

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON GUN VIOLENCE
NEW YORK STATE BAR ASSOCIATION
COMMISSION ON DOMESTIC & SEXUAL VIOLENCE
SECTION OF STATE AND LOCAL GOVERNMENT LAW
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local,
2 territorial, and tribal governments to enact statutes, rules and regulations that
3 provide law enforcement reasonable time to complete a thorough background
4 check of a prospective purchaser of a firearm before the transfer of a firearm can
5 take place;

6
7 FURTHER RESOLVED, That the American Bar Association urges the repeal of 18
8 U.S.C. § 922(t)(1)(B)(ii), also known as the “Charleston Loophole,” that allows for
9 the sale of a firearm to be consummated after three business days have expired,
10 even if the background check has not been completed; and

11
12 FURTHER RESOLVED, That the American Bar Association urges federal, state,
13 local, territorial, and tribal governments to authorize and appropriate sufficient
14 funds to agencies responsible for background checks, in order to ensure timely
15 processing.

REPORT

I. Introduction

Laws requiring background checks on all gun sales enjoy broad public approval.¹ There is widespread agreement that certain individuals should not be allowed to purchase, own, or possess firearms. Federal and state laws set forth the categories of such persons.² Performing a thorough background check is the key to preventing firearms from getting into the hands of those who should not possess them. In February of 2020, the American Bar Association's House of Delegates passed Resolution 20M107B which addressed the private-sale loophole that exists when persons purchase firearms from non-licensed dealers and individuals, including private sellers, at gun shows and online, which can take place without a background check. The Resolution urged authorities to close that loophole by passing laws that require anyone seeking to acquire a firearm to apply for a permit, to have a background check performed, and prohibiting the transfer of the firearm to anyone who does not possess a valid permit.³ The present Resolution seeks to close what has become known as the Charleston Loophole, which occurs as a result of the Federal law which allows the sale of a firearm to be consummated after three business days have expired, even if the background check has not been completed.⁴ This has resulted in numerous tragedies that could have been prevented if additional time had been allowed to complete a thorough background check of a potential purchaser. Twenty-one states have addressed this loophole with the passage of laws that expand the time for

¹ Polling demonstrates overwhelming support for background checks for all gun buyers, including from 87 percent of gun owners and 89 percent of Republicans. Quinnipiac University, "*US Voters Oppose Trump Emergency Powers on Wall 2-1 Quinnipiac University National Poll Finds; 86 Percent Back Democrats' Bill on Gun Background Checks*," news release (March 6, 2019), <https://poll.qu.edu/Poll-Release-Legacy?releaseid=2604>.

² See 18 U.S.C. § 922(g). For example, it is illegal for persons in the following categories to possess a firearm: convicted of a crime punishable by imprisonment for more than one year (18 U.S.C. § 922(g)(1)); fugitive from justice (18 U.S.C. § 922(g)(2)); unlawful user of, or addicted to, a controlled substance (18 U.S.C. § 922(g)(3)); adjudicated as a mental defective or committed to a mental institution (18 U.S.C. § 922(g)(4)); illegally or unlawfully in the United States (18 U.S.C. § 922(g)(5)); dishonorably discharged from the Armed Forces (18 U.S.C. § 922(g)(6)); U.S. citizens who have renounced their citizenship (18 U.S.C. § 922(g)(7)); subject to a domestic violence restraining order issued after a hearing on notice (18 U.S.C. § 922(g)(8)); convicted of a misdemeanor domestic violence crime (18 U.S.C. § 922(g)(9)). There are state laws that have added to these categories.

³ 20M107B.

⁴ 18 U.S.C. § 922(t)(1)(B)(ii). The law provides: (t) (1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless – (A) (before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act; (B)(i) the system provides the licensee with a unique identification number; or (ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and (C) the transferor has verified the identity of the transferee by examining a valid identification document (as defined in section 1028(d) of this title) of the transferee containing a photograph of the transferee.

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background checks in various ways.⁵ It is time for all federal, state, local, territorial, and tribal governments to enact statutes, rules and regulations that allow law enforcement a reasonable time to complete thorough background checks to ensure that guns do not get into the wrong hands.

II. Federal Law Requires that if a Background Check is not Completed within Three Business Days a Firearm may be Transferred to the Purchaser by an Authorized Seller⁶

The Federal Gun Control Act of 1968⁷ set forth categories of individuals who are prohibited from possessing guns under federal law.⁸ These categories have been expanded over time. It also required retailers and individuals in the business of selling firearms to obtain a Federal Firearm License (“FFL”). Under the 1993 Brady Handgun Violence Prevention Act (“Brady Act”),⁹ all holders of an FFL are required to run background checks of prospective firearms purchasers.¹⁰ There is no such requirement for private sellers. The Brady Act called for the establishment of the National Instant Criminal Background Check System (“NICS”) to enable FFL holders to access a database that could quickly inform them whether a potential purchaser is prohibited from owning a firearm.¹¹ The NICS was activated on November 30, 1998. Under existing federal law, if

⁵ Everytown for Gun Safety, *2022 Everytown Gun Law Rankings, Which states have closed or limited the Charleston Loophole?*, <https://everytownresearch.org/rankings/law/charleston-loophole-closed-or-limited/>. Many states have extended the time allowed for a background check to be completed by: (1) prohibiting the transfer of a firearm until a background check is completed or after the expiration of time greater than three business days (e.g., Utah has an indefinite amount of time for a background check to be completed (Utah Code Ann. § 76-10-526(5)(b)); New York requires a license to purchase a handgun, and the FFL holder has up to 30 days before the firearm must be transferred, (N.Y. Penal Law §§ 265.00 *et seq.*, 400.00, 400.01); (2) requiring the purchaser to obtain a license or permit prior to the transfer of a gun (e.g., New Jersey requires a permit to purchase a handgun or a Firearms Purchaser Identification Card to purchase a rifle or shotgun (N.J. Admin. Code § 13:54-1.9)); or (3) requiring mandatory waiting periods before transferring the gun to the purchaser (e.g., California has a 10-day waiting period that can be expanded up to 30 days if the background check is not completed, (Cal Penal Code § 28220(f)(1)(A)). See also, Giffords L. Ctr., *Browse State Gun Laws* (Jan. 2020), <https://giffords.org/lawcenter/gun-laws/browse-state-gun-laws/?filter0=,264>; Giffords L. Ctr., *Background Check Procedures*, <https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/background-check-procedures/>; and Giffords L. Ctr., *Gun Sales, Waiting Periods*, https://giffords.org/lawcenter/gun-laws/policy-areas/gun-sales/waiting-periods/#footnote_6_5633.

⁶		<i>Supra</i>		note		4.
⁷	18	U.S.C.	§	921	<i>et</i>	<i>seq.</i>
⁸		<i>Supra</i>		note		2.

⁹ 107 Stat. 1536, Pub. L. No. 103-159 (1993). The Brady Act amended the Federal Gun Control Act of 1968. The interim provisions (phase I) of the Brady Act went into effect February 28, 1994. The interim provisions applied to handgun purchases only and allowed law enforcement officers a maximum of five business days to conduct presale background checks for evidence of disqualifying information. The NICS became operational when the Brady Act’s permanent provisions went into effect on November 30, 1998.

¹⁰	18	U.S.C.	§	922(t)(1).
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¹¹ The FBI implemented the NICS for Federal Firearms Licensees so that they could instantly determine whether a prospective transferee is eligible to receive firearms or explosives. NICS screens for a wide variety of prohibiting factors that disqualify purchasers from obtaining firearms. See FBI website, *About NICS*, <https://www.fbi.gov/services/cjis/nics/about-nics>; and Criminal Justice Information Services Division of the Federal Bureau of Investigation, U.S. Department of Justice, *National Instant Criminal Background*

a background check has not been completed within three business days, a gun sale may go through without the results of the background check having been obtained.¹²

Most NICS background checks produce results within minutes, and the firearm can be transferred to the potential buyer when the FFL holder receives the results. About 9% need further investigation and review. Most of those are completed within three business days, however, approximately 3% of cases need more than three business days to achieve results,¹³ often because there are issues regarding a potential buyer's qualifications. Locating relevant information from state and local sources frequently takes more than the allotted three business days. Nonetheless, federal law allows the gun to be transferred to the buyer after the three-business day period has expired even if the NICS results have not been received.¹⁴ This can have devastating consequences if the gun gets into the wrong hands.

A fatal and tragic example of such consequences is the horrific shooting that occurred at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina on June 17, 2015. The shooter in that case, Dylann Roof, entered the church and sat through a Bible study group before killing the Pastor and eight parishioners. Roof should not have been allowed to purchase the .45-caliber Glock pistol he used to carry out the killings, due to a prior arrest record which revealed possession of a controlled substance. That would have disqualified him from purchasing the gun.¹⁵ But because the background check was not completed within three business days, the sale went through and Roof was able to gain possession of the firearm.¹⁶ To avoid this and other tragic shootings, the time to complete a background check before a gun is transferred to the purchaser should be extended to a reasonable period of time that allows law enforcement sufficient opportunity to complete a thorough background check.

A. The National Instant Criminal Background Check System

Before a firearm can be purchased, the FFL holder must contact NICS, electronically or by phone, to initiate a background check. The FBI developed the NICS in cooperation with the U.S. Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives

Check System (NICS) Section, 2019 Operations Report, <https://www.fbi.gov/file-repository/2019-nics-operations-report.pdf/view>.

¹² *Supra* note 4.
¹³ *Supra* note 11. See also, Giffords L. Ctr., *Background Check Procedures Laws*, <https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/background-check-procedures/#footnote 4 5615>.

¹⁴ *Supra* notes 4, 11, 13.
¹⁵ 118 U.S.C. § 922(g)(3).

¹⁶ See Michael S. Schmidt, *Background Check Flaw Let Dylann Roof Buy Gun, FBI Says*, New York Times (July 10, 2015), <https://nyti.ms/2VmlD0y>; Larry Buchanan, Josh Keller, Richard A. Opper, Jr. and Daniel Victor, *How They Got Their Guns*, New York Times (Feb. 16, 2018), <https://www.nytimes.com/interactive/2015/10/03/us/how-mass-shooters-got-their-guns.html>; Carrie Johnson, *FBI Says Background Check Error Let Charleston Shooting Suspect Buy Gun*, NPR (July 10, 2015), <https://www.npr.org/sections/thetwo-way/2015/07/10/421789047/fbi-says-background-check-error-let-charleston-shooting-suspect-buy-gun>; *Statement by FBI Director James Comey Regarding Dylann Roof Gun Purchase*, FBI Website, Press Releases (July 10, 2015), <https://www.fbi.gov/news/press-releases/press-releases/statement-by-fbi-director-james-comey-regarding-dylann-roof-gun-purchase>.

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“ATF”), and local and state law enforcement agencies. The NICS provides centralized access to criminal history and other disqualifying records by searching separate national databases.¹⁷ Those databases contain records compiled by the FBI and information that the states, and local, tribal, and territorial jurisdictions voluntarily provide. The relevant databases are: (1) the Interstate Identification Index (“III”), (2) the National Crime Information Center (“NCIC”), (3) the NICS Indices, and (4) Immigration-related databases maintained by the Department of Homeland Security’s Immigration and Customs Enforcement (“ICE”).¹⁸

The potential purchaser must fill out and sign an ATF Form 4473 (Firearms Transaction Record), and the FFL holder communicates the information from that form to the NICS. The form contains identifying information regarding the purchaser that must be verified by the FFL holder. The potential purchaser must certify that he or she is the actual buyer and truthfully answer questions regarding disqualifying conditions.¹⁹ Falsely filling out a Form 4473 is a federal felony punishable by up to 10 years in jail.²⁰ The NICS section, operated by the FBI, provides full service to FFL holders in 31 states, 5 U.S. territories and the District of Columbia; partial service to six states; and the remaining 13 states perform their own checks through the NICS.²¹ More than 300 million background checks have taken place since 1968, with more than 1.5 million purchases being denied.²²

When a background check is requested by an FFL holder, NICS will have one of four responses:

1. Proceed - the seller may proceed with the sale because no prohibiting record was located
2. Denied – the seller may not proceed with the sale because a prohibiting record was located
3. Delayed – information suggesting the prospective purchaser could be prohibited was located
4. Canceled – the request is canceled due to insufficient information being provided²³

¹⁷ See 28 C.F.R. § 25.6.

¹⁸ See Criminal Justice Information Services Division of the Federal Bureau of Investigation, U.S. Department of Justice, *National Instant Criminal Background Check System (NICS) Section, 2019 Operations Report*, <https://www.fbi.gov/file-repository/2019-nics-operations-report.pdf/view>; and William J. Krouse, Cong. Research Serv., R45970, *Gun Control: National Instant Criminal Background Check System (NICS) Operations and Related Legislation* (Oct. 17, 2019), <https://crsreports.congress.gov/product/pdf/R/R45970>.

¹⁹ See ATF website, *ATF Form 4473 – Firearms Transaction Record Revisions*, <https://www.atf.gov/firearms/atf-form-4473-firearms-transaction-record-revisions>; and *Id.*

²⁰ *Id.* 18 U.S.C. §§922(a)(6) and 924(a)(2).

²¹ See FBI website, *Criminal Justice Information Services (CJIS) About NICS*, <https://www.fbi.gov/services/cjis/nics/about-nics>.

²² See FBI website, *Criminal Justice Information Services (CJIS) National Instant Criminal Background Check System (NICS)*, <https://www.fbi.gov/services/cjis/nics>.

²³ *Supra* note 18.

It is this third category where a sale can be finalized if the FBI NICS Section background check is not completed within three business days.²⁴ This category frequently requires the analyst to reach out to state and local authorities to determine whether a disqualifying condition exists. If the information is not received within that three-business day time limit, the gun can be transferred. This is what happened with such devastating results in the Charleston shooting.

If the NICS Section analyst determines after the three-business day period that the buyer was in fact disqualified from purchasing a gun, it will notify the FFL holder of that denial. If the firearm has already been transferred to the disqualified buyer, the NICS Section will then notify the ATF that a prohibited person possesses the firearm and it should be retrieved.²⁵ These referrals are called “firearm retrieval referrals.” In 2016, for those delayed background checks that took longer than 3 business days, there were 4,170 firearm retrieval referrals to the ATF.²⁶ In 2017, there were 4,864 firearm retrieval referrals to the ATF;²⁷ in 2018, there were 3,960 firearm retrieval referrals to the ATF;²⁸ and in 2019 there were 2,989 firearm retrieval referrals to the ATF.²⁹ Out of these 2,989 transfers in 2019, the top three categories involved the transfer of firearms to 672 users of controlled substances, 634 felons and 562 persons convicted of a misdemeanor domestic violence crime.³⁰

In 2018, approximately 276,000 background checks took longer than the default three-business day time limit. That is roughly 3.35 percent of the 8,235,342 background checks performed in 2018.³¹ The chart below sets forth similar data for the period of 2014 through 2018.³²

²⁴ 18 U.S.C. § 922(t)(1)(B)(ii) and 28 C.F.R. § 25.6(c)(1)(iv)(B).

²⁵ *Supra* note 18.

²⁶ Criminal Justice Information Services Division of the Federal Bureau of Investigation, U.S. Department of Justice, *National Instant Criminal Background Check System (NICS) Operations 2016*, <https://www.fbi.gov/file-repository/2016-nics-operations-report-final-5-3-2017.pdf/view>.

²⁷ Criminal Justice Information Services Division of the Federal Bureau of Investigation, U.S. Department of Justice, *National Instant Criminal Background Check System (NICS) Operations, 2017*, <https://www.fbi.gov/file-repository/2017-nics-operations-report.pdf/view>.

²⁸ Criminal Justice Information Services Division of the Federal Bureau of Investigation, U.S. Department of Justice, *National Instant Criminal Background Check System (NICS) Section, 2018 Operations Report*, <https://www.fbi.gov/file-repository/2018-nics-operations-report.pdf/view>.

²⁹ Criminal Justice Information Services Division of the Federal Bureau of Investigation, U.S. Department of Justice, *National Instant Criminal Background Check System (NICS) Section, 2019 Operations Report*, <https://www.fbi.gov/file-repository/2019-nics-operations-report.pdf/view>.

³⁰ *Id.*

³¹ Joshua Eaton, *Exclusive: As Congress considers a fix to gun loophole, new FBI data shows the size of the problem*, THINKPROGRESS (March 6, 2019), <https://thinkprogress.org/exclusive-as-congress-considers-a-fix-to-gun-loophole-new-fbi-data-shows-the-size-of-the-problem-093354b9c31f/>; See also, Joshua Eaton, *Justice Department slow to answer Congress on gun background checks*, Roll Call (October 10, 2019), <https://rollcall.com/2019/10/10/justice-department-slow-to-answer-congress-on-gun-background-checks/>.

³² Joshua Eaton, *Exclusive: As Congress considers a fix to gun loophole, new FBI data shows the size of the problem*, THINKPROGRESS (March 6, 2019), <https://thinkprogress.org/exclusive-as-congress-considers-a-fix-to-gun-loophole-new-fbi-data-shows-the-size-of-the-problem-093354b9c31f/>. See the following link in the article for the chart: <https://docs.google.com/spreadsheets/d/1F9kKtxWwnMMOlvAcukn0C-kNwFRLCGBFJOTTBCBK4/edit#gid=0>.

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calendar year	federal checks	delayed transactions	not complete over the third business day	percentage of all federal checks
2014	8,256,688	791,850	228,006	2.76%
2015	8,973,538	900,567	271,359	3.02%
2016	9,360,833	1,063,090	303,146	3.24%
2017	8,638,246	998,886	310,232	3.59%
2018	8,235,342	n/a	276,000	3.35%
TOTAL	43,464,647	3,754,393	1,388,743	3.20%

If a background check results in a “proceed” outcome with no disqualifications being found, the background check record must be purged from the NICS system within 24 hours.³³ In situations where the determination is delayed, the NICS system will continue to work on the background check for up to 30 days, even if the 3-business day time limit has elapsed and the firearm has been transferred.³⁴ At 88 days after a potential sale was initiated, all pending background check records are purged from the NICS system, even if they remain incomplete.³⁵ Each year, hundreds of thousands of delayed background checks are deleted before they are ever completed. From 2014 through July 2019, the FBI failed to complete over 1.1 million background checks, making it impossible to know how many people purchased guns with an incomplete background check and how many of those people should have been disqualified.³⁶ A 2016 report issued by the Department of Justice’s Inspector General on the NICS similarly determined that the FBI did not complete 1.3 million background checks from fiscal year 2003 to May 2013 due to the requirement to purge background checks within 90 days.³⁷ According to the 2019 NICS Operations Report, there were 261,312 background requests that could not be resolved within the three business days, and out of those, 207,421 (79%) remained unresolved and were purged from the NICS within 90 days. This figure is consistent with prior years, based upon the yearly volume.³⁸

The COVID Pandemic resulted in a surge of firearm purchases.³⁹ Between March to November of 2020 there was a 43 percent increase in background check requests over

³³ *Supra* note 18; 18 U.S.C. § 922(t)(2)(C). The identifying number assigned to the inquiry, and the date it was assigned, remain in the system, 28 C.F.R. §25.9 (b)(1)(iii).

³⁴ *Supra* note 18.

³⁵ *Id.*; See also 28 C.F.R. §25.9 (b)(1)(iii).

³⁶ Joshua Eaton, *FBI Never Completes Hundreds of Thousands of Gun Checks*, Roll Call (December 3, 2019), <https://rollcall.com/2019/12/03/fbi-never-completes-hundreds-of-thousands-of-gun-checks/>.

³⁷ *Id.*

³⁸ *Supra* note 29. See also Giffords L. Ctr., *Background Check Procedures*, <https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/background-check-procedures/>.

³⁹ Keith Collins and David Yaffe-Bellany, *About 2 Million Guns Were Sold in the U.S. as Virus Fears Spread*, New York Times (April 1, 2020), <https://www.nytimes.com/interactive/2020/04/01/business/coronavirus-gun-sales.html>; Richard A. Oppel

the same period in 2019, resulting in a total of 30.3 million background checks being commenced.⁴⁰ In excess of 294,000 background checks were incomplete after three business days between March and July of 2020, more than the total number in 2019.⁴¹ This increase in background check requests has put an even greater strain on a system that is already stretched thin. This surge led the Justice Department to ask Congress for more resources to increase the FBI staff performing background checks and the ATF personnel addressing firearm retrievals.⁴²

Incomplete background checks would be reduced if the NICS System analyst were allowed more than three business days to complete the background check, thereby avoiding thousands of guns each year ending up in the hands of disqualified purchasers, and undoubtedly saving lives. It is important that the agencies at the federal and state levels responsible for background checks receive adequate resources to ensure timely processing of background checks.

B. Background Checks Often Take More Than Three Business Days to Complete when Disqualifying Factors Exist

A background check frequently takes longer than three business days because there is information in the potential purchaser's background that disqualifies them from gun possession. According to the FBI's internal report on the Charleston, South Carolina shooting, the main reasons for delays are "[u]ntimely responses and/or incomplete records" from the thousands of law enforcement agencies that provide information into the databases that comprise the NICS system.⁴³

More than 35,000 guns were transferred to prohibited purchasers between 2008 and 2017 because of the three business-day rule.⁴⁴ A review of background checks through NICS between 2015 and 2019 showed that completed background checks that take longer than three days are four times more likely to be denied.⁴⁵

Jr., *For Some Buyers With Virus Fears, the Priority Isn't Toilet Paper. It's Guns.*, New York Times (March 16, 2020), <https://www.nytimes.com/2020/03/16/us/coronavirus-gun-buyers.html>.

⁴⁰ Everytown for Gun Safety, Everytown Research & Policy, Report, *Undeniable: How Long-Standing Loopholes in the Background Check System Have Been Exacerbated by COVID-19* (April 23, 2021), <https://everytownresearch.org/report/background-check-loopholes/>.

⁴¹ *Id.* Everytown's analysis estimated that by the end of 2020, at least 7,500 transfers to prohibited purchasers occurred, more than in 2018 and 2019 combined.

⁴² Betsy Woodruff Swan, *Trump Justice Department Asks for More Resources to Enforce Gun Laws*, Politico (May 12, 2020), <https://politi.co/3fQju6E>.

⁴³ Joshua Eaton, *Charleston mass murderer got his gun because of background check gaps, internal report shows*, Roll Call (October 10, 2019), <https://rollcall.com/2019/10/10/charleston-mass-murderer-got-his-gun-because-of-background-check-gaps-internal-report-shows/>.

⁴⁴ Brady, *Resources, The Enhanced Background Checks Act of 2021 (H.R. 1446)*, <https://www.bradyunited.org/legislation/enhanced-background-checks-act-hr-1446-charleston-loophole>.

⁴⁵ Everytown for Gun Safety, *Everytown Research & Policy, Solutions, Close the Charleston Loophole*, <https://everytownresearch.org/solution/close-the-charleston-loophole/>.

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Delays are especially likely when the disqualifying basis involves a misdemeanor domestic violence offense.⁴⁶ A Government Accountability Office July 2016 report documented the difficulty of adequately completing background checks within three business days when domestic violence crimes are involved:

FBI data also show that during fiscal year 2015, the FBI completed 90 percent of denials that involved MCDV [misdemeanor crime of domestic violence] convictions within 7 business days, which was longer than for any other prohibiting category (e.g., felony convictions). The FBI completed 90 percent of denials that involved domestic violence protection orders in fewer than 3 business days. According to federal and selected state officials GAO contacted, the information needed to determine whether domestic violence records—and in particular MCDV convictions—meet the criteria to prohibit a firearm transfer is not always readily available in NICS databases and can require additional outreach to state agencies to obtain information.⁴⁷

Between 2006 to 2015, approximately 30% of NICS background check denials for misdemeanor crimes of domestic abuse took longer than 3 business days to complete, meaning that during that time, licensed dealers were legally authorized under federal law to transfer guns to 18,000 prohibited persons.⁴⁸ Twenty-six percent of those denials were returned within 20 business days.⁴⁹ Between 2006 and 2015, more than 6,000 firearms were transferred to persons with misdemeanor domestic violence convictions because the three-day business period could not be met.⁵⁰ And in 2017, 23% of the cases where a firearm was transferred to a purchaser with a prohibited status because the background check exceeded three business days involved someone with a misdemeanor conviction of domestic violence or a domestic violence restraining order.⁵¹

These compelling statistics highlight the importance of repealing 18 USC § 922(t)(1)(B)(ii), the Charleston Loophole, and extending the three-business day time limit to enable law enforcement reasonable and sufficient time to conduct a thorough and complete background check through NICS before a firearm sale is consummated.

III. Pending Federal Legislation

On March 11, 2021, The U.S. House of Representatives again passed two bills regarding background checks, one to require background checks on all firearm sales and transfers,

⁴⁶ *Supra* note 32.

⁴⁷ See U.S. Gov't Accountability Off., GAO-16-483, *Gun Control: Analyzing Available Data Could Help Improve Background Checks Involving Domestic Violence Records*, (July 2016), <https://www.gao.gov/assets/680/678315.pdf>.

⁴⁸ *Id.* No other prohibited category had more than 20% of its denials delayed beyond the three business days.

⁴⁹ *Supra* note 44.

⁵⁰ *Id.*

⁵¹ *Id.*

and the other to expand the 3-business day time limit on Federal background checks before a sale can go through.⁵² Similar bills had been passed by the House in the 116th Congress, but were never passed by the Senate. The Enhanced Background Checks Act of 2021, H.R. 1446 (117th Congress), was introduced by Representative Jim Clyburn of South Carolina to close the Charleston Loophole. The bill increases the time from three business days to ten business days for the initial background check review. If a background check has not been completed after the ten-day period, the potential purchaser may submit a petition for a final firearms eligibility determination. They must certify that they are not prohibited from purchasing or possessing a firearm when making this request. The FBI will then have an additional 10 business days to complete the background check. If after the ten-day period the background check is still not complete, the FFL holder may transfer the firearm. If the potential purchaser does not petition for an expedited review, they will have to wait until their background check is completed before the sale can go through. As soon as the background check is finalized the firearm may be transferred. This legislation is pending in the Senate.⁵³ The bill seeks to balance public safety with a purchaser's lawful right to purchase and possess a firearm.

IV. Extending the Time to Complete Background Checks Beyond Three Business Days Does Not Violate the Constitution

As noted in the Report from the Standing Committee on Gun Violence that accompanied Resolution 107B, adopted by the ABA House of Delegates in February of 2020,⁵⁴ under our federal system of government, states can pass their own laws regulating firearms, as long as those laws do not conflict with the Second Amendment of the Constitution or federal law. States have enacted gun regulation laws that expand upon federal law in the following areas: categories of prohibited purchasers; allowing more than three business days to complete a background check; requiring a license or permit for possession and purchase of a firearm; and requiring waiting periods beyond a three-day period before a firearm can be transferred to a purchaser.⁵⁵

In the seminal case of *District of Columbia v. Heller*,⁵⁶ the Supreme Court, while upholding the right under the Second Amendment to have a firearm in the home for self-defense, cautioned that the Second Amendment right it recognized is “not unlimited,” and does not confer “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁵⁷ The Court noted that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the

⁵² See Bipartisan Background Checks Act of 2021, H.R. 8, 117th Cong. (as passed by House, Mar. 11, 2021); Enhanced Background Checks Act of 2021, H.R. 1446, 117th Cong. (as passed by House, Mar. 11, 2021). See also, Congress*GOV, *H.R. 1446 – Enhanced Background Checks Act of 2021*, <https://www.congress.gov/bill/117th-congress/house-bill/1446>; and Michael A. Goster, CONG. RESEARCH SERV., R46958, *Federal Firearms Law: Selected Developments in the Executive, Legislative, and Judicial Branches* (Nov. 3, 2021), <https://crsreports.congress.gov/product/pdf/R/R46958>.

⁵³ *Id.*

⁵⁴ *Supra* note 3.

⁵⁵ *Supra* note 5.

⁵⁶ 554 U.S. 570 (2008).

⁵⁷ 554 U.S. at 626.

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mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”⁵⁸

Generally, lower courts engage in a two-step inquiry when analyzing Second Amendment claims. First, the courts ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment. If the court finds that the regulation does not impose such a burden, no further inquiry is needed and the challenge fails. If the court finds that a regulation implicates conduct protected by the Second Amendment, the second step of the analysis is required, which is to determine and apply the appropriate level of scrutiny. Courts, in general, determine the appropriate level of scrutiny based on the challenged law’s burden on Second Amendment rights. Most of the federal courts of appeal have applied intermediate scrutiny in reviewing Second Amendment challenges.⁵⁹ The inquiry under intermediate scrutiny is whether the law is substantially related to an important or significant governmental interest, and does not burden more conduct than is reasonably necessary to protect that interest.⁶⁰

Courts have consistently upheld laws that prohibit possession of guns by persons who are in a disqualified category, e.g., convicted of a felony or a domestic violence offense, subject to an order of protection, or involuntarily committed to a mental institution.⁶¹ Indeed, these are the types of prohibitions that the court in *Heller* would consider “longstanding” and “presumptively lawful.” Given that it can take more than three business days to screen for these types of prohibitions, especially in domestic violence and mental illness cases, it is illogical to contend that extending the time allowed for a background check to be completed beyond three business days before a firearm can be transferred to a potential purchaser would violate the Second Amendment.

The *Heller* Court stated that “nothing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms.”⁶² In reliance on *Heller*, courts have routinely upheld state laws that have placed additional restrictions beyond those required by federal law, for example, imposing a waiting period in excess of three business days before a firearm sale can be consummated.⁶³ There are several

⁵⁸ 554 U.S. at 626-27.

⁵⁹ See Giffords L. Ctr., *Post-Heller Litigation Summary* (Feb. 9, 2022), https://giffords.org/lawcenter/gun-laws/litigation/post-heller-litigation-summary/#footnote_28_4141. See, e.g., *Silvester v. Harris*, 843 F.3d 816, 822-823 (9th Cir. 2016), noting that “This court has applied intermediate scrutiny in a series of cases since *Heller* to uphold various firearms regulations,” and “Our intermediate scrutiny analysis is in line with that of other circuits.” *Silvester* upheld the constitutionality of California’s 10-day waiting period, even in cases where a background check has been completed. See also, *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 692 (6th Cir. 2016) (en banc): “A non-exhaustive review of [post-*Heller*] cases reveals a near unanimous preference for intermediate scrutiny.”

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Supra* note 58.

⁶³ See *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016). The court upheld a ten-day waiting period which applied even if a potential purchaser had a permit and cleared a background check in less than 10 days. The Court said it did not need to determine if the regulation was sufficiently longstanding to be presumed lawful because, in applying an intermediate scrutiny analysis, the ten-day waiting period was reasonable

states that have closed the Charleston Loophole by ensuring sufficient time for a background check to be finished before a firearm sale can be processed, whether by extending the time for background checks to be completed, requiring a license or permit before a purchase can occur, or imposing waiting periods.⁶⁴ It is time for federal law to close the Charleston Loophole by repealing 18 U.S.C. § 922(t)(1)(B)(ii), and allowing law enforcement reasonable time to complete a thorough background check of a prospective purchaser of a firearm before the sale or transfer of a firearm can take place.

V. The Federal Law Which Imposes a Three-Business Day Time Limit on Background Checks Must Be Repealed

The three-business day restriction on federal background checks has resulted in innumerable firearms getting into the hands of persons who are not entitled to possess them under the law. As discussed above, a tragic example of what can happen when this occurs is the heartbreaking shooting of a Pastor and eight parishioners at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina on June 17, 2015, when they were gathered together for a Bible study group. It is clear from reliable data that in countless instances, three business days is frequently insufficient to perform a thorough background check, especially when the potential purchaser has a disqualifying event that must be verified at the state or local level, often in cases involving domestic violence convictions. Early on, the FBI acknowledged that NICS could be improved and the number of prohibited purchasers who obtain guns reduced, if the three-business day period were extended.⁶⁵ Notably, the sponsors of the Brady Act initially proposed a seven-day waiting period for handgun transfers, and under the interim provisions of the Act, five business days were allowed to determine eligibility before a transfer had to take place. The three-business day provision went into effect when the permanent provisions of the Brady Act became effective.⁶⁶ Extending the three-business day time limit will not delay the sale to potential purchasers who have no prohibiting condition, since most background checks where the purchaser is not disqualified are completed within minutes and the firearm can be transferred.⁶⁷

and did not violate the Second Amendment. The Supreme Court denied certiorari in this case on February 20, 2018, No. 17-342.

⁶⁴ *Supra* note 5 and note 45.

⁶⁵ See Giffords L. Ctr., *Background Check Procedures*, <https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/background-check-procedures/>; U.S. Gov't Accounting Off., GAO-00-64, *Gun Control: Implementation of the National Instant Criminal Background Check System* (February 2000), <https://www.gao.gov/assets/ggd/aimd-00-64.pdf>; U.S. Gov't Accounting Off., GAO-00-56, *Gun Control: Options For Improving the National Instant Criminal Background Check System* (April 2000), <https://www.gao.gov/assets/ggd-00-56.pdf>; and U.S. Gov't Accounting Off., Testimony Before the Committee on the Judiciary, U.S. Senate, *Gun Control, Improving the National Instant Criminal Background Check System*, Statement for the Record of Laurie E. Ekstrand, Director, Administration of Justice Issues, General Government Division (June 21, 2000); <https://www.govinfo.gov/content/pkg/GAOREPORTS-T-GGD-00-163/pdf/GAOREPORTS-T-GGD-00-163.pdf>.

⁶⁶ William J. Krouse, Cong. Research Serv., R45970, *Gun Control: National Instant Criminal Background Check System (NICS) Operations and Related Legislation* (Oct. 17, 2019), <https://crsreports.congress.gov/product/pdf/R/R45970>.

⁶⁷ *Supra* note 13.

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Government has a significant interest in keeping people safe and ensuring that firearms do not end up in the hands of disqualified persons. Delaying the transfer of a firearm by a reasonable period of time which is greater than three business days does not impinge on a person's Second Amendment rights. Rather, it promotes the legitimate and important governmental interest of protecting people and not allowing firearms to be purchased by those who should not have them under the law.

Allowing law enforcement a reasonable period of time to complete a thorough background check will save lives. The concept of reasonableness is one that is used often in the law. In this context, it should be determined based on the data with respect to how much time it takes to complete thorough background checks in situations where individuals have disqualifying conditions in their history, including conditions that require contacting state and local authorities to ascertain the facts. Many states have passed laws to close the Charleston Loophole and expanded the period of time during which background checks can be completed.⁶⁸ The time frames differ, with some states imposing no specific time limit, and only allowing a sale to proceed when the background check is complete.⁶⁹ Jurisdictions can determine which requirements work best for their own particular localities, based on research and data, to ensure protection of the public while at the same time honoring a person's Second Amendment rights.

Interestingly, Walmart, which has a huge retail presence in the United States, issued a policy statement in 2018 on firearm sales at its stores. It noted that it does not sell hand guns (except in its Alaska stores), nor bump stocks, high-capacity magazines and similar accessories. The statement references its 2015 decision to stop selling modern sporting rifles, including AR-15s. It also highlighted the fact that although federal law allows the sale of a firearm to go through without a background check if there is no response within three business days, their policy prohibits the sale until they receive an approval. It explains: "We take seriously our obligation to be a responsible seller of firearms and go beyond Federal law by requiring customers to pass a background check before purchasing any firearm."⁷⁰

Scholarly research published in the *Journal of Law, Medicine and Ethics* in 2021 indicates that Walmart's decision to suspend handgun sales at all of its 1,975 stores in 1994 was responsible for preventing on an annual basis between 500 - 1,000 gun suicides.⁷¹ If large

⁶⁸ Supra note 5.

⁶⁹ *Id. Egs.*: Colorado - background check must be complete before transfer; Florida - minimum of three business days or until background check is complete, whichever is later; Utah - background check must be complete before transfer.

⁷⁰ See the February 28, 2018 *Walmart Statement on Firearms Policy*, <https://corporate.walmart.com/newsroom/2018/02/28/walmart-statement-on-firearms-policy>. In 2002, Walmart first implemented the rule that customers had to be approved by a background check before they could purchase rifles and shotguns (it did not sell handguns) regardless of how long it took to get the results; see Associated Press, *Wal-Mart toughens background-check policy for gun sales*, *DeseretNews*, July 4, 2002, <https://www.deseret.com/2002/7/4/19664325/wal-mart-toughens-background-check-policy-for-gun-sales>.

⁷¹ Ian Ayres, Zachary Shelley, and Fredrick E. Vars, *The Walmart Effect: Testing Private Interventions to Reduce Gun Suicide*, *The Journal of Law, Medicine and Ethics*, (January 6, 2021). The study also found evidence, although not as strong, that Walmart's later decision to end rifle and shotgun sales at some of

private commercial establishments can take responsible steps to prevent disqualified individuals from gaining access to firearms, then certainly Government can do the same.

VI. Conclusion

Extending the three-business day time limit under federal law to provide reasonable time for law enforcement to complete a thorough background check before a firearm is transferred to a purchaser will save lives. Doing so is consistent with the Second Amendment and case law, and promotes ABA policies passed over the years that seek to keep guns out of the hands of disqualified individuals. For these reasons, the ABA urges: federal, state, local, territorial, and tribal governments to enact statutes, rules and regulations that provide law enforcement reasonable time to complete a thorough background check of a prospective purchaser of a firearm before the transfer of a firearm can take place; repeal of 18 U.S.C. § 922(t)(1)(B)(ii), also known as the “Charleston Loophole,” that allows for the sale of a firearm to be consummated after three business days have expired, even if the background check has not been completed; and federal, state, local, territorial, and tribal governments to authorize and appropriate sufficient funds to agencies responsible for background checks, in order to ensure timely processing.

Respectfully Submitted,

Angela Adkins Downes
Chair, ABA Standing Committee on Gun Violence

August 2022

its stores reduced the firearms suicide rate in states in which Walmart did not subsequently change this policy. Finally, it found an association between stronger state gun laws with substantial and statistically significant reductions in suicide.

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GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Gun Violence, New York State Bar Association, and Commission on Domestic & Sexual Violence

Submitted By: Angela Adkins Downes, Chair, Standing Committee on Gun Violence

1. Summary of the Resolution(s).

Urges federal, state, local, territorial, and tribal governments to enact statutes, rules and regulations that provide law enforcement reasonable time to complete a thorough background check of a prospective purchaser of a firearm before the transfer of a firearm can take place; further urges the repeal of 18 U.S.C. § 922(t)(1)(B)(ii), the “Charleston Loophole,” that allows for the sale of a firearm to be consummated after three business days have expired, even if the background check has not been completed; and further urges federal, state, local, territorial, and tribal governments to authorize and appropriate sufficient funds to agencies responsible for background checks in order to ensure timely processing.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

Advance the Rule of Law (Goal 4)– This Resolution will improve existing law to enable law enforcement to complete thorough background checks before a firearm can be transferred to a potential buyer to ensure that the potential buyer is not prohibited under federal and state law from purchasing, possessing or owning a firearm. This Resolution will thereby serve the public good by keeping firearms out of the hands of persons who should not have them, and will save lives.

Eliminate Bias (Goal 3)- This resolution also advances the goal of eliminating bias. It should be noted that the church that brought the loophole into the public eye is the Emanuel African Methodist Episcopal Church, which predominately serves a diverse community. In addition, while mass shootings are more widely reported on the news, gun violence, a public health crisis, significantly impacts minority communities on a daily basis. Gun violence in our cities has seen dramatic increase in recent years.

3. Approval by Submitting Entity.

The Standing Committee on Gun Violence approved the Resolution on May 4, 2022

4. Has this or a similar resolution been submitted to the House or Board previously?

None

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The proposed Resolution is consistent with, and complementary to, existing Association policy regarding gun violence and federal and state firearms laws.

Policy 75A109.1, *Recommended Amendments to the Gun Control Act of 1968*, among other things, supported legislation that included provisions to mandate a waiting period prior to firearms purchases so that a criminal background check could be performed by the Bureau of Alcohol, Tobacco and Firearms.

Policy 11A10A, *NICS Accuracy and Funding*, among other things, supported legislation that included provisions urging the government to take all appropriate measures to ensure that NICS records are as complete and accurate as possible with respect to persons prohibited from buying firearms, and urged the government to devote adequate resources to fund complete and accurate implementation of the NICS system.

6. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

7. Status of Legislation. (If applicable)

Although the Resolution and Report do not endorse any specific legislation, the Report does describe proposed federal legislation, "H.R. 1446-117th Congress: Enhanced Background Checks Act of 2021," passed in the House of Representatives and currently pending in the Senate, that would extend the time in which a federal background check can be conducted by an initial ten business day period.

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

If adopted this policy can be the basis of advocacy at the federal and state level and possible amicus brief applications. It will also be incorporated into programs that the Standing Committee on Gun Violence offers.

9. Cost to the Association. (Both direct and indirect costs)

None

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10. Disclosure of Interest. (If applicable)

N/A

11. Referrals.

Criminal Justice Section
Commission on Youth at Risk
Government & Public-Sector Lawyers Division
Section of Civil Rights and Social Justice
Health Law Section
Judicial Division
Section of Family Law
Section of Litigation
Section of State and Local Government Law
Standing Committee on Pro Bono and Public Service
Tort Trial & Insurance Practice Section
Young Lawyers Division
Commission on Hispanic Rights and Responsibilities
Commission on Racial and Ethnic Justice
Commission on Sexual Orientation and Gender Identity
Law Student Division
GP Solo Division

12. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

Angela Adkins Downes
214-662-4442
Angela.Downes@untdallas.edu

13. Name and Contact Information. (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

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Monte E. Frank
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EXECUTIVE SUMMARY

1. Summary of the Resolution.

Urges federal, state, local, territorial, and tribal governments to enact statutes, rules and regulations that provide law enforcement reasonable time to complete a thorough background check of a prospective purchaser of a firearm before the transfer of a firearm can take place; further urges the repeal of 18 U.S.C. § 922(t)(1)(B)(ii), the “Charleston Loophole,” that allows for the sale of a firearm to be consummated after three business days have expired, even if the background check has not been completed; and further urges federal, state, local, territorial, and tribal governments to authorize and appropriate sufficient funds to agencies responsible for background checks, in order to ensure timely processing.

2. Summary of the issue that the resolution addresses.

Many background checks cannot be completed within three business days as required by Federal Law 18 U.S.C. § 922(t)(1)(B)(ii), also known as the Charleston Loophole, resulting in firearms being transferred to purchasers in a prohibited category for gun possession, e.g., persons: convicted of a felony; convicted of a domestic violence misdemeanor; who are unlawful users of a controlled substance; subject to a domestic violence restraining order issued after a hearing on notice; adjudicated as a mental defective or committed to a mental institution; among other categories.

3. Please explain how the proposed policy position will address the issue.

The proposed policy will allow additional time for a background check to be completed through the NICS (National Criminal Background Check System) in order to ensure that persons in prohibited categories under federal and state laws do not purchase or possess firearms, and will provide funding for the agencies that administer background checks to ensure timely processing of those background checks.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

None known