to the issuance of a license
- A license must be renewed after a set period of time with an updated background check performed

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<sup>11</sup> New York State requires a license to purchase a handgun (pistol or revolver), but not to purchase a shotgun or a rifle.

- The license should be revoked if the licensee becomes a prohibited purchaser or owner under the law; the licensee should be required to report this change in status
- A licensee must be required to report the theft/loss of a firearm or license

**10. Intermediate scrutiny and preponderance-of-the-evidence are appropriate legal standards for review of gun laws that do not substantially burden core Second Amendment rights.**

Under current Supreme Court precedent in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 3025 (2010), courts should apply a standard no higher than “intermediate scrutiny” when reviewing a gun regulation subject to a Second Amendment challenge. The applicable inquiry is whether the law furthers an important governmental interest, does so by means that are substantially related to that interest and does not burden more conduct than is reasonably necessary to protect that interest. A simple preponderance of the evidence standard should be applied, except in the narrow class of cases in which a challenger can show that the law “substantially” or “severely” burdens a core Second Amendment right.

Discussion of Case Law

A consensus exists among the federal appellate courts that “intermediate scrutiny” is the proper standard to apply in most cases challenging gun regulations under the Second Amendment; “strict scrutiny” is reserved for a narrow class of cases in which the law “substantially” or “severely” burdens a core Second Amendment right. *See Worman v. Healey*, 922 F.3d 26, 38 (1st Cir. 2019) (collecting cases) (“In our view, intermediate scrutiny is appropriate as long as a challenged regulation either fails to implicate the core Second Amendment right or fails to impose a substantial burden on that right.”); *N.Y.S. Rifle & Pistol Ass’n, Inc. v. City of N.Y.*, 883 F.3d 45, 56 (2d Cir. 2018) (“Even where heightened scrutiny is triggered by a substantial burden, however, strict scrutiny may not be required if that burden ‘does not constrain the Amendment’s ‘core’ area of protection.’”) (quoting *N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242, 259 (2d Cir. 2015)); *Cf. Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.*, 910 F.3d 106, 117 (3d Cir. 2018) (“[L]aws that severely burden the core Second Amendment right to self-defense in the home are subject to strict scrutiny.”).

Under “intermediate scrutiny,” courts will uphold the challenged law upon finding it furthers an important government interest and does so by means that are substantially related to that interest. *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 119 (“[U]nder intermediate scrutiny[,] the government must assert a significant, substantial, or important interest; there must also be a reasonable fit between that asserted interest and the challenged law, such that the law does not burden more conduct than is reasonably necessary.”) (quoting *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013)).

“Strict scrutiny” in contrast requires a challenged law to be struck down unless the proponent of the law demonstrates it serves a compelling governmental interest and is narrowly tailored to achieve that interest. *See, Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013) (“At the other end of the spectrum is strict scrutiny, which demands that the statute be “narrowly tailored to promote a compelling Government interest ... [;] [i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.”) (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813, (2000) (internal citations omitted)).

Recently, it has been suggested that the proper constitutional standard for evaluating gun laws is “strict scrutiny” similar to that applied to rights protected by the First Amendment (i.e., substantially related to the achievement of an important governmental interest and as narrowly tailored as possible). *See N.J. Rifle & Pistol Club.*, 910 F.3d at 127, 134 (Bibas, J. dissenting); *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1156-1160 (S.D. Cal. 2019) enjoining California large capacity magazine ban); <https://constitutioncenter.org/podcast-is-the-second-amendment-a-second-class-right> (accessed September 17, 2019). The N.R.A. has urged that “strict scrutiny” amendments should be made to state constitutions, and such amendments have passed in Alabama, Louisiana, and Missouri. Todd E. Pettys, *The N.R.A.'s Strict-Scrutiny Amendments*, 104 Iowa L. Rev. 1455, 1456 (2019). Furthermore, while “intermediate scrutiny” analysis puts the burden of proof on the proponent of the challenged gun law, “substantial” evidence has been deemed sufficient to support a “reasonable fit between [the] asserted interest and the challenged law[.]” *N.J. Rifle*, 910 F.3d at 112, 119, 120 n.24. But at least one Circuit Court dissent has urged that something more is required (i.e., “real evidence,” “hard evidence,” “concrete evidence,” “compelling evidence,” “specific proof”) and that “anecdotal evidence” and “armchair reasoning” are insufficient. *Id.* 910 F.3d at 126-127,

130, 133, 134 (Bibas, J. dissenting). Similarly, one district court has found that the “substantial evidence” standard requires “hard facts and reasonable inferences drawn from convincing analysis”—or simply “convincing evidence”—and that “softer forms of evidence “such as history, consensus, [] simple common sense, ... correlation evidence, and ... intuition" are not “enough.” *Duncan v. Becerra*, 366 F. Supp. 3d at 1161, 1176 (citation and quotations omitted).

#### **11. Impose penalties for failure to notify the authorities of stolen or lost guns.**

Imposing some significant form of liability for the failure to report a lost or stolen firearm within a certain period of time after a gun owner learns of the loss or theft would encourage gun owners to keep control of their firearms and limit the likelihood that their guns fall into the wrong hands. It could also limit the willingness of individuals to serve as a straw buyer if they know that they will face significant liability if a gun they purchased is later recovered by law enforcement.

Federal law does not require individual gun owners to report the loss or theft of a firearm to law enforcement. It does require licensed firearm dealers to do so within 48 hours of discovering the loss or theft to the United States Attorney General and appropriate local authorities (See, 18 U.S.C. § 923(g)(6)).

Most of the states do not have laws that require an individual owner of a firearm to report its loss or theft. New York requires an owner or person lawfully in possession of a firearm, rifle or shotgun to report its loss or theft within 24 hours from discovery to a police department or sheriff’s office. A violation of this provision is a class A misdemeanor crime. N.Y. Penal Law § 400.10.

We recommend that all states and the federal government require the speedy reporting of any lost or stolen firearm by gun dealers as well as individual owners. This law should apply to all types of firearms. The failure to do so is a crime under New York law. We believe that imposing criminal sanctions, along with prohibiting future gun ownership, is the most effective consequence for ensuring compliance with this law.

#### **12. Impose penalties for unlocked and unsecured guns.**

This would reduce the likelihood that firearms fall into the wrong hands and reduce the likelihood of gun thefts, in addition to preventing accidental injuries and deaths, particularly of children. Under the Protection of Lawful

Commerce in Arms Act, it is unlawful for a licensed importer, manufacturer or dealer to sell or transfer any handgun unless the transferee is provided with a secure gun storage or safety device. This federal law does not apply to private sellers or require the transferee to use the safety device. Governor Cuomo signed into law in July of 2019 a bill (S.6360/A.8174) that makes it a misdemeanor to fail to securely lock or store a firearm if the owner or custodian of the firearm lives with an individual under 16 years of age, or someone who is prohibited from possessing a firearm due to an extreme risk protection order or a conviction for a felony or serious offense. New York City requires an owner of a firearm to render it inoperable by using a safety locking device while the weapon is out of his or her possession or control, and prohibits the sale or transfer of any firearm without a safety locking device. Massachusetts has a similarly strict law requiring a person to store or keep any firearm, rifle or shotgun secured in a locked container or equipped with a tamper-resistant mechanical lock or other safety device, so as to render the weapon inoperable by any person other than the owner or authorized user. There are criminal penalties for failure to comply. Most states have no laws that speak to this issue, and those that do vary with respect to certain provisions, e.g., when they must be safely stored; if they require a safety lock when sold or transferred and what type of lock must be used. Adam Lanza, who had a history of mental health issues, killed 28 people in the Sandy Hook Elementary School shooting using his mother's guns which he was able to access at the home he shared with her.

We recommend that laws be enacted, on both a federal and state level, requiring that all firearms, regardless of the type, be disabled with a locking device or safely stored when not in the possession or control of the owner or authorized user, similar to the New York City and Massachusetts laws. We also recommend that locking devices be required on all firearms manufactured, sold or transferred, both by authorized dealers and private individuals. We recommend the imposition of a criminal penalty for failure to comply with these requirements.

### **13. Ensure all disqualifying events for gun ownership are reported to NICS**

All steps need to be taken to ensure disqualifying events are reported to NICS and all relevant regulatory authorities. This includes criminal background information in addition to disqualifying mental health conditions.

#### **1. Existing Reporting Laws must be implemented**

- a. The gunman that killed twenty-six people at a church in Sutherland Springs, Texas, on November 5, 2017, had a domestic violence conviction (a disqualifying factor) that had not been reported to NICS by the U.S. Air Force. If this conviction had been reported, as it should have been, the shooter would not have been allowed to purchase the assault rifle used in the shooting
2. All disqualifying mental health conditions should be reported to NICS.
    - a. The Gun Control Act of 1968 prohibits any person from selling or otherwise transferring a firearm or ammunition to any person who has been “adjudicated as a mental defective” or “committed to any mental institution.” Federal law prohibits the sale of firearms to certain individuals with a history of mental illness, but it cannot require states to make information identifying these people available to the federal or state agencies that perform background checks. Unfortunately, many states fail to voluntarily report the necessary records to the NICS with respect to people prohibited from possessing guns for mental health reasons.
    - b. A tragic example involving a state’s failure to report mental health records occurred in April 2007, when Virginia Tech Student Seung-Hui Cho shot and killed 32 people and injured 17 others on the college campus before committing suicide. Under federal law, Cho was prohibited at the time from purchasing firearms because of his history of mental illness (a Virginia judge had declared Cho to be an “imminent danger” to himself on December 14, 2005 as a result of mental illness, and directed him to seek outpatient treatment). Cho was able to purchase firearms through two licensed dealers following two background checks. While “Virginia law at that time required that some mental health records be submitted to the databases used for background checks, it did not require reporting of all people prohibited from possessing firearms for mental health reasons.”<sup>12</sup>
    - c. The number of mental health records in NICS increased dramatically after this tragedy. Likewise, many states have enacted laws authorizing or requiring the submission of mental health records to NICS. In January 2008, President Bush signed into law the NICS Improvement Amendments Act of 2007 to

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<sup>12</sup> <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/mental-health-reporting/>

provide financial incentives for states to report this type of disqualifying information to NICS. Unfortunately, there are still many individuals whose mental health histories are missing from this database, and the laws vary between the states as to: the categories of people who must be reported; whether it is mandatory to report such information; how soon the information should be reported; whether old records that pre-date reporting requirements will be searched for reporting purposes; how the information is reported; who has reporting requirements; and whether individuals seeking to purchase a gun must authorize disclosure of their mental health background.

3. We recommend that all states enact laws that:
  - a. Require reporting to NICS and all relevant authorities information regarding anyone prohibited by federal or state law from purchasing or possessing a firearm due to mental illness, including those individuals with mental health disqualifications prior to enactment of such reporting laws;
  - b. Require certain categories of professionals, including licensed psychotherapists, law enforcement officials and school administrators, to report mentally ill individuals who demonstrate violent behavior;
  - c. Require that all relevant mental health information be reported to the appropriate state agency as well as to NICS;
  - d. Require that all law enforcement agencies have access to databases containing relevant mental health records;
  - e. Require mental health facilities to report prohibited individuals with mental health conditions to the relevant state agency if they have not been previously reported by a court; and
  - f. Require that this reporting take place immediately upon the disqualifying event taking place.
  
4. We also recommend that the federal government allocate resources to assist the states in providing this essential information to NICS and all other relevant regulatory authorities.

**14. The public must be adequately informed of laws that exist to prevent mass shootings and other acts of violence.**

Information on how to obtain an Extreme Risk Protective Order and similar protective court orders that will potentially prevent mass shootings, must be widely disseminated and publicized, including on

government websites and other appropriate locations. Teachers and others in a position to seek such orders should be instructed on the provisions of the law. For example, in New York information on how to obtain an Extreme Risk Protection Order can be found on the New York State Unified Court System website at:

<https://www.nycourts.gov/CourtHelp/Safety/extremeRisk.shtml>.

New York Bill S.6158/A.7395, signed into law on December 16, 2019, requires that victims of domestic violence be informed of their rights by the police and district attorneys handling a domestic violence matter, including specifically the right to ask the court for an order of protection that can require an offender to turn in their firearms and any firearm licenses, and not obtain additional firearms.

We recommend that all states pass similar notification laws and take steps to ensure that these notices are provided to victims of domestic violence, and those in a position to seek ERPOs.

**15. Better data is needed to understand the causes of mass shootings and support remedial legislation.**

The Task Force Report will reiterate the findings of the Association's 2015 report *Understanding the Second Amendment – Gun Regulation in America Today and Yesterday*, approved by the House of Delegates on March 28, 2015, regarding the need for the government to gather and maintain data regarding incidents of mass shootings and gun violence in general, and to promote research into the cause and effects of this behavior. In order to ensure that there is robust evidentiary support to meet anticipated challenges to proposed gun laws, data should be collected, and studies commissioned, to provide the evidence of the relationship between a particular law and the governmental interest at issue. There is substantially less funding for gun violence research from the federal government than for other major causes of death.

We specifically recommend that the manner in which data is maintained by ATF in connection with gun ownership be improved in order to effectively trace weapons used in violent crimes, including mass shootings.<sup>13</sup> In January 2019, Representative Carolyn Maloney (D-NY-12) introduced H.R. 674 and Senator Edward Markey (D-MA) introduced S.184, known as the Gun Violence Prevention Research Act of 2019. The legislation directs Congress to

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<sup>13</sup> See the Video by David Field at: <https://www.theatlantic.com/video/index/595612/firearm-tracing-division/> for a shocking view of the condition of ATF records.

appropriate committed funding for the CDC to study the gun violence epidemic for the next five fiscal years. Doctors and public health officials from across the country, as well as the communities that are directly impacted by this violence every day, have voiced support of this research and affirmed the need to address gun violence as the health crisis that it is. We support this legislation.