Vermont Federation of Sportsman's Clubs
Testimony on H.230 – House Judiciary Committee
March 1st, 2023

My name is Chris Bradley, and I am the President and Executive Director of the Vermont Federation of Sportsman's Clubs. If you are not previously aware of the VTFSC: We were formed back in 1875, and we formed to address the fact that White Tailed deer had been hunted to near extinction here in Vermont. We were successful in spearheading the re-introduction of White Tails, and as a result of that effort we helped to form what is now the Vermont Fish & Wildlife Department.

The VTFSC is comprised of approximately 50 member clubs, with approximately 14,000 members.

The Federation, as an organization and as individuals, are fully aware of the nexus between firearms and suicide, and we have worked to address that.

It would be now that I would share all the work we did on the VT Gun Shop Project – but as it has been made clear that we should only focus on Constitutional aspects of this bill, I will instead focus on that.

Sections 1-2 - Findings and Legislative Purpose
In reviewing this section, we note that these listed facts do not mention that the biggest risk factor reported among Vermont deaths by suicide was related to people having a mental health diagnosis: Something that was present in 68% of reported suicides in the last report dated 2017-2018.

We also note that another rather important piece of information is missing, and that would be the number of times a Vermonter in crisis went to a gun store, bought a firearm, and then went home and used it to commit suicide.

I do not mean to be callous here, these suicides are tragic losses of life. In listening to the testimony that was given in the House Committee on Health Care however – we believe they only heard of 2 such tragic deaths here in Vermont in the last 10 years. 2.

Section 3 (Secure Firearms Storage)
In the testimony in HCHC, it was stated that of the 5 New England States (Maine, New Hampshire, Vermont, New York and Massachusetts): Only Vermont does not have a "Safe Storage" law.

When we looked at the Safe Storage laws implemented in those 4 states (I have submitted statute references to these in a separate document), we see a distinct difference in how Maine and New Hampshire approach this problem versus how New York and Massachusetts approach it.

In New Hampshire and Maine, there is no violation for the act of failing to secure firearms. Instead, there is a violation only if a firearm was stored improperly and then was used improperly.

In Massachusetts and New York, and just like what is being proposed in H230, there is one violation for failing to store a firearm properly, and then there is another violation if a firearm was stored improperly and then also used improperly.

Setting aside completely how one could possibly enforce how firearms are stored in the sanctity of one's home: It would be the VTFSC's thought that of those four other states, Vermont is far more closely aligned with New Hampshire and Maine than we are with Massachusetts or New York.

Beyond that however – laws which require firearms to be locked up or made inoperable was struck down in the 2008 by the Supreme Court of the United States (SCOTUS) in D.C. *v.* Heller, as any such law does not allow for the use of that firearm for self-defense. Simply put: It is unconstitutional, as determined by the highest court in our nation, to force citizens to lock up their firearms. They can voluntarily do so with education, guidance and easy access to low-cost or free locking mechanisms.

Back to the section at hand: We believe that Maine and New Hampshire's laws are constitutional whereas New York and Massachusetts are not, they haven't been constitutional per the highest court in our nation for the past 15 years, and MA and NY are simply awaiting a constitutional challenge.

Section 4–8 - Changes to ERPO Laws

While we see some merit to considering the addition of a family member to the list of those who may file a petition for an ERPO, we are not aware of any situation to date where a family member contacted a State's Attorney or the Office of the Attorney General with an ERPO concern, that concern was rebuffed, and the person in question then immediately went out and did something.

We most assuredly agree that a family member is likely to be the first to detect a person who is at risk of harming themselves or others, and evidence points to the fact that this reporting is how the majority of ERPOs get initiated. However: We feel strongly that bringing an extreme action should require some level of involvement by Law Enforcement – which is why this bill was originally written as it was.

Regarding the addition of "Household member", we feel that definition is too broad, as it encompasses renters, roommates, ex-partners and even ex-spouses to name a few. And again, we ask: Are there situations where requests to a State's Attorney or the Office of Attorney General has failed to intercede when the facts warranted it from whatever source?

In specific reference to the constitutionality of Extreme Risk Protection Orders, we need to alert you to the case of G.W. v. C.N which was decided on December 22, 2022 by the New York Supreme Court and which involved the constitutionality of that state's ERPO when examined under Bruen.

That opinion stated the following: "***The question presented is whether CPLR Article 63-a (Extreme Risk Protection Order Statute) sufficiently protects a New York's citizen's due process rights when, as here, the state denies a fundamental right, to wit: By infringing on that citizen's right to keep and bear arms under the Second Amendment of the United States Constitution. This court holds that CPLR §63-a does not sufficiently protect a citizen's rights and therefore is unconstitutional.***"

We do not believe that this decision has been appealed.

According to Federal Law: Property cannot be taken from a defendant without the defendant having the opportunity to defend themselves. Yet: This is ***exactly*** what happens Ex Parte in 13 VSA 4054 (Extreme Risk Protection Orders; Emergency Relief; temporary ex Parte order), and it is also exactly what happens 15 VSA 1104 (Domestic Relations; Abuse Prevention; Emergency relief).

In the strongest possible terms, it is the belief of the VTFSC that the failure to recognize the basic concept of Due Process in those referenced statutes makes them BOTH unconstitutional. With 13 VSA 4054 before you in regards to a suggested amendment, you may well have a duty to correct this error as you contemplate other changes.

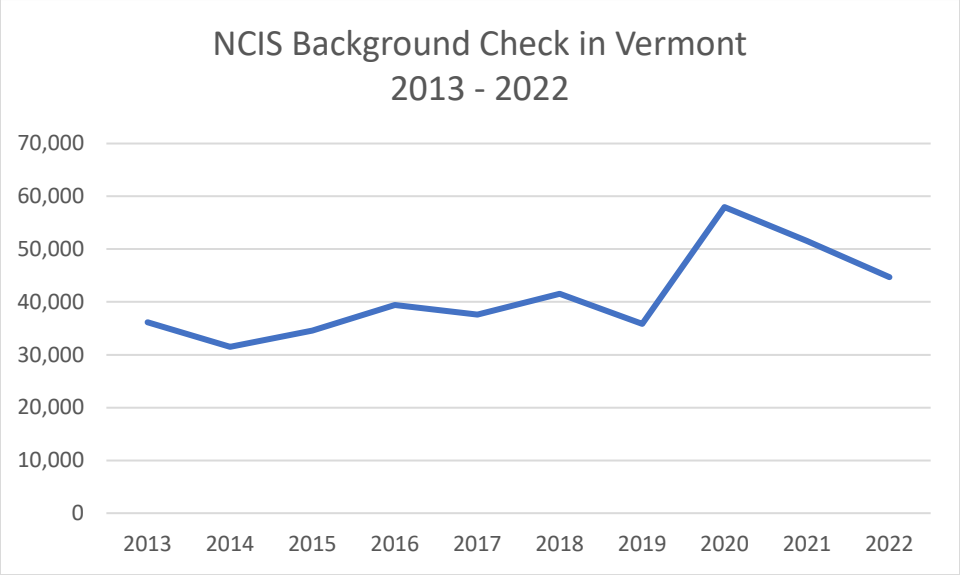
Section 9 – Waiting Periods

When I testified on this bill in HCHC this past Tuesday, they were still undecided as to whether or not this section should require a 48 or a 72-hour waiting period. Regarding either waiting period: That waiting period plus 5 minutes will defeat it.

We are not surprised that they chose the higher number, but we have been unable to find any conclusive study about the effectiveness of any waiting period for a person who is intent on suicide.

The truth however is that the vast, vast majority of suicides committed by firearm are done with firearms already owned, not firearms just purchased, which this bill does not consider.

We should therefore contrast those 2 cases to the number of firearms sold in Vermont.



For the period of time from 2014 through 2023, the NCIS system recorded that there were 440,881 background checks run on the purchase of firearms in Vermont. That's an average of 44,088 per year; an average of 3,674 a month, an average of 122 per day, or almost 5 per hour (using a 24-hour day).

In order to attempt to stop what appears to have been only two people who were intent on killing themselves, there were 440,879 other purchasers that did not have that in mind.

A significant point to be made here is number of Vermont homes have firearms in them, which means there are significant numbers of Vermonters who already have access to lethal means.

We ask: If the sole point of this bill is to stop people who do not own guns from buying one so that they can kill themselves with it, what is the point of subjecting an ***already-existing*** firearm owner to any waiting period?

On one side of the scale, we have a very, very, very small number of people who buy a firearm for the expressed purpose of immediately ending their life with it, people who are apparently very intent on killing themselves. With or without a waiting period, those suicides would be a tragedy.

On the other side of the scale, we have some unknown number of people who may have an immediate need to purchase a firearm for their defense or for the defense of someone else, ***which is an unalienable right***, and if prevented by a waiting period and they then die unable to defend themselves, that would also be a tragedy.

I would be pleased to present this committee with stories of women, admittedly non-Vermonters, who came under threat of violence, who wanted to buy a firearm to defend themselves with due to a waiting period, and who were then killed by their known assailant.

I can also provide you the story of a women who came under threat by a known assailant, she was no prevented by any waiting period, and the very next day after she bought it: She used it successfully to save herself from a brutal assailant that most likely would have killed her.

We have three final considerations for this committee.

First: The fastest growing demographic of new gun owners are people of color, with purchases by females exceeding purchases by males, and data shows that a significant portion of crime is against people of color. Women overall are a high demographic of new firearm purchasers.

Second: If Vermont ever establishes a Waiting Period, you will be effectively killing the long history of gun shows here in Vermont, when to the best of our knowledge there is not a single story in Vermont where a gun show was used to purchase a firearm that was then immediately used by the purchaser to kill themselves. Gun shows are very popular amongst the sporting communities here in Vermont, they fully conform to state and federal firearm laws, and they bring much needed revenue to local economies.

Finally, I must beat the drum of unconstitutionality one last time. In all of my research to date, I have yet to find an active challenge to any Waiting Period law under the Bruen decision. What I did find however was the case of Silvester *v.* Harris. In 2014, a challenge was made to California's 10-day waiting period

law. This was not a blanket challenge to the entire law; rather it was a challenge as to why there should be a 10-day waiting period for someone who already owned a firearm. This case was heard in the United State District Court of California, which ruled in 2014 that CA's law was unconstitutional for already existing firearm owners. In making that ruling, the opinion stated:

"***Defendant has identified no laws in existence at or near 1791 (founding) or 1868 (14th Amendment ratified) that imposed a waiting period of any duration between the time of purchase and the time of possession of a firearm.***"

In the Final Order, the District Court ruled: "***The Court has found that the 10-day waiting periods (of Penal Code § 26815(a) and § 27540(a)) violate the Second Amendment.***"

Upon receiving this verdict, the case was immediately appealed by California to the 9th Circuit, a circuit court that has never been known to fully embrace the 2nd Amendment. As might have been expected, the 9th Circuit overruled the lower court, and they did so by using a two-step means-end test and intermediate scrutiny.

That two-step means-end test and intermediate scrutiny has been specifically ruled as invalid by SCOTUS when dealing with the 2nd Amendment by the Bruen decision. In making that ruling, SCOTUS directed that the proper method of evaluating 2nd Amendment laws was a close examination of the text, history and tradition (I.E., historical analogues) of what the founders had in mind at the founding of our country.

Under Bruen, and as the District Court pointed out, there was no historical analogue to a having a Waiting Period to purchase a gun at the time of our founding and it therefore ruled the law as being unconstitutional. We also know that in order to over-rule the District Court's decision, the 9th Circuit used a testing scheme which SCOTUS has now specifically ruled as being incorrect.

That decision was then reviewed in 2018 by SCOTUS in Silvester *v.* Becerra, which denied certiorari. A dissenting opinion in that decision was written by Judge Clarence Thomas who stated the following:

"***The Ninth Circuit's deviation from ordinary principles of law is unfortunate, though not surprising. Its dismissive treatment of petitioner's challenge is emblematic of a larger trend. As I have already explained, the lower courts are resisting this Court's decision in Heller and MacDonald and are failing to protect the Second Amendment to the same extent that they protect other constitutional rights."***

And;

"***Nearly 8 years ago, this Court declared that the Second Amendment is not a 'second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees'. By refusing to review decisions like the one below, we undermine that declaration. Because I still believe that the Second Amendment cannot be 'singled out for special – and especially unfavorable – treatment', I respectfully dissent from the denial of certiorari.***"

Under the Bruen lens, and given the strength of Judge Thomas's statement coupled with the renewed interest in the 2nd Amendment by SCOTUS post-Bruen, it must be seen that a waiting period is unconstitutional AT LEAST for those that already own firearms, and the "unfairness" of the law can be gauged by the tragic loss of two people who were intent on killing themselves versus 410,879 other Vermonters who had no such intention.

The ability to defend oneself is a right, and as you consider a waiting period, I remind the committee of a quote from Dr. Martin Luther King: "A right delayed is a right denied".

Should you move with this bill as written, you will, in our opinion, be undoubtedly going against the Heller decision.

Moving forward with modifying the ERPO statutes, when you have been made aware that it's lack of Due Process is unconstitutional, but then not correct it and instead add to it, is really unthinkable to us.

Finally: Moving forward with the Waiting Period, when it there is every appearance that its constitutionality is more than just in question, would be imprudent.

Moving forward with this bill as written would be going against the expressed opinion of SCOTUS and other Courts on three major points, and would put in jeopardy the oath of office every legislator takes.

Thank you for the opportunity to speak; if you have any questions, I will do my best to answer them.