

22-1374

United States Court of Appeals

For the Second Circuit

NATIONAL SHOOTING SPORTS FOUNDATION, INC., BERETTA U.S.A. CORP., DAVIDSON'S, INC., GLOCK INC., CENTRAL TEXAS GUN WORKS, HORNADY MANUFACTURING COMPANY, LIPSEY'S LLC, OSAGE COUNTY GUNS LLC, RSR GROUP, INC., SHEDHORN SPORTS, INC., SIG SAUER, INC., SMITH & WESSON INC., SPORTS SOUTH LLC, SPRAGUE'S SPORTS INC., STURM, RUGER & COMPANY, INC.,

Plaintiffs-Appellants,

- against -

LETITIA JAMES, in her official capacity as New York Attorney General,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of New York

**BRIEF OF AMICUS CURIAE ALVIN L. BRAGG, JR.,
DISTRICT ATTORNEY, NEW YORK COUNTY, IN
SUPPORT OF APPELLEE**

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INTEREST OF AMICUS CURIAE

Alvin L. Bragg, Jr., District Attorney of New York County, submits this brief as amicus curiae in support of defendant-appellee Letitia James. The parties have consented to the filing of this amicus brief.¹

Plaintiffs—the National Shooting Sports Foundation and fourteen manufacturers or sellers of firearms, including Glock, Beretta U.S.A., and Smith & Wesson—filed this lawsuit to facially invalidate N.Y. Gen. Bus. Law §§ 898-a through 898-e. The New York Legislature enacted this gun-related public nuisance statute to prevent members of the gun industry from causing public harm in New York by engaging in unlawful or unreasonable business practices, or by failing to adopt reasonable controls and procedures to prevent the theft, trafficking, and unlawful use of firearms.

The Office of the District Attorney of New York County (“DANY”), under the leadership of DA Bragg, has a direct interest in the continuing validity of this gun-related public nuisance statute. DANY enforces state

¹ This brief has been authored independently of any party’s counsel. DANY received no money from a party, a party’s counsel, or any other outside source to fund the preparation or submission of this brief.

and local criminal laws in Manhattan, the most densely populated county in the country, and home to more than 1.5 million residents. Combatting gun violence is one of DANY's top priorities.² DANY routinely prosecutes defendants who use illegal firearms to perpetrate violent crimes, including murders, assaults, and robberies. DANY also vigorously enforces penal laws that criminalize the unlicensed possession of firearms; the possession of firearms with the intent to use them unlawfully; and the possession of dangerous and unusual firearms. *See* N.Y. Penal Law §§ 265.00 – 265.64.

Criminal prosecutions of the unlawful use and possession of firearms, however, are only part of the solution to the scourge of gun violence. DANY also devotes considerable resources to addressing the underlying causes of violent crimes, a crucial component of law enforcement's effort to stop gun violence. For example, DA Bragg's Gun Violence Prevention Community Initiative funds local organizations that work with youth and young adults who are at high risk of committing, or

² *Gun Violence*, Manhattan Dist. Att'y's Off., <https://www.manhattanda.org/our-work/gun-violence> (last visited Dec. 29, 2022).

falling victim to, gun violence. These initiatives are designed to discourage at-risk youth from carrying illegal guns.³ In addition, DANY's Criminal Justice Investment Initiative has channeled hundreds of millions of dollars into violence-prevention efforts in neighborhoods with high levels of gun crime. Young people in these neighborhoods are paid to engage in behavioral therapy, job training, and educational advancement, both to provide short-term support and to help them achieve long-term success.⁴

DANY also attempts to prevent gun violence through another critical avenue: ending gun trafficking. Gun traffickers profit by unlawfully selling firearms to criminals. It is through these gun traffickers that firearms frequently end up in the hands of people who are legally barred from possessing them—including convicted felons,

³ *Id.*; Tandy Lau, *Manhattan DA Alvin Bragg Announces Gun Violence Prevention Fund*, N.Y. Amsterdam News (June 9, 2022), <https://amsterdamnews.com/news/2022/06/09/manhattan-da-alvin-bragg-announces-gun-violence-prevention-fund>.

⁴ Alvin Bragg and Michael Jacobson, *To Reduce NYC Crime, Invest in Prevention*, N.Y. Daily News (Aug. 11, 2022), <https://www.nydailynews.com/opinion/ny-oped-the-prevention-agenda-to-stop-crime-in-new-york-20220811-y3dgsupkknchxdtih2zpzmsy54-story.html>.

drug addicts, people who suffer from serious mental health issues, and domestic abusers—and who then use these illegal guns to commit serious, violent offenses. DANY aggressively prosecutes gun traffickers who flood New York with illegal guns.

The gun-related public nuisance statute is a critical complement to these criminal prosecutions. Although downstream enforcement of New York’s criminal firearms laws is an important and effective tool in the fight to prevent gun violence, upstream safeguards that make it more difficult for gun traffickers to ply their trade help to stem unlawful firearms from being trafficked in the first place. The commonsense safeguards that the statute encourages in the gun industry are thus an essential part of a full-spectrum approach to combating gun trafficking and preventing gun violence. As defendant correctly argues in defending the statute against preemption under the federal Protection of Lawful Commerce in Arms Act of 2005 (the “PLCAA”), the statute directly regulates the gun industry’s sale and marketing of firearms by discouraging unreasonable and unlawful sales and distribution practices and by requiring the adoption of controls and procedures that will prevent the misuse of firearms in New York. If the gun industry does its

part to make it difficult for traffickers, felons, and dangerous criminals to obtain firearms, those violence-prevention efforts will provide a significant local benefit to law enforcement agencies like DANY and the public that we serve.

ARGUMENT

THE PUBLIC NUISANCE STATUTE PROMOTES PUBLIC SAFETY AND PROVIDES IMPORTANT LOCAL BENEFITS BY PREVENTING GUN TRAFFICKING AND VIOLENCE IN NEW YORK

The gun-related public nuisance statute prohibits members of the gun industry from endangering “the safety or health of the public” in New York through the “sale, manufacturing, importing or marketing” of firearms, ammunition, or component parts. N.Y. Gen. Bus. Law § 898-b(1). The Legislature enacted this prohibition specifically to address the “public health crisis of gun violence in the state.” Ch. 237, § 1, 2021 McKinney’s N.Y. Laws 898, 898. But plaintiffs and their amici dispute the statute’s benefits. Among other arguments, plaintiffs and their amici contend that the statute violates the dormant Commerce Clause because it provides negligible local benefits to New York that are outweighed by its burdens on interstate commerce (Brief for Appellant: 49-50; Brief of Amici Curiae Montana et al.: 25). Contrary to these characterizations,

the statute provides significant local benefits that complement the efforts of law-enforcement agencies like DANY to respond to gun violence in our communities. This Court should reject plaintiffs’ arguments and uphold the statute.

A. Gun Violence Imposes Serious Local Harms.

Gun violence has long been a serious threat to public safety in New York City. In recent years, the number of shooting incidents in the city overall—i.e., shootings that result in an injured victim⁵—has grown from

⁵ The New York City Police Department uses this definition of the term “shooting incidents.” Jeffrey A. Butts and Richard Espinobarros, *Shooting Trends Vary Across Areas of New York City*, JohnJayREC DataBits (2021), <https://johnjayrec.nyc/2021/10/26/databits202103/>.

776 in 2019, to 1,531 in 2020, and to 1,562 in 2021.⁶ Manhattan alone has seen the number of shooting incidents triple from 2018 to 2021.⁷

The harmful effects of firearms are not limited to those crimes where a victim actually suffered an injury from a shooting. Growing access to firearms has also led to an increase in the broader category of violent crimes committed using guns. In 2021, a total of 7,870 violent crimes were committed in New York City using firearms, including 1,356 in Manhattan.⁸ These figures, too, represent a stark increase from just a

⁶ *Factsheet: 2020 Shootings and Murders*, N.Y.C. Mayor's Office of Criminal Justice (Jan. 29, 2021), https://criminaljustice.cityofnewyork.us/wp-content/uploads/2021/01/2020-Shootings-and-Murder-factsheet_January-2021.pdf; Thomas Tracy, *NYC Homicide and Shooting Surge Continued in Pandemic-Stricken 2021*, N.Y. Daily News (Jan. 1, 2022), <https://www.nydailynews.com/new-york/nyc-crime/ny-nyc-ends-2021-with-uptick-in-homicides-shootings-20220101-mhzph6fdlje4daawc3kjuqnr4-story.html>.

⁷ See Ari Ephraim Feldman, *Shootings Data Show New Trends in Gun Violence*, Spectrum News NY1 (Mar. 28, 2022), <https://www.ny1.com/nyc/all-boroughs/news/2022/03/25/shootings-data-show-new-trends-in-gun-violence>.

⁸ *County Crime Rates*, Division of Criminal Justice Services (last visited Dec. 29, 2022), <https://www.criminaljustice.ny.gov/crimnet/ojsa/countycrimestats.htm>.

few years earlier: in 2018, only 4,255 violent gun crimes were committed in New York City, and there were just 545 such crimes in Manhattan.⁹

Nationwide, the picture is similar. In 2019, firearms caused 39,328 homicide and suicide deaths in the United States.¹⁰ In 2020, this figure increased markedly, to 43,675, and then rose even more in 2021: that year, guns caused 47,286 homicide and suicide deaths.¹¹

In a worrying trend, children's share of gun fatalities is increasing. Nationwide, gunfire is now the leading cause of death among children ages 1 through 18. To put this figure in perspective, more children die to gun violence than to car crashes, cancer, or drug overdoses. In 2021 alone, 3,597 American children died by gunfire; 2,279 of those deaths were homicides. This violence disproportionately affects Black children. Among youths, Black children represent almost half of all gun deaths and

⁹ *Id.*

¹⁰ Gun Violence Archive, <https://www.gunviolencearchive.org> (last visited Dec. 29, 2022).

¹¹ Roni Caryn Rabin, *Gun-Related Suicides and Killings Continued to Rise in 2021, C.D.C. Reports*, N.Y. Times (Oct. 6, 2022), <https://www.nytimes.com/2022/10/06/health/guns-homicides-suicides-cdc.html>.

two-thirds of gun homicides, despite making up only about 15 percent of children in the United States.¹²

Gun violence takes a terrible toll on New York City's children. As of December 18, 2022, 149 children had been struck by bullets in New York City in 2022, leading to 16 deaths. By comparison, in 2017, only 75 shooting victims in New York City were children. This violence has secondary effects too. Students who are repeatedly exposed to violent crime in their communities tend to score lower on standardized tests. In fact, the more violence they are exposed to, the more they fall behind scholastically.¹³

The growth in gun violence in New York City has correlated with a parallel rise in illegal gun possession. According to DANY's internal statistics, in the first nine months of 2019, DANY initiated only 315 prosecutions that included at least one gun possession charge. Over the

¹² Robert Gebeloff et al., *Childhood's Greatest Danger: The Data on Kids and Gun Violence*, N.Y. Times Magazine (Dec. 14, 2022), <https://www.nytimes.com/interactive/2022/12/14/magazine/gun-violence-children-data-statistics.html>.

¹³ Hurubie Meko, *149 Shot, 16 Dead: Gunfire's Rising Toll on New York City's Youngest*, N.Y. Times (Dec. 27, 2022), <https://www.nytimes.com/2022/12/27/nyregion/new-york-teen-shootings.html>.

same nine months of 2022, however, DANY initiated more than twice as many of those prosecutions: 693. The trends are similar in other parts of New York State. The Gun Involved Violence Elimination initiative—which includes police departments in twenty cities, towns, and counties across the State—found that between January and July 2022, member police agencies seized 6,007 illegal firearms—twenty percent more than in the same seven months of 2021.¹⁴

B. Gun Trafficking Drives Gun Violence.

Gun trafficking—the diversion of guns from legal to illegal streams of commerce—plays a dominant role in the worrying trend of violent gun crimes afflicting New York City. The link between gun trafficking and violent crime is clear. Between 2010 and 2015, law enforcement agencies in New York recovered 52,915 “crime guns”—that is, guns that were recovered in connection with a crime. Nineteen percent were recovered within a relatively short “time-to-crime” period—that is, the amount of

¹⁴ John Cropley, *Gun Violence in N.Y. Down from 2021 But Still Well Above Average*, *The Daily Gazette* (Aug. 24, 2022), <https://dailygazette.com/2022/08/24/gun-violence-in-n-y-down-from-2021-but-still-well-above-average>.

time between the gun’s purchase and its use in a crime. A short time-to-crime period is a significant indicator that the gun was purchased with the intent to use it for criminal purposes. And one in five of the crime guns that law enforcement recovered scored highly on a “Trafficking Index” that considered multiple factors—such as low time-to-crime, unrecorded gun transactions, and border crossings—to assess the likelihood that a crime gun had been trafficked. The overwhelming majority of these crime guns changed hands at least once between the purchase and the crime: only six percent of crime guns were recovered from the original purchaser.¹⁵ To be sure, some of the pre-crime transfers of these guns may have been legal. But many such transfers are the result of gun trafficking.

Criminals and traffickers obtain guns in myriad ways. Some traffickers or criminals purchase firearms from corrupt, licensed sellers of firearms—or corrupt employees of those sellers—who sell guns off the books, without completing background checks or the requisite

¹⁵ *Target on Trafficking: New York Crime Gun Analysis*, N.Y. Office of the Att’y General, <https://targettrafficking.ag.ny.gov> (last visited Dec. 29, 2022).

paperwork.¹⁶ Unscrupulous gun dealers sell guns to felons and domestic abusers, and some even alter their records or lie to investigators to conceal their wrongdoing.¹⁷ One study found that “corrupt retail gun dealers accounted for more guns diverted into the illegal market than any other single trafficking channel.”¹⁸ Although a “very small proportion of gun dealers sell the majority of guns traced to crime,” a national phone survey of retail gun dealers found that half of those dealers “indicated a willingness to make a sale under circumstances of questionable legality.”¹⁹

¹⁶ *Id.*; *Reducing Illegal Firearms Trafficking*, U.S. Dept. of Justice, Bureau of Justice Assistance ix (2000), <https://www.ojp.gov/pdffiles1/bja/180752.pdf>.

¹⁷ Brian Freskos et al., *The ATF Catches Thousands of Lawbreaking Gun Dealers Every Year. It Shuts Down Very Few*, The Trace (May 26, 2021), <https://www.thetrace.org/2021/05/atf-inspection-report-gun-store-ffl-violation>.

¹⁸ Daniel W. Webster et al., *Effects of State-Level Firearm Accountability Policies on Firearm Trafficking*, 86 No. 4 J. Urban Health 525, 525 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2704273>.

¹⁹ *Id.*

Traffickers may also obtain guns through theft. In 2021, federal firearm licensees reported 10,325 firearms as lost or stolen.²⁰ The controls that gun dealers do or do not adopt to prevent the theft or diversion of their firearms thus play a meaningful role in determining the quantity of guns that become available for criminals to use.

Finally, many traffickers obtain guns through straw purchases, where one individual purchases a gun after completing the necessary paperwork and undergoing a background check, but does so on behalf of someone else who is prohibited from possessing a gun or who seeks to avoid a background check and paper trail.²¹ Unfortunately, many gun sellers are willing to knowingly sell firearms to straw purchasers. One study found that one in five of the gun dealers in its sample were willing to sell firearms to customers who were explicitly asking to buy a gun on behalf of another person, without conducting a background check or

²⁰ *Federal Firearm Licensee Theft/Loss Report – 2021*, Bureau of Alcohol, Tobacco, Firearms, and Explosives, <https://www.atf.gov/resource-center/federal-firearms-licensee-theftloss-report-2021> (last updated Jan. 18, 2022).

²¹ *Target on Trafficking, supra.*

obtaining the necessary paperwork from the actual intended user of the firearm.²²

These are not theoretical concerns. For example, in June 2022, DANY indicted a defendant for trafficking guns into Manhattan that he had obtained by recruiting and paying straw purchasers. This defendant sold 36 firearms to an undercover NYPD officer; upon arrest, he was carrying five semi-automatic pistols and an AR-15 assault rifle with a high-capacity magazine.²³

In addition to those well-established channels of gun trafficking, privately made unlawful firearms, also known as “ghost guns,” pose a significant new danger. Ghost guns are homemade firearms that can be assembled quickly—in some cases, in less than an hour—using component parts that may be purchased online without undergoing a

²² Garen Wintermute, *Firearm Retailers’ Willingness to Participate in an Illegal Gun Purchase*, 87 No. 5 J. Urban Health 865 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2937134>.

²³ *D.A. Bragg, N.Y.P.D. Announce Indictment of Gun Trafficker Who Sold Dozens of Firearms from North Carolina in New York City*, Manhattan Dist. Att’y’s Off. (June 7, 2022), <https://www.manhattanda.org/d-a-bragg-n-y-p-d-announce-indictment-of-gun-trafficker-who-sold-dozens-of-firearms-from-north-carolina-in-new-york-city>.

background check.²⁴ Ghost guns are virtually untraceable because they can be assembled without serial numbers.²⁵ For these reasons, ghost guns are popular among criminals, traffickers, and other persons who are legally prohibited from possessing firearms or who intend to use them for unlawful purposes.

Recent criminal cases in Manhattan illustrate the danger that ghost guns pose. In 2022, DANY prosecuted several defendants who had assembled veritable arsenals of untraceable ghost guns. One such defendant possessed \$20,000 worth of ghost gun parts—including more than thirty frames and receivers and almost 300 high-capacity

²⁴ The definition of “qualified product” in 15 U.S.C. § 7903(4)—which is incorporated into the gun-related public nuisance statute, *see* N.Y. Gen. Bus. Law § 898-a(6)—explicitly includes “component part[s]” of firearms. Therefore, the statute plainly applies to members of the gun industry who engage in unreasonable business practices when they sell ghost gun components. Moreover, the Bureau of Alcohol, Tobacco, and Firearms recently clarified that “weapon part kits” and “aggregations of weapon parts” that are “designed to or may readily be converted to expel a projectile” by the “action of an explosive” qualify as “firearms” under the relevant federal laws and regulations. *Definition of “Frame or Receiver” and Identification of Firearms*, 27 CFR §§ 447, 478, 479 (2022), <https://www.govinfo.gov/content/pkg/FR-2022-04-26/pdf/2022-08026.pdf>; *see also* 18 U.S.C. § 921(a)(3)(A).

²⁵ Chris Hacker et al., *Fire Sale: Dealers Rush to Sell Ghost Gun Parts Before Restrictions Take Effect*, CBSNews.com (Aug. 24, 2022), <https://www.cbsnews.com/pittsburgh/news/ghost-guns-new-restrictions>.

magazines—that he purchased from twelve different online retailers.²⁶ Another defendant, who was convicted in 2022, was arrested after firing a ghost gun on his roof. He possessed eight operable, unserialized, untraceable ghost guns, which he too had assembled using component parts that he ordered online.²⁷ Still another defendant purchased at least 55 ghost gun parts worth over \$7,000, including a fully automated machine that could manufacture additional ghost guns by pressing a button; he was discovered to have been assembling assault weapons in his Lower East Side apartment.²⁸

Illegal ghost guns comprise an ever-increasing share of the crime guns recovered in New York City. Just a few years ago, ghost guns were

²⁶ *D.A. Bragg, D.A. Gonzalez and NYPD Announce Takedown of Ghost Gun Arsenal*, Manhattan Dist. Att’y’s Off. (May 25, 2022), <https://www.manhattanda.org/d-a-bragg-d-a-gonzalez-and-nypd-announce-takedown-of-ghost-gun-arsenal>.

²⁷ *D.A. Bragg Announces 5 Year Prison Sentence for Ghost Gun Manufacturer*, Manhattan Dist. Att’y’s Off. (May 24, 2022), <https://www.manhattanda.org/d-a-bragg-announces-5-year-prison-sentence-for-ghost-gun-manufacturer>.

²⁸ *D.A. Bragg and Commissioner Sewell Announce 32-Count Indictment in Ghost Gun Takedown*, Manhattan Dist. Att’y’s Off. (Oct. 11, 2022), <https://www.manhattanda.org/d-a-bragg-commissioner-sewell-announce-32-count-indictment-in-ghost-gun-takedown>.

rare. According to DANY's internal statistics, in 2018, law enforcement recovered only 17 ghost guns in New York City. Since then, the growth of ghost guns has been explosive. In 2022, law enforcement recovered 430 illegal ghost guns in New York City, representing about nine percent of all the guns recovered by law enforcement in the city. By comparison, as recently as 2020, only 2.68% of recovered firearms were ghost guns.

Furthermore, these ghost guns are already being used to commit horrific crimes. In 2022, ghost guns were used to commit at least two homicides in New York City. In April, 2022, a sixteen-year-old girl was killed by a stray bullet from a ghost gun. Less than a month later, a ghost gun was used to kill a man in the Bronx.²⁹ DANY's statistics also show that police officers have recovered ghost guns in connection with non-fatal shootings, robberies, and domestic-violence incidents, and during parole and probation visits.

²⁹ *Funeral Held for 16-Year-Old Girl Shot and Killed in Bronx*, abc7NY (Apr. 13, 2022), <https://abc7ny.com/bronx-teen-funeral-angellyh-yambo-jeremiah-ryan-shooting-suspect-identified/11740083>; Nicholas Williams and Larry McShane, *Taco Bell Worker Held Without Bail in Cold-Blooded Killing of Customer After Earlier Disputes*, N.Y. Daily News (May 4, 2022), <https://www.nydailynews.com/new-york/nyc-crime/ny-taco-bell-murder-arraignment-20220504-cdji4jia6berfcnie6hlosh5mu-story.html>.

C. The Gun-Related Public Nuisance Statute Provides Significant Local Benefits to New York by Reducing Gun Trafficking and Gun Violence.

The gun-related public nuisance statute encourages members of the gun industry to refrain from unlawful and unreasonable practices and to affirmatively adopt reasonable controls and procedures to prevent theft, avoid selling to straw purchasers, and stop corrupt, off-the-books sales. By adopting commonsense measures to limit the number of guns that are diverted into the illicit market, fewer guns will fall into criminals' hands. And stanching the flow of unlawful firearms will directly curb deadly gun violence, as the Legislature intended.

Civil liability for unreasonable, unlawful, or irresponsible business practices is a well-established tool to encourage businesses to adopt preventive measures to avoid predictable harms. *Cf. Banks v. Hyatt Corp.*, 722 F.2d 214, 226 (5th Cir. 1984); *see, e.g., Bell v. Cheswick Generation Station*, 734 F.3d 188, 196-98 (3rd Cir. 2013); *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 67 (2d Cir. 2010); *Instructional Sys. V. Comput. Curriculum Corp.*, 35 F.3d 813, 825 (3d Cir. 1994). Such potential liability has already proven effective at encouraging members of the gun industry to institute business practices that fight trafficking

and increase gun safety. In the past, civil actions against members of the gun industry have resulted in settlement agreements that required gun manufacturers to establish codes of conduct for authorized dealers and distributors; to add hidden sets of serial numbers on the inside of new guns to make it difficult for criminals to destroy identifying markings; to sell safety devices with each handgun; and to increase training for employees.³⁰ Similarly, when retail sellers of firearms become vulnerable to lawsuits by city officials for making illegal sales, “the flow of new guns into the illicit market often decreases significantly.”³¹

Industry adoption of such practices meaningfully reduces the flow of unlawful guns and thereby directly improves public safety. An

³⁰ James Dao, *Under Legal Siege, Gun Maker Agrees to Accept Curbs*, N.Y. Times (March 18, 2000), <https://www.nytimes.com/2000/03/18/us/under-legal-siege-gun-maker-agrees-to-accept-curbs.html>; Allen K. Rostron, *Book Review: Lawyers, Guns, & Money: The Rise and Fall of Tort Litigation Against the Firearms Industry*, 46 Santa Clara Law Rev. 481, 496-98 (2006), https://irlaw.umkc.edu/cgi/viewcontent.cgi?article=1655&context=faculty_works; Jon S. Vernick et al., *Availability of Litigation as a Public Health Tool for Firearm Injury Prevention: Comparison of Guns, Vaccines, and Motor Vehicles*, 97 No. 11 Am. J. Public Health 1991, 1992-93 (2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2040374>.

³¹ Webster, *Effects of State-Level Firearm Seller Accountability*, *supra*, at 526.

abundance of firearms is strongly correlated with higher firearm homicide rates.³² A large number of guns in a jurisdiction is also correlated with higher homicide rates for killings of police officers.³³ Conversely, jurisdictions that limit firearm possession or usage have lower rates of firearm related homicides and suicides.³⁴

Reducing the flow of illegal firearms also makes the crimes that do occur significantly less deadly. When one person assaults another, the presence of a gun increases the risk of death exponentially. One study

³² Michael Siegel et al., *The Relationship Between Gun Ownership and Firearm Homicide Rates in the United States, 1981–2010*, 103 No. 11 Amer. J. Public Health 2098, 2098 (Oct. 9, 2013), <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2013.301409>; *Firearms Research: Homicide*, Harvard Injury Control Research Center, <https://www.hsph.harvard.edu/hicrc/firearms-research/guns-and-death> (last visited Dec. 29, 2022).

³³ David I. Swedler et al., *Firearm Prevalence and Homicides of Law Enforcement Officers in the United States*, 105 No. 10 Amer. J. Public Health 2042, 2045 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4566543/pdf/AJPH.2015.302749.pdf>.

³⁴ *Gun Safety Policies Save Lives*, Everytown for Gun Safety, <https://everytownresearch.org/rankings> (last updated Jan. 12, 2023); Emma Tucker and Priya Krishnakumar, *States With Weaker Gun Laws Have Higher Rates of Firearm Related Homicides and Suicides, Study Finds*, CNN.com (May 27, 2022), <https://www.cnn.com/2022/01/20/us/everytown-weak-gun-laws-high-gun-deaths-study/index.html>.

determined that about 17.1% of interpersonal assaults involving a gunshot wound resulted in a homicide. By contrast, the most common method of assault—hands, fists, and feet—resulted in death only 0.009% of the time.³⁵ Taken together, these statistics indicate that measures such as the gun-related public nuisance statute that limit the number of firearms that end up in criminals' hands offer significant dividends in preventing crime or mitigating its harmful consequences.

Statutes like this one serve as an important complement to other federal, state, and local laws that seek to limit the circulation of illegal guns. In particular, the criminal prosecution of gun traffickers and perpetrators of gun violence—a DANY priority—provides a significant deterrent, especially where the odds of being caught and punished are high.³⁶ But criminal law by itself is not enough. By its nature, criminal prosecution targets wrongdoing after it has already occurred, and it can

³⁵ Susan B. Sorenson and Daniel W. Webster, *What Works: Policies to Reduce Gun Violence*, in *Gun Violence: Prediction, Prevention, and Policy*, 27 (American Psychological Association ed., 2013), <https://www.apa.org/pubs/reports/gun-violence-report.pdf>.

³⁶ Steven N. Durlauf and Daniel S. Nagin, *The Deterrent Effect of Imprisonment*, in *Controlling Crime: Strategies and Tradeoffs*, 43, 43-44 (Philip J. Cook et al. eds., 2011), <https://www.nber.org/system/files/chapters/c12078/c12078.pdf>.

be difficult to trace the source of a particular gun used in a violent crime. Those limitations are why DANY has focused many of its own resources on crime prevention, rather than just prosecution. The statute is consistent with this broader philosophy of addressing the upstream causes of violent crime to prevent wrongdoing from happening in the first instance.

Other civil regulatory regimes addressing firearms also have gaps that the statute helpfully fills. In particular, “[f]ederal laws require very high standards of evidence for license revocation or criminal prosecutions of dealers,” and “only one compliance inspection per dealer per year is permitted.”³⁷ As for the enforcement of these federal laws, a 2004 report from the Department of Justice’s Inspector General concluded that inspections of gun dealers “are infrequent and of inconsistent quality, and follow-up inspections and adverse actions have been sporadic,” even “when firearm law violations have been numerous and serious.”³⁸ These

³⁷ Webster, *Effects of State-Level Firearm Seller Accountability*, *supra* at 526; *see also* 18 U.S.C. § 923(g)(1)(B)(ii).

³⁸ *Inspections of Firearms Dealers by the Bureau of Alcohol, Tobacco, Firearms and Explosives*, Inspector General of the United States Department of Justice, i-ii (2004), <https://oig.justice.gov/reports/ATF/e0405/final.pdf>.

issues persist today.³⁹ The statute helps fill this gap because it provides an independent mechanism for encouraging gun industry members to rigorously conduct background checks; maintain proper records of gun sales; secure their products to avoid theft; and decline to sell guns to obvious straw purchasers. It also discourages online sales of firearm parts to individuals who have not undergone a background check, and similarly deters other business practices that have led to the rampant proliferation of illegal, untraceable ghost guns.

In sum, by encouraging gun industry members to take commonsense steps to cut off the flow of illegal firearms to criminals, the gun-related public nuisance statute protects New Yorkers from gun violence. The statute thus provides significant local benefits that complement the effect of other criminal and civil regimes. This Court should reject plaintiffs' challenges and affirm the district court's order.

³⁹ Freskos, *supra* (in 2020, “the ATF inspected only 5,827 licensed dealers, or 7.5 percent—the “lowest annual inspection rate since 2004,” and more than “2,400 of those dealers were found to have committed violations”).

CONCLUSION

The order of the district court should be affirmed.

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January 13, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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/s/ John T. Hughes