

DOMESTIC VIOLENCE, FIREARMS, AND A FEDERAL
REGISTRY: EQUIPPING VICTIMS TO ENFORCE LIFESAVING
LEGISLATION

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ABSTRACT

Guns and domestic violence can be a lethal combination for victims. In the 1990s, Congress recognized this danger and passed two important pieces of legislation: one barring individuals subject to a protection order from possessing firearms, and one prohibiting the same from individuals convicted of domestic violence. Unfortunately, these laws have not been well-enforced. One major obstacle to their enforcement is the absence of a national registry of firearm ownership data. This informational void has effectively stripped the domestic violence gun bans of their teeth: even when barred from possessing firearms, abusive partners often simply lie and claim they have none in their possession. Victims are often unaware that their abusive partners have retained firearms illegally; little recourse is available when nothing can confirm that the partner owns a firearm at all.

This Article proposes a bold solution—the creation of a federal registry of firearm owners—and describes how a registry would save the lives of domestic violence victims. The Article tackles how the recent landmark Second Amendment decision of New York State Rifle & Pistol Association v. Bruen would apply to a registry, and how the registry would survive even the heightened constitutional scrutiny this case created. A federal firearm registry is a critical, life-saving tool that will help enforce laws already on the books to protect domestic violence victims.

This country is reckoning with increasing gun violence and suffering the consequences of mass shootings often perpetrated by those with a history of committing domestic violence. This Article proposes a workable solution to start taking gun violence against domestic violence victims seriously.

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INTRODUCTION

In January 2017, Kevin Janson Neal was arrested for assault with a deadly weapon against a neighbor in Tehama County, California.¹ The presiding judge entered a criminal protection order against Neal that barred him from possessing firearms.² Neal turned in one pistol and told law enforcement that he had no other firearms in his possession.³ The authorities took him at his word.⁴

Ten months later, Neal shot and killed his wife, then hid her body beneath the floorboards in their home.⁵ The next day, he took a semi-automatic rifle that he manufactured illegally at home, a handgun registered to his wife, and a pistol he purchased in North Carolina, of which no record existed in California, and embarked on a shooting spree.⁶ Neal's attack targeted, among others, students at a local elementary school, and ended when he was ultimately killed in a shootout with police.⁷ Neal killed four adults that day and wounded ten others, including seven children.⁸ This tragedy is one of many that has taken place due to, at least in part, the lack of a comprehensive federal registration database of firearm ownership information. This dearth of information can lead to deadly results for communities, but it poses a particular danger to domestic violence victims.⁹

In a statement on the Congress floor in 1996, Senator Frank Lautenberg famously said, "all too often, the difference between a battered woman and a dead woman is the presence of a gun."¹⁰ Firearms and domestic violence are often a lethal combination for victims of abuse.¹¹ In recognition of this fact, Congress passed two laws in the 1990s to prohibit the possession of firearms by individuals

1. Shauna Williams & Phil Helsel, *Gunman in California Shootings Spree Needed Mental Health Help, Sister Says*, NBC NEWS (Nov. 15, 2017), <https://perma.cc/97HV-85HH>.

2. Joseph Serna, *Northern California Shooter Exploited 'Honor System' in Telling Court He Had No Guns*, L.A. TIMES (Nov. 21, 2017), <https://perma.cc/QGZ8-VER3>. Federal law only bans respondents to civil protection orders from possessing firearms when the order is on behalf of an intimate partner. See *infra* Section I. California, however, bars firearm possession when a protection order is entered on behalf of non-intimate partners as well. *Domestic Violence & Firearms in California*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://perma.cc/9WXF-CLG5> (last visited Dec. 14, 2022).

3. Serna, *supra* note 2.

4. *Id.* Tehama County District Attorney was later quoted as saying "The justice system relies on the honor system." *Id.*

5. Jim Seida, Corky Siemaszko, & Phil Helsel, *California Mass Shooter Killed Wife, Buried Her Beneath Floor*, NBC NEWS (Nov. 15, 2017), <https://perma.cc/N75P-CESE>.

6. Serna, *supra* note 2.

7. Alene Tchekmedyan, *These Are the Victims of the Rancho Tehama Shooting*, L.A. TIMES (Nov. 16, 2017), <https://perma.cc/P68S-Y7UT>.

8. Seida, Siemaszko, & Helsel, *supra* note 5.

9. Advocates in the field of domestic violence often use the term "victim" or "survivor" interchangeably to refer to individuals who have experienced domestic violence. Both terms have certain connotations. See *Beyond Victim or Survivor*, RESILIENCE: ADVOCATES FOR ENDING VIOLENCE (June 28, 2021), <https://perma.cc/6X9L-ZBSS>. This Article uses the term "victim" because this analysis centers on the civil and legal criminal system. *Id.*

10. 142 Cong. Rec. S11226-01 (daily ed. Sept. 25, 1996) (statement of Sen. Lautenberg) (quoting Sen. Wellstone's earlier remark).

11. See *infra* Section I.A. for an in-depth discussion of the risk that guns pose to victims of domestic violence.

who perpetrate domestic violence.¹² Unfortunately, these laws have not been enforced as intended. Although a variety of factors have led to this systemic failure, one tremendous obstacle in the path of successful enforcement is a third Congressional enactment in 1986, which prohibits the creation of a federal registry of firearm ownership data.¹³

On a systemic level, the lack of a firearms registry severely handicaps the ability of the criminal legal system to enforce current legal prohibitions banning certain categories of individuals from possessing firearms. Without a registry available to determine whether a particular individual actually possesses a gun, the legal system is stymied in enforcing the protective legislation Congress passed nearly three decades ago. Police officers and judges often have limited choices but to accept the false claims of those who perpetrate abuse who deny having firearms in their possession.¹⁴ There is generally no opportunity for law enforcement to obtain a search warrant to look for hidden firearms. Even if such a warrant could be obtained, resources are not being put toward actual retrieval of firearms in these situations.¹⁵ Absent a comprehensive registry of gun ownership, abusive partners often maintain possession of their firearms, in violation of federal and state laws, without repercussion.

On an individual level, the lack of a firearms registry poses an imminent danger to domestic violence victims. Victims who turn to the legal system for relief may assume that the proper mechanisms are in place to ensure their protection from firearm violence, but they simply are not. As a result, victims—particularly women who are at an increased risk of harm and death—enter into a system that does not do what the laws are designed to do. Given that they are at significantly higher risk of physical injury or even death if their intimate partner does own a gun,¹⁶ it is essential for victims—whether they have sought legal relief for the violence they have suffered or not—to have the ability to determine whether their partner has possession of a gun. The existence of a federal firearms registry, accessible in a privacy-protected way to a person's intimate partners, would be one tool to help empower a person to make an informed decision about the level of risk she is willing to assume entering or remaining in a relationship with anyone who is armed.

This Article explains why the lack of a federal firearms registry is problematic, and the unique burden that this inability to access to information—indeed, the prohibition on even compiling this information—has on victims of domestic violence. Section I of this Article will describe the level of danger women in the United States (U.S.) face when their abusive partners possess firearms and the

12. See *infra* Section I.B. for a discussion of these laws.

13. See *infra* Section II.B. for a discussion of the Firearm Owners Protection Act (FOPA).

14. See Jane K. Stoevers, *Firearms and Domestic Violence Fatalities: Preventable Deaths*, 53 FAM. L. Q. 183, 207–10 (2019).

15. *Id.* at 210.

16. See *infra* Section I.

legislation Congress enacted to ban that possession. Section II will discuss the historical underpinnings of the anti-registry law and the subsequent efforts by Congress to reverse its damage. Section III will describe the elements of a registry, including its requirements, enforceability accessibility, and logistics. Section IV will explain how a firearms registry is essential to save the lives of victims of domestic violence, both by empowering legal systems to enforce current laws and by providing victims with direct access to information that protects their safety. Section V will explain how two jurisdictions—Washington, D.C. and Hawaii—have implemented firearms registries and the constitutional scrutiny they faced. This Section will end with an analysis of the registry’s constitutionality following the Supreme Court’s ruling in *New York State Rifle & Pistol Association v. Bruen*.

I. THE NATIONAL CRISIS OF GUNS AND DOMESTIC VIOLENCE

A. THE DANGER OF GUNS TO DOMESTIC VIOLENCE VICTIMS

Domestic violence¹⁷ is a widespread issue across the country. One in three women¹⁸ and one in seven men¹⁹ will be abused by an intimate partner at some point in their lives. Domestic violence is often repetitive within a relationship and can escalate in severity over time.²⁰

Moreover, the link between domestic violence and firearm use is clear: abusive partners with access to firearms inflict the most severe abuse.²¹ Specifically, domestic homicides are considerably more likely to occur in homes where a firearm is present.²² One study found that the risk of homicide is over five times

17. The U.S. Department of Justice Office on Violence Against Women defines domestic violence as “a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, psychological, or technological actions or threats of actions or other patterns of coercive behavior that influence another person within an intimate partner relationship.” OFF. ON VIOLENCE AGAINST WOMEN, U.S. DEP’T OF JUST., DOMESTIC VIOLENCE, <https://perma.cc/FBU7-SQX8> (last visited Dec. 22, 2022).

18. Sharon G. Smith, Xinjian Zhang, Kathleen C. Basile, Melissa T. Merrick, Jing Wang, Marcie-jo Kresnow, & Jieru Chen, CTRS. FOR DISEASE CONTROL & PREVENTION ET AL., NATIONAL INTIMATE PARTNER & SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF – UPDATED RELEASE (2018), <https://perma.cc/YXC9-Q5JR>.

19. Sharon G. Smith, Jieru Chen, Kathleen C. Basile, Leah K. Gilbert, Melissa T. Merrick, Nimesh Patel, Margie Walling, & Anurag Jain, CTRS. FOR DISEASE CONTROL & PREVENTION ET AL., THE NATIONAL INTIMATE PARTNER & SEXUAL VIOLENCE SURVEY: 2010-2012 STATE REPORT 121 (2017), <https://perma.cc/3WXM-B894>.

20. Domestic Violence and Abuse, WOMEN’S RESOURCE CTR., <https://perma.cc/2254-HKGX> (last visited Dec. 14, 2022).

21. Jacqueline Campbell, Daniel Webster, Jane Koziol-McLain, Carolyn Block, Doris Campbell, Mary Ann Curry, Faye Gary, Nancy Glass, Judith McFarlane, Carolyn Sachs, Phyllis Sharps, Yvonne Ulrich, Susan A. Wilt, Jennifer Manganello, Xiao Xu, Janet Schollenberger, Victoria Frye, & Kathryn Laughon, *Risk Factors for Femicide in Abusive Relationships: Results from a Multi-Site Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003), <https://perma.cc/MG8M-MB3Y>.

22. Alison J. Nathan, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822, 824 (2000).

higher when abusive partners have access to a firearm than when they do not.²³ According to recent Federal Bureau of Investigation (FBI) estimates, a woman is shot to death by her intimate partner roughly every fourteen hours,²⁴ and over half of domestic homicides are committed with a firearm.²⁵ Almost one million women in the U.S. reported in 2018 that they had either been shot or shot at by an intimate partner.²⁶ Gun homicides disproportionately harm Black women in the U.S., as they are two times more likely to be fatally shot by an intimate partner than white women are.²⁷

This is a problem that has only worsened in recent years: the rate of domestic homicides committed with a firearm jumped by 26% between 2010 and 2017.²⁸ Rates of both firearm purchases and of reported domestic violence also rose during the COVID-19 pandemic.²⁹

Abusive partners use firearms not only to physically harm their victims but also to threaten harm.³⁰ Approximately four and a half million women in the U.S. reported in 2018 that an intimate partner had threatened them with a gun.³¹ Abusive partners also use firearms to coerce victims into doing things they may otherwise not do.³²

The harm caused by abusive partners with firearms is not limited to their partners, as illustrated by the tragedy in Tehama County in 2017. One study found in 2021 that more than two-thirds of mass shootings are perpetrated by a person with a history of domestic violence.³³ The same study also found that domestic violence-related mass shootings are more fatal than those unrelated to domestic violence.³⁴

23. Campbell, Webster, Koziol-McLain, Block, Campbell, Curry, Gary, Glass, McFarlane, Sachs, Sharps, Ulrich, Wilt, Manganello, Xu, Schollenberger, Frye, & Laughon, *supra* note 21.

24. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING PROGRAM: SUPPLEMENTARY HOMICIDE REPORTS (2016), <https://perma.cc/A4EW-E4BF>.

25. APRIL M. ZEOLI, BATTERED WOMEN'S JUSTICE PROJECT, MULTIPLE VICTIM HOMICIDES, MASS MURDERS, AND HOMICIDE-SUICIDES AS DOMESTIC EVENTS (2018), <https://perma.cc/4UYU-NRNU>.

26. Susan B. Sorenson & Rebecca A. Schut, *Nonfatal Gun Use in Intimate Partner Violence: A Systematic Review of the Literature*, 19 TRAUMA, VIOLENCE, & ABUSE 19 no. 4, 431–42 (2018).

27. *Gun Violence Disproportionately and Overwhelmingly Hurts Communities of Color*, CTR. FOR AM. Progress (June 30, 2022), <https://perma.cc/VYB3-AYVM>.

28. Madeline Carlisle & Melissa Chan, *Here's Why Domestic Violence Kills So Many Women and Children*, TIME (Oct. 17, 2019), <https://perma.cc/S2LX-XVTY>.

29. Brian Joslyn, *Rising Gun Ownership, Incidents of Domestic Violence, and How Women Pay the Price*, MS. MAGAZINE (Oct. 13, 2021), <https://perma.cc/2348-VU9W>.

30. Campbell, Webster, Koziol-McLain, Block, Campbell, Curry, Gary, Glass, McFarlane, Sachs, Sharps, Ulrich, Wilt, Manganello, Xu, Schollenberger, Frye, & Laughon, *supra* note 21.

31. Sorenson & Schut, *supra* note 26.

32. *Id.*

33. THE EDUCATIONAL FUND TO STOP GUN VIOLENCE, STUDY: TWO-THIRDS OF MASS SHOOTINGS LINKED TO DOMESTIC VIOLENCE (2021), <https://perma.cc/M7S5-CXUQ> (citing Geller, L.B., Booty, M., & Crifasi, C.K., *The Role of Domestic Violence in Fatal Mass Shootings in the United States, 2014–2019*, INJ. EPIDEMIOL. 8, 38 (2021)).

34. *Id.*

A quarter of mass shooting victims are children.³⁵ One in three mass shooters are legally prohibited from owning firearms at the time of their attack, either due to domestic violence or another disqualifying factor.³⁶ Unfortunately, the existence of these legal prohibitions does not mean they are effective.

B. THE CONGRESSIONAL RESPONSE

For nearly thirty years, federal law has recognized the unique danger that gun violence poses to victims of domestic violence. In 1994, Congress passed a law that prohibits respondents to civil protection orders on behalf of an intimate partner from possessing firearms (hereinafter the “protection order prohibition”).³⁷ A civil protection order is a state-court-issued order that is generally one to three years in duration³⁸ which directs an individual to stop harming and harassing another individual.³⁹ Most protection orders also require respondents to stay away from the petitioner,⁴⁰ the petitioner’s home, and other locations the petitioner frequents.⁴¹ Protection orders can also prohibit or limit the respondent from contacting the petitioner entirely.⁴² In order for a respondent to be subject to the protection order gun prohibition, they must have received actual notice of and the opportunity to participate in a hearing.⁴³ In addition to banning possession of firearms, the protection order prohibition also bans shipping, transporting, or receiving firearms or ammunition.⁴⁴ These bans last for the duration of the protection order.⁴⁵ Forty-three states either require or authorize judges to prohibit respondents from possessing firearms via protection orders.⁴⁶

35. Press Release, EVERYTOWN FOR GUN SAFETY, Women and Children in the Crosshairs: New Analysis of Mass Shootings in America Reveals 54 Percent Involved Domestic Violence and 25 Percent of Fatalities Were Children (Apr. 11, 2017), <https://perma.cc/4JBB-R4C2>.

36. *Mass Shootings in America*, EVERYTOWN FOR GUN SAFETY, <https://perma.cc/G6GY-YN65> (last visited Dec. 14, 2022).

37. 18 U.S.C. § 922(g)(8).

38. AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC & SEXUAL VIOLENCE, DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (June 2020), <https://perma.cc/5ZCU-U6LK>; *but see* Conn. Gen. Stat. § 46B-15(d) (Connecticut civil protection orders last for 120 days) and Miss. Code Ann. § 93-21-15(2)(b) (in Mississippi, the duration of the order is at the court’s discretion and it can be indefinite).

39. *Domestic Violence Restraining Orders*, WOMENSLAW, <https://perma.cc/M6AH-LVVH> (last visited Dec. 14, 2022).

Criminal protection orders, like the one entered by the court against Kevin Janson Neal, often have similar firearm ownership prohibitions.

40. A petitioner is an individual who seeks relief from the court, while a respondent is the person from whom relief is sought. Petitioner, LAW DICTIONARY, <https://perma.cc/CX9F-NT79> (last visited Dec. 14, 2022).

41. *See, e.g.*, D.C. Code § 16-1005 (2022) DC; VA. ADMIN. CODE § 19.2-152.10(A)(1)-(2)(2022).

42. *Id.*

43. 18 U.S.C. § 922(g)(8)(A).

44. 18 U.S.C. § 922(g)(8).

45. *Id.*

46. *Domestic Violence & Firearms*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://perma.cc/JT5H-QUTK> (last visited Dec. 14, 2022).

Two years after Congress enacted the protection order prohibition, Senator Frank Lautenberg proposed what became known as the Lautenberg Amendment, which banned individuals convicted of misdemeanor crimes of domestic violence from possessing, shipping, transporting, or receiving firearms or ammunition.⁴⁷ To qualify as a misdemeanor crime of domestic violence, the offense must be prosecuted under a law which includes as an element “the use or attempted use of physical force, or threatened use of a deadly weapon.”⁴⁸ The Lautenberg Amendment also contains a relational requirement that limits the ban to convicted individuals who are the current or former spouse, parent, or person in a dating relationship with the petitioner.⁴⁹ The gun ban is self-executing immediately upon conviction. Unlike the temporary nature of the protection order prohibition, firearm bans under the Lautenberg Amendment are permanent. Thirty-four states have legislation mirroring the Lautenberg Amendment, banning gun possession upon a misdemeanor conviction of domestic violence under state law.⁵⁰

Unfortunately, the federal protection order prohibition and Lautenberg Amendment have not been enforced effectively for a number of reasons.⁵¹ First, many jurisdictions have no mechanisms in place to inform individuals subject to gun bans that they may no longer possess firearms.⁵² This shortcoming resulted in tragedy for Mariah Carpenter, who was killed by her ex-boyfriend Quantaine Tate in Columbus, Ohio in 2018.⁵³ Tate had physically abused Carpenter, threatened her with a gun, and grabbed her around the throat in the years leading up to her death.⁵⁴ Tate was convicted of misdemeanor domestic violence and was thus permanently barred under the Lautenberg Amendment from possessing firearms.⁵⁵ Unfortunately, there is no evidence in court files of any judicial or law enforcement efforts to order him to relinquish his firearms.⁵⁶ It was not until the day after Tate shot Carpenter to death in front of their toddler that law enforcement discovered he had at least twenty guns, including assault rifles, in his storage unit.⁵⁷

47. 18 U.S.C. § 922(g)(9).

48. 18 U.S.C. § 921(a)(33)(A)(ii).

49. 18 U.S.C. § 921(a)(32) (“intimate partner” is defined in the statute as “the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person”); *see also* S. 2938 – Bipartisan Safer Communities Act (although the recent Bipartisan Safer Communities Act, signed into law by President Joseph Biden on June 25, 2022, closed the “boyfriend loophole” by expanding the definition of “intimate partner” in the Lautenberg Amendment, it did not do the same for the protection order prohibition).

50. *Domestic Violence & Firearms*, GIFFORDS, *supra* note 46.

51. Jennifer L. Vainik, *Kiss, Kiss, Bang, Bang: How Current Approaches to Guns and Domestic Violence Fail to Save Women’s Lives*, 91 MINN. L. REV. 1111, 1128 (2007).

52. *Id.* at 1129.

53. Jennifer Gollan & Grace Oldham, *Police Often Miss Red Flags in Domestic Abuse Cases and the Consequences Are Deadly*, REVEAL (Aug. 2, 2022), <https://perma.cc/38C6-6TFU>.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

Judges also often fail to notify perpetrators of domestic violence that they are not allowed to have guns in their possession. That failure means that many individuals illegally possess firearms without the knowledge that they are breaking the law. Knowledge of the illegal status of their gun ownership is not a required element for federal prosecution;⁵⁸ however, not knowing that gun possession is illegal is likely to result in many banned individuals continuing to possess them.

Moreover, when law enforcement officers suspect that an individual has a firearm, they can ask that person directly if they have a gun in their possession. If the person says they do not, there is little, if anything, that the officers can do.⁵⁹ There is no database that allows officers to confirm or contradict the individual's denial. That means that all an individual has to do is lie to law enforcement and they are often able to hold onto their firearms illegally without anyone being the wiser.

A third reason for the lack of enforcement is that jurisdictions lack the resources to store removed firearms.⁶⁰ There are also not enough agents in the Bureau of Alcohol, Tobacco, and Firearms (ATF) to investigate violations of these federal gun laws and an inadequate number of U.S. Attorneys to prosecute violations.⁶¹ Federal prosecutors are also limited by information that states put into the National Crime Information Center's (NCIC) database. Some states fail to provide complete, or even any, data regarding domestic violence convictions or protection orders, resulting in federal prosecutors' inability to file charges based on violations of the statutes.⁶² A combination of these barriers has meant that federal prosecutions for violations of these two laws have been very limited: violations of these provisions led to charges in only 920 cases from 2008–2017, out of a total 73,318 federal gun possession prosecutions.⁶³

Another obstacle that hinders the enforcement of these two laws is the sheer number of firearms in circulation, combined with a lack of information about those firearms and their owners.⁶⁴ There are an estimated 393 million guns

58. See, e.g., *United States v. Napier*, 223 F.3d 394, 398 (6th Cir. 2000); see also *United States v. Beavers*, 206 F.3d 706, 710 (6th Cir. 2000), *cert. denied*, 529 U.S. 1121 (2000).

59. See Jane K. Stoever, *Firearms and Domestic Violence Fatalities: Preventable Deaths*, 53 FAM. L.Q. 183, 207–08 (2019).

60. See e.g., Travis Fain, *NC police departments overflowing with seized firearms, want to change law barring gun destruction*, WRAL NEWS (Aug. 3, 2022), <https://perma.cc/YUB5-KPH3>.

61. *Saving Women's Lives: Ending Firearm Violence Against Intimate Partners*, AMS. FOR RESPONSIBLE GUN SOLUTIONS (June 2014).

62. *Id.*; see also Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 EVALUATION REV. 313, 322 (2006); Arkadi Gerney & Chelsea Parsons, *Women Under the Gun: How Gun Violence Affects Women and 4 Policy Solutions to Better Protect Them*, CTR. FOR AM. PROGRESS (June 18, 2014), <https://perma.cc/KV27-WE26> (identifying only three states—Connecticut, New Hampshire, and New Mexico—as submitting “reasonably complete records”; records from these states constitute 79% of all records nationwide).

63. Gerney & Parsons, *supra* note 62.

64. Vigdor & Mercy, *supra* note 62.

present in the U.S. today,⁶⁵ equating to an estimated 120.5 civilian firearms in every 100 households nationwide.⁶⁶ Four in ten Americans report that they either own a firearm or live in a home that has a firearm.⁶⁷ Gun ownership is ubiquitous in the U.S.; despite making up only 4.43% of the world's population, Americans own 42% of the world's firearms.⁶⁸ An average of one hundred Americans die by gun violence every day,⁶⁹ and rates of gun violence are rising nationwide.⁷⁰ It is telling that higher rates of gun ownership are tied to higher rates of domestic homicides but not to other homicides.⁷¹

Unfortunately, the numbers above regarding firearm ownership are estimates only. We currently simply do not *know* how many firearms are in circulation in the U.S., nor do we know who owns how many firearms, nor what types of firearms are owned by how many individuals.⁷²

Public support is not an obstacle in the path to creating a federal firearms registry; rather, the concept of a registry enjoys broad support across the country.⁷³ 62% of Americans support requiring gun registration, and 70% of Americans believe such a registry already exists.⁷⁴ Additionally, the public, like Congress, has recognized the danger that domestic violence victims face when their abusive partners have firearms. Not surprisingly, public support exists for removing firearms from individuals who commit acts of domestic violence. One study found that 84.3% of women and 70.1% of men believe firearms should be removed from an abusive partner after an incident of domestic violence.⁷⁵

Policies that restrict an abusive partner's access to firearms are effective at accomplishing their goals: when such policies are in place, there is a correlated reduction in intimate partner homicide—sometimes by as much as 25%.⁷⁶ Research

65. AARON KARP, ESTIMATING GLOBAL CIVILIAN-HELD FIREARMS NUMBERS, SMALL ARMS SURVEY (2018).

66. *History of Gun Control*, PROCON.ORG, <https://perma.cc/Z8NS-E56D> (last updated Sept. 21, 2022); KARP, *supra* note 65.

67. Kim Parker, Juliana Menasce Horowitz, Ruth Igielnik, J. Baxter Oliphant, & Anna Brown, *America's Complex Relationship with Guns*, PEW RSCH. CTR. (June 22, 2017), <https://perma.cc/FRU3-2YUL>.

68. Dylan Matthews, *Gun Crime Is More Prevalent in the U.S. Than in Other Rich Countries*, VOX (Nov. 14, 2018, 4:19 PM), <https://perma.cc/GL7U-LJ5X>.

69. *Statistics*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://perma.cc/LM7M-PTSB> (last visited Nov. 18, 2022).

70. *Id.*

71. Sarah Mervosh, *Gun Ownership Rates Tied to Domestic Homicides, but Not Other Killings, Study Finds*, N.Y. TIMES (July 22, 2019), <https://perma.cc/X8GF-PH34>; Aaron J. Kivisto, Laren A. Magee, Peter L. Phalen, & Bradley R. Ray, *Firearm Ownership and Domestic Versus Nondomestic Homicide in the U.S.*, 57 AM. J. OF PREVENTATIVE MED. 3 (2019).

72. KARP, *supra* note 65.

73. *Guns*, GALLUP, <https://perma.cc/6VJV-F7ZV> (last visited Dec. 14, 2022).

74. *Registration*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://perma.cc/FBU9-BS4B> (last visited Dec. 14, 2022).

75. Susan B. Sorenson, *Taking Guns from Batterers: Public Support and Policy Implications*, 30 EVALUATION REV. 361, 369 (2006).

76. April M. Zeoli & Daniel W. Webster, *Effects of Domestic Violence Policies, Alcohol Taxes and Police Staffing Levels on Intimate Partner Homicide in Large US Cities*, 16 J. INT'L SOC'Y FOR CHILD &

by the FBI and the Centers for Disease Control & Prevention (CDC) demonstrates that gun control policies which focus on *who* has a firearm (rather than, for example, the type of firearm they have) are most effective in reducing gun-related homicides.⁷⁷ These policies address the root of the problem that Congress intended to solve in passing the protection order prohibition: keeping firearms out of the hands of individuals who perpetrate domestic violence.

Unfortunately, not only do we currently lack the capacity to track firearm ownership information, but federal law explicitly bans the creation of such a registry.⁷⁸

II. A BRIEF HISTORY OF GUN LEGISLATION IN THE UNITED STATES

A. THE FIRST REGISTRY TO THE GUN CONTROL ACT OF 1964

To understand why Congress prohibited the creation of a federal firearms registry in 1986,⁷⁹ it is necessary to examine the history of firearms regulation in the U.S. In 1934, in response to the prevalence of crimes committed by the Mafia, Congress enacted the National Firearms Act (NFA).⁸⁰ Among other provisions, this law required individuals in possession of machine guns, shotguns, and rifles with barrels shorter than eighteen inches long to register their firearm ownership with the Secretary of the Treasury.⁸¹ Each of these types of firearms is considered an automatic, or “machine” gun, because it continues firing ammunition on its own once a trigger is pulled and it stops firing only when the shooter releases the trigger.⁸² The registration requirement under the NFA does not apply to the vast majority of firearms presently in circulation. However, this registry still exists today.⁸³

The Supreme Court limited the reach of the NFA in 1968 in *Haynes v. United States*, when it held that individuals could not be required to register firearms already in their possession at the time the NFA was passed.⁸⁴ The Court found that this retroactive requirement violated individuals’ Fifth Amendment right against self-incrimination.⁸⁵ However, it upheld the prospective requirement that

ADOLESCENT INJ. PREVENTION 2 (2010) (an example of such a policy is a state law which restricts access to firearms for persons subject to protective orders).

77. Jessica Colarossi & Kat J. McAlpine, *The FBI and CDC Datasets Agree: Who Has Guns—Not Which Guns—Linked to Murder Rates*, BRINK (Aug. 6, 2019), <https://perma.cc/8ZUU-DHVZ>.

78. 18 U.S.C. § 926(a).

79. *Id.*

80. 26 U.S.C. § 5801 *et seq.*

81. 26 U.S.C. § 5841; Dylan J. McDonough, *Locked, Loaded, and Registered: The Feasibility and Constitutionality of a Federal Firearm Registration System*, 96 NOTRE DAME L. REV. 1347, 1351 (2021).

82. Heath Druzin, *Automatic Weapons Are Legal, But It Takes A Lot to Get One of the 630,000 in the U.S.*, BOISE STATE PUBLIC RADIO (Dec. 21, 2018), <https://perma.cc/LFP3-4Q67>.

83. 26 U.S.C. § 5801 *et seq.*

84. *Haynes v. United States*, 390 U.S. 85, 91–94 (1968).

85. *Id.* at 95, 99.

individuals must register new machine guns as they came into an individual's possession.⁸⁶

Following the assassinations of President John F. Kennedy in 1963 and the Reverend Doctor Martin Luther King, Jr. in 1968,⁸⁷ and in reaction to the Court's decision in *Haynes*, Congress enacted the Gun Control Act of 1968 (GCA). The GCA removed the registration requirement for those individuals already in possession of unregistered firearms.⁸⁸ Congress explicitly stated in the GCA that any information the federal government obtains based on an individual's firearm registration may only be used in a criminal prosecution under the NFA if the alleged crime by that individual took place *after* the weapon was registered.⁸⁹ The GCA also mandated that all firearms be affixed with a serial number, set out a minimum age requirement for buying a gun, and created several classes of individuals prohibited from possessing firearms.⁹⁰

Additionally, the GCA established the National Firearms Registration and Transfer Record (hereinafter "the Record").⁹¹ Maintained by the Secretary of the Treasury, the Record requires individuals who manufacture, import, and transfer all NFA-eligible firearms register those weapons.⁹² To meet the registration requirement of the Record, an individual must file a written application, pay a tax, submit to fingerprinting, and have the Secretary approve the application.⁹³

Though limited in scope, the NFA serves as an example of how diligent regulation of firearm ownership can reduce crime. As of 2017, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) reported that there were 630,000 machine guns in circulation in the U.S.⁹⁴ No machine gun covered by the NFA has ever been used in a mass shooting in the U.S.⁹⁵

B. THE FIREARM OWNERS PROTECTION ACT OF 1986 TO PRESENT DAY

Following the enactment of the GCA, gun rights advocates believed that the federal ATF was overzealous in enforcing this law.⁹⁶ In response, the National Rifle Association (NRA) drafted what ultimately became known as the Firearm Owners' Protection Act (FOPA).⁹⁷ FOPA undid several of the key provisions in the GCA. For example, FOPA required that any violations of gun laws must be

86. *Id.* at 94.

87. *History of Gun Control*, PROCON.ORG, *supra* note 66.

88. McDonough, *supra* note 81, at 1352.

89. *Id.*

90. Gun Control Act of 1968, Pub. L. No. 90-618, § 201, 82 Stat. 1213 (1968).

91. 26 U.S.C. § 5841.

92. *Id.*; McDonough, *supra* note 81, at 1352–53.

93. *Id.*

94. Part of the reason for the limited number of machine guns is that, in a compromise to get FOPA passed, Republicans agreed to ban the purchase of new machine guns starting in 1986. Druzin, *supra* note 82.

95. *Id.*

96. Alex Yablon, *How "The Law That Saved Gun Rights" Gutted ATF Oversight of Firearm Dealers*, TRACE (June 7, 2018), <https://perma.cc/AS95-QUA8>.

97. *Id.* FOPA is also known as the McClure-Volkmer Act.

“willful,” meaning that the individual actor knew what he was doing was against the law.⁹⁸ It also allowed only one ATF inspection per year of a gun dealer’s records.⁹⁹ President Ronald Reagan signed FOPA into law on May 19, 1986.¹⁰⁰

In addition to these sweeping changes to the GCA, FOPA also explicitly prohibited the creation of a federal registry of firearm ownership data. The law states, in relevant part:

No such rule or regulation prescribed after the date of the enactment of the Firearm Owners’ Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision therefor, nor that any system of registration system of registration of firearms, firearms owners, or firearms transactions or dispositions be established.¹⁰¹

Notably, the law contains an exception for when there is an ongoing investigation, in which case the Attorney General’s office is permitted to obtain firearm registration records.¹⁰²

On the federal level, the most significant firearms legislation passed since FOPA is the Brady Handgun Violence Prevention Act of 1993 (hereinafter “Brady”).¹⁰³ Brady created the National Instant Criminal Background Check System (NICS) and mandated that individuals attempting to buy firearms from a Federal Firearm Licensee (FFL) first successfully pass a background check.¹⁰⁴

Gun-related homicides fell by 32% after Brady’s enactment in 1993.¹⁰⁵ NICS has been successful at preventing prohibited possessors from purchasing firearms; 400,000 firearm sales to domestic abusers have been stopped by NICS since 1998.¹⁰⁶ The Brady Campaign to Prevent Gun Violence reports that the law has

98. David T. Hardy, *The Firearms Owners’ Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 608 (1987).

99. *Id.*

100. Firearm Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986).

101. 18 U.S.C. § 926(a).

102. *Id.* (“Nothing in this section expands or restricts the Secretary’s authority to inquire into the disposition of any firearm in the course of a criminal investigation.”)

103. Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-159, § 103(i), 107 Stat. 1536 (1993).

104. *Id.*

105. *Gun Control Topic Overview*, GALE (2022), <https://perma.cc/JH3X-XBR6> (last visited Dec. 14, 2022).

106. *Guns and Violence Against Women*, EVERYTOWN FOR GUN SAFETY (Jan. 26, 2022), <https://perma.cc/52q6-hzgg>.

prevented the sale of over three million guns to ineligible buyers, saving “countless lives.”¹⁰⁷

Many gun vendors, however, escape the requirements of the NICS check by ensuring they are not captured within the FFL category.¹⁰⁸ Vendors must only apply for an FFL license if they plan to “engage in the business of importing, manufacturing, or dealing in firearms, or importing or manufacturing ammunition.”¹⁰⁹ Gun show vendors often fall outside of that category because they only periodically sell firearms and not as a primary source of income. Since they are not FFLs, vendors at gun shows are not required to initiate a background check on potential purchasers, creating an opportunity for otherwise ineligible firearms possessors to easily purchase guns.¹¹⁰

Two years after Brady was enacted, Senators Charles Schumer and Bill Bradley introduced a new bill, the Handgun Control and Violence Prevention Act of 1995 (hereinafter “Brady II”).¹¹¹ Brady II would have required any individual seeking to purchase a handgun to acquire a state permit.¹¹² Where states did not require permits for handguns, Brady II would have required that state to pass such a law.¹¹³ Brady II did not pass and never became law; had it been enacted, it likely would not have survived constitutional scrutiny given the Supreme Court’s decision in *Printz v. United States*.¹¹⁴ In *Printz*, the Court considered whether the federal government could require state law enforcement officers to conduct background checks on prospective gun buyers.¹¹⁵ The Court ruled that it could not, stating “the federal Government may not compel the States to enact or administer a federal regulatory program.”¹¹⁶ Compelling states to require gun permits, as proposed under Brady II, would likely have met the same fate.

After the failure of Brady II, states have been left on their own to determine what, if any, registration process to require of firearm owners. Currently, six states as well as Washington, D.C. have some registration requirements for firearm owners.¹¹⁷ Eleven states require that firearm sales or transfers be reported to

107. Press Release, *Brady Campaign to Prevent Gun Violence Marks 25th Anniversary of Passage of Groundbreaking Federal Background Checks Law*, BRADY: UNITED AGAINST GUN VIOLENCE (Nov. 30, 2018), <https://perma.cc/SN3L-CTTK>.

108. *Id.*

109. 18 U.S.C. § 923(a).

110. *Gun Shows*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://perma.cc/A7AX-RM5D> (last visited Dec. 14, 2022).

111. S. 631, 104th Cong. (1995).

112. James B. Jacob & Kimberly A. Potter, *Comprehensive Handgun Licensing & Registration: An Analysis & Critique of Brady II, Gun Controls Next (And Last?) Step*, 89 J. CRIM. L. & CRIMINOLOGY 81 (1998).

113. *Id.*

114. *Id.* at 85; *Printz v. United States*, 521 U.S. 898 (1997).

115. *Printz*, 521 U.S. at 902.

116. *Id.* at 933.

117. *Registration*, GIFFORDS, *supra* note 74.

local law enforcement,¹¹⁸ and two states require that new residents report their firearms to law enforcement.¹¹⁹ By contrast, tracking federal law, eight states ban the creation of a firearms registry.¹²⁰

III. PROPOSAL TO CREATE A FEDERAL FIREARMS REGISTRY

This Article proposes that Congress repeal the provision of FOPA that bans the creation of a federal firearms registry and pass a statute creating such a registry.

There is, of course, a massive political divide in this country over the regulation of firearms.¹²¹ Congress has been notoriously unwilling to act in this area.¹²² Until the Bipartisan Safer Communities Act passed in June 2022, no major federal firearm legislation had been enacted in nearly thirty years.¹²³ Congress was forced to pass this legislation in response to the national outcry after mass shootings at a grocery store in Buffalo, New York and at an elementary school in Uvalde, Texas. Currently, there is strong national support for reasonable gun regulations, and Congress must seize this moment of national reckoning by taking serious action, including the creation of a registry.

The firearms registry should be created at the federal level, rather than replicated among the states, for several reasons. The Gun Control Act of 1968—and subsequent amendments—identified categories of individuals prohibited from possessing firearms. The federal government has a compelling interest in monitoring who does and does not possess firearms but simply lacks the tools to effectively do so right now.

It is also critical that this registry be a federal undertaking, rather than a state-by-state endeavor, given the high level of interstate gun trafficking that occurs today: nearly two-thirds of guns used to commit crimes in states with strict gun control laws were purchased in a neighboring state with less restrictive regulations.¹²⁴ In the continental U.S., it is quite easy, and common, for guns to travel across state lines, making state-level enforcement of gun laws challenging. For example, if State A has restrictive gun laws, but neighboring State B does not, it is easy for a citizen of State A to obtain a firearm from State B and bring it back into State A, making it difficult for State A to monitor firearm possession. One

118. *Maintaining Records of Gun Sales*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://perma.cc/DK74-UN8Z> (last visited Dec. 14, 2022).

119. *Id.*

120. *Id.*

121. See e.g., ReShonda Tate, *The Political Divide Over Gun Reform Blocking Change*, DEFENDER NETWORK (June 1, 2022), <https://perma.cc/S6KN-ASFN>.

122. See Lauren Fox, *The Real Reasons Congress Can't Act on Guns or Immigration*, CNN (Mar. 23, 2018), <https://perma.cc/M2U9-4JB3>.

123. See Don Clyde & Shauneen Miranda, *Biden Signs Gun Safety Bill Into Law*, NPR (June 25, 2022), <https://perma.cc/3BGG-MQH4>.

124. *Trafficking & Straw Purchasing*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://perma.cc/67G7-SNF7> (last visited Dec. 14, 2022); see also Gregor Aish & Josh Keller, *How Gun Traffickers Get Around State Gun Laws*, N.Y. TIMES (Nov. 13, 2015), <https://perma.cc/BG92-A3ZJ> (“In New York and New Jersey, which have some of the strictest laws in the country, more than two-thirds of guns tied to criminal activity were traced to out-of-state purchases in 2014.”).

study from 2001 found that “states with registration and licensing systems appear to do a better job than other states of keeping guns initially sold within the state from being recovered in crimes.”¹²⁵ However, a limiting factor on the effectiveness of state registration and licensing laws is proximity to states that do not have such laws.¹²⁶

Unlike the failed proposal in Brady II, the creation of a federal registry of firearm owners would not run afoul of the Supreme Court’s precedent in *Printz* because states would not be required to implement local registries themselves; rather, the registry would be owned and maintained by the federal government.

A. REQUIREMENTS OF THE REGISTRY

The federal firearms registry should include several requirements, including that applicants provide and update certain identifying information and pay a nominal fee.

Registration of firearms should be required upon purchase or transfer. This requirement would capture individuals who come into possession of firearms in any manner. Applicants for registration must register their firearm within ten days of possessing it. In a registration application, an applicant must include their name, address, place of employment, address of employment, date and place of birth, and sex. This information will help ensure that individuals with similar names are easily distinguishable. The registration application should also include a requirement that applicants disclose any previous registration applications that have been denied. To best monitor the firearms themselves, the applications should include the firearm type, make, model, and serial number, and registrants should identify from whom they have obtained the firearm and where it will be kept.

Registrants should be required to provide fingerprints and a photograph to local law enforcement. Having this information enables law enforcement to more easily identify a gun owner, both upon registration or later, when checking the registration status of a particular firearm.

Registrants should also be required to keep their registration records current. If they lose or sell a firearm, they must note that with the local ATF office.¹²⁷ If they enter into a prohibited class of gun owners, they must acknowledge that as well. This requirement would allow law enforcement to ensure that those in possession of firearms are lawful owners at all times. It would also serve as a deterrent for banned individuals to possess firearms illegally; the registration of an applicant would be rescinded when the applicant updates his information to demonstrate he is in a prohibited category.

125. *MYTH: Firearm Registries Never Helped Solve a Crime*, GVPEDIA, <https://perma.cc/TTD6-MUGT> (last visited Dec. 14, 2022) (citing D.W. Webster, J.S. Vernick, & L.M. Hepburn, *Relationship Between Licensing, Registration, and Other Gun Sales Laws and the Source State of Crime Guns*, 7 *INJ. PREV.* 184 (2001)).

126. Webster, Vernick, & Hepburn, *supra* note 125.

127. See *infra* Section II.D for further discussion about the logistics of the registry.

In addition to the basic registration requirements, prospective registrants should be required to pay a small fee to offset the administrative cost of processing their registration application.

B. VIOLATIONS OF THE REGISTRY

It is important to consider how registration requirements will be enforced. The registry will only be effective if there are high rates of compliance among gun owners. There should be two categories of civil penalties for individuals who violate the registry requirements: first, individuals who are legally entitled to possess firearms but fail to register properly should be subject to a civil fine. Second, individuals who are *not* legally entitled to possess firearms and fail to attempt registration should be subject to a civil fine as well as removal of their firearm. This civil enforcement scheme, with a focus on firearm removal, will be the most effective response to violations, as it will directly address the actual danger to domestic violence victims—the presence of firearms in their homes, without improperly removing firearms from those entitled to possess them.

C. ACCESS TO REGISTRY INFORMATION AND GUN OWNER PRIVACY

One critical issue that a federal firearms registry will have to grapple with is how to balance firearm owners' privacy interests against domestic violence victims' interest in accessing ownership information of their abusive partners. Under this Article's proposal for a federal gun registry, information in the registry would be accessible to federal, state, and local law enforcement to further criminal legal enforcement as well as other crime solving efforts. However, in order to serve as an effective resource for victims, access to registry information must be readily available to them. That said, there should be an additional mechanism by which domestic violence victims can directly access information from the registry without necessarily seeking relief from the legal system. This system must be narrow in scope and limited only to current or former intimate partners seeking to protect their own safety.

This Article's proposal is to permit domestic violence victims to file an affidavit with ATF¹²⁸ requesting firearm ownership records upon verification of the following information: (1) that they are or were in an intimate partner relationship with the person whose records they seek; and (2) that they are seeking the information for their own personal safety and for no impermissible or criminal reason. If an individual verifies these two facts and swears to them, the ATF office should produce the redacted gun ownership information from the requested individual. The information disclosed to the affiant should include only whether the identified individual possesses weapons and how many and what types of weapons they possess. Affiants should not receive complete registry information, which would include the address, phone number, and other potentially private

128. See *infra* Section II.D for further discussion about the logistics of the registry, including control of the registry by ATF.

information of the requested person. Victims should be advised that they may not disseminate the information to anyone outside of their immediate family or household.

D. LOGISTICS: WHERE TO BEGIN AND HOW TO MAINTAIN THE REGISTRY

Logistically, a federal firearms registry would be comparable to the current state-run Departments of Motor Vehicles (DMV), which tracks a variety of information about vehicle ownership. Currently, every state has a DMV to issue vehicle titles, vehicle identification numbers, and track vehicle ownership. DMV records are used to determine vehicle ownership after an accident or a theft, to track criminal suspects, and for tax purposes.¹²⁹ Vehicle owners are generally required to register their vehicles with their resident state's DMV within a certain time period of entering the state. Owners pay a nominal cost, generally between \$30 and \$50, and registration must be renewed periodically.¹³⁰ Vehicle owners are fined for failure to register their vehicles.¹³¹ Some DMVs have enforcement officers who are empowered to fine drivers for infractions such as having overly tinted windows. This type of infraction could also lead to a suspended driver's license. States vary in how much access they provide the public to their records.¹³²

The DMV model is a good prototype for what a firearm registry could look like, with the main difference being that a firearm registry would be established at the federal, rather than state level.

Creating this registry from the ground up would be an enormous, but not impossible undertaking, with benefits that would far exceed the initial burden of getting it up and running. The basic infrastructure for a federal registry already exists; the Record would serve as an effective starting point for a more comprehensive registry. The Record is run by the Industry Processing Branch (IPB) within the ATF, making the ATF the ideal host of the registry. The ATF also monitors the National Tracing Center, which is the only federal crime gun tracing facility.¹³³ The ability to cross-reference firearms with the federal registry would further equip federal law enforcement to enforce firearm prohibitions as Congress intended. Of course, given the limited resources within the ATF,¹³⁴ such an undertaking would almost certainly require an increase in budget.

Supplementing the information on the narrow category of firearms covered by the NFA would be a substantial task. Fortunately, a federal system already exists

129. Kat Tretina, *What Is Car Registration, And Why Is It So Important?*, INVESTOPEDIA (Mar. 25, 2022), <https://perma.cc/D7K6-ALEA>.

130. *Id.*

131. *Id.*

132. Spencer Lam, *State-by-State Guide to DMV Records*, VR RESEARCH (Jan. 16, 2019), <https://perma.cc/98C9-Z8D6>.

133. BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, NATIONAL TRACING CENTER (June 15, 2020), <https://perma.cc/UUR5-LNRP>.

134. *See supra* Section I.B.

which includes a considerable amount of the above required information and would serve as an ideal foundation. This system is the NICS: the database that is maintained by the federal government for the purpose of running background checks on prospective gun buyers. In order to buy a firearm from a federally licensed firearm dealer, both the dealer and the prospective buyer must complete a Firearms Transaction Record, also known as Form 4473,¹³⁵ enabling the FBI to conduct a background check.

Form 4473 includes much of the information that would be required to populate the registry: the buyer's name, address, and date of birth. It also includes the make, model, and serial number of each firearm exchanged during the transaction.¹³⁶ While Form 4473 does not require a buyer to disclose any previously denied registration application, it does require the buyer to confirm that he does not fall within a list of prohibited possessor categories, including being the subject of an active protection order or having been convicted of a misdemeanor crime of domestic violence.¹³⁷

The other benefit of relying on NICS as a starting point for the federal registry is that it will be updated automatically when an individual purchases a new firearm. Of course, this will only happen where the firearm is purchased from a federally licensed dealer—private sales at gun shows are exempt from background checks. Closing this loophole would be another important way for Congress to ensure that gun owners are easily identifiable. Relying on information in NICS would offset some of the cost of the creation of a registry by utilizing information in a database that already exists.

Unfortunately, there is currently a provision in Brady which prohibits the use of NICS to establish a registration system,¹³⁸ and the regulation that created NICS also contains language that mirrors that prohibition. This provision would need to be rescinded by an act of Congress in order to effectuate the creation of a federal firearms registry.

IV. WHY THE CREATION OF A FEDERAL FIREARMS REGISTRY IS ESSENTIAL TO SAVING THE LIVES OF DOMESTIC VIOLENCE VICTIMS

The creation of a federal firearms registry would bring a multitude of benefits to victims of domestic violence: (1) it would monitor possession, and not merely purchase of firearms; (2) it would allow victims direct access to lifesaving information about their partners' gun possession; (3) it would facilitate investigations and prosecutions of abusive partners for victims who pursue criminal relief; and (4) it would help victims in civil cases get more appropriate relief.

135. BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, FIREARM TRANSACTION RECORD, <https://perma.cc/5X23-4T7P> (last visited Dec. 13, 2022).

136. *Id.*

137. *Id.*

138. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(i), 107 Stat. 1536, 1542 (1993).

A. ADDRESSING FIREARM POSSESSION, NOT MERELY FIREARM PURCHASE

The two laws in effect governing people who commit domestic violence and firearm use—the protection order prohibition and the Lautenberg Amendment—are intended to prevent *possession* of firearms.¹³⁹ This means that the moment a person falls into one of these two prohibited categories, (upon entry of a final protection order or upon conviction of a misdemeanor crime of domestic violence) that individual may not lawfully possess a firearm. Unfortunately, many of the mechanisms in place to enforce these laws currently deal with restricting an abusive partner's ability to *purchase* new firearms; background checks, for example, are required only when a person attempts to buy a firearm from a federally licensed firearm dealer. When an individual in one of the two prohibited categories attempts to buy a firearm from a federally licensed firearm dealer, that dealer is required to run a background check. Assuming all information has been entered correctly into the database,¹⁴⁰ that background check would reveal that the attempted purchaser is barred from possessing the firearm pursuant to federal law, and the dealer would stop the sale.

What the law does not address is two common scenarios. First, legally barred individuals can buy firearms at gun shows, where vendors are not required to run background checks; even a buyer who is legally barred from possessing a firearm could easily purchase one from a non-licensed dealer.

Second, legally barred individuals often continue to maintain firearms *already in their possession* at the time they become barred. Very few mechanisms exist to assist the state in determining whether a person in this scenario has a firearm. Few jurisdictions have policies to ensure that abusive partners have complied with the gun possession prohibition.¹⁴¹ Those that do have gun surrender policies often rely on the gun owner to voluntarily comply; when that fails, no backup enforcement mechanism exists.¹⁴² Where ownership of a firearm cannot itself first be proven, it is nearly impossible to enforce removal of that firearm from the home of a person convicted of domestic violence or who has a protection order entered against him.

A firearm registry would fill this informational gap by creating an ongoing database demonstrating ownership—and therefore presumed possession—of firearms at any given time. A database of information on firearm possession is a critical solution as an enforcement mechanism that can effectively monitor firearm

139. 18 U.S.C. §§ 922(g)(8)–(9).

140. Unfortunately, information is not put into NCIS regularly. See Gerney & Parsons, *supra* note 62.

141. Stoeber, *supra* note 14, at 207–08.

142. *Id.*

possession.¹⁴³ This would address buyers who purchase at gun shows because they would be required to register the firearm after purchasing it, despite not being subject to a background check. It would also address individuals who keep guns they once possessed legally, because they would be required to update their information with the local ATF office. A registry would also help prevent “straw purchases,” where one individual buys a firearm on behalf of another person who is ineligible to do so himself or who otherwise does not want the firearm traced back to him.¹⁴⁴ Individuals would not want to have their name associated with a firearm not in their possession in the event that it is used in a crime.

Two researchers with expertise on guns and domestic violence, Elizabeth Richardson Vigdor and James A. Mercy, conducted a study in 2006 in which they analyzed rates of intimate partner homicide in states where protection order laws prohibit respondents from purchasing firearms, compared to states that prohibit only possessing firearms. They found that states had lower rates of intimate partner homicides when their laws restricted the *purchase* of firearms by someone subject to a protection order.¹⁴⁵ By contrast, states that prohibit only possession of firearms by someone subject to a restraining order did not experience a reduction of intimate partner homicides.¹⁴⁶ At least one reason for this discrepancy was the lack of a registry of firearm ownership—states were limited in their ability to actually enforce laws that restricted gun possession only.

They concluded:

Specifically, our results show that prohibiting possession of firearms without explicitly prohibiting firearm purchases as well appears to undermine the effectiveness of a [protection] order law. It is unclear why this is the case. It may simply be that it is easier to enforce firearm restrictions at the point of purchase than to ascertain whether an individual already owns a firearm. One way to increase the potential effectiveness of possession-only laws would be to maintain a registry of all firearm owners.¹⁴⁷

B. INDIVIDUAL ACCESS TO LIFESAVING INFORMATION

Victims’ access to the registry will allow them to better plan for their own safety, with or without court involvement. Many domestic violence victims do not seek relief from the criminal or legal justice system when they are

143. Jane Stoeve, Clinical Professor of Law and Director of the Domestic Violence Clinic at the University of California, Irvine School of Law, agrees that “keeping a registry of all firearm owners is necessary to increase effectiveness of the current laws prohibiting possession.” *Id.* at 205.

144. *Registration*, GIFFORDS, *supra* note 74.

145. Vigdor & Mercy, *supra* note 62, at 333.

146. *Id.*

147. *Id.*

victimized,¹⁴⁸ and victims may be better than courts at assessing their level of risk within a relationship. However, a victim's ability to make that assessment is curtailed when she does not have a complete understanding of all the relevant facts. Because firearm ownership is correlated with increased rates of domestic violence,¹⁴⁹ it is important that victims have access to that information when planning for their own safety.

A federal firearms registry would allow for individual domestic violence victims to more safely plan for themselves. Victims will have direct, although still privacy-protected,¹⁵⁰ access to information in the registry regarding their partners. Allowing individuals to access this information as it pertains to their partners will serve several functions. First, it will allow victims who have sought help from the civil or criminal legal system to determine whether their abusive partners have been dispossessed of their weapons. As discussed above, both criminal and civil orders can bar abusive partners from possessing firearms; however, the mechanisms the courts use to ensure compliance with these orders are very limited or, in some jurisdictions, nonexistent.¹⁵¹ Because of these limitations, it is difficult for a victim to ascertain whether or when firearm relinquishment has actually occurred.¹⁵² The end result is that many abusive individuals who have been ordered not to possess firearms still possess them illegally and no state entity is tasked with ensuring compliance with the law. Giving victims access to their partner's firearm ownership information is one step toward ensuring that, to the extent a court has ordered their partner not to have a firearm, that firearm has been reported as transferred by the registry. Where such transfer has not taken place, the victim can contact local law enforcement to retrieve the firearms or contact the local prosecutors or probation office to inform them that the firearm owner is violating a court order.

In addition to allowing domestic violence victims to determine when a partner has complied (or failed to comply) with a court order to surrender firearms, individual access to the firearm registry will allow individuals at earlier stages of relationships to assess their own level of risk. Studies demonstrate a "gender gap" in knowledge of firearms present in a household; women often report that there are no guns or fewer guns in their home than the men they live with report.¹⁵³ In other words, a woman could be dating, living with, or married to a man and not know

148. See e.g., Meg Aprill, *Why Domestic Violence Survivors Fear Turning to the Police*, DAYONE (Aug. 5, 2020), <https://perma.cc/6SDD-VFRT>.

149. See *supra* Section I.

150. See *supra* Section III.D. for further discussion of how this Article proposes individuals have direct access to their intimate partner's registry records.

151. Stoever, *supra* note 14, at 208 (2019) (citing Katherine A. Vittes, Daniel W. Webster, Shannon Frattaroli, Barbara E. Claire, & Garen J. Wintemute, *Removing Guns from Batterers: Findings from a Pilot Survey of Domestic Violence Restraining Order Recipients in California*, 19 VIOLENCE AGAINST WOMEN 602, 604 (2013).)

152. Daniel W. Webster, *Women with Protective Orders Report Failure to Remove Firearms from Their Abusive Partners: Results from an Exploratory Study*, 19 J. WOMEN'S HEALTH (2007).

153. Stoever, *supra* note 14.

that that man keeps a firearm in their household. A firearm ownership registry would give individuals a mechanism through which they could learn whether their partner has a gun, allowing them to determine whether they are willing to live in the home any longer. The benefit of this kind of tool is that it is preventative in nature; it does not require domestic violence to have already taken place before an individual can determine whether their partner possesses a firearm.

This proposed affidavit access has several benefits. First, it captures an important class of domestic violence victims: those who choose not to seek criminal or civil legal relief. There should be no requirement that a victim pursue a legal case in order to access her partner's gun ownership information. Second, by limiting the access of information to current or former intimate partners only, this approach would not require individuals to demonstrate any proof that they are victims of domestic violence. Rather, by requiring merely a showing of an intimate partner relationship, the affidavit would permit a person newly entering into a relationship to ascertain whether their new partner has firearms. Even in a new or non-abusive relationship, an intimate partner could gain the knowledge of what firearms their intimate partner possesses. That way, the benefit of information is not limited to those upon whom harm has already befallen.

Third, the proposed affidavit narrowly proscribes who may access registry information and includes only those who would be statutorily authorized to file for a protective order that would trigger the prohibition. This would prevent a person from being able to find out the gun ownership status of everyone in a particular neighborhood, for example. Finally, because an affidavit is a sworn statement, a gun owner would have leave to seek relief for fraudulent or wrongful use of this approach. If a gun owner could prove that an affidavit was sworn out in bad faith, they could pursue a perjury case against the affiant.

Allowing intimate partners to access their partners' firearm ownership information in the way this Article proposes does come with some downsides. First, it may be difficult for victims to access their local ATF office, either in-person or online. There are approximately 215 ATF offices spread across the country, but given transportation and geographical limitations, in-person access to them would be difficult or impossible for some. Filing an affidavit online raises similar challenges, requiring access to technology that not everyone has. Some level of sophistication would be required for a victim to file an affidavit as well: the ability to read and write and access to a notary or another person who can place them under oath, to name a few. But these are necessary hurdles that exist currently to domestic violence victims seeking governmental relief through the civil legal system: they must be able to write a petition and file it, either in person or online, both of which present unique challenges. The criminal legal system comes with the additional burden of potentially being subpoenaed to testify against one's wishes. The straightforward process this Article proposes for people to access firearm ownership information of their intimate partners balances the interests of victims with the privacy interests of gun owners; by contrast, an online registry of

gun owners, available to the public, may make important information more accessible to individuals but would fail to address the real privacy interests of gun owners.

Concerns about people taking advantage of the affidavit system this Article proposes can be addressed by a person's ability to pursue perjury charges when an individual swears out a false affidavit to access gun ownership information. If a person lies about the nature of their relationship to the gun owner, for example, the person whose information they attempted to access could contact law enforcement and pursue a criminal case. This would serve as a deterrent against anyone who may otherwise seek to access information on the registry that is inappropriate.

A fully public registry could have disastrous consequences: would-be law-breakers could examine the firearm ownership information of every resident of certain neighborhoods, choosing to break into houses where no known firearm is present; alternatively, criminals could specifically target homes with firearms in an attempt to steal those weapons.

There is an additional concern that has been voiced by gun rights advocates: that the existence of a comprehensive firearms registry would be a slippery slope ultimately leading to government officials removing firearms from people who lawfully possess them.¹⁵⁴ That is not a reasonable fear based on the registry proposed here. The sole intent of the registry is to ensure that those found too dangerous to possess firearms do not unlawfully possess them; there is no intent, nor any mechanism by which Congress could remove firearms from law-abiding citizens. When individuals can legally possess firearms, there is no governmental interest in removing those firearms from them.

C. ADVANTAGES FOR VICTIMS WHO USE THE CRIMINAL LEGAL SYSTEM

As discussed above, some domestic violence victims do not seek relief through the criminal legal system. There has been little, if any, evidence to demonstrate that the criminal legal system has the preventative impact on domestic violence that was once anticipated.¹⁵⁵ The criminal legal system also disproportionately and harmfully impacts people and communities of color. That said, many victims do involve law enforcement and the courts after incidents of abuse. The existence of the registry would thus be a useful tool within the criminal legal system to improve general victim safety.

The registry would be particularly effective when law enforcement determines that the individual in possession of the firearm is no longer legally eligible to carry it. For example, an officer might be in a position to serve a protection order upon a respondent. Before attempting service, the officer could check the registry

154. Eric Swalwell, *President Biden Does Not Want to Take Your Guns Away*, NEWSWEEK (Apr. 21, 2022), <https://perma.cc/WRT2-P5GZ>; *Insisting On Gun Control Laws That Don't Work, Then Registration, Then Confiscation*, FIREARMS OWNERS AGAINST CRIME (Dec. 14, 2015), <https://perma.cc/HUX3-HPC9>.

155. See generally LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* (2018).

to determine whether the respondent lawfully possesses any firearms. If the respondent does possess firearms legally preceding the service of the order, that possession becomes unlawful upon service of the order.¹⁵⁶ In that case, after serving the order, the officer should inquire with the respondent about the firearm at issue and take it into law enforcement possession immediately. This process would stand in marked contrast to the process currently used by law enforcement, which is either ignoring the question of firearms altogether or asking the respondent whether he has firearms and not being able to verify his denial.¹⁵⁷ Even with a registry, respondents may still insist that they do not have a firearm, or that they have lost or sold it. In those cases, absent a search warrant, it may still be difficult for law enforcement to take possession of those firearms. However, if law enforcement hears from a witness that an individual has unlawfully retained possession of their firearm, they could issue a civil citation, charging them with a fine for failing to regularly maintain their registration status.¹⁵⁸

Additionally, a firearm registry would serve as another crime-solving tool for law enforcement officers; it would help law enforcement officers trace firearms found at crime scenes, including domestic violence scenes.¹⁵⁹ Access to a registry would allow law enforcement officials to more easily identify to whom a given weapon belongs, facilitating case investigations and convictions.

Even without direct law enforcement officer involvement, a registry would benefit the criminal legal system through its requirement that gun owners keep their information up to date. Upon receipt of updated information, ATF officers could rescind a gun owner's lawful registration certificate where the circumstances warrant it. This would capture a class of firearms owners who once possessed their firearms legally but have since become ineligible.

When victims avail themselves of the criminal legal system, a registry would also be helpful in that it would facilitate criminal prosecutions. The legality of firearms possession is implicated at both the state and the federal level. Sometimes, state law will permit a convicted misdemeanor of domestic violence to possess a firearm,¹⁶⁰ while federal law prohibits it. State prosecutors, who enforce domestic violence criminal statutes, could access the registry in preparing for trial or determining what plea offer to make. Where a state prosecutor is able to identify, through the registry, that a defendant currently lawfully possesses a firearm, she can make a tailored plea deal that requires the defendant to surrender the firearm under certain terms. The prosecutor could offer a lesser sentence or a reduced charge in exchange for such an agreement by the defendant. This result

156. 18 U.S.C. § 922(g)(8).

157. Garen J. Wintemute, Shannon Frattaroli, Barbara E. Claire, Katherine Vittes, & Daniel W. Webster, *Identifying Armed Respondents to Domestic Violence Restraining Orders and Recovering Their Firearms: Process Evaluation of an Initiative in California*, 104 AM. J. PUBLIC HEALTH (2014).

158. See *supra* Section III.A. regarding this Article's proposed registry requirements.

159. *Registration*, GIFFORDS, *supra* note 74.

160. See *Domestic Violence and Firearms*, GIFFORDS, *supra* note 47.

would both benefit the victim—by removing the firearm from the dangerous individual—while also not necessarily further burdening the criminal legal system.

By contrast, state prosecutors may check the registry and note that no firearms are registered to the defendant. However, in interviewing the victim or other witnesses, the prosecutor may come to find out that the defendant does possess a firearm. The prosecutor could use this knowledge as a bargaining chip in reaching a plea agreement with the defendant in several ways. First, the prosecutor could require the defendant to surrender the firearm in exchange for a decision not to charge the defendant with possession of an illegal firearm if they are ineligible to legally possess a firearm. A prosecutor could also work with defense counsel to advise the defendant on the illegality of his firearm possession subsequent to a domestic violence conviction.

Federal prosecutors could utilize the registry as a clear record of when a particular defendant came into possession of a firearm, and when, if at all, that possession became unlawful.

Finally, the registry would help judges presiding over criminal cases to carefully craft jail sentences that address the real harm to victims: their partners' access to firearms. If a judge makes a finding of guilt, either as a result of a guilty plea or after an evidentiary hearing, the judge would then be empowered to search the registry and identify whether the defendant possesses firearms. If the defendant does possess firearms, the judge could advise him on how to legally dispossess himself of that weapon in order to comply with federal (and possibly state) law. The judge could set out specific requirements, time periods, or other logistics under which the defendant must surrender the firearm. The judge may also find in the registry that the defendant has no firearms in his possession; but that may contradict either the recitation of the facts by the prosecutor or the findings of fact after a trial. Where a judge determines that a defendant does have access to a firearm, though it is not legally registered, the judge could still require the defendant to surrender the firearm on the same terms discussed above. The judge could also advise the defendant of the legal consequences of failing to surrender the firearm or of failing to register the firearm if he again becomes an eligible possessor in the future.

D. ADVANTAGES FOR VICTIMS WHO USE THE CIVIL LEGAL SYSTEM

A registry could benefit victims of domestic violence in several civil legal system contexts. Two particular civil legal contexts are relevant here: protection order cases and custody and visitation cases.

In protection order cases, attorneys and *pro se* litigants should have access to the registry to determine whether a respondent has access to a firearm.¹⁶¹ Evidence of firearm registration could be used to bolster a petitioner's testimony that the respondent does, in fact, have a firearm. It could also increase her

161. See *supra* Section III.C. about this Article's proposed affidavit access to the registry.

credibility in testifying that she has seen, or been threatened with, a firearm in the past, particularly if the respondent denies having access to it. By contrast, if a respondent has a firearm but no firearm is legally registered, an attorney could use that information to impeach a respondent's credibility, assuming the respondent testifies that he lawfully registered his weapon.

Attorneys, or petitioners representing themselves, could seek individualized relief of firearm surrender in a protection order case where the respondent is shown to have a firearm. A judge may, under ordinary circumstances, simply gloss over the federal (and depending on the jurisdiction, state) prohibition on firearm possession following the entry of a protection order; however, if the registry existed, a judge could craft a more tailored protection order depending on the firearm ownership circumstances of each particular respondent. If a judge knows that a respondent has possession of a firearm leading up to the entry of a protection order against him, that judge is more likely to advise the respondent on how to remain in compliance with the law by surrendering the weapon. The judge could also make surrendering the weapon a specific provision in the protection order. When a judge orders that a respondent surrender his firearms pursuant to the protection order, the respondent is more likely to do so or to have the firearms confiscated by law enforcement.¹⁶²

In the custody context, the registry would protect vulnerable children from parents who possess firearms illegally by allowing for corroborative evidence of what is in the best interests of the child. If one parent possesses an unregistered firearm, that could be presented as evidence of a risk to the child's physical well-being or a parent's unfitness to provide for the safety of their child. On the other hand, a parent may possess a firearm lawfully under the registry and operate under no domestic violence prejudice, but the judge may remain concerned about the children's safety. Under those circumstances, the judge could enter a provision in a custody or visitation order that that parent must keep their gun in a locked safe whenever the child is in their home or other sensible safety provisions to protect the child.

V. THE CONSTITUTIONAL PATH FORWARD

A federal firearms registry, like any other regulation implicating firearm ownership, must adhere to the constitutional rights guaranteed by the Second Amendment, which says: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."¹⁶³ A federal firearms registry would survive constitutional scrutiny, even under the new and heightened test adopted by the Supreme Court in *Bruen*, because basic registration requirements fall outside the scope of the Second Amendment's protections. Before delving into the *Bruen* analysis, it is critical to

162. Webster, *supra* note 152.

163. U.S. CONST. amend. II.

understand the path the Court took to get here. Although *Bruen* itself was not about a firearm registry, it relied heavily on *District of Columbia v. Heller*, concerning the District of Columbia's (D.C.) firearm registry, and its subsequent cases in the U.S. Court of Appeals for the D.C. Circuit. The next section briefly describes the foundational elements of registries in D.C. and Hawaii, two jurisdictions that require registration upon possession of all firearms, and of the Record. Following this description is an analysis of the constitutional scrutiny that D.C. and Hawaii registries face, followed by the constitutional scrutiny they each faced, and how the basic elements of each registry have been upheld.

A. MODEL STATE REGISTRIES: THE DISTRICT OF COLUMBIA AND HAWAII

1. Requirements of the Registries

In both D.C. and Hawaii, an individual is required to register any firearm in their possession.¹⁶⁴ A person attempting to register a firearm must provide certain personal information to the local police department. Relevant information includes their name, address, date of birth, and sex.¹⁶⁵ The applicant must also provide specific information regarding the firearm to be registered, including the type of firearm,¹⁶⁶ serial number,¹⁶⁷ and from whom the firearm was obtained.¹⁶⁸ D.C. also requires applicants to list any instances when they have been denied a firearm registration certificate or license in the past by any jurisdiction,¹⁶⁹ as well as the state where the firearm will be kept.¹⁷⁰ Both D.C. and Hawaii also require that applicants be fingerprinted and photographed,¹⁷¹ and both jurisdictions charge a nominal registration fee.¹⁷² D.C. also requires registrants to

164. D.C. CODE § 7-2502.06(a) (2020) (“An application for a registration certificate shall be filed (and a registration certificate issued) prior to taking possession of a firearm from a licensed dealer or from any person or organization holding a registration certificate therefor. In all other cases, an application for registration shall be filed immediately after a firearm is brought into the District. It shall be deemed compliance with the preceding sentence if such person personally communicates with the Metropolitan Police Department (as determined by the Chief to be sufficient) and provides such information as may be demanded; provided, that such person files an application for a registration certificate within 48 hours after such communication.”); HAW. REV. STAT. § 134-3 (2019): (“Every resident or other person arriving in the State who brings or by any other manner causes to be brought into the State a firearm of any description, whether usable or unusable, serviceable or unserviceable, modern or antique, shall register the firearm within five days after arrival of the person or of the firearm, whichever arrives later, with the chief of police of the county of the person’s place of business or, if there is no place of business, the person’s residence or, if there is neither a place of business nor residence, the person’s place of sojourn. . .”).

165. D.C. CODE § 7-2502.03(b) (name, addresses from the past 5 years, employer, employer information, sex, date and place of birth, any past denial of a firearm); HAW. REV. STAT. § 134-2(b).

166. D.C. CODE § 7-2502.03(b)(9); HAW. REV. STAT. § 134-2(f).

167. D.C. CODE § 7-2502.03(b)(9); HAW. REV. STAT. § 134-2(f).

168. D.C. CODE § 7-2502.03(b); HAW. REV. STAT. § 134-2(f).

169. D.C. CODE § 7-2502.03(b)(6).

170. *Id.* at § 7-2502.03(b)(11).

171. D.C. CODE § 7-2502.04; HAW. REV. STAT. § 134-3(a)(3).

172. D.C. CODE § 7-2502.05(b); HAW. REV. STAT. § 134-3(f).

complete a firearms training and safety class, free of charge, provided by the Chief of Police.¹⁷³

2. Violations

The Record, which covers NFA guns, and the Hawaii registry both criminalize the failure to properly register one's firearms. A violation of the federal registry requirements of the Record can result in a fine of up to \$10,000 and a prison sentence of up to ten years.¹⁷⁴ In Hawaii, a person who fails to register is guilty of a misdemeanor.¹⁷⁵ Hawaii will also confiscate any weapon not properly registered within five days of the owner receiving notice of a violation,¹⁷⁶ and the federal government states that unregistered firearms "shall be subject to seizure and forfeiture."¹⁷⁷

D.C. does not criminalize the failure to register a firearm under its statute. Rather, a first-time violation of the statute results in a civil fine of \$100.¹⁷⁸ A second violation results in a \$500 civil fine, the revocation of the registrant's registration certificate, and a five-year bar on possessing any firearm.¹⁷⁹ A third violation results in a \$1,000 civil fine, the revocation of the registrant's registration certificate, and a permanent bar on possessing any firearm within the jurisdiction.¹⁸⁰

3. Privacy

The Record defines NFA registration forms as tax documents, and the federal government generally cannot disclose tax documents to anyone except the taxpayer or their designee.¹⁸¹ The statute does include a list of exemptions when the government may disclose tax returns to "persons with having material interest," including close family members, those jointly filing, members of a partnership, and several other narrow categories.¹⁸² Therefore, there is no mechanism for a third party to access another person's firearm registration records.

Both D.C. and Hawaii specify by statute that records contained in their firearms registries are confidential and not available as public records.¹⁸³ Their statutes go into no further detail about who may access the records.

173. D.C. CODE § 7-2502.03(a)(13)(A). Individuals are exempt from this requirement if they have received firearms training in the U.S. military or have completed a reasonably equivalent training in another jurisdiction. *Id.* § 7-2502.03(a)(13)(B).

174. 26 U.S.C. § 5871.

175. HAW. REV. STAT. § 134-17(c).

176. *Id.*

177. 26 U.S.C. § 5872(a).

178. D.C. CODE § 7-2502.08(e)(1).

179. *Id.* at § 7-2502.08(e)(2).

180. *Id.* at § 7-2502.08(e)(3).

181. 26 U.S.C. § 6103.

182. *See id.* at § 6103(e).

183. D.C. CODE § 7-2502.11(a); *see* HAW. REV. STAT. § 134-3(b) (exceptions for processing the registration, for database management by the Hawaii criminal justice data center, by a law enforcement agency for the lawful performance of its duties, or by order of a court).

Unlike D.C. and Hawaii, California does not have a comprehensive firearm registry. However, California does require the state attorney general to collect records of firearm sales within the state and develop a registry of that information.¹⁸⁴ Generally, information is available to law enforcement officers and to city attorneys prosecuting a civil action.¹⁸⁵ Unlike D.C. and Hawaii, however, California lays out certain circumstances under which registry information can be disseminated to members of the public.¹⁸⁶ The statute specifically contemplates that victims of crime be given access to the registry information under certain circumstances, including when a crime is being or has been prosecuted, or when the victim has a restraining order.¹⁸⁷ This statute opens the door for the registry to be used not only as a tool for law enforcement, but also for domestic violence victims directly to learn more about what, if any, firearms their abusive partner has registered in their name. The statute does not contemplate access to registration records for a victim of domestic violence who has not sought relief from the legal system.

The California state code also specifies that information in its registry shall be available to researchers affiliated with the University of California, Davis California Firearm Violence Research Center.¹⁸⁸ This provision was recently challenged by gun owners who alleged it violated the Fourteenth Amendment¹⁸⁹ and

184. CAL. PENAL CODE § 11106 (a)–(b) (2022).

185. *Id.* at § 11106(b)(3).

186. *Id.* at § 11106(c)(2)–(3)

(“(2) Information may be disseminated pursuant to paragraph (1) only if all of the following conditions are satisfied:

(A) The subject of the record has been arraigned for a crime in which the victim is a person described in subdivisions (a) to (f), inclusive, of Section 6211 of the Family Code and is being prosecuted or is serving a sentence for the crime, or the subject of the record is the subject of an emergency protective order, a temporary restraining order, or an order after hearing, which is in effect and has been issued by a family court under the Domestic Violence Prevention Act set forth in Division 10 (commencing with Section 6200) of the Family Code.

(B) The information is disseminated only to the victim of the crime or to the person who has obtained the emergency protective order, the temporary restraining order, or the order after hearing issued by the family court.

(C) Whenever a law enforcement officer disseminates the information authorized by this subdivision, that officer or another officer assigned to the case shall immediately provide the victim of the crime with a “Victims of Domestic Violence” card, as specified in subparagraph (H) of paragraph (9) of subdivision (c) of Section 13701.

(3) The victim or person to whom information is disseminated pursuant to this subdivision may disclose it as they deem necessary to protect themselves or another person from bodily harm by the person who is the subject of the record.”).

187. *Id.*

188. *Id.* at § 11106(d).

189. Several courts have considered whether personal information regarding gun ownership is privacy protected and have concluded that it is not. *See, e.g.*, *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1300 (11th Cir. 2017) (holding that a Florida firearm privacy statute, which prevented medical professionals from asking patients whether they owned firearms due to privacy concerns, violated the medical professionals’ First Amendment free speech rights).

Second Amendment rights.¹⁹⁰ After the Supreme Court decided *Bruen*, the U.S. District Court for the Southern District of California ordered the parties to provide supplemental briefs. The California court then dismissed the plaintiffs case.¹⁹¹

4. Success (and Failure) of the Registries

Hawaii and D.C. have experienced disparate levels of success with their firearms registries. The registry is one reason Hawaii has been ranked second in the country in the strength of its gun control laws. That combination of laws has helped Hawaii enjoy the lowest rates of gun violence in the country.¹⁹² Hawaii's capital, Honolulu, has the lowest rate of violent crime compared with all other cities in the U.S.¹⁹³ On the other hand, other, non-gun related crime, such as property crime, exists in Hawaii on a relatively similar scale to the rest of the country.¹⁹⁴ Only about 25% of households in Hawaii have a gun, compared with 57% of households nationwide.¹⁹⁵

Law enforcement in Hawaii lauds its jurisdiction's firearm registries as a critical tool in solving crime and improving safety. In Hawaii Police Department Chief Paul K. Ferreira's words:

Firearms checks are used on a daily basis to confirm ownership of firearms recovered during the execution of search warrants, of firearms routinely found in the possession of suspects who are wanted for crimes, and firearms located within vehicles during traffic stops. Having the ability to access a person's firearms information prior to arriving at a domestic violence type call can provide vital information for threat assessment and officer safety. Being able to verify the ownership of a firearm or where it has been transferred to have led to multiple calls for service being solved to include burglaries, theft and violent crimes.¹⁹⁶

Similarly, the Criminal Justice Division of the Department of the Attorney General of Hawaii expressed that:

The courts routinely order that firearms are to be surrendered by persons who have been disqualified from ownership of firearms upon being charged with or convicted of felonies and certain misdemeanors, including domestic violence offenses. Also, a restraining or protective

190. Complaint at 1, *Doe v. Bonta*, 2022 WL 71720 (S.D. Cal. Jan. 5, 2022).

191. *Doe v. Bonta*, No.: 22-cv-10-LAB-DEB, 2023 WL 187574 (S.D. Cal. Jan. 12, 2023).

192. Colin Moore, *Why Hawai'i Has America's Lowest Rates of Gun Violence*, ZOCALO PUBLIC SQUARE (July 31, 2018), <https://perma.cc/4M8G-Q5EB>.

193. *Id.*

194. *Id.*

195. *Id.*

196. GVPEDIA, *supra* note 125.

order, particularly a domestic violence protective order or gun violence protective order, will prohibit the possession of firearms. Law enforcement officers serving the protective order can verify whether the person being served owns firearms and account for its surrender. Additionally, when law enforcement serves warrants or execute evictions, the firearm registry can provide vital information for threat assessment and officer safety.¹⁹⁷

By contrast, D.C. has the fourth highest rate of gun violence in the U.S., as well as the second highest rate of firearm homicides and assaults.¹⁹⁸ These high rates persist despite the existence of a firearms registry and otherwise strict gun control laws. D.C. “borders Virginia, which does not have strong gun laws.”¹⁹⁹ Weaker gun laws, like those in Virginia, lead to higher rates of gun violence not only in their own jurisdictions, but in neighboring jurisdictions as well.²⁰⁰ A primary reason for this spillover of gun violence into D.C. is gun trafficking from other states with weaker laws. One study found that in 2017, “nearly every gun recovered at a crime scene in DC was originally purchased in another state.”²⁰¹ Crime guns²⁰² are imported into D.C. at nearly forty-four times the rate they are exported.²⁰³ This proved a serious enough issue that the U.S. Department of Justice launched a Firearms Trafficking Strike Force in D.C. to disrupt illegal trafficking in July 2021.²⁰⁴ Data on the success of that strike force is not yet available. The relative lack of success of D.C.’s firearm registry is one reason a federal registry is critical; a state-by-state approach is inherently limited by states that decide not to create registries of their own.

In addition to understanding their differing levels of success, and what that means for a federal firearms registry, it is also critical to analyze how D.C.’s and Hawaii’s firearm registries have been scrutinized by the courts.

197. *Id.*

198. *Gun Violence in the District of Columbia*, EVERYTOWN FOR GUN SAFETY (Jan. 2021), <https://perma.cc/K3RY-QHHT>.

199. Danielle Kurtzleben, *FACT CHECK: Is Chicago Proof That Gun Laws Don’t Work?*, NPR (Oct. 5, 2017), <https://perma.cc/8XA7-SR2H>.

200. *Gun Safety Policies Save Lives*, EVERYTOWN FOR GUN SAFETY (Jan 19, 2022), <https://perma.cc/9B39-SXDF>.

201. *Washington DC Gun Laws*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://perma.cc/72PR-8NM9> (last visited Dec. 14, 2022).

202. “A crime gun is a gun that has been recovered by law enforcement after being used in a crime, suspected of being used in a crime, or the possession of the gun itself may have been a crime.” *What is a Crime Gun?*, UNITED AGAINST GUN VIOLENCE, <https://perma.cc/XB4Q-J846> (last visited Dec. 14, 2022).

203. *Washington DC Gun Laws*, GIFFORDS, *supra* note 201.

204. Press Release, U.S. Attorney’s Office for the Eastern District of Va., Department of Justice Announces Launch of Firearms Trafficking Strike Forces to Crack Down on Sources of Crime Guns (July 23, 2021), <https://perma.cc/4UR9-ZHBT>.

B. HISTORICAL CONSTITUTIONAL ANALYSIS OF STATE REGISTRIES

1. Challenges to the District of Columbia's Registry

The Supreme Court issued its landmark gun rights decision in *District of Columbia v. Heller* in 2008. In *Heller*, the Court directly addressed the initial gun registry that had been passed by the D.C. legislature.²⁰⁵ Specifically, D.C. had passed two separate laws: one which banned the possession of unregistered firearms and one which prohibited the registration of handguns.²⁰⁶ The combined effect of these laws effectively banned the possession of handguns in D.C.²⁰⁷ The Court found that this regulatory scheme violated the Petitioner's Second Amendment rights, and held that the Second Amendment confers an individual right to keep and bear arms; this right is unrelated to militia service, but rather for the purpose of self-defense.²⁰⁸

It is important to note that, when the Court decided *Heller*, it did not specify a test under which to determine the constitutionality of future firearms regulations. Instead, the Court found that, under any test, D.C. handgun registration scheme was unconstitutional.²⁰⁹ The Court did specify that a rational basis test was not the appropriate standard of review,²¹⁰ but did not indicate what level of scrutiny should be applied moving forward.

However, the Supreme Court was careful to caution that “like most rights, the right secured by the Second Amendment is not unlimited . . . nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”²¹¹

After the Supreme Court's ruling in *Heller*, the D.C. legislature attempted to rework its registration provisions to comply with the law. When the new law was challenged, the U.S. Court of Appeals for the D.C. Circuit, in *Heller v. District of Columbia (Heller II)*, adopted a two-step test to determine whether the law was constitutional. First, the court held that it must determine whether the provision impinges upon a Second Amendment right.²¹² If a law did not impinge upon a firearm owner's Second Amendment right, the court would uphold it.²¹³ On the other hand, if the law did impinge upon an individual's Second Amendment right, the court would next determine whether the provision

205. *District of Columbia v. Heller*, 554 U.S. 570, 573 (2008).

206. *Id.* at 570.

207. *Id.* at 576.

208. *Id.* at 572.

209. *Id.* at 635.

210. *Id.* at 634–35.

211. *Id.* at 626–27.

212. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1253 (D.C. Cir. 2011).

213. *Id.* at 1252–53.

survived intermediate scrutiny.²¹⁴ In adopting this approach, the court cited the other Circuits which use the same test.²¹⁵

In *Heller II*, the court found that the mere requirement by the D.C. legislature that residents register their handguns was presumptively constitutional.²¹⁶ It so held because handgun registration laws have been a longstanding and accepted practice in the U.S. and because they are “self-evidently de minimis.”²¹⁷ The court distinguished long-standing regulations from more recent regulations, which are not presumptively constitutional in the same way.²¹⁸

Because the court decided that basic handgun registration requirements did not impinge on a Second Amendment right, they did not reach the second question on that issue of whether the basic handgun registration requirements survived immediate scrutiny.²¹⁹ Though it upheld the basic registration regime, the court remanded much of D.C.’s challenged legislation for further development of the record to see whether provisions could survive intermediate scrutiny;²²⁰ the court assessed those provisions in *Heller v. District of Columbia (Heller III)*.²²¹ The *Heller II* court was also careful to note “the level of scrutiny applicable under the Second Amendment surely ‘depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right. . . . That is, a regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify.’”²²²

The *Heller III* court found that several requirements of D.C.’s gun registry did impinge upon the Second Amendment right but that they survived intermediate scrutiny.²²³ Intermediate scrutiny required the legislature to demonstrate that a law is “substantially related to an important governmental interest.”²²⁴ In the *Heller* cases, the governmental interests put forth by D.C. were two-fold: that the registration regulations protect the safety of law enforcement officers and that they aid in crime control.²²⁵ The court, in *Heller III*, ultimately rejected the first justification, as it found insufficient evidence that the registration requirements

214. *Id.* at 1265–66.

215. *Id.* (citing *Ezell v. Chicago*, 651 F.3d 684 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010)).

216. *Heller II*, 670 F.3d at 1253.

217. *Id.* at 1254–55; *see also* *Justice v. Cicero*, 577 F.3d 768 (7th Cir. 2009) (upholding a town ordinance requiring gun registry).

218. *Heller II*, 670 F.3d at 1253.

219. *Id.* at 1261.

220. *Id.*

221. *Heller v. District of Columbia (Heller III)*, 801 F.3d 264, 269 (D.C. Cir. 2015).

222. *Heller II*, 670 F.3d at 1257.

223. *Heller III*, 801 F.3d at 264.

224. *Heller II*, 670 F.3d at 1257.

225. *Id.* at 1258.

aided in officer safety.²²⁶ It reviewed the registration provisions based on whether D.C. had offered substantial evidence to demonstrate that the provisions would mitigate threats to public safety.²²⁷

The court in *Heller III* found that fingerprinting and photographing would impinge on a registrant's Second Amendment rights.²²⁸ However, the court upheld both requirements, finding that D.C. demonstrated that they would "directly and materially advance public safety by preventing at least some ineligible individuals from obtaining weapons and, more important, by facilitating identification of the owner of a registered firearm during any subsequent encounter with the police."²²⁹

The court also found that the imposition of a fee upon registration would impinge on a gun owner's Second Amendment right.²³⁰ It then analyzed whether the requirement could survive intermediate scrutiny. In this analysis, it found that reasonable fees associated with a constitutional registration requirement are themselves constitutional.²³¹

Finally, the *Heller III* court found several of D.C.'s gun registry requirements did impinge upon Second Amendment rights and did not survive intermediate scrutiny. The D.C. Circuit struck down language in the amended statute that would have allowed the Metropolitan Police Department to compel an applicant for registry to present the firearm in person at the police station.²³² D.C. argued that requiring a registrant to present the firearm in person would allow law enforcement to verify that the application information is correct. However, D.C. did not offer any evidence that such verification would improve public safety, and the court ultimately found that such a requirement could actually harm public safety by leading to an accidental shooting or theft of the firearm on the way to the police station.²³³ The D.C. Circuit also considered language in the statute which required registrants to demonstrate knowledge of D.C.'s firearms laws.²³⁴ The court found no evidence that such a knowledge test improved public safety and thus invalidated it.²³⁵

226. *Heller III*, 801 F.3d at 275 (the court so found because the Metropolitan Police Department officers "are trained to treat situations where there might be a crime in progress or domestic dispute or some other situation possibly involving violence as always having a potential to have a dangerous weapon present," and that officers regularly exercise caution even when there is no indication that a weapon would be present at the site of a call).

227. *Id.*

228. *Id.* at 297.

229. *Id.* at 277.

230. *Id.* at 297.

231. *Id.* at 278.

232. D.C. CODE § 7-2502.04(c); *Heller III*, 801 F.3d at 277.

233. *Heller III*, 801 F.3d at 277.

234. D.C. CODE § 7-2502.03(a)(10).

235. *Heller III*, 801 F.3d at 277.

Additionally, the amended D.C. statute limited the availability of firearms registration to one pistol per thirty days.²³⁶ The D.C. Circuit struck this down, again, for D.C.'s failure to demonstrate that the law promoted public safety.²³⁷ D.C. argued that this limitation would reduce gun trafficking because it would limit the number of guns in circulation; however, the evidence presented merely demonstrated that minimizing gun *purchases*, rather than gun *registrations*, would reduce gun trafficking. No evidence was presented drawing a correlation between reducing gun trafficking and limiting pistol registration to one per month.

Finally, the amended D.C. firearms registry statute required that a gun owner renew their registration every three years.²³⁸ D.C. offered three justifications for this renewal requirement: (1) improving public safety by making sure registrants had not fallen into prohibited categories since their last registration; (2) maintaining the accuracy of the registration database; and (3) verifying the location of the firearms.²³⁹ The court dismissed these three justifications in turn.²⁴⁰ It found that background checks could be performed at any time, thus obviating the need for re-registration to account for applicants who entered into prohibited classes since their initial registration. It found that the accuracy of the database and location of the firearms interests were met by other registration requirements that were more narrowly tailored to this goal (e.g., the requirement on gun owners to immediately report a lost or stolen weapon).²⁴¹ Finally, D.C. introduced no evidence that renewing registration would cause gun owners to re-examine the physical location of their firearms.²⁴²

2. Challenges to Hawaii's Registry

Hawaii's firearm registration faced similar constitutional challenges to D.C.'s scheme, although these challenges did not reach the Supreme Court. After hearing a challenge to similar legislation, the U.S. District Court for the District of Hawaii struck down one provision similar to provisions invalidated by *Heller III* in D.C.²⁴³ Like the D.C. Circuit, the District Court for Hawaii struck down a provision in the Hawaii legislation that would have permitted the local police to require registrants to bring their firearms to the police department.²⁴⁴ The court found that the stated governmental interest of improving public safety was legitimate but that the government failed to demonstrate how in-person inspection of firearms would further this interest.²⁴⁵

236. D.C. CODE § 7-2502.03(e).

237. *Heller III*, 801 F.3d at 280.

238. D.C. CODE § 7-2502.07(a)–(c).

239. *Heller III*, 801 F.3d at 277–78.

240. *Id.*

241. *Id.* at 278.

242. *Id.* at 277–78.

243. *Yukutake v. Connors*, 554 F. Supp. 3d 1074, 1080 (D. Haw. 2021).

244. *Id.*

245. *Id.* at 1088.

The District Court for Hawaii also struck down a requirement, unique to any enumerated by D.C., that would have imposed a ten-day time limit between the issuing of a permit for a firearm and the purchase of that firearm.²⁴⁶ The government had argued that such a limit would improve public safety in that “such requirements provide more effective supervision and control over the sale, transfer, and possession of firearms.”²⁴⁷ The court found, however, that Hawaii failed to demonstrate how this limit would further that interest.²⁴⁸

Although the D.C. and Hawaii courts both utilized intermediate scrutiny when reviewing the provisions in their jurisdiction’s gun registries, the constitutional analysis changed entirely with the Supreme Court’s decision in *Bruen* in the summer of 2022.

C. A NEW STANDARD FOR THE SECOND AMENDMENT: *NEW YORK STATE RIFLE & PISTOL ASSOCIATION V. BRUEN*

On June 23, 2022 the Supreme Court issued its long-anticipated decision in *New York State Rifle & Pistol Association Inc v. Bruen*.²⁴⁹ The question before the Court was whether a New York law requiring gun owners to prove a “proper cause” for concealed carry license, violated the Second Amendment.²⁵⁰ The Court answered that question in the affirmative.²⁵¹ The larger concern from the case is that the Court expressly declined to adopt the two-part intermediate scrutiny test that the D.C. Circuit and other appellate courts had adopted in *Heller*’s wake.²⁵² Rather, the Court adopted a new test. Justice Thomas, writing for the majority, stated:

When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s ‘unqualified command’²⁵³

The *Bruen* test is a blow for gun control advocates interested in passing new firearms regulations. It significantly raises the burden of proof on the government to justify such regulations and casts the constitutional validity of many existing regulations in doubt. However, the federal registry proposed in this Article would survive *Bruen*’s test for the reasons explained below.

246. *Id.* at 1083.

247. *Id.*

248. *Id.* at 1084.

249. See generally *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

250. *Id.* at 2125.

251. *Id.* at 2122.

252. *Id.* at 2125–26.

253. *Id.*

D. APPLYING *BRUEN* TO A FEDERAL FIREARMS REGISTRY

1. Basic Registration Requirements

Basic gun registration requirements fall outside the scope of the Second Amendment and therefore are not subject to *Bruen*'s heightened test demonstrating that the provisions are rooted in the nation's history.

The D.C. Circuit in *Heller II* found that the basic elements of D.C.'s registration scheme imposed only a de minimis burden on gun owners: "basic registration requirements are self-evidently de minimis, for they are similar to other common registration or licensing schemes, such as those for voting or for driving a car, that cannot reasonably be considered onerous."²⁵⁴ Because of that, these requirements were "presumed not to burden conduct within the scope of the Second Amendment."²⁵⁵

The Supreme Court could change course and decide that a federal gun registration requirement does implicate the Second Amendment right. If that were to happen, Congress would need to demonstrate that the registry "is consistent with the Nation's historical tradition of firearm regulation."²⁵⁶ This, again, is a finding that has already been made by the D.C. Circuit in *Heller II*.²⁵⁷ *Heller II* considered bans on felons possessing firearms to be "longstanding;" those began to be enacted in the early 1900s.²⁵⁸ This was the same time frame when a number of jurisdictions within the U.S. developed firearm registries.²⁵⁹ The court reviewed these laws and found that "the basic requirement to register a handgun is longstanding in American law, accepted for a century in diverse states and cities and now applicable to more than one fourth of the Nation by population."²⁶⁰

Unfortunately, the Court in *Bruen* provides little guidance for determining whether particular gun regulations are within the nation's historical tradition. The Court's sole parameter is that the Second Amendment was ratified in 1791 and the Fourteenth Amendment, making the Second Amendment binding on the states, was passed in 1868.²⁶¹ The law at issue in *Bruen* mirrored those passed in

254. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1247 (D.C. Cir. 2011).

255. *Id.* at 1253.

256. *Bruen*, 142 S. Ct. at 2130.

257. *Heller II*, 670 F.3d at 1253 ("We uphold the requirement of mere registration because it is longstanding, hence "presumptively lawful. . . The record supports the view that basic registration of handguns is deeply enough rooted in our history to support the presumption that a registration requirement is constitutional.").

258. *Id.* at 1254.

259. *Id.* (citing Act of May 25, 1911, ch. 195, § 2, 1911 N.Y. Laws 444–45 (a New York statute that required gun sellers to keep a register, which had to be open for inspection of any peace officer); Illinois Act of Apr. 16, 1881; Georgia Act of Aug. 12, 1910, No. 432, § 2, 1910 Ga. Laws 134; Oregon Act of Feb. 21, 1917, ch. 377, 1917 Or. Laws 804; Michigan, Act of June 2, 1927, No. 372, § 9, 1927 Mich. Laws 887).

260. *Id.*

261. *Bruen*, 142 S. Ct. at 2119.

the early 1900s.²⁶² Little else in the historical record supported the notion that such laws were commonplace. Specifically, the Court found that “the historical record compiled by respondent does not demonstrate a tradition of broadly prohibiting the public carry or commonly used firearms for self-defense. Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense.”²⁶³

The same cannot be said of gun registration laws, which are plainly deeply rooted in this nation’s tradition of firearm regulation. Early gun registration schemes date back to seventeenth century England. For example, in 1660, England ordered all gunsmiths to produce a record of the firearms they sold, including to whom they were sold; this reporting was required on a weekly basis.²⁶⁴ Early American colonies adopted similar registration laws. In 1631, a Virginia law required that all “arms and munitions” be reported upon arrival to the colony.²⁶⁵

Some early registration laws were directly linked to mandatory participation in local militias. With the exception of Pennsylvania, all colonies enrolled white adult males in state militias.²⁶⁶ Militia members were required to own firearms, and states kept track of those weapons.²⁶⁷ For example, in the 1700s, Massachusetts militiamen had to account for their firearms and this information was transmitted to the state.²⁶⁸

Between 1607 and 1790, three states had gun registration laws.²⁶⁹ From 1791 to 1867, that number was up to eight.²⁷⁰ Between 1868 and 1899, twelve states had such laws.²⁷¹ And from 1900 until 1934, eighteen states had them.²⁷² That culminated with the National Firearms Act of 1934,²⁷³ which was the first federal firearm registry for limited types of weapons. Registration laws, therefore, are deeply rooted in this nation’s tradition, dating back to English tradition and persisting until the present day, when twenty states have some firearm registration requirements.²⁷⁴ Thus, even if Congress were to find that basic gun registration

262. *Id.* at 2122.

263. *Id.* at 2137.

264. Bernard E. Harcourt, *On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars (A Call to Historians)*, 73 *FORDHAM L. REV.* 653, 661 (2004).

265. Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 *L. & CONTEMP. PROBLEMS* 55, 76 (2017).

266. Saul Cornell, *Five Types of Gun Laws the Founding Fathers Loved*, *CONVERSATION* (Oct. 15, 2017), <https://perma.cc/SPR4-7P29>.

267. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 510 (2004).

268. *Id.*

269. Spitzer, *supra* note 265, at 60.

270. *Id.*

271. *Id.*

272. *Id.*

273. *See supra* Section III.

274. *See* Spitzer, *supra* note 265, at 57.

requirements impinge upon the Second Amendment right, the basic requirements of a registry would survive the new *Bruen* test given this nation's historical tradition of registering firearms since its founding.

The Court would also uphold a requirement within the registry that gun owners keep their information up to date with their local ATF offices. This requirement differs slightly from the renewal requirement which the D.C. Circuit struck down in *Heller III*. Under those regulations, firearm owners in D.C. were required to renew their registration every three years.²⁷⁵ The Court struck down this requirement, finding that the legislature's goal—maintaining the accuracy of the database information—could be achieved under more narrowly tailored means: by requiring that gun owners report their weapons as lost or stolen.²⁷⁶ This Article's proposed requirement—that registrants be required to maintain the accuracy of all information on file with ATF—builds upon this lawful aspect of D.C.'s scheme; it requires reporting information not only about actual gun possession, but also about the gun owner themselves. This mirrors requirements by the DMV, state election boards, or other governmental agencies that contain an ongoing obligation on the registrant to provide accurate information. Since the basic registration requirements would survive under *Bruen*—either as falling outside the Second Amendment's purview or as a longstanding tradition in this nation's history—the requirement that this information remain up to date contains no additional burden and would also survive the Court's review.

2. Fees

A nominal administrative fee will also survive as a tax on an otherwise constitutional registration requirement.²⁷⁷ The fee would be used solely to offset costs to ATF of processing and maintaining new information. Congress should explicitly ground the legislation authorizing the creation of the registry in its tax power. Article I, Section 8 of the Constitution states that “[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.”²⁷⁸

Courts have consistently held that Congress may use its tax power to regulate firearms.²⁷⁹ In 1937, the Supreme Court upheld the firearms registry for

275. *Heller v. District of Columbia (Heller III)*, 801 F.3d 264, 269 (D.C. Cir. 2015).

276. *See id.* at 278.

277. *See id.* at 278 (first citing *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (upholding a fee under a parade licensing statute “to meet the expense incident to the administering of the act and to the maintenance of public order in the matter licensed.”), and then *Kwong v. Bloomberg*, 723 F.3d 160, 165–69 (2d Cir. 2013) (upholding a \$340 fee for a license to possess a handgun in one's home)).

278. U.S. CONST. art. I, § 8, cl 1.

279. *See, e.g., Sonzinsky v. United States*, 300 U.S. 506, 513 (1937); *United States v. Cox*, 906 F.3d 1170, 1183 (10th Cir. 2018).

dealers under the NFA in *Sonzinsky v. United States*, citing Congress's tax power.²⁸⁰

In order to withstand scrutiny as a valid use of Congress's tax power, a federal measure must be a true tax and not a penalty imposed with the intention of suppressing certain types of sales.²⁸¹ Some regulatory effect is permissible.²⁸² The regulation must be "productive of some revenue;"²⁸³ in *Sonzinsky*, the Court found that "mere registration provisions" were "obviously supportable as in aid of a revenue purpose."²⁸⁴

The Tenth Circuit reaffirmed Congress's ability to tax firearm ownership through the NFA in its decision in *United States v. Cox*.²⁸⁵ In addition, that court found that Congress had the authority to impose such a tax under its authority to enact any laws "necessary and proper" to carry out its tax power.²⁸⁶

3. Access to Registry Information

The affidavit access to registry information by intimate partners of gun owners is the most constitutionally vulnerable provision in my proposal. As discussed above, plaintiffs in California have challenged a similar provision, which makes their registry information available to local university researchers.²⁸⁷ A central argument for the California plaintiffs was that gun owners relied on California's original representation that their registration information would only be used for law enforcement purposes.²⁸⁸ That argument would fail in this case, as the registry statute would contain the proposed individual access provision from the outset.²⁸⁹ As of this writing, the California provision, which allows narrow access to registry information for crime victims, has not been challenged.

280. *Sonzinsky*, 300 U.S. at 513.

281. *Id.*; cf. *Bailey v. Drexel Furniture Co. (Child Lab. Tax Case)*, 259 U.S. 20, 36–37, 44 (1922) (invalidating a child labor tax because it went beyond a tax into penalty and was outside the presumed validity of a Congressionally-imposed tax – the tax was 10% of an employer's net income and there was a scienter requirement, which is associated with penalties and not taxes).

282. The *Sonzinsky* Court explained:

Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect . . . it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed.

Sonzinsky, 300 U.S. at 513.

283. *Id.* at 514.

284. *Id.* at 513.

285. *United States v. Cox*, 906 F.3d 1170, 1183 (10th Cir. 2018).

286. *Id.* at 1179 (citing U.S. CONST. art. 1, §8 (empowering Congress "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Power")).

287. Complaint at 2, *Doe v. Bonta*, No. 22CV0010W DEB (2022 WL 71720) (S.D. Cal. Jan. 5, 2022), available at <https://perma.cc/BZ2S-CCKH>.

288. *Id.* at 3.

289. The argument may have merit for pre-existing records collected from NICS. The disposition in *Doe v. Bonta*, 2022 WL 71720, will be instructive on whether this is a real issue.

The accessibility of the registry must survive the *Bruen* standard described above: if allowing intimate partners access to gun ownership registry information impinges upon a gun owner's Second Amendment right, then Congress would have to demonstrate that such accessibility is a longstanding tradition in this nation's history. That is simply not the case. However, a strong argument can be made that the accessibility provision this Article proposes does not impinge on a gun owner's Second Amendment right. First, access to the registry will not impact the vast majority of gun owners; most individuals simply will not take the steps to swear out an affidavit and request registry information. Most gun owners will never have their ownership information accessed by anyone outside of law enforcement.

Second, intimate partners' access to gun records imposes no burden or obligation on gun owners. It does not require any extra effort in the registration process itself, nor does it limit the number or type of firearms an individual can possess. Third, when an individual does get access to another individual's gun ownership records under my proposal, the only information produced is whether the person has a firearm, and how many and what type of firearms they possess.²⁹⁰ Personal identifying information, including home address, phone number, or email address, will not be produced.

Overall, most gun owners will not be impacted by this provision, and it is not covered by the Second Amendment's protection. If the Court disagrees, however, the proposed accessibility scheme would almost certainly be struck down, as there is no long-standing tradition of public access to gun ownership information in this country.

CONCLUSION

Domestic violence victims face a tremendous amount of risk when their abusive partners have access to weapons. Congress recognized that danger nearly thirty years ago and passed two critical pieces of legislation intended to keep firearms out of the hands of people who perpetrate domestic violence. Unfortunately, the intended protection of those laws is not currently being realized. One major obstacle in the way is the lack of any centralized database monitoring firearm ownership information. Gun owners who commit acts of domestic violence today can often simply lie and state that they have no firearms in their possession; law enforcement has little recourse when this happens. Victims of domestic violence often are not aware that the protection they have received on paper from the court—banning their partner from possessing firearms—has not materialized into removing firearms from their partners' home. A comprehensive federal firearms registry would provide much-needed information to allow law enforcement officers to do their jobs in removing firearms from those that Congress deemed too dangerous to possess them. Allowing a narrow, privacy-protected class of

290. See *supra* Section III.

individuals to access the registry to learn about firearms present in their homes or relationships will extend this knowledge directly to those who have the most to lose: victims (and potential victims) of domestic violence. Although the Supreme Court has ratcheted up the level of constitutional scrutiny required for gun control regulations to comply with the Second Amendment, the registry proposed herein would withstand that scrutiny, and is an important first step to protecting victims of domestic violence from harm or death.