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UNIVERSAL BACKGROUND CHECKING – NEW YORK’S SAFE
ACT

*James B. Jacobs**
*Zoe A. Fuhr***

When we passed the SAFE Act, just days after the tragedies in Newtown and Webster, New York proved to the nation that it is possible to enact sensible gun control that coexists with the Second Amendment. We showed that it can be done with bi-partisan support from both urban and rural communities. And we took a fundamental step forward to help end the stream of senseless killings by keeping guns out of the hands of criminals and the dangerously mentally ill. . . . New York has set the example—and it’s far past time for Washington to follow suit and pass a sensible national gun control policy. – Governor Andrew M. Cuomo.¹

Numerous studies conducted by academic researchers and by the federal government have shown that criminals do not use legal markets to obtain guns. . . . They do not buy guns in gun stores. They do not get guns at gun shows. They do not buy them from Internet sources. The study even found that criminals only rarely steal guns. – National Rifle Association, Institute for Legislative Action.²

The December 14, 2012 Sandy Hook Elementary School massacre in Newton, Connecticut ignited a new round of controversy over gun

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¹ Governor Andrew M. Cuomo, *Statement from Governor Andrew M. Cuomo on Decision by U.S. Court of Appeals Regarding NY SAFE Act*, N.Y. STATE (Oct. 19, 2015), <https://www.governor.ny.gov/news/statement-governor-andrew-m-cuomo-decision-us-court-appeals-regarding-ny-safe-act>.

² *Study: Criminals Don’t Get Guns from Legal Sources*, NATIONAL RIFLE ASSOCIATION INSTITUTE FOR LEGISLATIVE ACTION (Sept. 4, 2015), <https://www.nraila.org/articles/20150904/study-criminals-don-t-get-guns-from-legal-sources>.

control.³ At the federal level, a presidential inter-agency task force, headed by Vice President Joe Biden, recommended a number of familiar gun control strategies, including universal background checking for all firearms purchasers.⁴ At the state level, New York State's Governor Andrew Cuomo, promised to pass the "toughest gun [control] laws in the nation."⁵ To this end, on the evening of January 14, 2013, just one month after the Sandy Hook massacre, and well before federal legislation would be introduced into Congress, he submitted the Secure Ammunition & Firearms Enforcement Act (SAFE Act) into both houses of the state legislature. The bill was introduced under a message of necessity, thereby exempting it from the constitutionally mandated three-day period for considering a bill before voting on it.⁶ The New York State Senate, despite its Republican majority, passed the SAFE Act that night; the Democrat-controlled Assembly followed suit the next day.⁷ Governor Cuomo immediately signed the bill into law.⁸

The SAFE Act is a comprehensive gun control law that includes universal background checking provisions; prohibition of new assault weapons and new assault weapon owners; prohibition of large capacity magazines; registration for grandfathered assault weapon owners; mandatory reporting obligation for health care professionals who determine, in the exercise of their reasonable professional judgment, that a patient is likely to engage in conduct

³ New York State has experienced two mass shootings in the past two decades: i) the 1993 Long Island Railroad massacre with six people killed and nineteen injured and ii) the 2009 attack at an immigration center in Binghamton with thirteen fatalities and four wounded. See Los Angeles Times Staff, *Deadliest U.S. Mass Shootings 1984-2015*, L.A. TIMES (Dec. 2, 2015), <http://timelines.latimes.com/deadliest-shooting-rampages/>.

⁴ *Remarks by the President and the Vice President on Gun Violence*, THE WHITE HOUSE (Jan. 16, 2013), <https://www.whitehouse.gov/the-press-office/2013/01/16/remarks-president-and-vice-president-gun-violence>.

⁵ *Governor Cuomo Signs Groundbreaking Legislation That Will Give New York State the Toughest Protections Against Gun Violence in the Nation*, N.Y. STATE (Jan. 15, 2013), <https://www.governor.ny.gov/news/governor-cuomo-signs-groundbreaking-legislation-will-give-new-york-state-toughest-protections>.

⁶ See Jimmy Vielkind, *Gun Control Bill Advances*, TIMES UNION (Jan. 15, 2013, 6:45 AM), <http://www.timesunion.com/local/article/Gun-control-bill-advances-4192358.php>. Governor Cuomo insisted: "If there's an issue that fits the definition of 'necessity' in the State of New York today, I believe it's reducing gun violence." *Id.*

⁷ *Senate Bill S2230*, N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2013/s2230> (last visited April 7, 2016).

⁸ See Jen Chung, *N.Y. State Senate Passes "Most Comprehensive" Gun Control Bill in U.S.*, THE GOTHAMIST (Jan. 15, 2013, 9:27 AM), http://gothamist.com/2013/01/15/ny_state_senate_passes_most_compreh.php; Thomas Kaplan, *Sweeping Limits on Guns Become Law in New York*, N.Y. TIMES (Jan. 15, 2013), http://www.nytimes.com/2013/01/16/nyregion/tougher-gun-law-in-new-york.html?_r=0.

that would result in serious harm to self or others; and new substantive firearm-related crimes.⁹

This article focuses on the SAFE Act's requirement that all sellers, indeed all transferors, of firearms and ammunition initiate purchaser (transferee) background checks. These universal background checking provisions are important, not just for New York State, but for the whole country, because they provide an opportunity to examine gun control proponents' number one policy priority which, even after Sandy Hook, Congress did not pass.¹⁰ This article demonstrates that while universal background checking for all firearms purchasers makes overwhelming sense in principle, numerous implementation and enforcement obstacles, even in a gun-control-friendly state such as New York, significantly limit its potential efficacy in keeping guns out of the hands of dangerous persons.

Part I describes New York State's background checking laws prior to the SAFE Act's enactment. Part II explains the SAFE Act's universal background checking requirements. Part III examines problems in implementing universal firearms purchaser background checking. Part IV illuminates enforcement challenges. Part V assesses the SAFE Act's impact on firearms homicides, suicides and crimes. Part VI analyzes New York's pioneering effort to subject ammunition sales to universal background checking.

I. PRE-SAFE ACT BACKGROUND CHECKING IN NEW YORK

New York State has a strong gun control tradition.¹¹ The 1911 Sullivan Law, a landmark in 20th century gun control legislation, obliged New Yorkers to obtain a county-issued license to purchase or possess a handgun.¹² This licensing requirement applies only to handguns, except in New York City (NYC) where it also applies to rifles and shotguns.¹³ Possession of a handgun (and, in NYC, a long gun) without a license is a Class A misdemeanor, punishable by up

⁹ *Id.*

¹⁰ See Ted Barrett & Tom Cohen, *Senate Rejects Expanded Gun Background Checks*, CNN (Apr. 18, 2013, 11:02 AM), <http://www.cnn.com/2013/04/17/politics/senate-guns-vote/>.

¹¹ See Michael A. Walsh, *The Strange Birth of NY's Gun Laws*, N.Y. POST (Jan. 16, 2012, 5:00 AM), <http://nypost.com/2012/01/16/the-strange-birth-of-nys-gun-laws/>.

¹² *Id.* A separate license was required to *carry* a firearm in public.

¹³ See Peter Duffy, *100 Years Ago, the Shot that Spurred New York's Gun Control Law*, N.Y. TIMES (Jan. 23, 2011, 11:00 AM), <http://cityroom.blogs.nytimes.com/2011/01/23/100-years-ago-the-shot-that-spurred-new-yorks-gun-control-law/>.

to one year's imprisonment.¹⁴

In order to obtain a handgun license, the county licensing officer¹⁵ must find the applicant to be of "good moral character."¹⁶ Historically, in evaluating character for purposes of this restrictive licensing regime, a licensing officer checked the applicant's criminal record, history of mental illness and other information provided by government sources and personal references.¹⁷ Unlicensed individuals could, however, obtain firearms on the black market, the secondary sales market.¹⁸

New York firearms possessors are, of course, also subject to federal law. Since 1938, it has been a federal crime (subject to a maximum ten year prison sentence) for a person ever convicted of a felony to possess a firearm.¹⁹ Congress added other disqualifications over the years (people: who have been committed to a mental institution or adjudicated "mentally defective";²⁰ who are unlawful users of or addicted to controlled substances;²¹ "illegally or unlawfully in the United States;"²² who have renounced their U.S citizenship;²³ convicted of "misdemeanor crime of domestic violence;"²⁴ subject to a domestic violence restraining order;²⁵ dishonorably discharged from the armed forces;²⁶ or have fugitive from justice status²⁷). A prospective purchaser, seeking to acquire a firearm from a Federal Firearm Licensee (FFL), had to swear on a federal form, administered by the FFL that he or she was not

¹⁴ See N.Y. PENAL LAW §400.00(15) (Consol. 2016).

¹⁵ See *id.* § 265.00(10) ("Licensing officer' means in the City of New York, the police commissioner of that city; in the county of Nassau, the commissioner of police of that county; in the county of Suffolk, the sheriff of that county except in the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown, the commissioner of police of that county; for the purposes of section 400.01 of this chapter the superintendent of state police; and elsewhere in the state a judge or justice of a court of record having his office in the county of issuance").

¹⁶ *Id.* §400.00(1)(b).

¹⁷ See Matthew Bridge, *Exit, Pursued by a "Bear"?: New York City's Handgun Laws in the Wake of Heller and McDonald*, 146 COLUM. J.L. & SOC. PROBS. 145, 167–68 (2012).

¹⁸ See Chris Kirkham, *Private Gun Sale Loophole Creates Invisible Firearms Market, Prompts Calls for Reform*, HUFFINGTON POST (Dec. 21, 2012, 4:19 PM), http://www.huffingtonpost.com/2012/12/21/private-gun-sales-sandy-hook_n_2347420.html.

¹⁹ See 19 U.S.C. § 922(g)(1) (2016).

²⁰ *Id.* § 922(g)(4).

²¹ *Id.* § 922(g)(3).

²² *Id.* § 922(g)(5).

²³ *Id.* § 922(g)(7).

²⁴ *Id.* § 922(g)(9).

²⁵ *Id.* § 922(g)(8).

²⁶ *Id.* § 922(g)(6).

²⁷ *Id.* § 922(g)(2).

disqualified from possessing a firearm.²⁸ However, until 1993, there was no independent verification of the purchaser's sworn statement of firearms eligibility.²⁹

The 1993 Brady Law (Handgun Violence Prevention Act) strengthened the federal regulatory regime³⁰ by requiring FFLs to submit a prospective purchaser's name to the Chief Law Enforcement Officer (CLEO) in the FFL's jurisdiction.³¹ The CLEO had five business days to conduct an investigation and, if he found a disqualification, to notify the FFL not to complete the sale.³² In November 1998, the National Instant Background Checking System (NICS), run by the FBI, replaced this interim scheme.³³ The CLEO's role was eliminated.³⁴ FFLs were now required to transmit (by fax or phone) the prospective firearms purchaser's name and other identifying information to NICS.³⁵ NICS personnel check the purchaser against various databases of firearms prohibited persons.³⁶

The Brady Law applies only to firearms sales by FFLs. Private sellers do not need to initiate background checks. This limitation frequently is referred to as "the gun show loophole" because a gun

²⁸ See JACOB B. JACOBS, CAN GUN CONTROL WORK? 78 (2002).

²⁹ See *id.*

³⁰ The Brady Law was amended twice between 1994 and 1998, to add categories of persons ineligible to purchase firearms. *Id.* at 82. The amendments made firearms-ineligible 1) persons convicted of a "domestic violence misdemeanor" and 2) persons subject to a domestic violence restraining order. *Id.* at 83.

³¹ See 18 U.S.C. §922(s)(1)(A).

³² *Id.* See JACOBS, *supra* note 28, at 79.

³³ U.S. DEPT OF JUSTICE, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS iii (2014), <https://www.fbi.gov/about-us/cjis/nics/reports/2014-operations-report>.

³⁴ The 1998 transition to the National Instant Check System was fortunately timed. In *Printz v. United States*, 521 U.S. 898 (1997), the United States Supreme Court declared that the CLEO background checking requirement was an unconstitutional violation of the Tenth Amendment and the Constitution's "dual sovereignty" principle. *Printz*, 521 U.S. at 931–32, 933; see JACOBS, *supra* note 28, at 83–94.

³⁵ U.S. DEPT OF JUSTICE, *supra* note 33, at 24.

³⁶ NICS searches three databases: the (i) Interstate Identification Index (the FBI criminal record database, which contains information on arrests) (ii) National Crime Information Center (the central database of crime-related information maintained by the FBI's Criminal Justice Information Services Division) and (iii) the NICS Index. U.S. DEPT OF JUSTICE, NICS INDEX (2016), <https://www.fbi.gov/about-us/cjis/nics/general-information/nics-index-brochure> [hereinafter NICS INDEX]. "The NICS Index contains information provided by local, state, tribal, and federal agencies of persons prohibited from receiving firearms under federal or state law." See *id.* The NICS Improvement Amendments Act of 2007 (passed in January 2008) provides financial incentives for states to submit information relevant to whether a person is prohibited from purchasing or possessing a firearm. See NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 103(b), 121 Stat. 2559, 2567–68 (2008) (codified at 18 U.S.C. § 922).

show is a convenient locale for a private seller to find a buyer. In 2000, New York became the first state to extend background checking to purchasers from private (non-FFL) sellers at gun shows.³⁷ A New Yorker who wants to buy a firearm at a New York gun show from a private seller must take the firearm to an onsite FFL, who must initiate a NICS background check on the purchaser. Gun show operators must “conspicuously post” signs at the show stating that a background check must be completed prior to a firearm sale or transfer,³⁸ and must ensure that an FFL is available on-site to initiate a NICS background check.³⁹

The Shooter’s Committee on Political Education (SCOPE), a gun owners’ rights advocacy organization, immediately lodged a constitutional challenge to New York’s attempt to close “the gun show loophole.”⁴⁰ SCOPE argued that the law’s definition of “gun show” was so broad that it potentially encompassed a gun transfer at any gun club event, “such as a pig roast or political rally.”⁴¹ SCOPE submitted that under the definition, it was arguable that a firearm transfer at a club meeting or informal event would be unlawful unless brokered by an FFL.⁴² The federal district court agreed that the statute potentially infringed gun club members’ rights to free speech and assembly.⁴³ The challenge raised a serious interpretative question, common to all statutes that seek to eliminate the gun show loophole: how to define which sales are covered.

³⁷ See N.Y. GEN. BUS. LAW §§ 895–897 (McKinney 2016); Associated Press, *N.Y.’s Ground-Breaking Gun-Control Bill Signed*, L.A. TIMES (Aug. 10, 2000), <http://articles.latimes.com/2000/aug/10/news/mn-2008>. “Gun show” was defined in §895(1) as:

[A]n event sponsored, whether for profit or not, by an individual, national, state or local organization, association or other entity devoted to the collection, competitive use, sporting use, or any other legal use of firearms, rifles or shotguns, or an event at which (a) twenty percent or more of the total number of exhibitors are firearm exhibitors or (b) ten or more firearm exhibitors are participating or (c) a total of twenty-five or more pistols or revolvers are offered for sale or transfer or (d) a total of fifty or more firearms, rifles or shotguns are offered for sale or transfer. The term gun show shall include any building, structure of facility where firearms, rifles or shotguns are offered for sale or transfer and any grounds used in connection with the event.

N.Y. GEN. BUS. LAW § 895(1).

³⁸ *Id.* § 896(1). The FFL would provide the non-licensed seller with a U.S. Department of Justice, Bureau of Alcohol Tobacco and Firearm Form 4473 (Firearms Transaction Record), If the sale is approved and recorded on the Form, the FFL must retain a copy of the form and make it available for inspection by law enforcement for ten years.

³⁹ *See id.*

⁴⁰ SCOPE, Inc. v. Pataki, 386 F. Supp. 2d 184, 186, 188 (W.D.N.Y. 2005).

⁴¹ *Id.* at 188. *Id.* at 191.

⁴² *See id.*

⁴³ *Id.* at 197.

New York's law applies to gun sellers at a gun show who "offer or agree to sell or transfer a firearm," regardless of where the transfer ultimately takes place.⁴⁴ Literally, that means that a seller at a gun show, who gives his business cards to customers, must initiate a background check if, weeks later, a customer decides to purchase the firearm she saw at the gun show.⁴⁵ At that point, of course, there is no on-site FFL to initiate the background check

II. THE SAFE ACT'S UNIVERSAL BACKGROUND CHECKING

The SAFE Act requires that a NICS background check be carried out on transferees of "all sales, exchanges or disposals of firearms, rifles or shotguns,"⁴⁶ except those that occur between "immediate" family members (provided that the transferring family member does not know that the transferee is prohibited by law from possessing a firearm because of a prior conviction or some other firearm disqualification).⁴⁷ It also requires that registered ammunition transferors initiate a background check on ammunition transferees.⁴⁸

The SAFE Act obliges a prospective firearm transferor and transferee to process the sale via an FFL willing to initiate a NICS check on the prospective transferee.⁴⁹ The Act does not, however, mandate that FFLs play this processing role.⁵⁰ An FFL, who does elect to provide the service, may not charge the parties more than \$10 per transaction.⁵¹ The seller may leave the gun with the licensed dealer, but the purchaser must appear in person to show identification and fill out an ATF Form 4473.⁵² A background check

⁴⁴ N.Y. GEN. BUS. LAW § 897(2) (McKinney 2016).

⁴⁵ *See id.*

⁴⁶ N.Y. GEN. BUS. LAW § 898. The Act does not define firearm "exchange" or "disposal."

⁴⁷ *Id.* *See* N.Y. PENAL LAW § 265.17(3).

⁴⁸ *See id.* §400.03(3).

⁴⁹ *See id.* § 898(1). New York requires persons who engage "in the business of purchasing, selling, keeping for sale, loaning, leasing, or in any manner disposing of, any assault weapon, large capacity ammunition feeding device, pistol or revolver" to obtain a state license. *See id.* §§265.00(9), 400.00(2).

⁵⁰ *See id.* § 898. California law requires firearms licensees to perform background checks for private firearms transfers as a condition for holding a state license. *See* CAL. PENAL CODE §§26700, 28050(a), 28065 (Deering 2016); *Private Sales in California*, LAW CTR. TO PREVENT GUN VIOLENCE (2015), <http://smartgunlaws.org/private-sales-in-california/>. The licensed dealer may charge a maximum of \$10 for facilitating a private sale. *Id.* § 28055(a).

⁵¹ N.Y. GEN. BUS. LAW § 898(4); *NY Safe Act Frequently Asked Questions*, N.Y. STATE, http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/NYSAFEAct_FAQs.pdf (last visited May 10, 2016).

⁵² 27 C.F.R. § 478.102(a)(3) (2015). ATF Regulations governing recordkeeping and

is required even though the prospective purchaser may already have a handgun license.⁵³ If NICS approves the transfer, the FFL must retain the completed Form 4473 for twenty years,⁵⁴ and make it available for inspection by federal, state and local law enforcement officers.⁵⁵ If the prospective purchaser fails the background check, the sale cannot proceed.⁵⁶ The FFL must then initiate a background check on the gun's owner (the seller) to determine whether he or she is eligible to repossess the gun.⁵⁷

The SAFE Act also expanded the categories of persons prohibited from possessing a firearm because of mental illness.⁵⁸ While federal law disqualifies persons who have ever been civilly committed to a mental institution or adjudicated "mental defective,"⁵⁹ the SAFE Act provides for a five year suspension of the Second Amendment rights of individuals whom a health care professional reports as "likely to engage in conduct that would result in serious harm to self or others."⁶⁰ More than forty thousand New Yorkers rights have been reported pursuant to this procedure.⁶¹

III. IMPLEMENTATION CHALLENGES

The success of the SAFE Act's universal background checking scheme depends upon the willingness of FFLs to participate and on

background check procedures for private party firearm transfers suggest that a prospective transferor may leave the firearm to be transferred with the FFL. Recordkeeping and Background Check Procedures for Facilitation of Private Party Firearms Transfers, ATF PROC. 2013-1 (2013), <https://www.atf.gov/file/4961/download> [hereinafter ATF PROC. 2013-1]. The dealer must provide the purchaser with "a secure gun storage or safety device." 18 U.S.C. § 922(z)(1) (2016); ATF Proc. 2013-1.

⁵³ N.Y. GEN. BUS. LAW § 898(2).

⁵⁴ 27 C.F.R. § 478.129(b) (2015). Pursuant to ATF Ruling 2008-2, acquisition and disposition records may now be kept in computerized form. Records Required for Firearms Licensees, ATF RULING 2008-2, at 3 (2008), <https://www.atf.gov/file/55441/download>.

⁵⁵ 18 U.S.C. § 923(g)(1)(D). If NICS blocks the transaction, the FFL must retain the ATF Form 4473 for five years. 27 CFR § 478.129(b). These forms are not subject to public disclosure under NYS's Freedom of Information Law, but the dealer must make them available for police inspection. N.Y. GEN. BUS. LAW § 898(3)-(5). FFLs are required to maintain Acquisition and Disposition (A&D) records, including information about the acquisition and disposition of all firearms transactions that occur on their premises. 18 U.S.C. § 923(g)(1)(A).

⁵⁶ ATF Proc. 2013-1, *supra* note 52.

⁵⁷ *See id.*

⁵⁸ James B. Jacobs & Zoe Fuhr, *Preventing Dangerous Mentally Ill Individuals from Obtaining and Retaining Guns: New York's SAFE Act*, 14 GEO. J. L. PUB. POL'Y 77, at 97, forthcoming (2016).

⁵⁹ *Id.* at 8.

⁶⁰ N.Y. MENTAL HYG. LAW § 9.46 (Consol. 2016); Jacobs & Fuhr, *supra* note 58, at 79.

⁶¹ *See id.* at 22.

private sellers and purchasers to comply.

A. FFL Participation

The SAFE Act relies on FFLs voluntarily processing secondary sales.⁶² In order to assess the extent of FFL willingness to process secondary firearms sales, we interviewed (by phone) fifty randomly selected FFLs across New York State. Forty-two dealers (eighty-four percent) said they are willing to process at least some secondary sales. However, some respondents said that they only process secondary firearm sales for regular customers. Some FFLs objected to facilitating secondary sales because, without access to a stolen firearms database, they risk becoming embroiled in a police investigation.

Only eight (sixteen percent) respondent FFLs refuse to process firearms sales by private sellers. However, one of these non-participating FFLs is the giant retailer Walmart, which does not want private firearm sellers bringing possibly loaded firearms into its stores, thereby endangering customers and employees.⁶³ Most FFLs who are unwilling to process secondary sales expressed general opposition to the SAFE Act. Moreover, some believe that by helping to facilitate secondary gun sales they may hurt their own business interests in selling new guns.⁶⁴ They also complain that the \$10 fee cap⁶⁵ is insufficient compensation for the time and effort⁶⁶ required to process a secondary sale.⁶⁷ (By comparison, FFLs

⁶² See Jessica Alaimo, *Some Dealers Balking at Gun Transfers*, DEMOCRAT & CHRON. (Apr. 24, 2013).

⁶³ Alana Marie Burke, *No Guns Allowed in Wal-Mart? Can I Bring My Firearm While Shopping?*, Newsmax (Nov. 17, 2014, 4:44 PM), <http://www.newsmax.com/FastFeatures/no-guns-allowed-walmart/2014/11/17/id/607901/>.

⁶⁴ See Brief for Empire State Arms Collectors, Inc. as Amicus Curiae in Support of Plaintiffs-Appellants-Cross-Appellees at 27, *Nojay et al. v. Cuomo*, No. 14-0036-cv(L) (2d Cir. May 2, 2015). Similarly, the National Shooting Sports Foundation has argued that

[t]he universal background check is a pure cost to the retailer, most of which are small ‘mom-and-pop’ businesses. . . . Licensed retailers would be forced to use paid staff hours or to hire additional staff and pay for additional infrastructure to accommodate such transactions, including, but not limited to additional surveillance equipment, secure firearm storage, parking, IT infrastructure, and acquisition and distribution (A&D) records.

NAT’L SHOOTING SPORTS FOUNDATION, UNIVERSAL BACKGROUND CHECKS – KEY FACTS TO CONSIDER (2013), <http://nssf.org/factsheets/PDF/UBC.pdf>.

⁶⁵ Alaimo, *supra* note 62.

⁶⁶ Our survey respondents claim that it takes twenty to thirty minutes per firearm to complete the secondary sale.

⁶⁷ Empire State Arms Collectors’ amicus brief on behalf of the plaintiffs in *Nojay et al. v. Cuomo*, said:

typically charge \$30 to \$40 for facilitating an interstate firearms transfer.)⁶⁸ Empire State Arms Collectors, an organization which operates gun shows, and whose membership includes licensed dealers, explained in a legal brief challenging the SAFE Act that:

Generally speaking, in a private firearm sale a proposed seller places the firearm into the FFL's inventory, requiring the FFL to process the firearm into the A&D book, assume liability for the firearm, and be potentially unable to clear the firearm back out of inventory. If the proposed buyer fails a background check, the FFL is then required to run a background check on the proposed seller. (Once firearm is taken into the FFL's inventory, it cannot be released without an approved background check of the person to whom the firearm will be released, even if it is the original seller.) If the proposed seller likewise fails the background check, the FFL is not permitted to release the firearm from its inventory.⁶⁹

No doubt, the SAFE Act's drafters wanted to keep the FFL's processing charge low in order to encourage gun sellers' and purchasers' compliance, but the fee cap also discourages some FFLs from processing secondary sales.⁷⁰ A few dealers admitted to (unlawfully) circumventing the fee cap by charging an additional \$20 - \$50 "paper work" fee; others exceed the \$10 cap by buying the firearm from the seller and then reselling it to the purchaser for \$50 or \$60 more than they just paid.

B. Private Seller Compliance

There are several reasons why private sellers may ignore the

The State wants FFLs [to] facilitate private firearms sales for \$10. Gen. Bus. L. §898(4). To say 'facilitate' is a misnomer. Taking just the two core elements of the NICS federal background check and the A&D book into consideration, the FFL has significant federal compliance to perform in order to conduct the background check in the context of the private firearm sale.

Brief for Empire State Arms Collectors, *supra* note 64, at 27.

⁶⁸ See Alaimo, *supra* note 62. An FFL in East Rochester, New York described the required process as follows:

The store has to take the gun in, book it in, give you a receipt for selling it, give them a receipt for taking it, do a background check, book it out of our logbooks, save the background check forever in our records, and give them a lock with it, all for \$10.

Robert W. Hunnicutt, *New York: Dealers Resist Private Background Checks*, FIREARM NEWS (Apr. 24, 2013), <http://www.firearmsnews.com/politics/new-york-dealers-resist-private-background-checks/>.

⁶⁹ Brief for Empire State Arms Collectors, *supra* note 64, at 28 (internal citations omitted).

⁷⁰ See *id.* at 29.

SAFE Act's universal background checking requirement (and, by so doing commit a Class A misdemeanor).⁷¹ First, they may wish to avoid the inconvenience of locating an FFL, especially in rural counties where there is no nearby dealer.⁷² Second, many gun owners are opposed to the SAFE Act for reasons of principle and ideology.⁷³ (To say the least, the SAFE Act, is not popular with gun owners; indeed, it has provoked much protest.)⁷⁴

The prevalence of private sellers who are willing to ignore the SAFE Act's universal background checking requirement is unknown. However, a 2001 undercover investigation conducted by then NYC Mayor Michael Bloomberg's office found that sixty-two percent of persons who advertised firearms online agreed to make the sale even after the feigned purchaser explained that he or she "probably couldn't pass a background check."⁷⁵

Sellers who already routinely and knowingly sell firearms to criminals have no reason to alter their conduct;⁷⁶ they are the firearms equivalent of drug dealers. Indeed, their business may increase if ineligible firearms purchasers, on account of the SAFE Act, find it more difficult to buy guns in the secondary firearms market.⁷⁷

⁷¹ .N.Y. GEN. BUS. LAW § 898(6) (Consol. 2016).

⁷² Indeed, in some counties FFLs reported that government officials urged them to "volunteer" to process secondary sales because not enough FFLs were participating. [Author's Interview]

⁷³ See James B. Jacobs, *Why Ban "Assault Weapons"?*, 37 CARDOZO L. REV. 681, 704–05 (2015).

⁷⁴ Fifty-two of New York State's sixty-two counties passed resolutions opposing the SAFE Act's assault weapons ban. *County Resolutions*, NY SAFE RESOLUTIONS, <http://www.nysaferesolutions.com/resolutions/#counties> (last visited Apr. 10, 2016). The New York Sheriffs' Association criticized the ban. See Brief for New York State Sheriffs' Ass'n as Amicus Curiae Supporting Plaintiffs-Appellants-Cross-Appellees at 17–18, *New York State Rifle & Pistol Ass'n, Inc., et al. v. Cuomo, et al.*, No. 14-36-cv(L) (2d. Cir. Oct. 19, 2015); see also Jacobs, *supra* note 74, at 704 (noting other parties that opposed the law); James B. Jacobs & Zoe Fuhr, *The SAFE Act's Assault Weapons Ban*, 53(1) CRIM. LAW BULL. (forthcoming 2017) (noting other parties that opposed the law).

⁷⁵ Olivia Katrandjian, *New York Probe Finds 62 Percent of Private Gun Sellers Sell to Prohibited Individuals*, ABC NEWS (Dec. 14, 2011), <http://abcnews.go.com/Business/investigation-finds-62-private-gun-sellers-perform-background/story?id=15154436>.

⁷⁶ See *id.*

⁷⁷ Senator Charles Schumer (D. NY) issued a report showing that in 1998, 1% of the nation's FFLs were responsible for selling nearly half of the crime guns traced by ATF. See Ron Scherer, *A Few Dealers Sell A Lot of the Crime Guns*, CHRISTIAN SCIENCE MONITOR (June 9, 1999), <http://www.csmonitor.com/1999/0609/p2s1.html>. Criminals most often obtained their guns through straw purchasers who made repeat purchases from a small number of FFLs. See Philip J. Cook et al., *Some Sources of Crime Guns in Chicago: Dirty Dealers, Straw Purchasers, and Traffickers*, 104 J. Crim. L. & Criminology 717, 724 (2014).

C. Purchaser Compliance

In New York State, all handgun purchasers must obtain a handgun permit (license).⁷⁸ Rifle and shotgun purchasers, except in New York City, do not need a license.⁷⁹ Unlicensed possession of a handgun (and unlicensed possession of a long gun in New York City) is a criminal offense.⁸⁰ It is likely that a significant percentage of gun owners who are not licensed to possess a firearm would not meet the “good moral character” licensing requirement.⁸¹ That means that they probably also would not pass a NICS background check.⁸² Consequently, an unlicensed person who wants to acquire a firearm must find a way to avoid the SAFE Act’s universal background checking requirement.⁸³ One solution is to make contact with a black market seller.⁸⁴ Another solution is to recruit a “straw purchaser,” someone with a clean record who is willing, either as a favor or for compensation, to purchase a firearm and turn it over to the prohibited person.⁸⁵ Straw purchasing is itself unlawful.⁸⁶ It is also a crime to transfer a firearm to a person whom the transferor knows is a firearms-prohibited person.⁸⁷ A third solution is to acquire a gun⁸⁸ from a criminal associate or to steal one;⁸⁹ some “theft victims” may even collude with the firearms-prohibited person, i.e. turning a blind eye or accepting

⁷⁸ N.Y. PENAL LAW § 400.00(2) (Consol. 2016).

⁷⁹ See *id.* § 265.20; N.Y.C. Admin. Code § 10-303 (2015).

⁸⁰ See N.Y. PENAL LAW § 265.01-b; N.Y.C. Admin. Code § 10-310.

⁸¹ See N.Y. PENAL LAW § 400.00(1).

⁸² See *id.* § 400.00(1), (4); N.Y. GEN. BUS. LAW § 898(2) (Consol. 2016).

⁸³ See *id.* § 898.

⁸⁴ See Dan Noyes, *Frontline: Hot Guns: How Criminals Get Guns*, PBS.ORG, <http://www.pbs.org/wgbh/pages/frontline/shows/guns/procon/guns.html> (last visited Apr. 10, 2016).

⁸⁵ See U.S. DEP’T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, DS REGULATIONS REFERENCE GUIDE 165 (2005), <https://www.atf.gov/file/58686/download> [hereinafter FIREARMS REGULATIONS].

⁸⁶ See 18 U.S.C. § 922(a)(6) (2016); FIREARMS REGULATIONS, *id.*, at 165.

⁸⁷ See 18 U.S.C. § 922(d).

⁸⁸ In *Chow v. State*, the Maryland Court of Appeals held that because loaning a firearm to a friend does not constitute a permanent exchange of title or possession, Maryland law does not require the lender to initiate a background check. *Chow v. State*, 903 A.2d 388, 403–04, 405–07 (Md. 2006).

⁸⁹ It has been estimated that approximately 500,000 guns are stolen each year from private citizens. See PHILIP J. COOK & JENS LUDWIG, GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE SURVEY OF GUN OWNERSHIP AND USE 30 (1996). A 2012 Bureau of Justice Statistics report stated that from 2005 to 2010, 1.4 million firearms were stolen during household burglaries and other theft crimes. LYNN LANGTON, U.S. DEP’T OF JUSTICE, NCJ 2394436, FIREARMS STOLEN DURING HOUSEHOLD BURGLARIES AND OTHER PROPERTY CRIMES, 2005-2010, at 1 (2012), <http://www.bjs.gov/content/pub/pdf/fshbopc0510.pdf>.

compensation for the “theft.” A fourth solution is to obtain a gun from a family member as a gift, loan or sale.⁹⁰ Under the SAFE Act, an individual may directly transfer a firearm to a family member without involving an FFL.⁹¹ This exemption does not apply when the transferor “know[s] that [the transferee] is prohibited by law from possessing a firearm . . . because of a prior conviction or because of some other disability which would render him or her ineligible to lawfully possess a firearm . . .”⁹² However, the police are unlikely to find out about, much less be able to prove, that a firearms-prohibited individual obtained his gun voluntarily from a family member who knew of his ineligibility.⁹³

IV. CHALLENGES OF ENFORCEMENT

To a significant extent, compliance with the SAFE Act’s universal background checking requirement depends upon prospective firearms sellers perceiving a significant risk of apprehension, prosecution and punishment for violating the law.⁹⁴ However, the actual risk is negligible.⁹⁵ Since January 2013 (when the SAFE Act became effective) until the end of June 2015, there was not a single arrest statewide for knowing failure to comply with the SAFE Act’s universal background checking requirement.⁹⁶

⁹⁰ See N.Y. GEN. BUS. LAW § 898(1)–(2) (Consol. 2016).

⁹¹ *Id.*; OFFICE OF DIVISION COUNSEL, N.Y. STATE POLICE, GUIDE TO THE NEW YORK SAFE ACT FOR MEMBERS OF THE DIVISION OF STATE POLICE 9 (2014), <http://scopeny.org/ARCHIVES/Safe%20Act%20Field%20Guide%20revMarch2014.pdf>.

⁹² N.Y. PENAL LAW § 265.17(1) (Consol. 2016).

⁹³ The manner in which Sandy Hook shooter, Adam Lanza, obtained his firearm would have fallen within this exception as he “borrowed” firearms from his mother before fatally shooting her. Michael Isikoff, et al., *Investigators: Adam Lanza Surrounded by Weapons at Home; Attack Took Less Than 5 Minutes*, NBC NEWS, (Mar. 28, 2013, 6:23 AM), http://investigations.nbcnews.com/_news/2013/03/28/17501282-investigators-adam-lanza-surrounded-by-weapons-at-home-attack-took-less-than-5-minutes.

⁹⁴ See Ken Levy, *Dangerous Psychopaths: Criminally Responsible but Not Morally Responsible, Subject to Criminal Punishment and to Preventive Detention*, 48 SAN DIEGO L. REV. 1299, 1364, 1365 (2011).

⁹⁵ See Chris Eger, *Low SAFE Act Numbers Hint at Non-Compliance in NY*, GUNS.COM (June 23, 2015), <http://www.guns.com/2015/06/23/low-safe-act-numbers-hint-at-non-compliance-in-new-york/>; Teri Weaver, *Nearly All NY Safe Act Arrests Are For Offenses That Were Crimes Even Before Stricter Gun Law Adopted*, SYRACUSE.COM, http://www.syracuse.com/news/index.ssf/2014/06/nearly_all_ny_safe_act_arrests_are_for_offenses_there_were_crimes_even_before_stricter.html (last updated June 5, 2013, 8:32 AM).

⁹⁶ Under-enforcement of New York background checking laws parallels federal under-enforcement of the Brady Act. A study conducted for the U.S. Department of Justice found that in 2010 only sixty-two cases nationwide were referred for prosecution (twenty-two of those were for falsified information when buying firearms, and 11 for possession of a firearm by a convicted felon. RONALD J. FRANZSEN, U.S. DEP’T OF JUSTICE, NO. 239272,

The most likely way for the police to identify a SAFE Act violator is to persuade a person arrested for an armed offense to name the person from whom he acquired the gun.⁹⁷ (Prosecutors may be willing to make concessions to catch a major seller, but probably not to catch a casual seller). Unfortunately for law enforcement, most often the gun crime arrestee does not know the name, especially the real name, of the person from whom he purchased the firearm. Even if he did know and still remembers the seller's real name and whereabouts, the person he identifies will almost certainly deny having made the unlawful sale. What proof is there? The current owner (the criminal defendant in this scenario) is highly unlikely to have a signed receipt.

Enforcement of universal background checking would be greatly facilitated if police had access to a comprehensive firearms registry which would enable them to identify the last owner of a firearm recovered from an armed criminal or at a crime scene. Without a registry, it is very difficult, except by means of a sting operation, to prove that a particular individual sold someone a specific firearm.⁹⁸ Unfortunately, there is no national firearms registry.⁹⁹ Only the District of Columbia and a few states, not including New York, have attempted to create one.¹⁰⁰ Therefore, a private gun seller who ignores the SAFE Act's universal background checking requirement faces practically no risk of apprehension. Some private sellers will comply because they are habitually law-abiding or because they overestimate the risk of apprehension for unlawful sale. But many casual sellers and, by definition, black market sellers will not comply.

Given a firearms-prohibited person's many options for acquiring a gun,¹⁰¹ even under a licensing and universal background checking

ENFORCEMENT OF THE BRADY ACT, 2010: FEDERAL AND STATE INVESTIGATIONS AND PROSECUTIONS OF FIREARM APPLICANTS DENIED BY A NICS CHECK IN 2010, at 7 (2012). Further in Washington State, in the year following enactment of universal background checking, there were no arrests or prosecutions for violating the law. Austin Jenkins, *One Year Later, No Reports of Prosecutions Under Wash. Background Check Law*, NW NEWS NETWORK (Dec. 10, 2015), <http://nwnewsnetwork.org/post/one-year-later-no-reports-prosecutions-under-wash-background-check-law>.

⁹⁷ See JACOBS, *supra* note 28, at 147.

⁹⁸ See JACOBS, *supra* note 28, at 147.

⁹⁹ Laura Houser Oblinger, Note, *The Wild, Wild West of Higher Education: Keeping the Campus Carry Decision in the University's Holster*, 53 WASHBURN L.J. 87, 94 (2013).

¹⁰⁰ Hawaii and the District of Columbia require the registration of all firearms. See *Registration of Firearms Policy Summary*, LAW CTR. TO PREVENT GUN VIOLENCE (Oct. 1, 2013), <http://smartgunlaws.org/registration-of-firearms-policy-summary/>.

¹⁰¹ See, e.g., Don Terry, *How Criminals Get Guns: In Short, All Too Easily*, N.Y. TIMES

regime,¹⁰² it seems implausible that a strongly motivated individual would be unable to acquire one. Gun owners rights advocates argue that criminals will always be able to get guns, especially professional and highly active criminals who need a gun to compel victim compliance and to protect themselves from criminal rivals.¹⁰³ However, a firearms-ineligible individual who is only weakly motivated might give up the quest for a gun if several private sellers tell him that he must pass a background check.

V. CRIME AND SUICIDE REDUCING POTENTIAL OF UNIVERSAL BACKGROUND CHECKING

Evaluating the impact of the SAFE Act's universal background checking for firearms purchasers presents a significant challenge. Some analysts have compared firearms homicides and suicides in the years before a state enacted universal background checking with homicides and suicides in years following enactment.¹⁰⁴ This methodology is by no means conclusive. There are many other variables likely to contribute to or mask changes in the number and rate of firearm homicides and suicides.¹⁰⁵ Moreover, since the comprehensive SAFE Act has at least ten provisions aimed at reducing gun violence, attributing harm reduction to any one or more of them adds another level of complexity. In any event, using this type of before and after comparison does not make a strong case for the efficacy of the SAFE Act.¹⁰⁶

Table I shows that firearm and non-firearm homicides both declined in 2013 and 2014 in line with the state's two-decade decline in homicides.¹⁰⁷ The percentage of homicides that were firearm-

(Mar. 11, 1992), <http://www.nytimes.com/1992/03/11/us/how-criminals-get-guns-in-short-all-too-easily.html?pagewanted=all>.

¹⁰² *See id.*

¹⁰³ *See, e.g., Private Sales Restrictions and Gun Registration*, NAT'L RIFLE ASS'N – INST. LEGIS. ACTION (Jan. 17, 2013), <https://www.nrila.org/articles/20130117/private-sales-restrictions-and-gun-registration>.

¹⁰⁴ This is not a sound methodology because other variables, changing during that same time frame, might be causally responsible for the change in number of armed crimes and firearm suicides. Ideally, we would like to control for all variables except changes in the state's gun law, a tremendous challenge that we must leave to others.

¹⁰⁵ *See, e.g., Jason Sterzer, The Good, the Bad and the Ugly: A 50-State Survey Exploring Federal and State Firearm Regulations Related to Mental Health*, 33 J. LEGAL MED. 171, 190 n.148 (2012).

¹⁰⁶ *See infra* Tables 1–3.

¹⁰⁷ N.Y. DIV. OF CRIMINAL JUSTICE SERVS., NEW YORK STATE CRIME REPORT: CRIME IN NEW YORK STATE 2014 FINAL DATA 13 app.6 (2015).

related has fallen slightly since 2013, but in line with the general downward trend since 2009.¹⁰⁸

Table 1: Homicides in New York State, 2009–2014¹⁰⁹

Year	Total State Homicides	Homicides by Firearm	% of Homicides Committed by Firearm
2009	784	483	61.6%
2010	866	522	60.3%
2011	770	448	58.2%
2012	688	412	59.9%
2013	644	366	56.8%
2014	616	348	56.5%

Table 2 shows that both total suicides and firearm-related suicides decreased slightly after passage of the SAFE Act.¹¹⁰ There is no logical reason why the SAFE Act would have had a depressing effect on non-firearm suicides. Moreover, both firearm and non-firearm suicides increased in 2014, contradicting the hypothesis that the SAFE Act reduced suicides by keeping guns out of the hands of suicide-disposed individuals.¹¹¹

<http://www.criminaljustice.ny.gov/crimnet/ojsa/indexcrimes/nys-crime-report-2014.pdf>.

¹⁰⁸ See *infra* Table 1.

¹⁰⁹ N.Y. DIV. OF CRIMINAL JUSTICE SERVS., *supra* note 110, at 13 app.6.

¹¹⁰ See *infra* Table 2.

¹¹¹ See *infra* Table 2.

Table 2: Suicides in New York State, 2009–2014¹¹²

Year	Total Suicides	State Suicides by Firearm	% of Suicides Committed with Firearm
2009	1,417	422	29.78%
2010	1,547	459	29.67%
2011	1,658	505	30.46%
2012	1,708	516	30.21%
2013	1,687	465	27.56%
2014	1,700	474	27.88%

Table 3 shows that the proportion of firearm-related violent crimes has not decreased.¹¹³ In fact, the proportion of robberies and firearm-related aggravated assaults has *increased* since passage of the SAFE Act, suggesting that universal background checking has not prevented criminals from obtaining firearms.¹¹⁴ While firearm-related rapes decreased from 2013 to 2014, they represent a tiny proportion of total rapes; there is no clear trend.

¹¹² *Fatal Injury Reports, National and Regional, 1999–2014*, CTR. FOR DISEASE CONTROL & PREVENTION, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_us.html.

¹¹³ See *infra* Table 3.

¹¹⁴ See *infra* Table 3.

Table 3: Rapes, Robberies, and Aggravated Assaults in New York State, 2009–2014¹¹⁵

A. Rapes in New York State, 2009-2014

Year	Total Rapes	Rapes Committed with Firearm	% of Rapes Committed with Firearm
2009	1,733	23	1.3%
2010	1,730	14	0.8%
2011	1,680	20	1.2%
2012	1,668	29	1.7%
2013	1,502	32	2.1%
2014	1,467	27	1.8%

B. Robberies in New York State, 2009-2014

Year	Total Robberies	Robberies Committed with Firearm	% of Robberies Committed with Firearm
2009	9,466	2,807	29.7%
2010	8,797	2,550	29.0%
2011	8,577	2,520	29.4%
2012	8,364	2,454	29.4%
2013	8,004	2,438	30.5%
2014	7,408	2,282	30.8%

¹¹⁵ *New York State Gun Involved Violence Elimination (GIVE) Initiative Crime, Arrest, and Firearm Activity Report*, N.Y.S. DIV. CRIM. JUST. SERV. 3001, 3002 (Apr. 7, 2016), <http://www.criminaljustice.ny.gov/crimnet/ojsa/greenbook.pdf>.

C. Aggravated Assaults in New York State, 2009-2014

Year	Total Aggr. Assault	Assaults Committed with Firearm	% of Assaults Committed with Firearm
2009	16,961	2,282	13.5%
2010	16,490	2,331	14.1%
2011	15,741	2,217	14.1%
2012	16,020	2,266	14.1%
2013	14,273	2,131	14.9%
2014	13,742	2,139	15.6%

VI. THE SAFE ACT'S AMMUNITION PURCHASER BACKGROUND CHECKS

In the wake of the Sandy Hook massacre, New York became the first state to require all ammunition purchasers to undergo a background check at the time of sale or transfer. On the day the SAFE Act became law, Governor Andrew Cuomo's office issued a press release which, among other things, explained that the SAFE Act aimed to prevent potential mass killers, like Aurora, Colorado movie theater shooter James Holmes, from stockpiling thousands of rounds of ammunition through online purchases. The Governor argued that "just controlling guns isn't enough" and commended¹¹⁶ universal ammunition purchaser background checking as a means to enable police to monitor high-volume ammunition transactions:

[E]ach sale will require both a state background check and transmission of a record of the sale to State Police, so as to enable alerts of high volume purchases. . . . Ammunition ordered over the internet must be delivered in a face-to-face transaction with a firearms dealer and the purchaser will be subject to the state background check. The Aurora [Colorado movie theater] shooter reportedly amassed 6000 rounds

¹¹⁶ Thomas Kaplan, *Plan to Require Background Checks for Ammunition Sales is Suspended in New York*, N.Y. TIMES (July 10, 2015), <http://www.nytimes.com/2015/07/11/nyregion/plan-to-require-background-checks-for-ammunition-sales-is-suspended-in-new-york.html>.

through direct online purchases.¹¹⁷

The Governor's rationale for ammunition purchaser background checking was prevention of mass killings.¹¹⁸ Presumably, he believed that monitoring ammunition purchasers might identify dangerous individuals who are stockpiling ammunition in contemplation of perpetrating crimes or massacres.¹¹⁹ Regardless of how a "mass shooting" is defined, such incidents are rare in any community, and even in any state.¹²⁰ Target shooters routinely purchase large quantities of ammunition.¹²¹ Thus, a large purchase of ammunition is hardly an indicator of intent to perpetrate a rampage killing.¹²²

A. *The Ammunition Background Checking Regime*

Under the SAFE Act regime, a prospective ammunition purchaser must appear in person before an FFL or a "registered seller of ammunition", so that the seller can verify the purchaser's identity and notify the State Police.¹²³ This requirement triggered protests by gun clubs and firing ranges accustomed to purchasing bulk shipments of ammunition from manufacturers and wholesalers.¹²⁴

¹¹⁷ N.Y. STATE, *supra* note 5.

¹¹⁸ See Governor Cuomo Signs NY Safe Act in Rochester, N.Y. STATE (Jan. 16, 2013), <https://www.governor.ny.gov/news/governor-cuomo-signs-ny-safe-act-rochester>.

¹¹⁹ N.Y. STATE, *supra* note 5.

¹²⁰ Jeff Guo, *Mass Shootings Are Distracting from the Real Danger of Guns in America*, WASHINGTON POST (Dec. 7, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/12/07/mass-shootings-are-distracting-from-the-real-danger-of-guns-in-america/>. See Bonnie Berkowitz et al., *The Math of Mass Shootings*, WASHINGTON POST, <https://www.washingtonpost.com/graphics/national/mass-shootings-in-america/> (last updated Feb. 26, 2016).

¹²¹ See NAT'L SHOOTING SPORTS FOUNDATION, FEDERAL RESTRICTIONS ON THE PURCHASE AND SALE OF AMMUNITION (2013), <http://www.nssf.org/factsheets/PDF/AmmunitionSaleRestrictions.pdf>.

¹²² See *Good Question: Why Aren't Large Ammo Purchases Tracked?*, CBS MINNESOTA (July 23, 2012, 10:59 PM), <http://minnesota.cbslocal.com/2012/07/23/good-question-why-arent-large-ammo-purchases-tracked/>.

¹²³ See N.Y. PENAL LAW § 400.03(7) (Consol. 2016). The SAFE Act regulates only commercial ammunition and transactions involving a "seller of ammunition" (defined as "any person, firm, partnership, corporation or company who engages in the business of purchasing, selling or keeping ammunition"); someone who transfers ammunition as a gift or loan is not required to initiate a background check. See *id.* §§ 265.00(24), 400.03(2)–(8). Persons and entities that function as an intermediary between an out-of-state ammunition seller and a NYS purchaser must register under this category. (Most ammunition sellers are FFLs, but some "bait and tackle shops," that sell ammunition but not guns, must register. The State Police run a background check on all registration applicants.)

¹²⁴ See NAT'L SHOOTING SPORTS FOUNDATION, *supra* note 125; Jim Poole, *Gun Owners Take Aim at SAFE Act*, TIMES-JOURNAL (Jan. 14, 2014),

They complained about the cost and inconvenience of having to visit a dealer personally for every ammunition purchase.¹²⁵ In response, the State Police Superintendent issued an “Open Letter” exempting businesses and organizations that distribute ammunition on their premises from the face-to-face ammunition purchase requirement.¹²⁶ However, since the Superintendent lacks authority to amend legislation, his pronouncement amounted to a promise not to enforce. Exempted businesses and organizations, once registered, are allowed to receive direct shipments of ammunition from manufacturers and wholesalers.¹²⁷ Clubs which give or sell ammunition at cost to their members may register as ammunition “keepers,” rather than “sellers.” There is no required background check for persons who acquire ammunition from a “keeper of ammunition,” whether or not the ammunition acquirer intends to use the ammunition at the keeper’s premises. By contrast, if a gun club or shooting range intends to sell ammunition at a profit, it must register as a “seller of ammunition”, and initiate a background check on all purchasers, even repeat customers.

The licensed ammunition seller must send to the State Police the prospective purchaser’s name and identification as well as information about the ammunition, including “amount, caliber, manufacturer’s name and cartridges’ serial numbers, if any . . .”¹²⁸ (Ammunition is not manufactured with serial numbers.)¹²⁹

The State Police would then check the prospective ammunition purchaser against a state database of persons disqualified from purchasing ammunition.¹³⁰ Unlike federal law,¹³¹ and in what

<http://www.timesjournalonline.com/article.asp?id=88219>; *The Shot Heard Around NY*, WENY NEWS (Jan. 8, 2014), <http://www.weny.com/news/all/the-shot-heard-around-ny-01-08-2014> (exemplifying the continued protest by gun clubs throughout the state).

¹²⁵ See NAT’L SHOOTING SPORTS FOUNDATION, *supra* note 125.

¹²⁶ Open Letter from Joseph A. D’Amico, New York State Police Superintendent (Dec. 27, 2013) (available at <http://programs.governor.ny.gov/sites/default/files/documents/nysafeact/OpenLetterfromNewYorkStatePoliceSuperintendent.pdf>). The Superintendent’s letter explained that this exception should be of “particular interest to shooting ranges, hunting clubs, and youth safety and education programs, as it will allow those groups to continue to receive discounted ammunition directly from the manufacturer.” *Id.*

¹²⁷ See OFFICE OF DIV. COUNSEL, REVISED GUIDE TO THE NEW YORK SAFE ACT FOR MEMBERS OF THE DIVISION OF THE STATE POLICE 11 (Mar. 2014), <http://scopeny.org/ARCHIVES/Safe%20Act%20Field%20Guide%20revMarch2014.pdf>.

¹²⁸ N.Y. PENAL LAW § 400.03(3)(a).

¹²⁹ See, e.g., 27 C.F.R. § 478.92(b) (2016) (requiring identifying color markings for armor piercing ammunition, but not serial numbers).

¹³⁰ See, e.g., Jacobs & Fuhr, *supra* note 58, at 5. DCJS maintains a database of persons deemed too dangerous to possess a firearm on account of mental illness under § 9.46 of the

appears to be a serious oversight, New York State does not prohibit any categories of persons, other than those under sixteen years of age, from possessing ammunition; nor is it a state crime to possess ammunition in violation of federal law.¹³²

If the State Police does not notify the ammunition seller that the prospective purchaser is prohibited from possessing ammunition under federal law, it provides the seller with an identification number for the ammunition transfer.¹³³ The FFL or registered ammunition seller must inform the State Police that the ammunition transaction has been completed and record the sales details in the seller's record book,¹³⁴ which must be available to the police (but not to the general public).¹³⁵

In addition to carrying out a background check on the ammunition purchaser, the SAFE Act contemplates that the State Police will monitor high volume purchasers. Assuming that every individual's in-state ammunition purchases could be monitored, what size ammunition purchase would warrant what kind of investigation? The SAFE Act does not address these questions and the State Police did not decide on a threshold number of rounds. (Even if it does, it obviously will not publicly disclose that number). Regardless of the ammunition quantity that triggers investigation, monitoring purchasers does not make sense unless the State Police has the capacity to aggregate multiple purchases by the same purchaser from multiple sellers. Moreover, the SAFE Act provision that requires "ammunition records to be purged within a year of

Mental Hygiene Law. *Id.*

¹³¹ See 18 U.S.C. § 922 (b)(1), (d)(1)–(9) (2016). Federal law does not require private ammunition sellers (non-FFLs) to initiate a background check of ammunition purchasers. Brendan J. Healey, *Plugging the Buller Holes in U.S. Gun Law: An Ammunition-Based Proposal for Tightening Gun Control*, 32 J. MARSHALL L. REV. 1, 16 (1998).

¹³² See, e.g., 18 U.S.C. § 922(g), (h). Compare 18 U.S.C. § 922(b)(1) ("It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver . . . ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age . . ."), with N.Y. PENAL LAW § 265.05 ("It shall be unlawful for any person under the age of sixteen to possess . . . any gun or any instrument or weapon in or upon which any loaded or blank cartridges may be used, or any loaded or blank cartridges or ammunition thereof . . ."). Thus, a seventeen year old can lawfully possess ammunition in New York in violation of applicable federal law.

¹³³ *Id.* § 400.03(4)(a), (b).

¹³⁴ *Id.* § 400.03(2), (5). In the absence of a serial number, the seller must record "any other distinguishing number or identification mark on such ammunition." *Id.* § 400.03(2).

¹³⁵ *Id.* § 400.03(2). A first offense for failing to keep required records constitutes a violation, punishable by a fine of up to \$500; a second offense constitutes a Class B misdemeanor, punishable by registration revocation and up to three months in jail. *Id.* § 400.03(8).

submission,” would frustrate efforts to track an individual’s cumulative purchases over a multi-year period.¹³⁶

Ammunition background checking is a second, or even third, line gun violence prevention strategy because a prospective mass murderer or gun crime perpetrator will also be subject to a background check in order to *legally* purchase a long gun or handgun from an FFL or private seller. In addition, she or he will have had to pass a background check to obtain a handgun license and, in New York City, a license to possess a rifle or shotgun. Moreover, throughout New York State, the SAFE Act’s assault weapon registration requirement also imposes a background check.¹³⁷ The ammunition background check provides still another opportunity to thwart a dangerous or unreliable person from acquiring lethal firearm capacity. Of course, blocking a disqualified person from purchasing ammunition does not necessarily mean that he will be left without ammunition. The ammunition-disqualified person could obtain ammunition legally in a neighboring state or illegally, in New York, on the black market, via a straw purchaser, through theft or by making his own ammunition by reloading used casings or from scratch with or without the aid of kits available on the open market. Do-it-yourselfers can make approximately 300 rounds per hour at a cost much lower than retail.

B. The Collapse of Ammunition Background Checking

The SAFE Act’s ammunition control scheme required the creation of a new database populated with names of person disqualified from possessing ammunition (under federal law), because federal law does not permit NICS to be used for ammunition purchaser background checks.¹³⁸ A second database will need to be created and populated with information about each ammunition transfer. As of the date of this Article’s publication, New York has not succeeded in creating either of these essential databases.¹³⁹

The implementation date for the SAFE Act’s ammunition regime

¹³⁶ N.Y. PENAL LAW §400.03(3)(a).

¹³⁷ N.Y. PENAL LAW §400.00(16-a).

¹³⁸ See *National Instant Criminal Background Check System – Fact Sheet*, FBI, <https://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet> (last visited Apr. 23, 2016).

¹³⁹ See Rick Karlin, *Ammo Database Developed at Less than Bullet Speed*, TIMES UNION (Feb. 5, 2016, 10:33 PM), <http://www.timesunion.com/local/article/Ammo-database-developed-at-less-than-bullet-speed-6811101.php>.

was January 15, 2014, a year after the SAFE Act's passage, but that deadline passed without an operational system.¹⁴⁰ The State Police had been unable to create the databases and information system; the estimated cost was considered prohibitive.¹⁴¹ The main challenge was designing an information system fast enough to enable instant checks at the time of purchase. NICS background checks usually take about 90 seconds, but New York was unable to design a system, at reasonable cost, that would take less than 30 minutes. The State Police also lacked sufficient personnel to investigate suspicious purchasers; it would have to notify local police to carry out the investigations themselves. Instead, it decided on a fallback position, whereby ammunition sellers would be required to make sales information available to the police on request. The police would not be able to monitor sales, but if they had a lead, could check various vendors' ammunition sales books. It is hard to see how private sellers' decentralized records of ammunition purchasers would help police to identify suspicious high volume ammunition purchasers. At most, police might use such vendor records to add to the investigation of a suspicious person or perhaps to identify where ammunition found at a crime scene was purchased.

In June 2015, twenty-four Republican and two Democratic state senators co-sponsored a bill to repeal the SAFE Act's ammunition background checking provisions.¹⁴² While the bill did not obtain a floor vote in either house, it apparently attracted the attention of the Cuomo administration,¹⁴³ which decided to suspend its efforts to implement the SAFE Act's ammunition purchaser background checking provisions.¹⁴⁴ According to a Memorandum of Understanding (MOU) Regarding the Statewide License and Record Database Utilization for Eligibility to Purchase Ammunition, signed by the Senate's Republican majority leader and the State Director of Operations, the ammunition purchaser database "[could not] be established and/or function in the manner originally intended at

¹⁴⁰ *See id.*; Open Letter from Joseph A. D'Amico, *supra* note 130.

¹⁴¹ Bill Nojay, *State's SAFE Act Needs to Set Its Sights on Compliance*, TIMES UNION (Jan. 12, 2016, 5:12 PM), <http://www.timesunion.com/tuplus-opinion/article/State-s-SAFE-Act-needs-to-set-its-sights-on-6754126.php>.

¹⁴² Assemb. A08196, 2015–2016 Reg. Sess. (N.Y. 2015).

¹⁴³ *See* Press Release, Michael F. Nozzolio, N.Y.S. Senate, Giant Step Forward Toward Repeal of the SAFE Act (July 10, 2015) <https://www.nysenate.gov/newsroom/press-releases/michael-f-nozzolio/giant-step-forward-toward-repeal-safe-act> (explaining why Governor Cuomo signed the Memorandum of Understanding).

¹⁴⁴ *See id.*

this time” due to a “lack of adequate technology.”¹⁴⁵ Therefore, the parties agreed that “no expenditures of state monies shall be allocated for the purposes of purchasing and installing software, programming and interface required to transmit any record for the purpose of performing an eligibility check” for the database’s future development without bilateral agreement.¹⁴⁶

Senator James Seward called the suspension of the ammunition regulation “a clear victory for Second Amendment rights in New York.”¹⁴⁷ Republican Assemblyman Bill Nojay said that: “All this does is state something that we’ve known to be true for the last two years, which is that they don’t have the technology to do the database”¹⁴⁸ An NRA lobbyist called the MOU “a step in the right direction to restore a degree of sanity after the Safe Act’s over-the-top demonization of lawful New York gun owners.”¹⁴⁹ By contrast, some Democratic senators called the MOU an unconstitutional subversion of the SAFE Act.¹⁵⁰ For example, Deputy Minority leader Michael N. Gianris (D-Queens) argued that “[t]he notion that one house of the Legislature [Senate] will have greater powers than another, and the governor, with one house only, can agree to change state law, turns our democracy on its head.”¹⁵¹ A spokesperson for Senator Minority Leader Andrew Stewart-Cousins (D-Westchester) said: “This two-way agreement is outrageous,” sarcastically adding that “I’m looking forward to the MOUs on the minimum wage, paid family leave, . . . and the numerous other things the Senate Republicans are blocking.”¹⁵²

¹⁴⁵ See John Flanagan & James Malatras, *Memorandum of Understanding Regarding the Statewide License and Record Database Utilization for Eligibility to Purchase Ammunition* (July 10, 2015), <http://www.nytimes.com/interactive/2015/07/10/nyregion/document-order-delaying-new-york-ammunition-checks.html>.

¹⁴⁶ *Id.* Senator Catharine Young’s press release, following announcement of the memorandum of understanding, claimed that Senate Republicans had already successfully eliminated from the budget the Governor’s proposed spending on an ammunition database, “but sought a more official solution.” See Press Release, Catharine Young, N.Y.S. Senate, SAFE Act Ammunition Database Suspended (July 10, 2015), <https://www.nysenate.gov/newsroom/press-releases/catharine-young/safe-act-ammunition-database-suspended>.

¹⁴⁷ Kaplan, *supra* note 119..

¹⁴⁸ Michael Virtanen & David Klepper, *Questions Whether Safe Act Deal Changes Anything*, UTICA OBSERVER DISPATCH (Jul. 13, 2015, 6:55 PM), <http://www.uticaod.com/article/20150713/NEWS/150719769/?Start=1>.

¹⁴⁹ Kaplan, *supra* note 119.

¹⁵⁰ See *id.*

¹⁵¹ *Id.*

¹⁵² Teri Weaver, *Cuomo Agrees to Changes to NY Safe Act Regarding Ammunition Sales*, SYRACUSE.COM, http://www.syracuse.com/state/index.ssf/2015/07/cuomo_agrees_to_changes_to_ny_safe_act_regarding_ammunition_sales.html (updated July 10, 2015, 6:21

Assembly Speaker, Carl E. Heastie (D-Bronx) criticized the MOU as “an ill-advised end run around the Legislature and the Safe Act.”¹⁵³

In the midst of this melee, Governor Cuomo’s counsel sought to clarify the MOU’s legal effect:

There have been concerns raised that the State should not implement the database prematurely as it could cause unmanageable disruption in retail establishments and could cause undue delays. We agree. In fact, over the last two years the Superintendent of State Police has repeatedly and clearly said no system would be implemented until it is ready.

Members of the Republican Senate have indicated that, despite those prior statements, they continue to be questioned by the public and want to answer definitively that we are aware of the concerns and will act responsibly. The [MOU] issued by the Director of Operations simply restates that point. . . .

To be clear, the memorandum reiterates the administration’s intention to implement a functional database when it is ready and reinforces that the system cannot be launched prematurely. The memorandum can in no way supersede the law as passed by the legislature and further, there is nothing in the memorandum that is inconsistent with the letter, spirit or intent of the law.¹⁵⁴

That statement suggests that the Cuomo Administration has not, at least publicly, abandoned its commitment to implementing the SAFE Act’s ammunition provisions.

The requirement that ammunition purchases be transacted in person is the only part of the SAFE Act’s ammunition provisions currently in force. Many ammunition sellers whom we interviewed said that their business had increased as more customers were purchasing ammunition locally, (since they had to go into a store anyway to pick up their online purchases). Moreover, most dealers said that they do not act as an intermediary for sales transacted online. In effect, the law is pushing out-of-state competitors from the New York market.

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¹⁵³ Kaplan, *supra* note 119.

¹⁵⁴ Liz Benjamin, *Cuomo Admin Clarifies SAFE Act Changes*, NY STATE OF POLITICS (Jul. 12, 2015), <http://www.nystateofpolitics.com/2015/07/cuomo-admin-clarifies-safe-act-changes/>.

VI. CONCLUSIONS

Universal background checking is often cited as the number one example of “sensible gun control.”¹⁵⁵ *In principle*, it makes no sense to require people who purchase firearms from a licensed gun dealer to pass a background check, but not require background checks of persons who purchase firearms from unlicensed sellers. If background checking is an important strategy for keeping firearms out the hands of dangerous and unreliable people, it should apply to all purchasers, indeed to all transferees, regardless of who sells or otherwise transfers the firearm. However, extending background checking to all firearm transfers faces significant implementation and enforcement obstacles. Just as the Brady Law is easily circumvented by firearms-prohibited individuals obtaining a gun by means of a straw purchaser or directly in the secondary market or black market, firearms-prohibited individuals can easily avoid the SAFE Act’s universal background checking requirements by obtaining a gun from a family member, straw purchaser, black market dealer or private gun seller willing (perhaps for a premium) to ignore the background checking law.¹⁵⁶ It is hard to believe that a firearms disqualified person who wants to acquire a firearm will have difficulty obtaining one. New York statistics on firearm crimes and suicides before and after passage of the SAFE Act support this conclusion.¹⁵⁷

Ammunition background checking raises similar implementation and enforcement problems. On the one hand, ammunition is easier to regulate than firearms, because bullets must be constantly replenished.¹⁵⁸ On the other hand, bullets are easier than firearms to make in a home workshop and, because they lack serial numbers, are much harder, if not impossible, to track and trace.¹⁵⁹ New York State’s pioneering effort to regulate ammunition sales has encountered significant, perhaps fatal, implementation problems. No state has so far successfully implemented ammunition

¹⁵⁵ See, e.g., Allen Rostron, *Cease Fire: A “Win-Win” Strategy on Gun Policy for the Obama Administration*, 3 HARV. L. & POL’Y REV. 347, 349, 358, 360–61 (2009).

¹⁵⁶ See Healey, *supra* note 135, at 21,22.

¹⁵⁷ See Matthew Hamilton, *A Year After the SAFE Act, Are We Safer?: A Comprehensive Look at the NY SAFE ACT from its Impact on Gov. Andrew Cuomo’s Legacy to Whether the People of the State are Safer*, CITY & STATE (Jan. 20, 2014), <http://cityandstateny.com/articles/politics/new-york-state-articles/safer-one-year-after-its-passage,-has-the-safe-act-reduced-gun-violence-in-new-york.html#.Vwlfj1IoEII>.

¹⁵⁸ See Healey, *supra* note 135, at 5–6, 22.

¹⁵⁹ See *id.* at 26, 32–33.

background checking.¹⁶⁰ The potential efficacy of ammunition purchaser monitoring and background checking as a gun control strategy remains to be seen.

¹⁶⁰ *Id.* at 20]; see Valerie Richardson, 'Ammo Control' Picks Up Steam Among Democrats Aiming to Limit Gun Access, WASH. TIMES (Oct. 15, 2015), <http://www.washingtontimes.com/news/2015/oct/15/background-checks-ammunition-buys-moving-toward-ba/?page=all> (noting that no state has implemented a background check process for ammunition sales). On November 2016, California voters passed Proposition 63 ("Background Checks for Ammunition Purchases and Large-Capacity Ammunition Magazine Ban Initiative"). Its various provisions will come into effect between 2017 and 2019.