

**Testimony of Hannah Shearer  
Litigation Director  
Giffords Law Center to Prevent Gun Violence**

**Before the Vermont House Judiciary Committee  
on H. 610**

**Tuesday, January 28, 2020**

**INTRODUCTION**

Good afternoon and thank you for the opportunity to testify today. I'm an attorney and the litigation director at Giffords Law Center to Prevent Gun Violence, the legal nonprofit arm of the gun-safety organization founded by former US Congresswoman Gabrielle Giffords. I commend the drafters and supporters of H. 610, which will make Vermont safer for survivors of domestic violence and those at risk of other types of gun violence. I'll focus today on three provisions: the default proceed fix, the provision requiring gun relinquishment in relief from abuse orders, and family and household member risk protection orders.

**DEFAULT PROCEED FIX**

After a horrific, racially motivated shooting at Emanuel A.M.E. church in Charleston left nine worshippers dead, the FBI revealed the shooter should have failed a background check when he bought the murder weapon.<sup>1</sup> However, the FBI agent conducting his background check did not find information showing that the shooter had a substance abuse conviction within three days,<sup>2</sup> so the sale was allowed to proceed by default. This error exposed a dangerous pre-existing flaw in the federal National Instant Criminal Background Check System (NICS): the three-day default proceed. Eighteen states have acted to correct this flaw for some or all firearm transactions,<sup>3</sup> and **the FBI supports closing the loophole as well, as it has said in official interviews with the Government Accountability Office.**<sup>4</sup> It's time for Vermont to join the states that have fixed this dangerous flaw and made sure gun buyers must actually pass a background check.

Ninety-one percent of NICS checks take under two minutes, but about 9% require more time to determine if a buyer is prohibited.<sup>5</sup> Background checks can take days or weeks longer if the FBI needs to contact local, state or tribal agencies for conviction records, a process that takes time and can depend on how quickly agencies connect the FBI with needed information. Delayed checks tend to take longer precisely because there is something worth looking into; **default proceed sales are 8 times as likely to involve prohibited**

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<sup>1</sup> Carrie Johnson, "FBI Says Background Check Error Let Charleston Shooting Suspect Buy Gun," NPR (Jul. 10, 2015), <https://www.npr.org/sections/thetwo-way/2015/07/10/421789047/fbi-says-background-check-error-let-charleston-shooting-suspect-buy-gun>.

<sup>2</sup> *Id.*

<sup>3</sup> These states are Florida, New York, Utah, Maryland, Pennsylvania, California, Colorado, Connecticut, Illinois, Massachusetts, New Jersey, Hawaii, Delaware, Minnesota, North Carolina, Rhode Island, Tennessee, and Washington. (see <https://lawcenter.giffords.org/wp-content/uploads/2018/05/Default-Proceeds-Factsheet-Giffords-Law-Center.pdf>).

<sup>4</sup> See U.S. General Accounting Office, *Gun Control: Implementation of the National Instant Criminal Background Check System* 13 (Feb. 2000), at <https://www.gao.gov/new.items/g100064.pdf> ("FBI and Justice officials indicated that NICS could be improved by extending the maximum time allowed for conducting background checks to minimize the number of default-proceed transactions.")

<sup>5</sup> See FBI Criminal Justice Information Services Division, U.S. Dep't of Justice, *National Instant Criminal Background Check System (NICS) Operations 2014*, at <https://www.fbi.gov/about-us/cjis/nics/reports/2014-operations-report>.

**purchasers** than other sales.<sup>6</sup> But under current law, if a check takes more than 3 days, the sale can proceed without a background check result. The following statistics show why this loophole must be fixed:

- Nationwide 4,864 prohibited purchasers bought guns in 2017 before a background check cleared.<sup>7</sup>
- The erroneous default proceed rate is higher for certain types of prohibited purchasers. The leading cause for a default proceed sale to a prohibited person is **to people convicted of misdemeanor crimes of domestic violence (MCDV)**.<sup>8</sup> Here's more data on this category of purchasers:
  - **Nearly 30% of background check denials linked to a DV misdemeanor took more than 3 days to determine**, according to the U.S. Government Accountability Office (GAO). As a result, from 2006 to 2015, over 6,220 buyers obtained guns despite being prohibited based on a MCDV. (No other category had more than 20% of denials delayed past 3 days, though the second highest is unlawful controlled substance users, like the Charleston shooter.)<sup>9</sup>
  - The GAO attributes the high rate of delayed denials for MCDVs to the challenge of identifying MCDV convictions within records that aggregate all misdemeanor crimes; the lack of fingerprinted arrest records; and situations where an arrest record does not include a final disposition.<sup>10</sup> **The FBI simply needs more time to complete these background checks.**
- What happens when a sale wrongly goes through by default? **From 2006 to 2015, the FBI referred ATF 6,700 delayed denials related to domestic violence**, asking ATF to retrieve those guns that were sold to prohibited people.<sup>11</sup> But ATF is under-resourced and has a backlog of these requests. That means firearms do not get recovered promptly; sometimes, only a fraction are recovered:
  - Department of Justice and GAO reports in 2004 and 2014 highlighted problems with ATF's recovery of guns sold to prohibited buyers after the 3-day deadline and ATF's tracking of firearm recoveries, including cases where it took agents months to recover a firearm.<sup>12</sup>
  - In 1999, ATF got 3,353 referrals for sales to prohibited people but was only able to retrieve 442 of those guns, creating an enormous backlog.<sup>13</sup> A 2004 report found that ATF retrievals were delayed in 35% of cases; 43% of delays lasted four months to over a year.<sup>14</sup>

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<sup>6</sup> Mayors Against Illegal Guns, *A Blueprint for Federal Action on Illegal Guns: Regulation, Enforcement, and Best Practices to Combat Illegal Gun Trafficking* (Section I. Improving Gun Background Checks) (Aug. 2009), at [http://www.joycefdn.org/assets/images/blueprint\\_federal\\_action.pdf](http://www.joycefdn.org/assets/images/blueprint_federal_action.pdf) (citing Letter from Thomas E. Bush, III, FBI, to the Mayor of New York City (October 21, 2008), at [http://everytown.org/documents/2016/10/2008\\_10\\_21-fbi-letter.pdf](http://everytown.org/documents/2016/10/2008_10_21-fbi-letter.pdf)).

<sup>7</sup> FBI Criminal Justice Information Services Division, U.S. Dep't of Justice, *National Instant Criminal Background Check System (NICS) Operations 2017*, at <https://www.fbi.gov/file-repository/2017-nics-operations-report.pdf/view>.

<sup>8</sup> Gov't Accountability Office, *Gun Control: Implementation of the National Instant Criminal Background Check System 24-27* (Jul. 2016), at <https://www.gao.gov/assets/680/678204.pdf>.

<sup>9</sup> *Id.* at 25, 27.

<sup>10</sup> *Id.* at 11-15.

<sup>11</sup> *Id.* at 29.

<sup>12</sup> Dep't of Justice, Office of the Inspector General, *Review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' Enforcement of Brady Act Violations Identified Through the National Instant Criminal Background Check System* (Jul. 2004), at <https://www.documentcloud.org/documents/3719308-DOJ-IG-2014-ATF-Report.html>; Gov't Accountability Office, *Enhancing Data Collection Could Improve Management of Investigations* (Jun. 2014), at <https://www.documentcloud.org/documents/3719331-GAO-2014-ATF-Report.html>.

<sup>13</sup> U.S. General Accounting Office, *Implementation of the National Instant Criminal Background Check System 13*, [www.documentcloud.org/documents/3717301-GAO-2000-NICS-Implementation-Report.html#document/p7/a353248](http://www.documentcloud.org/documents/3717301-GAO-2000-NICS-Implementation-Report.html#document/p7/a353248).

<sup>14</sup> Dep't of Justice, Office of the Inspector General, *Review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' Enforcement of Brady Act Violations Identified Through the National Instant Criminal Background Check System iii* (Jul. 2004), at <https://www.documentcloud.org/documents/3719308-DOJ-IG-2014-ATF-Report.html>.

On the other hand, background checks rarely provide *false-positive* results, so ending default proceeds hasn't harmed law-abiding purchasers. FBI quality control evaluations, conducted by Office of the Inspector General in 2016, suggest background checks are accurate 99.3 to 99.8% of the time.<sup>15</sup> In the event someone is wrongly delayed, they will still get their gun in the end; and there are available remedies if they fall within the 0.2% of inaccurate checks, including getting underlying records corrected.

The above numbers lay out the scope of the problem. There are thousands of people every year, including convicted domestic abusers, who are able to wrongfully obtain guns through this loophole. It is only a matter of time before this loophole enables another mass shooting like Charleston, or a domestic violence shooting on a smaller scale that might get less attention. The solution is clear. The responsible thing to do is to close the loophole and improve the reliability of our background check system so that the FBI can do its job.

**Acting on their own, some firearm dealers, including Walmart, have made the smart decision to refuse dangerous default proceed transactions.**<sup>16</sup> These dealers will only sell guns when a background check shows a purchaser is not prohibited—a lifesaving policy that should be made into the law in Vermont.

### DOMESTIC VIOLENCE + FIREARM RELINQUISHMENT

Turning to the domestic violence relinquishment provisions, this bill aims to mitigate the deadly toll of domestic gun violence, particularly for women who survive abuse. Of all women shot to death by others in the U.S., *half* were shot by their intimate partners.<sup>17</sup> Even when abuse doesn't end in murder, abusers' access to guns can injure, threaten, and traumatize their partners. 1 million women alive today report being shot or shot at by an intimate partner and 4.5 million report a partner threatened them with a gun.<sup>18</sup>

Often before these harms occur, law enforcement was involved: **of women killed by their intimate partners, half had contact with the criminal justice system about their abuse within the preceding year.**<sup>19</sup> Those contacts provide critical windows of opportunity for police and courts to intervene and prevent harm. H. 610's relinquishment provisions take advantage of that window of opportunity and match what 20 states have already done by explicitly requiring individuals subject to a relief from abuse order to relinquish guns for the duration of the order.<sup>20</sup> Research demonstrates that these relinquishment provisions save lives:

- A study published in the American Journal of Epidemiology found that these state laws requiring that abusers relinquish guns are linked to a 12 to 16% reduction in intimate partner murders with guns.<sup>21</sup>
- An analysis of California's relinquishment law found that, over a 14-year period starting in 2000, when California first mandated that defendants in relief from abuse orders relinquish firearms, the

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<sup>15</sup> Dep't of Justice, Office of the Inspector General, "Audit of the Handling of Firearms Purchase Denials Through NICS" (Sept. 2016), at <https://oig.justice.gov/reports/2016/a1632.pdf>.

<sup>16</sup> See Office of the NYC Mayor, "Mayor Bloomberg Announces Final Settlement in Groundbreaking Litigation against Gun Dealers Caught Selling In Apparent Violation of Federal Law: Final Settlement Mirrors Responsible Firearms Retailer Partnership Developed by Wal-Mart & Mayors Against Illegal Guns," (Sept. 23, 2008), at <http://www1.nyc.gov/office-of-the-mayor/news/374-08/mayor-bloomberg-final-settlement-groundbreaking-litigation-against-gun-dealers-caught>.

<sup>17</sup> FBI, Uniform Crime Reporting Program: Supplementary Homicide Reports (SHR), 2012-2016.

<sup>18</sup> Susan B. Sorenson and Rebecca A. Schut, "Nonfatal Gun Use in Intimate Partner Violence: A Systematic Review of the Literature," *Trauma, Violence, & Abuse* 19, no. 4 (2018): 431–442.

<sup>19</sup> The Consortium for Risk-Based Firearm Policy, *Guns, Public Health, and Mental Illness: An Evidence-Based Approach for Federal Policy* (2013), at <http://www.efsgv.org/wp-content/uploads/2014/10/Final-FederalReport.pdf>.

<sup>20</sup> These states are Massachusetts, Hawaii, New Jersey, Illinois, California, Colorado, Connecticut, Maryland, New Hampshire, Oregon, Pennsylvania, Tennessee, Wisconsin, Iowa, Louisiana, Minnesota, New Mexico, New York, North Carolina, and Washington (see <http://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/#state>).

<sup>21</sup> April M. Zeoli, et al., "Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and Their Association with Intimate Partner Homicide," *American Journal of Epidemiology* 187, no. 11 (2018).

number of **domestic violence calls to law enforcement involving the use or threatened use of a firearm fell by 44%**. This drop happened even as the number of calls regarding domestic violence incidents *without* a weapon increased by nearly half.<sup>22</sup>

- Research also shows that the “honor system” of surrendering guns without intervention from a court does not work. People who remain illegally armed all too often use guns in subsequent crimes: one study documented that between 40% and 69% of those incarcerated for gun crimes were already legally prohibited from owning guns when they committed their latest offense.<sup>23</sup>

H. 610’s relinquishment process is well-crafted in that it protects the safety of survivors while protecting the constitutional rights of defendants. Every court to consider the issue has determined that the Second Amendment allows for relief from abuse orders that require relinquishment of firearms for the duration of the order.<sup>24</sup> These courts have noted that there are grave public safety interests that justify removing firearms for the duration of a protective order from domestic abusers who have committed acts of violence, abuse, or done similar acts or made credible threats.<sup>25</sup> H. 610 also respects due process and the Fourth Amendment by requiring judges to make findings of probable cause before issuing warrant to search for firearms.

### **FAMILY + HOUSEHOLD MEMBER RISK PROTECTION ORDERS**

Finally, I’ll speak in favor of the provisions in the bill authorizing family or household members to file a petition for an extreme-risk protection order (ERPO).

In this respect, H. 610 follows the lead of 12 states and Washington DC that allow family or household members to file ERPO petitions, provided they can meet the evidentiary standards required to file for and obtain an extreme risk-protection order.<sup>26</sup> There is strong evidence that extreme risk laws are being used in these states to prevent suicide, mass shootings, and gun homicides. For example, a case study by physicians at the UC Davis School of Medicine found at least 21 cases in California where ERPOs were used to disarm people who threatened mass shootings, including a car dealership employee who threatened to shoot up his workplace, and a high school student who threatened a mass shooting at a school assembly.<sup>27</sup> At the time this case study was published, none of the threatened shootings had occurred, and no other homicides or suicides by persons subject to the orders were identified by the researchers.

The evidence is equally strong that **extreme risk laws work to prevent suicide, which is a serious and growing problem in Vermont**.<sup>28</sup> Mental health experts believe up to 80% of people considering suicide give some sign of their intentions.<sup>29</sup> Family members and household members are the ones witnessing these signs. Connecticut’s and Indiana’s extreme risk laws have been shown to reduce firearm suicide rates in

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<sup>22</sup> “Crime in California: 2014,” Office of the Attorney General: California Department of Justice, Table 47, <https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd14/cd14.pdf>.

<sup>23</sup> Katherine A. Vittes, Jon S. Vernick, and Daniel W. Webster, “Legal status and source of offenders’ firearms in states with the least stringent criteria for gun ownership,” *Injury Prevention* 19, no. 1 (2013).

<sup>24</sup> See, e.g., *United States v. Chapman*, 666 F.3d 220 (4th Cir. 2012); *United States v. Bena*, 664 F.3d 1180 (8th Cir. 2011); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010); *United States v. Erwin*, 2008 U.S. Dist. LEXIS 78148 (N.D.N.Y. Oct. 6, 2008); *United States v. Luedtke*, 2008 U.S. Dist. LEXIS 117970 (E.D. Wis. 2008).

<sup>25</sup> See, e.g., *Webb v. Schlagal*, 2017 Tex. App. LEXIS 8331 (Tex. Ct. App. 2017), *petition for review denied*, 2017 Tex. LEXIS 1127 (Dec. 8, 2017).

<sup>26</sup> See <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/>.

<sup>27</sup> Garen J. Wintemute, et al., “Extreme Risk Protection Orders Intended to Prevent Mass Shootings: a Case Series,” *Annals of Internal Medicine* (2019).

<sup>28</sup> In 2017, Vermont’s firearm suicide rate was 1.5 times higher than the national firearm suicide rate, and nearly three times higher than that of other Northeastern states. Vermont’s firearm suicide rate increased by nearly 40% between 2000 and 2017, reaching its highest level in 25 years. See CDC WISQARS, “Fatal Injury Data,” last accessed Feb. 8, 2019, <https://www.cdc.gov/injury/wisqars>.

<sup>29</sup> “Suicide,” Mental Health America, <http://www.mentalhealthamerica.net/suicide>.

these states by 14% and 7.5%.<sup>30</sup> For every 10 to 20 firearm removals under Connecticut's and Indiana's extreme risk laws, approximately one life was saved through an averted suicide.<sup>31</sup>

This bill would expand Vermont's current ERPO process that allows only law enforcement to petition for orders. But it would do so through a process that is consistent with and already has precedent in Vermont and in all 50 states—the process used for relief from abuse (RFA) orders, where the petitioners are intimate partners or family or household members. **All 50 states have a domestic violence restraining order law that allows victims of domestic violence—including family or intimate partners—to petition for a civil restraining orders.** Research has shown these laws to be effective,<sup>32</sup> and courts have upheld them against constitutional challenges.<sup>33</sup> This bill would apply that exact same framework to risk protection orders and let people decide to go directly to a court as a petitioner after they observe warning signs in a family member.

That concludes my remarks. Thank you very much for your attention to this important bill.

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## ABOUT GIFFORDS LAW CENTER

For nearly 25 years, the legal experts at Giffords Law Center to Prevent Gun Violence have been fighting for a safer America by researching, drafting, and defending the laws, policies, and programs proven to save lives from gun violence. Learn more at [giffordslawcenter.org](http://giffordslawcenter.org).

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<sup>30</sup> Aaron J. Kivisto and Peter Lee Phalen, "Effects of Risk-based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981–2015," *Psychiatric Services* 69, no. 8 (2018): 855–862.

<sup>31</sup> Jeffrey W. Swanson, et al., "Implementation and Effectiveness of Connecticut's Risk-based Gun Removal Law: Does it Prevent Suicides." *Law & Contemporary Problems* 80, (2017): 179–208; Jeffrey W. Swanson, et al., "Criminal Justice and Suicide Outcomes with Indiana's Risk-Based Gun Seizure Law." *The Journal of the American Academy of Psychiatry and the Law*, (2019).

<sup>32</sup> See, e.g., April M. Zeoli, et al., "Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and Their Association with Intimate Partner Homicide," *American Journal of Epidemiology* 187, no. 11 (2018).

<sup>33</sup> E.g., *Kampf v. Kampf*, 603 N.W.2d 295, 296 (Mich. 1999); *Blazel v. Bradley*, 698 F. Supp. 756, 768 (W.D. Wis. 1988); *State ex rel Williams v. Marsh*, 626 S.W.2d 223, 232 (Mo. 1982).