



**Testimony of Allison Anderman  
Senior Counsel  
Giffords Law Center to Prevent Gun Violence**

**Before the Oregon House Judiciary Committee  
on H. 2543**

**Thursday, February 18, 2021**

**Background**

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> While the FBI noticed the shooter's arrest on a felony drug charge, a series of reporting errors made it difficult to determine whether he was an unlawful drug user, or convicted of the charge, both statutes that would have rendered him ineligible for firearms purchase.<sup>2</sup> Because the investigating agent was unable to determine within three days whether the arrest had led to a conviction, the sale was allowed to proceed by default. The resulting massacre exposed a dangerous loophole in the federal background checks system: the three-day "default proceed" provision now dubbed the "Charleston Loophole."

While 91% of FBI checks conducted through the National Instant Background Check System (NICS) take under two minutes, about 9% require more time to determine if a buyer is prohibited.<sup>3</sup> The Charleston Loophole, however, allows a dealer to turn a firearm over to a purchaser if the FBI needs more than three calendar days to process the check. Oregon allows a dealer to transfer a firearm to a purchaser in an even shorter timeframe than federal law. Oregon requires dealers to initiate a background check with the Department of State Police (DSP) which conducts an investigation of NICS and state databases (including Oregon's mental health data system).<sup>4</sup> If, after

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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> 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>.

<sup>4</sup> Or. Rev. Stat. §§ 166.412(2)(d), 166.432(1), 166.434(1).

initiating a background check, DSP is unable to determine whether a purchaser is qualified or disqualified from completing the transfer by *the close of the next business day*, the dealer may proceed with the transfer.<sup>5</sup>

Eighteen states and the District of Columbia have extended the time state investigators or NICS has to conduct a background check before a transfer may proceed for some or all firearms,<sup>6</sup> and **the FBI supports closing the loophole as well, as it has said in official interviews with the Government Accountability Office (GAO).**<sup>7</sup> H. 2543 would allow Oregon to join these states and ensure gun buyers actually pass a background check before receiving a gun.

### The Data

Background checks can take days or weeks, or occasionally 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 provide 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 purchasers** than other sales.<sup>8</sup> But under current law, if the FBI cannot respond to DSP in one business day, the sale can proceed without a background check result. The following data demonstrate why this practice is so dangerous.

- Nationwide 4,864 prohibited purchasers bought guns in 2017 before a background check cleared.<sup>9</sup>

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<sup>5</sup> Or. Rev. Stat. § 166.412(3).

<sup>6</sup> These states are California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Massachusetts, New Jersey, Hawaii, 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>7</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/q100064.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>8</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>9</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>.

- **People convicted of misdemeanor crimes of domestic violence (MCDV)** are the most common type of prohibited person to receive a gun via the Charleston Loophole.<sup>10</sup>
  - **Nearly 30% of background check denials linked to a DV misdemeanor took more than 3 days to determine**, according to the 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 category involved unlawful controlled substance users, like the Charleston shooter.)<sup>11</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>12</sup> **The FBI simply needs more time to complete these background checks.**
- What happens when a gun is transferred to a person later determined to be prohibited? **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>13</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

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<sup>10</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>11</sup> *Id.* at 25, 27.

<sup>12</sup> *Id.* at 11-15.

<sup>13</sup> *Id.* at 29.

3-day period and ATF's tracking of firearm recoveries, including cases where it took agents months to recover a firearm.<sup>14</sup>

- In 1999, ATF received 3,353 referrals for sales to prohibited people but was only able to retrieve 442 of those guns, creating an enormous backlog.<sup>15</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>16</sup>

**On the other hand, background checks rarely provide false-positive results, so closing the Charleston Loophole will rarely inconvenience legal purchasers.** FBI quality control evaluations, conducted by the Office of the Inspector General in 2016, suggest background checks are accurate 99.3 to 99.8% of the time.<sup>17</sup> In the event someone falls within the 0.2% of legal purchasers for whom a background check is delayed, the individual has remedies including getting the underlying records corrected that led to the delay.

## **Conclusion**

There are thousands of people prohibited from gun possession, including convicted domestic abusers, who are able to obtain guns through the Charleston Loophole each year. **Because of this, responsible dealers, including Walmart, have made the responsible decision to refuse dangerous default proceed transactions.**<sup>18</sup>

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<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* (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>15</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>16</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>.

<sup>17</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>18</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>.



It is only a matter of time before this loophole enables another mass shooting or domestic violence murder yet the solution is clear - close the loophole and allow DSP and the FBI adequate time to do their jobs. Accordingly, I urge you to vote aye on H. 2543.

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#### **ABOUT GIFFORDS LAW CENTER**

For over 25 years, the legal experts at Giffords Law Center to Prevent Gun Violence have been fighting for a safer America. Led by former Congresswoman Gabrielle Giffords, Giffords Law Center researches, drafts, and defends the laws, policies, and programs proven to save lives from gun violence.