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To: The Senate Judiciary Committee
From: David Scherr, Assistant Attorney General, on behalf of the Attorney General's Office
Date: March 19, 2018
Re: H.422--AGO Testimony Regarding Purpose, Public Safety, and Constitutionality

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What H.422 Does:

The bill allows police to protect victims by giving officers the authority to temporarily remove firearms from dangerous domestic violence situations even when the firearms are not evidence of a crime.

The bill also brings domestic violence allegations into court on the next business day. This allows for rapid review of any gun seizures and allows a judge to set appropriate pre-trial conditions.

The Public Safety Need:

Between 1994 and 2016, 49% of homicides in Vermont were related to domestic violence. 58% of domestic violence homicides were committed by guns.¹ Peer-reviewed studies show removing guns from the scenes of domestic violence significantly lowers the risk that victims will be murdered.² The days following state intervention in a domestic violence situation are especially dangerous for victims.³

The Law:

The "special needs" doctrine allows Vermont to lawfully enact and enforce this bill. Federal case law recognizes the special needs doctrine as an exception to the Fourth Amendment and

¹ 2017 AGO Domestic Violence Fatality Review Report, pages 13-14: <http://ago.vermont.gov/wp-content/uploads/2018/02/2017-AGO-Domestic-Violence-Fatality-Review-Report.pdf>.

² Annals of Internal Medicine Study: <http://annals.org/aim/fullarticle/2654047/state-intimate-partner-violence-related-firearm-laws-intimate-partner-homicide>.

American Journal Epidemiology Study: <https://www.sciencedaily.com/releases/2017/11/171129090415.htm>.

³ National Institute of Health Study: <https://www.ncbi.nlm.nih.gov/pubmed/18523113>

the Vermont Supreme Court has applied the doctrine to Article Eleven of the Vermont Constitution. It allows for a search or seizure that: 1) serves a purpose other than gathering evidence of a crime and 2) serves a vital public need.

The special needs doctrine applies when two questions are answered in the affirmative:

1. Does the state’s interest in conducting a search or seizure constitute “exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable”? State v. Martin, 2008 VT 53, ¶ 9 (emphasis added).
2. Does the special need outweigh the individual’s interest in Fourth Amendment protections?⁴

In this case the answer to both questions is yes.

First, taking a firearm to protect victim safety in the domestic violence context constitutes a special need because it is an exceptional circumstance that is something other than a prosecutorial law enforcement function. H.422 does not take weapons for the purpose of gathering evidence of any crime. Instead they are temporarily taken to protect safety. (In the special needs cases the phrase “beyond the need for law enforcement” refers to a state interest other than gathering evidence of a crime for the purpose of furthering a prosecution.)

Second, the special need outweighs the individual’s Fourth Amendment or Article Eleven protections because the state has a compelling interest in preventing gun violence in the domestic violence context. From 1994 to 2016, about half of homicides in Vermont were related to domestic violence, and 58% of those were gun homicides.⁵ Removing guns significantly lowers homicide rates. A 2017 study published in the American Journal of Epidemiology found that restraining orders for dating partners that include firearm restrictions (present in 22 states) were linked to a 10 percent decrease in romantic partner homicides and a 14 percent reduction in partner homicides committed with firearms.⁶ A 2017 study in the Annals of Internal Medicine found similar results.⁷ Moreover, the National Institutes of Health has shown the moment of state intervention is especially dangerous for victims: of domestic violence homicides occurring after restraining orders a third happened within 30 days of the order and a fifth within 2 days.⁸

The individual’s Fourth Amendment interest carries less weight given the brevity of the deprivation proposed by this bill: all cases will be reviewed by a judge the next business day.

⁴ State v. Martin provides a good overview of Vermont’s special needs jurisprudence. City of Indianapolis v. Edmonds, 531 U.S. 32, rejects the use of special needs in that case but provides a good overview of federal jurisprudence on the doctrine.

⁵ See footnote 1.

⁶ See footnote 2.

⁷ See footnote 2.

⁸ See footnote 3.

Therefore, the balance lies in favor of the State’s special need to protect victims by temporarily removing firearms from the scene of domestic violence even when they are not evidence of a crime.

Other States:

Twelve other states have laws that do essentially the same thing as H.422: they allow the state to remove firearms from the scene of domestic violence even if the weapons are not evidence or contraband. These states are: Alaska, Arizona, California, Connecticut, Hawaii, Indiana, Maryland, Nebraska, New Hampshire, New Jersey, Tennessee, and West Virginia.

Only New Jersey has litigated the law. The New Jersey Supreme Court has noted with approval a lower court decision that used the special needs doctrine to uphold the statute’s validity as a tool to temporarily seize weapons from the scene of domestic violence. State v. Harris, 211 N.J. 566, 581-83 (2012).