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**New York State Bar Association**

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

*Reducing the Epidemic of Mass Shootings  
in the United States*

*– If Not Now, When?*

**Final Report**

**November 2020**

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~~[Names of people and organizations will be added before the 11/7/20 House of Delegates Meeting]~~

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~~There are many knowledgeable individuals, institutions and organizations that have contributed to this undertaking. We would like to recognize the tremendous wealth of research and background information, both factual, legal, and academic, from the following organizations:~~

- ~~• The Regional Gun Violence Research Consortium at the Rockefeller Institute of Government~~
- ~~• The Giffords Law Center to Prevent Gun Violence~~
- ~~• Everytown for Gun Safety~~

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- ~~• Robert J. Spitzer, Distinguished Service Professor and Chair of the Political Science Department at SUNY Cortland~~
- ~~• Joel Capellan, Assistant Professor of Law & Justice Studies at Rowan University~~
- ~~• Dr. Sonali Rajan, Assistant Professor of Health Education at Teachers College, Columbia University~~
- ~~• Dr. Michael Siegel, Professor, Department of Community Health Sciences at Boston University School of Public Health~~

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Margaret J. Finerty

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Task Force on Mass Shootings and Assault Weapons

## INTRODUCTION

The Task Force on Mass Shootings and Assault Weapons (“Task Force”) was appointed in the Summer of 2018 by then New York State Bar Association (“NYSBA”) President Michael Miller to update the Association’s 2015 Report *Understanding the Second Amendment – Gun Regulation in America Today and Yesterday*, with a more specific focus on the role of mass shootings and assault weapons in the continuing tragedy of gun violence in America. The Task Force was charged with developing appropriate recommendations for firearm regulations based on available data in an effort to reduce the incidence of mass shootings and the numbers of deaths and injuries that result from mass shootings. To gain an understanding of various types of firearms before developing these recommendations, Task Force members met with firearms experts from the New York City Police Department’s Firearms and Tactics Section. These experts explained and demonstrated various firearms, including assault-style weapons, to the Task Force, and we are grateful for the education they provided to us.

During the term of this Task Force, the incidence of mass shootings, including those in which assault-style weapons were used, only increased. As reported on the front page of the New York Times of Sunday, September 22, 2019:<sup>1</sup>

From Memorial Day to Labor Day [2019], there were 26 mass shootings in the United States. They spanned the nation, terrorizing crowded public places and shattering private homes. Among the 126 killed were a 3-year-old girl and a 90-year-old man. And all we could do was ask why. And wait for it to happen again.

While mass shootings may account for only about one percent of all gun-related deaths,<sup>2</sup> they traumatize the nation and make people feel that no place is safe. While there is no one regulation that will solve this national problem, there is widespread and growing public support for taking certain actions that offer a reasonable chance of reducing the incidence of mass shootings and resulting casualties. There is still a need for more research and better data, but the Task Force has concluded that there are a number of actions that federal, state, and local governments can and should take, consistent with courts’ interpretations and applications of the Second Amendment, that will help to save lives.

The Task Force’s Mission Statement is as follows:

<sup>1</sup> — Mitch Smith, *Inside a Deadly American Summer*, N.Y. TIMES (Sept. 21, 2019), <https://www.nytimes.com/interactive/2019/09/21/us/summer-mass-shootings.html?action=click&module=Top%20Stories&pgtype=Homepage> (last visited Nov. 4, 2020); Mitch Smith, *Inside a Deadly American Summer*, N.Y. TIMES (Sept. 22, 2019), <https://static01.nyt.com/images/2019/09/22/nytfhomepage/scan.pdf> (last visited Oct. 9, 2020).

<sup>2</sup> Jennifer Skeem & Edward Mulvey, *What role does serious mental illness play in mass shootings, and how should we address it?*, CRIMINOLOGY & PUBLIC POLICY, (2020;19:85-108). 2019 AMERICAN SOCIETY OF CRIMINOLOGY, (internal footnotes omitted). <https://onlinelibrary.wiley.com/doi/10.1111/1745-9133.12473> (last visited Oct. 9, 2020).

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The task force will consider the connection between mental health and mass shootings; the relationship between domestic violence and mass shootings and make appropriate recommendations. Among its considerations, it will explore the potential effectiveness of enhanced waiting periods and enhanced background checks; uniformity of rules regarding purchases in stores and gun shows; whether private sellers should be required to conduct background checks on the domestic violence registry; and Federal and State model regulation of assault weapons and related accessories such as large ammunition magazines, “bumpstocks” and other devices.

This Report is intended to help educate the public and to provide a resource to legislators and policymakers as they seek to address the epidemic of gun violence in America. The members of the Task Force were selected to provide a balance of perspectives on these issues. They include avid hunters, target shooters, and gun owners as well as those who do not own or use firearms. They include people who live in rural and other upstate areas of New York State as well as residents of New York City and the greater metropolitan area. Some are solo practitioners and lawyers who practice in large and small firms, current or former prosecutors, and criminal defense counsel. They are people of various political beliefs. This Report is a consensus document that emerged from a collaborative process.

## EXECUTIVE SUMMARY

The 2015 Report by the NYSBA Task Force on Gun Violence discussed the legal framework that governs and regulates the ownership, use, and possession of firearms under the Second Amendment. It surveyed the law and history of gun regulation in the United States and was intended to help educate the public, law makers, and policy makers with respect to gun rights and regulations. This Report of the NYSBA Task Force on Mass Shootings and Assault Weapons is focused more specifically on mass shootings and the use of assault-style weapons in mass shootings in an effort, based on available data, to understand the incidence and causes of mass shootings, to describe the role of assault-style weapons in them, and to make recommendations that offer a reasonable chance to reduce the number of mass shootings and casualties that result from them.

### I. The New York State Bar Association's Role

~~The legal profession has a responsibility to contribute to policy making and law that impact the public interest. Accordingly, NYSBA's purposes include promoting reform in the law and applying its members' knowledge and experience in the law to promote the public good. Indeed, NYSBA has a long history of contributing thoughtful analysis to matters of pressing public concern. The State of New York has been a leader in enacting legislation to address gun violence, and NYSBA believes lawyers have a special role to play in addressing gun violence in America. This Report is intended to be a nonpartisan effort, based on legal developments and experience since the 2015 Report, to address the continuing tragedy of mass shootings and gun violence that have touched people all across our country.~~

**The legal profession has a responsibility to use its legal expertise to contribute to changes in the law that promote the public good. Each year, the New York State Bar Association adopts federal and state legislative priorities to advocate for changes and improvements in the law. Indeed, NYSBA has a long history of contributing thoughtful analysis to matters of pressing public concern where our knowledge and experience as lawyers enables us to provide beneficial and responsible guidance. The State of New York has been a leader in enacting legislation to address gun violence, and NYSBA believes lawyers have a special role to play in addressing gun violence in America given our mission to protect the rule of law and the federal and state constitutions. We know from firsthand experience, for example, how important it is to seek orders of protection for our clients in domestic abuse or mental health situations, and to defend those who are accused of gun offenses to ensure their constitutional and other legal rights. This Report is intended to be a nonpartisan effort, based on legal developments and experience since the 2015 Report, to address the continuing tragedy of mass shootings and gun violence that have touched people all across our country.**

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As discussed above, the members of this Task Force have been selected to provide a variety of perspectives and a balanced approach to the issues around mass shootings and assault

weapons. They have worked to arrive at consensus-based recommendations based on the available data and the current state of the law regarding the Second Amendment.

## II. Recommendations

The recommendations of the Task Force include:

- Ban the possession, sale and manufacture of assault-style weapons
- Ban large-capacity magazines that hold more than 10 rounds of ammunition
- Ban bump stocks and other devices that effectively enable semi-automatic firearms to be fired in fully automatic mode
- Ban firearms manufactured without a license and without a serial number
- Enact universal background checks for all gun sales, private and through licensed dealers
- Expand the time for background checks to be completed before finalizing ~~firearm~~-gun sales
- Require gun owners to obtain a license as a purchase and possession requirement for all types of firearms, rifles and shotguns
- Expand the category of individuals who are prohibited from purchasing or possessing ~~guns~~firearms
- Close reporting loopholes to ensure all disqualifying data is reported to the National Instant Criminal Background Check System (“NICS”)
- Enact laws that provide for Extreme Risk Protection Orders (“ERPOs”), i.e., “~~R~~~~e~~~~d~~ ~~F~~~~l~~~~a~~~~g~~” laws
- Impose penalties for failure to notify the authorities of stolen or lost guns
- Impose penalties for unlocked/unsecured guns in certain circumstances
- Affirm that intermediate scrutiny and preponderance of the evidence proof apply to gun laws that do not substantially burden core Second Amendment rights
- Educate the public regarding gun legislation and their rights to seek protection in situations of domestic violence
- Promote and fund research and data collection regarding gun violence, including mass shootings

## III. Mass Shootings

One of the complications in analyzing mass shootings is that there is no universally accepted definition of a mass shooting, and different studies have used different definitions. For example, the Congressional Research Service adopted four “parallel definitions for patterns of ‘mass murder’ committed entirely with firearms”: “mass shooting,” “mass public shooting,” “familial mass shooting,” and “other felony mass shooting.”<sup>3</sup> The Congressional Research Service defined mass shooting as, “a multiple homicide incident in which four or more

<sup>3</sup> WILLIAM J. KROUSE, CONG. RESEARCH SERV., R44126, MASS MURDER WITH FIREARMS: INCIDENTS AND

victims are murdered with firearms—not including the offender(s)—within one event, and in one or more locations in close geographical proximity” and used a more conservative definition for public mass shooting: “a multiple homicide incident in which four or more victims are murdered with firearms—not including the offender(s) —within one event, and at least some of the murders occurred in a public location or locations in close geographical proximity . . . and the murders are *not* attributable to any other underlying criminal activity or commonplace circumstance . . . .”<sup>4</sup> A simpler definition commonly used by researchers is to adopt the FBI’s criteria for a “mass murderer” and set a casualty threshold of four fatalities by firearm, excluding the offender(s), in a single incident and typically in a single location. Other definitions vary using factors such as time, place, method, circumstances, and number of victims (whether killed or injured) excluding the offender(s). This Task Force has reviewed and relies on various available databases, studies, and reports, without confining our research to a specific definition of mass shooting. For example, in our discussion of the relation between domestic violence and mass shootings, some of the incidents we cite may have occurred in private, rather than public, places. Nevertheless, we are confident that available data from reputable sources support the general conclusions we have reached and the recommendations we make.

The different definitions of a mass shooting and the relative rarity of these events compared to the total number of gun-related deaths make it difficult to analyze trends. However, data indicate that both the incidence of mass shootings and the numbers of casualties are increasing. Based on an analysis of its public mass shootings database, in August of 2019, *The Washington Post* proclaimed: “More and deadlier: Mass shooting trends in America.”<sup>5</sup> In September of 2019, the *Los Angeles Times* published an Opinion based on a research project funded by the National Institute of Justice, the research arm of the U. S. Department of Justice, which concluded: “We analyzed 53 years of mass shooting data. Attacks aren’t just increasing, they’re getting deadlier.”<sup>6</sup> Obviously, not all mass shootings follow the same pattern. The Violence Project, funded by the National Institute of Justice, has developed a “Mass Shooter Database” of 171 mass public shootings from 1966 to 2019 coded on 100 life history variables in an effort to identify evidence-based prevention strategies. Research must continue on many fronts. But the time is now to take actions that offer a reasonable possibility of reducing the damage caused by mass shootings in America.

#### IV. Assault Weapons

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VICTIMS, 1999-2013 10 (July 30, 2015), <https://fas.org/sgp/crs/misc/R44126.pdf> (last visited Oct. 9, 2020).

<sup>4</sup> *Id.*

<sup>5</sup> Bonnie Berkowitz et al., *More and Deadlier: Mass Shooting Trends in America*, WASH. POST (Aug. 5, 2019), <https://www.washingtonpost.com/nation/2019/08/05/more-deadlier-mass-shooting-trends-america/?arc404=true> (last visited Oct. 9, 2020).

<sup>6</sup> James Densley & Jillian Peterson, Opinion, *We Analyzed 53 Years of Mass Shooting Data. Attacks Aren’t Just Increasing, They’re Getting Deadlier*, L.A. TIMES (Sept. 1, 2019), <https://www.latimes.com/opinion/story/2019-09-01/mass-shooting-data-odessa-midland-increase> (last visited Oct. 9, 2020).

As with the definition of mass shooting, determining the precise definition of an assault weapon can be challenging.<sup>7</sup> Because firearms deemed to be “assault weapons” carry greater restrictions than other firearms, gun manufacturers have been very creative in bypassing legal definitions by altering the design of firearms to avoid specified features. Certain states have adopted different definitions to try to address these efforts to circumvent statutory definitions. Among other recommendations, the Report discusses the definition of assault weapon and suggests a potentially improved working definition.

Generally speaking, assault weapons are high-powered semiautomatic firearms capable of autoloading a new cartridge into the chamber after the gun is discharged. Users then need only to pull the trigger to fire the gun again. Given the frequency with which such weapons are used in mass shootings and their increased lethality compared to most other types of firearms, the Task Force recommends that a ban on the sale and possession of assault-style weapons be implemented on both the federal and state levels. Data support the conclusion that such a ban will decrease the occurrence and casualties of mass shootings. Similarly, in an effort to reduce the number of casualties of mass shootings, magazines capable of holding more than ten rounds and bump stocks and other devices that effectively permit semiautomatic firearms to be fired in fully automatic mode should be banned. Additional measures should be taken to try to keep firearms from getting into the hands of people who should not have them, including universal background checks, extending the time for completing background checks, and adding basic requirements for the purchase, acquisition, and securing of firearms.

#### V. Recent Developments in the Law

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court, in a 5-4 decision, held for the first time that the Second Amendment protects an individual right of law-abiding citizens to possess an operable handgun in the home for self-defense. The Court cautioned that this right is “not unlimited” and that certain regulations and limitations are “presumptively lawful.” The Report includes an updated post-*Heller* discussion of Second Amendment challenges to gun regulations and various types of gun safety laws; courts’ reasoning in these cases as they have applied a standard of “intermediate scrutiny” unless the law in question seriously burdens the “core” Second Amendment right of self-defense in the home; and the Supreme Court’s reluctance to grant certiorari in Second Amendment cases. The Report includes a table summarizing some of the 2018-2020 cases in which *Heller* was discussed in depth.

#### VI. Domestic Violence and Mass Shootings

Studies show that there is a demonstrable connection between domestic violence and mass shootings. Federal law and the laws of several states address this problem by (1)

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<sup>7</sup> See for a general discussion: Erica Goode, *Even Defining ‘Assault Rifles’ Is Complicated*, N.Y. TIMES (Jan. 16, 2013), <https://www.nytimes.com/2013/01/17/us/even-defining-assault-weapons-is-complicated.html?pagewanted=all> (last visited Oct. 9, 2020).

prohibiting persons who have threatened or committed certain acts of domestic violence from purchasing or possessing firearms, and (2) providing for protective orders (variously called “domestic violence restraining orders,” “orders of protection,” or similar terms) that include such prohibitions and may require the person subject to the order to surrender their firearm(s). These protective orders can be obtained in civil Family Court or divorce proceedings, as well as in the context of a criminal case. Protective orders relating to domestic violence should be reported to federal and state authorities and maintained in registries or databases such as the ~~National Instant Criminal Background Check System~~ (“NICS”) and corresponding state registries. This will enable the orders to appear during a background check and identify those who are disqualified from owning or possessing firearms. Victims of domestic violence should be educated by law enforcement and other agencies about their right to obtain these protective orders. And the laws should broaden both who qualifies to seek domestic violence protective orders and abusers who may be subject to such orders. Reporting or registering such orders must be enforced. At the same time, the constitutional rights of persons alleged to have committed acts of domestic violence that would disqualify them from owning or possessing firearms should be respected. To this end, at the expiration of the protective orders or disqualifications, there should be reasonable procedures for the retrieval of firearms and the restoration of the right to own or possess firearms, if appropriate. The Report includes a discussion of the issues and recommendations related to domestic violence and a summary of federal and selected state laws that address these issues.

## VII. Mental Health and Mass Shootings

The Report demonstrates the connection between serious mental health issues and mass shootings and discusses efforts by the federal government and several states to prevent persons with mental health problems from purchasing or possessing firearms, which, in turn, may prevent mass shootings or other gun violence including suicide. The Report includes a detailed discussion of ~~Extreme Risk Protection Orders~~ ERPOs (which allow families and law enforcement, and in some instances school officials, to temporarily restrict individuals’ access to guns if they present a higher risk of harming themselves or others) and recommends the enactment of a federal law providing support for such orders, as well as the adoption or expansion of such laws at the state level. Although federal law identifies persons who are ineligible to purchase or possess firearms because of certain mental health issues, the Report recommends that the categories of individuals who are prohibited from purchasing or possessing firearms due to mental health concerns be expanded. The Report also urges that all disqualifying events for gun ownership and possession, including mental health issues, must be reported to NICS and state registries. NICS is the foundation of the system that enables a quick background check and determination of whether a prospective gun buyer is eligible to purchase a firearm. But the system is only as good as the records in it and is largely reliant on federal agencies, state and local courts, and law enforcement agencies to submit records, including mental health records, to NICS and to state registries. Improved reporting and background checks can be effective in keeping firearms out of the hands of people who should not have them, but more needs to be done at the federal and state levels. The Report includes a number of recommendations to address these issues, including that the federal government allocate

resources to assist and incentivize the states in providing essential information to NICS and all other relevant authorities.

### VIII. The Sale and Transfer of Guns, Accessories and Ammunition

In addition to banning assault-style weapons, bump stocks and high capacity magazines, the Task Force recommends that “ghost guns”<sup>8</sup> be prohibited, and that all firearms be manufactured by licensed individuals, bear serial numbers, and be detectable by standard screening systems with an image that displays its shape. We recommend universal background checks for all weapons sales, by licensed dealers as well as private individuals, in person and online, and that the sale of unfinished frames and receivers require background checks as well. The time in which to complete a background check should be extended. The current 3-day federally required turnaround time can be insufficient, especially for locating disqualifying information from state sources. A tragic example of this 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 due to a prior arrest record. Because his background check was not completed within the three-day period, however, the sale went through.<sup>9</sup> New York has expanded the time frame in which to complete a background check to 30 days. There is pending federal legislation that would allow additional time as well.<sup>10</sup> It passed in the House on February 28, 2019, but has not been acted upon by the Senate. The categories of people prohibited from purchasing a firearm should be expanded to include individuals convicted of violent misdemeanors in addition to domestic violence offenses, such as hate crimes, stalking and lower level illegal gun possession. We strongly urge that anyone purchasing or possessing any type of firearm, ~~as well as including~~ a rifle or shotgun, be required to obtain a license or permit beforehand, and that a course be required on the safe operation and storage of the weapon. This would ensure that background checks are performed, and that weapons do not get into the hands of disqualified individuals. All states require that a person be licensed and pass a test before they can drive a car. A gun is as deadly a weapon as a car when not operated and maintained safely. Additionally, the right to possess a weapon carries with it responsibilities, including storing it in a safe manner so that it does not get into the wrong hands and children do not have access to it. The Task force recommends that laws be enacted, to the extent they do not already exist, to impose criminal penalties for the failure to promptly report lost or stolen guns, and the failure to securely and safely store them when not in the owner’s possession.

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<sup>8</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.

<sup>9</sup> See Carrie Johnson, *FBI Says Background Check Error Let Charleston Shooting Suspect Buy Gun*, NPR (July 10, 2015), <https://www.npr.org/sections/thetwo-way/2015/07/10/421789047/fbi-says-background-check-error-let-charleston-shooting-suspect-buy-gun> (last visited Oct. 9, 2020).

<sup>10</sup> The Enhanced Background Checks Act of 2019, H.R. 1112, extends the window for background checks to 10 days.

## REPORT SECTION ONE

### Update on *District Of Columbia v. Heller* and The Current State of the Law

This Section provides a summary of the status of Second Amendment jurisprudence ~~(as of February 7, 2020)~~ in light of the United States Supreme Court decisions in *District of Columbia v. Heller* and *McDonald v. City of Chicago*. This summary relies heavily on a document prepared by the Giffords Law Center,<sup>11</sup> which summarizes the post-*Heller* litigation, and a recent law review article by Eric Ruben and Joseph Blocher, which analyzes Second Amendment litigation after *Heller* through February 2016.<sup>12</sup>

#### I. Overview

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court, in a 5-4 decision, “held for the first time that the Second Amendment protects an individual right of law-abiding citizens to possess an operable handgun in the home for self-defense. . . . [T]he Court struck down Washington D.C. laws prohibiting handgun possession and requiring that firearms in the home be stored unloaded and disassembled or locked at all times.”<sup>13</sup>

In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held in another 5-4 ruling that this Second Amendment right is incorporated in the Due Process Clause of the Fourteenth Amendment, and therefore binds the States as well as the Federal Government. “The Court invalidated a Chicago law entirely prohibiting the possession of handguns.”<sup>14</sup>

In *Heller*, the Court cautioned that the Second Amendment right it recognized is “not unlimited,” and does not confer “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Heller*, 554 U.S. at 626. The Court noted that “prohibitions on carrying concealed weapons were lawful under the Second Amendment” and identified a non-exhaustive list of “presumptively lawful regulatory measures,” including: “prohibitions on the possession of firearms by felons and the mentally ill,” laws forbidding guns in “sensitive places” like schools and government buildings, and “conditions and qualifications” on the commercial sale of firearms. *Id.* at 626-27, 627 n. 26. “The Court also noted that laws banning ‘dangerous and unusual weapons,’ such as M-16 rifles and other firearms that are most useful in military service, are consistent with the Second Amendment. *Id.* at 627 (internal quotation marks omitted). Finally, the Court declared that its analysis should not be read to suggest ‘the invalidity of laws regulating the storage of firearms to prevent accidents.’ *Id.* at 632.”<sup>15</sup>

<sup>11</sup> See generally Giffords L. Ctr., *Post-Heller Litigation Summary* (Jan. 2020), <https://lawcenter.giffords.org/wp-content/uploads/2020/02/PHLS-February-2020-Update.pdf>. Since updated on August 25, 2020, <https://giffords.org/lawcenter/gun-laws/litigation/post-heller-litigation-summary/#:~:text=In%20a%205%E2%80%934%20ruling,the%20home%20for%20self%2Ddefense> (last visited Oct. 9, 2020).

<sup>12</sup> See generally Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433 (2018).

<sup>13</sup> *Supra* note [11](#).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

Because *Heller* suggested that certain “presumptively lawful” regulations fall outside the scope of the Second Amendment, most courts have no difficulty upholding these types of laws. More broadly, however, “Second Amendment challenges as a whole . . . have been overwhelmingly rejected.”<sup>16</sup> For example, in October 2018 the Giffords Law Center reported that in more than 1,300 state and federal court decisions it tracked, “courts have rejected the Second Amendment challenges 93% of the time,” upholding many gun laws, including the following:

- Requiring “good cause” for the issuance of a permit to carry a concealed firearm;
- Prohibiting the possession of machine guns, assault weapons, and large capacity ammunition magazines;
- Requiring that firearms be stored in a locked container or other secure manner when not in the possession of the owner;
- Forbidding gun possession by dangerous persons including those convicted of felonies and domestic violence crimes, and those who have been involuntarily committed to mental institutions;
- Requiring the registration of all firearms;
- Forbidding persons under 21 years old from possessing firearms or carrying guns in public;
- Regulating firing ranges, including zoning, construction, and operation requirements;
- Requiring that handguns sold within a state meet certain safety requirements;
- Imposing fees on the commercial sale of handguns to fund firearm safety regulations; and
- Requiring a waiting period before completing a firearm sale.<sup>17</sup>

## II. Types of Gun Safety Laws

### A. Guns in Public or Public Carry Laws

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<sup>16</sup> Ruben & Blocher, *supra* note 12, at 1446. This study analyzed 1,153 Second Amendment challenges through February 2016 and found only 108 that were not rejected, “an overall success rate of 9 percent.” *Id.* at 1472.

<sup>17</sup> Giffords L. Ctr., *Post-Heller Litigation Summary* (Oct. 2018), <https://giffords.org/lawcenter/gun-laws/litigation/post-heller-litigation-summary/> (last visited Oct. 10, 2020).

*Heller* did not reach this issue, but challenges to public carry restrictions have had the highest success rate, particularly when the challenged law or regulation attempts to completely ban public carry. Such bans have been struck down in Illinois and in Washington, D.C.<sup>18</sup> Nevertheless, even where the courts have held that the Second Amendment protects some right to carry a gun in public, they have also expressly recognized the government's broad authority to regulate guns in public, including licensing, residency, and age requirements.<sup>19</sup>

#### B. Possession of Firearms by Criminals or Other Dangerous People

Regulations that prohibit certain categories of people from possessing firearms are the most commonly challenged. These challenges are also among the least likely to succeed, due in large part to the number of them involving felons in possession of firearms.<sup>20</sup> However, some litigants challenging laws that impose lifetime firearms prohibitions have had measured success in convincing the courts that their personal circumstances potentially warrant lifting such prohibitions.<sup>21</sup>

#### C. Unusually Dangerous Weapons and Ammunition

In *Heller*, the Supreme Court recognized that one limitation on the Second Amendment is the prohibition on carrying “dangerous and unusual weapons.” *Heller*, 554 U.S. at 627 (citation omitted). The Court also noted that it does not violate the Second Amendment to ban “weapons that are most useful in military service,” such as “M-16 rifles and the like.” *Id.* The court explained that its prior decision *United States v. Miller*, 307 U.S. 174 (1939), provided that the weapons protected by the Second Amendment are those “in common use at the time.” *Id.* (quoting *Miller*, 307 U.S. at 179). In addition, the Court observed that protected arms are those “typically possessed by law-abiding citizens for lawful purposes.” *Id.* at 625.

But a finding that a particular weapon is in “common use” or “typically possessed” does not guarantee its protection under the Second Amendment. Relying on *Heller*'s recognition that “M-16 rifles and the like” may be banned, courts have upheld restrictions on assault weapons and large-capacity magazines. Courts have also upheld bans or restrictions on the sale or manufacture of short-barreled shotguns, machine guns, silencers, grenades, pipe bombs, and mines, as well as some types of ammunition.<sup>22</sup>

#### D. Commercial Sale of Firearms

In *Heller*, the Supreme Court stated that “laws imposing conditions and qualifications on the commercial sale of arms” are presumptively lawful and do not run afoul of the Second Amendment. *Heller*, 554 U.S. at 626-27. Accordingly, laws regulating the sales of firearms and accessories are routinely upheld, including prohibiting the sale of weapons and ammunition to people under the age of 21, requiring waiting periods prior to the transfer of firearms, requiring

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<sup>18</sup> See Ruben & Blocher, *supra* note 12, at 1484-85.

<sup>19</sup> See Giffords L. Ctr., *supra* note 11, at 9-10.

<sup>20</sup> See Ruben & Blocher, *supra* note 12, at 1481.

<sup>21</sup> See Giffords L. Ctr., *supra* note 11, at 19.

<sup>22</sup> See *id.*, at 14-16.

new handguns to meet safety requirements, zoning regulations, fees, and requiring dealers to be licensed.<sup>23</sup>

#### E. Firearms in Sensitive Places

Although courts usually agree that bans on firearm possession in or near schools and government property are constitutional, challenges to laws that prohibit possession of weapons, shooting ranges, or gun stores in specific locations have a better success rate than challenges to other types of regulations.<sup>24</sup>

#### F. Other – Including Registration, Transfer, and Safety of Firearms

Many courts have upheld laws requiring all firearms to be registered; requiring background checks; requiring individuals to be licensed to own a handgun; requiring fees for license or permit applications; requiring the safe storage of guns in the home or in vehicles; and prohibiting possession of firearms while intoxicated.<sup>25</sup>

### III. Second Amendment Challenges

A study conducted by Eric Ruben and Joseph Blocher, and summarized in the above-referenced Duke Law Journal article, identified certain characteristics of Second Amendment challenges and doctrinal trends. Not surprisingly, a significant proportion of Second Amendment litigation has occurred in geographic areas known to have stronger gun laws, e.g., Illinois, California, Massachusetts, and New Jersey.<sup>26</sup> Criminal cases accounted for almost 65 percent of the cases that Ruben and Blocher analyzed, but the success rate in criminal cases is less than half of that in civil cases, 6 percent versus 15 percent.<sup>27</sup>

Although Second Amendment challenges have largely been rejected post-*Heller*, they have “experienced a steadily increasing success rate, from 0 percent in the challenges brought after *Heller* in 2008, to 19 and 15 percent in 2014 and 2015, respectively.”<sup>28</sup> Of the 108 successful challenges analyzed by Ruben and Blocher, 70 were at the appellate level.<sup>29</sup> As would be expected, as-applied challenges were successful at a higher rate than facial challenges in Second Amendment litigation, at least in federal court.<sup>30</sup>

#### A. The Courts’ Reasoning in Second Amendment Cases

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<sup>23</sup> See Giffords L. Ctr., *supra* note 11, at 22-23.

<sup>24</sup> See Ruben & Blocher, *supra* note 12, at 1483.

<sup>25</sup> See Giffords L. Ctr., *supra* note 11, at 25-26.

<sup>26</sup> Ruben & Blocher, *supra* note 12, at 1475-77.

<sup>27</sup> *Id.* at 1478.

<sup>28</sup> *Id.* at 1486.

<sup>29</sup> *Id.* at 1497.

<sup>30</sup> *Id.* at 1499.

Generally, lower courts engage in a basic two-step inquiry when analyzing Second Amendment claims.<sup>31</sup> First, the courts ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment. If the court finds that the regulation does not impose such a burden, no further inquiry is needed and the challenge fails. If the court finds that a regulation indeed implicates conduct protected by the Second Amendment, the second step of the analysis is required, which is to determine and apply the appropriate level of scrutiny.<sup>32</sup>

In *Heller*, the Court stated that the “rational basis” test is not appropriate in the Second Amendment context. *Heller*, 554 U.S. at 628 n. 27. Accordingly, courts have uniformly rejected rational basis scrutiny.<sup>33</sup> Courts tend to agree that the appropriate level of scrutiny depends on the nature of the conduct being regulated and the degree to which the challenged law burdens Second Amendment rights. To this end, “the proper level of scrutiny is generally determined by looking at how severely the law in question burdens the ‘core’ Second Amendment right of self-defense in the home.”<sup>34</sup> In general, a consensus has emerged that intermediate scrutiny, which examines whether a law is reasonably related to an important or significant government interest, is appropriate in the majority of Second Amendment cases. Under this view, gun control measures that do not prevent law-abiding, responsible citizens from possessing an operable handgun in the home for self-defense are analyzed under intermediate scrutiny.<sup>35</sup>

An example of this approach is found in *New York State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015). In this case, firearms owners, sellers, and advocacy groups challenged the constitutionality of New York’s Secure Ammunition and Firearms Enforcement Act (“SAFE Act”)<sup>36</sup> and Connecticut’s “An Act Concerning Gun Violence Prevention and Children’s Safety.” At issue were provisions of both the New York and Connecticut laws prohibiting possession of semiautomatic assault weapons and large-capacity magazines, as well as New York’s law regulating load limits and Connecticut’s law banning the non-semiautomatic Remington 7615. On review, the Second Circuit adopted “a two-step analytical framework, determining first whether the regulated weapons fall within the protections of the Second Amendment and then deciding and applying the appropriate level of constitutional scrutiny.” *Id.* at 253.

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<sup>31</sup> In their analysis, however, Ruben and Blocher, found that only 41% of the challenges in their dataset explicitly involved the two-part test. *Id.* at 1490-91.

<sup>32</sup> See Giffords L. Ctr., *supra* note 11, at 3.

<sup>33</sup> *Id.* at 6.

<sup>34</sup> *Id.* at 3.

<sup>35</sup> See *id.* at 6-7.

<sup>36</sup> The New York Secure Ammunition and Firearms Enforcement Act, known as the SAFE Act, S.2230/A.2388, 2013-2014 Legis. Sess. (2013), was signed into law by Governor Cuomo on January 15, 2013. Appendix B includes a description of (1) amendments to the SAFE Act effective since the Task Force’s 2015 report, and (2) cases decided since the Task Force’s 2015 report addressing the SAFE Act involving issues not related to the *Heller* decision. For an excellent discussion of the background and provision of New York’s Safe Act, see 78 Albany Law Review 749, Robert J. Spitzer, *New York State and the New York State Safe Act: A Case Study in Strict Gun Laws*, (2015), [http://www.albanylawreview.org/Articles/Vol78\\_2/78.2.749%20Spitzer.pdf](http://www.albanylawreview.org/Articles/Vol78_2/78.2.749%20Spitzer.pdf) (last visited Oct. 9, 2020).

The court first determined that “[b]y their terms, the statutes at issue implicate[d] the core of the Second Amendment’s protections by extending into the home, ‘where the need for defense of self, family and property is most acute.’” *Id.* at 258 (quoting *Heller*, 554 U.S. at 628). However, because the regulated weapons were not handguns, “that ‘quintessential self-defense weapon,’” the laws did not implicate Second Amendment rights to the same extent as the laws at issue in *Heller*. *Id.* (quoting *Heller*, 554 U.S. at 629). Still, because the New York and Connecticut laws amounted to an absolute prohibition of a certain class of weapons, the laws operated as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for lawful purposes. *Id.* at 259. Nevertheless, the court concluded that intermediate, rather than strict, scrutiny was appropriate. *Id.* at 260. The key question for the court was whether the statutes at issue were substantially related to the achievement of an important governmental interest. *Id.* at 261. In the court’s view, there could be no argument that both states had “substantial, indeed compelling, governmental interests in public safety and crime prevention,” so the court believed its only role was to “assure ourselves that, in formulating their respective laws, New York and Connecticut have drawn reasonable inferences based on substantial evidence.” *Id.* at 261–62 (internal quotation marks omitted). To survive intermediate scrutiny, the “fit between the challenged regulation [and the government interest] need only be substantial, not perfect.” *Id.* at 261 (citation omitted). It was not necessary to ensure that the statute was “narrowly tailored” or the “least restrictive available means to serve the stated governmental interest.” *Id.* (citation omitted). The “predictive judgments of the legislature” were entitled to “substantial deference,” and as long as the defendants produced evidence that “fairly support[ed] their rationale, the laws will pass constitutional muster.” *Id.* (internal quotation marks omitted).

In this case, the court believed that both states had produced such evidence, finding that “semiautomatic assault weapons have been understood to pose unusual risks,” “tend to result in more numerous wounds, more serious wounds, and more victims,” “are disproportionately used in crime, and particularly in criminal mass shootings like the attack in Newtown,” and “are also disproportionately used to kill law enforcement officers.” *Id.* at 262. According to the court, it needed “merely to ensure that the challenged laws are substantially—even if not perfectly—related to the articulated governmental interest.” *Id.* at 263. The prohibition of semiautomatic assault weapons passed this test, and the same logic applied to the restrictions on large-capacity magazines. *Id.*

As for the seven-round load limit in New York’s SAFE Act, however, the court found that New York failed to present sufficient evidence that a seven-round load limit would best protect public safety or that “the mere existence of this load limit will convince any would-be malefactors to load magazines capable of holding ten rounds with only the permissible seven.” *Id.* at 264. On intermediate scrutiny review, the state cannot “get away with shoddy data or reasoning”; rather, “the defendants must show *reasonable* inferences based on *substantial* evidence that the statutes are substantially related to the governmental interest.” *Id.* (internal quotation marks omitted). The court also struck down Connecticut’s prohibition of the Remington Tactical 7615, a non-semiautomatic pump-action rifle. *Id.* at 269. It did so, however, because the state failed to present any argument at all regarding this weapon or others like it. *See id.* at 269, 258 n. 73.

In a more recent opinion, the First Circuit adopted the two-step approach to uphold provisions of the Massachusetts firearms licensing statute allowing Boston and Brookline to restrict licenses to carry firearms in public (the licenses at issue allowed the holders to carry firearms only in relation to certain specified activities or because the holder has good reason to fear injury, but denied them the right to carry firearms more generally). *See Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018).<sup>37</sup>

According to the First Circuit, the plaintiffs’ appeal hinged on two questions: Does the Second Amendment protect the right to carry a firearm outside the home for self-defense? And, if it does, may the government condition the exercise of that right on a showing that a citizen has a “good reason” for carrying a firearm outside the home?<sup>38</sup> *Id.* at 666. The term “firearm” in this case referred to a conventional handgun but not to assault weapons. *Id.* at 666-67. Plaintiffs contended that the right to carry firearms in public for self-defense lies at the core of the Second Amendment and, thus, admits of no regulation; and that the Boston and Brookline policies therefore fail under any level of scrutiny that might apply. *Id.* at 667.

The court disagreed with plaintiffs that the Second Amendment guarantees an unconditional right to carry firearms in public for self-defense: “*Heller* simply does not provide a categorical answer to whether the challenged policies violate the Constitution,” and neither does *Heller* “imperil every law regulating firearms.” *Id.* at 668 (citation omitted). Applying the first step of the two-step approach, however, the court concluded that *Heller* implied that the right to carry a firearm for self-defense guaranteed by the Second Amendment is not limited to the home. *Id.* at 670. Acknowledging that *Heller* does not “supply . . . a map to navigate the scope of the right of public carriage for self-defense,” the court proceeded on the assumption that the Boston and Brookline policies therefore burden the Second Amendment. *Id.*

Applying the next step of the two-step approach, the court rejected plaintiffs’ invitation to apply strict scrutiny: “Strict scrutiny does not automatically attach to every right enumerated in the Constitution.” *Id.* Moreover, “[e]ven though the Second Amendment right is fundamental, the plaintiffs have offered us no valid reason to treat it more deferentially than other important constitutional rights.” *Id.* Rather, making explicit what it had previously implied, the court held that “the core Second Amendment right is limited to self-defense in the home,” citing as support cases from the Second, Third, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits. *Id.* at 671. As the court explained:

The home is where families reside, where people keep their most valuable possessions, and where they are at their most vulnerable (especially while sleeping at night). Outside the home, society typically relies on police officers, security guards, and the watchful eyes of concerned citizens to mitigate threats. This same panoply of protections is much less effective inside the home. . . . Last—but surely

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<sup>37</sup> The district court in *Gould v. O’Leary*, 291 F. Supp. 3d 155, 174 (D. Mass. 2017), granted summary judgment for the defendants, Boston, Brookline, and the Commonwealth.

<sup>38</sup> Plaintiffs did not challenge the Massachusetts firearms licensing statute as a whole, nor did they challenge the Commonwealth’s requirement that an individual must have a license to carry firearms in public. *See Gould v. Morgan*, 907 F.3d 659, 666 (1st Cir. 2018).

not least—the availability of firearms inside the home implicates the safety only of those who live or visit there, not the general public.

*Id.* at 671-72.

The court reasoned that “[v]iewed against this backdrop, the right to self-defense—upon which the plaintiffs rely—is at its zenith inside the home. This right is plainly more circumscribed outside the home.” *Id.* at 672. Indeed, “[t]his sort of differentiation is not unique to Second Amendment rights,” the court observed. *Id.* “Many constitutional rights are virtually unfettered inside the home but become subject to reasonable regulation outside the home.” *Id.* Ultimately, citing its own precedent as well as decisions of its sister circuits, the court decided that intermediate scrutiny was the appropriate test in this case. *Id.* at 672-73.

Applying intermediate scrutiny, the court did not dispute “the obvious importance” of Massachusetts’ compelling governmental interests in both public safety and crime prevention. *Id.* at 673. The question reduced to whether the “good reason” requirement was substantially related to those interests. *Id.* In answering the question, the predictive judgments of the state legislature were entitled to substantial deference, although not “blind allegiance.” *Id.* at 673-74. Still, the legislature’s chosen means did not need to be narrowly tailored to achieve its ends; rather, the fit need only be substantial. *Id.* at 674. Here, the Boston and Brookline policies did not impose a total ban on the right to public carry of firearms. *Id.* Furthermore, the defendants “forged a substantial link between the restrictions imposed . . . and the indisputable governmental interests.” *Id.* There was evidence that Massachusetts consistently had one of the lowest rates of gun-related deaths in the nation, as well as several studies indicating that states with more restrictive licensing schemes for public carry experienced significantly lower rates of gun-related homicides and other violent crimes. *Id.* at 675.

Finally, the court acknowledged the “profusion of countervailing studies and articles” presented by plaintiffs, but concluded that in the “process of crafting sound policy, a legislature often must sift through competing strands of empirical support and make predictive judgments to reach its conclusions.” *Id.* at 675-76. “This is plainly an inexact science, and courts must defer to a legislature’s choices among reasonable alternatives.” *Id.* at 676. “[T]his case falls into an area in which it is the legislature’s prerogative—not ours,” the court concluded, “to weigh the evidence, choose among conflicting inferences, and make the necessary policy judgments.” *Id.* The court further reasoned:

It would be foolhardy—and wrong—to demand that the legislature support its policy choices with an impregnable wall of unanimous empirical studies. Instead, the court’s duty is simply “to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence.”

*Id.* (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (Kennedy, J.)).

Here, according to the court, the defendants adduced such evidence, and “the legislature was entitled to rely on it to guide its policy choices.” *Id.*

The plaintiffs filed a Petition for Writ of Certiorari in this matter (now captioned *Gould v. Lipson*) in April 2019, and the respondents' opposition brief and petitioner's reply brief was filed in May. The case was distributed for conference on May 21, 2019. The Supreme Court denied the petition for certiorari on June 15, 2020.<sup>39</sup>

In another recent opinion, the Third Circuit applied the two-step approach to conclude that a law limiting the amount of ammunition in a single firearm magazine to ten rounds does not unconstitutionally burden the Second Amendment right to self-defense in the home, upholding the district court's denial of the plaintiffs' motion for a preliminary injunction. See *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. of N.J.*, 910 F.3d 106 (3d Cir. 2018). After first determining that magazines are "arms" under the Second Amendment, the court applied the first step of the two-step approach to assume, without deciding, that large-capacity magazines ("LCMs") are typically possessed by law-abiding citizens for lawful purposes and that they are entitled to Second Amendment protection. *Id.* at 116-17. Addressing the level of scrutiny that must be applied, the court stated that the applicable level of scrutiny is dictated by whether the challenged regulation burdens the core Second Amendment right, and if that core right is severely burdened, strict scrutiny applies. *Id.* at 117. If not, intermediate scrutiny applies. *Id.*

The LCM law at issue here did not severely burden the core Second Amendment right to self-defense in the home for five reasons, according to the court. First, the law did not categorically ban a class of firearms. *Id.* at 117. Second, the law did not prohibit an entire class of arms that is overwhelmingly chosen by American society for self-defense in the home. *Id.* at 118. Third, a prohibition on LCMs does not effectively disarm individuals or substantially affect their ability to defend themselves. *Id.* Fourth, the law does not render the firearm at issue incapable of operating as intended. *Id.* And fifth, "it cannot be the case that possession of a firearm in the home for self-defense is a protected form of possession under all circumstances." *Id.* Indeed, "[b]y this rationale, any type of firearm possessed in the home would be protected merely because it could be used for self-defense." *Id.* Thus, the law did not severely burden, "and in fact respects, the core of the Second Amendment right." *Id.*; see also *id.* at 118 n. 21 (noting that no court has applied strict scrutiny to LCM bans).

Under intermediate scrutiny, the court found that New Jersey had "undoubtedly, a significant, substantial and important interest in protecting its citizens' safety," and that the LCM ban "reasonably fit" that interest. *Id.* at 119 (internal quotation marks omitted). There was evidence that LCMs are used in mass shootings and in the murders of police, and that LCMs allow for more shots to be fired and thus more casualties to occur when they are used. *Id.* In addition, an LCM ban would present opportunities for shooting victims to flee and bystanders to intervene because the shooter would have fewer bullets available and would need to either change weapons or reload to continue shooting, a view that was corroborated by additional evidence. *Id.* at 119-20. Finally, the law did not burden more conduct than reasonably necessary—it did not disarm the individual and it did not impose a limit on the number of firearms or magazines or amount of ammunition a person may lawfully possess. *Id.* at 122. Moreover, the record did not show that LCMs are well-suited or safe for self-defense. *Id.* For these reasons, the LCM ban survived intermediate scrutiny, and the court held that such laws do

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<sup>39</sup> See <https://www.supremecourt.gov/Search.aspx?FileName=/docket/docketfiles/html/public%5C18-1272.html> (last visited Oct. 9, 2020).

not violate the Second Amendment. *Id.* at 122-23. The plaintiffs petitioned for certiorari. The case (now captioned *Rogers v. Grewal*) ~~is fully briefed and~~ was distributed for conference on May 7, 2019. The Supreme Court denied the petition for certiorari on June 15, 2020, the same day it denied the petition for certiorari in *Gould v. Lipson*.<sup>40</sup>

B. The Supreme Court Has Repeatedly Denied Certiorari in Second Amendment Cases, But Granted Certiorari in *New York State Rifle & Pistol Ass'n Inc.*

Since *Heller*, the Supreme Court has denied certiorari in at least 150 Second Amendment cases.<sup>41</sup> The Court has heard only two such cases: *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (per curiam) and *New York State Rifle & Pistol Ass'n Inc. v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280). In *Caetano*, Massachusetts sought to prohibit the private possession of stun guns. The Court did not rule that stun guns are protected by the Second Amendment, but vacated and remanded the Massachusetts Supreme Judicial Court's decision upholding the constitutionality of the state's stun gun ban. *Caetano*, 136 S. Ct. at 1027-28.<sup>42</sup> Massachusetts later dropped its prosecution, so the case did not continue after remand.<sup>43</sup> In *New York State Rifle & Pistol Ass'n Inc. v. City of New York*, the petitioners challenged the New York City rule prohibiting gun owners with premises licenses—licenses enabling residents to keep handguns in their homes—from transporting firearms outside of the city. *See* 883 F.3d 45 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (U.S. Jan. 22, 2019) (No. 18-280). After the Court granted certiorari, and before oral argument, the City modified the challenged regulation to allow premises license holders to transport their handguns outside of city limits, and amended its handgun licensing statute to require localities to permit such license holders to engage in such transport. The City subsequently argued that these changes rendered the case moot. *See* Respondents' Suggestion of Mootness at 1, *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525 (2020) (No. 18-280). The petitioners, however, argued that the case still presented a live controversy, claiming that, among other things, the current version of the rule prohibited gun owners from stopping within city bounds, with their firearms, on their way out of the city. Brief for Petitioners at 2, 6-11, *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525 (2020) (No. 18-280). At oral argument, a few of the Justices, including Justices Kagan and Sotomayor, expressed skepticism about this argument, noting that the petitioners have already obtained the relief that they originally sought. *See* Transcript of Oral Argument at 5, 8, *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525 (2020) (No. 18-280). The Court ultimately dismissed the case in a *per curiam* decision as being moot.<sup>44</sup>

As noted above and below, additional Second Amendment cases may be poised for Supreme Court review, and there is an emerging view in Second Amendment jurisprudence that the Court's disinclination to expand its decision in *Heller* has relegated gun ownership rights to "second-class" status. A dissenting opinion in the Third Circuit case discussed above is a recent example of this view: "The Second Amendment is an equal part of the Bill of Rights," the

<sup>40</sup> *See Rogers v. Grewal*, 140 S. Ct. 1865 (2020).

<sup>41</sup> *See Giffords L. Ctr.*, *supra* note 11, at 28-29.

<sup>42</sup> In a concurring opinion, however, Justices Alito and Thomas concluded that "Massachusetts' categorical ban of such weapons . . . violates the Second Amendment." *Caetano*, 136 S. Ct. at 1033.

<sup>43</sup> Earlier this year, however, the Massachusetts Supreme Judicial Court struck down the stun gun statute as facially invalid in *Ramirez v. Commonwealth*, 479 Mass. 331 (2018).

<sup>44</sup> *See N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525 (2020) (per curiam).

circuit judge wrote. *Ass'n of N.J. Rifle & Pistol Clubs, Inc.*, 910 F.3d at 126 (Bibas, J., dissenting). “We must treat the right to keep and bear arms like other enumerated rights, as the Supreme Court insisted in *Heller*. We may not water it down and balance it away based on our own sense of wise policy.” *Id.*

Under this view, strict scrutiny should be applied to any law that burdens the core Second Amendment right of self-defense in the home. *See id.* at 127. This core Second Amendment right is no different than core First Amendment rights, and it is entitled to the same level of scrutiny. *See id.* “How much the law impairs the core or how many people use the core right that way does not affect the tier of scrutiny.” *Id.* at 128. “So,” according to the dissent, “like any other law that burdens a constitutional right’s core, this [LCM ban] warrants strict scrutiny.” *Id.*

The dissent accuses the majority of taking a forbidden balancing approach, rejected by *Heller*. *See id.* at 128-29. “Deciding the severity of the burden before picking a tier of scrutiny is deciding the merits first,” which is backwards and “upends *Heller*’s careful approach.” *Id.* at 129.<sup>45</sup> According to the dissent:

The Supreme Court insisted that the Second Amendment has already made the basic policy choice for us. By enacting it, the Framers decided that the right to keep and bear arms is “really worth insisting upon.” So the Court needed no data on how many people wield handguns defensively. It did not evaluate alternatives. It was enough that banning handguns impaired self-defense in the home.

*Id.* (internal citations omitted).

The dissent finally concluded that, even under intermediate scrutiny, the LCM ban fails, claiming that the majority “takes a record on which the District Court did not rely and construes everything in favor of the government, effectively flipping the burden onto the challengers.” *Id.* at 130. The dissent agrees that New Jersey has a compelling interest in reducing the harm from mass shootings. *Id.* at 131. Indeed, “[n]o one disputes that.” *Id.* But the dissent simply rejects the evidence cited by the majority, claiming that not even the District Court relied on the evidence and concluding that there was no evidence relied on by the District Court “that specifically links large magazines to mass-shooting deaths.” *Id.* at 131-32. In sum, according to the dissent, the government must prove that the LCM ban will advance its interests and is tailored to do so, and they should be required to introduce “real studies of any causal evidence that large-magazine limits prevent harm from mass shootings or gun violence in general.” On this point, the majority commented on the dissent’s insistence “on a particular type of evidence, namely empirical studies demonstrating a causal link between the LCM ban and a reduction in mass shooting deaths.” *Id.* at 120 n. 24. “This is not required,” the court wrote. *Id.* “To take the dissent’s suggestion concerning the need for empirical studies to its logical conclusion, the State would have to wait for studies analyzing a statistically significant number of active and mass shooting incidents before taking action to protect the public. The law does not impose such a stringent requirement.” *Id.* at 122.

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<sup>45</sup> The majority notes that its “dissenting colleague seems to misunderstand the analytical approach that we have adopted and which is consistent with our precedent. The dissent suggests that we engage in interest-balancing. Our analysis demonstrates that we do not.” *Ass'n of N.J. Rifle & Pistol Clubs, Inc.*, 910 F.3d at 119 n. 22.

IV. Recent Lower Court Cases

A. Firearms Cases

*Heller* has been cited in almost 2,000 cases in the ten years since it was handed down, according to Westlaw. In 2018 alone, it was cited in over 170 cases. The following summarizes some of the 2018-2020 cases in which *Heller* was cited in greater depth.

| CASE   | CLAIMS/ISSUE(S)/<br>PROCEDURAL HISTORY   | OUTCOME  |
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| <p><i>Holloway v. Attorney Gen. United States</i>, 948 F.3d 164 (3d Cir. 2020)</p> | <p>A Pennsylvania resident convicted of a second DUI at the highest blood alcohol content, a first-degree misdemeanor with a maximum penalty of five years' imprisonment, claimed that the prohibition on possessing a firearm under 18 U.S.C. § 922(g)(1) violated his Second Amendment rights. The district court held that his DUI offense was a "non-serious crime" that was not a historical basis for disarmament and that the government failed to show that disarmament of individuals like him would promote public safety, and permanently enjoined the government from applying § 922(g)(1) to him.</p> | <p>Reversed and remanded. The court first determined that the application of § 922(g)(1) was presumptively lawful under <i>Heller's</i> affirmance of the "longstanding prohibitions on possession of firearms by felons," because the appellee's DUI misdemeanor conviction carried a maximum penalty of five years and was thus a disqualifying felony. Turning to the issue of whether the DUI offense was a "serious crime" sufficient to strip the appellee of his Second Amendment rights under Third Circuit precedent, the court considered the high potential for harm posed by drunk driving, as recognized by Supreme Court cases, federal legislation requiring states to implement highway safety programs to reduce injuries and deaths caused by drunk driving, executive-branch rules conditioning state funding on impaired driving countermeasures, and the state's decision to impose a mandatory minimum jail term and a higher maximum penalty of five years' imprisonment. The court concluded that the appellee fell within the class of "persons historically excluded from Second Amendment protections."</p> |
| <p><i>Culp v. Raoul</i>, 921 F.3d 646 (7th Cir. 2019)</p>                          | <p>Out-of-state residents claimed that Illinois' Firearm Concealed Carry Act, which allows the state to issue concealed-carry licenses only to residents who pass criminal and mental health background checks and monitoring, and</p>   | <p>The court upheld the law. As it reasoned, <i>Heller</i> emphasized that the Second Amendment right was not unlimited and recognized the "propriety of the longstanding prohibitions on the possession of firearms by felons and the mentally ill." The court found that the state's interest in ensuring public safety justifies prohibitions on the possession of firearms by individuals with felony</p>  |

| CASE  | CLAIMS/ISSUE(S)/<br>PROCEDURAL HISTORY   | OUTCOME   |
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|   | <p>nonresidents from states with “substantially similar” requirements, violates the Second Amendment. The district court granted summary judgment to the state, underscoring that the state has a substantial interest in restricting such licenses to those individuals whose qualifications can be verified and monitored.</p>   | <p>criminal records and mental illness. The court also rejected the plaintiffs’ claims that the “substantial-similarity” requirement violates the Second Amendment, noting that the licensing standards for residents and nonresidents were identical, and that the requirement stems from the information deficit the states faces in vetting and monitoring out-of-state residents. As the court held, the state demonstrated that the requirement directly relates to its “weighty interest” in maintaining public safety by preventing individuals with mental illness and felony criminal records from carrying firearms in public.</p>  |
| <p><i>Kanter v. Barr</i>, 919 F.3d 437 (7th Cir. 2019)</p>      | <p>The plaintiff, who was convicted of a nonviolent felony, was barred from possessing a firearm under federal and Wisconsin law. He challenged those statutes under the Second Amendment, as applied to nonviolent offenders. The district court granted the governments’ motions to dismiss, holding that applying the federal and Wisconsin felon dispossession laws to the plaintiff is substantially related to the government’s important interest in preventing gun violence.</p> | <p>Affirmed. Although <i>Heller</i> and historical evidence did not address whether nonviolent felons as a class historically enjoyed Second Amendment rights, the court noted that <i>Heller</i> had recognized felon disarmament laws as “presumptively lawful.” The court applied intermediate scrutiny and found that the government met its burden under that standard. The government showed that it had an interest in preventing gun violence by keeping firearms from certain individuals such as convicted felons, who are likely to misuse them, and presented statistical evidence showing that nonviolent offenders are more likely to commit violent crimes in the future. As the court determined, prohibiting even nonviolent felons from possessing firearms is substantially related to the state’s interest in ensuring public safety.</p> |
| <p><i>Medina v. Whitaker</i>, 913 F.3d 152 (D.C. Cir. 2019)</p> | <p>An individual convicted of felony mortgage fraud 27 years ago brought an as-applied challenge to 18 U.S.C. § 922(g)(1), which prohibits anyone convicted of a crime punishable by imprisonment for a term exceeding one year from</p>   | <p>Affirmed. In light of <i>Heller</i>’s statement that felon firearm prohibitions are “longstanding” and “presumptively lawful,” the court rejected the argument that non-violent felons have a right to bear arms under the Second Amendment. The court noted <i>Heller</i>’s assertion that the Second Amendment protects the right of “law-abiding, responsible citizens to use arms in defense of hearth and home”—</p>  |

| CASE  | CLAIMS/ISSUE(S)/<br>PROCEDURAL HISTORY   | OUTCOME  |
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|   | <p>owning firearms for life. The district court dismissed the complaint, holding that felons are not protected by the Second Amendment, and, even if they were, the law met intermediate scrutiny.</p>   | <p>a category excluding both violent and nonviolent felons. Medina’s as-applied challenge failed because he could not show that his conviction for felony fraud was distinguishable from other convictions encompassed by § 922(g), given that felony fraud is a serious crime (<i>malum in se</i>), and that a few years after his conviction, he was convicted of three additional counts of misdemeanor fraud.</p>  |
| <p><i>Doe I v. Evanchick</i>, 355 F. Supp. 3d 197 (E.D. Pa. 2019)</p> | <p>Plaintiffs attempted to purchase firearms for self-defense in their homes, but were prohibited from doing so by Section 6105(c)(4) of the Pennsylvania Uniform Firearms Act (“PUFA”), which bans individuals who have been temporarily committed under the Pennsylvania Mental Health Procedures Act (“MPRA”) from possessing firearms. Plaintiffs brought a facial challenge to Section 6105(c)(4), claiming that it deprives them, and all other similarly-situated individuals committed under Section 302 of the MPRA (“section 302 committees”), of the right to bear arms without procedural due process.</p> | <p>The court granted the defendant’s motion for summary judgment. The court acknowledged that although <i>Heller</i> stated that a prohibition on the right to own firearms by the mentally ill is presumptively lawful, a temporary emergency commitment to a mental institution is not sufficient to consider an individual “mentally ill.” However, the court held that a section 302 committee is not entitled to additional pre-deprivation procedures before the state police enter his mental health record in state databases, which, in turn, prevents the committee from purchasing a firearm under section 6105(c)(4). The court found that the state’s interest in preventing someone who poses a “clear and present danger to himself” from owning or using firearms outweighs the need for a pre-deprivation hearing. The court also determined that the state’s post-deprivation procedures, which provides a committee with three ways to restore his right to bear arms—including a full evidentiary hearing—satisfied due process.</p> |
| <p><i>Miller v. Sessions</i>, 356 F. Supp. 3d 472 (E.D. Pa. 2019)</p> | <p>Plaintiff had a 20-year-old misdemeanor conviction for possessing and using documents issued by PennDOT that he knew were altered, and completed one year of</p>  | <p>The court granted the plaintiff’s motion for summary judgment, finding that this offense was not “serious” in light of the fact that it was a non-violent misdemeanor and the plaintiff’s punishment was one year of probation. As applied to the plaintiff, the statute did not survive intermediate scrutiny</p>  |

| CASE  | CLAIMS/ISSUE(S)/<br>PROCEDURAL HISTORY   | OUTCOME  |
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|   | <p>probation. He brought an as-applied challenge to 18 U.S.C. § 922(g)(1), which prohibits anyone convicted of a crime punishable by imprisonment for a term exceeding one year from owning firearms for life.</p>   | <p>because the government did not meet its burden of demonstrating a “substantial fit” between disarming the plaintiff and protecting the community from crime. Although circuit precedent did not require the government to show empirical evidence, the court concluded that there was no evidence showing that the plaintiff would be “dangerous to his community” if allowed to possess a firearm. The court granted plaintiff’s request for permanent injunctive relief barring the government from enforcing § 922(g)(1) against him.</p>  |
| <p><i>Harley v. Barr</i>, No. 18-cv-396, 2019 U.S. Dist. LEXIS 66056 (E.D. Va. Apr. 16, 2019)</p> | <p>Plaintiff, who was convicted of a domestic violence misdemeanor thirty years earlier, brought an as-applied challenge to 18 U.S.C. § 922(g)(9), arguing that the statute was unconstitutional as applied to him because of his law-abiding history and his public service. Section 922(g)(9) applies specifically to prior domestic abusers and was added to the statute in 1997 to address the large number of domestic abusers who are not charged with, or convicted of, felonies.</p> | <p>The court denied the plaintiff’s motion for summary judgment and granted the government’s cross-motion for summary judgment. The government showed that there was a reasonable fit between § 922(g)(9) and its “important interest in protecting individuals from gun violence perpetrated by domestic abusers.” The court rejected the plaintiff’s argument that the passage of time combined with demonstrated rehabilitation invalidated the statute as applied to him, citing other circuit decisions rejecting similar claims due to the high rates of recidivism amongst domestic abusers. As the court noted, “Congress, in passing § 922(g)(9), created a regulation that has a reasonable relationship to its desired objective, <i>i.e.</i> eliminating domestic gun violence,” and “it is improper to create a judicial exception that has no basis in the text of the statute.”</p> |
| <p><i>Williams v. Barr</i>, 379 F. Supp. 3d 360(E.D. Pa. 2019)</p>                                | <p>Plaintiff was convicted of a DUI at the highest rate of intoxication with a prior offense and sentenced to house arrest, due to a medical condition. He had previously been arrested for another DUI, which was ultimately dismissed. He brought an as-applied</p>  | <p>The court denied plaintiff’s motion for summary judgment and granted summary judgment for the government. First, the court considered whether the plaintiff’s first-degree misdemeanor was sufficiently “serious,” and concluded that it was not, because it was a non-violent misdemeanor and there was no “clear consensus” among the states regarding its seriousness. However, the court held that the government met its burden of intermediate</p>  |

| CASE   | CLAIMS/ISSUE(S)/<br>PROCEDURAL HISTORY  | OUTCOME  |
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|  | challenge to 18 U.S.C. § 922(g)(1), which prohibits the possession of firearms by individuals convicted of a crime punishable by a term of imprisonment exceeding one year.   | scrutiny, taking into account an expert report submitted by the government showing that DUI offenders are 5.6 times more likely to commit a violent or firearms-related offense than someone with no criminal history. In light of this study, the court found a reasonable fit between the plaintiff's disarmament and the "important government interest of preventing armed mayhem."  |
| <i>Baumiller v. Sessions</i> , 371 F. Supp. 3d 224(W.D. Pa. 2019)                                    | Plaintiff was convicted of theft by unlawful taking in Pennsylvania, a first-degree misdemeanor with a maximum sentence of five years of prison time, and was sentenced to one year of probation. He brought an as-applied challenge to a statute barring him from owning a gun for the rest of his life.   | The court granted summary judgment for the government, finding that the plaintiff's crime was "serious." Although Pennsylvania classified the plaintiff's crime as a misdemeanor and it did not involve the use of force, the court considered the fact that the maximum penalty was five years and the vast majority of states classified the plaintiff's offense as a felony. In light of this finding, the court rejected the plaintiff's challenge without considering whether the statute met intermediate scrutiny.  |
| <i>Laudenslager v. Sessions</i> , No. 17-00330, 2019 U.S. Dist. LEXIS 23213 (M.D. Pa. Feb. 13, 2019) | Plaintiff was charged with a misdemeanor (knowing receipt of stolen property) which was punishable by up to five years of imprisonment, and he was sentenced to three years' probation. He sought a judgment restoring his right to bear arms and declaring that his conviction fell outside of the scope of a statute banning firearm possession by misdemeanants who have committed crimes punishable by more than two years' imprisonment, and brought an as-applied challenge to the statute. | The court denied the plaintiff's motion for summary judgment. Under Third Circuit precedent, misdemeanors subject to a maximum penalty of more than two years' imprisonment are subject to the statutory prohibition on firearm possession, even if the conviction does not include any prison term. The court also rejected the plaintiff's as-applied challenge, because most states classify the plaintiff's crime as a felony or as a misdemeanor punishable by more than two years' imprisonment, which supported the conclusion that it was a crime sufficiently "serious" to trigger disarmament. |
| <i>Rocky Mountain Gun Owners v.</i>  | Gun right advocates filed suit against the state,   | Affirmed. The court held that the LCM restrictions are a reasonable exercise of the  |

| CASE   | CLAIMS/ISSUE(S)/<br>PROCEDURAL HISTORY   | OUTCOME  |
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| <p><i>Hickenlooper</i>, No. 17CA1502, 2018 WL 5074555 (Colo. Ct. App. Oct. 18, 2018)</p>   | <p>alleging that statutes prospectively prohibiting the sale, transfer, or possession of large-capacity magazines (“LCMs”) violated the right to bear arms clause of the Colorado Constitution. (Plaintiffs did not allege that the statutes violated their rights under the Second Amendment to the U.S. Constitution.) The trial court upheld the constitutionality of the statutes. Gun rights advocates appealed.</p>                              | <p>state’s police power. The trial court’s finding that the legislative purpose in enacting the statutes was to reduce the number of people who are killed or shot in mass shootings was supported by the record. There was evidence that LCMs were used close to 50% of the time in mass shootings versus only 20% of other crimes; that the use of LCMs increases the fatality rate per mass shooting by 40% and increases the number of people who are shot by a factor of roughly two to three; that the use of LCMs results in victims being struck by more bullets, which causes a greater chance of death; that small-capacity magazines cause a shooter to pause in firing, which affords victims more opportunity for escape; and that states without LCM bans experienced three times as many mass shootings as states with a ban.</p> |
| <p><i>Congden v. Michigan Dep’t of Health &amp; Human Servs.</i>, No. 17-cv-13515, 2018 WL 2431605 (E.D. Mich. May 29, 2018)</p> | <p>Plaintiff posted a picture of himself to his Facebook page wearing a Santa Claus outfit and carrying a legally purchased semiautomatic rifle. He was constructively discharged from his employment as an officer with Child Protective Services after the unsatisfactory completion of his one-year probationary period. He filed a wrongful termination suit against the defendants alleging Second Amendment retaliation, among other claims.</p> | <p>The defendants were entitled to qualified immunity on the Second Amendment claim because the officials’ acts did not violate the plaintiff’s clearly established constitutional right. Plaintiff contended <i>Heller</i> clearly established that the Second Amendment protects the right to own and possess a firearm inside one’s own home. But the court held that “<i>Heller</i> does not stand for such a broad proposition.” “[T]he Court in <i>Heller</i> seemed to at least acknowledge that there is no Second Amendment right to carry a semiautomatic rifle like the one depicted in [plaintiff’s] Facebook post.”</p>   |

| CASE   | CLAIMS/ISSUE(S)/<br>PROCEDURAL HISTORY   | OUTCOME  |
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| <i>Libertarian Party of Erie Cty. v. Cuomo</i> , 300 F. Supp. 3d 424 (W.D.N.Y. 2018)   | New York State’s licensing scheme, which requires applicants to be over 21 years old, have “good moral character,” have no history of crime or mental illness, and demonstrate no “good cause” to deny the license, violates Second and Fourteenth Amendments.   | Licensing scheme upheld. New York State’s firearms licensing laws are substantially related to the state’s governmental interest because they are designed to ensure that “only law-abiding, responsible citizens are allowed to possess” a firearm, and the laws “promote[] public safety and prevent gun violence” by preventing classes of individuals without the requisite character and qualities from possessing firearms. An appeal to the Second Circuit has been filed. Briefs were filed and oral argument took place on February 20, 2019; a decision is pending.  |
| <i>Mance v. Sessions</i> , 896 F.3d 699 (5th Cir. 2018)  | Handgun dealers and purchasers and gun rights organization challenged the constitutionality of the federal interstate handgun transfer ban, which prohibits a federally-licensed firearms dealer (“FFL”) from transferring handguns to individuals who do not reside in the state in which dealer’s place of business is located. District court granted plaintiffs’ motion for summary judgment and issued an injunction. | Reversed and injunction vacated. The in-state sales requirement is not unconstitutional either facially or as applied to plaintiffs. The requirement that a handgun purchased from an FFL outside of the state be transferred to an FFL located in the state in which purchaser lives is narrowly tailored to assure that an FFL who actually delivers a handgun to a buyer can reasonably be expected to know and comply with the laws of the state in which the delivery occurs, and it is the least restrictive means of assuring that the purchasers are authorized under their home state’s laws to purchase and possess the particular firearms they seek to buy. In addition, the in-state sales requirement does not violate the Due Process Clause because it does not favor or disfavor residents of any particular state and it imposes the same restrictions on sellers and purchasers of firearms in each state. A petition for writ of certiorari is pending and was distributed for conference on April 8, 2019 |
| <i>N.Y. State Rifle &amp; Pistol Ass’n v. City of N.Y.</i> , 883 F.3d 45 (2d Cir. 2018), <i>cert. granted</i> , ___ U.S. ___ (2020). | Firearm owners’ association and individual handgun owners challenged city’s licensing scheme that limited the circumstances under which an individual with a   | Licensing scheme upheld. The court found the rule to be substantially related to an important governmental interest of protecting public safety and preventing crime. “There is a longstanding tradition of states regulating firearm possession and use in public because of the dangers posed to public safety.” A   |

| CASE  | CLAIMS/ISSUE(S)/<br>PROCEDURAL HISTORY   | OUTCOME   |
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|   | “premises license” for a handgun could remove the gun from the premises specified.   | petition for writ of certiorari was filed on September 6, 2018 and granted on Jan. 22, 2019. <i>See supra</i> at pp. 22-23 for a summary of the briefing and oral argument.   |
| <i>Pena v. Lindley</i> , 898 F.3d 969 (9th Cir. 2018)         | Handgun purchasers brought an action challenging the constitutionality of provisions of California’s Unsafe Handgun Act (“UHA”) regarding required features for handguns. District court granted summary judgment for defendant. | Affirmed. The UHA requires new models of handguns to have a chamber load indicator and a magazine detachment mechanism, both designed to limit accidental firearm discharges. A third provision, designed to aid law enforcement, requires new handguns to stamp microscopically the handgun’s make, model, and serial number onto each fired shell casing. The Court of Appeals rejected plaintiffs’ claims that the laws were unconstitutional, finding that the law only regulates commercial sales, not possession, and does so in a way that does not impose a substantial burden on purchasers. The court rejected plaintiffs’ claims that they have a constitutional right to purchase a particular handgun. The court also found no violations of the Equal Protection Clause. A Petition for Writ of Certiorari was filed on December 28, 2018. A response was filed on February 4, 2019, and the case was distributed for conference on March 20, 2019. |
| <i>United States v. Jimenez</i> , 895 F.3d 228 (2d Cir. 2018) | Defendant was charged with possession of ammunition after having been dishonorably discharged from the military. The district court denied defendant’s motion to dismiss, and he appealed.                                       | Affirmed. <i>Heller</i> protects the rights of “law-abiding, responsible citizens to use arms in defense of hearth and home.” Criminalizing possession of a bullet after being dishonorably discharged for felony-equivalent conduct was substantially related to achieving an important government interest of regulating firearms. The defendant’s conviction, therefore, did not violate the Second Amendment.   |
| <i>Glass v. Paxton</i> , 900 F.3d 233 (5th Cir. 2018)         | State university professor brought an action alleging that a Texas law permitting concealed carry of handguns on campus and a corresponding university policy prohibiting  | Affirmed. Professors lacked standing to bring First Amendment claim because she did not allege that harm from concealed-carrying students was certainly impending. Rather, she alleged only a probability that concealed-carry license holders would intimidate professors and students in the classroom. The   |

| CASE  | CLAIMS/ISSUE(S)/<br>PROCEDURAL HISTORY  | OUTCOME  |
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|   | <p>professors from banning such weapons in their classrooms violated her rights under the First Amendment, Second Amendment, and Equal Protection Clause. The district court dismissed the Complaint.</p>   | <p>court also rejected Plaintiff’s argument that the campus concealed-carry law violated the Second Amendment because firearm usage in her presence was not sufficiently “well regulated.” According to the court, <i>Heller</i> foreclosed that argument by stating “[t]he Amendment’s first clause does not limit or expand the scope of the operative clause.” Finally, Plaintiff’s equal protection claim failed because Plaintiff did not “negative every conceivable basis which might support” the campus concealed-carry law.</p>  |
| <p><i>Stimmel v. Sessions</i>, 879 F.3d 198 (6th Cir. 2018)</p> | <p>Plaintiff, who had a misdemeanor domestic violence conviction, filed suit challenging a statutory firearm restriction under 18 U.S.C. § 922(g)(9) that denied him the opportunity to purchase a firearm based on his conviction. The district court granted the government’s motion to dismiss.</p>        | <p>Affirmed. Section 922(g)(9) did not violate the Second Amendment because the statute was reasonably related to an important government interest of preventing domestic gun violence. “All of our sister circuits that have considered Second Amendment challenges to § 922(g)(9) have unanimously upheld the restriction as constitutional.”</p>  |
| <p><i>Young v. Hawaii</i>, 896 F.3d 1044 (9th Cir. 2018)</p>    | <p>Applicant for a license to carry handgun brought a § 1983 action against county officials, alleging that the denial of his application violated the Second Amendment right to carry a loaded firearm in public for self-defense. The district court dismissed the action for failure to state a claim.</p> | <p>Reversed. Under Hawaii law, a license for open carry of a loaded handgun may be granted only “[w]here the urgency or the need has been sufficiently indicated” and the applicant “is engaged in the protection of life and property.” The Court of Appeals, in a 2-1 decision, concluded that, “[o]nce identified as an individual right focused on self-defense, the right to bear arms must guarantee some right to self-defense in public.” While finding that concealed carry of firearms categorically falls outside Second Amendment protection, the right to carry a firearm in public for self-defense is protected. Thus, the Hawaii statute’s limitations on the open carry of firearms violates the core of the Second Amendment and is void. This decision aligns with the majority opinion in <i>Wrenn v. District of Columbia</i>, 864 F.3d 650, 655 (D.C. Cir.</p> |

| CASE   | CLAIMS/ISSUE(S)/<br>PROCEDURAL HISTORY   | OUTCOME   |
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|  |  | 2017), which was the first to describe the right to carry firearms in public as part of the “core” of the Second Amendment. A strong dissent was rendered in <i>Young</i> , and rehearing en banc was granted in February 2019. The court stayed en banc proceedings pending the issuance of an opinion by the Supreme Court in <i>New York State Rifle &amp; Pistol Ass’n Inc. v. City of New York</i> . After the Supreme Court dismissed the case in a per curiam decision as being moot, <sup>46</sup> the en banc proceedings went forward. Oral argument occurred on September 24, 2020, and a decision is awaited.   |
| <i>United States v. Cox</i> , 906 F.3d 1170 (10th Cir. 2018) | After a jury trial, defendants appealed their convictions for violations of the National Firearms Act (“NFA”), alleging that the NFA is an invalid exercise of congressional power and a violation of the Second Amendment right to bear arms. Defendants were convicted of possessing an unregistered silencer, possessing an unregistered short-barreled rifle, and dealing in unregistered silencers. | Affirmed. The Tenth Circuit agreed with the government that the NFA is a valid exercise of Congress’ taxing power, rejecting the defendants’ argument that it was an invalid exercise of congressional power. On the Second Amendment claims, the court found that short-barreled rifles are dangerous and unusual and therefore possession of such firearms falls outside the Second Amendment. As for silencers, since they are not weapons in themselves, they are not “bearable arms” and therefore not protected by the Second Amendment. The NFA’s regulation of these activities, then, does not burden protected conduct. Because there was no Second Amendment violation, the court also rejected defendants’ argument that the NFA was a prohibited “general revenue tax on the exercise of a constitutional right.” Finally, the defendants sought to invoke as a defense Kansas’ Second Amendment Protection Act (“SAPA”), which purports to exempt any personal firearm, accessory, or ammunition “manufactured, owned, and remaining within Kansas’ borders” from “any federal law.” The court found that “allowing state legislature to estop the federal government from prosecuting its laws would upset the |

<sup>46</sup> *Supra* note 44.

| <b>CASE</b> | <b>CLAIMS/ISSUE(S)/<br/>PROCEDURAL HISTORY</b> | <b>OUTCOME</b>  |
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|             |  | balance of powers between states and the federal government and contravene the Supremacy Clause.” |

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| <p><i>Duncan v. Becerra</i>, 366 F. Supp. 3d 1131 (S.D. Cal. 2019), <i>aff'd</i>, 970 F.3d 1133 (9th Cir. 2020).</p> | <p>Plaintiffs challenged the constitutionality of California laws (Cal. Penal Code § 32310 and § 16740) prohibiting the acquisition and possession of a magazine with more than ten rounds (a large capacity magazine), and moved for summary judgment and injunctive relief.</p> | <p>The plaintiffs’ motion for summary judgment was granted, and the court issued a permanent injunction, holding that the right of a law-abiding citizen to acquire, possess, and keep common firearms and magazines holding more than 10 rounds was protected under the Second Amendment. The court decided that under <i>Heller</i>, the California laws infringed the right to bear arms “in common use”, as magazines holding more than 10 rounds are “commonly used by responsible, law-abiding citizens for lawful purposes such as self-defense.” Determining that the laws burdened a core Second Amendment right—the right to use arms in defense of the home—the court applied strict scrutiny and ruled that the ban did not survive such scrutiny, because the state did not have a compelling interest for the ban and the ban was not narrowly tailored, but categorical. Even under intermediate scrutiny, the court found that the laws were not a “reasonable fit” with the state’s goals of protecting citizens and law enforcement from gun violence, because the state did not present substantial evidence demonstrating a reasonable fit. The court subsequently stayed the judgment as to the provisions prohibiting the sale, manufacture, import, or other transfer of a firearm magazine able to hold more than 10 rounds, on grounds that the state demonstrated “a substantial case on the merits” and that maintaining the status quo until further judicial deliberation would benefit society, but allowed the injunction to go into effect as to the law criminalizing the simple possession of magazines with more than 10 rounds. On appeal, the Ninth Circuit affirmed the lower court’s decision granting summary judgment for the plaintiffs-appellees. The Court applied a strict scrutiny standard, distinguishing cases in other jurisdictions, and said that even if an intermediate level of scrutiny were applied, the statute in question would fail.</p> |
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| CASE   | CLAIMS/ISSUE(S)/<br>PROCEDURAL HISTORY  | OUTCOME  |
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| <p><i>Drummond v. Robinson Twp.</i>, No. 18-1127, 2020 U.S. Dist. LEXIS 45305 (W.D. Pa. Mar. 16, 2020)</p> | <p>The plaintiff alleged that the defendant township unconstitutionally barred it from operating a gun club on leased property.</p>   | <p>After the District Court initially granted the defendant’s motion to dismiss, holding that the township’s zoning ordinances restricting commercial gun sales and outdoor shooting activities were permissible time, place, or manner regulations under the Second Amendment (361 F. Supp. 3d 466 (W.D. Pa. Jan. 22, 2019)), the case went up to the Third Circuit. The Third Circuit vacated / remanded this decision in part because it determined that the Court erred in the way it evaluated whether the law burdened Second Amendment rights. <i>See Drummond v. Twp. of Robinson</i>, 784 Fed. Appx. 82 (3d Cir. 2019). When the case went back to the District Court, the Court again granted the Defendant Township’s Motion to Dismiss, and applied an intermediate scrutiny analysis in determining whether the challenged regulation serves an important governmental interest, and the fit between the regulation and the objective was reasonable.</p> |
| <p><i>United States v. Fierro-Morales</i>, No. 17CR3096 WQH, 2018 WL 3126116 (S.D. Cal. June 26, 2018)</p> | <p>Defendant moved on Second Amendment grounds to dismiss count in indictment charging defendant with violating a federal statute that prohibits an alien who is illegally in the United States from knowingly possessing a firearm.</p>              | <p>Motion denied. “[T]he core of the Second Amendment is the ‘right of the law-abiding, responsible <i>citizens</i> to use arms in the defense of hearth and home.’” Nothing in <i>Heller</i> indicates that it was intended to provide protections for the right to bear arms of non-citizens in the United States without any legal status. Further, prohibiting the possession of firearms by an alien with no legal status is a reasonable method to promote important interests in crime control and public safety.</p>   |
| <p><i>Flanagan v. Harris</i>, No. 16 CV 06164, 2018 U.S. Dist. LEXIS 82844(C.D. Cal. May 7, 2018)</p>      | <p>Plaintiffs who wished to carry a firearm in public for self-defense challenged California statutes regulating open and concealed carry of firearms and the Los Angeles County Sheriff’s policy for requiring a showing of “good cause” for the</p> | <p>California’s motion for summary judgment was granted. California submitted sufficient evidence to show a reasonable fit between the challenged statutes and its interest in protecting public safety by reducing violent-crime rates, conserving law enforcement resources, and protecting law enforcement officers and the public from unnecessary and potentially dangerous confrontations.</p>   |

| CASE  | CLAIMS/ISSUE(S)/<br>PROCEDURAL HISTORY   | OUTCOME  |
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|   | issuance of concealed carry permits.   |  |
| <i>Hatfield v. Barr</i> , 925 F.3d 950 (7th Cir. 2019)                        | Convicted felon brought an as-applied Second Amendment challenge to a federal statute that banned him from owning a gun. Plaintiff moved for summary judgment.   | Plaintiff’s motion for summary judgment was initially granted by the District Court ( <i>Hatfield v. Sessions</i> , 322 F. Supp. 3d 885 (S.D. Ill. 2018)). The Court found that the conviction that prevented Plaintiff from keeping a gun in his home for self-defense occurred 28 years ago for a non-violent offense and Plaintiff did no prison time. The district court concluded that although felon disarmament bans are “presumptively lawful” under <i>Heller</i> , “if there is any case that rebuts the presumption, it is this one.” The Seventh Circuit reversed this decision and found that <i>Heller</i> and <i>McDonald</i> specifically acknowledged the longstanding prohibitions on felons possessing firearms. The Court found no support for the argument that nonviolent felons should be excluded from this prohibition. |
| <i>Zeno v. LeBlanc</i> , No. 17-6234, 2018 WL 2163800 (E.D. La. Feb. 1, 2018) | Habeas corpus petitioner sought to overturn his convictions for possession of a firearm by a convicted felon and illegal carrying of a weapon while in possession of a controlled dangerous substance.   | Petition denied. Longstanding prohibitions on the possession of firearms by felons, expressly referenced in <i>Heller</i> , compelled the conclusion that the state appellate court’s decision in this case could not have been contrary to or an unreasonable application of clearly established law.   |
| <i>Worman v. Healey</i> , 922 F.3d 26 (1st Cir. 2019)                         | Plaintiff filed suit, alleging that a Massachusetts statute banning the transfer or possession of assault weapons and large capacity magazines violates the Second and Fourteenth Amendments. The district court granted the Attorney General’s motion for summary judgment. | Affirmed grant of Attorney General’s summary judgment motion and constitutionality of statute. Assuming without deciding that possession of assault weapons and LCMs in the home for self-defense is safeguarded by the Second Amendment, the court found that the statute’s burden on the Second Amendment was minimal, because it only banned a subset of semiautomatic assault weapons, which were not as suited to self-defense in the home as handguns and not commonly used for home self-defense purposes. Because the act did not heavily burden the core Second Amendment right of  |

| CASE   | CLAIMS/ISSUE(S)/<br>PROCEDURAL HISTORY  | OUTCOME  |
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|  |   | self-defense within the home, intermediate scrutiny was appropriate. The court determined that the statute survives intermediate scrutiny, in light of the statute’s manifest purpose—ensuring public safety by making it more difficult for criminals to obtain the guns at issue—and evidence that semiautomatic assault weapons and LCMs posed “unique dangers.”  |
| <i>Avitabile v. Beach</i> , 368 F. Supp. 3d 404(N.D.N.Y. 2019) | The plaintiff brought a Second Amendment challenge to New York’s total ban on the civilian possession of tasers and stun guns, arguing that prohibiting people from keeping and using such weapons in the home for self-defense was unconstitutional. | Under <i>Heller</i> , the court determined that tasers and stun guns are protected by the Second Amendment, in light of the plaintiff’s showing that tasers and stun guns are in common use and are typically possessed by law-abiding citizens for law-abiding purposes such as self-defense. The court applied intermediate scrutiny, on grounds that the plaintiff did not demonstrate that these electric arms are as commonly used for self-defense as handguns, and held that the ban fails such scrutiny, because it is not “substantially related” to the state’s interest in promoting public safety, and noted that the ban on tasers and stun guns could make it more likely that people would buy handguns for protection in the home, which would result in an increased likelihood of injury or death. |
| <i>Doe v. Putnam Cty.</i> , 344 F. Supp. 3d 518(S.D.N.Y. 2018) | Plaintiffs alleged that a New York law publicizing the names and addresses of all handgun permit holders violates due process and impermissibly chills the free exercise of fundamental Second Amendment rights.                                      | Attorney General’s motion to dismiss granted in part and denied in part. The motion to dismiss was denied as to the Second Amendment claim because the NYAG had not supplied evidence adequate to show a substantial relationship between the public disclosure requirements and an important governmental interest. The motion to dismiss was granted as to the Fourteenth Amendment claim because the disclosure of one’s name, address, and status as a firearm licensee is not a constitutionally protected privacy right.   |
| <i>Tripodi v. Sessions</i> , 339 F. Supp. 3d                   | Plaintiff, a businessman convicted of a federal conspiracy felony over 13   | United States’ motion to dismiss granted. Allegations that the conviction was old and for a non-violent offense, as well as that   |

| CASE   | CLAIMS/ISSUE(S)/<br>PROCEDURAL HISTORY   | OUTCOME  |
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| 458(E.D. Pa. 2018)   | years ago challenged the existing ban on the possession of firearms by convicted felons.   | plaintiff had since led a peaceful and productive life were irrelevant. Congress defined plaintiff's conduct as serious, and his conviction for that conduct bars him from possessing a firearm.   |
| <i>King v. Sessions</i> , No. 17-884, 2018 WL 3008527 (E.D. Pa. June 15, 2018)                 | Plaintiff challenged the constitutionality of 18 U.S.C. § 922(g)(1), which prohibits anyone who has been convicted of a crime punishable by imprisonment for a term exceeding one year from possessing firearms or ammunition.                   | Attorney General's motion to dismiss granted. Plaintiff failed to (1) identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member, and (2) present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class.  |
| <i>Mai v. United States</i> , No. C17-0561 RAJ, 2018 WL 784582 (W.D. Wash. Feb. 8, 2018)       | Plaintiff challenged the constitutionality of 18 U.S.C. § 922(g)(4), which prohibited him from possessing firearms because he had been involuntarily committed for mental health treatment 15 years ago.   | Attorney General's motion to dismiss granted. Plaintiff failed to plead sufficient facts to distinguish himself from those historically barred from Second Amendment protections: the mentally ill. Moreover, defendants had shown that the fit between the asserted interest and the challenged law is reasonable, and the law is substantially related to the Government's interest in promoting public safety and preventing suicide. |
| <i>United States v. Collins</i> , No. 18-cr-00068, 2018 WL 3084708 (S.D. W. Va. June 22, 2018) | Defendant moved to dismiss his indictment for possessing a weapon while being a prohibited person who has been previously adjudicated as a mental defective or committed to a mental institution.  | Defendant's motion to dismiss denied. The statute is constitutional under a strict scrutiny standard, because "[i]t is statistically supported that citizens suffering from a mental illness are more likely to commit harm with a firearm than those who are not, and Congress has a compelling interest [in] reducing the risk of danger."   |
| <i>Cruz-Kerkado v. Puerto Rico</i> , No. 16-2748 (ADC), 2018 WL 1684329 (D.P.R. Apr. 5, 2018)  | Plaintiff challenged provisions of the Puerto Rico Weapons Act that required target shooting permit holders to be a member of a gun club or organization and a shooting federation duly recognized by the Secretary of the Department of Sports. | Plaintiff's facial challenge failed because he did not establish that the statute lacks any "plainly legitimate sweep."  |

| CASE  | CLAIMS/ISSUE(S)/<br>PROCEDURAL HISTORY   | OUTCOME  |
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| <i>People v. Webb</i> , 2019 IL 122951, 131 N.E.3d 93 (Ill. 2019)                       | Defendants, who were charged with misdemeanors for carrying stun guns in public under section 24-1(a)(4) of the Unlawful Use of Weapons statute, filed motions to dismiss the charges, arguing that because the statute operated as a complete ban on carrying stun guns and tasers in public, it violated the Second Amendment. | The court first found that stun guns and tasers were bearable arms protected by the Second Amendment, as the government conceded. The government contended that the statute did not completely prohibit carrying stun guns and tasers in public, because another statute, the Firearm Concealed Carry Act, allowed a license holder to carry “concealed firearms,” which the government claimed encompassed stun guns and tasers. However, the court rejected this interpretation as unsupported by legislative intent and held that the statute was facially unconstitutional under the Second Amendment. |
| <i>People v. Chairez</i> , 2018 IL 121417, 104 N.E.3d 2158 (Ill. 2018)                  | Defendant was convicted of possessing a firearm within 1,000 feet of a public park. The trial court declared the statute unconstitutional and voided defendant’s conviction. The state appealed.   | Affirmed. Statutory provision prohibiting possession of a firearm within 1,000 feet of a public park was facially unconstitutional under the Second Amendment. The state provided no evidentiary support for its claims that such a prohibition would reduce the risks it identified. In addition, the state conceded that the 1,000-foot firearm restriction zone around a public park would effectively prohibit the possession of a firearm for self-defense within a vast majority of the acreage in the city of Chicago since there are more than 600 parks in the city.                              |
| <i>People v. Cunningham</i> , 2019 IL App (1st) 160709, 126 N.E.3d 600 (Ill. App. 2019) | Defendant appealed his felony conviction for unlawful use of a firearm in public housing.  | Affirmed. The court found that there was a “reasonable fit” between the government’s interest in protecting the safety of residents and guests on public housing property and the statutory prohibition on carrying firearms in public housing property.   |
| <i>People v. Bell</i> , 2018 IL App (1st) 153373, 107 N.E.3d 1047 (Ill. App. 2018)      | Defendant appealed his conviction for unlawful use of a weapon in a public park.   | Affirmed. The “troubling aspects” present in <i>Chairez</i> [above] are not present here. “[A] person can certainly preserve an undiminished right of self-defense by simply not entering a public park.”  |

| CASE  | CLAIMS/ISSUE(S)/<br>PROCEDURAL HISTORY   | OUTCOME  |
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| <i>People v. Martin</i> , 2018 IL App (1st) 152249, 111 N.E.3d 168 (Ill. App. 2018) | Following a bench trial, Defendant was convicted of armed habitual criminal, unlawful use of a weapon by a felon, and six counts of aggravated unlawful use of a weapon. Defendant argued that the armed habitual criminal statute was unconstitutional as applied to him because his underlying felony offenses were nonviolent and more than 20 years old. | Affirmed. “[P]rohibiting felons from possessing firearms falls outside the scope of the Second Amendment.” The armed habitual criminal statute is a valid exercise of Illinois’ right to protect the health, safety, and general welfare of its citizens from the potential danger posed by convicted felons in possession of firearms.  |
| <i>Ramirez v. Commonwealth</i> , 479 Mass. 331, 94 N.E.3d 809 (2018)                | Defendant moved to dismiss charge for criminal possession of a stun gun on Second Amendment grounds.   | Statute absolutely prohibiting civilian possession of stun guns violates the Second Amendment. Taking guidance from <i>Caetano v. Massachusetts</i> , 136 S. Ct. 1027 (2016), the court concluded that stun guns are “arms” within the protection of the Second Amendment. Thus, the possession of stun guns may be regulated, but not absolutely banned. Since the statute is facially invalid, it was struck down in its entirety.         |
| <i>Alpert v. Missouri</i> , 543 S.W.3d 589 (Mo. banc 2018)                          | A convicted felon who was required to surrender his firearms license in accordance with a statutory amendment filed a declaratory judgment action seeking a declaration that the state could not enforce the statute against him without violating his Second Amendment rights. The trial court sustained the state’s motion for summary judgment.           | Affirmed. The Missouri Supreme Court rejected Alpert’s call to apply strict scrutiny to his Second Amendment challenge. Alpert cited no case in which a Second Amendment claim was subjected to strict scrutiny and the challenger prevailed. Alpert had been convicted of two serious felonies requiring him to serve prison time. <i>Heller</i> makes clear that prohibitions against felons possessing firearms are presumptively lawful. |
| <i>State v. Weber</i> , 132 N.E.3d 1140 (Ohio App. 2019)                            | Defendant appealed his conviction for using weapons while intoxicated.   | Conviction affirmed. The statute is narrowly tailored to serve the government’s significant interest in preventing injury or death by  |

| CASE   | CLAIMS/ISSUE(S)/<br>PROCEDURAL HISTORY   | OUTCOME  |
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|  |  | prohibiting intoxicated individuals from using or carrying firearms.   |
| <i>State v. Smith</i> , No. 18AP-124, 2018-Ohio-4297, 2018 WL 5279075 (Ohio App. Oct. 23, 2018)            | Defendant unsuccessfully moved the trial court to dismiss a charge against him for improperly handling a firearm in a motor vehicle. After a no-contest plea, Defendant brought an action alleging that the statute at issue violated his Second Amendment rights. | Conviction affirmed. Ohio's statutory scheme provides numerous legal avenues by which people in Ohio can effectively defend a motor vehicle with a firearm. Using or carrying a handgun outside of those regulations in such a vehicle is not constitutionally protected according to <i>Heller</i> .  |
| <i>State v. Wheatley</i> , 94 N.E.3d 578 (Ohio App. 2018)  | Defendant appealed his conviction for violating a statute that prohibited persons who are drug-dependent from possessing a weapon.   | Conviction affirmed. The statute does not violate defendant's Second Amendment rights because he is not a law-abiding citizen and therefore not entitled to possess a firearm "in defense of hearth and home."   |
| <i>State v. Beeman</i> , 417 P.3d 541 (Or. App. 2018)  | Defendant appealed his conviction for being a felon in possession of a firearm.  | Conviction affirmed. According to the court, "[n]o state law banning felons from possessing guns has ever been struck down," nor has any federal ban on felons possessing guns been struck down in the wake of <i>Heller</i> .   |
| <i>Gun Range, LLC v. City of Phila.</i> , No. 1529 C.D. 2016, 2018 WL 2090303 (Pa. Commw. Ct. May 7, 2018) | Appellant, who operated a shooting range, sought approval from the zoning board to change his registration permit from "gun range" to "gun range & gun sales." The board denied the application, and the Court of Common Pleas (trial court) affirmed.             | Remanded. The trial court failed to address the constitutional arguments, which were properly submitted to the zoning board. A dissenting judge would have affirmed the trial court on the Second Amendment issue because "there is no right guaranteed under the Second Amendment that gives a person the right to sell guns," and there was no evidence that the zoning ordinance violated anyone's Second Amendment right by impeding a city resident who wished to purchase a firearm from doing so. |
| <i>Wargocz v. Brewer</i> , No. 02-17-00178-CV, 2018 WL 4924755 (Tex. App. Oct. 11, 2018)                   | Appellant appealed a trial court's protective order against him, which also prohibited him, pursuant to statute, from possessing a firearm for the duration of the protective order.   | The statute did not violate Appellant's Second Amendment rights. Appellant, who had committed the offense of stalking, threatened to kill his ex-wife, and knowingly violated the trial court's ex parte temporary protective order, could not be regarded as a law-abiding,   |

| CASE   | CLAIMS/ISSUE(S)/<br>PROCEDURAL HISTORY   | OUTCOME  |
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|  |  | responsible citizen who possesses the right to carry a weapon for self-defense under <i>Heller</i> .   |
| <i>Reininger v. Attorney Gen. of N.J.</i> , No. 14-5486-BRM, 2018 WL 3617962 (D. N.J. July 30, 2018) | Habeas corpus petition brought by defendant convicted of unlawful possession of rifles, shotguns, hollow-nose bullets, and large capacity ammunition magazine. Petitioner argued that his convictions under New Jersey gun control laws violated the Second Amendment.                     | Relief denied. <i>Heller</i> and <i>McDonald</i> do not extend to gun possession outside the home or the manner in which guns may be transported.                            |
| <i>Commonwealth v. Cassidy</i> , 479 Mass. 527 (2018)  | Defendant failed to properly register the firearms as required by Massachusetts law and was convicted of unlawful possession of an assault weapon, four large capacity feeding devices, a large capacity firearm, and ammunition. He appealed his convictions on Second Amendment grounds. | Affirmed. “[A]n individual’s Second Amendment right does not prohibit laws regulating who may purchase, possess, and carry firearms, and where such weapons may be carried.” |
| <i>United States v. Stepp-Zafft</i> , 733 Fed. Appx. 327 (8th Cir. 2018)                             | Defendant appealed his conviction on three counts of possession of unregistered firearms, including five short-barreled rifles, nine destructive devices, and two silencers.   | Affirmed. The Second Amendment does not extend to short-barreled rifles or silencers, and neither are typically possessed by law-abiding citizens for lawful purposes.       |

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| <i>Gallinger v. Becerra</i> , 898 F.3d 1012 (9th Cir. 2018)                                 | Permit holders challenged California’s Gun-Free School Zone Act, which prohibited permit holders from possessing firearms on school grounds, but allowed retired peace officers to carry firearms on school grounds. The district court dismissed the action.                           | Affirmed. The statute did not violate the Equal Protection Clause because it was rationally related to a legitimate state interest. No Second Amendment challenge was asserted in this case.  |
| <i>Rupp v. Becerra</i> , No. 17-cv-00746-JLS-JDE, 2018 WL 2138452 (C.D. Cal. May 9, 2018)   | Plaintiffs challenged California’s Assault Weapons Control Act (“AWCA”), including provisions enacted in response to the 2015 mass shooting in San Bernardino, alleging violations of the Due Process Clause, the Takings Clause, and the Second Amendment.                             | Attorney General’s motion to dismiss granted. The firearms categorized as assault weapons have “such a high rate of fire and capacity for firepower that [their] function as . . . legitimate sports or recreational firearm[s] is substantially outweighed by the danger that [they] can be used to kill and injure human beings.” Thus, the legislature had a legitimate government objective in enacting the amendments to the AWCA. |
| <i>United States v. Sawyer</i> , No. 17-40060-01-CM, 2018 WL 572094 (D. Kan. Jan. 26, 2018) | Defendant was charged with felon in possession of a firearm and possession of an unregistered firearm. Defendant moved to dismiss the charges, arguing, in part, that the provision of National Firearms Act (“NFA”) prohibiting short-barreled shotguns violates the Second Amendment. | Motion to dismiss denied and NFA provision upheld. District court declined to depart from United States Supreme Court and Tenth Circuit precedent that specifically upheld the NFA’s taxation and licensing requirements related to short-barreled shotguns in the absence of evidence that such firearms are now considered “in common use” to warrant Second Amendment protections.   |

B. Bump Stocks, etc.

A “bump stock” is a type of trigger activator, which is “marketed to shooters seeking to convert their weapon to simulate the rapid, continuous fire of an automatic firearm while using a semi-automatic gun.”<sup>47</sup> A recent ruling in the United States District Court for the District of

<sup>47</sup> Giffords L. Ctr., *State Legislative Tool Kit: Addressing Bump Stocks*, [https://giffords.org/wp-content/uploads/2017/11/Giffords\\_Six-State-Bump-Stocks-Toolkit.pdf](https://giffords.org/wp-content/uploads/2017/11/Giffords_Six-State-Bump-Stocks-Toolkit.pdf) (last visited Oct. 10, 2020).

Maryland upheld a Maryland statute, enacted in April 2017, which generally prohibits people from owning, manufacturing, selling, or purchasing rapid fire “trigger activators.” *See Md. Shall Issue, Inc. v. Hogan*, 353 F. Supp. 3d 400 (D. Md. 2018). The shooter involved in the massive attack on concert-goers in Las Vegas in October 2017 used AR-15 assault rifles modified with “bump stocks,” and the Maryland law was designed to ensure that these dangerous and unusual devices cannot be used in Maryland as they were in Las Vegas. Plaintiffs in this case argued that the Takings Clause of the Fifth Amendment compels Maryland to compensate plaintiffs for their trigger activators, which they could no longer legally own after the law took effect on October 1, 2018. On November 16, 2018, the district court granted the defendant’s motion to dismiss all counts of the Complaint. The court found that plaintiffs failed to plausibly allege a per se taking under any theory recognized in federal Takings Clause jurisprudence. An appeal was filed in the United States Court of Appeals for the Fourth Circuit on December 13, 2018. On June 29, 2020 the 4<sup>th</sup> Circuit issued a decision upholding the District Court’s decision to dismiss the Complaint. *See Md. Shall Issue, Inc. v. Hogan*, 963 F.3d 356 (4th Cir. 2020).

## REPORT SECTION TWO

### Mass Shootings and Domestic Violence

#### I. The Nexus Between Domestic Violence and Mass Shootings

There is a proven nexus between domestic violence offenders and mass shooters. Although this does not mean that such offenders necessarily become mass shooters, the correlation is significant enough that limiting their access to guns must be factored into the passage of meaningful gun legislation.

A New York Times article published on August 10, 2019, titled *A Common Trait Among Mass Killers: Hatred Toward Women*,<sup>48</sup> provides several key examples of mass shootings which all involved a shooter who had committed or threatened acts of violence against women. Of note, the article points out that “[t]he University of Texas tower massacre in 1966,<sup>49</sup> generally considered to be the beginning of the era of modern mass shootings in America, began with the gunman killing his mother and wife the night before.”<sup>50</sup>

Statistical data support the connection between domestic violence and mass shootings noted in the New York Times article. A report issued by the organization Everytown for Gun Safety (“Everytown”) that analyzed data from mass shootings in the United States between 2009 and 2020 found the following:

Although many people think of mass shootings as random acts of violence, this analysis shows that most mass shootings are not at all random: In at least 54 percent of mass shootings between 2009 and 2018, the perpetrator shot a current or former intimate partner or family member during the mass rampage. These domestic violence-related mass shootings resulted in at least 532 people shot and killed and

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<sup>48</sup> Julie Bosman, Kate Taylor & Tim Arango, *A Common Trait Among Mass Killers: Hatred Toward Women*, N.Y. TIMES (Aug. 10, 2019), <https://www.nytimes.com/2019/08/10/us/mass-shootings-misogyny-dayton.html> (last visited Oct. 10, 2020).

<sup>49</sup> An article on Wikipedia provides the following overview of the University of Texas tower massacre:

On August 1, 1966, after stabbing his mother and his wife to death the night before, Charles Whitman, a former Marine, took rifles and other weapons to the observation deck atop the Main Building tower at the University of Texas at Austin, then opened fire indiscriminately on people on the surrounding campus and streets. Over the next 96 minutes he shot and killed 14 more people (including an unborn child) and injured 31 others. The incident ended when a policeman and a civilian reached Whitman and shot him dead. At the time, the attack was the deadliest mass shooting by a lone gunman in U.S. history, being surpassed 18 years later by the San Ysidro McDonald’s massacre. *University of Texas Tower Shooting*, WIKIPEDIA, [https://en.wikipedia.org/wiki/University\\_of\\_Texas\\_tower\\_shooting](https://en.wikipedia.org/wiki/University_of_Texas_tower_shooting) (last updated Apr. 17, 2020) (last visited Oct. 9, 2020).

“The San Ysidro McDonald’s massacre was an act of mass murder which occurred at a McDonald’s restaurant in the San Ysidro neighborhood of San Diego, California on July 18, 1984. The perpetrator, . . . James Huberty, fatally shot 21 people and wounded 19 others before being killed by a police sniper approximately 77 minutes after he had first opened fire.” *San Ysidro McDonald’s Massacre*, WIKIPEDIA, [https://en.wikipedia.org/wiki/San\\_Ysidro\\_McDonald%27s\\_massacre](https://en.wikipedia.org/wiki/San_Ysidro_McDonald%27s_massacre) (last updated Mar. 28, 2020) (last visited Oct. 9, 2020).

<sup>50</sup> Bosman, Taylor & Arango, *supra* note 48.

83 people wounded, amounting to almost half of all mass shooting deaths and one in ten injuries.<sup>51</sup>

The following examples of mass shootings further illustrate this deadly connection:

- In 2012, an 11-month-old boy was hospitalized twice in one week. The circumstances of the boy's hospitalization concerned hospital staff, in part because during the second visit he appeared to have a hand-shaped bruise on his face.<sup>52</sup> Prosecutors would later charge the boy's stepfather—Devin Patrick Kelley—with striking the boy “with a force likely to produce death or grievous bodily harm,” and with similar violence towards the boy's mother.<sup>53</sup> In June of 2012, Kelley escaped from a mental health facility where he was sent after being charged with the assault on his wife and stepson (he had also made death threats against his military superiors and had tried to smuggle weapons onto the military base). Kelley was found guilty of the domestic abuse charges in November 2012 in a court martial proceeding by the Air Force, and sentenced to 12 months confinement.<sup>54</sup> In August 2014, Kelley was charged with misdemeanor mistreatment of animals after neighbors observed him punching and throwing a dog.<sup>55</sup> On November 5, 2017, Kelley walked into a church in Sutherland Springs, Texas and fatally shot 26 people, wounding 20 others. Investigators believe that Kelley's anger at his mother-in-law, who belonged to the Church, may have motivated the attack.<sup>56</sup> Kelley's prior conviction should have prevented him from obtaining a firearm, but that conviction had not been properly flagged for the FBI. Indeed, there were six distinct instances in which the Air Force should have submitted records regarding Kelley's conduct to the FBI but failed to do so.<sup>57</sup>
- A similar pattern of domestic violence can be seen in the events preceding the shooting at the Azana Salon and Spa in Milwaukee on October 21, 2012. Just *three days* before that shooting, during which three people were killed and four others were injured, the

<sup>51</sup> *Ten Years of Mass Shootings in the United States, An Everytown For Gun Safety Support Fund Analysis*, EVERYTOWN (Nov. 21, 2019), <https://everytownresearch.org/massshootingsreports/mass-shootings-in-america-2009-2019/> (last visited Oct. 9, 2020).

<sup>52</sup> Katie Mettler & Alex Horton, *Air Force Failed 6 Times to Keep Guns from Texas Church Shooter Before He Killed 26, Report Finds*, WASH. POST (Dec. 7, 2018), <https://www.washingtonpost.com/national-security/2018/12/08/air-force-failed-six-times-keep-guns-texas-church-shooter-before-he-killed-report-finds/> (last visited Oct. 9, 2020).

<sup>53</sup> Eli Rosenberg & Wesley Lowery, *Devin Patrick Kelley Had a Violent Past, Records Indicate*, WASH. POST (Nov. 6, 2017), [https://www.washingtonpost.com/national/devin-patrick-kelley-had-a-violent-past-records-indicate/2017/11/06/f7ee6222-c33d-11e7-84bc-5e285c7f4512\\_story.html](https://www.washingtonpost.com/national/devin-patrick-kelley-had-a-violent-past-records-indicate/2017/11/06/f7ee6222-c33d-11e7-84bc-5e285c7f4512_story.html) (last visited Oct. 9, 2020).

<sup>54</sup> Simon Romero, Alan Blinder and Richard Perez-Pena, *Texas Gunman Once Escaped From Mental Health Facility*, N.Y. TIMES (Nov. 7, 2017), <https://www.nytimes.com/2017/11/07/us/texas-shooting-church.html> (last visited Oct. 9, 2020). See also, Eli Rosenberg, Mark Berman & Wesley Lowery, *Texas church gunman escaped mental health facility in 2012 after threatening military superiors*, WASH. POST (Nov. 7, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/11/07/as-texas-town-mourns-details-emerge-on-gunmans-methodical-tactics-in-church-massacre/> (last visited Oct. 9, 2020).

<sup>55</sup> *Supra* note 5348.

<sup>56</sup> *Supra* note 4954, *Texas church gunman escaped mental health facility in 2012 after threatening military superiors*, WASH. POST (Nov. 7, 2017).

<sup>57</sup> *Supra* note 5247.

shooter's wife, Zina Houghton, testified at a restraining order hearing.<sup>58</sup> Zina told the court that she believed her husband, Radcliffe Houghton, would kill her and recounted an incident in which Radcliffe had threatened her with a gun which then accidentally discharged, narrowly missing her and her daughter.<sup>59</sup> In her application for a restraining order, she stated that Radcliffe had "threatened to throw acid in my face, burn me and my family with gas. His threats terrorize my every waking moment."<sup>60</sup> Zina obtained the restraining order, but Radcliffe was nonetheless able to purchase a firearm two days later by exploiting a loophole in Wisconsin law that only requires background checks for purchases from a gun dealer.<sup>61</sup> Radcliffe purchased a Glock .40 caliber handgun from a private seller over the internet, and the next day he used it to kill his wife and two others, in addition to killing himself.<sup>62</sup>

- On February 25, 2016, Cedric Ford went on a shooting rampage shortly after being served with a "protection from abuse" order filed by his domestic partner who accused him of placing her in a chokehold. Ford opened fire at several locations in Harvey County, Kansas, injuring 14 people and killing three at a lawn mower factory where he worked. He was killed by police fire. Despite prior criminal records in Kansas and Florida, he was able to obtain the pistol and long gun he used in the attack.
- On June 12, 2016, Omar Mateen walked into the Pulse night club in Orlando, Florida carrying a Glock 9mm handgun and a SIG Sauer MCX military-style rifle, and killed 49 people and wounded 53 others, before being killed himself during a shoot-out with police. Subsequently, details emerged about the violent nature of Mateen's relationship with his wife, Noor Salman. Relatives stated that Mateen began beating Salman soon after they married, on one occasion punching her in the shoulder while she was pregnant and, on a separate occasion, attempting to strangle her while shoving her against the wall (he also reportedly beat his first wife who fled with the help of her parents within the first year of their marriage).<sup>63</sup> After the shooting, Salman was charged with aiding and abetting the commission of a terrorist act and obstruction of justice for allegedly helping Mateen case the club on the night before the attack and formulate an alibi. She was acquitted of all counts after a federal jury trial.<sup>64</sup> A New York Times article from June 15, 2016, entitled *Control and Fear: What Mass Killings and Domestic Violence Have in Common*, notes: "[T]here are striking parallels between the intimate terrorism of

<sup>58</sup> Lateef Mungin, *Wisconsin Spa Shooting: Wife Told Court "I Don't Want to Die"*, CNN (Oct. 23, 2012) <https://www.cnn.com/2012/10/23/justice/wisconsin-shooting/index.html> (last visited Oct. 9, 2020).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Dan Barry, Serge F. Kovalski, Alan Blinder and Mujib Mashal, *'Always Agitated. Always Mad': Omar Mateen, According to Those Who Knew Him*, N.Y. TIMES (June 18, 2016), <https://www.nytimes.com/2016/06/19/us/omar-mateen-gunman-orlando-shooting.html> (last visited Oct. 9, 2020). Rachel Louise Snyder, *Was the Wife of the Pulse Shooter a Victim or an Accomplice?* THE NEW YORKER (Mar. 14, 2018), <https://www.newyorker.com/news/news-desk/the-wife-of-the-pulse-night-club-shooter-goes-on-trial> (last visited Oct. 9, 2020).

<sup>64</sup> Patricia Mazzei, *Noor Salman Acquitted in Pulse Nightclub Shooting*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/2018/03/30/us/noor-salman-pulse-trial-verdict.html> (last visited Oct. 9, 2020).

domestic violence and the mass terrorism perpetrated by lone-wolf attackers like Mr. Mateen seems to have been. Both, at their most basic level, are attempts to provoke fear and assert control.”<sup>65</sup>

- On June 14, 2017, James T. Hodgkinson fired more than 50 rounds of ammunition from a military-style rifle and a handgun, in Alexandria, Virginia, at a group of Republican members of Congress during a baseball practice. House Majority Whip Steven Scalise was seriously injured from the gunfire, and four others were also shot. Hodgkinson died from police gunshots fired at the scene.<sup>66</sup> Hodgkinson reportedly had a history of domestic violence. In 2006 he was arrested after he entered a neighbor’s home where his teenage foster daughter was visiting. During the encounter, which began inside the neighbor’s home and ended up outside, Hodgkinson threw his foster daughter around the bedroom and hit her, punched his foster daughter’s friend in the face, and fired off a shotgun and hit the friend’s boyfriend with the butt of the shotgun. When the daughter attempted to flee the location in her car, Hodgkinson began choking her and tried to cut the seat belt. The charges ended up being dismissed.<sup>67</sup>

These are just a few of many examples where individuals who have carried out a mass shooting have also engaged in acts of domestic violence. Laws that prevent those who have been convicted of domestic violence from being able to purchase and possess guns go a long way towards addressing this proven and deadly connection, and preventing more tragic mass shootings.

## II. Federal and State Laws Addressing the Connection between Domestic Violence and Mass Shootings

Federal law includes certain provisions intended to address the nexus between domestic violence and mass shooting. For example, the Federal Gun Control Act prohibits two classes of individuals from purchasing or possessing firearms: (1) under 42 U.S.C. § 922(g)(8), anyone subject to a “domestic violence restraining order” issued after a hearing on notice cannot have firearms; and (2) under 42 U.S.C. § 922(g)(9), anyone convicted of misdemeanor domestic violence crimes cannot have firearms. Although these laws are an important step to preventing domestic violence abusers from obtaining firearms and ammunition, they do not cover all such individuals. This is because the prohibition only applies if specific criteria are met. In

<sup>65</sup> Amanda Taub, *Control and Fear: What Mass Killings and Domestic Violence Have in Common*, N.Y. TIMES (June 15, 2016), <https://www.nytimes.com/2016/06/16/world/americas/control-and-fear-what-mass-killings-and-domestic-violence-have-in-common.html> (last visited Oct. 9, 2020).

<sup>66</sup> Peter Hermann, Amber Phillips, Paul Kane & Rachel Weiner, *Lawmaker Steve Scalise is critically injured in GOP baseball shooting; gunman James T. Hodgkinson is killed by police*, WASH. POST (June 14, 2017), [https://www.washingtonpost.com/local/public-safety/multiple-people-injured-after-shooting-in-alexandria/2017/06/14/0289c768-50f6-11e7-be25-3a519335381c\\_story.html?skafhsduifhsuighisdfg&utm\\_term=.b329487558be&tid=a\\_inl\\_manual](https://www.washingtonpost.com/local/public-safety/multiple-people-injured-after-shooting-in-alexandria/2017/06/14/0289c768-50f6-11e7-be25-3a519335381c_story.html?skafhsduifhsuighisdfg&utm_term=.b329487558be&tid=a_inl_manual) (last visited Oct. 9, 2020).

<sup>67</sup> Jane Mayer, *The Link Between Domestic Violence And Mass Shootings*, THE NEW YORKER (June 17, 201), <https://www.newyorker.com/news/news-desk/the-link-between-domestic-violence-and-mass-shootings-james-hodgkinson-steve-scalise> (last visited Oct. 9, 2020). Charlotte Alter, *Why So Many Mass Shooters Have Domestic Violence in Their Past*, TIME, (June 16, 2017), [HTTPS://TIME.COM/4818506/JAMES-HODGKINSON-VIRGINIA-SHOOTING-STEVE-SCALISE/](https://time.com/4818506/james-hodgkinson-virginia-shooting-steve-scalise/) (last visited Oct. 9, 2020).

particular, the prohibition applies only if the protective order was issued after notice to the abuser and a hearing, and only if the order protects an abuser’s “intimate partner” or child.<sup>68</sup> An “intimate partner” is limited to a current or former spouse, a parent of a child in common with the abuser, or an individual with whom the abuser does or has cohabitated.<sup>69</sup> For these and other reasons, the federal laws intended to prevent access to firearms by domestic abusers have significant limitations.

Many states have adopted broader laws to address these limitations in federal laws. State laws that close loopholes in federal law, and comprehensively restrict access to firearms by a person subject to a domestic violence restraining order, are associated with a significant reduction in the number of intimate partner homicides.<sup>70</sup> Three types of legislation that states enact to close the gaps in federal law pertaining to abusers who are subject to domestic violence protective orders include: (1) legislation that broadens the scope of individuals who may seek a protective order; (2) legislation that authorizes or requires courts to prohibit abusers subject to protective orders from purchasing or possessing firearms; and/or (3) legislation that authorizes or requires removal or surrender of firearms when a protective order is issued.<sup>71</sup>

### III. Orders of Protection and Gun Restrictions Under New York State Law

“An order of protection is issued by the court to limit the behavior of someone who harms or threatens to harm another person. It is used to address various types of safety issues, including, but not limited to situations involving domestic violence.”<sup>72</sup> In New York State, an individual can obtain an order of protection in both the civil and criminal courts.<sup>73</sup> While in both instances the individual seeks the assistance of the legal system to end violent or threatening behaviors, the criminal side adds a potential punitive result.

#### A. Obtaining an Order of Protection in New York

There are multiple avenues for people to seek orders of protection in the New York legal system. In Family Court an individual can choose to file a family offense petition or seek an order of protection within the context of custody matters or other proceedings. In Supreme

<sup>68</sup> 18 U.S.C. § 922(g)(8). The order must also contain a finding that the person presents a credible threat to the victim, ~~and~~ ~~or~~ restrain him or her from certain specified conduct. ~~Id.~~

<sup>69</sup> 18 U.S.C. § 921(a)(32).

<sup>70</sup> See Everytown for Gun Safety, *Guns and Violence Against Women: America’s Uniquely Lethal Intimate Partner Violence Problem* 22 (Oct. 2019) (citing AM Zeoli et al., *Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and Their Associations With Intimate Partner Homicide*, 187 AM. J. EPIDEMIOLOGY 2365 (2018)), <https://everytownresearch.org/report/guns-and-violence-against-women-americas-uniquely-lethal-intimate-partner-violence-problem/> (“States that prohibit abusers subject to domestic violence restraining orders from possessing guns have seen a 13 percent reduction in intimate partner firearm homicide rates.”) (last visited Oct. 10, 2020).

<sup>71</sup> See generally *Domestic Violence & Firearms*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/> (last visited Oct. 9, 2020).

<sup>72</sup> *Obtaining an Order of Protection*, NY COURTS, <https://www.nycourts.gov/faq/orderofprotection.shtml#:~:text=An%20order%20of%20protection%20is,to%20situations%20involving%20domestic%20violence> (last updated Jan. 4, 2019) (last visited Oct. 9, 2020).

<sup>73</sup> This includes Family Court proceedings and civil divorce actions in Supreme Court, as well as criminal matters, both misdemeanor and felony, handled in the various courts in New York State. See *id.*

Court, an individual can petition for an order of protection within a divorce action. In Criminal Court, an individual can receive an order of protection against an offender charged with a criminal offense after an arrest as part of a criminal prosecution brought by the local District Attorney's Office.<sup>74</sup> Individuals can also pursue both civil and criminal court options simultaneously, and there is concurrent jurisdiction between New York Family and Criminal Courts if the alleged acts fall under enumerated offenses set forth in New York's Family Court Act § 812 and Penal Law § 530.11.<sup>75</sup>

In the Family Court context, an "order of protection is issued as part of a civil proceeding. Its purpose is to stop violence within a family, or within an intimate relationship, and provide protection for those individuals affected."<sup>76</sup> Persons who wish to file a family offense petition to obtain an order of protection must have a relationship to the alleged respondent as defined in the Family Court Act. Such a relationship is defined as a spouse or former spouse, a parent or a child, or other member of the same family or household. A member of the same family or household includes persons related by consanguinity or affinity, persons legally married to each other, persons formerly married to one another regardless of whether they still reside in the same household, persons who have a child in common regardless of whether they were ever married or ever lived together, and persons who have been in an intimate relationship, whether or not they ever lived together. In determining whether a relationship qualifies as "intimate," a court will examine the nature or type of relationship, regardless of whether it is sexual, the frequency of interactions between the persons, and the duration of the relationship. The Family Court Act excludes business relationships or casual relationships from the definition of intimate relationships.<sup>77</sup>

Orders of protection pursuant to a family offense petition can be issued on a temporary basis and contain a variety of conditions and restrictions on the offender to limit any possibility of further violence and conflict, as well as address child custody, visitation, and support. If the person filing a family offense petition proves that a family offense has been committed, the order of protection can become final and include the same conditions. Such orders typically last up to

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<sup>74</sup> *Supra note 72, ee-id.*

<sup>75</sup> As listed in New York's Family Court Act § 812 and Penal Law §530.11, these include: disorderly conduct (which does not have to take place in public); unlawful dissemination or publication of an intimate image; harassment in the first degree; harassment in the second degree; aggravated harassment in the second degree; sexual misconduct; forcible touching; sexual abuse in the third degree; sexual abuse in the second degree as set forth in subdivision one of section 130.60 of the penal law; stalking in the first degree; stalking in the second degree; stalking in the third degree; stalking in the fourth degree; criminal mischief; menacing in the second degree; menacing in the third degree; reckless endangerment; criminal obstruction of breathing or blood circulation; strangulation in the second degree; strangulation in the first degree; assault in the second degree; assault in the third degree; an attempted assault; identity theft in the first degree; identity theft in the second degree; identity theft in the third degree; grand larceny in the fourth degree; grand larceny in the third degree; coercion in the second degree; coercion in the third degree as set forth in subdivisions one, two, and three of section 135.60 of the Penal Law between spouses and former spouses or between parent and child or between members of the same family or household except that if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the Penal Law then the Family Court shall have exclusive jurisdiction over such proceeding.

<sup>76</sup> *Obtaining an Order of Protection, supra note 7268.*

<sup>77</sup> See N.Y. Family Court Act Law § 812 (1)(e) (Consol. 2020).

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two years but can be as long as five years upon a finding of the presence of aggravating circumstances or the violation of a valid order of protection.<sup>78</sup>

In the Criminal Court context, an order of protection “is issued as a condition of a defendant’s release and/or bail in a criminal case.”<sup>79</sup> A temporary order of protection is issued when the defendant is arraigned or first appears in court. The order of protection can contain conditions of behavior that prohibit or restrict the defendant from having contact with the victim. However, a criminal court cannot address child custody, visitation, or support issues. The order of protection will usually remain in effect during the pendency of the proceeding. Any final order of protection issued in criminal court is done pursuant to a sentencing or plea arrangement and can last from one to several years depending on the seriousness of the case and whether the defendant is convicted of a misdemeanor or felony.<sup>80</sup>

Orders of protection are enforceable throughout New York State and across state lines in keeping with Full Faith and Credit protections and the federal Violence Against Women Act.<sup>81</sup>

#### B. Resulting Restrictions on Access to and Possession of GunsFirearms

As noted above, the Federal Gun Control Act generally prohibits individuals from purchasing or possessing firearms if they are subject to a “domestic violence restraining order” or convicted of misdemeanor domestic violence crimes.<sup>82</sup> New York statutes include these restrictions in the Family Court Act, Criminal Procedure Law, and the Penal Law.

New York’s Family Court Act Section 842-a addresses the suspension and revocation of a firearms license when a temporary order of protection is issued. In particular, the law provides that the respondent’s firearms license will be suspended, that the respondent cannot obtain a firearms license, and that the respondent must surrender any firearms under certain circumstances. First, such measures apply if the respondent has: (1) a prior conviction of any violent felony offense; (2) a previous willful failure to obey a prior order of protection that involved infliction of physical injury, the use or threatened use of a deadly weapon or dangerous instrument, or behaviors constituting any violent felony offense; or (3) a prior conviction for stalking in the first degree, second degree, or third degree. Second, such measures apply if a court finds a substantial risk that the respondent may use or threaten to use a firearm, rifle, or shotgun against the subject of the order of protection. Similar restrictions apply if a court issues a durational order of protection and includes s procedures for license revocation as well. Under

<sup>78</sup> See N.Y. Family Court Act Law § 842 (Consol. 2020). New York’s Family Court Act § 827(a)(vii) defines Aggravating Circumstances as: “physical injury or serious physical injury to the petitioner caused by the respondent, the use of a dangerous instrument against the petitioner by the respondent, a history of repeated violations of prior orders of protection by the respondent, prior convictions for crimes against the petitioner by the respondent or the exposure of any family or household member to physical injury by the respondent and like incidents, behaviors and occurrences which to the court constitute an immediate and ongoing danger to the petitioner, or any member of the petitioner’s family or household.”

<sup>79</sup> *Obtaining an Order of Protection*, *supra* note [7268](#).

<sup>80</sup> See N.Y. Criminal Procedure Laws § 530.12.

<sup>81</sup> See N.Y. Office for the Prevention of Domestic Violence, *Orders of Protection (OPs) Involving Members of the Same Family or Household*, N.Y. STATE, [https://opdv.ny.gov/professionals/criminal\\_justice/ops.html](https://opdv.ny.gov/professionals/criminal_justice/ops.html) (last visited Oct. 9, 2020).

<sup>82</sup> See 42 U.S.C. §§ 922(g)(8)-(9).

the Family Court Act provisions, the order of protection must say explicitly that the abuser must surrender his or her guns or license in order for it to be illegal under New York State law for the abuser to possess a gun or license.<sup>83</sup>

In criminal courts, Criminal Procedure Law Section 530.14 governs and provides the same standards as those in the New York Family Court Act. In addition, New York Criminal Procedure Law and Penal Law provide that a court must order individuals to surrender all weapons, including firearms, rifles, and shotguns, if they are convicted of a felony or serious offense.<sup>84</sup> These laws establish that certain misdemeanor crimes are “serious” offenses when they are committed against members of the same family or household.<sup>85</sup> Notably, Criminal Procedure Law Section 530.11(1) makes clear that individuals do not have to be related by consanguinity, live together, have children together, or have been married to be “members of the same family or household.” It is sufficient if the individuals are, or have been in, an intimate relationship, regardless of whether it was sexual in nature. The court determines whether a relationship is “intimate” by considering various factors, such as the nature of the individuals’ relationship, how often the individuals interact, and how long the relationship has lasted.<sup>86</sup>

New York’s Penal Law Section 400.00(11) addresses when and how an individual must surrender their weapons if they are issued an order of protection. In any instance in which a person’s firearms license is suspended or revoked, the person must surrender: (1) such license to the appropriate licensing official, and (2) any and all firearms, rifles, or shotguns they own or possess to an appropriate law enforcement agency. The Penal Law defines appropriate law enforcement agencies in Section 265.20(a)(1)(f). The appropriate agency is usually the one located where the individual resides. In the event an individual does not surrender their license, firearm, shotgun, or rifle, such items shall be declared a nuisance, and police officers or peace officers acting pursuant to their special duties are authorized to remove any and all such weapons.<sup>87</sup>

In keeping with the legal provisions discussed above, the following language appears at the bottom of all orders of protection issued in New York State:

It is a federal crime to:

....

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<sup>83</sup> See N.Y. Family Court Act Law § 842-a (Consol. 2020). See also, *Disarming Prohibited People in New York*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/disarming-prohibited-people-in-new-york/> (last updated Oct. 23, 2018) (last visited Oct. 9, 2020) (“When a protective order or temporary protective order is issued or when such orders are violated, the court must make a determination regarding the suspension or revocation of a license to carry or possess a firearm, ineligibility to obtain such a license, and the surrender of firearms already possessed.” (citing N.Y. Family Court Act Law §§ 446-a, 552, 656-a).

<sup>84</sup> See N.Y. Penal Law § 400.00(11) (Consol. 2020); N.Y. Crim. Proc. Law § 370.25 (Consol. 2020).

<sup>85</sup> The enumerated misdemeanors are, “assault in the third degree, menacing in the third degree, menacing in the second degree, criminal obstruction of breathing or blood circulation, unlawful imprisonment in the second degree, coercion in the third degree, criminal tampering in the third degree, criminal contempt in the second degree, harassment in the first degree, aggravated harassment in the second degree, criminal trespass in the third degree, criminal trespass in the second degree, arson in the fifth degree, or attempt to commit any of the above-listed offenses.” N.Y. Penal Law § 265.00(17)(c); N.Y. Crim. Proc. Law § 370.15(1).

<sup>86</sup> See N.Y. Crim. Proc. Law § 530.11(1)(a)-(e).

<sup>87</sup> See *Disarming Prohibited People in New York*, supra note 8378 (citing N.Y. Penal Law §§ 400.05).

- buy, possess or transfer a handgun, rifle, shotgun or other firearm or ammunition while this Order remains in effect (Note: there is a limited exception for military or law enforcement officers but only while they are on duty); and
- buy, possess or transfer a handgun, rifle, shotgun or other firearm or ammunition after a conviction of a domestic violence-related crime involving the use or attempted use of physical force or a deadly weapon against an intimate partner or family member, even after this Order has expired. (18 U.S.C. §§ 922(g)(8), 922(g)(9), 2261, 2261A, 2262).<sup>88</sup>

The order may also contain provisions for the respondent or defendant to follow regarding the surrender of existing guns or purchase of future guns by stating:

Surrender any and all handguns, pistols, revolvers, rifles, shotguns and other firearms owned or possessed, including, but not limited to, the following: \_\_\_\_\_; and do not obtain any further guns or other firearms. Such surrender shall take place immediately, but in no event later than [specify date/time]: \_\_\_\_\_ at: \_\_\_\_\_.<sup>89</sup>

The order of protection may restrict a respondent or a defendant’s gun license during the pendency of the order or protection as well by stating:

It is further ordered that the above-named Defendant’s [or Respondent’s] license to carry, possess, repair, sell or otherwise dispose of a firearm or firearms, if any, pursuant to Penal Law § 400.00, is hereby : [13A] \_\_\_ suspended, or [13B] \_\_\_ revoked (note: final order only), and/or [13C] \_\_\_ the Defendant [or Respondent] shall remain ineligible to receive a firearm license during the period of this order.<sup>90</sup>

### C. Computerized Registry for Orders of Protection

Pursuant to the Family Protection and Domestic Violence Intervention Act of 1994,<sup>91</sup> which went into effect in October 1995, New York State maintains a computerized domestic violence registry database (“Registry”). The Registry includes all orders of protection<sup>92</sup> issued by New York courts in domestic violence matters, as well as orders of protection from courts of competent jurisdiction in other states, territories, or tribal jurisdictions when submitted to the Registry with an accompanying affidavit.<sup>93</sup> The Registry was developed by the New York State Unified Court System in collaboration with the New York State Police. Through this

<sup>88</sup> *Criminal Form 1 Order of Protection 2* (2020), N.Y. COURTS <https://www.nycourts.gov/LegacyPDFS/FORMS/familycourt/pdfs/crim1.pdf> (last visited Oct. 9, 2020).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Family Protection and Domestic Violence Intervention Act of 1994, 1994 N.Y. Laws ch. 222.

<sup>92</sup> See Letter from Servs. & Community Dev. & Housing & Adult Serv. to Comm’rs of Community Soc. Servs. re The Family Protection and Domestic Violence Intervention Act (June 23, 1995), <https://ocfs.ny.gov/main/policies/external/1995/INFs/95-INF-20%20The%20Family%20Protection%20and%20Domestic%20Violence%20Intervention%20Act.pdf> (“The new law requires the creation of a statewide registry of all orders of protection[.]”) (last visited Oct. 9, 2020).

<sup>93</sup> A template for affidavits in support of entry of an out-of-state order of protection onto the New York Registry of Orders of Protection is available on the New York Courts website. See *Domestic Violence Forms*, Form No. GF-5e, N.Y. COURTS, <https://www.nycourts.gov/LegacyPDFS/FORMS/familycourt/pdfs/GF-5e.pdf> (last visited Oct. 9, 2020).

collaboration, court clerks are able to transmit the orders real time to the State Police repository, which ultimately transmits the orders to the Registry.<sup>94</sup> The Registry is available to criminal justice users, including local police, the courts, and probation departments, through the eJustice NY portal. This portal is a browser-based application designed for use by qualified agencies as a single point of access to computerized information both within and outside of New York State.<sup>95</sup> In addition to providing information on current orders of protection, the Registry is an historical record. Orders of protection remain in the state's database even after they expire.<sup>96</sup>

The New York Sheriff's Institute maintains the New York Order of Protection Notification System as a service to the public. This system can notify individuals who are granted an order of protection when the order has been served so that they can take any necessary precautions. As noted on the Sheriff's Institute's website, the 45-minute period following service of an order of protection is a crucial period of time to ensure the safety of an individual. Individuals can sign up on the Institute's website to receive notices of service by text, email, or phone.<sup>97</sup>

The collaboration between New York courts and state police to maintain its Registry has facilitated national efforts to ensure that individuals subject to protective orders are not improperly granted firearms licenses. In particular, New York is highly adept at submitting orders of protection to the National Crime Information Center ("NCIC") database. The NCIC is an "an electronic clearinghouse of crime data that can be tapped into by virtually every criminal justice agency nationwide, 24 hours a day, 365 days a year."<sup>98</sup> The NCIC includes files, such as protective orders, that officials search when performing firearms background checks through the ~~National Instant Criminal Background Check System ("NICS")~~.<sup>99</sup> The NICS "is a national system that checks available records" to determine whether an individual is disqualified from receiving firearms due to, for example, domestic violence.<sup>100</sup>

New York contributed nearly 174,000 firearms-disqualifying orders to the NICS database in 2014, the highest of any state. Approximately one-third of such disqualifying orders were issued out of family courts, the remaining two-thirds out of criminal courts, and the total number

<sup>94</sup> See Becki Goggins & Anne Gallegos, *State Progress in Record Reporting for Firearm-Related Background Checks: Protection Order Submissions*, NCJRS 9 (Apr. 2016), <https://www.ncjrs.gov/pdffiles1/bjs/grants/249864.pdf> (last visited Oct. 9, 2020).

<sup>95</sup> Div. of Crim. Justice Servs., *eJusticeNY*, N.Y. STATE, <https://www.criminaljustice.ny.gov/ojis/ejusticeinfo.htm> (last visited Oct. 9, 2020).

<sup>96</sup> *Order of Protection Notification System*, NYS SHERIFF'S INSTITUTE VICTIM SERVICES (2020), [HTTPS://SHERIFF-ASSIST.ORG/ORDER-OF-PROTECTION-NOTIFICATION-SYSTEM](https://sheriff-assist.org/order-of-protection-notification-system) (last visited Oct. 9, 2020).

<sup>97</sup> See *How to Use the Order of Protection Notification System*, N.Y.S. SHERIFF'S INST., <https://sheriff-assist.org/order-of-protection-notification-system> (last visited Oct. 9, 2020).

<sup>98</sup> See *National Crime Information Center (NCIC)*, FBI, <https://www.fbi.gov/services/cjis/ncic> (last visited Oct. 9, 2020).

<sup>99</sup> The NICS database was mandated by the federal Brady Handgun Violence Protection Act ("Brady Act"). The FBI implemented the database for Federal Firearms Licensees so that they could instantly determine whether a prospective transferee is eligible to receive firearms or explosives. NICS screens for a wide variety of prohibiting factors that disqualify purchasers from obtaining firearms. See *About NICS*, FBI, <https://www.fbi.gov/services/cjis/nics/about-nics> (last visited Oct. 9, 2020).

<sup>100</sup> See *id.*

of transmissions averaged 650 per day.<sup>101</sup> New York’s Registry captures relationship information, and terms, conditions, and service requirements for all orders of protection so as to comply with federal firearms prohibitions. The orders can be reviewed as PDF images, which enables officials performing background checks to quickly assess New York records entered into NICS. Because firearms background checks have a 72-hour turnaround time, this easy access to New York records is crucial to ensuring that firearms do not end up in the wrong hands.<sup>102</sup>

The success of New York’s Registry is attributed to a unified court system, a statewide high-speed computer network within all its courts, and the administration of a single domestic violence database managed and supported by the courts. As a result, New York can successfully facilitate the immediate calculation and transmission of statewide firearms-prohibiting data to the federal databases.

#### D. Retrieval of Firearms and Restoration of Gun Permits

When an individual’s order of protection expires, whether issued by a Criminal Court or the Family Court, that individual can apply to have their weapons returned and license or permit restored. Any court which exercises criminal jurisdiction may hear such an application. The application must be made on notice, with an opportunity to be heard, to the following individuals: the district attorney, the county attorney, the protected party, and every licensing officer responsible for issuing a firearms license to the subject of the order. Before the individual’s gun rights can be restored, there must be a written finding that there is no legal impediment to their possession of a surrendered firearm, rifle, shotgun or license. If the licensing officer informs the court that the officer will seek to revoke the individual’s license, the order shall be stayed by the court until the conclusion of any license revocation proceeding.<sup>103</sup>

#### IV. Specific Recommendations

The Task Force proposes legislation and other measures that the federal and state governments can adopt to minimize the risk of shootings committed by individuals with a documented history of domestic violence. The recommendations include the following:

- The category of disqualifying events for gun ownership should be expanded to include findings of liability under abuse and neglect petitions rather than being limited to domestic violence protective orders.
- The current federal definition of “intimate partner” under 18 U.S.C. § 922(g)(8) should be expanded to include anyone in a romantic relationship with an abuser, which better reflects the nature of modern relationships. New York law already includes this more expansive protection, thus closing what has become known as the “boyfriend loophole.”<sup>104</sup> Federal law, and other state laws, should do so as well. There is legislation that has been introduced in the Congress, companion

<sup>101</sup> Goggins & Gallegos, *supra* note 9489, at 9-10.

<sup>102</sup> *See id.* at 10.

<sup>103</sup> *See* N.Y. Crim. Proc. Law § 530.14(5)(b) (Consol. 2020).

<sup>104</sup> *Id.* *Supra* note 86.

federal bills S. 120 and H.R. 569, that would 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. We urge the passage of this legislation.

- Reporting domestic violence incidents should be encouraged, and the available protections to victims of domestic violence should be well publicized. For example, a New York Victims' Rights Notice Bill<sup>105</sup> (S.6158/A.7395) signed into law in December of 2019 requires that victims of domestic violence be informed of their rights by the police and district attorneys handling the matter. The disclosure requirement includes notifying victims of their right to ask the court for an order of protection, which can include provisions requiring offenders to turn in their firearms and any firearm licenses, as well as preventing offenders from obtaining or possessing any additional firearms. Other states should pass similar laws and take steps to ensure that these notices are provided to victims of domestic violence.

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<sup>105</sup> *An Act to Amend the Family Court Act and the Criminal Procedure Law, in Relation to Notification of Rights of Victims of Domestic Violence in Criminal and Family Court Proceedings*, S.6158/A.7395, 2019-2020 Legis. Sess. (2019).

### REPORT SECTION THREE

#### Mass Shootings and Mental Health Issues

Although most individuals with mental health illnesses are not mass shooters, it is undeniable that many mass shooters suffer from some type of serious mental health condition. A backgrounder from the Treatment Advocacy Center, a national non-profit organization that advocates for better treatment of mental illness, summarized four surveys published between 1999 and 2012, which found that mass killings are increasing over time, and that about half of mass shooters suffered from untreated severe mental illness.<sup>106</sup> It's important to keep perspective and note that mass shootings account for less than 1% of gun murder victims in the United States.<sup>107</sup> Many mass shooters suffer from serious mental illness that went undiagnosed or did not follow the medical regimen prescribed to address the illness. Furthermore, "the extant research on mass murders suggests that these events are caused by a complex interaction of emotional turmoil, psychopathology, traumatic life events, and other precipitating factors unique to each case."<sup>108</sup> Research shows that most people with serious mental illness, such as schizophrenia, bipolar disorder and major depression, are not violent.<sup>109</sup> To the extent people suffering from such severe disorders are likely to engage in gun violence, it is more likely to involve suicide than a mass shooting.<sup>110</sup> Keeping guns away from individuals with serious mental illness is not the complete solution for our country's mass shooting and gun violence crisis.

To the extent that there may be a correlation between serious mental illness and mass shootings, there are typically other psychological and social risk factors involved, such as substance abuse, antisocial traits, low self-esteem, a paranoid outlook, anger, narcissism, a history of being abused, and the perception of being rejected by society. In fact, as noted in a recent article appearing in a special issue of *Criminology & Public Policy*, published by the American Society of Criminology, on *Countering Mass Violence in the United States*, these other factors are a better predictor of violent behavior among people suffering from serious mental illness.

Among people with serious mental illness, general risk factors like substance abuse, antisocial traits, anger, and a history of maltreatment predict violence much more

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<sup>106</sup> See The Commonsense Gun Laws P'ship, *Commonsense Solutions: How State Laws Can Reduce Gun Deaths Associated With Mental Illness* 11 (2014), <https://giffords.org/lawcenter/toolkit/first-co-branded-toolkit-from-national-gun-policy-law-center-and-gabby-giffords-organization-urges-legislators-and-activists-to-take-the-steps-to-help-prevent-gun-violence-in-mental-hea/> (last visited Oct. 9, 2020) (citing Treatment Advoc. Ctr., *Are Mass Killings Associated With Untreated Mental Illness Increasing?* (Mar. 2014), [https://www.treatmentadvocacycenter.org/storage/documents/mass\\_killings\\_increasing\\_2013\\_feb.pdf](https://www.treatmentadvocacycenter.org/storage/documents/mass_killings_increasing_2013_feb.pdf) (last visited Oct. 9, 2020)).

<sup>107</sup> *Supra* note 2.

<sup>108</sup> James L. Knoll IV, M.D. & George D. Annas, M.D., M.P.H., *Mass Shootings and Mental Illness*, AMERICAN PSYCHIATRIC ASSOCIATION PUBLISHING, Ch. 4, p. 86 (2016) (internal footnotes omitted), [https://www.researchgate.net/publication/284156856\\_Mass\\_Shootings\\_and\\_Mental\\_Illness](https://www.researchgate.net/publication/284156856_Mass_Shootings_and_Mental_Illness) (last visited Oct. 9, 2020).

<sup>109</sup> *Id.*

<sup>110</sup> *Supra* note 2.

strongly compared to psychosis or other clinical factors. Psychosis and clinical factors seem to play a role primarily among people with few of these general risk factors who are less likely to be violent in the first place. It seems most mass shootings are not directly caused by serious mental illness and would not be prevented by policies that assume otherwise. Mass violence is caused by multiple social, situational, and psychological factors that interact with one another in complex ways that are poorly understood and difficult to predict in advance. . . . A consistent finding in research conducted with community . . . psychiatric . . . and correctional . . . samples is that the most robust risk factors for violence are shared by people with and without mental illness—including demographic factors (e.g., male sex, young age, and low socioeconomic status), histories of victimization and exposure to violence (e.g., childhood maltreatment and trauma), substance abuse and involvement with drug markets, histories of violence and other criminal behavior, and antisocial traits including poor anger controls and impulsivity.<sup>111</sup>

Because “mass violence is a multidetermined problem,”<sup>112</sup> the solutions for preventing mass shootings need to go beyond more than just keeping guns out of the hands of individuals suffering from mental illness. The solutions need to have a multidimensional approach.

Because major risk factors for violence are shared, improvements in policies designed to keep guns out of the hands of dangerous people without mental illness will also go far in preventing incidents involving those with mental illness. Chiefly, these steps include sharpening the criteria for gun disqualification and temporarily removing guns from individuals at imminent risk for violence. The implementation of threat assessment teams and funding for crisis services for people with and without mental illness may also be helpful.<sup>113</sup>

There are various steps that can be taken to prevent individuals suffering from serious mental illness from having access to firearms thereby minimizing the incidence of mass shootings and the devastating injuries and loss of life that occur, as well as the self-inflicted harm that is often a more probable outcome. In this Section of the Report, the Task Force examines and makes recommendations concerning three issues of fundamental importance to the proper balance of public safety and individual rights in this area. The first is the subject of so-called “red flag” laws or Extreme Risk Protective Order Laws. The second is the broadening of mental health bases for prohibiting the purchase or possession of firearms. And, lastly, we discuss the National Instant Criminal Background Check System (~~NICS~~), the expansion of information being reported to NICS, and the rights of individuals whose mental health information has been reported to NICS.

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<sup>111</sup> *Supra* note 2.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

## I. Extreme Risk Protective Order Laws Should be Implemented in all Jurisdictions

With the increase in the number of mass shootings over time and the desire to take steps to proactively prevent them, many states have passed laws that enable family members, friends, school administrators, and law enforcement personnel to seek a court order that allows guns to be removed from individuals determined to be at risk of harming themselves or others. These laws are known as “Red Flag” laws, because the behavior of the individuals subject to the order has put up a red flag that they may hurt themselves and others. These orders are often referred to as Extreme Risk Protective Orders (“ERPOs”).

The Task Force recommends the enactment of an ERPO law in all states that do not currently have one. We also recommend passage of H.R. 1236 by the Congress as soon as possible to establish a program under the Department of Justice to award grants to states to implement extreme risk laws, as well as to empower the federal courts to issue ERPOs extreme Risk Protective Orders, when sought by law enforcement or family and household members. It is critically important that the provisions of these laws do not violate federal and state constitutional protections and other applicable laws.

### A. Rationale Behind Extreme Risk Protective Orders

Data from studies substantiate the fact that many individuals who commit mass shootings give signs beforehand that they are at serious risk of committing violent behavior against themselves and others. For example, Everytown for Gun Safety (“Everytown”) performed an analysis of mass shootings from 2009 to 2018 and found that shooters exhibited warnings signs that they posed a risk to themselves or others before the shooting in 54 percent of incidents.<sup>114</sup>

These warning signs are even more apparent among perpetrators of school violence.<sup>115</sup> The United States Secret Service National Threat Assessment Center conducted a study of school violence incidents from 2008 through 2017 in which a weapon was used causing physical injury or death in grades K – 12. The study, reported in November 2019, found that all of the perpetrators exhibited troubling behavior beforehand, whether at home, school, elsewhere, or online.<sup>116</sup>

Jillian Peterson and James Densley, academics who head an organization called “The Violence Project,”<sup>117</sup> studied every mass shooting since 1966 and, in an Op-Ed in the *Los*

<sup>114</sup> *Ten Years of Mass Shootings in the United States*, EVERYTOWN, *supra* note 51.

<sup>115</sup> See Everytown for Gun Safety, Am. Fed’n of Teachers, & Nat’l Educ. Ass’n, *Keeping Our Schools Safe: A Plan for Preventing Mass Shootings and Ending All Gun Violence in American Schools* 13 (Feb. 2020), <https://everytownresearch.org/report/a-plan-for-preventing-mass-shootings-and-ending-all-gun-violence-in-american-schools/> (last visited Oct. 9, 2020).

<sup>116</sup> *Id.* (citing U.S. Dep’t Homeland Security, U.S. Secret Serv., Nat’l Threat Assessment Ctr., *Protecting America’s Schools: A U.S. Secret Service Analysis of Targeted School Violence* (2019), <https://bit.ly/2U7vnwa> (last visited Oct. 9, 2020)).

<sup>117</sup> The Violence Project is a nonpartisan think tank that has performed research on mass shootings. It is funded by the National Institute of Justice, the research, development, and evaluation agency of the U.S. Department of Justice. For more information on The Violence Project, see THE VIOLENCE PROJECT, <https://www.theviolenceproject.org/> (last visited Oct. 9, 2020).

*Angeles Times*, dated August 4, 2019, discussed the four things all mass shooters have in common based on their research.<sup>118</sup> They noted that in almost all cases, the shooter “reached an identifiable crisis point in the weeks or months leading up to the shooting . . . [and] often had become angry and despondent because of a specific grievance.” This may have been triggered by a change in job status or rejection in a relationship. They further noted that mass shooters often displayed signs prior to the shooting. “Such crises were, in many cases, communicated to others through a marked change in behavior, an expression of suicidal thoughts or plans, or specific threats of violence. . . . Most mass public shooters are suicidal, and their crises are often well known to others before the shooting occurs. The vast majority of mass shooters leak their plans ahead of time.”<sup>119</sup> ERPO laws provide people who see such warnings with a means to report them before a tragedy occurs.

#### B. Specific Examples of Mass Shootings Where Signals Were Given

In reviewing highly publicized mass shootings, it is common to find that the shooter had had some form of serious mental illness and exhibited warning signs prior to the shooting that they were at risk of harming themselves or others. Unfortunately, one also finds examples in which concerned individuals tried to alert authorities but were unable to prevent the shootings from occurring. In the following examples, the shooter’s access to a firearm resulted in these warning signs becoming fatal.

1. The Heritage Foundation, as part of a three-part series addressing mental illness, violence, and firearms, published a Legal Memorandum discussing prime examples of mass shootings where the shooter exhibited troubling, and sometimes psychotic, symptoms at the time of the shooting.<sup>120</sup>
  - a. Jennifer San Marco killed seven people in Goleta, California on January 30, 2006 – a former neighbor and six postal workers in the mail processing plant where she used to work – before shooting herself in the head. A couple of months prior to the shooting, police were alerted to her bizarre behavior which, for example,

<sup>118</sup> Jillian Peterson & James Densley, Opinion, *Op-Ed: We Have Studied Every Mass Shooting Since 1966. Here’s What We’ve Learned About the Shooters*, L.A. TIMES (Aug. 4, 2019), <https://www.latimes.com/opinion/story/2019-08-04/el-paso-dayton-gilroy-mass-shooters-data> (last visited Oct. 9, 2020). The authors have compiled a database that dates back to 1966 “of every mass shooter who shot and killed four or more people in a public place, and every shooting incident at schools, workplaces, and places of worship since 1999.” The four things the data revealed that mass shooters have in common are: 1) they “experienced early childhood trauma and exposure to violence;” 2) they “reached an identifiable crisis point in the weeks or months leading up to the shooting;” 3) most shooters “had studied the actions of other shooters and sought validation for their motives;” and 4) they “all had the means to carry out their plans.”

<sup>119</sup> *Id.*

<sup>120</sup> See John Malcolm & Amy Swearer, Legal Memo. No. 239, *Part I: Mental Illness, Firearms, And Violence*, THE HERITAGE FOUNDATION, 6-7 (Jan. 31, 2019) (internal footnotes omitted), <https://www.heritage.org/sites/default/files/2019-01/LM-239.pdf> (last visited Oct. 9, 2020).

consisted of: kneeling by her car in a post office parking lot talking to herself; ordering food at restaurants and rushing out the door before eating it; and taking her shirt off in public.<sup>121</sup>

- b. Seung-Hui Cho, the shooter who killed 32 people and wounded 17 others at Virginia Tech on April 16, 2007 before killing himself, likewise exhibited telltale signs that he was suffering from serious mental illness. “Cho told his college roommate that he had a supermodel girlfriend who lived in outer space and traveled by spaceship, was known to fixate on female students, and had to be removed from his undergraduate poetry class over worrying behavior. After suggesting he might kill himself, he was determined to be mentally ill and in need of hospitalization for presenting a danger to himself or others, but received only minimal psychiatric treatment.”<sup>122</sup>
- c. Jiverly Wong, who killed 13 people and himself at a civic association in Binghamton, New York in 2009, sent a letter to a news station before the shooting. He claimed in the letter that he was being “persecuted by undercover cops who caused him to lose his job by spreading rumors about him, touched him in his sleep, stole money from his wallet, and tried to force him into a car accident.”<sup>123</sup>
- d. Jared Loughner killed 6 people and wounded 13 others, including Congresswoman Gabrielle Giffords, in January 2011 at a shooting in Tucson, Arizona. He “was almost certainly suffering from untreated schizophrenia in the year prior to the shooting. . . . Loughner’s parents were so worried about his mental health that his father confiscated Loughner’s shotgun,

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<sup>121</sup> *Id.* (citing Dan Frosch, *Woman in California Postal Shootings Had History of Bizarre Behavior*, N.Y. TIMES (Feb. 3, 2006), <https://www.nytimes.com/2006/02/03/us/woman-in-california-postal-shootings-had-history-of-bizarre-behavior.html> (last visited Oct. 9, 2020)); see Martin Kasindorf, *Woman Kills 5, Self at Postal Plant*, USA TODAY (Feb. 1, 2006), [https://usatoday30.usatoday.com/news/nation/2006-01-31-postal-shooting\\_x.htm](https://usatoday30.usatoday.com/news/nation/2006-01-31-postal-shooting_x.htm) (last visited Oct. 9, 2020).

<sup>122</sup> Malcom & Swearer, *supra* note 120, at 6 (internal quotation marks and footnotes omitted); see Christine Hauser & Anahad O’Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES (Apr. 16, 2007), <https://www.nytimes.com/2007/04/16/us/16cnd-shooting.html> (last visited Oct. 9, 2020).

<sup>123</sup> Malcom & Swearer, *supra* note 120, at 6.

disabled his car, and tried to get him mental health treatment.”<sup>124</sup>

- e. James Holmes killed 12 people and injured 70 others in a movie theater in Aurora, Colorado, on July 20, 2012. Holmes was seeing a University of Colorado psychiatrist before the shooting, who was so worried about his mental state that she reached out to University Police regarding putting him under a psychiatric hold. Holmes sent a package to his psychiatrist containing a notebook with plans for the shooting and his obsession with killing. Police found explosives and gasoline when they searched his apartment after the shooting, the door to which had been boobytrapped.<sup>125</sup>
- f. On December 14, 2012, Adam Lanza shot and killed his mother at the home he shared with her in Newtown, Connecticut, and then traveled to the Sandy Hook Elementary School where he murdered 20 children and 6 adults by shooting them. He shot himself in the head as police arrived at the school. As set forth in an official report issued by the Connecticut Office of the Child Advocate regarding the shooting,<sup>126</sup> he had exhibited symptoms consistent with schizophrenia at a young age, including excessive hand washing and smelling non-existent odors. During the year before the shooting, he demonstrated increasingly antisocial behavior, such as staying in his room and only communicating with his mother, with whom he lived, by text messages.<sup>127</sup> Lanza’s mother had consulted with Yale University’s Child Study Center when he was in ninth grade, however, she unfortunately did not follow its recommendations for therapy and medication for her son. Lanza participated in an online community for mass-murder enthusiasts. He had easy access to a number of firearms and high-capacity magazines in his

<sup>124</sup> *Id.* (internal footnotes omitted).

<sup>125</sup> *Id.*; see *also* *Colorado Theater Shooting Fast Facts*, CNN, <https://www.cnn.com/2013/07/19/us/colorado-theater-shooting-fast-facts/index.html> (last updated July 14, 2019) (last visited Oct. 9, 2020).

<sup>126</sup> See John Malcolm & Amy Swearer, *supra* note 120 at 7, nn. 101-04 (citing Connecticut Off. of the Child Advoc., *Final Report: Shooting at Sandy Hook Elementary School* (Nov. 21, 2014)).

<sup>127</sup> *Id.*

home, which enabled him to carry out this horrible tragedy.<sup>128</sup>

2. A more recent example is Nikolas Cruz's massacre of 17 students at the Marjory Stoneman Douglas High School in Parkland, Florida on February 14, 2018. Cruz's guardian described him as a "ticking time bomb." In fact, his guardian had contacted law enforcement on multiple occasions regarding his threatening behavior, which included holding a gun to her head.<sup>129</sup>

### C. New York State's Red Flag Law

New York State's ERPO law became effective on August 24, 2019.<sup>130</sup> The law allows not only a family or household member of the person at risk, or law enforcement, to apply for such an order, but a school official as well. In this regard, New York's law allows more categories of individuals to seek ERPOs than the laws of some other states.<sup>131</sup> If granted, the ERPO prohibits the person at risk from purchasing or possessing firearms and orders them to surrender any firearms they possess to law enforcement. The order may also authorize the police to search the individual, their home, or their vehicle for any firearms.

The New York State Assembly's memorandum in support of this legislation<sup>132</sup> provides a number of justifications for the law. For example, the memorandum notes that "[f]amily and household members are often the first to know when someone is experiencing a crisis or exhibiting dangerous behavior." Moreover, even in situations where the concerns have been reported to law enforcement, "in New York, as in many other states, law enforcement officers may not have the authority to intervene based on the evidence they are provided, sometimes resulting in preventable tragedies, including interpersonal gun violence or suicide involving a gun." The memorandum further notes that California, Washington, Indiana, and Connecticut all have similar laws on the books. In addition, the memorandum acknowledges the important goal of keeping New Yorkers safe, while respecting due process rights.<sup>133</sup>

<sup>128</sup> Alison Leigh Cowan, *Adam Lanza's Mental Problems 'Completely Untreated' Before Newtown Shootings, Report Says*, N.Y. TIMES (Nov. 21, 2014), <https://www.nytimes.com/2014/11/22/nyregion/before-newtown-shootings-adam-lanzas-mental-problems-completely-untreated-report-says.html> (last visited Oct. 9, 2020).

<sup>129</sup> See *Nikolas Cruz's Caretaker Claims She Warned Authorities That Parkland Suspect Was 'Ticking Time Bomb'*, INSIDE EDITION (Mar. 20, 2018, 2:52 PM), <https://www.insideedition.com/nikolas-cruzs-caretaker-claims-she-warned-authorities-parkland-suspect-was-ticking-time-bomb-41716> (last visited Oct. 9, 2020).

<sup>130</sup> It is set forth in Article 63-A of New York's Civil Practice Law and Rules.

<sup>131</sup> See *Extreme Risk Protection Orders*, GIFFORDS L. CTR, <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/> (last visited Oct. 9, 2020).

<sup>132</sup> N.Y. State Assembly, *Memorandum in Support of Legislation A06994*, [https://nyassembly.gov/leg/?default\\_fld=&bn=A6994&term=2017&Memo=Y](https://nyassembly.gov/leg/?default_fld=&bn=A6994&term=2017&Memo=Y) (last visited Oct. 9, 2020).

<sup>133</sup> See *id.*

## 1. Applying for an ERPO in New York

To apply for an ERPO, an individual (“Petitioner”) files a sworn application in New York Supreme Court in the County where the individual against whom the order is being sought (“Respondent”) lives. The application may contain supporting documentation and must set forth facts that justify the issuance of the ERPO. The application should indicate if the Respondent owns firearms and where they are located, to the best of the Petitioner’s knowledge.<sup>134</sup> A court may issue a temporary ERPO, ex parte or otherwise, if the Petitioner shows that there is probable cause to believe that the Respondent is likely to engage in conduct that would result in serious harm to himself, herself or others. The court must issue a written decision on a temporary ERPO application on the same day it is filed. If the court grants a temporary ERPO, the written decision must set forth the grounds that warrant issuing a temporary ERPO.<sup>135</sup>

## 2. Service of a Temporary ERPO on the Respondent

If the application is granted, the temporary ERPO, petition, and supporting papers are to be served promptly on the Respondent, typically by a law enforcement agency in the Respondent’s jurisdiction. The Order must, among other things, direct the Respondent: (1) not to purchase, possess, or attempt to purchase or possess, a firearm, rifle or shotgun during the time the Order is in effect; (2) to promptly surrender to law enforcement any such weapon the Respondent possesses; and (3) to list all firearms, rifles, and shotguns possessed by the Respondent and the location of same. The Court may also direct a police officer to search the premises, vehicle, and person of the Respondent in a manner that is consistent with procedures set forth in Article 690 of N.Y. Criminal Procedure Law, which govern the granting of search warrants in connection with criminal matters. The

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<sup>134</sup> N.Y. C.P.L.R. § 6341 (Consol. 2020).

<sup>135</sup> N.Y. C.P.L.R. § 6342.

Respondent is given written notice of the time and place for the hearing to determine whether a final ERPO should be granted. The hearing must take place between 3 to 6 days after service of the temporary ERPO.<sup>136</sup>

The Court must notify the appropriate law enforcement agencies by the next business day after the Order is issued and provide a copy of the Order. The Division of Criminal Justice Services (“DCJS”)<sup>137</sup> is required to immediately report the Order to the Federal Bureau of Investigation so that the Bureau is aware that the Respondent is prohibited from purchasing firearms, rifles, and shotguns. The Court also must direct the law enforcement agency with jurisdiction over the temporary ERPO to conduct a background investigation, and then report to the court information pertaining to Respondent’s prior convictions, current criminal charges, firearm registrations, orders of protection against the Respondent, and current parole or probation status, if applicable.<sup>138</sup>

### 3. Issuance of a Final ERPO

As noted above, the Court must hold a hearing soon after the temporary ERPO is issued to determine whether to issue a final ERPO.<sup>139</sup> At the hearing, the Petitioner has the burden of proving, by clear and convincing evidence, that the Respondent is likely to engage in conduct that would result in serious harm to himself, herself or others. If the Court issues a

<sup>136</sup> *Id.* The Respondent is advised in writing that he or she may seek a longer time frame for the hearing and that the Respondent may promptly seek the advice of an attorney.

<sup>137</sup> DCJS is a New York State agency that provides resources and services to improve the quality of the criminal justice system and enhance the public safety. Among its many responsibilities, it provides training to law enforcement, analyzes statewide crime and program data, maintains criminal history records and fingerprint files, performs background checks, and administers the state’s Sex Offender Registry, Missing Persons Clearinghouse and DNA Databank, <https://www.criminaljustice.ny.gov/crimnet/mail.htm> (last visited Oct. 9, 2020).

<sup>138</sup> *Supra note 135.*

<sup>139</sup> N.Y. C.P.L.R. § 6343. The time frame in which to hold a hearing regarding the issuance of a final ERPO is set forth in § 6343(1) as follows: the hearing shall take place no sooner than three business days nor later than six business days after service of the temporary ERPO on the Respondent. If no temporary ERPO has been granted, the Petitioner is still entitled to a hearing (unless the application is voluntarily withdrawn) no later than 10 business days after service of the application. If the Respondent requests additional time for the hearing, in both situations, the Court may grant that request.

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permanent ERPO, it must be served on the Respondent in the same manner as the temporary ERPO was served. Any firearms previously removed by law enforcement pursuant to a temporary ERPO must be retained by law enforcement; any firearm licenses the Respondent possesses must be suspended; the Respondent must be prohibited from purchasing or possessing a firearm, rifle or shotgun; and the Respondent must surrender any such weapons to law enforcement.<sup>140</sup> Similar to the service of the temporary ERPO, the Court may direct a police officer to search the Respondent's premises, vehicle, and person in a manner that is consistent with procedures set forth in Article 690 of N.Y. Criminal Procedure Law. The Final ERPO may last for up to one year from the date the final ERPO (or temporary ERPO) was issued. The Court must make the same notifications to law enforcement agencies and the Federal Bureau of Investigation as with the issuance of a temporary ERPO.<sup>141</sup>

If the Court determines that the burden of proof for issuing a final ERPO has not been met, and firearms have been taken from the Respondent, the Court must order the return of those weapons to the Respondent. In addition, the Respondent is entitled to petition the Court for a hearing to set aside the final ERPO before it expires; however, the Respondent may only do so once and bears the burden of proof by clear and convincing evidence that there are changed circumstances justifying a change to the final ERPO. The Petitioner must receive notice of any such hearing.<sup>142</sup>

#### 4. Renewal of a Final ERPO

Within 60 days before a final ERPO expires, a Petitioner can request an extension if he or she believes that there is still a likely risk that the Respondent will engage in conduct that would result in serious harm to himself, herself, or others. The Court will conduct a hearing similar to that held when considering the first

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

ERPO, in determining whether to grant an extension.<sup>143</sup> If the Court is convinced by clear and convincing evidence that an extension is warranted, the final ERPO can be renewed for up to one year.<sup>144</sup> After an ERPO expires, the records of the proceedings are sealed from the general public. However, certain individuals and entities will still have access to the records, including: courts, police who enforce criminal state laws, agencies that issue firearm licenses, and prospective law enforcement employers.<sup>145</sup>

#### 5. Return of Weapons After Expiration of a Final ERPO

Once the ERPO has expired, the Respondent can submit a written application for the return of his or her firearm(s). This application must be made with notice to the Petitioner and all law enforcement responsible for issuing a firearm license to the Respondent, and an opportunity for those parties to be heard. If the Court determines that there is no legal impediment to the Respondent possessing the surrendered firearms, the Court will order their return. However, if a licensing officer informs the Court that he or she is going to seek a revocation of Respondent's license to possess a firearm, the Court must stay the return order until a license revocation proceeding can be completed.<sup>146</sup>

#### D. Other State ERPO Laws

Several states in addition to New York have enacted Extreme Risk Protection Laws. Many of these laws were passed after the tragic shooting on February 14, 2018 at the Marjory Stoneman Douglas High School in Parkland, Florida, during which 17 people were killed and 17 others were injured. At least 18 states and the District of Columbia currently have Extreme Risk Protection laws on the books.<sup>147</sup> An analysis performed by Everytown of petitions filed seeking ERPOs ~~Extreme Risk Orders~~ in jurisdictions with such laws in effect as of January 2019 found that at least 3,900 petitions for such orders were filed between January 2018 and August 2019 across all of the states. Furthermore, states with such laws on the books for more than two years

<sup>143</sup> N.Y. C.P.L.R. § 6345.

<sup>144</sup> See *FORMS & INSTRUCTIONS - Application for an Extreme Risk Protection Order*, NYCOURTS.GOV, <http://ww2.nycourts.gov/erpo> (last visited Oct. 9, 2020).

<sup>145</sup> N.Y. C.P.L.R. § 6346.

<sup>146</sup> *Id.*

<sup>147</sup> See *Extreme Risk Laws Save Lives*, EVERYTOWN (Apr. 17, 2020), <https://everytownresearch.org/extreme-risk-laws-save-lives/> (last visited Oct. 9, 2020); see also *Extreme Risk Protection Orders*, *supra* note 131).

(California, Connecticut, and Washington), revealed a vast increase in the number of petitions being filed over time.<sup>148</sup>

The above data indicate that Extreme Risk Protection laws are being increasingly utilized as a means to prevent mass shootings and suicides. In addition, Everytown's analysis provides examples of incidents in several states where it is believed that an ERPO prevented a mass shooting tragedy:<sup>149</sup>

- A study in California, published in 2019, examined 21 cases where a Gun Violence Restraining Order [comparable to an ERPO] was issued to disarm people who threatened to commit mass shootings, including an employee of a car dealership who threatened to shoot up his workplace and a student who threatened a mass shooting at a school assembly;
- In Maryland, four individuals who threatened violence against schools were disarmed during the first three months after its extreme risk law went into effect; and
- In Florida, extreme risk laws were used to remove firearms from a person who said that killing people would be “fun and addicting”; as well as in several potential school violence cases, including one where a student accused of stalking an ex-girlfriend threatened to kill himself.

#### E. Proposed Federal Legislation

The Extreme Risk Protection Order Act of 2019<sup>150</sup> was introduced in the House of Representatives on February 14, 2019 (exactly one year after the mass shooting tragedy at the Marjory Stoneman Douglas High School in Parkland, Florida). If enacted, this Act would establish a program under the Department of Justice to award grants to states to implement extreme risk laws and set forth minimum standards that states must meet to be eligible for the grants. The funding would 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; developing protocols, forms, and orders to carry out the extreme risk laws; and raising public awareness regarding extreme risk laws. The act would also empower federal courts to issue ~~ERPOs~~ **Extreme Risk orders** when sought by law enforcement or family and household members.<sup>151</sup> The bill was ordered to be

<sup>148</sup> *Extreme Risk Laws Save Lives*, *supra* note 147. In California the number of petitions filed for ERPOs increased by more than 330 percent between 2016 and 2018.

<sup>149</sup> See *Extreme Risk Protection Orders*, *supra* note 131 (internal footnotes omitted).

<sup>150</sup> H.R. 1236, 116th Cong. (2019).

<sup>151</sup> Representative Jerrold Nadler offered an Amendment to the bill on September 10, 2019, during a Consideration and Mark-up Session by the Committee on the Judiciary, which would authorize federal courts to issue ERPOs. See House Comm. on Judiciary, Press Release, *Chairman Nadler Statement for the Markup of H.R. 1236 the Extreme Risk Protection Order Act of 2019*, JUDICIARY.HOUSE.GOV (Sept. 10, 2019), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2106> (last visited Oct. 9, 2020). This provision was present in the Federal Extreme Risk Protection Order Act of 2019, introduced in the House on June 4, 2019. H.R. 3076, 116th Cong. (2019).

Reported as amended on September 10, 2019 by the Judiciary Committee. This is the last action that has been taken on this legislation to date.

Notably, in a recent survey of over 2,500 likely 2020 voters across the country, 85 percent of participants were in favor of Congress passing an extreme risk law, including 78 percent of gun owners.<sup>152</sup>

#### F. Due Process Considerations with ERPO Laws

As set forth in the New York Assembly’s Memorandum in support of the ERPO bill, the goal of ERPO laws is to “keep New Yorkers safe while respecting due process rights.”<sup>153</sup> There can be no doubt that New York and other state ERPO laws are effective tools for helping to prevent mass shootings. To protect Respondents’ due process rights, New York’s ERPO law specifically provides that “no finding or determination made pursuant to this article shall be interpreted as binding or having collateral estoppel or similar effect, in any other action or proceeding, or with respect to any other determination or finding in any court, forum or administrative proceeding.”<sup>154</sup> Nevertheless, there have been concerns raised by attorneys, including the Criminal Justice Section, [the Committee on Disability Rights](#), and the Committee on Mandated Representation of the New York State Bar Association,<sup>155</sup> that the implementation of New York’s Red Flag law raises due process, [privacy](#), constitutional, and right to counsel concerns that should be addressed.

Among these concerns is that because the application for an ERPO (temporary or permanent), set forth in N.Y.C.P.L.R. Article 63-A, is a civil proceeding, it lacks certain protections that attach to a criminal action and could potentially result in criminal jeopardy for a respondent. Moreover, the ERPO law’s provisions contain concerning ambiguities, including how judicial findings about a respondent’s mental health in an ERPO proceeding might be used in other civil or criminal proceedings, or whether “evidence” discovered in an ERPO proceeding could be used in a criminal action or be discoverable pursuant to the new criminal discovery provisions under the Criminal Procedure Law. In addition, since there is no right to counsel in connection with the ERPO civil proceeding, Respondents may unwittingly take actions that can result in self-incrimination, for example, by signing a receipt acknowledging possession of seized firearms that could later form the basis for a criminal weapons charge.

A detailed discussion of the due process concerns stemming from ERPOs is beyond the scope of this Report. However, the Task Force understands that these are serious concerns and that further action by the Legislature, the courts, or both, may be required to address them. We

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<sup>152</sup> Global Strategy Group & Everytown for Gun Safety, *Voters Call for Background Checks, Strong Red Flag Bill*, (Sept. 6, 2019), <https://everytown.org/documents/2019/09/global-strategy-group-and-everytown-for-gun-safety.pdf/> (last visited Oct. 9, 2020).

<sup>153</sup> *Supra* note 132.

<sup>154</sup> N.Y. C.P.L.R. § 6347.

<sup>155</sup> See Letter from N.Y. Bar Ass’n Comm. on Mandated Representation, to Henry Greenberg, President, N.Y. Bar Ass’n (Oct. 31, 2019), attached at Appendix A.

recommend that the New York State Bar Association further explore these issues in order to make additional suggestions regarding proposed legislation that address these important matters.

#### G. Recommendation of the Task Force

According to The Violence Project’s research, another factor that all mass shooters have in common is the means to carry out their plan, i.e., access to a firearm. Through their study of mass shootings since 1966, Professors Peterson and Densley found that “[i]n 80% of school shootings, perpetrators got their weapons from family members, . . . Workplace shooters tended to use handguns they legally owned. Other public shooters were more likely to acquire them illegally.”<sup>156</sup> Based on these findings, Peterson and Densley recommend that people be more proactive in identifying and reporting concerns about individuals in crisis, as well as taking steps to prevent such individuals’ access to weapons. At the legislative level, they recommend laws requiring individuals to obtain a license before purchasing a firearm, universal background checks, safe storage laws, and red flag laws.<sup>157</sup> The Task Force is supportive of all of these recommendations. In particular, ERPOs are an effective way to prevent those individuals at serious risk of doing harm to themselves and others from having access to the firearms that can inflict such devastating loss of life.

The Task Force recommends the enactment of an ERPO law in all states that do not currently have one. We also recommend that Congress pass H.R. 1236 as soon as possible, which will establish a program under the Department of Justice to award grants to states to implement Extreme Risk Laws, and empower federal courts to issue ERPOs~~Extreme Risk Orders~~ when sought by law enforcement or family and household members. Ideally ERPOs should also enable school officials to seek court intervention, as provided for under New York’s Red Flag Law. We recommend that family, household members, and school administrators who have knowledge regarding an individual who is at risk of harming himself, herself, or others, first go to law enforcement, if possible, to advise them of the relevant information. The Task Force also recognizes that there are differences between the state laws currently enacted regarding who is afforded standing, the burden of proof, and the scope of the ERPOs. The Task Force favors common sense approaches to these laws, but believes it is critically important to respect and support everyone’s constitutional rights and due process. To that end, we recommend that the concerns raised by NYSBA’s Criminal Justice Section and Committee on Mandated Representation be addressed by NYSBA in future discussions with the legislature and the Courts.

#### II. Expand the Categories of Individuals Prohibited from Purchasing or Possessing Firearms Guns

The Task Force recommends that the categories of individuals who are prohibited from purchasing or possessing firearms under both federal and state law include: (i) individuals

<sup>156</sup> Peterson & Densley, *supra* note 118.

<sup>157</sup> *Id. See id.*

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undergoing court-ordered outpatient mental health treatment, and (ii) individuals who have voluntarily committed themselves to a mental health hospital.

#### A. Federal Law

Federal law sets forth the circumstances under which people are ineligible to possess or purchase firearms for mental health and other reasons.<sup>158</sup> In particular, people who have been “adjudicated as a mental defective” or committed to a mental institution are prohibited from buying or possessing firearms or ammunition.<sup>159</sup> Effective August 26, 1997, the Bureau of Alcohol, Tobacco and Firearms (“ATF”) amended regulations to define the categories of persons prohibited from receiving or possessing firearms.<sup>160</sup> The definitions are meant to facilitate the implementation of the National Instant Criminal Background Check System required under the 1993 Brady Handgun Violence Prevention Act,<sup>161</sup> which is discussed further in the following Section.

The term “adjudicated as a mental defective” is defined by law to mean that a court, board, commission, or other lawful authority has determined that a person, due to “marked subnormal intelligence, or mental illness, incompetency, condition or disease” is a danger to himself, herself, or others; or lacks the mental capacity to contract or manage his or her own affairs.<sup>162</sup> The term includes individuals found to be “insane” by a court in a criminal case, and individuals found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. §§ 850a, 876b.<sup>163</sup> In effect, individuals who have been involuntarily committed to an inpatient mental facility, found incompetent to stand trial, found not guilty due to insanity or serious mental illness, or placed under a legal conservatorship because of serious mental illness, are not allowed to possess a firearm or ammunition.<sup>164</sup>

“Committed to a mental institution” is defined by law to mean a formal commitment of a person to a mental institution by a court, board, commission, or other legal authority, and

<sup>158</sup> See Federal Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.*

<sup>159</sup> See *id.*; see also 27 C.F.R. § 478.11.

<sup>160</sup> See Dep’t of Treasury, Bureau of Alcohol, Tobacco, & Firearms, Final Rule, Treasury Decision, TD ATF-391, Definitions for the Categories of Persons Prohibited From Receiving Firearms (95R-051P), <https://www.atf.gov/file/84311/download> (last visited Oct. 9, 2020). Note that ATF’s name was changed to “Bureau of Alcohol, Tobacco, Firearms, and Explosives” with the enactment of the Homeland Security Act of 2002. It was also moved from the Department of the Treasury to the Department of Justice under that act. It is still referred to as “ATF.”

<sup>161</sup> Brady Handgun Violence Prevention Act, 107 Stat. 1536, Pub. L. No. 103-159 (1993).

<sup>162</sup> See sources cited *supra* notes 158-160.

<sup>163</sup> See *id.*; see also 10 U.S.C. § 850a (indicating that the defense of lack of mental responsibility at a court-martial proceeding is established if the accused proves by clear and convincing evidence that as a result of a severe mental disease or defect, they were unable to appreciate the nature and quality or the wrongfulness of the acts); 10 U.S.C. § 876b (mentally incompetent to stand trial means that a person is presently suffering from a mental disease or defect that renders them unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case).

<sup>164</sup> See Dep’t of Treasury, Bureau of Alcohol, Tobacco, & Firearms, *supra* note 160; see also Emma Elizabeth McGinty, Daniel W. Webster, & Colleen L. Barry, *Gun Policy and Serious Mental Illness: Priorities for Future Research and Policy*, 65 PSYCHIATRIC SERVS. 50 (2014), <https://ps.psychiatryonline.org/doi/full/10.1176/appi.ps.201300141> (last visited Oct. 9, 2020).

includes a commitment to a mental institution involuntarily. It includes a commitment for mental defectiveness or mental illness, as well as for other reasons, such as for drug use.<sup>165</sup>

The federal prohibition on firearm possession for mental health reasons does not include people who have voluntarily committed themselves to a mental health facility, or who have been admitted for observation. It also does not include individuals who are undergoing mandatory court-ordered outpatient treatment determined necessary for that person to live safely in the community.<sup>166</sup> Notably, a number of states have expanded their laws beyond the federal prohibition categories to include some of these situations, such as mandatory outpatient commitment and voluntary commitment to an inpatient program.<sup>167</sup> The Task Force recommends that the federal prohibitions be expanded to include these situations.

#### B. Involuntary Outpatient Commitment

Most states have laws that allow courts to mandate that individuals undergo mental health treatment as part of an outpatient program rather than on an inpatient basis.<sup>168</sup> In New York, Kendra's Law (passed in 1999 and named in memory of Kendra Webdale who was pushed in front of a subway train and killed by a man with a history of mental illness and hospitalizations) provides for court-ordered outpatient treatment for those individuals with mental illness who are likely to have difficulty living safely in the community without the supervision and assistance of outpatient treatment.<sup>169</sup>

Even though federal law does not include involuntary outpatient commitment as one of its prohibited categories for firearm ownership, several states prohibit individuals ordered to receive outpatient mental health treatment from possessing firearms, and require reporting those individuals to state and/or federal authorities.<sup>170</sup> These reporting requirements can save lives. For example, the shooter in the 2007 Virginia Tech massacre, during which 32 people were killed and 17 people were injured, was ordered to receive outpatient treatment, but was not reported to authorities as ineligible for gun ownership because the law did not require it. In the aftermath of that tragedy, Virginia amended its law to prohibit gun ownership based on involuntary outpatient commitment.<sup>171</sup> The Consortium for Risk-Based Firearm Policy, which includes leading researchers, practitioners, and advocates in gun violence prevention and mental health, specifically recommends that “[i]nvoluntary outpatient commitment should disqualify

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<sup>165</sup> See 27 C.F.R. § 478.11.

<sup>166</sup> See sources cited *supra* notes 158-160.

<sup>167</sup> See McGinty, Webster, & Barry, *supra* note 164.

<sup>168</sup> See The Commonsense Gun Laws Partnership, *supra* note 106, at 11-12 (internal footnotes omitted). Notably, the Commonsense Gun Law Partnership was a collaboration of the Americans for Responsible Solutions and the Law Center to Prevent Gun Violence. The two organizations joined together in 2016 to form the Giffords Law Center to Prevent Gun Violence.

<sup>169</sup> See N.Y. Mental Hygiene Law § 9.60 (Consol. 2020).

<sup>170</sup> See *Mental Health Reporting*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/mental-health-reporting/> (last visited Oct. 9, 2020).

<sup>171</sup> See Va. Code Ann. § 18.2-308.1:3 (2019) (“It shall be unlawful for any person involuntarily . . . ordered to mandatory outpatient treatment . . . or ordered to mandatory outpatient treatment as the result of a commitment hearing . . . to purchase, possess, or transport a firearm.”)

individuals from purchasing or possessing firearms under federal law if there is a court finding of substantial likelihood of future danger to self or others or an equivalent finding.”<sup>172</sup>

A mandate that a mentally ill person participate in involuntary outpatient commitment because he or she is likely to endanger him or herself, or others, should have the same prohibiting effect as an inpatient commitment to a mental institution. The Task Force recommends that the federal statute be amended to add mandatory outpatient treatment to the prohibition against purchasing or possessing a firearm, and that states that do not already have such a prohibition enact one.

### C. Voluntary Admission to a Mental Institution

Federal law does not prohibit people who voluntarily admit themselves to a mental institution from purchasing firearms.<sup>173</sup> According to the Giffords Law Center: “The following states have closed this gap by prohibiting firearm purchase or possession by persons who have been voluntarily admitted to a mental hospital within specified time periods: Connecticut (within six months), Illinois (until receiving a certification that he or she is not a danger), Maryland (until receiving ‘relief’ from the firearm disqualification), and the District of Columbia (within five years).”<sup>174</sup> New York State law does not include voluntary commitment to a mental institution within its definition of “committed to a mental institution,” for purposes of disqualification from firearms possession.<sup>175</sup>

The position of the Task Force is that individuals who voluntarily commit themselves to a mental institution should be prohibited from purchasing or possessing a firearm. We believe this prohibition should be required under federal law as well as under all state law. Any subsequent restoration of the individual’s right to possess a firearm should be determined after balancing the individual’s right to purchase or possess a firearm against any continuing public safety concerns.<sup>176</sup>

### III. All Disqualifying Events Prohibiting Gun Ownership Should be Reported to NICS

The Task Force recommends that all disqualifying events for gun ownership and possession be reported by all state and federal entities, including law enforcement, courts and mental facilities, to the National Instant Criminal Background Check System to ensure thorough and effective background checks. There is no doubt that this will help prevent guns from getting into the hands of individuals who should not have them.

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<sup>172</sup> Consortium for Risk-Based Firearm Policy, *Guns, Public Health, and Mental Illness: An Evidence-Based Approach for Federal Policy* 3 (Dec. 11, 2013), <https://www.issueab.org/resources/18225/18225.pdf> (last visited Oct. 9, 2020).

<sup>173</sup> See sources cited *supra* notes 158-160.

<sup>174</sup> *Categories of Prohibited People*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/categories-of-prohibited-people/> (last visited Oct. 9, 2020).

<sup>175</sup> See 14 CRR-NY 543.3-.4.

<sup>176</sup> See *infra* Report Section Three, Part III. G. *State Procedures for Restoration of Firearm Possession Rights* for a further discussion of restoring gun possession rights: ~~pp. 81-82.~~

#### A. The National Instant Criminal Background Check System (“NICS”)

The NICS was established to carry out the firearm purchase background check requirements enacted into law by the Brady Handgun Violence Prevention Act of 1993.<sup>177</sup> The NICS is managed by the Federal Bureau of Investigation and is used to conduct presale background checks for individuals seeking to purchase firearms from Federal Firearms Licensees (“FFL”).<sup>178</sup> The NICS is defined by statute as: “[T]he National Instant Criminal Background Check System, which an FFL must, with limited exceptions, contact for information on whether receipt of a firearm by a person who is not licensed under 18 U.S.C. 923 would violate federal or state law.”<sup>179</sup>

The NICS provides disqualifying information under 18 U.S.C. § 922(g) or (n) to FFLs when they are processing an individual’s potential firearms purchase. The FBI developed the NICS in cooperation with ATF, and local and state law enforcement agencies. The NICS provides centralized access to criminal history and other disqualifying records by searching three separate national databases.<sup>180</sup> Those databases contain records compiled by the FBI and information that the states voluntarily provide. The three separate databases are: (1) the National Crime Information Center (“NCIC”),<sup>181</sup> (2) the Interstate Identification Index (“III”), and (3) the NICS Index.

- The NCIC is defined as “the nationwide computerized information system of criminal justice data established by the FBI as a service to local, state, and federal criminal justice agencies.”<sup>182</sup> It has been in existence since 1967 and contains a wealth of information, including: individuals who are the subjects of domestic violence protection orders, active criminal warrants, immigration violations, missing persons, stolen property, and other information helpful to law enforcement.<sup>183</sup> It contains information

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<sup>177</sup> 107 Stat. 1536, Pub. L. No. 103-159. The Brady Act amended the Federal Gun Control Act of 1968 (18 U.S.C. § 921 *et seq.*). The interim provisions (phase I) of the Brady Act went into effect February 28, 1994. The interim provisions applied to handgun purchases only and allowed law enforcement officers a maximum of five business days to conduct presale background checks for evidence of disqualifying information. The NICS became operational when the Brady Act’s permanent provisions went into effect on November 30, 1998.

<sup>178</sup> An FFL is a person who is licensed as a manufacturer, importer, and/or dealer of firearms. A person must be licensed by the Bureau of Alcohol, Tobacco, Firearms and Explosives to engage in the business of firearms. See 28 C.F.R. § 25.2; see also *Fact Sheet - Federal Firearms and Explosives Licenses by Types*, ATF (May 2019), <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-federal-firearms-and-explosives-licenses-types> (last visited Oct. 9, 2020).

<sup>179</sup> See 28 C.F.R. § 25.2. 18 U.S.C. § 923 deals with licensing for individuals engaged in the business of importing, manufacturing, or dealing in firearms and ammunition, or licensing as a collector.

<sup>180</sup> See 28 C.F.R. § 25.6.

<sup>181</sup> For a discussion on the NICS and NCIC in the context of domestic violence and, in particular, Orders of Protection, see *supra*, Report Section Two, III. C. *Computerized Registry for Orders of Protection*, ~~*supra pp.*~~ 53-55.

<sup>182</sup> 28 C.F.R. § 25.2.

<sup>183</sup> See *National Crime Information Center (NCIC)*, FBI, <https://www.fbi.gov/services/cjis/ncic> (last visited Oct. 9, 2020).

voluntarily contributed by federal, state, local and international criminal justice agencies.<sup>184</sup>

- The III is defined as “the cooperative Federal-State system for the exchange of criminal history records; and . . . includes the National Identification Index, the National Fingerprint File and, to the extent of their participation in such system, the criminal history record repositories of the states and the FBI.”<sup>185</sup> It is a national system for the interstate exchange of criminal history records, and also contains information voluntarily contributed by federal, state, local, and international criminal justice agencies.<sup>186</sup> It includes information on arrests and convictions for serious offenses anywhere in the United States. The III is compiled and maintained by the FBI.
- The NICS Index is defined as “the database, to be managed by the FBI, containing information provided by federal and state agencies about persons prohibited under federal law from receiving or possessing a firearm. The NICS Index is separate and apart from the NCIC and the Interstate Identification Index (III).”<sup>187</sup> It was specifically created for NICS and contains descriptive information regarding disqualified individuals, such as unlawful drug use, dishonorable discharge from the military, unlawful aliens, persons adjudicated or committed as a mental defective, and other information that would prohibit an individual from possessing a firearm based on state or federal law. The information from localities and states is voluntarily contributed to the NICS Index and may not be found in the III or the NCIC. Although the majority of records in the NICS Index may come from federal agencies, this is considered a vehicle for states to share relevant mental health information according to what their state laws allow.<sup>188</sup> To this end, the NCIS Index was expanded in 2012 to include state records regarding information prohibiting firearm purchase or possession.<sup>189</sup>

In addition to the three databases above, during an NICS background check the Department of Homeland Security’s U.S. Immigration and Customs Enforcement databases are also searched for disqualifying information.

## B. Performing a Background Check

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<sup>184</sup> 28 C.F.R. § 25.4.

<sup>185</sup> 34 U.S.C. § 40316.

<sup>186</sup> 28 C.F.R. § 25.4.

<sup>187</sup> 28 C.F.R. § 25.2.

<sup>188</sup> 28 C.F.R. § 25.4; *see also* FBI Nat’l Press Office, Press Release, *National Instant Criminal Background Check System Posts NICS Index Data*, FBI (Mar. 18, 2016), <https://www.fbi.gov/news/pressrel/press-releases/national-instant-criminal-background-check-system-posts-nics-index-data> (last visited Oct. 9, 2020).

<sup>189</sup> *See* U.S. Dep’t Just., FBI, Crim. Just. Info. Servs. Division, *National Instant Criminal Background Check System (NICS) Operations 2012*, <https://archives.fbi.gov/archives/about-us/cjis/nics/reports/2012-operations-report> (last visited Oct. 9, 2020).

The procedure FFLs follow in performing background checks depends upon the state in which the FFL is conducting business, and whether the state government or FBI serves as the Point of Contact (“POC”) for the sale and background check. “Each state decides whether the FFLs in its state call a state POC or the FBI to initiate firearm background checks.”<sup>190</sup>

“Point of Contact” is defined by statute to mean:

[A] state or local law enforcement agency serving as an intermediary between an FFL and the federal databases checked by the NICS. A POC will receive NICS background check requests from FFLs, check state or local record systems, perform NICS inquiries, determine whether matching records provide information demonstrating that an individual is disqualified from possessing a firearm under Federal or state law, and respond to FFLs with the results of a NICS background check. A POC will be an agency with express or implied authority to perform POC duties pursuant to state statute, regulation, or executive order.<sup>191</sup>

FFLs must follow one of these three procedures in performing background checks, depending upon the state in which they are located:<sup>192</sup>

- In states where the state government has agreed to serve as the POC for the sale of handguns as well as long guns, the FFLs contact the NICS through the state POC for all firearm transfers. The state POC conducts the NICS check and determines whether the transfer would violate state or federal law.
- In states where the state government has agreed to serve as a POC for handgun purchases but not for long gun purchases, FFLs contacts the NICS through the designated state POC for handgun transfers and the FBI NICS Section for long gun transfers.
- In states where the state government has declined to serve as a POC for both firearm and long gun transfers, FFLs contact the NICS directly. The FBI conducts the NICS check and determines whether the transfer would violate state or federal law.

The NICS provides full service to FFLs in 30 states, five U.S. territories, and the District of Columbia. The NICS provides partial service to seven states. The remaining 13 states perform their own checks through the NICS.<sup>193</sup>

<sup>190</sup> *About NICS, supra* note 99.

<sup>191</sup> 28 C.F.R. § 25.2.

<sup>192</sup> See U.S. Dep’t Just., FBI, Crim. Just. Info. Servs. Division, *NICS Federal Firearms Licensee Manual* (Aug. 2011), <https://www.fbi.gov/file-repository/nics-firearms-licensee-manual-111811.pdf/view> (last visited Oct. 9, 2020).

<sup>193</sup> See *National Instant Criminal Background Check System (NICS)*, FBI, <https://www.fbi.gov/services/cjis/nics> (last visited Oct. 9, 2020).

After a search is initiated pursuant to an FFL's request, the initial results will yield a disqualifying record, no disqualifying record, or will indicate that there is a delay because potential disqualifying information was found but more research is needed for verification. If FFLs have not been notified within three business days that a firearm sale would violate federal or state law, they can proceed with the sale if they wish to do so.<sup>194</sup>

### C. State Submissions of Mental Health Records to NICS and The National Instant Criminal Background Check System (NICS) Improvement Amendments Act of 2007

If a state is a POC for purposes of performing a background check for an FFL, it will often have access to information that goes beyond that which the FBI can access. Federal law requires that federal agencies submit information they possess regarding people prohibited from possessing firearms to the NICS.<sup>195</sup> Federal law, however, does not require state agencies to report individuals prohibited from purchasing firearms under either federal or state law to the NICS. As such, the FBI will only be able to access state mental health disqualifying information if a state voluntarily provides such information to an NICS database.<sup>196</sup> Not all states have provided this information, or if they do, the information is often incomplete. Consequently, the FBI is reliant on states voluntarily submitting relevant records for use in the NICS and has strongly encouraged states to provide more complete records.<sup>197</sup>

The National Instant Criminal Background Check System (NICS) Improvement Amendments Act of 2007 ("NIAA")<sup>198</sup> was passed to encourage states that were not reporting mental health and other disqualifying records for firearm possession to the NICS to do so.<sup>199</sup> At the time of its passage, most states did not report mental health records to NICS.<sup>200</sup> In the *Sec. 2 FINDINGS* portion of the NIAA, Congress set forth facts to support the legislation, including the following:

Although most Brady background checks are processed through NICS in seconds, many background checks are delayed if the Federal Bureau of Investigation (FBI)

<sup>194</sup> See 18 U.S.C. § 922(t)(1); 28 C.F.R. § 25.2. Some states have longer waiting periods that must be met before a firearm may be transferred. For example, New York allows up to 30 days (S. 2374/A2690 signed into law in July 2019).

<sup>195</sup> See NICS Improvement Amendments Act of 2007, 121 Stat. 2559, Pub. L. 110-180 (2008); 34 U.S.C. § 40901(e)(1)(C); see also the Fix NICS Act of 2017, passed as part of the Consolidated Appropriations Act, 132 Stat. 348, Pub. L. 115-141 (2018).

<sup>196</sup> See 28 C.F.R. § 25.4; see also Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and the National Instant Criminal Background Check System (NICS), 81 Fed. Reg. 382 (Jan. 6, 2016) (codified at 45 C.F.R. pt. 164); *Printz v. United States*, 521 U.S. 898 (1997) (5-4 decision striking down the interim provisions of the Brady Act obligating local law enforcement officers to conduct background checks on prospective handgun purchasers and holding that requiring state and local officials to do violated the Tenth Amendment.).

<sup>197</sup> U.S. GEN. ACCOUNTING OFF., GAO/GGD/AIMD-00-64, GUN CONTROL: IMPLEMENTATION OF THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM 12-13 (Feb. 2000), <http://www.gao.gov/new.items/g100064.pdf> (last visited Oct. 9, 2020).

<sup>198</sup> NICS Improvement Amendments Act, 121 Stat. 2559, Pub. L. No. 110-180.

<sup>199</sup> See McGinty, Webster, & Barry, *supra* note 164, at 51-52 (internal citation omitted).

<sup>200</sup> *Id.*

does not have automated access to complete information from the States concerning persons prohibited from possessing or receiving a firearm under Federal or State law. . . . The primary cause of delay in NICS background checks is the lack of . . . automated access to information concerning persons prohibited from possessing or receiving a firearm because of mental illness, restraining orders, or misdemeanor convictions for domestic violence. . . .<sup>201</sup>

Congress goes on to cite the 2007 Virginia Tech shooting as an example of how “[i]mproved coordination between State and Federal authorities could have ensured that the shooter’s disqualifying mental health information was available to NICS.”<sup>202</sup> Due to the importance of federal access to state records through the NICS system, the Act authorizes state grants to: (1) establish or upgrade information and identification technologies for firearms eligibility determinations, and (2) create electronic systems to provide accurate and timely information to NICS of individuals prohibited from obtaining firearms under federal law.<sup>203</sup>

In July 2012, the U.S. Government Accountability Office issued a report assessing the progress that the Department of Justice and the states had made in implementing key provisions of the NIAA.<sup>204</sup> The report noted that the NIAA was intended to assist states in making more records available to NICS for use in background checks, and provides financial incentives, including rewards and penalties, based on the percentage of records each state makes available. Those financial incentives are in the form of NICS Act Record Improvement Program (“NARIP”) grants from the DOJ to the states to aid them in providing such records. To be eligible to receive a grant, a state must: (1) give DOJ an estimate of the number of NICS-related records it has, and (2) establish a program that will allow individuals with a mental health-related firearm prohibition to seek relief from that prohibition under certain conditions.<sup>205</sup>

The report found that between 2004 and 2011, the total number of mental health records that states made available to the NICS Index increased by approximately 800 percent. Most of these records came from 12 states.

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<sup>201</sup> NICS Improvement Amendments Act, 121 Stat. 2559, Pub. L. No. 110-180.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> See U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-684, GUN CONTROL SHARING PROMISING PRACTICES AND ASSESSING INCENTIVES COULD BETTER POSITION JUSTICE TO ASSIST STATES IN PROVIDING RECORDS FOR BACKGROUND CHECKS (July 2012), <https://www.gao.gov/assets/600/592452.pdf> (last visited Oct. 9, 2020).

<sup>205</sup> Such a program must allow an individual, who previously was disqualified for mental health reasons, to apply for relief from these disabilities, with an opportunity for an adjudication before a court or other appropriate state body, with due process protections. The person is to be granted this relief if it is determined that he or she is not likely to act in a manner dangerous to public safety, and if granting the relief would not be contrary to the public interest. If the relief is denied there must be an opportunity for the individual to petition the appropriate state court for a *de novo* judicial review of the denial. If the relief is granted, the mental health disqualification is treated as if it never occurred. *Id.*; *supra* at note 189, Sec. 105 RELIEF FROM DISABILITIES PROGRAM REQUIRED AS CONDITION FOR PARTICIPATION IN GRANT PROGRAMS.

Everytown ~~for Gun Safety~~ performed an analysis of the NICS Indices database<sup>206</sup> “obtained from the FBI for the years of 2008 to 2017.”<sup>207</sup> It found that in 2009, the first year that funding became available under the NIAA for states to upgrade their reporting systems to NICS, three states received the funds; but by the end of 2017 that had increased to 29 states.<sup>208</sup> It further found that the number of state mental health records submitted to the NICS system dramatically increased along with the funding,<sup>209</sup> and the numbers of individuals denied firearms on mental health grounds likewise increased.

The Everytown analysis showed that between 2008 and 2017, states with laws requiring or authorizing reporting of mental health records (43 states at the time of the report) increased the number of disqualifying mental health records in NICS by 11 times. States without such laws (seven at the time and the District of Columbia) increased their reporting, but at a much lower rate of two times.<sup>210</sup> Not surprisingly, states with reporting laws have submitted more than twice as many records per capita as states without such laws, “1,600 vs. 700 per 100,000 people, respectively.”<sup>211</sup>

The specifics of an individual state’s reporting laws make a difference in terms of whether disqualifying information ends up being transmitted to NICS. Not surprisingly, the Everytown analysis found that if a reporting law requires mental health information to be reported to NICS, as compared to just authorizing transmittal, it makes a significant difference.<sup>212</sup> Whether the laws require reporting prospectively versus reporting going back for a period of time also impacts on the completeness of the records reported to NICS. Requiring courts and mental health facilities to submit this information makes a further positive impact on the completeness of the information to which NICS has access.

#### D. New York State Law

New York State has enacted a number of measures to ensure that federal and state authorities have access to records that show whether an individual is disqualified from purchasing firearms due to mental health or other reasons.

In 2008, after the passage of the NIAA, New York passed the Gun Safety Act, which amended the Mental Hygiene and related laws to authorize the Commissioner of the Office of

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<sup>206</sup> As noted above, information from localities and states is voluntarily contributed to the NICS Index and may not be found in the Interstate Identification Index or the NCIC. The NICS Indices database is considered a vehicle for states to share relevant mental health information according to what their state laws allow.

<sup>207</sup> Everytown For Gun Safety, *Fatal Gaps: How the Virginia Tech Shooting Prompted Changes in State Mental Health Records Reporting 2* (July 2, 2018), <https://everytownresearch.org/report/fatal-gaps/> (last visited Oct. 9, 2020).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* (“In 2007, only eight states had laws requiring or explicitly authorizing the reporting of prohibiting mental health records to NICS. Between 2007 and 2017, 35 states passed new reporting laws and, by the end of 2017, 43 states had reporting laws in place. In that same time period, 16 of those states have also amended and improved existing laws.”).

<sup>210</sup> *Id.* at 4.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 6 (“Of the 10 states with the highest record submission rates per capita, there are eight that require reporting, rather than merely authorizing it.”(emphasis omitted)).

Mental Health (“OMH”) and the Commissioner of the Office for People with Developmental Disabilities (“OPWDD”) to: (1) collect records from the private and county-operated facilities in the state that provide inpatient mental health treatment, and (2) share with the NICS database non-clinical identifying records regarding mental health disabilities that would disqualify individuals from possessing firearms under federal law.<sup>213</sup> This information includes involuntary commitments, but not voluntary commitments. The information is submitted to the New York State Division of Criminal Justice Services (“DCJS”) by OMH and OPWDD, which then transmits it to NICS.<sup>214</sup>

New York’s SAFE Act<sup>215</sup> amended the Mental Hygiene Law (“MHL”) by adding a new § 9.46, effective March 16, 2013, which requires mental health professionals to report patients who they believe are likely to engage in conduct that would result in serious harm to themselves or others. A “mental health professional” includes physicians (including psychiatrists), psychologists, registered nurses, and licensed clinical social workers. The report is to be made to the county director of community services or his or her designees as soon as practicable. If the county mental health official agrees with the mental health professional’s assessment, he or she will report non-clinical identifying information to DCJS. DCJS then determines if the reported individual possesses a firearms license. If they do, DCJS will notify the appropriate licensing official to revoke or suspend the license as soon as possible. The individual must surrender the license and all firearms, and if he or she does not do so voluntarily, the police are authorized to remove them.<sup>216</sup>

The SAFE Act also created a statewide database of firearms license holders that is operated by the New York State Police. In addition to DCJS checking the MHL § 9.46 reports, it also periodically checks the statewide firearms license database for criminal convictions, mental health, and other records to determine if an individual is no longer eligible to possess a firearm.<sup>217</sup>

New York requires operators of mental health facilities or programs that are licensed or funded by the state to provide OMH with any records pertaining to persons who may be disqualified from possessing a firearm due to mental illness.<sup>218</sup> The state further requires the Chief Administrator of the Courts to adopt rules requiring transmission of the name and other identifying information of each person who has a guardian appointed to him or her because of marked subnormal intelligence, mental illness, incapacity, condition or disease or who lacks the

<sup>213</sup> See Carl E. Fisher, Ziv E. Cohen, Steven K. Hoge, & Paul S. Appelbaum, *Restoration of Firearm Rights in New York*, 33 BEHAV. SCI. & L. 334, 335-36 (2015), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/bsl.2171> (last visited Oct. 10, 2020).

<sup>214</sup> *Id.*

<sup>215</sup> *Supra* at note 36.

<sup>216</sup> New York Mental Hyg. Law § 9.46 (Consol. 2020); see also NYS Off. of Mental Health & NYS Off. for People with Dev. Disabilities, *Guidance Document: New York Secure Ammunition and Firearms Enforcement Act (NY SAFE Act)*, <https://nics.ny.gov/docs/guidance.pdf> (last visited Oct. 9, 2020).

<sup>217</sup> See NYS Off. of Mental Health & NYS Off. for People with Dev. Disabilities, *supra* note 216, at 5.

<sup>218</sup> See *Mental Health Reporting: State by State; Mental Health Reporting in New York*, <https://lawcenter.giffords.org/gun-laws/state-law/50-state-summaries/mental-health-reporting-state-by-state/> (last updated Oct. 23, 2018) (citing N.Y. Mental Hyg. Law §§ 7.09(j), 31.11, 33.13(b)) (last visited Oct. 9, 2020).

mental capacity to contract or manage his or her own affairs to the Criminal Justice Information Service of the FBI or DCJS.<sup>219</sup>

#### E. The Fix NICS Act of 2017

Even though federal agencies and departments are mandated to report disqualifying information to NICS, they have not always done so. This failure can result in tragedies. One such example is the mass shooting that occurred at the First Baptist Church in Sutherland Springs, Texas on November 5, 2017, during which 27 people were killed (including the shooter) and 20 were injured. The shooter opened fire on a church congregation in which his mother-in-law, with whom he did not get along, was a member. The shooter was a former airman in the Air Force and had been court-martialed in 2012 for an assault on his spouse and stepson. He pled guilty and received a bad conduct discharge and 12 months confinement. The domestic violence conviction prohibited him under federal law from buying or possessing a firearm. However, the Air Force failed to report the disqualifying conviction to the NICS system. As a result, he twice passed a background check when buying firearms at San Antonio-area Academy Sports & Outdoors stores. He had also been able to purchase two firearms in 2014 and 2015 in Colorado.<sup>220</sup>

On March 23, 2018, in the wake of the Sutherland Springs shooting, the Fix NICS Act of 2017<sup>221</sup> was passed and signed into law in an attempt to improve federal agencies' reporting of disqualifying gun possession events. In summary, the law:

- Requires federal agencies and departments to submit semiannual certifications to the Attorney General. The certifications must indicate whether the agency is in compliance with the NICS record submission requirements and describe all relevant records in its possession during the previous 6-month reporting period.
- Requires federal agencies to establish a four-year implementation plan to improve the submission of records to NICS.
- Incentivizes state and tribal governments to establish four-year implementation plans with grant preferences, and to comply with said plans.
- Requires the Attorney General to report to Congress on a semiannual basis regarding federal agencies' compliance with the Act.
- Requires the Attorney General to determine whether federal agencies, states, and tribal governments have achieved substantial compliance with the benchmarks set out in their implementation plans.

<sup>219</sup> See *Id.* (citing N.Y. Jud. L. § 212(2)(q) (Consol. 2020)).

<sup>220</sup> See David Montgomery, Richard A. Oppel Jr., & Jose A. Del Real, *Air Force Error Allowed Texas Gunman to Buy Weapons*, N.Y. TIMES (Nov. 6, 2017), <https://www.nytimes.com/2017/11/06/us/texas-shooting-church.html> (last visited Oct. 9, 2020).

<sup>221</sup> Consolidated Appropriations Act, 132 Stat. 1132-38, Pub. L. 115-141 (2018). The Fix NICS Act comprises Title VI of the Appropriations Act.

The Attorney General submitted the first semiannual report to Congress on November 14, 2019.<sup>222</sup> The results, as published, reflected improved sharing of records and information to NICS at all levels of government, including state and federal. Moreover, each of the 50 states and the District of Columbia submitted implementation plans.<sup>223</sup> The report notes a large increase in the number of records in the NICS databases between April 2018 and August 2019. Specifically, more than six million records were added to the three databases that are searched during a NICS check. Of particular significance is the 15% increase in the number of records in the NICS Indices, which is where the records relating to mental health adjudications are primarily located. Another positive development is the increased number of dispositions reported for cases that had previously just reported an arrest. Cases without a reported disposition require additional time to research the outcome and, consequently, cause a delay in reporting the results of the NICS background check. The number of records submitted, as well as the means of transmission to NICS, has improved in several federal agencies and departments, including the U.S. Immigration and Customs Enforcement (“ICE”), the Homeland Security Investigations Section of ICE, the United States Army, and the Air Force. Likewise, the states have made progress, and several have initiated working groups to address reporting issues. It remains to be seen if the goals set out in the implementation plans will be attained, but it appears that the reporting of relevant records by federal agencies and departments, and the states, is improving and will hopefully continue on this trajectory. The way to ensure an effective background check system is to have as many relevant records in the system as possible in order to keep firearms out of the hands of those who should not possess them under the law.

#### F. Privacy Considerations

Federal and state privacy laws do not prevent states from sharing relevant mental health records with the NICS system. Given the sensitive nature of this information, however, federal regulations include requirements to ensure the privacy and security of mental health records that have been submitted to NICS.<sup>224</sup> Moreover, access to this data is restricted to agencies authorized by the FBI and limited to use in firearm purchaser background checks and other closely related law enforcement activities.

The federal Health Insurance and Portability and Accountability Act of 1996 (“HIPAA”), and implementing regulations, restrict disclosure of protected health information by covered entities, which consist of health care providers, health plans, and clearinghouses.<sup>225</sup> However, HIPAA and its regulations permit disclosures under certain circumstances, including when required by law and for a law enforcement purpose to a law enforcement official.<sup>226</sup>

The Department of Health and Human Services (“HHS”) issued a final rule, effective February 5, 2016, modifying HIPPA to specifically allow certain HIPPA-covered entities to disclose to the NICS, or a state repository of NICS data, the identities of individuals with a

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<sup>222</sup> U.S. DEP’T JUSTICE, THE ATTORNEY GENERAL’S SEMIANNUAL REPORT ON THE FIX NICS ACT (Nov. 2019), <https://www.justice.gov/ag/page/file/1217396/download> (last visited Oct. 9, 2020).

<sup>223</sup> *See id.*

<sup>224</sup> *See* 28 C.F.R. § 25.1.

<sup>225</sup> *See* 45 C.F.R. § 164.104.

<sup>226</sup> *See* 45 C.F.R. § 164.512.

mental health condition that disqualifies them from shipping, transporting, possessing, or receiving a firearm under federal law. This rule clarifies for states that by releasing mental health records to the NICS, even in the absence of any state law compelling them to do so, they are not violating the HIPPA privacy requirements. The permitted disclosure is limited to information NICS needs to ascertain whether someone is disqualified from possessing a firearm and excludes diagnostic or clinical information from medical records. As such, the rule balances privacy concerns with the strong public safety need for this information to be communicated to the NICS and the goal of encouraging states to provide disqualifying mental health information to the NICS.<sup>227</sup>

#### G. State Procedures for Restoration of Firearm Possession Rights

As noted above, the NIAA requires states to implement a relief from disabilities program in order to receive grant funds under that statute.<sup>228</sup> State laws differ regarding when, and for how long, people suffering from mental illness will have their gun rights restricted. They also differ with respect to the procedures in place to petition for restoration of gun possession rights. Some states require that a physician certify that restoration of those rights will not endanger the public safety, whereas others rely solely on a judicial proceeding. In addition, not all states have enacted legislation setting forth restoration procedures.<sup>229</sup>

A comprehensive review of various state laws published in a 2011 New York Times article found that:

The intent of these state laws is to enable people to regain the right to buy and possess firearms if it is determined that they are not a threat to public safety. But an examination of restoration procedures across the country, along with dozens of cases, shows that the process for making that determination is governed in many places by vague standards and few specific requirements.

States have mostly entrusted these decisions to judges, who are often ill-equipped to conduct investigations from the bench. Many seemed willing to simply give petitioners the benefit of the doubt. The results often seem haphazard.<sup>230</sup>

New York, in light of the requirements of the NIAA, passed the New York Gun Safety Act of 2008 requiring the Commissioners of OMH and OPWDD to establish a relief

<sup>227</sup> See Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and the National Instant Criminal Background Check System (NICS), 81 Fed. Reg. 382 (Jan. 6, 2016) (codified at 45 C.F.R. Pt. 164).

<sup>228</sup> See NICS Improvement Amendments Act, 121 Stat. 2559, Pub. L. No. 110-180, § 105 (Relief from Disabilities Program Required as Condition for Participation in Grant Programs); *Supra* note 205493.

<sup>229</sup> McGinty, Webster, & Barry, *supra* note 164, at 52 (internal citations omitted); see also Alan R. Felthous & Jeffrey Swanson, *Prohibition of Persons With Mental Illness From Gun Ownership Under Tyler*, 45 J. AM. ACAD. PSYCHIATRY & L. 478, 479 (2017), <http://jaapl.org/content/jaapl/45/4/478.full.pdf> (last visited Oct. 9, 2020) (noting that 19 states and the District of Columbia have not enacted restoration procedures as of the 2017 date of publication); Fisher, Cohen, Hoge, & Appelbaum, *supra* note 213.

<sup>230</sup> Michael Luo, *Some With Histories of Mental Illness Petition to Get Their Gun Rights Back*, N.Y. TIMES (July 2, 2011), <https://www.nytimes.com/2011/07/03/us/03guns.html?auth=login-email&login=email&smid=em-share> (last visited Oct. 9, 2020).

from disabilities program for individuals disqualified from firearm possession under federal law due to mental health conditions.<sup>231</sup> In 2010, OMH and OPWDD adopted regulations for that program.<sup>232</sup> A person who has been disqualified from possessing a firearm due to mental health conditions may apply for a certificate of relief from civil disabilities to regain their ability to possess a firearm. The procedures in the two Offices differ somewhat, but detailed medical records of the applicant's mental health history and treatment must be provided, and in most cases a recent psychiatric evaluation must be performed.<sup>233</sup> A determination is made whether or not to grant a Certificate of Relief based on whether a person's "record and reputation are such that he/she will not be likely to act in a manner dangerous to public safety and where granting the relief would not be contrary to the public interest."<sup>234</sup> If the petition is denied, the basis for that denial must be set forth in writing, and the petitioner may seek a *de novo* review under N.Y.C.P.L.R. Article 78.<sup>235</sup>

#### H. Conclusion

It is essential that all disqualifying events for gun ownership and possession be reported by all state and federal entities, including law enforcement, courts and mental facilities, to the NICS to ensure thorough and effective background checks. There is no doubt that this will help prevent guns from getting into the hands of individuals who should not have them.

The NIAA requires that states receiving grant funds from the federal government have a process that provides for the possibility of restoring gun possession rights. Although the NIAA does not require states to implement a specific process, they must guarantee due process protection and grant individuals relief if their record and reputation are such that they will not be likely to act in a manner dangerous to public safety and granting them relief would not be contrary to the public interest.<sup>236</sup> Consequently, states that have implemented restoration laws have varying processes in place.

Although the Task Force does not endorse one particular process, we emphasize that there should be a fair opportunity for individuals to seek restoration of their rights to possess a firearm after a mental health disqualification. We also recommend that all state restoration procedures require the evaluation and opinion of a mental health professional and incorporate both a clinical and judicial component to ensure that the rights of individuals and public safety interests are appropriately considered in the restoration process.

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<sup>231</sup> *Supra* note 213, at 336.

<sup>232</sup> *See* 14 CRR-NY 543, 643; *See also supra* note 213.

<sup>233</sup> Such an evaluation is required under OPWDD procedures in addition to an IQ and behavior assessment, whereas OMH has the right to require a psychiatric evaluation in appropriate cases. When asked about this difference, OMH stated that it anticipated requesting psychiatric evaluations in most cases. *Supra note 213* *see id.* at 337-38.

<sup>234</sup> 14 CRR-NY 543.1, 643.1.

<sup>235</sup> *Id.*; N.Y. Mental Hyg. Law § 7.09(j) (Consol. 2020).

<sup>236</sup> *See* NICS Improvement Amendments Act of 2007, 121 Stat. 2559, Pub. L. 110-180 (2008).

## REPORT SECTION FOUR

### Mass Shootings and the Sale and Transfer of Guns, Accessories, and Ammunition

The Task Force considered the issues surrounding the sale and transfer of guns, accessories (e.g., bump stocks), and ammunition by examining how people acquire guns and the physical components and accessories of guns. We divide the discussion into the topic of “Hardware Issues,” which addresses whether people should be able to possess certain types of guns or accessories, and “Acquisition Issues,” which addresses how people obtain these items.

#### I. Hardware Issues

##### A. Assault-Style Weapons

Whether people should be able to possess assault-style weapons is a hot button issue. While many people question the need for any law-abiding gun owner to possess what has been termed an assault-style weapon, many law-abiding citizens do choose to hunt with rifles that fall within many definitions of an assault-style rifle. Assault weapons are generally high-powered semiautomatic firearms that are capable of autoloading a new cartridge into the chamber after the gun is discharged. As a result, users only need to pull the trigger to fire the gun, eliminating additional steps between firing rounds and speeding up the rapidity 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 shooting events.<sup>237</sup> Well known examples of the devastating effects using assault-style weapons can have include 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, a semiautomatic assault weapon,<sup>238</sup> have been used in many mass shootings, including those that occurred in Dayton, Ohio; Las Vegas; Parkland; and Sandy Hook.

Given the frequency with which such weapons are used in mass shootings and their increased lethality compared to most other types of firearms, the Task Force recommends that a ban on the sale and possession of assault-style weapons be implemented on both the federal and

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<sup>237</sup> See Jaclyn Schildkraut, Policy Brief, *Assault Weapons, Mass Shootings, and Options for Lawmakers*, ROCKEFELLER INST. OF GOV'T 6 (Mar. 22, 2019), [https://rockinst.org/wp-content/uploads/2019/03/190321b\\_Mass-Shootings-and-Assault-Weapons.pdf](https://rockinst.org/wp-content/uploads/2019/03/190321b_Mass-Shootings-and-Assault-Weapons.pdf) (last visited Oct. 9, 2020).

<sup>238</sup> The AR-15 is a type of “Armalite rifle, named after the company that developed the weapon.” The AR-15 is a semiautomatic rifle, meaning that “the user needs to pull the trigger to fire each shot. . . . The AR was designed for speedy reloading in combat situations, and it can fire dozens of rounds in seconds. The butt of the rifle, or the stock, has a large internal spring that absorbs the shock of each firing. The low recoil makes it easier to shoot and is more accurate than earlier military weapons. It can also be easily customized by adding scopes, lasers and more.” Julie Vitkovskaya & Patrick Martin, *4 Basic Questions About The AR-15*, WASH. POST. (Feb. 16, 2018), <https://www.washingtonpost.com/news/checkpoint/wp/2018/02/15/4-basic-questions-about-the-ar-15/> (last visited Oct. 9, 2020).

state levels. Data support the conclusion that such a ban will in fact decrease the occurrence and casualties of mass shootings.

New York's SAFE Act, signed into law on January 15, 2013,<sup>239</sup> bans manufacturing, transporting, disposing of, or possessing assault-style weapons in New York.<sup>240</sup> The federal Assault Weapons Ban, in effect from 1994-2004 (it sunset in 2004), included a prohibition on manufacturing certain specific weapons as well as a more general ban on semiautomatic weapons with military-style features, and certain large capacity ammunition magazines.<sup>241</sup> It prohibited individuals from manufacturing, owning, or selling a semiautomatic assault weapon.<sup>242</sup> During the ban the relative frequency of assault-style rifles being used in mass shootings declined.<sup>243</sup> In January 2019, legislation was introduced in the United States Senate by Senator Dianne Feinstein to again ban assault weapons. This federal legislation (S. 66 – Assault Weapons Ban of 2019) has been referred to the Committee on the Judiciary, but has not been acted upon beyond that.<sup>244</sup>

Scholarly research supports the effectiveness of these laws in decreasing mass shootings. For example, an article published in the scholarly healthcare journal *The BMJ* on March 6, 2019 entitled *State Gun Laws, Gun Ownership, and Mass Shootings In the US: Cross Sectional Time Series* studied whether the restrictiveness or permissiveness of state gun laws or gun ownership are associated with mass shooting rates in the United States. The researchers concluded that “[t]he permissiveness or restrictiveness of state gun laws is associated with the rate of mass shootings in the US. States with more permissive gun laws and greater gun ownership have higher rates of mass shootings.”<sup>245</sup> In a New York Times opinion piece dated September 4, 2019, Stanford Law professor John Donohue and student Theodora Boulouta reported similar conclusions through their research on whether the federal Assault Weapons Ban reduced the occurrence of mass shootings. They concluded that: “[P]ublic mass shootings — which we defined as incidents in which a gunman killed at least six people in public — dropped during the decade of the federal ban. Yet, in the 15 years since the ban ended, the trajectory of gun massacres has been sharply upward, largely tracking the growth in ownership of military-style

<sup>239</sup> *Supra* note 36.

<sup>240</sup> New York State has established a very helpful website for people to learn about the provisions of the NY SAFE Act. See NYSAFE, <https://safeact.ny.gov/> (last visited Oct. 9, 2020).

<sup>241</sup> Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103d Cong., 2nd Sess. (1994); see also VIVIAN S. CHU, CONG. RESEARCH SERV., R42957, FEDERAL ASSAULT WEAPONS BAN: LEGAL ISSUES (Feb. 14, 2013), <https://fas.org/sgp/crs/misc/R42957.pdf> (last visited Oct. 9, 2020).

<sup>242</sup> “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 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.” Schildkraut, *supra* note 237, at 7 (internal footnotes omitted); see also 18 U.S.C. § 921(a)(30)(B) (repealed).

<sup>243</sup> See Schildkraut, *supra* note 237, at 7-8.

<sup>244</sup> See S.66 - Assault Weapons Ban of 2019, CONGRESS, <https://www.congress.gov/bill/116th-congress/senate-bill/66> (last visited Oct. 9, 2020).

<sup>245</sup> Paul M. Reeping et al., *State Gun Laws, Gun Ownership, and Mass Shootings In the US: Cross Sectional Time Series*, *BMJ* 2019; 364:1542 (2019), available at <https://doi.org/10.1136/bmj.1542>.

weapons and high-capacity magazines.”<sup>246</sup> They further noted that, “[c]ompared with the decade before its adoption, the federal assault weapon ban in effect from September 1994 through 2004 was associated with a 25 percent drop in gun massacres (from eight to six) and a 40 percent drop in fatalities (from 81 to 49).”<sup>247</sup>

These data support the Task Force’s position that enacting a nation-wide ban against assault-style weapons makes sense. This is so even if the law will require periodic updating to meet efforts by gun manufacturers and others to make minor modifications to firearms in an effort to avoid the ban. Moreover, given the large number of assault-style weapons in existence, any legislation could include a buyback program encouraging gun owners to voluntarily turn in assault-style weapons in order to reduce the number of such weapons in circulation.

Determining how to define an “assault weapon” for purposes of such legislation can be challenging. This is because gun manufacturers are very creative in altering a firearm’s design to create firearms that are, in effect, assault weapons but do not meet the criteria set forth in the legal definition. To address this issue, the Task Force offers the following definition of an assault weapon for consideration. It is largely based on the definition in the federal Assault Weapons Ban that was in place from 1994 through 2004. The Task Force submits that this definition is clear, simple, and captures the most common features of assault-style weapons without resulting in an overly broad definition that would include many traditional-style hunting firearms:

- **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 two of the following characteristics:**

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

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<sup>246</sup> John Donohue & Theodora Boulouta, Opinion, *That Assault Weapon Ban? It Really Did Work*, N.Y. TIMES (Sept. 4, 2019), <https://www.nytimes.com/2019/09/04/opinion/assault-weapon-ban.html> (last visited Oct. 9, 2020).

<sup>247</sup> *Id.*

- (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.**

#### B. Large Capacity Magazines<sup>248</sup>

A magazine is “a holder in or on a gun for cartridges . . . to be fed into the gun chamber.”<sup>249</sup> “[M]agazines with a capacity of more than 10 rounds of ammunition” are typically considered to be high capacity magazines.<sup>250</sup> As noted by the Giffords Law Center, high capacity magazines “are a common thread in many high-profile mass shootings in the United States. Because shooters with such magazines can fire at large numbers of people without taking the time to reload, those in the line of fire do not have a chance to escape, law enforcement does not have the chance to intervene, and the number of lives shattered by acts of gun violence increases dramatically.”<sup>251</sup> For example, the shooter in the October 1, 2017 Las Vegas Country Music Festival mass shooting used high capacity magazines in addition to a bump stock, which effectively transforms a semi-automatic rifle into a fully automatic rifle. He killed 58 people and injured 441. Similarly, the shooter in the August 4, 2019 Dayton, Ohio mass shooting used 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 the 32 seconds before police arrived and fatally shot him.<sup>252</sup>

There are no compelling reasons why a law-abiding gun owner would need to use magazines that hold more than ten rounds; and limiting shooters to lower capacity magazines has the potential to save lives. 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. New York State already bans the sale and possession of magazines holding more than ten rounds under the New York SAFE Act. Other states who do not yet have such a ban, and the federal government, should do the same.

<sup>248</sup> Large capacity magazines are also referred to as high capacity magazines.

<sup>249</sup> *Magazine*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/magazine> (last updated Apr. 21, 2020) (last visited Oct. 9, 2020).

<sup>250</sup> *Large Capacity Magazines*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/large-capacity-magazines/> (last visited Oct. 9, 2020).

<sup>251</sup> *Id.*

<sup>252</sup> Adeel Hassan, *Dayton Gunman Shot 26 People in 32 Seconds, Police Timeline Reveals*, N.Y. TIMES (Aug. 13, 2019), <https://www.nytimes.com/2019/08/13/us/dayton-shooter-video-timeline.html> (last visited Oct. 9, 2020).

### C. 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 one by harnessing the recoil energy of a semi-automatic firearm so that the trigger automatically resets and continues firing instead of the shooter having to physically reset the trigger. Like high capacity magazines, bump stocks increase the lethality of shootings. For example, bump stocks were used in the 2017 Las Vegas mass shooting referenced above.

In recognition of these dangers, the federal government has taken significant steps to outlaw bump stocks for most individuals. First, it is illegal under federal law, in most instances, to possess a fully-automatic firearm manufactured after 1986, when the Firearm Owners Protection Act<sup>253</sup> was passed. Under the Act, if an individual wishes to own a fully automatic weapon, it must be manufactured prior to 1986, not prohibited by the individual's state law, and the individual must obtain a special license from the federal government, which is very difficult and requires an extensive background check and periodic renewal. Second, effective March 26, 2019, the federal government enacted a federal rule revising its interpretation of the limits on fully-automatic weapons to specifically include guns fitted with bump stocks.<sup>254</sup> In other words, it is now illegal under federal law to possess a bump stock (unless the possessor has the required license to possess a machine gun) and any bump stocks will have to be destroyed or surrendered to law enforcement officials.

New York State has also acted to outlaw bump stocks. On July 29, 2019, Governor Cuomo signed S. 2448/A. 2684 into law, which makes possessing bump stocks and similar devices an A misdemeanor, and manufacturing or shipping such devices a felony. The Task Force recommends that a similar ban be enacted into law by each state that does not already ban bump stocks.

### D. Firearms Manufactured Without a Serial Number (Ghost Guns)<sup>255</sup> and Not Made By a Licensed Manufacturer

3D printing technology has not yet advanced to where it can be used to create an effective firearm; however, we are not far from a time when a layperson could use 3D printing to create a lower receiver and combine it with legally available gun parts to create an effective, unlicensed/unregistered, and untraceable semi-automatic or fully automatic rifle. 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 using legally available parts. These ghost guns enable individuals to obtain deadly firearms without undergoing required background checks and have been used in mass shootings. For example, on November 14, 2019, Nathaniel Berhow, aged 16, killed two students, and later himself, and

<sup>253</sup> Pub. L. 99-308, 100 Stat. 449 (May 19, 1986).

<sup>254</sup> See Bump-Stock-Type Devices, 83 Fed. Reg. 246 (proposed Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 477, 478 and 479).

<sup>255</sup> *Supra* note 8.

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.<sup>256</sup>

In July 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 (a) are undetectable by a metal detector (including 3D printed guns) after removal of grips, stocks and magazines, or (b) have a major component that does not generate an image that displays the shape of the component by a security screening device.<sup>257</sup> Building upon this legislation, an Act was introduced in the New York State Assembly and Senate<sup>258</sup> in February of 2020 to prohibit the possession of unfinished receivers by anyone other than a gunsmith, and would create felony crimes of possession of an unfinished frame or receiver and the criminal sale of an unfinished frame or receiver in the first, second and third degrees. This legislation was introduced in memory of Scott J. Beigel, a teacher at the Marjory Stoneman Douglas High School in Parkland, Florida who was killed in the tragic mass shooting on February 14, 2018. The Task Force urges the passage of this legislation for the reasons set forth in the New York State Assembly Memorandum in support of the legislation:

With an epidemic of gun violence plaguing the United States, and in the face of Federal inaction in dealing with the crisis, it is incumbent upon the states to enact common-sense reforms that close dangerous loopholes that allow untraceable weapons to flood our communities. Unfinished receivers, also called lowers or blanks, are used to form the lower part of a firearm. An individual can use an unfinished receiver to circumvent gun laws by making their own semiautomatic weapon at home. These unfinished receivers can be turned into a firearm incredibly easily; all that is required is for an individual to drill holes in the unfinished receiver, well out other areas of the unfinished receiver, and then combine with the other pieces needed to make a fully functioning semiautomatic rifle. A skilled individual can assemble an operational semi-automatic firearm using a lower in under an hour, and someone with little experience can, after watching a YouTube video, use a lower make [sic] a semi-automatic weapon in only a slightly longer time. Unfinished receivers are not tracked, and it is unknown exactly how many of them have been finished into weapons.

<sup>256</sup> See *Saugas High School Shooting*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Saugus\\_High\\_School\\_shooting](https://en.wikipedia.org/wiki/Saugus_High_School_shooting) (last updated Oct. 9, 2020).

<sup>257</sup> See N.Y. Penal Law §§ 265.50, 265.55 (consol. 2020).

<sup>258</sup> Session Year 2019, Bill Nos. A 9945 and S 7762; currently referred to the Codes Committee.

Because these weapons are made at home, they contain no serial number and are untraceable.<sup>259</sup>

The Undetectable Firearms Act of 1988 makes it illegal, in effect, to manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm (after removal of grips, stocks and magazines) with less than 3.7 ounces of metal (so as to be detectable by a walk-through metal detector), or that is not in the traditional shape of a gun. The image of all major components of the firearm, i.e., the barrel, slide or cylinder, frame or receiver, must be detectable by x-ray machines.<sup>260</sup> However, the law “does not specify what portion of the firearm must be detectable by a metal detector. This could allow an individual to create a mostly plastic but technically compliant firearm, using a 3D printer or other technology, that contains metal in an extraneous part of the firearm that could be removed prior to entering a security area.”<sup>261</sup> Indeed, 3D printing of guns has become more common in the years after the law’s most recent renewal in 2013.<sup>262</sup>

Several states have passed legislation to address the issue of ghost guns in addition to New York, including California, Connecticut, New Jersey and Washington.<sup>263</sup>

- California and Connecticut laws require that individuals who manufacture or assemble a ghost gun request a unique serial number from state law enforcement and engrave that serial number on the firearm. California also prohibits individuals or companies from helping individuals assemble or manufacture a firearm if such individuals are prohibited from possessing a firearm under state law. Connecticut prohibits individuals who cannot possess a firearm under state law from possessing unfinished frames or receivers.
- 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 capable of manufacturing firearms and firearm 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; to manufacture an untraceable firearm (i.e., one without a serial

<sup>259</sup> [https://nyassembly.gov/leg/?default\\_fld=&leg\\_video=&bn=A09945&term=2019&Summary=Y&Memo=Y](https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A09945&term=2019&Summary=Y&Memo=Y) (last visited Oct. 9, 2020).

<sup>260</sup> See 18 U.S.C. § 922. The term “firearm” under the statute does not include the frame or receiver of the weapon, 18 U.S.C. § 922 (p)(2)(A); “major component” is defined in 18 U.S.C. § 922 (p)(2)(B).

<sup>261</sup> *Ghost Guns*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/ghost-guns/#state> (last visited Oct. 9, 2020).

<sup>262</sup> *Id.* See also H.R. Con. Res. 3626, 113th Cong. (2013) (enacted), Pub. L. No. 113-57 (renewing the Undetectable Firearms Act for another 10 years).

<sup>263</sup> *Supra* note 261.

number) with intent to sell it; or assist someone who is prohibited from possessing firearms with manufacturing an undetectable or untraceable firearm.

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.

- On January 30, 2019, the Undetectable Firearms Modernization Act was introduced in the House of Representatives by Representative Madeleine Dean of Pennsylvania and has several co-sponsors.<sup>264</sup> If enacted, the Bill would prohibit the possession of any firearm that is undetectable by airport-level detection devices and require any firearm with all of its major components attached to generate a gun-shaped image in detection systems. The Bill was referred to the Subcommittee on Crime, Terrorism, and Homeland Security by the Committee on the Judiciary on March 25, 2019.<sup>265</sup>
- On June 13, 2019, the 3D Printed Gun Safety Act was introduced in the Senate by Senator Edward Markey of Massachusetts, joined by others.<sup>266</sup> 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.<sup>267</sup> On that same date the 3D Printed Gun Safety Act of 2019 (H.R. 3265) was also introduced in the House by Representative Theodore Deutch of Florida, with many co-sponsors. On June 28, 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.
- On June 27, 2019 the Untraceable Firearms Act of 2019 was introduced in the House by Representative David Cicilline of Rhode Island, and referred to the House Committee on the Judiciary.<sup>268</sup> On August 15, 2019, the bill was referred to the House Subcommittee on Crime, Terrorism, and Homeland Security by the Committee on the Judiciary.<sup>269</sup> This legislation would prohibit the manufacture and sale of firearms without serial numbers.
- On May 14, 2020, a group of 15 Democrat Senators, led by Senator Richard Blumenthal of Connecticut, introduced legislation, called the Untraceable Firearms Act of 2020,<sup>270</sup> that would require that all guns sold in the U.S. after

<sup>264</sup> H.R. 869, 116th Cong. (2019).

<sup>265</sup> See *All Information (Except Text) for H.R.869 - Undetectable Firearms Modernization Act*, CONGRESS, <https://www.congress.gov/bill/116th-congress/house-bill/869/all-info> (last visited Oct. 9, 2020).

<sup>266</sup> S. 1831, 116th Cong. (2019).

<sup>267</sup> See *S.1831 - 3D Printed Gun Safety Act of 2019*, CONGRESS, <https://www.congress.gov/bill/116th-congress/senate-bill/1831/text> (last visited Oct. 9, 2020).

<sup>268</sup> H.R. 3553, 116th Cong. (2019).

<sup>269</sup> See *H.R.3553 - Untraceable Firearms Act of 2019*, CONGRESS, <https://www.congress.gov/bill/116th-congress/house-bill/3553?r=5&s=1> (last visited Oct. 9, 2020).

<sup>270</sup> S. 3743: Untraceable Firearms Act of 2020.

January 1, 2022 be traceable by ATF; and includes ghost guns, unfinished frames and receivers, and gun-making kits, in the definition of a firearm under federal law. It subjects gun-kit manufacturers, distributors, sellers and buyers to the same federal regulations that govern the purchase or sale of completed firearms. This includes: licensing requirements for all parties involved; that a serial number be placed on the frame or receiver included in each kit; and that background checks be completed on all buyers of these kits and parts. This bill incorporated the Undetectable Firearms Modernization Act, discussed above. It was specifically noted in the announcement of this legislation by Senator Blumenthal that the coronavirus pandemic has caused an increased demand for ghost guns, that results in a mounting threat to public safety.<sup>271</sup> The legislation has been referred to the Committee on the Judiciary.

The Task Force supports these federal legislative efforts. We believe that the most effective way to address the issue of ghost guns is to pass legislation that:

- Bans the manufacturing, assembly or sale of firearms and firearm components, including unfinished frames and receivers, and 3D components and firearms, by those without the appropriate license.
- Requires that 3D printed firearms and components, and all frames and receivers, finished or unfinished, have serial numbers imprinted on them.
- 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.
- Requires 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.

Notably, at its February 2020 Mid-Year Meeting, the American Bar Association adopted as policy a consistent recommendation presented by its Standing Committee on Gun Violence:

The American Bar Association urges federal, state, local, territorial, and tribal governments to enact statutes, rules and regulations that would make it unlawful for any person to transfer, sell, trade, give, transport, or deliver any unfinished firearm frame or receiver to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) unless (i) the unfinished frame or receiver is serialized in accordance with federal requirements for the serialization of firearms, (ii) the recipient passes a background check consistent with the federal requirements for a licensed dealer's transfer of a firearm, and (iii) the seller or transferor of the unfinished frame or receiver creates and retains records consistent with the federal record-keeping requirements for licensed firearm dealers related to

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<sup>271</sup> See the "one pager" issued by Senator Richard Blumenthal describing the Untraceable Firearms Act of 2020, <https://www.blumenthal.senate.gov/imo/media/doc/Untraceable%20Firearms%20Act%20of%202020%20-%20OnePager%20-%2020200513.pdf>, (internal footnotes omitted) (last visited Oct. 9, 2020).

the disposition of firearms, and prohibits the possession, without a federal firearms license, of a finished or unfinished firearm frame or receiver that has not been serialized.<sup>272</sup>

We urge all states that have not already done so to pass effective legislation to prevent the manufacture, sale, and transport of ghost guns, and urge the federal government to enact the legislation that is currently pending before the House and Senate.

## II. Acquisition Issues

### A. Universal Background Checks

Closing the “gun show loophole” is an essential step in preventing mass shootings. While firearms sales through licensed dealers are subject to a background check of the prospective purchaser, sales between private individuals without a federal firearms license (including at gun shows and over the internet) do not require a background check.<sup>273</sup> Legislation should be passed making it illegal for anyone to sell or transfer a firearm, rifle or shotgun without a background check of the prospective purchaser being performed, just as licensed firearm dealers are required to do. This type of legislation passed in the House of Representatives but has not been addressed by the Senate. The Bill, the Bipartisan Background Checks Act of 2019,<sup>274</sup> 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.

Since 2013, the New York SAFE Act has required *all* sellers of firearms, rifles, shotguns and ammunition—both private sellers and licensed firearm dealers—to conduct universal background checks through ~~the National Instant Criminal Background Check System~~ (“NICS”).<sup>275</sup> A private firearm sale must be processed by a federally licensed dealer.<sup>276</sup> Failure to comply with these requirements is punishable as a class A misdemeanor.<sup>277</sup>

<sup>272</sup> Am. Bar Ass’n Standing Comm. on Gun Violence, *Policy 2020*, AM. BAR ASS’N, [https://www.americanbar.org/groups/public\\_interest/gun\\_violence/policy/](https://www.americanbar.org/groups/public_interest/gun_violence/policy/) (last visited Oct. 9, 2020).

<sup>273</sup> See *Universal Background Checks*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/universal-background-checks/> (last visited Oct. 9, 2020) (“A dangerous gap in our federal gun laws lets people buy guns without passing a background check. Under current law, unlicensed sellers—people who sell guns online, at gun shows, or anywhere else without a federal dealer’s license—can transfer firearms without having to run any background check whatsoever.”).

<sup>274</sup> H.R. 8, 116th Cong. (2019).

<sup>275</sup> *Supra* note 36. See also N.Y. Gen Bus Law § 898.

<sup>276</sup> Under New York’s SAFE Act, there is also an exception for sales between immediate family members provided that the transferor-seller does not know of any prohibition preventing the transferee-buyer from owning a firearm.

<sup>277</sup> See *Resources for Gun Owners, Frequently Asked Questions*, NYSAFE, <https://safeact.ny.gov/resources-gun-owners> (last visited Oct. 9, 2020) (“Q. What if I fail to comply with the background check provision? A: Failure to comply with the provision is punishable as a class A misdemeanor.”).

Many mass shootings could have been prevented if this provision had been 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 hijacked 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. Ator 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.<sup>278</sup>

#### B. Extending the Time in which Background Checks May Be Completed

In many jurisdictions, including under federal law, if a background check has not been completed within three days, a ~~firearm~~ gun sale may go through without waiting for the results. There are occasions when the NICS check cannot be completed within three days, often because there are issues regarding a potential buyer's qualifications. Nonetheless, federal law requires that the gun be transferred to the buyer after the three-day period has expired if the NICS results have not been received.<sup>279</sup> This can have devastating effects if the gun gets into the wrong hands.

A fatal and tragic example of why the background check time limit 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 due to a prior arrest record. Because his background check was not completed within the three-day period, however, the sale went through.<sup>280</sup>

Additionally, a Government Accountability Office July 2016 report further documents the difficulty of adequately completing background checks within three days:

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

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<sup>278</sup> See *Midland–Odessa shooting*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Midland%E2%80%93Odessa\\_shooting](https://en.wikipedia.org/wiki/Midland%E2%80%93Odessa_shooting) (last updated Apr. 17, 2020) (last visited Oct. 9, 2020).

<sup>279</sup> See 118 U.S.C. § 922(t)(1).

<sup>280</sup> *Supra* note 9.

available in NICS databases and can require additional outreach to state agencies to obtain information.<sup>281</sup>

New York addressed this issue in July 2019, when Governor Cuomo signed legislation (S. 2374/A2690) into law that extends the time to obtain results from the NICS before a ~~gun~~firearm sale can be finalized up to 30 days. A bill passed the House of Representatives on February 28, 2019 that would also address this issue, but it has not been acted upon by the Senate. The Enhanced Background Checks Act of 2019, H.R. 1112, extends the window for background checks to 10 days.<sup>282</sup>

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 finalized sooner.

The Task Force recommends 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 to at least a 30-day period. The proposed federal legislation is a vast improvement over the current 3-day period, and the Senate should pass it as soon as possible.

C. Expand the Categories of People Who Are Precluded from Purchasing ~~and Possessing~~ a ~~Firearm~~ Gun

A person who has committed a violent act towards another is not prohibited from possessing guns under federal law unless he or she is the subject of a domestic violence restraining order, has been convicted of a felony, or has been convicted of a domestic violence misdemeanor.<sup>283</sup> However, there are additional categories of individuals who have been found to have engaged in violent behavior, or are at great risk of doing so. For example, the Consortium for Risk-Based Firearm Policy reported that, “[t]he research evidence conclusively

<sup>281</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-483, GUN CONTROL: ANALYZING AVAILABLE DATA COULD HELP IMPROVE BACKGROUND CHECKS INVOLVING DOMESTIC VIOLENCE RECORDS, at What GAO Found (July 2016), <https://www.gao.gov/assets/680/678204.pdf> (last visited Oct. 9, 2020).

<sup>282</sup> See H.R. 1112, 116th Cong. (2019); H.R.1112 - Enhanced Background Checks Act of 2019, Congress, <https://www.congress.gov/bill/116th-congress/house-bill/1112/text> (last visited Oct. 9, 2020). 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. See also BRADY, RESOURCES, *The Enhanced Background Checks Act of 2019 (H.R. 1112)*, <https://www.bradyunited.org/legislation/the-enhanced-background-checks-act-of-2019-hr-1112-charleston-loop-hole> (last visited Oct. 9, 2020).

<sup>283</sup> See 18 U.S.C. § 922(d)(1), (8)-(9).

shows that individuals convicted of violent misdemeanors are at increased risk of committing future violent crimes.”<sup>284</sup>

The Task Force believes the following categories of individuals should also be prohibited from gun ownership and possession:

- Individuals convicted of violent misdemeanor crimes such as hate crimes, stalking, and lower level illegal gun possession, among others;
- Individuals found liable under an abuse and neglect petition in a Family Court-type proceeding;
- Individuals who have abused someone with whom they are, or have been, in an intimate relationship (this category closes the “boyfriend loophole” discussed in Report Section Two above).
- Individuals on the federal government’s Terrorist Watch list.

#### D. Ensure All Disqualifying Information Is Reported to NICS

Increased reporting of information that would disqualify individuals from purchasing firearms can save lives and, indeed, may have prevented some of the worst mass shootings in the past two decades. For example, 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 the U.S. Air Force failed to report to NICS. As a result, the shooter was able to purchase several firearms despite his lengthy history of disqualifying criminal and mental health records.<sup>285</sup> 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.

Federal law requires federal agencies that have information concerning people who are prohibited from possessing firearms to submit that information to NICS.<sup>286</sup> As discussed above, however, “Federal law cannot require states to make information identifying people ineligible to possess firearms available to the federal or state agencies that perform background checks.”<sup>287</sup> Although some states have passed laws to close this gap, many states fail to voluntarily report disqualifying information to the proper databases. As a result, the available

<sup>284</sup> Consortium for Risk-Based Firearm Policy, *Guns, Public Health, and Mental Illness: An Evidence-Based Approach for Federal Policy* 14 (Dec. 11, 2013) (internal citations omitted), <https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/archive-2019/pdfs/GPHMI-State.pdf> (last visited Oct. 9, 2020).

<sup>285</sup> Alex Horton, *The Air Force Says It Failed to Follow Procedures, Allowing Texas Church Shooter to Obtain Firearms*, WASH. POST (Nov. 7, 2017) <https://www.washingtonpost.com/news/checkpoint/wp/2017/11/06/the-air-force-says-it-failed-to-follow-procedures-allowing-texas-church-shooter-to-obtain-firearms/> (last visited Oct. 9, 2020).

<sup>286</sup> 34 U.S.C. § 40901(e)(1)(C).

<sup>287</sup> *NICS & Reporting Procedures*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/nics-reporting-procedures/> (last visited Oct. 9, 2020) (citing 28 C.F.R. § 25.4). Case law suggests that a federal statute requiring states to disclose records to the FBI would violate the Tenth Amendment. In *Printz v. United States*, 521 U.S. 898 (1997), a 5-4 decision, the Supreme Court struck down the interim provisions of the Brady Act obligating local law enforcement officers to conduct background checks on prospective handgun purchasers. The Court held that Congress cannot compel state officials to enact or enforce a federal regulatory program.

information during a background check is often incomplete. As discussed in a Giffords Law Center Report on NICS & Reporting Procedures:<sup>288</sup>

This problem applies to every category of person prohibited from possessing firearms, including:

- **Criminal History Records:** A survey in December 2010 found that out of all 50 states, only 12 reported that 80% or more of their felony charges had a final disposition recorded in their criminal history databases.<sup>289</sup> Without a disposition record, it cannot immediately be determined whether a person who was arrested for a crime was ultimately convicted of that crime and became prohibited from possessing firearms.
- **Mental Health Records:** States have also inconsistently reported records identifying people whose mental health histories prevent them from legally possessing firearms . . . . [This is discussed in greater detail in Section 3 above].
- **Drug Abuse Records:** Federal law prohibits unlawful users and individuals addicted to illegal drugs from possessing firearms, and federal regulations define these terms to include any person found through a drug test within the preceding year to have used a controlled substance unlawfully.<sup>290</sup> There are now hundreds of drug court programs across the country that require periodic drug testing, yet this positive test data is rarely available for firearm purchaser background checks.<sup>291</sup> According to a November 2011 report by Mayors Against Illegal Guns, 44 states have submitted fewer than 10 records to the controlled substance file of a centralized nationwide database, and 33 states have not submitted any records at all.<sup>292</sup>
- **Domestic Violence Records:** Federal law prohibits firearm possession by individuals subject to a domestic violence protective order or who have been convicted of a domestic violence misdemeanor.<sup>293</sup> Yet, states have had difficulty identifying and reporting individuals who fall within these categories. . . .<sup>294</sup>

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* (citing SEARCH Nat'l Consortium for Justice Info. & Stat., *Improving the National Instant Background Screening System for Firearm Purchases: Recommendations by SEARCH* 13, 19 (Feb. 2013), <http://www.search.org/files/pdf/ImprovingNICSforFirearmsPurchases.pdf> (last visited Oct. 9, 2020)).

<sup>290</sup> *Id.* (citing 18 U.S.C. § 922(g)(3); 27 C.F.R. § 478.11).

<sup>291</sup> *Id.* (citing SEARCH Nat'l Consortium for Justice Info. & Stat., *supra* note 289, at 19; U.S. GOV. ACCOUNTABILITY OFF., GAO-12-684, GUN CONTROL—SHARING PROMISING PRACTICES AND ASSESSING INCENTIVES COULD BETTER POSITION JUSTICE TO ASSIST STATES IN PROVIDING RECORDS FOR BACKGROUND CHECKS 20-24 (July 2012), <https://www.gao.gov/assets/600/592452.pdf> (last visited Oct. 9, 2020)).

<sup>292</sup> *Id.* (citing Mayors Against Illegal Guns, *Fatal Gaps: How Missing Records in the Federal Background Check System Put Guns in the Hands of Killers* 8 (Nov. 2011), <https://www.issueab.org/resources/14319/14319.pdf> (last visited Oct. 9, 2020)).

<sup>293</sup> *Id.* (citing 18 U.S.C. § 922(g)).

<sup>294</sup> *Id.* (citing U.S. Dep't Justice, *Information Needed to Enforce the Firearm Prohibition: Misdemeanor Crimes of Domestic Violence* (Nov. 2007), [http://www.ncdsv.org/images/MCDV\\_Info%20needed%20to%20enforce%20the%20firearm%20prohibition.pdf](http://www.ncdsv.org/images/MCDV_Info%20needed%20to%20enforce%20the%20firearm%20prohibition.pdf) (last visited Oct. 9, 2020)).

In light of these significant reporting deficiencies, the FBI strongly encouraged states to provide more complete records.<sup>295</sup>

The Task Force recommends that all states that do not currently require the reporting of disqualifying information to NICS pass legislation that ensures that such information will be provided to the FBI. We further recommend that the federal government provide resources to the states to assist in this process, as provided for in the NICS Improvement Amendments Act of 2007.

E. Require Gun Owners to Have a License to Purchase and Possess All Types of ~~Firearms- Guns~~

A limited number of states require an individual to obtain a license (or permit) before purchasing a handgun,<sup>296</sup> and fewer jurisdictions require a license (or permit) in order to purchase a rifle or shotgun. Other states require a license to own a firearm.<sup>297</sup> Almost all states require licenses to hunt with a gun, and most require gun education and safety training. Federal law, however, does not require gun owners or purchasers to be licensed. Moreover, some states require a license in order to purchase ammunition.<sup>298</sup> While such a requirement makes sense, it would be unnecessary if individuals were precluded from purchasing a firearm without a license since the ammunition is useless without a firearm.

Requiring a license (or permit) to purchase or own any type of firearm, as well as a rifle and a shotgun, 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 the construction of churches are subject to state licensing or permitting and related regulatory requirements. A ~~firearm~~-licensing requirement could include mandatory safety training as well as a written and a practical test on gun safety. Just as all states require significant training and education for a driver's license, this is a reasonable requirement in order to ensure the public's safety and welfare. Many states already require the completion of a gun safety training course in order to obtain a license to carry a concealed firearm.<sup>299</sup> Moreover, since firearm safety is a part of any hunter education course

<sup>295</sup> *Id.* (citing U.S. GEN. ACCOUNTING OFF., GAO/GGD/AIMD-00-64, GUN CONTROL: IMPLEMENTATION OF THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM 12-13 (Feb. 2000), <http://www.gao.gov/new.items/g100064.pdf> (last visited Oct. 9, 2020)).

<sup>296</sup> According to an American Bar Association Report to its House of Delegates from the Standing Committee on Gun Violence and other ABA entities, 11 states, and the District of Columbia, have laws, referred to as "permit to purchase" laws, that require a prospective gun buyer to first obtain a permit in order to purchase a firearm. See Am. Bar Ass'n Standing Committee on Gun Violence, *20M107B – Permit to Purchase* (Feb. 19, 2020), [https://www.americanbar.org/groups/public\\_interest/gun\\_violence/policy/20m107b/](https://www.americanbar.org/groups/public_interest/gun_violence/policy/20m107b/) (last visited Oct. 9, 2020).

<sup>297</sup> New York State requires a license to purchase a handgun (pistol or revolver), but not to purchase a shotgun or a rifle.

<sup>298</sup> See Am. Bar. Ass'n Standing Committee on Gun Violence, *supra* note 296.

<sup>299</sup> See *Licensing*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/gun-owner-responsibilities/licensing/> (last visited Oct. 9, 2020).

(required by most, if not all, states in order to obtain a hunting license),<sup>300</sup> completion of a hunter education course could satisfy this requirement, making it less of a burden for many gun owners.

The Giffords Law Center to Prevent Gun Violence reports in its section on Licensing that studies show that licensing laws can lead to significant reductions in both gun homicides and gun suicides.<sup>301</sup> Specifically it notes:

- When Connecticut passed a licensing law, its firearm homicide rate decreased by 40%<sup>302</sup> and its firearm suicide rate decreased by 15%.<sup>303</sup>
- Conversely, when Missouri repealed its licensing law, its firearm homicide rate increased by 25%<sup>304</sup> and its firearm suicide rate increased by 16%.<sup>305</sup>
- A study of licensing laws across 80 large urban counties found that these laws are associated with an 11% decrease in firearm homicides.<sup>306</sup>

Notably, at its February 2020 Mid-Year Meeting, the American Bar Association adopted the following policy at the recommendation of its Standing Committee on Gun Violence:

The American Bar Association urges federal, state, local, territorial, and tribal governments to enact statutes, rules and regulations that require any person seeking to acquire a designated firearm to apply for a permit from a designated law enforcement or public safety agency, in person, to be fingerprinted, and be subject to a background and criminal records check; and prohibit the sale, delivery or transfer of a firearm to anyone who does not possess a valid permit.<sup>307</sup>

The Task Force recommends that all states pass legislation requiring a license (or permit) before a person can purchase or possess any type of firearm, as well as a rifle and a shotgun, that a background check be completed before issuance, and that training in the use of the weaponfirearm as well as safety measures be required.

#### F. Penalties for Failure to Notify the Authorities of Stolen or Lost Guns

<sup>300</sup> See, e.g., Dep't Environmental Conservation, *Hunter Education Course*, N.Y. STATE, <https://www.dec.ny.gov/outdoor/92267.html> (last visited Oct. 9, 2020) ("The NY Hunter Education course (Hunter Safety course) is required to purchase a hunting license in New York.").

<sup>301</sup> See *Licensing*, *supra* note 299.

<sup>302</sup> *Id.* (citing Kara E. Rudolph, Elizabeth A. Stuart, Jon S. Vernick, & Daniel W. Webster, *Association Between Connecticut's Permit-to-purchase Handgun Law and Homicides*, 105 AM. J. PUB. HEALTH 49 (2015)).

<sup>303</sup> *Id.* (citing Cassandra K. Crifasi, John Speed Meyers, Jon S. Vernick, & Daniel W. Webster, *Effects of Changes in Permit-to-purchase Handgun Laws in Connecticut and Missouri on Suicide Rates*, 79 PREVENTIVE MED. 43 (2015)).

<sup>304</sup> *Id.* (citing Daniel Webster, Cassandra K. Crifasi, & Jon S. Vernick, *Effects of the Repeal of Missouri's Handgun Purchaser Licensing Law on Homicides*, 91 J. URBAN HEALTH 293 (2014)).

<sup>305</sup> *Id.* (citing Crifasi, Meyers, Vernick, & Webster, *supra* note 303).

<sup>306</sup> *Id.* (citing Cassandra K. Crifasi *et al.*, *Association Between Firearm Laws and Homicide in Urban Counties*, 95 J. URBAN HEALTH 383 (2018)).

<sup>307</sup> Am. Bar Ass'n Standing Committee on Gun Violence, *supra* note 296.

Imposing some significant form of liability for the failure to promptly report a lost or stolen ~~weapon~~~~firearm~~ 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 an individual's willingness to serve as straw buyers 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, however, require licensed firearm dealers to do so. Such reports must be made within 48 hours of discovering the loss or theft to the United States Attorney General and appropriate local authorities.<sup>308</sup> Most states do not have laws that require an individual owner of a firearm to report its loss or theft.<sup>309</sup> New York, however, requires an owner or person lawfully in possession of a firearm, rifle, or shotgun to report its loss or theft within 24 hours of discovery to a police department or sheriff's office. Violating this requirement is a class A misdemeanor crime.<sup>310</sup>

The Task Force recommends that all states and the federal government require the prompt 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, are the most effective consequences for ensuring compliance with ~~such a~~~~this~~ law.

#### G. Penalties for Unlocked and Unsecured Guns

Although many people may argue that there are legitimate reasons to keep a firearm handy (and unlocked) for self-defense purposes, requiring gun owners to safely and securely store their firearms, ~~rifles and shotguns~~ and imposing penalties for failing to do so, would reduce the likelihood of firearms falling into the wrong hands. This, in turn, may prevent tragic mass shootings. For example, 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.<sup>311</sup> Had Lanza's mother secured her ~~guns~~~~firearms~~, he may not have been able to access the weapons he used in the shooting.

Under the Protection of Lawful Commerce in Arms Act,<sup>312</sup> 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. A reasonable compromise position would be to impose liability for leaving firearms loaded and unsecured in situations where they could be easily accessed by minors or emotionally disturbed persons. For example, in July 2019,

<sup>308</sup> See 18 U.S.C. § 923(g)(6); *Reporting Lost & Stolen Guns*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/gun-owner-responsibilities/reporting-lost-stolen-guns/> (last visited Oct. 9, 2020).

<sup>309</sup> *Id.*, *Reporting Lost & Stolen Guns*.

<sup>310</sup> See N.Y. Penal Law § 400.10 (Consol. 2020).

<sup>311</sup> See Kristina Sgueglia & Ray Sanchez, *Sandy Hook Families Sue Estate of Shooter's Mother*, CNN (Mar. 15, 2015), <https://www.cnn.com/2015/03/14/us/connecticut-sandy-hook-lawsuits/index.html> (last visited Oct. 9, 2020).

<sup>312</sup> 15 U.S.C. §§ 7901-03.

Governor Cuomo signed into law a bill (S.6360/A.8174) that makes it a misdemeanor for firearm, rifle or shotgun owners or custodians to fail to securely lock or store their firearms if they live with (a) an individual under 16 years of age, or (b) someone who is prohibited from possessing a firearm due to an extreme risk protection order or a conviction of a felony or serious offense. New York City further requires firearm owners to render their firearms inoperable by using a safety locking device while the weapon is out of their possession or control, and prohibits the sale or transfer of any firearm without a safety locking device.<sup>313</sup> Most states have no laws that speak to this issue, and those that do vary with respect to certain provisions, e.g., when firearms must be safely stored; whether firearms require a safety lock when sold or transferred; and what type of lock must be used for firearms.<sup>314</sup>

Notably, at its February 2020 Mid-Year Meeting, the American Bar Association adopted as policy, at the recommendation of its Standing Committee on Gun Violence, the following:

The American Bar Association urges federal, state, local, territorial, and tribal governments to enact statutes, rules and regulations that define the requirements of safe storage of a firearm, require firearm owners to meet those requirements, promote safe storage education for firearm owners, [and] urge the federal government to incentivize safe storage programs within the states.<sup>315</sup>

There have been too many children killed as a result of being able to access guns in their homes. The Task Force recommends that laws be enacted, on both a federal and state level, requiring that all firearms, rifles and shotguns regardless of the type, be disabled with a locking device and safely stored when not in the possession or immediate control of the owner or authorized user (the stricter New York City requirement); and that locking devices be required on all weapons firearms manufactured, sold, or transferred by both authorized dealers and private individuals. We recommend the imposition of a criminal penalty for failure to comply with this requirement.

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<sup>313</sup> See *Safe Storage*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/child-consumer-safety/safe-storage/> (last visited Oct. 9, 2020).

<sup>314</sup> See *id.*

<sup>315</sup> Am. Bar Ass'n Standing Committee on Gun Violence, *supra* note 296.

## RECOMMENDATIONS

The following recommendations will have a significant impact on decreasing the occurrence of mass shootings. Some of these recommendations have already been implemented on a state and federal level. Many of them have been recommended by scholars, public interest groups and elected officials. To the extent that these recommendations have not been addressed by all of the states or by the federal government, we recommend that they be implemented promptly. The specifics and manner in which each state addresses these recommendations legislatively and administratively should be determined based on what each state's elected officials deem best for its constituents.

These recommendations pass constitutional muster. The Supreme Court, in a 5-4 decision, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), held for the first time that the Second Amendment protects an individual right of law-abiding citizens to possess an operable handgun in the home for self-defense. In *Heller*, however, the Court cautioned that the Second Amendment right it recognized is “not unlimited,” and does not confer a “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Heller*, 554 U.S. at 626. The following recommendations respect a citizen's right to possess a firearm as set forth in the Constitution and interpreted in *Heller* and subsequent cases, while imposing reasonable and lawful restrictions that are in the government's and public's best interest.

Throughout this report we have noted proposed federal legislation that the Task Force believes can effectively minimize the occurrence of mass shootings, as well as other gun violence. We have urged prompt passage of this legislation. The current Congressional session of the 116<sup>th</sup> United States Congress, during which this legislation has been introduced but not yet passed, will end on ~~December 31, 2020~~ January 3, 2021. If this legislation is not enacted into law by that date, these bills that have been introduced in the House or Senate will be null and void. Bills with identical or similar provisions, may be introduced during the 117<sup>th</sup> United States Congress commencing on January 3, 2021 and ending on January 3, 2023. We urge the passage of all future bills introduced during the 117<sup>th</sup> United States Congress that are similar to those recommended in this report.

The following fifteen recommendations are based upon the information set forth in Report Sections One through Four, and summarize the general recommendations that appear in the body of the report.

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

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 the shooting. The power and speed of such weapons inflicts greater damage at a faster rate.

As discussed in Section Four of this report, data indicate that the use of assault-style weapons results in deadlier events.<sup>316</sup> Well known examples of this occurred in the following mass shootings: Sandy Hook Elementary School, Newtown, Connecticut; Pulse Nightclub in Orlando, Florida; Las Vegas Country Musical Festival; First Baptist Church in Sutherland Springs, Texas; and Marjory Stoneman Douglas High School in Parkland, Florida. 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, Florida; and Newtown, Connecticut.

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. During the ban the relative frequency of assault-style rifles in mass shootings declined.<sup>317</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. 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>316</sup> See Jaclyn Schildkraut, *supra* note 237.

<sup>317</sup> *Id.*

- (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.

The Task Force recommends that all jurisdictions, state and federal, enact laws similar to the New York SAFE Act's<sup>318</sup> ban on manufacturing, transporting, disposing of, or possessing assault-style weapons.

Legislation was introduced in the United States Senate in January of 2019 by Senator Dianne Feinstein to reinstitute the Assault Weapons ban. This federal legislation (S. 66 – Assault Weapons Ban of 2019) has been referred to the Committee on the Judiciary, but has not been acted upon beyond that. The Task Force urges the passage of this or similar legislation that again bans assault weapons, as the prior federal Assault Weapons Ban did that was in effect from 1994 through 2004.

We further suggest that legislation banning assault-style weapons define the term in a manner similar to that suggested in this recommendation.

## 2. **Ban large-capacity magazines that 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

<sup>318</sup> The New York Secure Ammunition and Firearms Enforcement Act, known as the SAFE Act, S.2230/A.2388, 2013-2014 Legis. Sess. (2013), was signed into law by Governor Cuomo on January 15, 2013. For an excellent discussion of the background and provision of New York's Safe Act, see 78 Albany Law Review 749, Robert J. Spitzer, *New York State and the New York State Safe Act: A Case Study in Strict Gun Laws*, (2015), [http://www.albanylawreview.org/Articles/Vol78\\_2/78.2.749%20Spitzer.pdf](http://www.albanylawreview.org/Articles/Vol78_2/78.2.749%20Spitzer.pdf) (last visited Oct. 9, 2020).

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>319</sup> New York State already bans the sale and possession of magazines holding more than ten rounds under the New York SAFE Act.

In *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F. 3d 242 (2d Cir. 2015), the United States Court of Appeals upheld the constitutionality of the core provisions of New York's SAFE Act and Connecticut's laws prohibiting the possession of semiautomatic assault weapons and large-capacity magazines, finding that the provisions withstood an intermediate scrutiny review and were substantially related to the achievement of an important governmental interest. The Court noted in its decision that:

The record evidence suggests that large-capacity magazines may “present even greater dangers to crime and violence than assault weapons alone, in part because they are more prevalent and can be and are used . . . in both assault weapons and non-assault weapons.” Large-capacity magazines are disproportionately used in mass shootings, like the one in Newtown, in which the shooter used multiple large-capacity magazines to fire 154 rounds in less than five minutes. Like assault weapons, large-capacity magazines result in “more shots fired, persons wounded, and wounds per victim than do other gun attacks.” Professor Christopher Koper, a firearms expert relied upon by all parties in both states, stated that it is “particularly” the ban on large-capacity magazines that has the greatest “potential to prevent and limit shootings in the state over the long-run.” We therefore conclude that New York and Connecticut have adequately established a substantial relationship between the prohibition of both semiautomatic assault weapons and large-capacity magazines and the important—indeed, compelling—state interest in controlling crime. These prohibitions survive intermediate scrutiny. [citations in the opinion omitted] (804 F.3d at 263-64)

The provision in New York's SAFE Act that limited the number of rounds in the magazine to no more than seven, even though a magazine capable of holding up to 10 rounds was legal, did not withstand intermediate scrutiny and was deemed unconstitutional. Therefore the current law in New York allows magazines that can hold up to 10 rounds, and an authorized gun owner can load up to 10 rounds in that magazine.

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<sup>319</sup> Adeel Hassan, *Dayton Gunman Shot 26 People in 32 Seconds, Police Timeline Reveals*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/2019/08/13/us/dayton-shooter-video-timeline.html> (last visited Oct. 9, 2020).

The former federal Assault Weapons ban that sunset in 2004<sup>320</sup> had a provision banning a magazine that could hold more than 10 rounds of ammunition. Reportedly, the federal ban resulted in a reduced use of large capacity magazines in criminal activity.<sup>321</sup> Currently federal law does not ban large capacity magazines and the vast majority of states do not have such a ban.

The Task Force recommends that all states and the federal government impose a ban on the sale and possession of all magazines that exceed a 10- rounds capacity, and apply the law retroactively regardless of when the magazines were manufactured or purchased. If this happens, lives will be saved.

3. **Ban bump stocks and other devices that effectively enable 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. It enables the shooter to fire a weapon at nearly the speed of a machine gun. Twelve of the rifles used by the gunman in the Las Vegas Country Music Festival mass shooting in 2017, where 58 people were killed and 441 people were injured, were modified with a bump stock attachment.<sup>322</sup> Effective March 26, 2019, the federal government revised its interpretation of the limits on fully-automatic weapons to specifically include guns fitted with bump stocks, and it is now illegal under federal law to possess a bump stock (unless the possessor has the required license to own a machine gun) and any bump stocks will have to be destroyed or surrendered to law enforcement officials. This was enacted as a federal rule, and involves potentially severe consequences of fines and imprisonment if violated.<sup>323</sup>

<sup>320</sup> Violent Crime Control and Law Enforcement Act of 1994, 18, U.S.C. § 921 *et seq.*,

<sup>321</sup> A Washington Post study analyzed data kept by the Virginia State Police and found a clear decline in the percentage of crime guns that were equipped with large capacity ammunition magazines after the federal ban was enacted. The percentage reached a low of 10% in 2004 and then steadily climbed after Congress allowed the ban to expire; by 2010, the percentage was close to 22%. *About the Project: The Hidden Life of Guns*, Wash. Post, Jan. 22, 2011, at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/22/AR2011012204243.html> (last visited Oct. 9, 2020); David S. Fallis & James V. Grimaldi, *Virginia Data Show Drop in Criminal Firepower During Assault Gun Ban*, Wash. Post, Jan. 23, 2011, at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/22/AR2011012203452.html> (last visited Oct. 9, 2020).

<sup>322</sup> *What Is a Bump Stock and How Does It Work?* N.Y. TIMES (Mar. 28, 2019), <https://www.nytimes.com/interactive/2017/10/04/us/bump-stock-las-vegas-gun.html> (last visited Oct. 9, 2020); Larry Buchanan, Evan Grothjan, Jon Huang, Yuliya Parshina-Kottas, Adam Pearce and Karen Yourish, *What Is a Bump Stock and How Does It Work?* N.Y. TIMES (Mar. 28, 2019), <https://www.nytimes.com/interactive/2017/10/04/us/bump-stock-las-vegas-gun.html> (last visited Oct. 9, 2020).

<sup>323</sup> Bump-Stock-Type Devices, 83 Fed. Reg. 246 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 477, 478 and 479).

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In New York, Governor Cuomo signed S. 2448/A. 2684 into law on July 29, 2019 that 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. The Task Force recommends that the ban be enacted into law by each individual state that does not already ban bump stocks, and that criminal penalties be imposed for violating the law, as New York has done.

4. **Ban the possession, sale, transfer, and manufacture of: firearms without a serial number (ghost guns),<sup>324</sup> firearms that are not made by a licensed manufacturer; and firearms that are not detectable by standard screening devices.**

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.<sup>325</sup> Using this information, ATF can track firearms from the manufacturer or importer through the 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>326</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

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<sup>324</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.

<sup>325</sup> Under the Gun Control Act of 1968 (GCA), 18 U.S.C. § 923(i), licensed manufacturers must identify each firearm manufactured by a serial number in the manner prescribed by regulation. 18 U.S.C. Section 921(a)(3), defines a “firearm,” in relevant part, as both a “weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive” (921(a)(3)(A)), and the “frame or receiver of any such weapon” (921(a)(3)(B)).

<sup>326</sup> Sellers of gun 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.

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.

Tragically, a real-life example of the deadly consequences that ghost guns can inflict occurred on November 14, 2019, in Santa Clarita, California, when Nathaniel Berhow, aged 16, killed two students, and later himself, and injured 3 others, at his high school. 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.<sup>327</sup>

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 (after removal of grips, stocks and magazines) 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 shape of a gun. The image of A all major components of the firearm, i.e., the barrel, slide or cylinder, frame or receiver, must be detectable by x-ray machines. The law, however, does not specify what part of the firearm must be detectable. 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. This could enable a person to create a mostly plastic, but technically compliant, firearm using a 3D printer that contains metal in an extraneous part of the firearm that could be removed before screening.

Several states have passed legislation to address the issue of ghost guns, including New York, California, Connecticut, New Jersey and Washington.<sup>328</sup> 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>329</sup>

An act was introduced in the New York State Assembly and Senate<sup>330</sup> in February of 2020 to prohibit the possession of unfinished receivers by anyone other than a gunsmith, and would create felony crimes of possession of an unfinished frame or receiver and the criminal sale of an unfinished frame or receiver in the first, second and third degrees. This legislation was introduced in memory of Scott J. Beigel, a teacher at the Marjory Stoneman Douglas High School in Parkland, Florida who was killed in the

<sup>327</sup> Zusha Elinson, *Saugus High Shooter Used 'Ghost Gun' Built From Parts*, The Wall Street Journal (Nov. 21, 2019), <https://www.wsj.com/articles/saugus-high-shooter-used-ghost-gun-built-from-parts-11574360615> (last visited Oct. 9, 2020).

<sup>328</sup> See in general *Ghost Guns*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/ghost-guns/#state> (last visited Oct. 9, 2020).

<sup>329</sup> *Id.* N.Y. Penal Law §§ 265.50, 265.55 (consol. 2020).

<sup>330</sup> Session Year 2019, Bill Nos. A 9945 and S 7762; currently referred to the Codes Committee.

tragic mass shooting on February 14, 2018. We urge the New York legislature to pass this bill.

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.

- The Undetectable Firearms Modernization Act H.R. 869), 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 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.
- On June 13, 2019 the 3D Printed Gun Safety Act (S. 1831) was introduced in the Senate by Senator Edward Markey of Massachusetts, and others. The bill would prohibit the online distribution of blueprints and instructions for the 3D printing of Firearms. On that same date the 3D Printed Gun Safety Act of 2019 (H.R. 3265) was also introduced in the House by Representative Theodore Deutch of Florida, with many co-sponsors. This legislation would prohibit the manufacture and sale of firearms without serial numbers.
- 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. This legislation would prohibit the manufacture and sale of firearms without serial numbers.
- On May 14, 2020, a group of 15 Democrat Senators, led by Senator Richard Blumenthal of Connecticut, introduced legislation, called the Untraceable Firearms Act of 2020,<sup>331</sup> that would require that all guns sold in the U.S. after January 1, 2022 be traceable by ATF; and includes ghost guns, unfinished frames and receivers, and gun-making kits, in the definition of a firearm under federal law. It subjects gun-kit manufacturers, distributors, sellers and buyers to the same federal regulations that govern the purchase or sale of completed firearms. This includes: licensing requirements for all parties involved; that a serial number be placed on the frame or receiver included in each kit; and that background checks be completed on all buyers of these kits and parts. This bill incorporated the Undetectable Firearms Modernization Act, discussed above. It was specifically noted in the announcement of this legislation by Senator Blumenthal that the coronavirus pandemic has

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<sup>331</sup> S. 3743: Untraceable Firearms Act of 2020.

caused an increased demand for ghost guns, that results in a mounting threat to public safety.<sup>332</sup>

The Task Force supports all of these legislative efforts, both in New York and on the federal level. We recommend that all states, as well as the federal government, pass effective legislation to prevent the manufacture, sale, and transport of ghost guns. We believe that the most effective way to address the issue of ghost guns is to pass legislation that:

- Bans the manufacturing, assembly or sale of firearms and firearm components, including unfinished frames and receivers, and 3D components and firearms, by those without the appropriate license
- Requires that 3D printed firearms and components, and all frames and receivers, finished or unfinished, have serial numbers imprinted on them
- 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.
- Requires 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, rifles and shotguns – by licensed firearms dealers as well as by private individuals, whether in person at gun shows or elsewhere, including sales 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, rifle or shotgun without a National Instant Criminal Background Check System (“NICS”) check to determine if the prospective purchaser is disqualified from purchasing the firearm.

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, rifles, and shotguns and

<sup>332</sup> See the “one pager” issued by Senator Richard Blumenthal describing the Untraceable Firearms Act of 2020, <https://www.blumenthal.senate.gov/imo/media/doc/Untraceable%20Firearms%20Act%20of%202020%20-%20OnePager%20-%2020200513.pdf> (last visited Oct. 9, 2020), (internal footnotes omitted).

~~ammunition~~ since 2013, including private sales.<sup>333</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 hijacked a U.S. Postal Service worker, killing her and driving off in her van. At the end of his shooting spree he had killed 7 people, and injured at least 22. 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.<sup>334</sup>

The Task Force recommends that background checks be required for all sales, whether by private or licensed firearm dealers, for all types of guns. We urge the federal government to pass H.R. 8 or similar legislation. We urge all states to pass provisions requiring universal background checks for private gun sales conducted in person and on the internet, similar to the provisions of the New York SAFE Act, with criminal consequences for failure to comply.

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

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 business days, the sale may go through without waiting for its results.<sup>335</sup> There are occasions when the NICS check cannot be completed within three days, often when there are issues regarding a potential buyer's qualifications.<sup>336</sup> Nonetheless, federal law requires that the gun must be transferred to the buyer after the three-business 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 that demonstrates 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, during which 9 people were

<sup>333</sup> *Supra* notes 36, 2725 and 2736.

<sup>334</sup> Brandon Formby, *Reports: Odessa shooter bought gun via private sale without background check*, The Texas Tribune (Sept. 3, 2019), <https://www.texastribune.org/2019/09/03/odessa-texas-shooter-bought-gun-private-sale-without-background-check/> (last visited Oct. 9, 2020).

<sup>335</sup> 18 U.S.C. § 922(t)(1).

<sup>336</sup> *See*, United States Government Accountability Office, July 2016, GAO-16-483, "Gun Control, Analyzing Available Data Could Help Improve Background Checks Involving Domestic Violence Records." The report notes at *What GAO Found*: "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)." <https://www.gao.gov/assets/680/678204.pdf> (last visited Oct. 9, 2020).

killed. The shooter had a prior arrest record that would have disqualified him from purchasing the gun. The background check was not completed within the three-day period, however, and the sale went through.<sup>337</sup> To avoid this and other tragic mass shootings, the time to complete a background check before a ~~gunfirearm~~ is transferred to the purchaser should be extended to a reasonable period of time sufficient to complete a thorough background check.

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

A bill passed the House of Representatives on February 28, 2019 that would also address this issue, but it has not been acted upon by the Senate. The Enhanced Background Checks Act of 2019, H.R. 1112, extends the window for background checks to 10 days.<sup>338</sup> 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.<sup>339</sup>

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 finalized sooner.

The Task Force recommends 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.

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<sup>337</sup> Larry Buchanan, Josh Keller, Richard A. Oppel, Jr. and Daniel Victor, *How They Got Their Guns*, NEW YORK TIMES (Feb. 16, 2018), <https://www.nytimes.com/interactive/2015/10/03/us/how-mass-shooters-got-their-guns.html?searchResultPosition=15> (last visited Oct. 9, 2020).

<sup>338</sup> See H.R. 1112, 116th Cong. (2019); H.R.1112 - Enhanced Background Checks Act of 2019, Congress, <https://www.congress.gov/bills/116th-congress/house-bill/1112/text> (last visited Oct. 9, 2020).

<sup>339</sup> *Id.* See also BRADY, RESOURCES, *The Enhanced Background Checks Act of 2019 (H.R. 1112)*; <https://www.bradyunited.org/legislation/the-enhanced-background-checks-act-of-2019-hr-1112-charleston-loop-hole> (last visited Oct. 9, 2020).

7. **Require gun owners to have a license to purchase and possess all types of firearmsguns .**

A limited number of states require an individual to obtain a license (or permit) before purchasing a handgun, and fewer jurisdictions require a license (or permit) in order to purchase a rifle or shotgun. Other states require a license to own a firearm.<sup>340</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 gunfirearm 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 should also 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 a licensing education requirement as well, 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 or permitting requirements should apply to the purchase and possession of all types of guns, 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 or permit
- A license or permit must be renewed after a set period of time with an updated background check performed
- The license or permit should be revoked if the holder becomes a prohibited purchaser or owner under the law; the holder should be required to report this change in status
- A license or permit holder must be required to report the theft/loss of a gunfirearm or license/permit
- The license or permit holder must be required to safely store the gunfirearm when not in the licensee's possession.

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<sup>340</sup> New York State requires a license to purchase a handgun (pistol or revolver), but not to purchase a shotgun or a rifle. [New York City requires a license to possess handguns and a permit for rifles and shotguns.](#)

8. **Expand the category of individuals who are prohibited from purchasing or possessing gunsfirearms.**

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 (d), 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 United States; 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.”<sup>341</sup>

To the extent a law does not prohibit the following categories of people from purchasing and possessing a gunfirearm, 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, similar to the way New York Law determines whether someone is in an intimate relationship.<sup>342</sup> Proposed federal legislation, S. 120 and H.R. 569, are companion bills that would 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. We urge the passage of this legislation.

<sup>341</sup> See N.Y. Family Court Act Law § 812 (1)(e) (Consol. 2020).

<sup>342</sup> *Id.* § 812 (1) “For purposes of this article, “members of the same family or household” shall mean the following: (e) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an “intimate relationship” include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an “intimate relationship”.”

- 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 gunfirearm.
- c. Expand the types of violent misdemeanors that preclude individuals from possessing a firearm-gun beyond what is currently set forth in federal law.<sup>343</sup> Federal law prohibits individuals who have convictions for a domestic violence misdemeanor offense from purchasing a gun.<sup>344</sup> This disqualification should be expanded, both on the state and federal level, to include 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 should not be allowed to purchase or possess a gunfirearm.
- e. Individuals who suffer from serious 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.<sup>345</sup> This does not include individuals, for example, who have been voluntarily committed to a mental hospital or ordered by a court to undergo outpatient mental health treatment.<sup>346</sup> The disqualification regarding mental illness should be expanded to include situations such as voluntary commitments as well as court-ordered outpatient mental health treatment.

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

Screening gun buyers with an effective background check “is the backbone of any comprehensive gun violence prevention strategy, and it works to keep firearms out of the hands of people who pose a danger of violence to themselves or others.”<sup>347</sup>

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

- 1. Existing Reporting Laws must be implemented.

<sup>343</sup> See generally Michael Siegel & Claire Boine, *What Are The Most Effective Policies in Reducing Gun Homicides?*, Rockefeller Institute of Government (March 29, 2019), <https://rockinst.org/wp-content/uploads/2019/08/8-13-19-Firearm-Laws-Homicide-Brief.pdf> (last visited Oct. 9, 2020).

<sup>344</sup> 18 U.S.C. § 922 (d)(9).

<sup>345</sup> 18 U.S.C. § 922 (d)(4).

<sup>346</sup> 27 C.F.R. § 478.11.

<sup>347</sup> EVERYTOWN FOR GUN SAFETY, *FATAL GAPS: HOW THE VIRGINIA TECH SHOOTING PROMPTED CHANGES IN STATE MENTAL HEALTH RECORDS REPORTING* (2018), <https://everytownresearch.org/report/fatal-gaps/> (last visited Oct. 9, 2020).

- a. All disqualifying information set forth in 18 U.S.C. § 922 must be reported to NICS by all federal and state agencies.<sup>348</sup>
  - b. The gunman who 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>349</sup>
  - c. The number of mental health records in NICS increased dramatically after this tragedy.<sup>350</sup> 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 provide financial incentives for states to report this type of disqualifying

<sup>348</sup> This includes the federal disqualifying events discussed in this report, e.g., individuals: adjudicated as a mental defective or committed to a mental institution; subject to a domestic violence order of protection, or convicted of a misdemeanor domestic violence crime; indicted or convicted of a felony; addicted to a controlled substance; as well as individuals who are in the country illegally, been given a dishonorable discharge from the armed services, less than eighteen years of age (excludes shotguns, rifles and ammunition for these types of weapons); and if the state law where the sale is taking place prohibits the sale to the individual.

<sup>349</sup> *Mental Health Reporting*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/mental-health-reporting/> (last visited Oct. 9, 2020).

<sup>350</sup> *Id.* Giffords Law Center reports that “[s]ince the Virginia Tech shooting, about half of the states have enacted laws authorizing and requiring the submission of relevant mental illness records to the NICS . . . States that have enacted such laws have, in fact, subsequently submitted greater numbers of records.” Of the states that had submitted the top 15 highest numbers of records as of May 2013, 14 (93%) had enacted such laws, while only two of the 15 poorest performing states (12%) had enacted such laws.”

information to NICS.<sup>351</sup> 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 of all individuals disqualified from possessing a gunfirearm under either federal or state law to NICS and all relevant federal and state agencies.
  - b. Require reporting to NICS, and all relevant federal and state authorities, of all information regarding individuals prohibited by federal or state law from purchasing or possessing a gunfirearm due to mental illness, including those individuals with mental health disqualifications prior to enactment of such reporting laws;
  - c. The following information should be included in the reporting:
    - i. court-ordered outpatient treatment,
    - ii. voluntary commitments;
    - iii. people under the care of a court-appointed guardianship due to mental illness;
    - iv. people found incompetent to stand trial
    - v. people found not guilty by reason of insanity
    - vi. people who are prohibited from possessing a weapon under a particular state's law
    - vii. all mental health disqualifications set forth under 18.U.S.C. § 922 (e.g., someone who has been adjudicated as a mental defective or has been committed to any mental institution)
  - d. Require certain categories of professionals, including licensed psychotherapists, law enforcement officials and school administrators, to promptly report mentally ill individuals who demonstrate violent behavior;
  - e. Require that all law enforcement agencies have access to databases containing relevant mental health records;
  - f. Require mental health facilities to report prohibited individuals with mental health conditions to NICS and the relevant state agency if they have not been previously reported by a court;
  - g. Require courts to report prohibited individuals with disqualifying mental health conditions to NICS and the relevant state agencies if they have not been previously reported
  - h. Require that this reporting take place immediately upon the disqualifying event's occurrence

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<sup>351</sup> *Id.*

4. The NICS Improvement Amendments Act of 2007 provides for financial incentives to the states to report disqualifying information to NICS. We recommend that the federal government allocate resources to assist the states in providing this essential information to NICS and all other relevant regulatory authorities.

**10. 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 family and household members and school administrators, in addition to law enforcement, 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. This law 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<sup>352</sup> 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 bill would also empower the federal courts to issue Extreme Risk Protection Orders when sought by law enforcement or family and household members.<sup>353</sup>

The Task Force recommends that all states adopt Red Flag laws. This will enable those who are in a position to observe warning signs from an individual who might commit a mass shooting to prevent that from happening and to obtain help for that individual if they are suffering from a serious mental illness. It is critically important that these ERPO laws contain due process safeguards, and do not violate federal and state constitutional protections and other applicable laws. are administered in a manner that protects the individual’s constitutional rights.

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

<sup>352</sup> This was exactly one year after the mass shooting tragedy at the Marjory Stoneman Douglas High School in Parkland, Florida.

<sup>353</sup> Representative Jerold Nadler offered an Amendment to the bill on September 10, 2019, during a Consideration and Mark-up Session by the Committee on the Judiciary, that would authorize federal courts to issue ERPOs. This provision was present in H.R. 3076, the Federal Extreme Risk Protection Order Act of 2019, introduced in the House on June 4, 2019.

Imposing some significant form of liability for the failure to report a lost or stolen ~~gunfirearm~~ within a reasonable period of time after a gun owner learns of the loss or theft would encourage gun owners to keep control of their ~~weaponsfirearms~~ and limit the likelihood that their guns fall into the wrong hands. It could also limit the willingness of an individual 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 ~~its~~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 ~~gunfirearm~~ 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 ~~gunfirearm~~ by gun dealers as well as individual owners. This law should apply to all types of ~~guns, including~~ firearms, ~~rifles and shotguns~~. 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.

Requiring that all guns sold or transferred be enabled with a secure locking device, and that guns be locked and securely stored when not in the possession of the owner, would reduce the likelihood of gun thefts, keep guns out of the wrong hands, and prevent 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, ~~rifle or shotgun~~ if the owner or custodian of the ~~gunfirearm~~ lives with an individual under 16 years of age, or someone who is prohibited from possessing a ~~gunfirearm~~ 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, ~~rifle or shotgun~~ 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.<sup>354</sup> 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

<sup>354</sup> *Supra* note 313.

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 ~~guns, firearms~~, regardless of the type, be disabled with a locking device and safely stored when not in the possession or immediate control of the owner or authorized user; and 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.

**13. 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.

Post-*Heller* court decisions indicate 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), *aff'd*, 970 F.3d 1133 (9th Cir. 2020), enjoining California large capacity magazine ban). 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).

Based on the *Heller*, *McDonald* and the majority of subsequent federal appellate court case law, the Task Force submits that courts should apply a standard no higher than “intermediate scrutiny” when reviewing a gun regulation subject to a Second Amendment challenge, and inquire 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.

**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, Orders of Protection in Domestic Violence situations and similar court protective orders that will potentially prevent mass shootings, must be widely disseminated and publicized, including on government websites and other appropriate locations. Teachers and those in a position to seek such orders should be instructed on the relevant 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 domestic violence matters, 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, as well as the public in general.

**15. Better data is needed to understand the causes of mass shootings and support remedial legislation; funding should be provided to the appropriate governmental agencies to collect, maintain and analyze the data.**

The Task Force Report reiterates the findings of NYSBA’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 law enforcement has the best information to minimize the alarming number of mass shootings, and that there is robust evidentiary support to meet anticipated challenges to proposed gun laws, data should be collected, and studies commissioned, to provide evidence that will accomplish these goals. There is substantially less funding for gun violence research from the federal government than for other major causes of death.

The Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) mission is to protect communities from violent criminals, criminal organizations, and the illegal use and trafficking of firearms, among other things. One of the major ways in which ATF

fighters crime is by tracing firearms used in crimes.<sup>355</sup> In a letter dated June 30, 2016 to members of Congress contained in a June 2016 GAO Report on Firearms Data,<sup>356</sup> it was noted:

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), a criminal and regulatory enforcement agency within the Department of Justice (DOJ), is responsible for the regulation of the firearms industry and enforcing federal statutes regarding firearms, including enforcing criminal statutes related to the illegal possession, use, transfer, or trafficking of firearms, among other things. The Gun Control Act of 1968,<sup>357</sup> as amended, established a system requiring federal firearms licensees (FFL)<sup>358</sup> to record and maintain records of firearms transactions and make these records available to ATF for inspection under certain circumstances. To carry out its enforcement responsibilities, ATF maintains certain computerized information on firearms, firearms transactions, and firearms purchasers. Over the years, Congress has balanced the law enforcement need for firearms retail purchaser information with the competing interest of protecting the privacy of firearms owners. To achieve this balance, Congress requires FFLs to provide certain firearms transaction information to ATF, while also restricting ATF's maintenance and use of such information.<sup>359</sup> Since 1979, Congress has restricted ATF from using appropriated funds to consolidate or centralize FFL records within the department where ATF is located. [Some internal citations omitted].

These restrictions have resulted in a record keeping system that has posed tremendous challenges to ATF's ability to carry out its mission. As noted in a 2019 video by

<sup>355</sup> The ATF is the "United States' only crime gun tracing facility." See ATF's website at <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-national-tracing-center> (last visited Oct. 9, 2020).

<sup>356</sup> United States Government Accountability Office, June 2016, GAO-16-552, "Firearms Data, ATF Did Not Always Comply with the Appropriations Act Restriction and Should Better Adhere to Its Policies" at pp. 1-2, <https://www.gao.gov/assets/680/678091.pdf> (last visited Oct. 9, 2020).

<sup>357</sup> *Id.* at footnote 3: "As originally enacted, the Gun Control Act of 1968 required FFLs to submit such reports and information as the Secretary of the Treasury prescribed by regulation and authorized the Secretary to prescribe such rules and regulations as deemed reasonably necessary to carry out the provisions of the act. At that time, ATF was part of the Department of the Treasury."

<sup>358</sup> *Id.* at footnote 4: "FFLs are persons—including companies—licensed by ATF, pursuant to federal firearms laws and regulations, to engage in a firearms business, such as manufacturing, purchasing, and selling firearms. FFLs include firearms manufacturers, importers, wholesalers, and retailers, among other things."

<sup>359</sup> *Id.* at footnote 5: "For the purposes of this report, ATF maintaining information means keeping information at an ATF facility in a variety of formats—such as electronic and paper copies. Depending on the type of information, statutory and policy restrictions apply to ATF's maintenance of the information, as discussed later in this report."

David Freid on the ATF's National Tracing Center, in Martinsburg, West Virginia: "There, a nonsearchable index of paperwork related to gun purchases is housed in hundreds of shipping containers and file boxes. The small federal agency operates with technology so antediluvian that it precludes the use of an Excel spreadsheet. It is the only facility in the country that tracks firearms from a manufacturer to a purchaser."<sup>360</sup>

In a 2016 news article published in The Trace,<sup>361</sup> ATF's record-keeping was described as: "lack[ing] certain basic functionalities standard to every other database created in the modern age. Despite its vast size, and importance to crime fighters, it is less sophisticated than an online card catalog maintained by a small town public library. To perform a search, ATF investigators must find the specific index number of a former dealer, then search records chronologically for records of the exact gun they seek. They may review thousands of images in a search before they find the weapon they are looking for. That's because dealer records are required to be "non-searchable" under federal law. Keyword searches, or sorting by date or any other field, are strictly prohibited."

David Chipman, a former 25-year special agent with ATF who oversaw its firearms programs, and who joined the Gifford Law Center as a senior policy advisor afterwards, described conditions as follows in a 2018 interview reported by WUSA9: "'When you see the tracing center, and how difficult it is for patriots to do their job, that isn't accidental,' Chipman said. 'That's been set up that way and that's what makes it so frustrating for the people who are not just trying to solve gun crime, but prevent it from ever happening in the first place.'" The article goes on to quote Neil Troppman, a program manager at ATF's records center, who said "the facility is filled with roughly 700,000,000 documents. Instead of records being entered into a computer, they are stuffed into shipping containers and stacked in boxes. . . We house those in a system that is still manually searched . . . [b]ecause we are prohibited from maintaining any sort of a searchable database of names."<sup>362</sup>

<sup>360</sup> The Atlantic, *The Extremely Inefficient And Only Way to Trace Guns in the U.S.*, Video by David Freid, August 6, 2019, at: <https://www.theatlantic.com/video/index/595612/firearm-tracing-division/> (last visited Oct. 9, 2020) for a shocking view of the condition of ATF records; Emily Buder, *The Extremely Inefficient-And Only-Way to Trace Guns in the U.S.*, Video by David Freid, The Atlantic, August 6, 2019, at: <https://www.theatlantic.com/video/index/595612/firearm-tracing-division/> (last visited Oct. 9, 2020) for a shocking view of the condition of ATF records.

<sup>361</sup> Dan Friedman, *The ATF's Nonsensical Non-Searchable Gun Databases, Explained*, THE TRACE (Aug. 24, 2016), <https://www.thetrace.org/2016/08/atf-non-searchable-databases/> (last visited Oct. 9, 2020).

<sup>362</sup> WUSA9, *Former ATF agent: Current gun tracing system is 'insane'*, by Eric Flack, May 8, 2018, <https://www.wtsp.com/article/news/investigations/former-atf-agent-current-gun-tracing-system-is-insane/67-561778661> (last visited Oct. 9, 2020); Eric Flack, *Former ATF agent: Current gun tracing system is 'insane'*, WUSA9 (June 5, 2018), <https://www.wtsp.com/article/news/investigations/former-atf-agent-current-gun-tracing-system-is-insane/67-561778661> (last visited Oct. 9, 2020).

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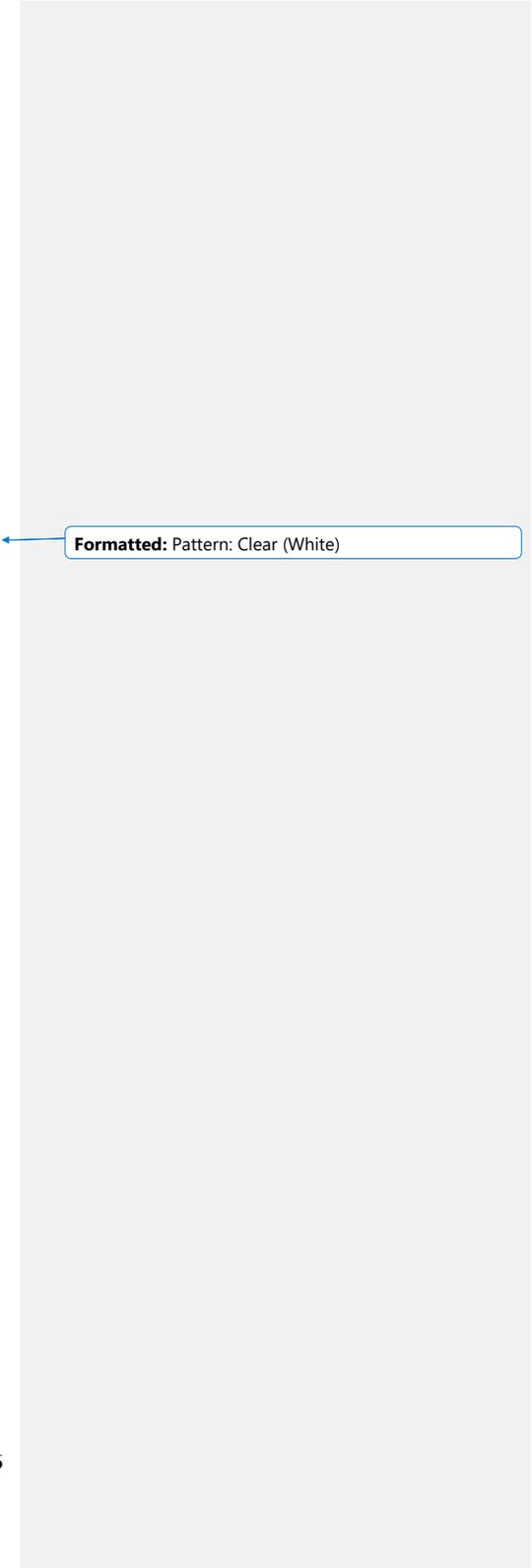
The Task Force recommends that the manner in which data is maintained by ATF in connection with gun ownership be improved in order to allow for effectively searching a database that can quickly and accurately trace weapons used in violent crimes, including mass shootings. We also urge Congress to consider lifting the legal restrictions that have forced ATF to maintain records in a fashion that does not allow them to perform their legal obligations thoroughly and efficiently.

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 appropriate committed funding for the Centers for Disease Control and Prevention 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. Both bills have been referred to Committee. We support this legislation and urge its passage.

## CONCLUSION

The United States has more mass shootings and more casualties resulting from mass shootings than any other developed country in the world. Although we acknowledge that mass shootings account for only approximately one percent of all [gunfirearm](#) deaths in this country, we must also state that it is not enough simply to extend “thoughts and prayers” to the communities, families and victims of these repeated, senseless tragedies in every part of the nation. It is not enough to focus solely on the shooters.

We must take a comprehensive approach to this problem. Consistent with the Second Amendment right to bear arms in self-defense in one’s home, it is time – indeed it is past time – for federal and state legislators and other policy makers to enact reasonable and common sense measures to address mass shootings in the United States and to increase research and data collection to evaluate and understand what measures will be most effective. The New York State Bar Association Task Force on Mass Shootings and Assault Weapons has recommended a number of measures in this Report, based on available data and consistent with our review of Second Amendment law, that can reasonably be expected to make progress toward these goals. Available evidence indicates that stronger regulation of [gunsfirearms](#) results in fewer firearm deaths. It is our hope that this Report and these recommendations will contribute to making public policy and law that will further the public good by addressing the epidemic of mass shootings in the United States.



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**-APPENDIX A**

**[Bibliography will be added before the 11/7/20 House of Delegates Meeting]**

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## **APPENDIX B**

### New York's SAFE ACT - Update

#### 1. Revisions to Laws Amended by the SAFE Act Since 2015

Section 1 of the SAFE Act revised CPL § 330.20 (“Procedure following verdict or plea of not responsible by reason of mental disease or defect”). Revisions apparently not relating to the SAFE Act were made effective September 3, 2019.

Section 3 of the SAFE Act revised Correction Law § 404 (“Disposition of mentally ill inmates upon release to parole, conditional release, or expiration of sentence”). Subdivision (4) was added effective January 27, 2015 and reads as follows:

4. Every inmate who has received mental health treatment pursuant to this article within three years of his or her anticipated release date from a state correctional facility shall be provided with mental health discharge planning and, when necessary, an appointment with a mental health professional in the community who can prescribe medications following discharge and sufficient mental health medications and prescriptions to bridge the period between discharge and such time as such mental health professional may assume care of the patient. Inmates who have refused mental health treatment may also be provided mental health discharge planning and any necessary appointment with a mental health professional.

Section 16 of the SAFE Act revised Executive Law § 837 (“Functions, powers and duties of division”). Revisions apparently not relating to the SAFE Act were made effective July 1, 2017.

Section 18 of the SAFE Act revised Judiciary Law § 212 (“Functions of the chief administrator of the courts”). Revisions apparently not relating to the SAFE Act were made effective October 9, 2019.

Section 19 of the SAFE Act revised Mental Hygiene Law § 7.09 (“Powers of the office and commissioner; how exercised”). Revisions apparently not relating to the SAFE Act were made effective October 18, 2019.

Section 23 of the SAFE Act revised Mental Hygiene Law § 9.60 (“Assisted outpatient treatment”). Revisions apparently not relating to the SAFE Act were made effective October 26, 2015.

Section 24 of the SAFE Act revised Mental Hygiene Law § 13.09 (“Powers of the office and commissioner; how exercised”). Revisions apparently not relating to the SAFE Act were made effective October 19, 2016.

Section 25 of the SAFE Act revised Mental Hygiene Law § 33.13 (“Clinical records; confidentiality”). Revisions apparently not relating to the SAFE Act were made effective November 28, 2016.

Sections 43 and 48 of the SAFE Act revised Penal Law § 400.00 (“Licenses to carry, possess, repair and dispose of firearms”). Effective June 11, 2018, the definition of “serious offense” set forth in Penal Law § 265.00(17) was amended to add a paragraph (c) to include misdemeanors which may relate to acts of “domestic violence,” which affects Penal Law § 400.00 section 16-a (“Registration”). At the same time, Penal Law § 400.00(1)(c) was amended to add, as an eligibility requirement for a firearms license, that the applicant not be the “subject of an outstanding warrant of arrest” for the commission of a felony or serious offense. Effective July 16, 2019, the New York Legislature amended Penal Law § 400.00(6) to define when removal of a handgun (“pistol or revolver”) from the dwelling or place of business of a person with an appropriate license pursuant to Penal Law § 400.00(2) (a) or (b) is authorized. This applies “[n]otwithstanding any inconsistent provision of state or local law or rule or regulation.” The law permits the “transport” of a licensed handgun “directly” to and from: (1) another dwelling or place of business of the licensee; (2) a shooting range; (3) a shooting competition; or (4) “any other location” where the licensee is “lawfully authorized” to possess the handgun. During transport, the handgun must be in a locked container, unloaded, with the ammunition “carried separately.” A person licensed other than by New York City’s police commissioner must not transport a handgun “into” the City in the absence of written authorization to do so from the City’s police commissioner. In addition, Penal Law § 400.00(18) was added to require a licensing officer upon the issuance of a license to issue a written notice of the law’s storage requirements and potential criminal penalty for failure to adhere thereto.

Section 49 of the SAFE Act revised Penal Law § 400.02 (“Statewide license and record database”). Effective September 3, 2019, the law was revised to grant access to local and state law enforcement of records of applications for licenses of firearms.

## 2. Cases Addressing the SAFE Act

In addition to those discussed in the body of the memorandum, recent New York federal and state cases concerning the SAFE Act are described below.

| CASE  | SUMMARY   |
|---|---|
| <i>Montgomery v. Cuomo</i> , 291 F. Supp. 3d 303 (W.D.N.Y. 2018)                            | The court dismissed a complaint challenging the SAFE Act amendment to Mental Hygiene Law (“MHL”) 9.46(b) requiring a report that triggers the possible revocation of a firearms license under Penal Law 400.00(11). Plaintiffs Montgomery, Carter, and Reid were gun owners who had lost their licenses for reasons other than MHL 9.46(b), and thus lacked standing on those grounds. Plaintiff Bechler was involuntarily committed to a mental health facility and was thus disqualified from holding a license under federal law, not MHL 9.46(b), so lacked standing on that ground. The court included a detailed discussion of the SAFE ACT amendments but ultimately dismissed the case without actually applying the SAFE ACT provisions, except to note that the federal law controlled. |
| <i>Riley v. Cuomo</i> , 2:17-cv-01631 (ADS)(AYS), 2018 WL 1832929 (E.D.N.Y. April 16, 2018) | The plaintiff, whose firearms were seized, alleged that the SAFE Act was unconstitutional and sought an order requiring the governor to provide fair hearings to victims of gun seizures. The court dismissed the case against Governor Cuomo on the basis that the plaintiff failed to allege that the governor has “the power or duty to take action” regarding the Act, and held that, in any event, the Governor has sovereign immunity over those claims.  |
| <i>Schulz v. State of New York Executive</i> , 134 A.D.3d 52 (3d Dep’t 2015)                | The Appellate Division for the Third Department held that the Governor’s “message of necessity” setting forth facts which required an immediate vote on the passage of the SAFE Act did not require a heightened level of judicial scrutiny and that the Act survived intermediate scrutiny. The court found that “the governmental interest in public safety is substantially furthered by reducing access to weapons designed to quickly fire significant amounts of ammunition and the ammunition feeding devices required to hold that ammunition.”   |
| <i>Kampfer v. Cuomo</i> , 643 F. App’x 43 (2d Cir. 2016) (summary order)                    | The court affirmed the district court’s denial of the plaintiff’s facial Second Amendment challenge to the SAFE Act on the ground that it was foreclosed by the <i>New York State Rifle &amp;</i>   |

| CASE   | SUMMARY   |
|--|---|
|  | <p><i>Pistol Ass’n, Inc. v. Cuomo</i> decision, which upheld the constitutionality of the SAFE Act. The court also denied the plaintiff’s Equal Protection challenge to the Act’s grandfather clause, holding that the clause fell in the category of “long-accepted legislative tools for mitigating the effect of new regulations on persons who have relied on existing law” and withstood rational basis review.</p>  |
| <p><i>Matter of Doe</i>, 47 Misc. 3d 328, 4 N.Y.S. 3d 845 (Albany City Ct. 2015)</p>   | <p>The court granted a <i>pro se</i> applicant an exemption – apparently unopposed – from public disclosure of her firearms registration as a law enforcement officer.</p>  |
| <p><i>Vidurek v. Cuomo</i>, 2018 WL 4903225 (W.D.N.Y. October 9, 2018) and <i>Monjielo v. Cuomo</i>, 40 Misc. 2d 362, 968 N.Y.S. 2d 828 (Sup. Ct. 2013).</p> | <p>The <i>pro se</i> plaintiff’s “sovereign citizen” attack on the SAFE Act and all New York firearm legislation premised on infringements of Second Amendment and “natural law” was dismissed on the pleadings. Reconsideration of the federal decision was denied on both procedural grounds and the merits in <i>Vidurek v. Cuomo</i>, 2019 WL 2569648 (W.D.N.Y. June 21, 2019).</p>   |
| <p><i>Gannett Satellite Information Network, Inc v. Cty of Putnam</i>, 142 A.D.3d 1012 (2d Dep’t 2016)</p>   | <p>A news organization made a N.Y. Freedom of Information Law (“FOIL”) request for gun licensing documents under the SAFE Act amendment to Penal Law 400.05, which permits disclosure, and its conflict with Public Officers Law 87(2), which provides exceptions to the FOIL law. The court held that the exceptions do apply to the SAFE Act, but none of them applied in this case and the documents had to be disclosed.</p>  |
| <p><i>In re McKay</i>, 52 Misc.3d 936 (Yates Cty. Ct. 2016)</p>  | <p>Plaintiff had lost her license to carry a pistol because she had voluntarily checked herself into a mental health facility. A report was generated under the SAFE Act amendment to Mental Hygiene Law 9.46(b), which triggers the ability to revoke a license under Penal Law 400.00(11) for “good cause”, which was exercised by the county sheriff. The court characterized McKay as a “forthright, conscientious, thoughtful person,” found a lack of good cause, and ordered reinstatement of the license.</p> |

**APPENDIX C**

Letter from N.Y. Bar Ass'n Comm. on Mandated Representation, to Henry Greenberg, President, N.Y. Bar Ass'n (Oct. 31, 2019)



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## COMMITTEE ON MANDATED REPRESENTATION

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October 31, 2019

Dear President Greenberg:

I write to express the concerns of the Committee on Mandated Representation regarding New York State's new Extreme Risk Protection Order Statutes, CPLR Art. 63-A. As a matter of background, on August 24, 2019, the Extreme Risk Protection Order otherwise known as "New York State's Red Flag Law," came into effect. The legislative intent behind this law is to protect the community against gun violence. Unfortunately, Art. 63-A raises significant concerns about the absence of the right to counsel for the indigent – in addition to significant other constitutional and criminal justice concerns.

Although this is a civil statute, this committee believes that it has implications for criminal justice and in doing so violates the respondent's/defendant's right to counsel. Many other constitutional arguments can and should be made about the validity of this new law. The issue at the forefront of this committee's concerns is the circumvention of the respondent's right to counsel.

An application for a Temporary Extreme Risk Protection Order (TERPO) is made in an ex parte proceeding in the New York Supreme Court. While these petitions are made in a similar fashion to a petition for Order of Protection in Family Court, the resulting Order extends beyond restricting a person's actions and allows for a search of a person and his or her property. Yet because it is an ex parte application, the respondent does not have a right to be heard or to counsel.

The statute also requires the respondent to sign a receipt for any items recovered pursuant to a voluntary surrender or any subsequent search. §6342(4)(ii). Signing of the receipt is, in effect, a written admission made by the respondent. There is nothing in CPLR 63-A that limits the use of these statements in any subsequent criminal proceeding.

The statute allows for a hearing within six days of the issuance of the TERPO to determine the need for the Final Extreme Protection Order. Because this is a civil proceeding, the right to counsel does not attach at this stage either. According to Article 63-A, a person "may" seek the advice of counsel and an attorney "should" be consulted. §6342(4)(iii). But there is no right to counsel.

Most relevant to this committee is that there is no right to government-paid counsel if someone is indigent. Therefore, although a person "may" seek the advice of counsel or "should"

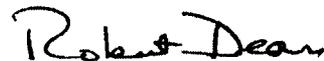
consult an attorney, there is no chance that this will occur in the large percentage of cases where the respondents cannot afford counsel.

There are other criminal justice concerns beyond the direct purview of our committee. For example, as to the search that can be ordered by a court, the statute is ambiguous as to what constitutes a "lawful" search and whether such search must be ordered pursuant to CPL §690. The term "lawful" is not defined in the statute, and although a court "may" order a search pursuant to CPL §690, such procedure is not mandatory. CPLR §§6340, 6342(8). Further, this law may violate the Mental Hygiene Law and the new discovery statutes under CPL Art 245, since there is no indication any of the documentation generated by the Extreme Risk Protection Order proceedings would be discoverable in a related criminal proceeding.

Finally, CPLR §6347, which limits the use of findings under CPLR Art. 63-A in any other legal action, is vague. It leaves open whether such findings could be used in a claim made under "common law or a provision of any other law," such as a criminal, immigration, or family court actions. Neither does the provision speak to the admissibility of contraband recovered or statements made in a criminal proceeding.

This committee would like to meet with you, representatives from the criminal justice section, and the government relations staff. Our goal would be to propose amendments to the law and then work with the Governor's office and/or the drafters of this law to enact them, which may include amendments to the Penal Law and/or Criminal Procedure Law.

Very truly yours,



Robert S. Dean  
Chair, Committee on Mandated Representation

cc: Criminal Justice Section Executive Committee  
Pamela McDevitt  
Kathy Baxter  
Ronald Kennedy