

**NEW YORK COUNTY LAWYERS' ASSOCIATION REPORT ON PROPOSED
FEDERAL GUN CONTROL LEGISLATION**

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I. Introduction

Mass shootings are horrifying for the victims, their families and friends. But they also leave in their wake a footprint of trauma impacting the nation as a whole. The venues for many mass shootings – schools, movie theaters, malls, churches, temples, courthouses – sit at the center of community life. In a very real sense, an attack on a single school represents an attack on all schools. An attack in a single church disturbs America's expectation of safety in all places of worship. When there are multiple shootings in such venues, the threat becomes even more real. This broader impact is especially profound in an era where mass media ensures pervasive and repetitive coverage of the violence.

Studies have shown that this impact is severe and long lasting. Mass shootings generate feelings similar to those experienced by the military in combat, including increased incidence of post-traumatic stress disorder and other markers of trauma.¹ This is especially true where the victims are children.² The damage not only includes psychological trauma but tends to lead such children into violent conduct as a way of protecting themselves.³ Thus, while mass shootings constitute a small portion of the tens of thousands of firearms deaths in the United States, their outsize impact on the fabric of our society and how we are ultimately viewed and judged on the world stage, justifies policy solutions targeted at limiting this specific breed of violence.

Several legislative proposals are now on the table. In this whitepaper, we review these proposals, first in terms of whether, had they been in effect, they would they have addressed the various factual scenarios presented by past mass shootings,⁴ starting with the 1999 Columbine shootings in Colorado and continuing through the recent shootings at Sandy Hook Elementary School in Newtown, Connecticut. In order to conduct this analysis, we needed to collect as much data as possible regarding the shootings. The U.S. Centers for Disease Control and

¹ See North, McCutcheon, Spitznagel, & Smith, Three-year follow-up of survivors of a mass shooting episode. *JOURNAL OF URBAN HEALTH*, 79, 383-91 (2002).

² See Nader, Pynoos, Fairbanks, & Frederick, Children's PTSD reactions one year after a sniper attack at their school. *AMERICAN JOURNAL OF PSYCHIATRY*, 14, 1526-30 (1990); Trapper & Friedman, Malignant memories: PTSD in children and adults after a school shooting. *Journal of the American Academy of Child and Adolescent Psychiatry*, 30, 936-44 (1991); Report of United States Attorney General Holder's National Task Force on Children Exposed to Violence at 143 (Dec. 12, 2012) *available at* <http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf>.

³ National Task Force on Children Exposed to Violence, *supra*.

⁴ A "mass shooting" is defined by the FBI as involving four or more victims, excluding the shooter, with no "cooling off period" between victims." We have used this definition for our Report. We have excluded killings of multiple family members by another family member and committed in the home as well as gang or drug related shootings since the legal and political issues may be different.

Prevention (“CDC”) maintained a database containing this type of information, but, in 1996, a provision was introduced to the CDC’s annual appropriations bills at the request of the NRA to stop funding the collection of this information. These annual restrictions technically only apply to studies that “advocate or promote gun control,” but they have had a significant and predictable chilling effect on federal agencies’ willingness to fund research related to gun control.⁵

Similarly, in 1978, an amendment to the appropriations budget for the Bureau of Alcohol, Tobacco and Firearms (“ATF”) was added that precluded ATF from using its funding to consolidate and centralize its gun receipt and disposition records. Over time, additional amendments, supported by the NRA, prevented ATF from collecting and organizing detailed data from licensees and providing access to any researchers to its data other than aggregate composite data on particular broad topics.⁶

We therefore had to rely on other databases, including those from the FBI’s Supplementary Homicide Report, the Violence Policy Center, the Brady Campaign to Prevent Gun Violence, Mayors Against Illegal Guns, newspaper reports describing the shootings, gun manufacturer websites describing the guns used, and magazine reports, including a detailed chart published in Mother Jones, purportedly cataloging mass shootings.

The following factors were considered when available: location, venue, date and year of the shooting; summary of the event; number of fatalities, injuries, and victims; type of weapon used, where obtained, whether purchased legally/illegally; weapon manufacturing details; whether the weapon(s) used would be banned under the proposed 2013 Assault Weapons Ban; whether a high-capacity magazine⁷ was used in the shooting; whether the perpetrator committed suicide at the time of the shooting; whether the perpetrator had a previous criminal background; prior signs of possible mental illness and summary of the perpetrator’s mental health; whether the perpetrator had been committed or adjudicated mentally ill, and details regarding what, if any, professional help the perpetrator received prior to the shooting. We then compared this data against the various proposals to assess whether the proposal could have prevented the shooting had it been in effect.

Following this analysis, where we determined that particular proposed legislation may have prevented the shooting(s), we reviewed the proposed legislation in terms of whether it would, under the current state of the law, likely pass muster if challenged on Second Amendment

⁵ See January 10, 2013 Joint Letter of Crime Researchers to Vice President Joseph Biden at 3, *available at* https://crimelab.uchicago.edu/sites/crimelab.uchicago.edu/files/uploads/Biden%20Commission%20letter_2013_0110_final.pdf (noting *inter alia* that NIH research awards for studies related to firearm deaths lag significantly behind research awards for far less significant public health threats, like rabies). President Obama has, by presidential memorandum, recently instructed the CDC to resume studying gun violence but, unfortunately, not in time for this whitepaper. Presidential Memorandum of Jan. 16, 2013 at p. 8. Also, in the current political climate, Congress’s willingness to grant the required funding is far from certain.

⁶ NYCLA supports removing this impediment to ATF’s ability to collect and disseminate important data regarding firearms ownership. In order to determine which legislative proposals make sense with more authority better data would be helpful.

⁷ For purposes of this report, a “high capacity magazine” is defined as a magazine for handguns and rifles with a capacity greater than ten rounds and shotgun magazines with a capacity greater than five rounds. This definition conforms to the category of magazines that would be prohibited under the Assault Weapons Ban of 2013, S. 150, 113th Cong. (2013) § 2.

(right to bear arms), Due Process (Fifth and Fourteenth Amendments), and/or Commerce Clause (Article I, Section 8 of the Constitution) grounds. If so, we have provided our recommendations with respect to each of the proposals.

II. Constitutional Background

The Supreme Court's 2008 decision in *District of Columbia v. Heller* was hailed as a watershed moment for supporters of gun rights and lamented as a disaster by gun control advocates. In the 200 years prior to *Heller*, the courts had held that the Second Amendment supports a collective right to possess and carry arms in connection with military service, but does not confer any justiciable individual right.⁸ *Heller* overruled that reading and established that the Second Amendment protects an individual right to keep a firearm in one's home for purposes of self-defense, which the federal government may not abridge.⁹ Two years later, in *McDonald v. Chicago*, the Court extended its ruling to the individual states.¹⁰

Yet, for all the talk of a sea change in the Court's understanding of the meaning of the Second Amendment, the practical effect of these rulings on federal gun control initiatives has been minimal. Since *Heller*, over 80 cases have been brought challenging the constitutionality of various prohibitions on gun ownership, and nearly all have failed.¹¹ Indeed, the language of the majority in *Heller* makes clear that the types of gun control measures most likely to be enacted in 2013 are unquestionably consistent with the Second Amendment:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons."¹²

We believe that most of the proposed legislation is likely to fall within these categories of

⁸ See, e.g., *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Miller*, 307 U.S. 174 (1939).

⁹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹⁰ *McDonald v. Chicago*, 561 U.S. 3025 (2010).

¹¹ See, e.g., *United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009) (rejecting argument that ban on juveniles possessing handguns violates Second Amendment); *Kachalsky v. County of Westchester*, 708 F.3d 81 (2d Cir. 2012) (upholding prohibition on concealed carry); *United States v. Bledsoe*, 334 Fed. Appx. 771 (5th Cir. 2009) (prohibition on straw purchases); *United States v. Scroggins*, 551 F.3d 257 (5th Cir. 2010) (prohibition on possession by felons); *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009) (prohibition on possession by individual with domestic violence misdemeanors); *United States v. Henry*, 688 F.3d 637 (9th Cir. 2012) (prohibition on machine guns).

¹² *Heller*, 554 U.S. at 626 (citations omitted).

regulation unaffected by the Court's ruling in *Heller*.

This is not to say that these proposals would not face constitutional challenges. The more colorable potential constitutional objections, however, will likely arise under the Interstate Commerce Clause,¹³ and the due process clauses of the Fifth and Fourteenth Amendments, which ensure due process before an individual is deprived of life, liberty or property.¹⁴ As discussed below, we believe that these constitutional objections should be addressed, but that they pose no obstacle to a wide range of legislation that could have a meaningful impact on gun violence.

III. Current Law

Current federal law regulating firearms is found in the Title 18 U.S.C. §§ 921, et seq. The statutes establish a scheme whereby the federal government licenses importers, manufacturers, and dealers to ship, transport, and receive firearms or ammunition in interstate commerce and then regulates sales and transfers by those federally licensed. For instance, Section 922(a) outlaws the sale of certain types of especially “dangerous and unusual” firearms (i.e., machine guns, short-barreled shotguns and short-barreled rifles) and ammunition (i.e., armor piercing bullets), except for use by the U.S. government or where authorized by the Attorney General.¹⁵

The statute also outlaws the sale or delivery of firearms or ammunition to certain classes of individuals, including, for instance, an individual,

- under 18;
- under 21, other than shotguns, rifles or associated ammunition;
- where purchase or possession by such person would be in violation of any State law in the State where the purchase is taking place;
- under indictment or a convicted felon;
- who is a fugitive from justice;
- who is an unlawful user of or addicted to a controlled substance;
- who has been adjudicated a mental defective or committed to a mental institution;
- who is an illegal alien or admitted to the United States on a nonimmigrant visa;
- who has been dishonorably discharged from the U.S. military;
- who has renounced his/her United States citizenship;
- who is subject to a court order restraining him/her from harassing, stalking or threatening such person's intimate partner or the child of such person or his/her intimate partner or engaging in conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, so long as the person received due process; or
- who has been convicted of a domestic violence misdemeanor.¹⁶

¹³ U.S. Const., art. I, § 8, cl. 3.

¹⁴ U.S. Const., amend. V; U.S. Const., amend. XIV.

¹⁵ 18 USC § 922(a).

¹⁶ 18 USC §§ 922(b), (d).

There are, however, no restrictions on mail or online sales of ammunition by federally licensed firearms dealers.¹⁷

In addition, it is a crime for certain of these individuals (but not the underage classes) and others, such as illegal aliens, to ship or transport in interstate or foreign commerce, any such firearm or ammunition or to receive any such firearm or ammunition that has been in “interstate or foreign commerce.”¹⁸

Furthermore, the statute requires that every transfer of a firearm by a federally licensed dealer only be completed after the purchaser undergoes a background check using the National Instant Criminal Background Check System (“NICS”). The purpose of the NICS and the background check requirement is to prevent the sale of firearms to individuals who are not permitted to possess firearms under the statute by checking the individual’s identity against federal, state, and local law enforcement and mental health records.¹⁹ There are, however, no background check requirements for selling ammunition.

Regulations governing the operation of the NICS are issued by the Department of Alcohol, Tobacco and Firearms (“ATF”) and found at 28 C.F.R. Part 25. Those regulations contemplate that most records in the NICS index will come from federal agencies, with some limited number being provided by state and local law enforcement agencies on a voluntary basis.²⁰ Since 2007, the federal government has sought to incentivize states to provide thorough and complete records to the NICS by tying “Justice Assistance Grant” funding to states’ compliance with record completeness goals and authorizing new grant programs to reward improved provision of information to the NICS.

Finally, current laws also require that all firearms sold, delivered, or transferred by licensed firearms dealers include either a safety device on the firearm itself or come with a gun safe or case.²¹

Note the definition of “dealer” is one selling guns as a “regular course of trade with the principal objective of livelihood and profit.” 18 U.S.C. § 921(a)(21)(D). This fairly narrow definition has allowed gun show sellers, pawn shop owners, and “occasional” sellers of guns to avoid needing to comply with gun control laws; that is, licensing, safety, and background check requirements do not apply.

Note also that under current law, a dealer can sell a gun to a purchaser who has been convicted of a misdemeanor such as, for example, purchasing a weapon in the past when the purchaser knows he is prohibited from doing so. Also whereas an “unlawful user” of a controlled substance is prevented from purchasing a gun from a licensed dealer, one addicted to

¹⁷ See e.g., <http://smartgunlaws.org/ammunition-regulation-policy-summary/>; Laurie Ure, “Democrats propose limits on online ammo sales,” CNN.com (Jul. 30, 2012) available at <http://www.cnn.com/2012/07/30/politics/democrats-ammo-sales>.

¹⁸ In other words, if a dealer sells a firearm to a 16 year old, the dealer, not the 16 year old buyer, has committed a crime.

¹⁹ 18 USC § 922(t).

²⁰ 28 CFR § 25.4. The Supreme Court struck down an attempt by the federal government to compel state law enforcement personnel to assist the background checks in *Printz v. United States*, 521 U.S. 898 (1997).

²¹ 18 USC § 922(z).

alcohol is not.

There is also no federal law against “straw purchases,” in which an individual legally purchases a gun for the purpose of transferring or providing it to another, even one who is not legally permitted to own or possess a gun.

IV. Summary of Data Collected

From Columbine to the present, there have been 47 documented mass shootings (defined as at least four victims, excluding intra-family shootings in the home and those relating to gang or drug violence), resulting in 642 victims, over half of which were fatalities. At least eight-seven percent (87%) of these mass shootings involved semiautomatic weapons or assault weapons (as defined in Senator Feinstein’s proposed legislation)²² and at least fifty-one percent (51%) involved extended or high-capacity magazines. On average, mass shootings using high-capacity magazines resulted in double the number of fatalities and victims as those that did not. In at least seventy percent (70%) of the mass shootings the weapons had been purchased legally, approximately half of those purchases from licensed dealers presumably requiring background checks. Of the remaining shooters most would have been prevented from buying firearms had they been subjected to effective background checks.

In approximately twenty five percent (25%) of the mass shootings where the firearm was purchased from a licensed dealer, federal background data was incomplete due to the relevant states not sending information into NICS, and in each the shooter would not have passed the check had the states been more vigilant. The result was over one hundred and ten (110) victims. More than half of the mass shooters, involving over 440 victims, had mental health issues but only four of those had been committed or adjudicated mentally defective.

V. Recommendations Regarding Proposed Legislation

A. Assault Weapons and High-Capacity Ammunition Ban

1. Proposed Legislation

From 1994-2004, federal law banned the manufacture, sale, and transfer of certain semiautomatic weapons defined as “semiautomatic assault weapons” as well as high-capacity ammunition magazines that were capable of feeding more than 10 rounds of ammunition. Congress allowed this ban to expire in 2004.

Senator Dianne Feinstein and the President have independently proposed to reinstitute the semiautomatic assault weapons and high-capacity magazine ban.²³ Senator Feinstein’s proposed bill has been modified from the 1994 version of the law in order to simplify what constitutes an assault weapon by using one characterization rather than requiring two. The major provisions of the bill are as follows:

²² Sixty-four percent (64%) involved semi-automatic weapons, and 26% involved assault weapons (under Senator Feinstein’s definition).

²³ Assault Weapons Ban of 2013, S. 150, 113th Cong. (2013).

The bill would ban the importation, manufacture, sale, transfer, or possession of “semiautomatic assault weapons,” a term defined in the statute to include semiautomatic rifles, pistols, and shotguns (1) that have a fixed magazine containing more than 10 rounds or (2) that have the capacity to accept a detachable magazine and have any one of a series of characteristics commonly referred to as “military features.” The bill lists, by model number, 157 types of firearms that it would outlaw, including all AR-15 and AK-47 rifles, variations of which have been used in over twenty-five percent (25%) of the mass shootings, including the Sandy Hook massacre. The bill specifically grandfathers in semiautomatic assault weapons already in circulation prior to the date of enactment and excepts inoperable or antique weapons, weapons used by the military or law enforcement, and various types of firearms contained in a 95-page Appendix because they are used for hunting and sport.

The bill would also outlaw the importation, manufacture, sale, transfer, or possession of “large capacity ammunition feeding devices”²⁴ after the date of enactment. A separate bill has been introduced in the Senate by Senator Frank Lautenberg that would outlaw high-capacity magazines capable of feeding more than 10 rounds of ammunition.²⁵

Senator Feinstein’s bill also makes it unlawful for any person owning a semiautomatic assault weapon besides licensed dealers, manufacturers, and importers to store or keep that weapon if that person knows or has reasonable cause to believe that the weapon will be accessible to an individual prohibited from possessing a firearm under federal or state law, unless the firearm is carried on the person or locked in such a way that the prohibited individual has no way to access it.

The bill requires background checks for any private transfer of grandfathered semiautomatic assault weapons, including gifts, by first temporarily transferring the weapon to a licensed dealer to conduct the background check.

Finally, the bill proposes to use federal grant funds to conduct a voluntary buy-back program for grandfathered semiautomatic assault weapons and high-capacity magazines.

2. *Constitutionality*

The Supreme Court never considered the constitutionality of the 1994 assault weapons ban when it was law, and the law expired before the Supreme Court’s decision in *Heller*. It therefore remains an open question whether a new federal assault weapons ban would survive constitutional attack before the Supreme Court. However, *Heller* itself provides some guidance and significant court decisions since *Heller* have held that similar laws passed by states and the District of Columbia are constitutional under the Second Amendment.

As stated above, in *Heller*, the Supreme Court recognized that an individual’s Second

²⁴ “Large capacity ammunition feeding device” is defined in the bill to mean “a magazine, belt drum, feed strip, or similar device, including any such device joined or coupled with another in any matter, that has an overall capacity of, or that can be readily restored, changed or converted to accept, more than 10 rounds of ammunition,” excluding “an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition.” Assault Weapons Ban of 2013, S. 150, 113th Cong. (2013) § 2.

²⁵ Large Capacity Ammunition Feeding Device Act of 2013, S. 33, 113th Cong. (2013).

Amendment right to possess firearms is not unlimited; ownership and possession can reasonably be regulated where the firearm is “dangerous and unusual.”²⁶ The Court stated, for instance, that its decision in *Heller* did not cast doubt on regulations outlawing possession of M-16 rifles.²⁷ If semiautomatic weapons are viewed, therefore, as “dangerous and unusual,” arguably they too could be subject to increased regulation under *Heller*.

Similarly, in *People v. James*, an appellate court in California held in 2009 that California’s assault weapons ban did not violate the Second Amendment because, under the Supreme Court’s reasoning in *Heller*, the Second Amendment only guarantees a right to possess the type of weapon typically possessed by law-abiding citizens for lawful purposes.²⁸ The court concluded that the assault weapons outlawed by California’s law were of such an “unusual and dangerous” nature that they were “not the types of weapons that are typically possessed by law-abiding citizens for lawful purposes such as sport hunting or self-defense; rather, these are weapons of war.”²⁹ The court went on to compare the types of semiautomatic weapons barred by California’s assault weapons ban to weapons such as machine guns and short-barreled shotguns that have been banned by the federal government. The court concluded that semiautomatic weapons had the potential to be at least as, if not more, “unusual and dangerous” than such weapons.³⁰

Likewise, in 2011, the Washington, D.C. laws replacing those overturned by the Supreme Court in *Heller*, including an assault weapons and high-capacity magazine ban, were challenged before the D.C. Circuit Court of Appeals (“*Heller II*”).³¹ The D.C. Circuit upheld the assault weapons ban, finding that it was “difficult to draw meaningful distinctions” between semiautomatic weapons and the types of automatic weapons – namely the M-16 – that the Supreme Court has held are subject to reasonable regulation as “dangerous and unusual.”³² The court moreover found that high-capacity magazines posed such a danger to innocent civilians and law enforcement officers that banning such magazines was likely to promote important governmental interests.³³

Whether the Supreme Court would uphold a similar assault weapons and high-capacity magazine ban at the federal level remains to be seen. But the *James* and *Heller II* decisions provide sound arguments for why, based on the speed, volume, and sheer destructiveness of these weapons, they can be regulated as “unusual and dangerous” weapons for purposes of the Second Amendment.³⁴

Although an assault weapons and high-capacity magazine ban could be challenged on

²⁶ *Heller*, 554 U.S. at 627.

²⁷ *Id.*

²⁸ *People v. James*, 174 Cal. App. 4th 622, 674-77 (Cal. App. 3rd Dist. 2009).

²⁹ *Id.* at 676.

³⁰ *Id.* at 676-77.

³¹ *Heller v. District of Columbia*, 680 F.3d 1244,1262-64 (D.C. Cir. 2011).

³² *Id.* at 1263.

³³ *Id.* at 1263-64.

³⁴ We recognize that challenges will focus on whether these weapons are, in fact, unusual and dangerous or whether they are the same as those used in self defense or for sport/hunting. This is when better data from the CDC and ATF would be helpful. If the numbers suggest that their use is more prevalent in mass shootings than in successful self defense situations, such a challenge could be weakened.

other constitutional grounds, any such efforts should fail. Indeed, gun manufacturers unsuccessfully challenged the constitutionality of the 1994 assault weapons ban before the D.C. Circuit on Commerce Clause grounds in 1999.³⁵ Likewise, any potential argument that the ban constituted an unlawful taking under the Fifth Amendment is precluded by the fact that preexisting ownership of such weapons and ammunition is grandfathered in by the bill.

3. *NYCLA Recommendation*

The federal ban on the manufacture and sale of machine guns after 1986 has been effective in taking such weapons out of circulation and preventing violence by use of those weapons. Indeed, none of the mass shootings that NYCLA examined involved fully automatic weapons.

The subset of firearms and accompanying ammunition that are both in circulation and legal that have been shown to be used in mass shootings repeatedly appear to be as dangerous as automatic weapons—namely, semiautomatic weapons powered by detachable, high-capacity magazines.

The term “semiautomatic weapon” refers to a firearm that, although only capable of discharging one round of ammunition per pull of the trigger, can reload automatically. This category covers a broad range of firearms, including the types of weapons used by some law-abiding gun owners for hunting and the types of handguns kept in the home for purposes of self-defense. But it also includes the types of military-style weapons capable of inflicting mass casualties using large amounts of ammunition that seemingly have no legitimate hunting purpose. Our research shows that ninety percent (90%) of the mass shooting events in the past 15 years involved semiautomatic or assault weapons, and that more than a quarter of these shootings involved the types of military-style “assault weapons” that Congress has tried to legislate in the past.

It is NYCLA’s position, therefore, that Congress should pass the bill proposing to ban semiautomatic assault weapons and high-capacity magazines. Both the Newtown, Connecticut and Aurora, Colorado shootings, which alone caused 100 fatalities and injuries, involved the use of weapons that would be banned under the Assault Weapons Ban of 2013. Although any effort to ban all semiautomatic weapons may not survive constitutional challenge, Congress should act to take the most dangerous of these weapons, which tend to have no legitimate hunting or self-defense purpose, out of circulation.

If there is no political will to pass the semiautomatic weapons ban, Congress should nevertheless pass the separate ban on high-capacity magazines. The use of high-capacity magazines to fire an astounding number of bullets in a short period of time is a tragically unifying feature of the most deadly of the mass shootings in recent years. Our research shows that the use of high-capacity magazines in mass shootings has resulted in, on average, double the number of deaths and injuries as compared to incidents where high-capacity magazines were not

³⁵ *Navegar, Inc. v. United States*, 192 F.3d 1050 (D.C. Cir. 1999). Certain provisions of the proposed Assault Weapons Ban of 2013 that purport to regulate the storage and private transfer of grandfathered assault weapons and high-capacity magazines by non-federally licensed dealers may be susceptible to a Commerce Clause challenge. Assault Weapons Ban of 2013, S. 150, 113th Cong. (2013) §§ 3, 5.

used. Ammunition clips capable of holding between 15 and 30 bullets played a part in the Newtown, Aurora, Tucson, Fort Hood and Virginia Tech massacres, among others. For instance, Jared Loughner was able to fire 30 bullets in less than 15 seconds in the 2011 attack on Representative Gabrielle Giffords. Had Loughner been able to fire 10 rounds per ammunition clip and required to reload after each clip, lives may have been saved.³⁶ While banning high-capacity magazines will not prevent mass shootings altogether, taking such magazines out of circulation is likely to reduce the number of casualties and injuries resulting from mass shooting incidents.

B. Ammunition Sales Bills (Including Background Checks)

1. *Proposed Legislation*

Two bills currently pending in the Senate would close the gap between federal regulation of firearms and the lack of sufficient regulation for ammunition.

First, the “Stop Online Ammunition Sales Act of 2013” introduced by Senator Lautenberg would add restrictions on mail/internet sales of ammunition by federally licensed dealers so that these sales are regulated in the same way as mail/internet sales of guns.³⁷ The bill would also require licensed dealers to report to law enforcement the sale of more than 1,000 rounds of ammunition to one person at any one time or over the course of five consecutive business days.

Second, the “Ammunition Background Check Act of 2013” introduced by Senator Richard Blumenthal would institute background checks for sales of ammunition by federally licensed dealers so that these sales are treated the same way as sales of firearms.³⁸ The bill would also ban interstate sales of ammunition, increase record-keeping requirements for sales of ammunition, and require dealers to report purchases of large quantities of ammunition at any one time or over a five-day period. The bill would empower the Attorney General to determine what constitutes a “large quantity” and allow that determination to differ by geographic area.

2. *Constitutionality*

There do not appear to be any significant constitutional issues raised by most of these proposals. As federal laws are already in place that parallel these measures with respect to firearms, and as these bills are directed at the activities of federally licensed dealers of products in or affecting interstate commerce, there are no Commerce Clause issues. As to the background check requirement, the Supreme Court held in *Heller* that regulations limiting access to firearms and ammunition for certain types of individuals are permitted under the Second Amendment. The proposal for background checks on ammunition purchases seeks to keep bullets away from individuals who are already not permitted to purchase ammunition from licensed dealers, and who undergo background checks for purchases of firearms from licensed dealers. As the

³⁶ New York’s comprehensive gun safety reform legislation enacted in January 2013, the “NY SAFE Act,” strengthens New York’s existing semiautomatic assault weapons ban and includes a ban on ammunition magazines of more than seven rounds, the toughest ammunition ban in the country.

³⁷ Stop Online Ammunition Sales Act of 2013, S. 35, 113th Cong. (2013)

³⁸ Ammunition Background Check Act of 2013, S. 174, 113th Cong. (2013).

Supreme Court has strongly implied that such regulations are reasonable in order to limit inherently dangerous individuals' access to firearms and ammunition, in our view such a proposal does not run afoul of the Second Amendment.

3. *NYCLA Recommendation*

The lack of a background check for ammunition dilutes the efficacy of the current statute prohibiting the sale or transfer by licensed dealers of ammunition to felons, individuals convicted of a domestic abuse misdemeanor, individuals adjudicated mental defective or committed to a mental institution, and others. Without a background check requirement for ammunition sales, ammunition dealers are not compelled to do anything, aside from asking the person, in order to investigate whether the purchaser might belong to any of these categories. For instance, Maurice Clemmons, a convicted felon, used weapons that were lost or reported stolen years before to murder four off-duty police officers in a Seattle coffee shop in 2009.³⁹ While a background check would have stopped Clemmons from purchasing a firearm from a licensed dealer due to his felony conviction, the current lack of a background check requirement for ammunition permits released felons like him to load up on ammunition for illegally obtained firearms despite their criminal record. For these reasons, the "Ammunition Background Check Act of 2013" is a sensible proposal. The bill's reporting and record-keeping requirements likewise seek to bring the regulation of ammunition into conformance with the regulation of firearms, and are therefore laudable.^{40, 41}

The "Stop Online Ammunition Sales Act of 2013" also contains sensible proposals that will make it more difficult for those who are not permitted to possess guns or ammunition under current federal law from obtaining ammunition. The bill would also make it, in general, less convenient for individuals to purchase ammunition by requiring them make purchases in person. The reporting requirement, though easy to circumvent by purchasing any amount of ammunition less than 1,000 rounds or by staggering purchases over more than five days, is also important in bringing the regulation of ammunition into conformance with the regulation of firearms and is therefore worth pursuing.

Note, however, that neither proposal prevents a convicted felon or other prohibited class from purchasing ammunition in a private sale from a non-licensed dealer.

C. Expanding Background Check Requirements Beyond Sales by Licensed "Dealers" to Encompass Gun Shows, Pawn Shops, and Other Occasional Sellers

³⁹ Jonathan Martin & Ken Armstrong, "Deputies ran check on Clemmons hours before 4 officers slain, reports show," *Seattle Times* (Feb. 7, 2011) available at http://seattletimes.com/html/localnews/2014155225_clemmons08m.html.

⁴⁰ New York's NY SAFE Act passed in 2013 includes both a ban on direct internet sales of ammunition and institutes background checks for the sale of ammunition.

⁴¹ However, the intended benefits of the proposal to give the Attorney General discretion to set the number of ammunition rounds that would trigger reporting requirements by geographic area are ambiguous. It is not clear how the Attorney General could effectively differentiate which geographic areas should have lower ammunition caps in a way that will reduce gun violence more than an across-the-board cap. Such a law may also raise a Second Amendment and Equal Protection issues by arbitrarily limiting citizens' abilities to purchase ammunition based on where they reside.

1. *Proposed Legislation*

President Obama has requested that Congress create a universal background check requirement.

Senator Lautenberg of New Jersey has proposed the “Gun Show Background Check Act of 2013” as a potential solution.⁴² The Act would require that all firearm sales at gun shows – defined as “any event at which 50 or more firearms are offered or exhibited for sale” – take place through a licensed importer, manufacturer, or dealer, who would, in turn, be required to conduct a NICS background check.

The proposed legislation would create criminal liability for gun show promoters for: failing to register a gun show with the Attorney General; failing to verify the identity of each vendor; and failing to notify each person attending of the background check requirements.” A vendor who sells a gun at a gun show is similarly criminally liable if he makes the transaction without going through a licensed dealer to perform the background check.

Senators Chuck Schumer, Joe Manchin, Mark Kirk and Tom Coburn are similarly working on bipartisan legislation expanding background checks.

2. *Constitutionality*

The requirement of background checks for sales by a licensed dealer have never been successfully challenged on constitutional grounds. Given the fact that gun sales fall squarely in the middle of the stream of interstate commerce, regulation of those sales by Congress falls within its powers under the Interstate Commerce Clause.⁴³ To find that a similar requirement on gun shows is unconstitutional, a litigant would have to argue that gun shows exist outside the traditional channels of commerce. It is difficult to see how such a showing could be possible. Guns almost always cross state lines as they move from manufacture to sale. The phenomenon of guns originating at gun shows being trafficked across state lines is well established.⁴⁴ Moreover, by defining a “gun show” as a gathering where 50 or more firearms are sold, the proposed statute leaves little doubt that it addresses real commercial concerns. It is thus unlikely that an expansion of the background check requirement to encompass gun shows would be found to be unconstitutional.

3. *NYCLA Recommendation*

A recent article in the *New York Times* notes that forty percent (40%) of all gun purchases are exempt from background checks under the current law.⁴⁵ Our data review resulted in a similar conclusion for guns used in mass shootings; we could assume background checks in

⁴² Gun Show Background Check Act of 2013, S.22, 113th Cong. (2013).

⁴³ *Heart of Atlanta Hotel, Inc. v. United States*, 379 U.S. 241, 256 (1964) (“the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.”)

⁴⁴ See Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, “Following the Gun: Enforcing Federal Laws Against Firearms Traffickers,” (June 2000) at 19.

⁴⁵ Jennifer Steinhauer, “Congress Set To Consider Tighter Rules On Firearms,” *New York Times* (Feb. 24, 2013) at A15.

fewer than half the purchases. Nevertheless, one of the most potentially potent law enforcement tools to prevent prohibited persons from acquiring firearms is the NICS database. Under the Brady Handgun Violence Prevention Act, all licensed firearms dealers in the United States are required by law to verify that a buyer is eligible to purchase the weapon; in the vast majority of cases, this verification takes the form of a call to NICS.⁴⁶ From 1994 to 2009, these background checks prevented 1.9 million attempted firearm purchases, primarily preventing sales to felons and fugitives.⁴⁷

Congress should pass the Gun Show Background Check Act of 2013. In a June 2000 study, the Bureau of Alcohol, Tobacco and Firearms found that sales at gun shows constituted the second most significant source of illegal gun trafficking, behind only straw purchases.⁴⁸ In the Columbine shooting, Eric Harris and Dylan Klebold purchased two of the most deadly weapons used in their rampage from an unlicensed seller at a Colorado gun show through a straw purchaser, Mr. Klebold's girlfriend, Robyn Anderson. Following the shootings, Ms. Anderson testified before the Colorado legislature that the shooters sought out private sellers at the Tanner Gun Show to avoid any potential background check and that she would not have purchased the weapons if required to undergo a background check.⁴⁹ Ms. Anderson's testimony indicates that a uniform background check could have a significant deterrent effect on individuals seeking weapons for mass shootings.⁵⁰

Even if background checks are made nearly universal, that regime is only as strong as the information in the NICS database. For this reason, more should be done to assist States in providing complete data related to mental health and felony status. An improved database could yield concrete results. For example, if the state of Virginia had submitted records using the federal regulatory definition of "mental defective,"⁵¹ Seung-Hui Cho, the Virginia Tech shooter, could have been prevented from purchasing the two semiautomatic handguns he used to gun down 33 faculty and students, including himself, due to a state judge's earlier finding that Mr. Cho "presented an imminent danger to himself as a result of mental illness."⁵² The State of Virginia did not forward this information to NICS because Mr. Cho had not been forcibly committed, a distinction that does not appear in federal law.

The NICS Improvement Amendment Act of 2007 was intended to provide incentives to States to report such information. A 2012 General Accountability Office Report, while recognizing the value of such incentives in improving the database, notes that there are other

⁴⁶ 18 U.S.C. § 922(s).

⁴⁷ See Department of Justice Bureau of Justice Statistics, "Background Checks for Firearm Transfers, 2009 - Statistical Tables," (Oct. 20, 2010) at Table 1.

⁴⁸ See "Following the Gun: Enforcing Federal Laws Against Firearms Traffickers," *supra* n.42. The Bureau's study also identified approximately 26,000 illegally diverted firearms that were originally purchased at gun shows or flea markets.

⁴⁹ "Columbine gun-buyer unaware of motives," United Press International, (Jan. 27, 2000).

⁵⁰ New York's NY SAFE Act enacted in 2013 includes provisions requiring background checks for private sales of firearms, excluding transfers among immediate family members.

⁵¹ 27 CFR § 478.11 (including in definition of "mental defective" individuals determined by a court to be a danger to themselves or others).

⁵² Michael Luo, "U.S. Rules Made Killer Ineligible to Purchase Gun," *New York Times* (Apr. 21, 2007) at A1.

technological issues and confusion at the state level as to what needs to be reported.⁵³ Since Congress may be unable to force states to comply with data-sharing mandates,⁵⁴ any efforts to seek voluntary compliance and consistency of standards through financial incentives, training, and support would be money well spent. President Obama has also called for Congress to improve incentives for the states to make more complete background check data available to the NICS.

D. Outlawing Gun Trafficking and Straw Purchases

1. *Proposed Legislation*

President Obama has called for legislation imposing serious penalties on gun trafficking to prevent “straw purchases” of firearms. Two bills pending, including a bipartisan bill in the Senate and a bipartisan bill pending in the House of Representatives, seek to criminalize “straw purchases” of firearms.

In the Senate, the “Stop Illegal Trafficking in Firearms Act of 2013” introduced by Senator Patrick Leahy would make it a crime for anyone other than a federally licensed importer, manufacturer, or dealer to purchase a firearm on behalf of, or with the intent to transfer it to, any other person.⁵⁵ The bill includes stiffer penalties if the transfer is committed knowingly or with reasonable cause to believe that a firearm involved will be used to commit a crime of violence. The bill includes an exception for bona fide gifts so long as the recipient is not known or believed to be prohibited from possessing a firearm.

The “Gun Trafficking Prevention Act of 2013” introduced by Senator Kirsten Gillibrand and co-sponsored by Republican Senator Mark Kirk makes it a crime to transfer or receive two or more firearms if the transferor or recipient, respectively, knows or has reasonable cause to believe that the use or possession of the firearm by the transferee would result in a felony.⁵⁶ The bill also criminalizes false statements to a licensed dealer regarding the purchase of such firearms. The bill likewise includes a gift exception so long as the recipient is not actually prohibited from possessing a firearm.

In the House of Representatives, the “Gun Trafficking Prevention Act of 2013” introduced by Representative Carolyn Maloney and co-sponsored by Republican Representatives Scott Rigell and Pat Meehan largely tracks the language of its counterpart in the Senate, except that there is no requirement that the transfer be of two or more firearms – transfer of one firearm is all that is needed.⁵⁷ The bill is the first, and so far only, gun safety bill to be introduced in 2013 with bipartisan support.

2. *Constitutionality*

⁵³ “Sharing Promising Practices and Assessing Incentives Could Better Position Justice to Assist States in Providing Records for Background Checks”
GAO-12-684, Jul 16, 2012

⁵⁴ *Printz v. United States*, 521 U.S. 898 (1997).

⁵⁵ Stop Illegal Trafficking in Firearms Act of 2013, S. 54, 113th Cong. (2013).

⁵⁶ Gun Trafficking Prevention Act of 2013, S. 179, 113th Cong. (2013).

⁵⁷ Gun Trafficking Prevention Act of 2013, H.R. 452, 113th Cong. (2013).

The bipartisan proposed legislation designed to punish and deter gun trafficking likely does not infringe upon Second Amendment rights. Particularly, the “Gun Trafficking Prevention Act of 2013” regulates transfers of firearms that are known or reasonably believed to evade restrictions on who may possess a firearm – restrictions that the Supreme Court recognized as legitimate and reasonable under the Second Amendment in *Heller*. Outlawing these straw purchases does not impede the possession of firearms by law-abiding, responsible citizens. Furthermore, because straw purchases and subsequent transfers associated with the purchases undoubtedly occur in the stream of interstate commerce, we identify no Commerce Clause issues with laws regulating gun trafficking.

Arguably, the main provision of the “Stop Illegal Trafficking in Firearms Act of 2013” runs afoul of the Second Amendment because it purports to outlaw the purchase of a firearm with the intent to transfer to another person, even where both the transferor and transferee are law-abiding, responsible citizens. Notably, however, the bill outlaws the initial purchase of a firearm with the *intent* to transfer it to another rather than the secondary transfer. The intent element is key. Such purchases intentionally assist the transferee to evade the federal background check requirement, which requirement is a reasonable condition on the commercial sale of firearms. Regulating this intentional evasion of a reasonable condition on firearms purchases should not run afoul of the Second Amendment.

The current lack of a background check requirement for private sales poses an issue in that, without universal background checks, the bill as written criminalizes an individual buying a firearm with the intent to sell it privately, such as at a gun show. For the reasons discussed above, that scenario presents Second Amendment concerns. If a universal background check bill is passed, however, this bill, in light of the gift exception it includes, is likely on safe constitutional ground.

3. *NYCLA Recommendation*

These bills are primarily aimed at keeping guns out of the hands of those who cannot otherwise legally purchase them under current federal law and as such we support them. The first Senate bill goes further in that it criminalizes any purchase of firearms where the gun is being purchased for another, whether or not the intended recipient’s possession of a gun would be felonious. Although there are potential constitutional challenges, particularly with the first bill, we support these proscriptions to prevent gun trafficking and straw purchases. We believe that, by imposing criminal penalties on the transfer of firearms where the firearms could end up in the hands of criminals or could be used to commit a violent crime, these proposals disincentivize otherwise law-abiding gun owners from allowing their firearms to fall into the hands of others, thereby limiting the commercial flow of firearms generally. As a significant number of the mass shootings we reviewed, including Columbine, involved the shooter obtaining firearms from others rather than purchasing it directly from a dealer, we feel that these measures, in combination with a universal background check requirement, can contribute to a more responsible gun culture. We would also suggest closing the gift loophole in Senator Gillibrand’s bill. The 2004 shooting of 11 people at a Damageplan concert in Columbus, Ohio was carried out by an individual who had exhibited signs of mental illness but received a 9mm Beretta as a

gift from his mother.⁵⁸

E. Proposed Bill Ending Gun Manufacturers' Immunity Against Civil Suits

1. *Proposed Legislation*

Under the Federal Protection of Lawful Commerce in Arms Act (“PLCAA”) passed in 2005, firearms manufacturers and sellers are immune from civil lawsuits arising from the unlawful misuse of firearms distributed in interstate commerce.⁵⁹ Recently, legislation has been introduced by Representative Adam Schiff in the House of Representatives that would end this immunity and allow negligence and products liability suits against gun manufacturers to go forward. The “Equal Access to Justice for Victims of Gun Violence Act” claims that state and federal courts have read the PLCAA contrary to its intent by dismissing non-frivolous lawsuits claiming negligence, product defects, and other causes of action.⁶⁰ The bill seeks to allow actions against manufacturers, sellers, or trade associations for damages or relief resulting from an alleged defect or negligence and to increase access to discovery for such litigants.

2. *Constitutionality*

We did not identify any significant constitutional issues with this proposal. Indeed, PLCAA was recently successfully challenged in *Williams v. Beemiller, Inc.*,⁶¹ wherein the N.Y. Appellate Division, 4th Department, ruled the law cannot immunize a manufacturer supplying a gun trafficking ring with 181 Saturday Night Specials.

3. *NYCLA Recommendation*

There can be no legitimate justification for providing firearms manufacturers with blanket immunity against valid, non-frivolous civil lawsuits in light of the widespread danger and harm their products cause. As in other industries, the threat of civil liability has the capacity to act as a deterrent against otherwise legal but significantly harmful conduct. Congress should pursue the bill to end the firearms industry’s immunity against civil lawsuits. This is particularly true if smart technology catches up to the gun industry. Should guns be able to recognize their owners, injury to an innocent person caused by a defective gun allowing a third party access should not go unredressed.

F. Improving Gun Safety Technology

President Obama’s plan for reducing gun violence included a directive to the Attorney General to “review existing and emerging gun safety technologies” and issue a report on his findings, as well as a challenge to the gun industry to “develop innovative and cost-effective gun safety technology and provide prizes for those technologies that are proven to be reliable and effective.”⁶² While a good first step, the federal government should also be more proactive in

⁵⁸ Gil Kaufman, “Dimebag Killer’s Mom: ‘I Bought Him That Gun,’” MTV.com (Dec. 16, 2004), *available at* <http://www.mtv.com/news/articles/1494943/dimebag-killers-mom-bought-gun-him.jhtml>

⁵⁹ 15 U.S.C. §§ 7901-7903.

⁶⁰ Equal Access to Justice for Victims of Gun Violence Act, H.R. 332, 113th Cong. (2013).

⁶¹ 2012 WL 4748703 (N.Y. A.D. 4th Dep’t) (Oct. 5, 2012).

⁶² Presidential Memorandum of Jan. 16, 2013 at p. 10.

requiring federally licensed gun manufacturers to include certain safety features on their products.

In particular, gun personalization or so-called “smart gun” technology that would prevent a gun from being fired by anyone other than the person who purchased it provides perhaps the best hope of preventing firearms from falling into the hands of individuals who are otherwise not permitted to access them. Both Maryland and New Jersey have enacted statutes requiring their state governments to examine and review the status of gun-personalization technology.⁶³ New Jersey’s law calls for the state to require gun-personalization technology on all handguns sold in the state within three years of such technology being available for retail sale.⁶⁴

Because the federal Consumer Product Safety Act exempts firearms and ammunition from its requirements,⁶⁵ the Consumer Product Safety Commission (“CPSC”) has no authority to require these or any other safety features. Moreover, while some of these technology features, such as gun personalization, may not be ready to be marketed today, simply challenging gun makers to explore this technology in the future is not enough. Gun manufacturers should be compelled by Congress to explain why this technology is not marketable now and when it will be marketable. Similarly, gun manufacturers should be required by ATF to meet certain gun-personalization or safety standards by a date certain, as automobile manufacturers are required to meet fuel-efficiency standards by the Environmental Protection Agency. Congress should also explore ending the exemption for firearms and ammunition in the Consumer Product Safety Act so that these products can be regulated by the CPSC like thousands of other consumer products.

G. Revising Current Law to Preclude Those Convicted of Violent Misdemeanors, In Addition to Domestic Violence Misdemeanors, from Obtaining Firearms

There is no pending legislation of which we are aware that suggests expanding the types of prior misdemeanors that warrant precluding a prospective gun owner from purchasing a gun. Nor did we find data to support the proposition that a significant number of mass shooters had previously been convicted of a violent or gun-related misdemeanor. The available data, however, is, as we know, incomplete. Should the CDC be funded to study gun violence again and/or should the restrictions on ATF’s ability to collect and disseminate data be lifted, NYCLA would encourage an inquiry into shooters’ prior misdemeanor convictions and history of alcohol addiction to determine if an expansion of prohibited owners is warranted. Note that the new New York gun control law prevents individuals from obtaining a license to possess a firearm or (since 2013) purchase ammunition if the individual has been convicted of a felony or a “serious offense.” “Serious offense” is defined to include a broad array of offenses, some of which are misdemeanors, including various controlled substance violations, weapons offenses, and sex offenses.⁶⁶

⁶³ <http://smartgunlaws.org/personalized-owner-authorized-firearms-policy-summary/>

⁶⁴ N.J. Stat. Ann. §§ 2C:391dd, 2C:58-1(A)(5)(e), 2C:58-2.2-2.5.

⁶⁵ 15 U.S.C. § 2052(a)(1)(ii)(E).

⁶⁶ NY Penal Code Section 265.00(17) states that: “Serious offense” means (a) any of the following offenses defined in the former penal law as in force and effect immediately prior to September first, nineteen hundred sixty-seven: illegally using, carrying or possessing a pistol or other dangerous weapon; making or possessing burglar’s instruments; buying or receiving stolen property; unlawful entry of a building; aiding escape from

H. Incentivizing States to Enact Certain Laws Pursuant to their Health and Safety Mandate

1. *Potential Legislation*

There are a number of other sensible measures that could contribute to reducing gun violence and mass shootings that have not yet been proposed or pursued at the federal level. Many of these proposals have been put in place at the state level and would not require comprehensive legislation from Congress. Indeed, many of these measures could be pursued under Congress' spending power by conditioning certain funding to the states based on the establishment of a minimum set of laws and standards for gun ownership. Incentivizing states to meet minimum standards for gun ownership could result in a series of "best practices" that reduce gun violence. Alternatively, these and other common sense measures could be pursued through stricter regulation of the firearms industry by the executive branch.

2. *Constitutionality*

The federal government already conditions certain funding for Justice Assistance Grants on states' compliance with background check information-sharing goals. Congress should explore other sources of funding that can be tied to states' regulation of gun ownership. Although in 2012 the Supreme Court struck down the Medicaid expansion provisions of the Affordable Care Act ("ACA") – which conditioned states' Medicaid funding on their willingness to adopt the Act's Medicaid expansion program – as unconstitutional under the Spending Clause,⁶⁷ that ruling likely would not preclude Congress from using its spending power to encourage states to enact certain gun policies. The ACA decision was the first time that Supreme Court ruled that such a funding mandate violated the Constitution, and the Court's reasoning turned largely on the size and impact of what Congress proposed. States denying the Medicaid expansion would have been forced to forego funding for their entire Medicaid programs, or around ten percent (10%) of the typical state budget, a massive sum that the Court

prison; that kind of disorderly conduct defined in subdivisions six and eight of section seven hundred twenty-two of such former penal law; violations of sections four hundred eighty-three, four hundred eighty-three-b, four hundred eighty-four-h and article one hundred six of such former penal law; that kind of criminal sexual act or rape which was designated as a misdemeanor; violation of section seventeen hundred forty-seven-d and seventeen hundred forty-seven-e of such former penal law; any violation of any provision of article thirty-three of the public health law relating to narcotic drugs which was defined as a misdemeanor by section seventeen hundred fifty-one-a of such former penal law, and any violation of any provision of article thirty-three-A of the public health law relating to depressant and stimulant drugs which was defined as a misdemeanor by section seventeen hundred forty-seven-b of such former penal law.

(b) any of the following offenses defined in the penal law illegally using, carrying or possessing a pistol or other dangerous weapon; possession of burglar's tools; criminal possession of stolen property in the third degree; escape in the third degree; jostling; fraudulent accosting; endangering the welfare of a child; the offenses defined in article two hundred thirty-five; issuing abortifacient articles; permitting prostitution; promoting prostitution in the third degree; stalking in the fourth degree; stalking in the third degree; the offenses defined in article one hundred thirty [sex offenses]; the offenses defined in article two hundred twenty [controlled substance offenses].

⁶⁷ *Nat'l Fed. of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2607 (2011).

viewed as less an “inducement” and more a compulsion.⁶⁸ Whereas the Supreme Court has long recognized that Congress can use its spending power as a “relatively mild encouragement” for the states to act a certain way, the Court in this instance saw the program as more akin to a coercive “gun to the head.”⁶⁹ Accordingly, any inducement from the federal government to address state gun policies must be reasonable and not be so dramatic as to, for instance, defund the state’s entire law enforcement mechanism.

Similarly, there is nothing in the Second Amendment that prevents the executive branch from regulating the firearms industry and, in fact, the ATF already does just that. So long as ATF regulations do not infringe upon an individual’s constitutional right to possess a handgun for purposes of self-defense as set forth in *Heller*, the executive branch has considerable latitude to regulate the firearms industry in a manner similar to other products and industries that have the capacity to endanger the public health and welfare (i.e., tobacco, drugs, automobiles).

3. *NYCLA Recommendation*

NYCLA supports Congress pursuing or supporting any or all of the following proposals:

a. Licensing of Gun Owners and Registration of Weapons

Currently, eleven states require an individual to obtain a license or permit authorizing the individual to purchase and/or possess a firearm⁷⁰ and seven states plus the District of Columbia require registration of some or all firearms.⁷¹ These laws are designed to ensure that only those who have demonstrated knowledge of gun laws and gun safety are permitted to purchase and possess firearms and to decrease the sale and transfers of firearms to individuals who cannot legally obtain them. While federal regulations currently prohibit the federal government from maintaining a national firearms registry, Congress could use its spending power to encourage states to enact laws requiring licensure of gun owners and registration of weapons.

b. Limiting Purchases of Firearms to One Gun Per Month

Currently, three states, the District of Columbia and New York City limit individuals to purchasing one handgun per month.⁷² Such laws are primarily intended to limit the likelihood of gun trafficking, as ATF studies have shown that multiple handguns purchased at the same time by the same individual are more likely to be used to commit a crime. For instance, Virginia had become recognized as the primary source of crime guns recovered in the Northeastern U.S. before it instituted a one-gun-per-month law in 1993. Within two years of the law’s passage, the percentage of guns recovered in criminal investigations in the Northeast that came from Virginia dropped dramatically.⁷³ Virginia repealed its one-gun-per-month law in 2012 over perceived Second Amendment concerns. However, the Third Circuit Court of Appeals recently affirmed the dismissal of a challenge to New Jersey’s one-gun-per-month law on various Constitutional

⁶⁸ *Id.* at 2601-07.

⁶⁹ *Id.* at 2604.

⁷⁰ <http://smartgunlaws.org/licensing-of-gun-owners-purchasers-policy-summary/>

⁷¹ <http://smartgunlaws.org/registration-of-firearms-policy-summary/>

⁷² <http://smartgunlaws.org/multiple-purchases-sales-of-firearms-policy-summary/>

⁷³ Editorial, “New Jersey’s Useful One-Gun a-Month-Law,” *New York Times* (Feb. 3, 2013).

grounds.

As many of the mass shootings we have reviewed involved both legal purchases of firearms and the use of multiple firearms, limiting the number of weapons that an individual can legally purchase at one time could have an effect on mass shootings. Congress should consider limiting the number of firearms that federally licensed dealers can sell to an individual in a given time period or consider using its spending power to encourage states to enact such laws.

c. Reporting Lost or Stolen Firearms

Currently, seven states plus the District of Columbia require gun owners to report the loss or theft of their firearms to law enforcement.⁷⁴ In addition, New Jersey also imposes civil liability upon a registered gun owner if the gun is used in the commission of a crime and the owner has failed to report that the gun was lost or stolen.⁷⁵ These laws encourage responsible gun ownership and safe storage of firearms, deter gun trafficking by enabling law enforcement to better track the flow of firearms, and help ensure that guns stay out of the hands of individuals who might be dangerous or barred from possessing a firearm. NYCLA supports Congress using its spending power to encourage states to enact laws requiring the reporting of lost or stolen firearms.

d. Mental Health Measures

The majority of the shooters had mental health issues. Yet, there are no federal proposals pending that would specifically prevent mentally ill buyers with violent proclivities who have not been committed or adjudicated mentally ill from purchasing guns. Any such proposal would have to survive thorny privacy, due process and void-for-vagueness issues that would necessarily ensue in trying to define an appropriate group. We have not, therefore, included in this whitepaper any potential legislation touching on this topic. We do, however, support Governor Cuomo and the New York State Legislature's recently enacted provision in the NY SAFE Act described on the Governor's website as follows:

Mental Health Alert: Under the legislation, mental health professionals will be required to report to local mental health officials when there is reason to believe a patient is likely to engage in conduct that will cause serious harm to themselves or others. This information will then be crosschecked against the new comprehensive, and regularly updated, gun registration database. If the patient possesses a gun, the license will be suspended and law enforcement will be authorized to remove the person's firearm.⁷⁶

NYCLA further supports the idea of Congress using its spending power to incentivize states to enact similar legislation.

e. Waiting-Period Requirements

⁷⁴ <http://smartgunlaws.org/reporting-lost-or-stolen-firearms-policy-summary/>

⁷⁵ N.J. Stat. Ann. § 2C:58-12(g).

⁷⁶ <http://www.governor.ny.gov/2013/gun-reforms>

Currently, eleven states and the District of Columbia impose a waiting period on the purchase of some or all firearms, with the length of the waiting period ranging from 24 hours to 14 days.⁷⁷ Waiting-period laws are designed to allow for the completion of a comprehensive background check and to allow for a “cooling off period” in order to deter impulsive acts of violence. For instance, Adam Lanza attempted to purchase a rifle from a Connecticut gun shop days before attacking Sandy Hook Elementary School in Newtown, Connecticut but decided to forego the purchase because he did not want to undergo the required 14-day waiting period for long gun purchases by individuals without the valid permits.⁷⁸ While Lanza was nevertheless able to obtain firearms from his mother, one can see how waiting-period laws might prevent others without easy access to firearms from carrying out their crimes or allow time for law enforcement officials to be alerted to their dangerous intentions. Had Lanza had to wait the same cooling off period for ammunition or if such high-capacity ammunition had not been available to him, Sandy Hook may also have been avoided.

While the federal Brady Handgun Violence Prevention Act enacted in 1993 included a five-day waiting period requirement for all handgun purchases from federally licensed dealers, that requirement expired in 1998 and was replaced by the background check requirement when the NICS was established. Accordingly, there is no current waiting-period requirement under federal law beyond the standard background check, which typically takes a matter of moments. If the background check is not completed within three days, the firearm purchase can proceed. Congress should consider reinstating a federal waiting-period requirement for firearms or ammunition or seek ways to incentivize states to enact such requirements.

f. Requiring Gun Owners to Obtain Insurance Against Damage Caused by the Gun in Order to Obtain a License/Permit

Several states that have gun permit requirements are now considering legislation to require gun owners to obtain insurance coverage for damages caused by the weapon. The idea is that insurance companies, capable of assessing risk, would make it too costly for someone at high risk of misuse to purchase insurance and, thus, own a gun legally.

NYCLA recognizes the similarity to the constitutionally accepted imposition of auto insurance requirements and supports such legislation.

⁷⁷ <http://smartgunlaws.org/waiting-periods-policy-summary/>

⁷⁸ Richard A. Serrano & Alana Semuels, “Suspect in massacre tried to buy rifle days before, sources say,” *Los Angeles Times* (Dec. 15, 2012).