Brief: The Background of Background Checks

By Chris Jeub

***Resolved: The United States should require universal background checks for all gun sales and transfer of ownership.***

The November resolution for NSDA public forum debaters calls for the US to require universal background checks, a requirement that closes claimed “loopholes” and extends into private transfer of ownership. This two-day initial brief explores the status quo of current law (specifically the National Instant Criminal Background Check System), how the background checks work along with the apparent loopholes that exist, and how effective the background checks are. We conclude with advocate groups from both sides and their positions on universal background checks for firearm sales.

Brief: The Background of Background Checks 2

National Instant Criminal Background Check System (NICS) 2

NICS is about saving lives 2

Brady Act of 1993 created the NICS of 1998 2

NICS claims efficiency 2

How background checks work 3

What background checks cover 3

Background checks draw from three databases 3

Background checks are instantaneous 90% of the time 3

What happens when clearance not instantaneous: “Default proceed” can lead to public safety implications 4

Retrieval orders are relatively rare 4

269 million background checks since NICS 5

Effectiveness of status quo 5

Mental health not a reason for most background rejections 5

40% of firearm sales done without background checks 6

DOJ: Private-party gun market leading source of guns used in crimes 6

96% of gun offenders obtained firearm through private seller 6

Licensing laws not as effective as point-of-transfer background checks 6

PRO: Advocacy for Universal Background Checks 7

The Coalition to Stop Gun Violence (CSGV) 7

Law Center to Prevent Gun Violence 7

Brady Campaign 7

19 states currently adopt extended background checks 8

Democratic Platform on gun control 8

CON: Advocacy against Universal Background Checks 8

NRA-ILA 8

Gun Owners of America 8

National Shooting Sports Foundation 9

National Association for Gun Rights 9

Second Amendment Foundation 9

Republican Platform on gun control 10

Works Cited: Universal Background Checks 11

Brief: The Background of Background Checks

National Instant Criminal Background Check System (NICS)

NICS is about saving lives

Federal Bureau of Investigation. Accessed 10/1/17. National Instant Criminal Background Check System (NICS). <https://www.fbi.gov/services/cjis/nics>

The National Instant Criminal Background Check System, or NICS, is all about saving lives and protecting people from harm—by not letting guns fall into the wrong hands. It also ensures the timely transfer of firearms to eligible gun buyers. Mandated by the Brady Handgun Violence Prevention Act of 1993 and launched by the FBI on November 30, 1998, NICS is used by Federal Firearms Licensees (FFLs) to instantly determine whether a prospective buyer is eligible to buy firearms. Before ringing up the sale, cashiers call in a check to the FBI or to other designated agencies to ensure that each customer does not have a criminal record or isn’t otherwise ineligible to make a purchase. More than 230 million such checks have been made, leading to more than 1.3 million denials.

Brady Act of 1993 created the NICS of 1998

Federal Bureau of Investigation. Accessed 10/1/17. About NICS. <https://www.fbi.gov/services/cjis/nics/about-nics>

Mandated by the Brady Handgun Violence Prevention Act (Brady Act) of 1993, Public Law 103-159, the National Instant Criminal Background Check System (NICS) was established for Federal Firearms Licensees (FFLs) to contact by telephone, or other electronic means, for information to be supplied immediately on whether the transfer of a firearm would be in violation of Section 922 (g) or (n) of Title 18, United States Code, or state law. The Brady Act is a public record and is available from many sources including the Internet at www.atf.gov.

NICS claims efficiency

Federal Bureau of Investigation. Accessed 10/1/17. About NICS. <https://www.fbi.gov/services/cjis/nics/about-nics>

The NICS is a national system that checks available records on persons who may be disqualified from receiving firearms. The FBI developed the system through a cooperative effort with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and local and state law enforcement agencies. The NICS is a computerized background check system designed to respond instantly on most background check inquiries so the FFLs receive an almost immediate response. In Calendar Year 2015, the NICS Contacted Call Centers handled calls an average of 141 seconds. After transferring the calls to the NICS Section, the wait and processing time averaged 446.3 seconds. When firearm background checks were conducted via the NICS E-check, the wait and processing time averaged 107.5 seconds. Depending on the willingness of state governments to act as a liaison for the NICS, the FFLs contact either the FBI or a designated state Point of Contact (POC) to initiate background checks on individuals possessing or receiving firearms. The background check process, as performed by the FBI and by state POCs, is described below.

How background checks work

What background checks cover

Miles Kohrman and Jennifer Mascia 2017. “Everything You Need to Know About Federal Background Checks.” The Trace, March 14, 2017. <https://www.thetrace.org/2015/07/background-checks-nics-guns-dylann-roof-charleston-church-shooting/>

What does the FBI look for in a background check? Criminal and mental health history, dishonorable military discharges, immigration status, whether someone has an open warrant, and drug use. The most common reason for a gun purchase denial is a criminal conviction. More than 175,000 fugitives, 130,000 domestic offenders, and 123,000 unlawful drug users have been denied in the 18 years NICS has been online.

Background checks draw from three databases

Miles Kohrman and Jennifer Mascia 2017. “Everything You Need to Know About Federal Background Checks.” The Trace, March 14, 2017. <https://www.thetrace.org/2015/07/background-checks-nics-guns-dylann-roof-charleston-church-shooting/>

Where do those records come from? To ascertain whether an applicant should be disqualified from owning a gun, the FBI draws from three databases: The NICS Index, which includes records contributed by federal and state agencies identifying individuals prohibited from buying a gun, for reasons ranging from criminal history to severe mental illness; the Interstate Identification Index, a database of criminal histories; and the National Crime Information Center, or NCIC, an “electronic clearinghouse” of criminal records. Records reporting to NICS by state and local agencies is notoriously spotty. According to a Bureau of Justice Statistics report published in February, at the end of 2014 there were 7.8 million active-warrant records in state warrant databases, but only about 2.1 million such records in the NCIC database. NICS also consults mental health records submitted by each state. According to a 2013 congressional report, these records can show whether someone has been “adjudicated as a mental defective” by a “court, board, commission, or other lawful authority,” or has been involuntarily committed to a mental institution — both circumstances would bar someone from purchasing a firearm. However, federal law does not require states to forward mental health records to NICS, and some states are resistant, citing privacy laws. As of March 2017, several states have submitted only a handful of disqualifying mental health records to NICS.

Background checks are instantaneous 90% of the time

Miles Kohrman and Jennifer Mascia 2017. “Everything You Need to Know About Federal Background Checks.” The Trace, March 14, 2017. <https://www.thetrace.org/2015/07/background-checks-nics-guns-dylann-roof-charleston-church-shooting/>

Back to my check: How long does it take? NICS has “instant” in its name for a reason. Department of Justice guidelines require NICS reviewers to make an immediate decision in 90 percent of cases, according to the FBI. If the check comes back clean, the FBI gives the sale a green light. If it doesn’t, the purchase is denied. Sometimes the FBI seeks more information to make a final determination on the sale, and in those cases, the check is transferred to the FBI’s Criminal Justice Information Services Division, where an examiner reaches out to local law enforcement and other state agencies.

What happens when clearance not instantaneous: “Default proceed” can lead to public safety implications

Miles Kohrman and Jennifer Mascia 2017. “Everything You Need to Know About Federal Background Checks.” The Trace, March 14, 2017. <https://www.thetrace.org/2015/07/background-checks-nics-guns-dylann-roof-charleston-church-shooting/>

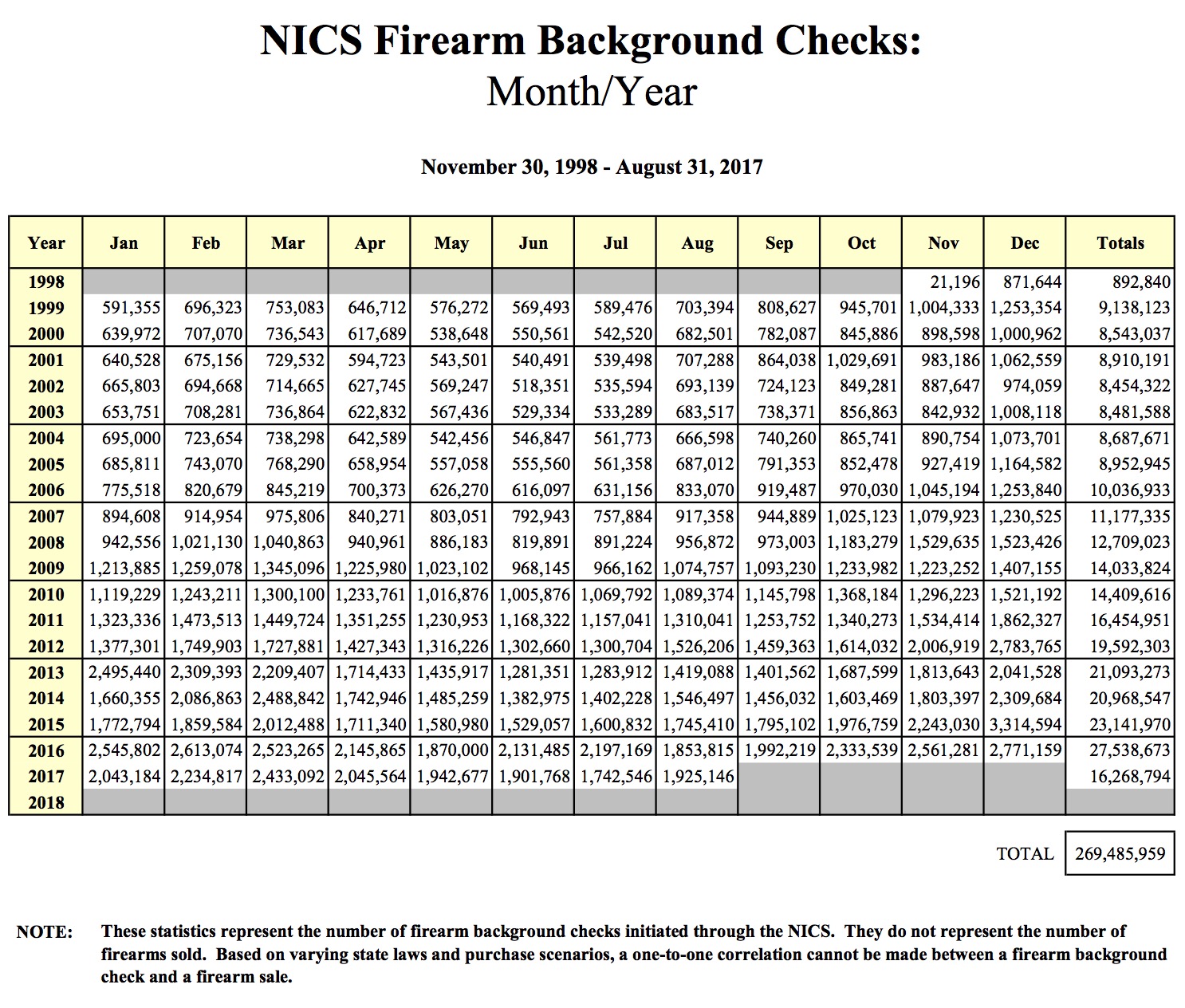
What happens when a background check does not clear right away? When a check requires more information, the FBI has three business days to make a final determination on the buyer. If a decision can’t be made in that time frame, the FFL is allowed by law to go ahead and sell the firearm, in a sale commonly referred to as a “default proceed.” The dealer is also not required to notify the FBI when a sale has been made after a three-day delay. Default proceed sales can have public safety implications. In April 2015, Dylann Roof legally purchased a Glock handgun in such a transaction after a cascade of clerical errors delayed his background check. Roof was disqualified from gun ownership due to a drug charge. Two months later, he used the weapon to murder nine parishioners at a Charleston, South Carolina, church.

Retrieval orders are relatively rare

Say my background check is denied after that three-day period. Then what happens to the gun I just bought? When a background check runs past the three-business-day deadline, the NICS examiner tasked with the case will still attempt to make the final determination on the purchaser and has up to 90 days to reach a conclusion. If the FBI determines that the buyer was prohibited, the agency sends out a retrieval order to the ATF. The ATF is then responsible for getting the gun back. Retrieval orders are relatively rare: A NICS operations report from 2000 noted that of more than 45,000 default proceeds issued that year, approximately 5,000 resulted in a retrieval order.

269 million background checks since NICS

Federal Bureau of Investigation. Accessed 10/1/17. <https://www.fbi.gov/about-us/cjis/nics/reports/nics_firearm_checks_-_month_year.pdf>



Effectiveness of status quo

Mental health not a reason for most background rejections

Miles Kohrman and Jennifer Mascia 2017. “Everything You Need to Know About Federal Background Checks.” The Trace, March 14, 2017. <https://www.thetrace.org/2015/07/background-checks-nics-guns-dylann-roof-charleston-church-shooting/>

For all the focus on mental health, the bar for denying someone on psychiatric grounds is very high, leading to relatively few rejections: 27,992 applicants have been denied because they were declared mentally unfit by a judge.

40% of firearm sales done without background checks

“Universal Background Checks.” Law Center to Prevent Gun Violence. <http://smartgunlaws.org/gun-laws/policy-areas/background-checks/universal-background-checks/>

By far the most dangerous gap in federal firearms laws today is the background check loophole. Although federal law requires licensed firearms dealers to perform background checks on prospective purchasers, it does not require unlicensed sellers to do so. An estimated 40% of all firearms transferred in the US are acquired from unlicensed sellers without a background check.

DOJ: Private-party gun market leading source of guns used in crimes

“Universal Background Checks.” Law Center to Prevent Gun Violence. <http://smartgunlaws.org/gun-laws/policy-areas/background-checks/universal-background-checks/>

According the US Department of Justice, because federal law fails to require background checks by every person who sells or transfers a gun—known as universal background checks—“individuals prohibited by law from possessing guns can easily obtain them from private sellers and do so without any federal records of the transactions.” “The private-party gun market,” one study observed, “has long been recognized as a leading source of guns used in crimes.” Although this loophole is frequently referred to as the “gun show” loophole, because of the particular problems associated with gun shows, it applies to all private firearm sales, regardless of where they occur.

96% of gun offenders obtained firearm through private seller

“Universal Background Checks.” Law Center to Prevent Gun Violence. <http://smartgunlaws.org/gun-laws/policy-areas/background-checks/universal-background-checks/>

Gun offenders overwhelmingly obtain their guns through private sales. A survey of state prison inmates in 13 states who were convicted of gun offenses found that only 13% obtained the gun from a gun store or pawnshop where background checks are required. Nearly all (96%) of those inmates who were already prohibited from possessing a gun at the time of their crime obtained the firearm through an unlicensed private seller.

Licensing laws not as effective as point-of-transfer background checks

“Universal Background Checks.” Law Center to Prevent Gun Violence. <http://smartgunlaws.org/gun-laws/policy-areas/background-checks/universal-background-checks/>

Eight states implement firearm background check requirements on private sales primarily by prohibiting private sellers from transferring firearms to purchasers who do not have a requisite state license or permit, and by requiring a background check before issuing the license or permit.  
States that Require Permits for Private Purchasers after Background Checks  
- Hawaii  
- Illinois  
- Iowa (handguns only)  
- Massachusetts  
- Michigan (handguns only)  
- Nebraska (handguns only)  
- New Jersey  
- North Carolina (handguns only)  
Hawaii, Illinois, Massachusetts, and New Jersey require a person to obtain a license or permit before purchasing any firearm from any seller, and require applicants to pass a background check in order to obtain that license or permit. Iowa, Michigan, Nebraska, and North Carolina require a person to pass a background check in order to obtain a license or permit for the purchase of a handgun but not long guns like rifles or shotguns. State licensing requirements are discussed in detail in our policy page on Licensing. While these requirements ensure that a background check has been conducted at some point, a person may fall within a prohibited category after the license or permit is issued but before the time the person attempts to purchase a firearm. As a result, licensing laws do not necessarily prevent prohibited people from accessing firearms as effectively as point-of-transfer background checks.

PRO: Advocacy for Universal Background Checks

The Coalition to Stop Gun Violence (CSGV)

The Coalition to Stop Gun Violence. Accessed October 1, 2017. <https://www.csgv.org/about-us/>

The Coalition to Stop Gun Violence (CSGV) is a 501(c)(4) organization founded in 1974. CSGV’s guiding principle is simple: We believe that all Americans have a right to live in communities free from gun violence. We pursue this goal through policy development, strategic engagement, and effective advocacy. CSGV is a thought leader in the modern gun violence prevention movement. Drafting, passing, and implementing evidence-based legislation is our number one priority. While legislative gridlock has largely stymied gun legislation at the federal level, CSGV has worked hard to secure major victories in the states. In recent years, we have worked with scientific experts to develop the Gun Violence Restraining Order (GVRO), a law that allows law enforcement and family members to temporarily remove firearms from a loved one in crisis. The GVRO, which recently passed in California, Oregon, and Washington, is based on data-driven behavioral risk factors for dangerousness rather than a diagnosis. Focusing on behavior helps identify individuals at risk of violence towards themselves or others without unfairly stigmatizing those living with mental illness, the vast majority of whom will never be violent. Our commitment to addressing gun violence in all its forms — from suicide to intimate partner homicide to the shootings that never make headlines — sets us apart. In addition to our data-driven policy development, CSGV is dedicated to taking on the National Rifle Association (NRA) and their toxic agenda. We were the first gun violence prevention group to use the term “insurrectionism” to describe the NRA’s dangerous interpretation of the Second Amendment. By exposing the hypocrisy of the NRA’s messaging, CSGV has reframed the debate and put the gun lobby on the defensive. Through a combination of data-driven policy development and aggressive lobbying, CSGV is leading the way forward. We invite you to explore our website, learn more about our initiatives, and help us fight for a safer America.

Law Center to Prevent Gun Violence

Law Center to Prevent Gun Violence. Accessed October 1, 2017. <http://smartgunlaws.org/about/mission/>

Founded in the wake of the July 1, 1993, assault weapon massacre at 101 California Street in San Francisco that left eight dead and six wounded, the Law Center to Prevent Gun Violence is now the premier resource for legal expertise and information regarding state and federal firearms laws. Made up of the foremost gun law attorneys in the nation, the Law Center tracks and analyzes firearms legislation in all 50 states, files amicus briefs in critical Second Amendment cases across the country, and works with lawmakers and advocates to craft and promote legislation that will reduce gun violence and save lives. As a nonprofit organization founded by attorneys, we remain dedicated to preventing the loss of lives caused by gun violence through educating the public, free of charge, on America’s gun laws and the commonsense solutions that will reduce the epidemic of gun violence in this country. The Law Center operates as part of the Americans for Responsible Solutions Foundation, the 501(c)3 arm of Americans for Responsible Solutions. Contributions are tax deductible to the fullest extent of the law.

Brady Campaign

“Background Checks.” Brady Campaign, accessed October 1, 2017. <https://www.bradycampaign.org/our-impact/campaigns/background-checks>

The bottom line: background checks work. But today, experts estimate that 40% of gun sales occur in “no questions asked” transactions that often take place over the Internet or at gun shows where, in most states, background checks are not required. This dangerous loophole puts thousands and thousands of guns in the hands of dangerous people like domestic abusers, felons and the dangerously mentally ill.

19 states currently adopt extended background checks

“Universal Background Checks.” Law Center to Prevent Gun Violence. <http://smartgunlaws.org/gun-laws/policy-areas/background-checks/universal-background-checks/>

Nineteen states and Washington DC have extended the background check requirement beyond federal law to at least some private sales. Nine states (California, Colorado, Connecticut, Delaware, Nevada, New York, Oregon, Rhode Island, Washington) and DC require universal background checks at the point of sale for all transfers of all classes of firearms, including purchases from unlicensed sellers; Maryland and Pennsylvania do the same for handgun purchases only. Four states (Hawaii, Illinois, Massachusetts, and New Jersey) require any firearm purchaser, including a purchaser from an unlicensed seller, to obtain a permit issued after a background check, and four more states (Iowa, Michigan, Nebraska, and North Carolina) do the same only for handgun purchasers. Illinois also requires a background check whenever a firearm is sold at a gun show. Voters in Washington and Nevada adopted universal background checks laws by ballot initiative in 2014 and 2016 respectively.

Democratic Platform on gun control

The 2016 Democratic Platform. Accessed October 1, 2017. <https://www.democrats.org/party-platform>

To build on the success of the lifesaving Brady Handgun Violence Prevention Act, we will expand and strengthen background checks and close dangerous loopholes in our current laws; repeal the Protection of Lawful Commerce in Arms Act (PLCAA) to revoke the dangerous legal immunity protections gun makers and sellers now enjoy; and keep weapons of war—such as assault weapons and large capacity ammunition magazines (LCAM's)—off our streets.

CON: Advocacy against Universal Background Checks

NRA-ILA

About the NRA Institute for Legislative Action. NRA-ILA. Accessed October 1, 2017. <https://www.nraila.org/about/>

The Institute for Legislative Action (ILA) is the lobbying arm of the NRA. Established in 1975, ILA is committed to preserving the right of all law-abiding individuals to purchase, possess and use firearms for legitimate purposes as guaranteed by the Second Amendment to the U.S. Constitution. ILA’s ability to fight successfully for the rights of America’s law-abiding gun owners directly reflects the support of NRA’s nearly 5 million members—a number that has more than tripled since 1978. When restrictive “gun control” legislation is proposed at the local, state or federal level, NRA members and supporters are alerted and respond with individual letters, faxes, e-mails and calls to their elected representatives to make their views known.

Gun Owners of America

Jordan Stein. “The Massive Failure of the NICS and Universal Background Checks.” August 17, 2011. <https://gunowners.org/the-massive-failure-of-the-nics-and-universal-background-checks.htm>

Americans shouldn't have to be screened by the government to exercise a constitutionally-protected right. Not only are background checks (the National Instant Check System and universal background checks) unconstitutional, they epically fail at stopping criminals and crazies from getting guns. Gun Owners of America has documented how background checks for gun buyers are ineffective, unconstitutional and dangerous.

National Shooting Sports Foundation

Why the Firearms Industry Opposes so-called “Universal Background Checks.” <https://www3.nssf.org/share/factsheets/PDF/UBC_Concerns.pdf>

Federally licensed firearms retailers will be burdened with having to perform a governmental function (background check on private party transfers). Many proposals mandate that the dealer perform background checks on private party transfers, but cap the fee a dealer can charge: a. The time and effort necessary to perform the check at government set fee is inadequate to cover the retailers cost. Must maintain A&D records and the Form 4473 for 20 years. b. FFL status can be jeopardized by mandatory record keeping requirements imposed by Federal (and State) laws. A retailer could have their FFL revoked for a record-keeping error in the paperwork for a gun they didn’t actually sell.

National Association for Gun Rights

National Association for Gun Rights. Accessed October 1, 2017. <https://www.nationalgunrights.org/about-nagr>

With our rapidly expanding membership of 4.5 million grassroots activists, the National Association for Gun Rights has led the charge to halt the radical anti-gun agenda across the nation. Accepting NO COMPROMISE on the issue of gun control, NAGR works tirelessly to hold politicians accountable for their anti-gun views, and has made great strides in protecting and preserving the Second Amendment. But our effectiveness in the battle against the gun grabbers depends entirely on the support of gun rights supporters like you.

Second Amendment Foundation

Second Amendment Foundation. “Mission Statement.” Accessed October 1, 2017. <https://www.saf.org/mission/>

The Second Amendment Foundation (SAF) is dedicated to promoting a better understanding about our Constitutional heritage to privately own and possess firearms. To that end, we carry on many educational and legal action programs designed to better inform the public about the gun control debate.

Top of Form

Bottom of Form

Republican Platform on gun control

The 2016 Republican Platform. Accessed October 1, 2017. [https://prod-cdn-static.gop.com/media/documents/DRAFT\_12\_FINAL[1]-ben\_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf)

We uphold the right of individuals to keep and bear arms, a natural inalienable right that predates the Constitution and is secured by the Second Amendment. Lawful gun ownership enables Americans to exercise their God-given right of self defense for the safety of their homes, their loved ones, and their communities. We salute the Republican Congress for defending the right to keep and bear arms by preventing the President from installing a new liberal majority on the Supreme Court. The confirmation to the Court of additional anti-gun justices would eviscerate the Second Amendment’s fundamental protections. Already, local officials in the nation’s capital and elsewhere are defying the Court’s decisions upholding an individual right to bear arms as affirmed by the Supreme Court in Heller and McDonald. We support firearm reciprocity legislation to recognize the right of law-abiding Americans to carry firearms to protect themselves and their families in all 50 states. We support constitutional carry statutes and salute the states that have passed them. We oppose ill-conceived laws that would restrict magazine capacity or ban the sale of the most popular and common modern rifle. We also oppose any effort to deprive individuals of their right to keep and bear arms without due process of law. We condemn frivolous lawsuits against gun manufacturers and the current Administration’s illegal harassment of firearm dealers. We oppose federal licensing or registration of law-abiding gun owners, registration of ammunition, and restoration of the ill-fated Clinton gun ban. We call for a thorough investigation — by a new Republican administration — of the deadly “Fast and Furious” operation perpetrated by Department of Justice officials who approved and allowed illegal sales of guns to known violent criminals

Works Cited: Universal Background Checks

1. Federal Bureau of Investigation. National Instant Criminal Background Check System (NICS). https://www.fbi.gov/services/cjis/nics
2. Miles Kohrman and Jennifer Mascia 2017. “Everything You Need to Know About Federal Background Checks.” The Trace, March 14, 2017. https://www.thetrace.org/2015/07/background-checks-nics-guns-dylann-roof-charleston-church-shooting/
3. “Universal Background Checks.” Law Center to Prevent Gun Violence. http://smartgunlaws.org/gun-laws/policy-areas/background-checks/universal-background-checks/
4. The Coalition to Stop Gun Violence. https://www.csgv.org/about-us/
5. Law Center to Prevent Gun Violence. http://smartgunlaws.org/about/mission/
6. The 2016 Democratic Platform. https://www.democrats.org/party-platform
7. About the NRA Institute for Legislative Action. NRA-ILA. https://www.nraila.org/about/
8. Jordan Stein. “The Massive Failure of the NICS and Universal Background Checks.” August 17, 2011. https://gunowners.org/the-massive-failure-of-the-nics-and-universal-background-checks.htm
9. Why the Firearms Industry Opposes so-called “Universal Background Checks.” https://www3.nssf.org/share/factsheets/PDF/UBC\_Concerns.pdf
10. National Association for Gun Rights. https://www.nationalgunrights.org/about-nagr
11. Second Amendment Foundation. “Mission Statement.” https://www.saf.org/mission/
12. The 2016 Republican Platform. https://prod-cdn-static.gop.com/media/documents/DRAFT\_12\_FINAL[1]-ben\_1468872234.pdf