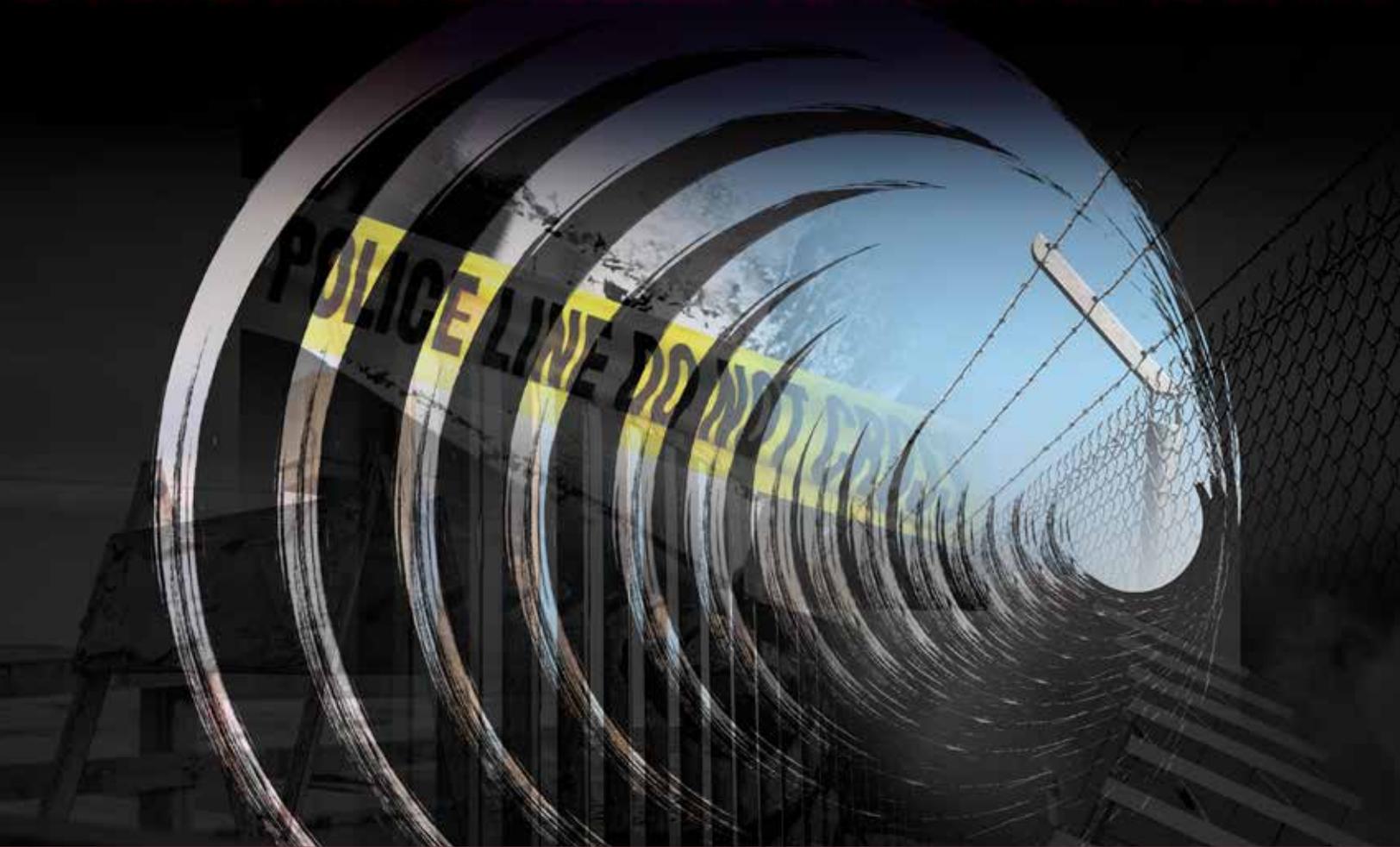


“UNIVERSAL BACKGROUND CHECKS” & BURDENING ACCESS TO HUMAN RIGHTS



[FPC] FIREARMS
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POLICY BRIEF

“Universal Background Checks” & Burdening Access to Human Rights

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EXECUTIVE SUMMARY

“UNIVERSAL BACKGROUND CHECKS” require that a background check be conducted anytime a firearm is transferred between two private parties.¹ Federal law already requires anyone who purchases a firearm from a licensed dealer to undergo a background check.² Universal background checks extend that requirement to purely private and intrastate transactions.

Background checks are relatively recent gun controls. There is no colonial or founding era basis for such laws, aside from discriminatory restrictions on persons who were not considered citizens. Rather than require government permission to own firearms, the historical practice in America was for the government to require firearm ownership. Only in the twentieth century did some states start requiring all purchasers to demonstrate good moral character, and even then the laws were rarely as burdensome as universal background checks, which apply to all transactions and all firearms.

Proponents of “universal background checks” claim that it would reduce crime by closing the “gun show loophole” and thus a major source of crime guns. But statistics show that hardly any crime guns are originally sold at gun shows—according to government studies, less than 1%—and that most crime guns are acquired illegally. This reveals a flaw with mandatory background check systems: only purchasers who expect to pass a background check submit to them. Indeed, strict laws already prohibit

transfers to prohibited persons; law-abiding people already follow those laws, while criminals already violate them.

Nor do universal background checks address the problem of mass-shootings—which constitute an exceedingly small percentage of gun violence and a mere fraction of homicides to begin with. Nearly every mass-shooter in recent history would have—or did—pass a background check, and a few that background checks should have prevented passed the check anyway, because the system failed.

That universal background checks would have little effect on crime is especially problematic when considering the burden they place on law-abiding individuals. Background checks make it more difficult and more expensive to acquire a firearm for self-defense, to lend a firearm to a family member or friend in danger, to train with firearms at the gun range, and to share a firearm when hunting. And in every instance, they place the government between the American people and the exercise of a constitutional right.

HISTORY OF THE ISSUE

Colonial and Founding Eras

There were no laws requiring an individual to seek any government approval prior to purchasing or owning a firearm in the colonial or founding eras, with the exception of discriminatory laws applying to Indians, slaves, and free blacks.³ To the contrary, militiamen and heads of households (including women) were often required to keep arms at home.⁴

¹ See generally Cal. Penal Code §§ 27850-28070.

² 18 U.S.C. § 922(t).

³ See, e.g., 1715 Md. Laws 117 (“no Negro or other slave, within this Province, shall be permitted to carry any Gun, or any other offensive Weapon, from off their Master’s Land, without Licence from their said Master”); 4 William Waller Hening, *The Statutes at Large; Being a Collection of all the Laws of Virginia from the First Session of the Legislature, in the year 1619*, at 131 (1820) (1723 Virginia statute mandating that “all negros, mullattos, or indians, bond or free, living at any frontier plantation, be permitted to keep and use guns, power, and shot, or other weapons, offensive or defensive; having first obtained a licence for the same, from some justice of the peace...”).

⁴ See generally, David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. 495 (2019) (providing hundreds of colonial and founding era laws requiring firearm ownership in the home).

Those who were not required to keep arms were nevertheless able to without government permission.⁵

Nineteenth Century

Discriminatory laws requiring government permission for firearm ownership continued through the nineteenth century. After the Civil War, southern states quickly learned that licensing regimes could keep free blacks deprived of the right to arms. Several states passed such laws, then denied freedmen the government permission needed for the license.⁶ As a Florida Supreme Court Justice later explained about his state's licensing law, "the Act was passed for the purpose of disarming the negro laborers" and "was never intended to apply to the white population and in practice has never been so applied."⁷

Twentieth Century

In the twentieth century, licensing laws became more common and less overtly racist—some were

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still motivated by discriminatory intent.⁸ These laws often required that the purchaser demonstrate "good moral character." Still, these typically applied to retail purchases. The first law that applied to private sales—as Universal Background Checks do—was Missouri's 1921 law.⁹ But it applied to only handguns; not long guns.¹⁰

The Gun Control Act of 1968 was the first federal law requiring a background check for firearm sales.¹¹ Specifically, the Act requires every federal firearms licensee (FFL) (i.e., any person "engaged in the business" of selling firearms¹²) to make the purchaser fill out Form 4473, which contains dozens of questions for the purchaser and seller to ensure that the sale is lawful and the purchaser is not prohibited.¹³ The system's effectiveness was limited, however, by dealers not being required to verify the purchaser's responses.

The Brady Bill passed in 1993, requiring FFLs to contact the FBI or a state counterpart to conduct an

⁵ See, e.g., 3 Samuel Sheperd, *The Statutes at Large of Virginia*, from October session 1792, to December session 1806, at 274 (1836) (1805 Virginia state providing that "no free negro or mulatto shall be suffered to keep or carry any fire-lock of any kind, any military weapon, or any powder or lead, without first obtaining a license from the court..."); John G. Aikin, *A Digest of the Laws of the State of Alabama: containing all the statutes of a public and general nature, in force at the close of the session of the General Assembly, in January 1833*, at 391–92 (2d ed. 1836); (1805 Alabama law stating that "No slave shall keep or carry any gun, powder, shot, club, or other weapon whatsoever, offensive or defensive . . . Provided nevertheless, That any justice of the peace may grant, in his proper county, permission in writing to any slave, on application of his master or overseer, to carry and use a gun and ammunition within the limits of his said master's or owner's plantation").

⁶ See, e.g., 1865 FL. Laws 25 (1865); 1865 Miss. Laws 165, 166-67.

⁷ *Watson v. Stone*, 148 Fla. 516, 524 (1941).

⁸ New York's 1911 Sullivan Act, for example, was aimed at suppressing the rights of the state's growing immigrant population. See Robert J. Cottrol & Raymond T. Diamond, "Never intended to be applied to the white population": *Firearms regulation and racial disparity—The redeemed south's legacy to a national jurisprudence?*, 70 CHI. - KENT L. REV. 1307, 1334 (1995) ("the Sullivan Law was aimed at New York City, where the large foreign born population was deemed peculiarly susceptible and perhaps inclined to vice and crime.").

⁹ "No person, other than a manufacturer or wholesaler thereof to or from a wholesale or retail dealer therein, for the purposes of commerce, shall directly or indirectly buy, sell, borrow, loan, give away, trade, barter, deliver or receive, in this state, any pistol, revolver or other firearm of a size which may be concealed upon the person, unless the buyer, borrower or person receiving such weapon shall first obtain and deliver to, and the same be demanded and received by, the seller, loaner, or person delivering such weapon, within thirty days after the issuance thereof, a permit authorizing such person to acquire such weapon." 1921 Mo. Laws 692 § 2.

¹⁰ *Id.*

¹¹ 18 U.S.C. § 922(d)

¹² 18 U.S.C. § 921(21).

¹³ Under federal law, the following individuals are prohibited from possessing firearms and ammunition:

1. A person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year or any state offense classified by the state as a misdemeanor and is punishable by a term of imprisonment of more than two years.
2. Persons who are fugitives from justice.

“instant check.”¹⁴ This system became functional in November 1998, when the National Instant Criminal Background Check System (NICS) went into effect.

CURRENT STATE OF THE ISSUE

Federal law currently requires background checks be performed for firearm transfers from licensed dealers to individuals.¹⁵ Interstate private firearm sales are prohibited under federal law,¹⁶ and intrastate private sales are primarily regulated by the states.

As explained above, any purchase or transfer that goes through a licensed dealer requires that the person obtaining the firearm complete ATF Form 4473¹⁷ and undergo a background check. Some states contact FBI's NICS directly to conduct a background check, while others operate as a middleman in what are known as “point of contact” states. These states often query databases of their own in addition to the NICS system.¹⁸

Once a background check is conducted, the NICS examiner will advise the dealer to proceed (meaning no prohibiting criteria on the transferee was found), delay (meaning that more research needs to be done to determine whether the transferee is prohibited), or

that the transaction has been denied (meaning that something was flagged in the system indicating that the transferee is prohibited).¹⁹

If NICS takes longer than 72 hours to conduct a background check, the transfer may lawfully proceed. This prevents the government from deterring or frustrating firearm ownership by taking an unreasonable amount of time to process transfers. Despite the clear intent, this 72-hour limit has been referred to as a “loophole” by those who want to abolish it. The time limit was implemented to give the government adequate time to perform a check, as technological constraints then limited what could be accomplished in 72 hours. Improvements in technology over the past two decades, however, seem to suggest that the length of time allowed for the government to process a background check should be decreased, rather than increased.

Notably, when Congress imposed the background check requirement on commercial sales, firearms became the most heavily regulated consumer product in America, and private sales were intentionally shielded from the background check burden. Had the bill required background checks for intrastate private sales as well as retail sales, it would not likely

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3. An unlawful user and/or an addict of any controlled substance; for example, a person convicted for the use or possession of a controlled substance within the past year; or a person with multiple arrests for the use or possession of a controlled substance within the past five years with the most recent arrest occurring within the past year; or a person found through a drug test to use a controlled substance unlawfully, provided the test was administered within the past year.
 4. A person adjudicated mental defective or involuntarily committed to a mental institution or incompetent to handle own affairs, including dispositions to criminal charges of found not guilty by reason of insanity or found incompetent to stand trial.
 5. A person who, being an alien, is illegally or unlawfully in the United States.
 6. A person who, being an alien except as provided in subsection (y) (2), has been admitted to the United States under a non-immigrant visa.
 7. A person dishonorably discharged from the United States Armed Forces.
 8. A person who has renounced his/her United States citizenship.
 9. The subject of a protective order issued after a hearing in which the respondent had notice that restrains them from harassing, stalking, or threatening an intimate partner or child of such partner. This does not include ex parte orders.
 10. A person convicted in any court of a misdemeanor crime which includes the use or attempted use of physical force or threatened use of a deadly weapon and the defendant was the spouse, former spouse, parent, guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited in the past with the victim as a spouse, parent, guardian or similar situation to a spouse, parent or guardian of the victim.
 11. A person who is under indictment or information for a crime punishable by imprisonment for a term exceeding one year.

Many states have enumerated additional crimes that would prohibit a person from possessing firearms or ammunition in that state.

¹⁴ 18 U.S.C. § 922(t)

¹⁵ *Id.*

¹⁶ 18 U.S.C. § 922(a)(2).

¹⁷ U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives, OMB No. 1140-0020, Firearms Transaction Record (2016), <https://bit.ly/2xfVwKg>.

¹⁸ U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives, *Permanent Brady State Lists*, <https://www.atf.gov/rules-and-regulations/permanent-brady-state-lists> (last updated Feb. 28, 2019).

¹⁹ Fed. Bureau of Investigation, *About NICS*, <https://bit.ly/2TqF1eI> (last visited Aug. 25, 2019).

have become law as Congress lacks the power to regulate private transactions occurring completely within a state's borders.²⁰

As far as state regulation of private transfers are concerned, eleven states (California, Colorado, Connecticut, Delaware, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington) and the District of Columbia have taken it upon themselves to require background checks on private transfers in addition to those required for retail transactions. Additionally, Nevada has a law requiring background checks on all transfers set to take effect January 1, 2020. Maryland requires background checks on private transfers of "assault weapons" and handguns, while Pennsylvania requires background checks on handgun transfers between private parties.

ERRONEOUS DENIALS

Those who are denied by NICS or the state counterpart can presently challenge the denial. As many have come to learn, the NICS database is error prone, resulting in numerous individuals being erroneously denied the ability to acquire a firearm. In 2018, for example, the FBI had to overturn 4,716 erroneous denials.²¹ Compounding the problem is the length of time it takes the FBI to process an appeal.²² Thus, thousands of law-abiding Americans each year are stuck in a position in which they are unable to

exercise their Second Amendment rights due to failings of the background check system.

INEFFECTIVENESS OF BACKGROUND CHECKS

NICS is a data-driven system that depends on local governments, federal agencies, courts, medical professionals, and Indian tribes to feed relevant data to the system. Many of these sources lack the funding, organization, or competence to do so. Consequently, the background check system's effectiveness at serving its stated purpose is limited, despite erroneously denying thousands of innocent Americans. Indeed, NICS has failed to catch a number of mass murderers who were prohibited from purchasing a firearm under existing law.²³ Some have thus suggested that resources would be better spent fixing the current system than expanding it.²⁴ What can be

done is also limited, as the federal government is constitutionally prohibited from forcing state and local governments to implement federal policy.

Moreover, the Obama Administration's Department of Justice researched various gun controls and determined that universal background checks require gun registration to be most effective.²⁵ Registration of firearms and their owners is expressly prohibited by the federal law.²⁶ Even absent this law, mandatory registration of arms is both legally and morally repugnant in a society where bearing arms is a right.

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²⁰ U.S. Const. Art. I, § 8, Cl. 3.

²¹ Fed. Bureau Investigation, National Instant Criminal Background Check System (NICS) 2018 Operations Report at 22 (2018), <https://bit.ly/2TMhCkx>.

²² Kevin Johnson, *FBI Official: 'Perfect storm' imperiling gun background checks*, USA Today, (Jan. 20, 2016, 12:01 PM) <https://cnb.cx/2IEarxz>.

²³ See Kevin Johnson, *Texas church shooting: Background check breakdown highlights federal gun record problems*, USA Today, (Nov. 9, 2017, 3:38 PM) <https://bit.ly/2zvmekl>; Rick Jervis, *10 Years after Va. Tech shooting: How gun laws have changed*, USA Today, (Apr. 14, 2017, 12:14 PM) <https://bit.ly/2pu5C7M>; *Gun Shop owner: Orlando shooter passed background check*, CBS News, (June 13, 2016, 5:42 PM) <https://cbn.ws/2D8E2Cw>.

²⁴ Lawrence Keane, *What Fixing NICS Really Entails – and What it Does Not Portend*, National Shooting Sports Foundation, (Dec 7, 2017) <https://bit.ly/2Zq3PWQ>; Beth Baumann, *What Is the 'Fix NICS' Bill Congress Keeps Talking About?*, TownHall, (Mar. 06, 2018) <https://bit.ly/34cpXTt>.

²⁵ Glenn Kessler, *Portman's Slippery Language on Obama and a National Gun Registry*, Washington Post (Apr. 8, 2013), <https://wapo.st/2L7KjWr>.

²⁶ Gun registration had previously been prohibited by Congress in response to the Nazis' effective use of registration records to disarm their victims. Stephan Halbrook, *How the Nazis Used Gun Control* (Dec. 2, 2013), <https://bit.ly/30M4EGa>. For more on the way Nazis utilized registration records, See Stephan Halbrook, *Gun Control in the Third Reich* (1st ed. 2014).

LACK OF NECESSITY

Universal Background Check proponents frequently claim that 40% of firearms are acquired without a background check.²⁷ They call this the “gun show loophole.” Data shows this assertion to be erroneous. The oft-cited 40% figure comes from a survey of acquisitions in 1993 and 1994, long before NICS went into effect.²⁸ Even at that time, studies showed that gun show sales rarely produced crime guns. For instance, a government study found that 0.6% of crime guns came from gun shows in 1991, and 0.7% in 1997.²⁹ Both then and now, crime guns are most commonly obtained from family, straw purchases, and theft.³⁰ This reflects a major flaw with mandatory background check systems: only purchasers who expect to pass a background check submit to them. While background checks are touted as a solution, particularly to mass shootings, statistics do not support that closing this “loophole” would have any significant impact on violent crime.

Additionally, laws already exist that prohibit transfers to prohibited persons. For instance, federal law forbids the transfer of a firearm to someone when the transferor “know[s] or ha[s] reasonable cause to believe” the transferee is prohibited.³¹ Violation of such laws can carry up to 10 years’ imprisonment.³²

This model [background check] law provides no exception for emergency self-defense situations

BURDEN ON LAW-ABIDING PEOPLE

While versions of universal background check legislation differ, there is a standard model created by Michael Bloomberg and his “Everytown” lobby.³³ This model law provides no exception for emergency self-defense situations—for instance, if one’s neighbor is facing an imminent threat from her ex-boyfriend.³⁴ The law impedes the ability to temporarily transfer firearms for safety training and hunting,³⁵ and it prohibits commonplace transfers to many family members.³⁶

Exacerbating these problems is the difficulty many may have in locating an FFL to conduct what have traditionally been routine transfers, especially in rural areas. For instance, a rancher wanting to arm a ranch hand to protect livestock from an active predator threat could have to spend hours traveling together to the nearest FFL, leaving the vulnerable livestock unattended.³⁷

Additionally, there is no need for people who have already passed an in-depth background check to pay for and undergo an additional check each time they purchase a firearm. Some state concealed carry permits qualify as alternatives to the background check requirements of the Brady

²⁷ The Washington Post fact-checker gave President Obama three Pinocchios for making this claim. Glenn Kessler, *Obama’s continued use of the claim that 40 percent of gun sales lack background checks* (Apr. 2, 2013), <https://wapo.st/2elX11m>.

²⁸ Philip Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, Nat’l Inst. of Justice: Research in Brief 1, 1-7 (1997) <https://bit.ly/Q4Scvw>.

²⁹ Caroline Harlow, *Firearm Use by Offenders, Bureau of Justice Statistics: Special Report 1*, 6 (2002) <https://bit.ly/2Pr1JRS>.

³⁰ *Id.* See also Greg Ridgeway, *Summary of Select Firearm Violence Prevention Strategies*, (Jan. 4, 2013) <https://bit.ly/34dM9fJ>.

³¹ 18 U.S.C. § 922(b)(1)-(3), (d), (x)(1).

³² 18 U.S.C. § 924.

³³ For an in-depth analysis of Bloomberg’s model with a detailed history on background check and licensing laws, see David B. Koppel, *Background Checks for Firearms Sales and Loans: Law, History, and Policy*, 53 *Harvard Journal on Legislation* 303, (2016) <https://bit.ly/2UcZqRk>.

³⁴ See *id.* at 316-17.

³⁵ See *id.* at 318-20, 327.

³⁶ See *id.* at 320-21.

³⁷ Ironically, laws restricting women’s access to abortion have been fiercely opposed by many who promote universal background checks, despite similarities in consequences. Compare the ACLU’s positions: Georgeanne Usova, *Abortion Rights for All Means Your Access to Abortion Shouldn’t Depend on Where You Live or How Much You Make*, (May 30, 2019) <https://bit.ly/2NLI8yl> (arguing that access to abortion should not depend on where you live) with Louise Melling, *The ACLU’s Position on Gun Control*, (Mar. 26, 2018) <https://bit.ly/2Waw6uq> (“We do not object to universal background checks...”).

Bill, though roughly half do not.³⁸

Perhaps most problematically: since FFLs are prohibited by federal law from transferring handguns to anyone under 21 or long guns to anyone under 18, by requiring that transfers occur through an FFL, universal background checks prohibit a tremendous number of Americans from acquiring firearms they could otherwise lawfully possess.³⁹

PUBLIC OPINION

Proponents often tout that 90% of Americans want universal background checks.⁴⁰ That claim is handily contradicted when people actually vote on universal background check bills. Nevada voters passed a measure in 2016 by a slim margin, 50.45% to 49.55%.⁴¹ That same year, Maine defeated a similar measure 52% to 48%.⁴² Universal background checks found their greatest support in Washington, but even there only 59% voted in favor of them.⁴³

CONSTITUTIONALITY

The constitutionality of a law that burdens the protected rights of self-defense,⁴⁴ range training,⁴⁵ firearms acquisition,⁴⁶ and hunting⁴⁷ as substantially as universal background checks is dubious at best. Also dubious is Congress's ability to regulate purely intrastate transactions between private parties, which are the focus of universal background checks. Justice Thomas of the United States Supreme Court previously acknowledged that "a colorable argument

exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections."⁴⁸

OUR POSITION & OUR POSITION'S CONNECTION TO VALUES/PRINCIPLES

Firearms Policy Coalition opposes universal background checks because they (1) prevent individuals from freely alienating their personal property; (2) place a substantial governmental barrier between an individual and the exercise of the Second Amendment right to keep and bear arms; (3) create an excessively burdensome process for law-abiding sellers and purchasers of firearms; (4) are contrary to American history and tradition; (5) eliminate the right of young adults to acquire firearms; and (6) ultimately require a gun registry to be most effective.

Additionally, universal background checks fail to provide any significant solution to crime. They affect only persons willing to submit to a background check, and not the criminals who will continue to acquire firearms through theft, straw purchases, and other illegal means, as they have done for years. Thus, universal background checks infringe on the rights of law-abiding people without offering any meaningful benefit to the People and thus have no place in a society that values the fundamental individual right to keep and bear arms for lawful purposes, especially self-preservation through self-defense.

³⁸ *Permanent Brady Permit Chart*, (July 25, 2019) <https://bit.ly/1FLA6Z6>.

³⁹ Historically, 18-to-20-year-olds have been protected by the Second Amendment. Thus, a law banning their ability to acquire handguns would likely be unconstitutional. See David Kopel & Joseph Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. UNIV. L. J. 495 (2019).

⁴⁰ U.S. Voter Support For Abortion Is High, Quinnipiac University National Poll Finds; 94 Percent Back Universal Gun Background Checks, (May 22, 2019), <https://bit.ly/2w6sChE> ("American voters support 94 - 4 percent requiring background checks for all gun buyers. Gun owners support universal background checks 90 - 9 percent.").

⁴¹ Colton Lochhead, *Measure to expand background checks for gun sales passes by razor-thin margin*, Las Vegas Review-Journal (2016) <https://bit.ly/2Hx3x5s>.

⁴² *Maine Question 3 — Expand Gun Background Checks — Results: Rejected*, The New York Times, (Aug. 1, 2017) <https://nyti.ms/2ZA-W7bF>.

⁴³ Office of the Secretary of State of Washington, *Initiative Measure No. 594 Concerns background checks for firearm sales and transfers*, (last upd. Nov. 25, 2014) <https://bit.ly/30LAanz>.

⁴⁴ *D.C. v. Heller*, 128 S. Ct. 2783, 2822 (U.S. 2008).

⁴⁵ *Ezell v. City of Chicago*, 651 F.3d 684, 711 (7th Cir. 2011); *Ezell v. City of Chicago*, 70 F. Supp. 3d 871, 876 (N.D. Ill. 2014). 46 *Sivester v. Beccerra*, 138 S.Ct. 945, 951 (2018) (Thomas, J., dissenting from denial of cert).

⁴⁷ *Heller*, 128 S. Ct. at 604; *United States v. Skoien*, 587 F.3d 803, 812 (7th Cir. 2009); *Heller v. D.C.*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Kolbe v. Hogan*, 813 F.3d 160, 180 (4th Cir. 2016).

⁴⁸ *Printz v. United States*, 521 U.S. 898, 938 (1997) (Thomas, J., concurring).

