

**GIFFORDS
LAW CENTER**
TO PREVENT GUN VIOLENCE

FOR THE RECORD: NICS AND PUBLIC SAFETY

Essential Improvements to the
National Instant Criminal
Background Check System

FOR THE RECORD: **NICS & PUBLIC SAFETY**

In 2015, there were more than 121,000 shootings in the United States, of which over 36,000 were fatal. Worse yet, we know too many of these tragedies are preventable. The National Instant Criminal Background Check System, or NICS, helps keep guns out of the hands of dangerous people—one of the most effective ways of preventing deadly shootings.

WHAT IS NICS?

The National Instant Criminal Background Check System, known as NICS, is one of the most important tools we have in the fight against gun violence. This powerful, necessary set of databases helps stop more than 100,000 prohibited purchasers from buying guns from licensed dealers every year. Unfortunately, far too many others slip through the cracks due to missing or incomplete background check records, often with deadly consequences.

In 2014, there were over 700,000 state protection order records missing from the NICS database.

STRENGTHENING THE BACKGROUND CHECK SYSTEM

Improving the number and quality of records sent to NICS must be a top priority for lawmakers in every state in order to ensure the background check system is as thorough as possible. Our comprehensive report *For the Record: NICS & Public Safety* explores what NICS is, how it works, and why this system is so essential to safeguarding our communities.

By examining existing gaps in federal law and record-reporting challenges at the state level, we can better understand how to strengthen this critical system. Background checks can and do stop the flow of guns to dangerous people, but NICS must be properly maintained and strengthened to maximize its lifesaving potential.

NUMBER OF ILLEGAL GUN SALES
STOPPED BY BACKGROUND CHECKS

2.8 MILLION

SINCE 1993

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THE NICS PROCESS



WE'RE ON A MISSION TO SAVE LIVES

For 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. Founded in the wake of a 1993 mass shooting in San Francisco, in 2016 the Law Center joined with former Congresswoman Gabrielle Giffords to form a courageous new force for gun safety that stretches coast to coast.

CONTACT US
media@giffords.org

READ THE FULL REPORT:

lawcenter.giffords.org/NICS

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INTRODUCTION

The United States is in the grips of a widespread public health crisis.

More than 114,000 Americans are shot every year, 33,000 of them fatally.¹ Over *one million* people have been victims of gun violence in the United States in the past decade.² American rates of injury and death from gun violence dwarf other industrialized nations, and for 20 years the gun lobby has run roughshod over Congress, using campaign contributions and attack ads to bully our leaders into pushing through legislation that threatens public safety while simultaneously granting unprecedented immunity to firearms manufacturers. All this while the vast majority of Americans—over 92%—agree that smart gun laws like universal background checks must be enacted to reduce the crushing toll gun violence exacts on our communities.³

But the momentum is finally shifting. In recent years, Americans have begun to stand up to the gun lobby at the state level: a remarkable 160 new smart gun laws have been passed in 42 states and DC since the tragic murder of 20 first-graders and six educators at Sandy Hook Elementary in Newtown, CT, on December 14, 2012. In 2016 alone, three states passed comprehensive gun reform by ballot measure, and at the federal level Congressional leaders have fought back against the gun lobby's deadly agenda, leading filibusters, holding sit-ins, and demanding change.

Meanwhile, a growing body of research has linked commonsense gun safety laws, in particular universal background checks, with significantly lower rates of gun injury and death. For example, since Missouri repealed its handgun background check requirement in 2007, the share of crime guns in Missouri that were originally

purchased in-state has grown by 23%⁴ and the crime-gun murder rate in the state has risen 25%.⁵ Conversely, in California, lawmakers have enacted the strongest gun laws in the country during the last two decades. During that time, the state's gun death rate dropped by nearly 60%.⁶ Simply put, *smart gun laws work*.

Keeping guns out of the hands of dangerous individuals such as convicted felons, domestic abusers, and the violently mentally ill is one of the most effective methods of preventing deadly shootings. It is imperative that we strengthen our existing background checks system and close the loopholes that allow anyone to purchase guns in private sales—including online and at gun shows—without undergoing a background check. By doing so, we will keep these deadly weapons from falling into the wrong hands, preventing shootings before they happen and saving lives from this devastating epidemic.

Fortunately, we already have a tool to help us dramatically reduce the number of guns sold to dangerous members of our society. A set of databases maintained by the FBI, the **National Instant Criminal Background Check System (NICS)**, is a crucial component in the fight against gun violence. NICS was created to implement the 1993 Brady Handgun Violence Prevention Act, which requires background checks for firearms transfers that go through federally licensed dealers. Since the Brady Act took effect, background checks have stopped 2.8 million felons, abusers, and other dangerous people from obtaining a gun from a federally licensed dealer.⁷

Every year, NICS stops over 100,000 prohibited people from buying guns from federally licensed dealers.⁸ **But far too many others are slipping through the cracks due to missing or incomplete background check records, often with deadly consequences.** The FBI provides its own records of those who commit federal crimes, but the only way NICS receives records of state-level convictions, mental health adjudications, and other records—which vastly outnumber their federal counterparts—is through voluntary submissions. As one would expect, some states do a far better job than others sharing this potentially lifesaving information.

Improving the number and quality of records sent to NICS must be a top priority for every state in order to ensure that each background check is as thorough as possible. ***For the Record: NICS and Public Safety*** explores what NICS is, how it works, and why strengthening this system is so crucial to saving lives from gun violence. The report also discusses the difficulties states face when submitting records to NICS and the best practices that have been developed to address these challenges. Most Americans know little about NICS and even less about how it works. By gaining an understanding of this critical tool and the policies that will improve our use of it, we can make a powerful difference in the fight to save lives from gun violence.

WHAT IS NICS?

In 1993, President Bill Clinton signed the Brady Handgun Violence Prevention Act into law.

The Brady Act requires dealers, but not unlicensed sellers, to conduct background checks to determine whether a gun transfer is prohibited by the Gun Control Act of 1968, one of the few federal laws regulating the firearms industry and gun transfers.⁹ The Brady Act gave the Department of Justice five years to create a national background check system for this purpose. In 1998, the FBI launched the National Instant Criminal Background Check System, known as NICS, a centralized catalog of records comprised of three separate national databases. Two of these databases, the National Crime Information Center and the Interstate Identification Index existed long before NICS was created, while the third, known as the NICS Index, was created at the same time the FBI launched the system.

THE NATIONAL CRIME INFORMATION CENTER

The FBI has maintained the National Crime Information Center (NCIC) since 1967.¹⁰ Among other things, law enforcement uses NCIC to learn crucial information about a person or property they encounter. For example, when a police officer stops a vehicle, he or she may check NCIC to determine whether the occupant of the vehicle is currently wanted for a crime or if the vehicle has been stolen. In addition to these types of records, NCIC contains domestic violence protective orders, fugitive records, missing person reports, and many other records.

A NICS check includes a search of NCIC records because some records in the database, such as fugitive and domestic violence protective orders, result in firearms prohibitions. During a background check, the NICS system accesses NCIC to determine whether there is a match with a prohibiting record.

THE INTERSTATE IDENTIFICATION INDEX

Law enforcement, employers, professional licensing agencies, and others use the Interstate Identification Index (III) to check criminal backgrounds. Essentially, the III is a catalogue of identifying information about individuals who have been arrested or indicted anywhere in the country for a serious crime.¹¹ (Serious crimes include all felonies and some misdemeanors.) Misdemeanors that are deemed to be minor crimes, such as trespassing or loitering, are generally not included in the III, which has been maintained by the FBI since 1983. NICS accesses the III during a background check search to determine whether a person has committed a felony or misdemeanor that would result in a firearm prohibition.

THE NICS INDEX

Unlike NCIC and III, the FBI maintains the NICS Index solely for firearms background checks. The NICS Index functions as a catchall database for records that do not fit within NCIC or III but do indicate that an individual is prohibited from purchasing firearms.¹² For example, mental health records are typically found only in the NICS Index because they do not fall into the categories contained in NCIC or III. In 2012, the NICS Index was expanded to include state-prohibiting records, thereby providing the NICS Section (the sub-agency within the FBI that handles background check requests) and state users with the ability to effectively and efficiently identify people prohibited from possessing guns by state law through NICS, provided states have reported their records to the NICS Index.¹³

The NICS Index functions as a catchall database for records that do not fit within NCIC or III but do indicate that an individual is prohibited from purchasing firearms.

In addition, because federal law prohibits gun ownership by a person who is unlawfully in the United States, has been admitted to the US under a non-immigrant visa, or has renounced citizenship, a NICS check includes a search of Homeland Security's Immigration and Customs Enforcement databases, which contain records regarding non-US citizens.

HOW A NICS CHECK WORKS

Federal law requires a completed form for every firearm transfer conducted by a dealer.

A Firearms Transaction Record, more commonly referred to as ATF Form 4473, is the first step in the background check process.¹⁴ A transfer generally includes sale, gift, lease, loan, or disposal of a firearm. Form 4473 records the transferee's name, address, and identifying information such as height, weight, and date of birth. The transferee must show a valid government-issued photo ID and the dealer must record the type of ID, its identification number, and its expiration date on the form.

As long as the transferee has adequately completed Form 4473, has not indicated on the form that he or she is a prohibited purchaser, has produced a valid ID, and the dealer has no reasonable cause to believe that the transferee is prohibited from possessing a firearm, the next step is for the dealer to contact the FBI's NICS Operation Center.

A gun lobby-backed law prohibits ATF from digitizing records, making tracing crime guns incredibly difficult.

Licensed gun dealers can contact the NICS Operation Center by phone or via the E-Check System, the online access point for background checks. In a "point of contact" state, a state agency accesses NICS on behalf of the dealer.

The dealer provides the Operation Center with the customer's name and descriptive information as reported on Form 4473. In turn, the dealer must record the date of

contact with NICS, the transaction number provided by NICS, and the response on Form 4473. Dealers must keep these forms for at least 20 years for completed transactions and for at least five years for incomplete transactions—dealers may discard the records after these time periods have passed.

It's important to note that Form 4473 records are not centralized and are instead kept at the individual locations of the over 60,000 federally licensed dealers all across the United States. A gun lobby-backed appropriations rider dating to 1997 prohibits the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), the federal agency responsible for enforcing most federal gun laws, from consolidating, digitizing, or centralizing these records, making it incredibly difficult to trace the history of guns used in crimes.¹⁵ These onerous rules are part of a larger gun lobby effort to hamstring ATF efforts to regulate for public safety.

Once the dealer has provided the descriptive information, the system determines whether the purchaser matches any records in the databases that make up NICS. If no matches are found, the dealer is instructed to proceed with the transfer.

Federal law requires the FBI to destroy the record of the NICS search within 24 hours when a transferee passes a NICS check, another example of the gun lobby's efforts to heavily influence oversight of the gun industry.¹⁶

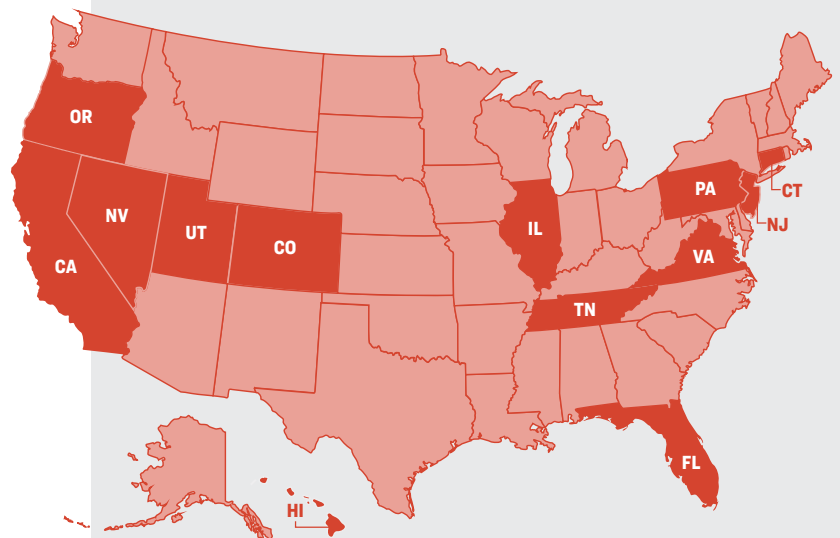
If a match, also known as a "hit," is found, a NICS examiner may conduct a more thorough search of the records. After an investigation, the examiner will instruct the dealer to take one of three actions:

A MORE THOROUGH CHECK POINT OF CONTACT STATES

In a point of contact state, dealers contact a state agency instead of the FBI. The designated agency, such as the state police, conducts a search of the databases that make up NICS and, often, independent in-state databases as well.

According to the FBI, state point of contact background checks are more thorough than those performed by the FBI because they can access independent state criminal histories and other databases in addition to NICS. One study found that states that perform background checks locally rather than relying solely on NICS have a 27% lower firearm suicide rate and a 22% lower homicide rate for people over 21.⁴⁵

Currently, 13 states act as points of contact for all firearm transfers. Eight additional states employ this system for handgun background checks only.⁴⁶



● POINT OF CONTACT STATES FOR ALL FIREARMS

- An **instruction to proceed** means there was no disqualifying record in any of the three databases that comprise NICS.
- An **instruction to deny** means there was a match with a record indicating the transferee is prohibited under federal or state law.
- An **instruction to delay** signifies that there was a match, but more research is needed to determine if the match is accurate and/or if the record indicates a firearm prohibition.

Following a delay, if there is no final response from the NICS examiner after three business days, federal law allows the dealer to transfer the firearm to the customer at his or her discretion.¹⁷ Some states have enacted laws allowing more time for an investigation in the event of a delay. Delaware is the most recent state to enact such legislation—in 2016, the state extended the time period to complete a background check to 25 days.¹⁸

U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives

OMB No. 1140-0020

Firearms Transaction Record Part I - Over-the-Counter

WARNING: You may not receive a firearm if prohibited by Federal or State law. The information you provide will be used to determine whether you are prohibited under law from receiving a firearm. Certain violations of the Gun Control Act, 18 U.S.C. §§ 921 et. seq., are punishable by up to 10 years imprisonment and/or up to a \$250,000 fine.

Transferor's Transaction Serial Number (if any)

Prepare in original only. All entries must be handwritten in ink. Read the Notices, Instructions, and Definitions on this form. "PLEASE PRINT."

Section A - Must Be Completed Personally By Transferee (Buyer)

1. Transferee's Full Name
Last Name First Name Middle Name (if no middle name, state "NMN")

2. Current Residence Address (U.S. Postal abbreviations are acceptable. Cannot be a post office box.)
Number and Street Address City County State ZIP Code

3. Place of Birth
U.S. City and State -OR- Foreign Country

4. Height
Fe. In.

5. Weight
(Lbs.)

6. Gender
☐ Male ☐ Female

7. Birth Date
Month Day Year

8. Social Security Number (Optional, but will help prevent misidentification)

9. Unique Personal Identification Number (UPIN) if applicable (See Instructions for Question 9.)

10.a. Ethnicity
☐ Hispanic or Latino ☐ Not Hispanic or Latino

10.b. Race (Check one or more boxes.)
☐ American Indian or Alaska Native ☐ Black or African American ☐ White
☐ Not Hispanic or Latino ☐ Asian ☐ Native Hawaiian or Other Pacific Islander

11. Answer questions 11.a. (with exceptions) through 11.i. and 12. (if applicable) by checking or marking "yes" or "no" in the boxes to the right of the questions.

a. Are you the actual transferee/buyer of the firearm(s) listed on this form? **Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you. (See Instructions for Question 11.a.)** Exception: If you are picking up a repaired firearm(s) for another person, you are not required to answer 11.a. and may proceed to question 11.b. Yes No

b. Are you under indictment or information in any court for a felony, or any other crime, for which the judge could imprison you for more than one year? (See Instructions for Question 11.b.) Yes No

c. Have you ever been convicted in any court of a felony, or any other crime, for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation? (See Instructions for Question 11.c.) Yes No

d. Are you a fugitive from justice? Yes No

e. Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance? Yes No

f. Have you ever been adjudicated mentally defective (which includes a determination by a court, board, commission, or other lawful authority that you are a danger to yourself or to others or are incompetent to manage your own affairs) OR have you ever been committed to a mental institution? (See Instructions for Question 11.f.) Yes No

g. Have you been discharged from the Armed Forces under dishonorable conditions? Yes No

h. Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner? (See Instructions for Question 11.h.) Yes No

i. Have you ever been convicted in any court of a misdemeanor crime of domestic violence? (See Instructions for Question 11.i.) Yes No

j. Have you ever renounced your United States citizenship? Yes No

k. Are you an alien illegally in the United States? Yes No

l. Are you an alien admitted to the United States under a nonimmigrant visa? (See Instructions for Question 11.l.) If you answered "no" to this question, do NOT respond to question 12 and proceed to question 13. Yes No

12. If you are an alien admitted to the United States under a nonimmigrant visa, do you fall within any of the exceptions set forth in the instructions? (If "yes," the licensee must complete question 20c.) (See Instructions for Question 12.) If question 11.l. is answered with a "no" response, then do NOT respond to question 12 and proceed to question 13. Yes No

13. What is your State of residence (if any)? (See Instructions for Question 13.)

14. What is your country of citizenship? (List check more than one, if applicable. If you are a citizen of the United States, proceed to question 16.) ☐ United States of America ☐ Other (Specify)

15. If you are not a citizen of the United States, what is your U.S.-issued alien number or admission number? Yes No

Note: Previous Editions Are Obsolete

Transferee (Buyer) Continue to Next Page
STAPLE IF PAGES BECOME SEPARATED

ATF Form 4473 (5/2009) (Part I)
Revised April 2012

ATF FORM 4473

If you are not the actual buyer, you are prohibited from receiving a firearm. If you are not the actual buyer, you are prohibited from receiving a firearm. If you are not the actual buyer, you are prohibited from receiving a firearm.

19. If sale at a gun show or other qualifying event.

Name of Event

City, State

Identification (e.g., Virginia Driver's License (V/LD) or other valid government-issued photo identification) (See Instructions for Question 20.a.)

Number on Identification

Expiration Date of Identification (if any)

Month Day Year

Alternate Documentation (if driver's license or other identification document does not show current residence address) (See Instructions for Question 20.b.)

20. The NICS or State transaction number (if provided) was:

21. The NICS or State response was:

21a. If initial NICS or State response was "Delayed," the following response was received from NICS or the appropriate State agency:

21b. If initial NICS or State response was "Denial," the following response was received from NICS or the appropriate State agency:

21c. If initial NICS or State response was "Proceed," the following response was received from NICS or the appropriate State agency:

21d. If initial NICS or State response was "Cancellation," the following response was received from NICS or the appropriate State agency:

21e. If initial NICS or State response was "No resolution was provided within 3 business days," the following response was received from NICS or the appropriate State agency:

21f. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21g. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21h. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21i. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21j. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21k. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21l. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21m. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21n. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21o. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21p. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21q. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21r. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21s. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21t. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21u. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21v. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21w. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21x. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21y. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

21z. If initial NICS or State response was "No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS," the following response was received from NICS or the appropriate State agency:

22. The name and ready identification number of the NICS examiner (optional)

23. The name and ready identification number of the NICS examiner (optional)

24. The name and ready identification number of the NICS examiner (optional)

25. Recertification Date

Page 2 of 6

ATF Form 4473 (5/2009) (Part I)
Revised April 2012

In addition to making our communities safer, NICS background checks are remarkably quick and burden-free, ensuring the process of legally purchasing of a firearm remains smooth and efficient.

In 2015, NICS Call Centers processed background checks in an average of just over two minutes.¹⁹ Calls transferred to NICS examiners for further investigation were handled in less than eight minutes, on average, including wait and processing time. The fastest processing time is through the NICS E-Check System, which averages less than two minutes.²⁰ The vast majority of background checks are completed in less time than a commercial break.

WHY IS NICS IMPORTANT?

The records in NICS are essential to making background checks strong and reliable. Data shows that NICS effectively prevents guns from falling into the hands of felons, domestic abusers, and other dangerous people thousands of times each year. Overall, since NICS was launched in 1998, the FBI has used it to deny 1,380,896 prohibited people (not including those denied in point of contact states).²¹ Most denials are due to felony or misdemeanor convictions. For example, to date 745,648 felons and misdemeanants (in non-point of contact states) have been denied after a NICS check.²²

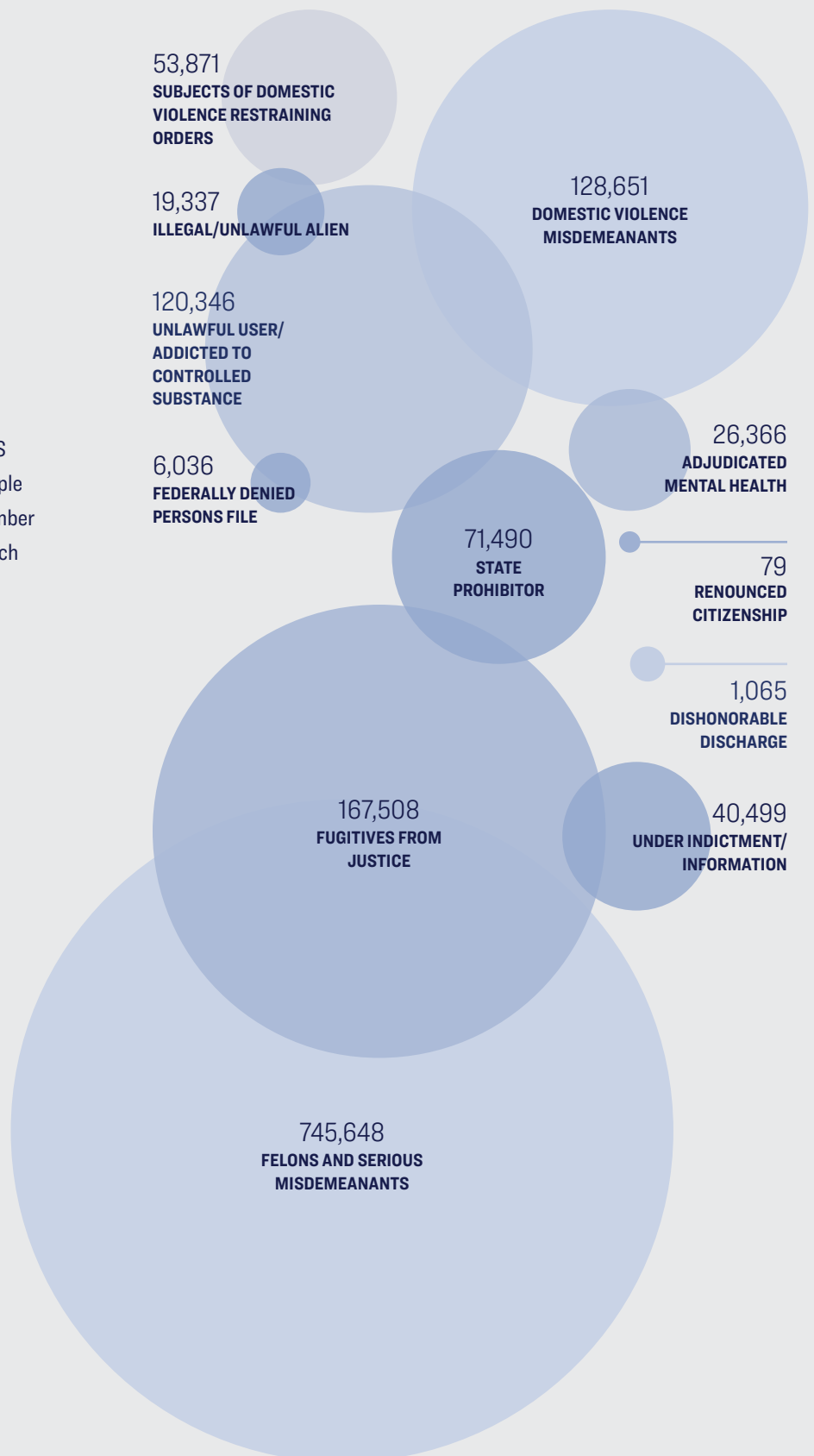
Unfortunately, data also shows that the records in NICS are incomplete, since states submit their records on a voluntary basis. The FBI estimates that, on average, about **3,000 people pass a NICS background check each year despite being prohibited** under state or federal law from purchasing a gun.²³ The actual number may be even higher.

It is crucial that states improve the submission of records to NICS to maximize the effectiveness of background check laws, ensuring that felons and other dangerous people do not have easy access to deadly weapons.

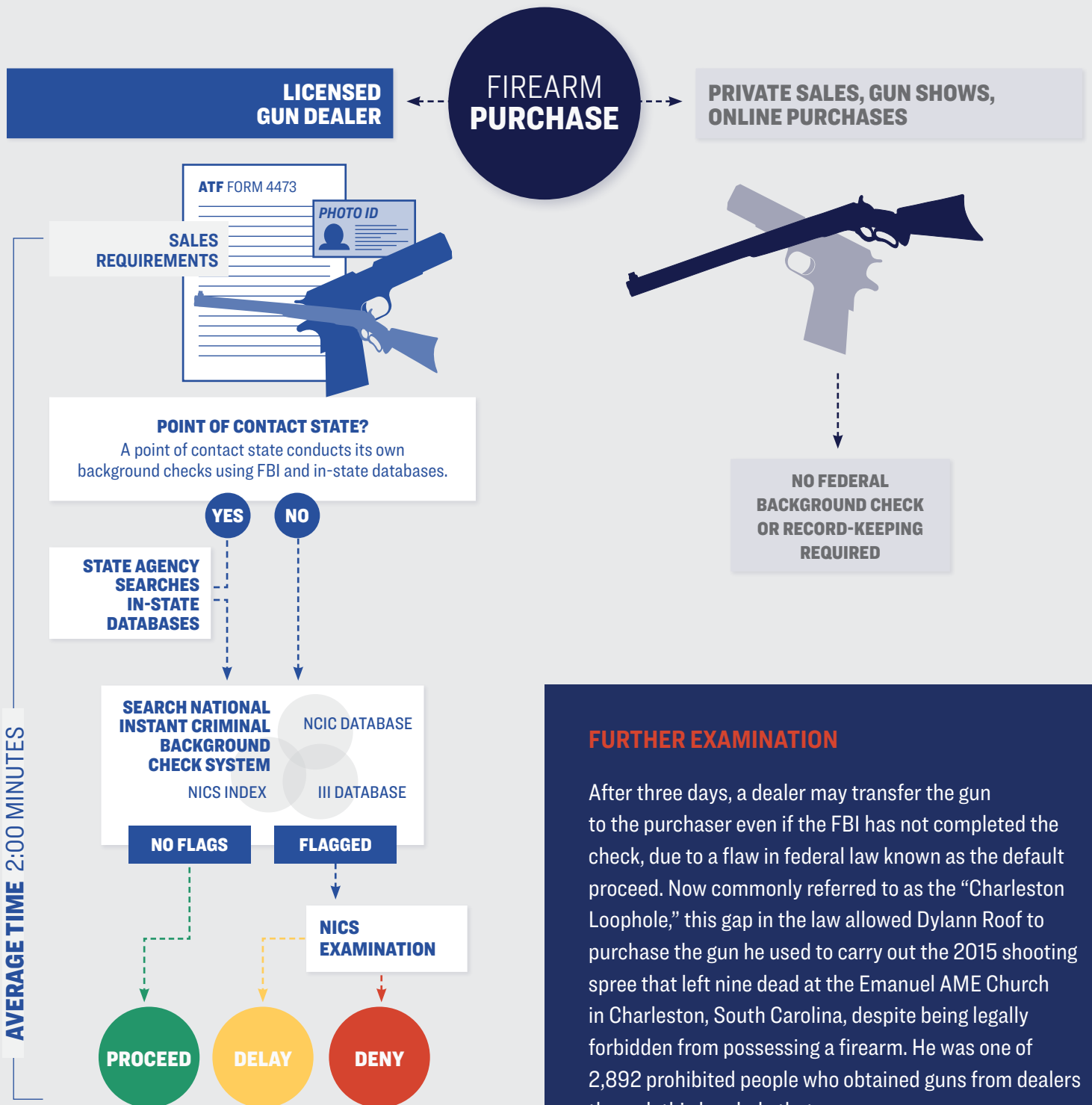
1,380,896

TOTAL NICS DENIALS NON-POINT OF CONTACT STATES

Federal law prohibits the purchase and possession of firearms by certain groups of people such as felons, domestic abusers, and the dangerously mentally ill. From November 30, 1998, to November 30, 2016, NICS background checks stopped 1,380,896 prohibited people from purchasing a gun from a licensed dealer. This number does not include denials in point of contact states, which when included bring the total to over 2.8 million.



THE NICS PROCESS



FURTHER EXAMINATION

After three days, a dealer may transfer the gun to the purchaser even if the FBI has not completed the check, due to a flaw in federal law known as the default proceed. Now commonly referred to as the "Charleston Loophole," this gap in the law allowed Dylann Roof to purchase the gun he used to carry out the 2015 shooting spree that left nine dead at the Emanuel AME Church in Charleston, South Carolina, despite being legally forbidden from possessing a firearm. He was one of 2,892 prohibited people who obtained guns from dealers through this loophole that year.

CHALLENGES AND BEST PRACTICES

To reduce gun violence, we must call on state lawmakers to dramatically improve the way states report to NICS.

The types of records included in the background check system vary greatly and, as such, they originate in different agencies, even within the same state. For example, records that someone has been found not guilty by reason of insanity are generated by a criminal court, while records of involuntary commitments come from either a mental health agency, a special mental health court, or a veterans court. Both types of records indicate that a person is prohibited by federal law from purchasing a firearm, but if the proper records never make it to one of the databases searched during a NICS check, the transfer may be approved. Domestic violence and mental health records in particular pose challenges for reporting agencies and even felony conviction records are not always adequately represented in NICS. The discussion below examines these and other challenges and steps that can be taken to improve the reporting process.

DOMESTIC VIOLENCE RECORDS CHALLENGES

Federal law prohibits the purchase and possession of firearms by individuals subject to certain domestic violence protection orders or convicted of a “misdemeanor crime of domestic violence.” Records for both categories are grossly underreported to NICS.

For example, in 2014, there were 2,143,002 records in state protection order databases across the country. While some of these records would not affect a gun purchase, they should all have been sent to the NCIC Protection Order File. Yet that year the file contained only 1,404,205 records—over 700,000 records never made it in.²⁴ The NCIC Protection Order File allows police to verify the validity of a protection order and enforce it, even when the order was issued by a court in a different state. Since federal law prohibits the subject of some domestic violence protection orders from purchasing firearms, this data is also checked during a NICS search.

In 2014, the NCIC Protection Order File should have contained 2,143,002 records, but only 1,404,205 were properly reported by state agencies.

Several factors contribute to the underreporting of protection order records to NCIC. For example, an agency that reports a protection order to NCIC must be available 24 hours a day, seven days a week for law enforcement requests to verify the validity of the order.²⁵ This is impossible for some agencies, like courts, which do not have staff after hours.

Submitting protection order records to NCIC can also be time consuming. Agencies must include descriptive information about the subject of the order and must inspect each record on a regular basis to ensure it is accurate and still valid. In addition, with some exceptions, an agency cannot submit a record until the subject of the order has been served. Sometimes, the agency responsible for submitting records is not notified when the order is served and therefore doesn't know the record should be sent to NCIC.

Other obstacles arise with regard to submitting domestic violence misdemeanor conviction records. For example, criminal history records may lack sufficient detail for a NICS operator to determine the relationship between the victim and the perpetrator. This makes it difficult to tell, for example, whether an assault was committed against the defendant's spouse, making it a domestic violence misdemeanor, versus an assault against a stranger. Without this key information, a NICS operator needs to conduct a further investigation to determine whether the subject of the record is prohibited from purchasing a firearm. The need for an investigation can lead to a delay that, if longer than three business days, can result in transfer of the weapon by default.

Fortunately, steps can be taken to improve the submission of domestic violence records to NICS databases. The next section will provide ideas and give examples of states that are improving the way they share domestic violence records with NICS.

BEST PRACTICES FOR DOMESTIC VIOLENCE RECORDS

PROTECTION ORDER RECORDS

One of the most significant obstacles to ensuring that domestic violence records are submitted to NICS is the requirement that an agency submitting a protection order to NCIC be available to verify the record 24 hours a day, seven days a week. In some states, courts have formed a partnership with law enforcement agencies to overcome this challenge. Since local law enforcement agencies operate around the clock, they can agree to submit court orders to NCIC and be available to respond to requests for verification.

For example, according to a 2016 report by the National Consortium for Justice Information & Statistics (SEARCH) and the National Center for State Courts,²⁶ West Virginia used funding provided by the Bureau of Justice Statistics to create a system in which court staff scans protection order documents into a database immediately after the orders are issued. The records are then formatted by the state police and submitted to NCIC. Local law enforcement agencies have access to the database and can view electronic copies of protection orders at any time of day or night, allowing those agencies to respond to verification requests.

Another way to address the NCIC 24/7 verification requirement is for courts to submit protection order records to the NICS Index instead of NCIC, since the NICS Index does not require round-the-clock responses to validation requests.

The SEARCH/National Center for State Courts report also highlights the success of a different approach in Nebraska.²⁷ In that state, the Nebraska State Patrol manages a system that allows courts and other agencies to enter and access data via a portal to a previously existing database. Agencies can use other information already contained in the database to provide descriptive information when submitting records to NCIC. Information submitted via the portal can be accessed by law enforcement 24/7 to respond to validation requests.

DOMESTIC VIOLENCE MISDEMEANOR CONVICTION RECORDS

Several states have taken legislative steps to address the difficulties in determining if a misdemeanor conviction should be classified as a domestic violence misdemeanor and sent to NICS. **Illinois, Massachusetts, Minnesota, and New York have all enacted specific laws to help ensure that misdemeanor domestic violence records are identified and reported properly to NICS.**²⁸ The laws in Illinois and New York provide a process during the criminal trial to determine whether the conviction qualifies as a federal domestic violence misdemeanor. This determination is then reported, along with the record, to NICS.

In addition, states can submit domestic violence misdemeanor records to III and the NICS Index. This practice helps operators determine whether a record in III or NICS Index constitutes a firearms prohibition. States can also flag records when submitting them to NICS databases to indicate they qualify as domestic violence misdemeanor convictions.

MENTAL HEALTH RECORD CHALLENGES

Federal law prohibits individuals who have been adjudicated as a “mental defective” or involuntarily committed to a mental health facility from buying guns.²⁹ Federal regulations define this adjudication to include those whom a court has found to be a danger to themselves or others or found to be lacking the mental capacity to manage their own affairs. A person who has been found not guilty by reason of insanity or mentally incompetent to stand trial also falls into the same category.³⁰ Federal regulations define someone as “committed to a mental institution” only if a lawful authority has formally committed that person as an inpatient to a mental health facility.³¹

Congress designed these standards to include only the most seriously mentally ill individuals, and it is estimated that 4% of the US population suffers from this level of mental illness.³² States have also enacted laws prohibiting additional categories of dangerously mentally ill individuals from purchasing firearms. Federal and state mental health categories are intentionally narrow. The goal is to include only individuals with a mental health history that indicates a higher propensity toward violence.

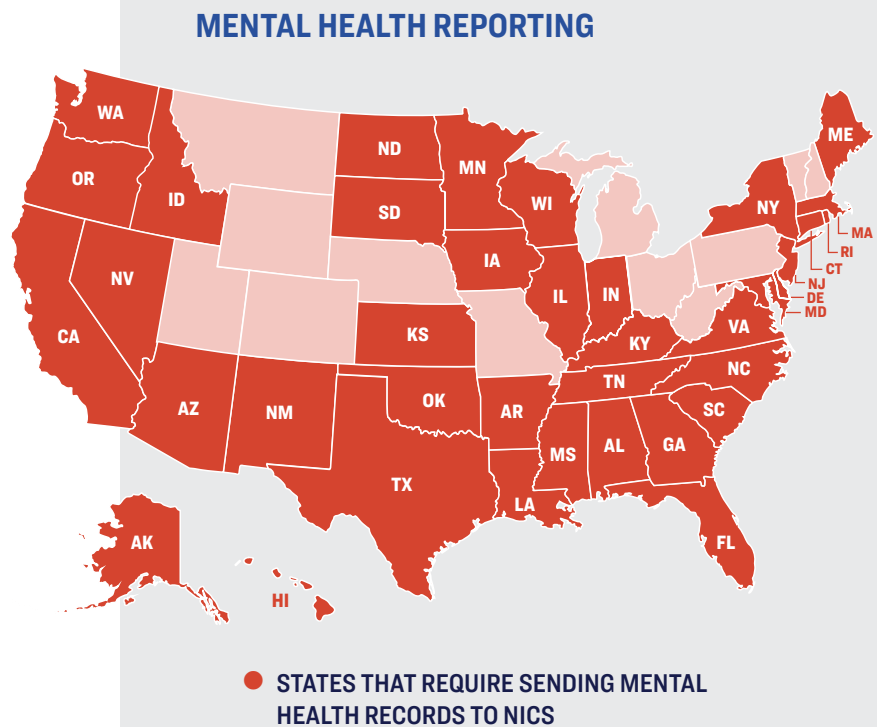
In 2007, a mass shooting on the campus of Virginia Tech brought the issue of mental health records maintained within NICS into the national spotlight. Seung-Hui Cho passed two background checks before he shot 49 people, killing 32, in what was, at the time, the deadliest mass shooting in American history. Cho was, in fact, prohibited from purchasing a firearm under federal law because a court had declared him to be “an imminent danger” to himself or others as a result of serious mental illness. In an appalling oversight, the record of the court’s determination was never sent to the proper federal database where it would have been discovered during a NICS background check.

Since the tragedy, 33 states, including Virginia, have enacted laws requiring the reporting of all mental health records to NICS. Six additional states do not require submission of records to NICS but do allow agencies to submit records voluntarily.

The number of active mental health records in NICS totaled 4,250,388 in 2015.³³ But the database is far from complete, since not all mental health records reach NICS. The number of mental health records submitted to the system varies widely by state, with some states reporting the majority of their records and others reporting fewer than 100. For example, by December 31, 2015, California had submitted 684,341 records to NICS (1.8% of its population) while Wyoming had submitted just four (0.0007% of its population).³⁴ There is no state law in Wyoming that requires the reporting of mental health records to NICS.

The 2016 report by SEARCH and the National Center for State Courts highlights challenges to mental health reporting to NICS.³⁵ One problem is that many mental health records originate in an agency that is accustomed to keeping patient information confidential, fostering a misconception that sending records to NICS would violate patient privacy. However, **federal privacy laws are not a barrier to submitting mental health records to NICS.** Federal regulations ensure the privacy and security of mental health records, and data stored in NICS can only be accessed for firearm purchaser background checks and other closely related law enforcement activities (such as the issuance of firearms-related permits and enforcement activities by ATF).³⁶ In February 2016, the Department of Health and Human Services issued a rule modifying the Health Insurance Portability and Accountability Act, or HIPAA, the federal law that protects the confidentiality of medical information. By expressly allowing certain state agencies to submit mental health records to NICS, the new rule clarifies that such submission does not violate federal privacy law. The rule protects the privacy of NICS mental health records by prohibiting the disclosure of any mental health data beyond the information that the individual is prohibited by law from purchasing a firearm.³⁷

Another obstacle to record submission is that the sources of many mental health records are not criminal justice agencies and therefore do not have access to, or familiarity with, criminal databases. Certain non-criminal courts that adjudicate involuntary mental health commitments may not know or understand the NICS reporting process. Additional training on how to submit records to the NICS system could help overcome this obstacle.



BEST PRACTICES FOR MENTAL HEALTH RECORDS

There are several steps states can take to improve mental health record reporting for inclusion in NICS. As mentioned above, states can enact laws to require mental health records be sent to NICS. Such laws can also contain specific language clarifying that submitting mental health records to NICS does not violate state privacy laws.

Mental health record reporting laws have become one of the most popular steps states take to combat gun violence. In fact, since 2013, at least 20 states³⁸ have enacted laws improving the way mental health records are sent to databases for background checks. This includes states that are traditionally less likely to enact gun violence prevention measures such as Alabama, Louisiana, Mississippi, and Oklahoma.

States can also create a centralized database managed by a state agency that allows both courts and mental health agencies to submit records to a centralized location. The administering agency can then forward the records to the proper NICS database. As with the reporting of any NICS documentation, states should require agencies to submit records as soon as possible. If records are not sent soon after the disqualifying event, a person may be able to pass a background check and access a gun.

In 2015, California submitted 684,341 mental health records to NICS, while Wyoming submitted just four.

Finally, many states have made significant improvements using federal grants provided by the Bureau of Justice Statistics. These grants were authorized by the NICS Improvement Act, which President Bush signed into law in 2008, following the Virginia Tech shooting, to assist states in submitting background check records to federal databases for inclusion in NICS.³⁹ Recipients of the most commonly used grant, the NICS Act Record Improvement Program (NARIP), are required to form NICS taskforces that are made up of record-reporting stakeholders. These taskforces meet regularly to evaluate the processes in place to ensure that records are being submitted to NICS and to make recommendations for improvement.⁴⁰

In 2009, the year the Bureau of Justice Statistics first began providing NARIP funding to states, only 923 firearms transfers were denied due to mental health records in the NICS Index. In 2014, 3,557 seriously mentally ill individuals were denied after a NICS check—a 285% increase.⁴¹ Without question, these background checks denying the seriously mentally ill access to deadly weapons save lives and prevent tragedy.

FELONY AND OTHER CONVICTION RECORD CHALLENGES

LACK OF DISPOSITIONS

One of the problems that can delay background checks and result in a prohibited person obtaining a firearm by default is the lack of a final disposition for a criminal record—the resolution of an arrest, hearing, or other incident. Without a disposition, it is impossible for a NICS examiner to know whether a person is prohibited without further investigation.

For example, if a NICS check reveals that a transferee has been arrested for a felony but there is no final disposition associated with that arrest record, an examiner cannot know whether charges were filed and, if they were, whether there was a conviction. Examiners must then spend time contacting reporting agencies to investigate. If this investigation takes longer than three business days, federal law allows the dealer to transfer the gun.

An important step states should take to improve the quality of records in NICS is to check the percentage of criminal history arrests or events in the III that lack dispositions. States can look at the originating agency identifiers (a unique number assigned by the FBI to police departments and other agencies across the country) for records that don't have dispositions and determine which agencies are submitting a high percentage of incomplete records. This will help a state identify the source of the problem and improve the quality of the records being submitted.

LACK OF FINGERPRINTS

Fingerprinting is key to the criminal history records in III. When a person is arrested for a crime, he or she is usually fingerprinted. These fingerprints serve as the basis for the person's criminal history record. Without fingerprints, a record cannot enter a state's criminal history database and is therefore not included in the III, or identifiable through NICS.

In 2016, Arizona enacted a law that requires a booking agency or the arresting law enforcement officer to take fingerprints and submit them to the state police.⁴² In 2015, Arizona also enacted a law requiring courts to have appropriate fingerprints on file prior to sentencing.⁴³ These laws help ensure that records can be sent to III and will be available during a NICS check.

States can also take action to improve the quality of fingerprints by utilizing live-scan fingerprinting, an electronic method more efficient and more accurate than traditional fingerprinting. The live-scan fingerprinting process produces a digital set of fingerprints using a sophisticated scanner and software system that evaluates

the quality of each scan before accepting the fingerprint and requires the prints to be retaken until the quality is sufficient. Because the prints are digital, agencies can instantly share them with other agencies as soon as they are obtained.

CONDITIONS OF RELEASE AND PROBATION

When an individual is released from incarceration and/or on probation, courts often place conditions on the defendant's behavior, including firearm prohibitions. Records of these conditions should be added to NCIC, but often, these records never make it into the database. If these records are not being reported to the system, a person who does not otherwise fall into a prohibited category will be able to pass a background check despite the court's order. States can and should enact laws requiring that all conditions of release and probation be sent to NICS.

ACTIVE WARRANTS

Federal law prohibits fugitives from purchasing firearms. Active warrants in NCIC indicate a person's status as a fugitive and under current law should result in a denial after a NICS background check. In practice though, active warrants are vastly underreported. Typically, state agencies only enter active warrants into NCIC if the state has funding available to extradite a defendant. Since states do not have funds to extradite the subjects of most active warrants, millions of records that should be in NCIC are missing.

In order to keep fugitives from justice from legally purchasing guns, agencies should be required to mark all active warrants for submission to NCIC, regardless of whether there are funds set aside to conduct an extradition. In Arizona, a NICS taskforce supported the creation and implementation of a warrant repository to facilitate submission of active warrants to NCIC. **When law enforcement agencies in Maricopa County began using this system in 2015, the number of active warrants in NCIC increased from approximately 20,000 to over 68,000 in one year⁴⁴** making it more difficult for these dangerous fugitives to get their hands on guns and commit violent crimes.

CONCLUSION

The daily presence of gun violence leaves all Americans at risk.

Fortunately, the gun violence crisis is not a problem without effective, practical solutions. NICS is a powerful tool in the fight to curb the widespread, preventable episodes of violent crime across the country. Research shows time and again that the background check system can and does stop the flow of guns to dangerous people—but it must be strengthened, utilized, and properly maintained. State lawmakers can take the simple step of requiring that all relevant records be sent to NICS—this background check system is key to enforcing the laws on the books and keeping deadly weapons out of the wrong hands.

Background checks have already prevented more than 2.8 million felons, abusers, and other dangerous people from purchasing guns, yet an unacceptable number of prohibited purchasers slip through cracks in the NICS system every single day, endangering our families and communities. Too many lives are lost—more than 33,000 every year—for us to stand by and allow people to take advantage of gaps in our background check system.

All states should require background checks every time a gun is transferred—at stores, gun shows, online, and in private sales. It is far too easy for convicted criminals, domestic abusers, and the dangerously mentally ill to unlawfully obtain guns, and too few lawmakers are willing to stand up to the gun lobby by enacting and enforcing smart gun laws like these. Universal background checks are a simple, popular way for lawmakers to prioritize community safety—and over 92% of Americans want laws like this on the books.

One of the most effective ways legislators can protect their constituents is reporting records in order to foster a robust and thorough background check system. We need states with poor reporting histories to follow the examples of the states that have dramatically improved the way they send records to NICS in recent years, like Arizona and Virginia, and we need more lawmakers to stand up to the gun lobby to enact and enforce smart gun laws like these.

Each time our nation is forced to face the news of another devastating shooting, thoughts and prayers are too often the meager substitute for real, decisive action against these pernicious, increasingly frequent occurrences. More than 114,000 Americans are shot every year in incidences of street violence, domestic abuse, suicide, mass shootings, and more. It is our national collective duty to demand meaningful action from our lawmakers if we want to change the status quo and enact responsible, commonsense gun laws. The costs and consequences are far too great if we don't act now.

Americans should not be forced to endure this deadly epidemic any longer, and, luckily, we have the tools to reduce the devastating toll the gun violence epidemic has on our nation. Now is the time to enact these essential, necessary laws our country so desperately needs—pieces of legislation that a vast majority of Americans support. It is only through steady improvements to our gun laws, background check systems, and the use of tools like NICS, that we will save lives.

Research shows time and again that NICS can and does stop the flow of guns to dangerous people—but it must be strengthened, utilized, and properly maintained.

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For 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. Founded in the wake of a 1993 mass shooting in San Francisco, in 2016 the Law Center joined with former Congresswoman Gabrielle Giffords to form a courageous new force for gun safety that stretches coast to coast.