IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:23-cv-02563-JLK

ROCKY MOUNTAIN GUN OWNERS, and
ALICIA GARCIA

Plaintiffs,

v.

JARED S. POLIS, in his official capacity as Governor of the State of Colorado

Defendant.

RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Introduction and Background

This case will come down to two things, both of which this Court may answer as questions of law, on summary judgment: (1) does a restriction on obtaining a firearm for three days relate to arms-bearing activity; and (2) has the government met its extremely high burden to identify an historical analogue to the Waiting Period Law, including matching the precise "how" and "why" of *that* law to the Waiting Period Law? No matter the expertise supporting the policy goals of the law, or the consequences of striking it down, based on the two inquiries above, the Court is bound by *Bruen* and *Rahimi* to enter judgment in favor of Plaintiffs.

On October 1, 2023, Plaintiffs Alicia Garcia and Rocky Mountain Gun Owners Association (RMGO) filed the current case challenging the constitutionality of Colo. Rev. Stat. § 18-12-115 (the "Waiting Period Law"). On that same day, Plaintiffs filed a motion seeking to enjoin the Waiting Period Law.

With limited exceptions, the Waiting Period Law makes it unlawful for any person who sells a firearm to a purchaser to deliver the purchaser's property to them until a minimum of three calendar days after the sale has occurred, even if a clean background check comes back immediately.[1]

On November 13, 2023, this Court issued its Order Denying Motion for Preliminary Injunction, finding that (i) the Second Amendment's plain text does not cover the conduct that the Waiting Period Law implicates; (ii) the Waiting Period Law is also presumptively lawful, because it is a law that imposes a condition or qualification on the commercial sale of arms; and (iii) that

[1] The provisions of the Waiting Period Law do not apply to: (1) the sale of an antique firearm; (2) the sale of a firearm to a family member by a person serving in the military who will be deployed outside of the United States within the next 30 days; and (3) a firearm transfer for which a background check is not required pursuant to state or federal law. Colo. Rev. Stat. § 18-12-115(1)(ab)(2).

there were two relevant historical analogues that sufficed to validate the Waiting Period Law—one that disarmed intoxicated persons, and one related to licensing regimes. [ECF No. 32, Order Denying Motion for Preliminary Injunction, at 13.]

On May 8, 2025, Plaintiffs and Defendant filed separate Motions for Summary Judgement—both parties asserting that "there is no genuine dispute as to any material fact" and that they are therefore "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Plaintiffs hereby submit their response to Defendant's Motion for Summary Judgement.

Response to Defendant's Statement of Undisputed Material Facts

Pursuant to the Court's Practice Standard N.4., Plaintiffs offer the following admissions, denials, and clarifications regarding Defendant's assertions of undisputed facts.

1. Admit to that portion which states, "In the modern era, gun and ammunition purchases can be made … from tens of thousands of licensed gun dealers, private sales, gun shows, and through internet sales;" but deny as to the use of the words "easily and rapidly," due to the fact that those terms are inherently subjective and not specifically defined or qualified in Professor Spitzer's report.
2. Admit that "[i]n the eighteenth century the vast majority of firearms available in America were European imports," and that there were few retail "outlets" in the colonies / early United States from which to purchase firearms; but deny as to the implication that this meant firearms were not readily available and accessible to most Americans. [Francis Report and Declaration at 5-7, ¶¶ 13-18.]
3. Admit, even though gunsmith work at the time of the Founding is irrelevant for the purposes of a *Bruen*, step-2, historical analogue analysis.
4. Admit.

5. Admit.

6. Admit that people "'might have [had] to wait a few weeks' to get a firearm due to low production rates;" but deny as to the implication that this was a situation experienced by most or even a considerable portion of the American population. [*Id.*]

7. Admit; but deny as to the implication that these new processes necessarily resulted in an increase in the overall percentage of Americans who possessed firearms. [Spitzer Report and Declaration at 6-7, ¶ 12.]

8. Admit that "[t]he rise of handgun mail order purchasing through such companies as Montgomery Ward and Sears in the 1870s and 1880s brought cheap handguns to buyers' doors," but deny that this phenomena resulted in unspecified "adverse consequences," and was the impetus for states enacting "numerous ant-gun carry and other restrictions in the late 1800s and early 1900s."

9. Admit, but only as to those waiting periods necessary for conducting a background check.

10. Deny that a modern waiting period serves the purpose of allowing for time to complete a background check because in more cases than not, background checks are completed within 30 minutes of submission. [ECF No. 30, Transcript of Preliminary Injunction Hearing, at 52, lines 1-6.]

11. Admit that in 1923, California was the first state to impose a firearms related waiting period. Up until 1996, this and all other waiting period laws implemented throughout the country were intended to provide enough time for a background check to be conducted. The first "cooling off" waiting period – like the one at issue in this case – was not enacted until 1996 in the State of California. [ECF No. 30 at 39, lines 6-13.]

12. Admit, "waiting period laws, as they are understood and implemented today, did not exist early in the country's history," or for the first 150 years of its history. [ECF No. 30 at 39, lines 6-13.]

13. Admit.

14. Admit.

15. Admit.

16. Admit.

17. Admit

18. Admit.

19. Admit.

20. Admit.

21. Admit, as long as this statement is qualified as relating specifically to the period of the nation's founding.

22. Admit, as long as this statement is qualified as relating specifically to the period of the nation's founding.

23. Admit.

24. Admit.

25. Admit, as long as this statement is qualified as relating specifically to the period of the nation's founding.

26. Admit.

27. Admit.

28. Admit.

29. Admit.

30. Admit.

31. Admit.

32. Admit.

33. Admit.

34. Deny due to the misleading nature of the statement. Although "laws restricting or punishing the handling, carrying, or use of firearms while intoxicated appeared among the very earliest weapons regulations in America," it was not until 1878 that the first law barring the sale of a firearm to an intoxicated person was implemented. Professor Spitzer confirmed during his deposition testimony that up until the early 20th century, the only two states that implemented laws which prohibited firearm sales to those who were intoxicated were Mississippi in 1878, and Delaware in 1911. [Spitzer Deposition Transcript, at 143, lines 17-25, 144, lines 1-6, and at 145, lines 10-16; and ECF No. 18 at # 5 Exhibit 5, Ex. B to Spitzer Dec: Table of Intoxication/Weapons Laws.]

35. Deny on the same basis as Fact #34. Up until 1878, none of the intoxication laws cited by Defendant prohibited the sale of a firearm to an intoxicated person. [*Id.* and Francis Report and Declaration at 8, ¶ 21.]

36. Admit.

37. Admit.

38. Admit.

39. Admit.

40. Admit.

41. Admit.

42. Admit.

43. Admit.

44. Admit.

45. Admit.

46. Admit.

47. Admit.

48. Admit.

49. Admit.

50. Admit.

51. Admit, but with the qualifier that it was not until 1878 that the first law prohibiting the sale of a firearm to an intoxicated person was enacted. [Spitzer Deposition Transcript, at 143, lines 17-25, 144, lines 1-6, and at 145, lines 10-16; and ECF No. 18 at # 5 Exhibit 5, Ex. B to Spitzer Dec: Table of Intoxication/Weapons Laws.]

52. Admit.

53. Deny. Unlike "cooling off" waiting periods – like the one at issue in this case, licensing and permitting laws involve a specific administrative approval process that frequently requires the submission of an application or form that must be completed by the applicant and subsequently approved / denied by the reviewing agency or authority. [Spitzer Deposition Transcript at 160, lines 10-14.]

54. Deny. The vast majority of licensing laws deal with how an already acquired / possessed firearm is specifically used or "carried" (e.g. concealed carry permit, hunting license, etc.), not the acquisition of that firearm. In fact, it was not until 1885 that a licensing law was enacted in the United States that required individuals to obtain a permit before acquiring a firearm. [*Id.* at 167, lines 13-21; and at 169, lines 20-25; and at 170, lines 1-11.]

55. Admit.

56. Admit.

57. Admit, but with the qualifier that none of the Founding Era weapons licensing laws cited by Professor Spitzer in his Report required someone to delay taking possession of a firearm. [ECF No. 18 at 5 Exhibit 5, Ex. D to Spitzer Dec: Table of Weapons Licensing Laws; and Francis Report and Declaration at 21-22, ¶ 65.] And, it was not until 1885 that a licensing law was enacted in the United States that required individuals to obtain a permit before acquiring a firearm. [*Id.* at 167, lines 13-21.]

58. Admit.

59. Admit.

60. Admit.

61. Admit.

62. Admit.

63. Deny, this statistic is based on a single study conducted with inadequate control variables. [Poliquin Deposition Transcript at 35, lines 19-25, at 36, lines 1-4; at 48, lines 1-6; at 78, lines 4-18; at 93, lines 1-12; at 99, lines 13-25; and at 100, lines 1-3.]

64. Deny, for the reasons outlined in 63 above. *Id.*

65. Deny, for the reasons outlined in 63 above. *Id.*

66. Deny, for the reasons outlined in 63 above. *Id.*

67. Deny, for the reasons outlined in 63 above. *Id.*

68. Admit.

69. Admit.

70. Admit.

71. Admit that these statistics were included as a reason for the Waiting Period Law, but deny as to the veracity of those statistics for the reasons outlined in 63 above. *Id.*

72. Admit.

73. Admit.

74. Admit.

75. Admit.

76. Admit.

77. Admit.

78. Admit.

79. Admit.

80. Deny, due to the fact that the statement does not fully capture Taylor Rhodes' testimony regarding the impact of the Waiting Period Law on RMGO and its membership. Although Mr. Rhodes testified that the Waiting Period Law had not prevented RMGO from pursuing its mission, he qualified that statement by making it clear that the law had in fact "hinder[ed] it." He then went on to provide specific examples of the impact on the organization and its membership.

a. Q. Does the waiting period law prevent RMGO from carrying out its mission of advocacy? A. Certainly hinders it, but it does not prevent it. [Rhodes Deposition Transcript at 48, lines 11-14.]

b. Q. Does RMGO purchase guns for organizational use? A. It does. Q. It does, And what is that organizational use? A. Giveaways. Q. That's it? A. We occasionally do them as—as bonuses to staff. Occasionally, we'll do—this last June, we had a banquet, which the waiting period law made that a frickin' nightmare. We bought

> [firearm related items] for a banquet, for auction items, silent auction items. … Q. Were you able to purchase guns in advance of that auction? A. We were. But the individuals that purchased those guns could not take them home with them that night and then had to come to—back to an FFL in Denver, many of which [members] lived all over. I mean, we had people from—folks from Grand Junction to Durango to Holyoke that were there [for the banquet] that, you know, won firearms that made it a nightmare to actually do that 'cause, because of law, we couldn't process background checks that night. So they paid the [auction] price. They then had to wait till the next day, go to the FFL to run the background check, then go home, or not—or get a hotel for three days, go home, wherever that might be, and wait the three days, and come back to pick it up. … Q. And they were—they were able to collect them three days later? A. Yes. Actually, one was not. One told me to keep it, use it for something else because he didn't want to come back. [*Id.* at 48, lines 22-25; at 49, lines 1-8 and lines 17-25; at 50, lines 1-7; and at 51, lines 1-8.]

81. Admit as to part and deny as to part. The two additional RMGO members referenced during Taylor Rhodes deposition testimony were "JH and SH," not "BH and SH." [*Id.* at 80, lines 4-8.] Admit that neither JH nor SH filed declarations in the present case.

82. Admit as to part and deny as to part.

a. Once again, the two additional RMGO members referenced during Taylor Rhodes deposition testimony were "JH and SH," not "BH and SH."

b. Admit to all remaining items outlined in 82 a-g.

83. Deny due to lack of clarity on which two RMGO members the statement is referring to—Alicia Garcia and Taylor Rhodes or B.H. and S.H.

84. Admit, but with the qualifier that RMGO did not identify any member who could not take possession of a firearm after the three-day mandatory waiting period had lapsed.

Discussion

I. Standard of Review

Summary judgment should be granted when "there is no genuine dispute as to any material fact." *Wiggins v. Lab'y Corp. of Am. Holdings*, No. 24-0648, 2024 U.S. Dist. LEXIS 185859, at*10 (E.D. Pa. Oct. 11, 2024) (quoting Fed. R. Civ. P. 56(a)). While the parties disagree as to the best interpretation of the facts, and their relevance to the constitutional inquiry before the Court, the parties do not disagree about material facts, or think that any facts must go before a jury. The questions presented by this case are questions of law.

II. Defendant's Arguments on Standing Lack Merit.

In Defendant's Motion for Summary Judgement, the government urges this Court to break new ground, and avoid the merits, by disposing of the case on the basis of standing. They contend that only "gun sellers" are injured by a law that is directed at "purchasers." [ECF No. 63, Def's. Mot. for Sum. Judg., at 9.] This argument is both doctrinally incorrect and dangerous. Indeed, if taken to its logical conclusion, state actors seeking to impair constitutional rights could often find ways to achieve their ends by simply regulating upstream actors that are necessary to exercise the rights at issue—ink sellers, website hosts, and messaging platforms in the First Amendment context, for instance.

Moreover, as both Plaintiffs have repeatedly outlined in their declarations and testimony, they have personally suffered an actual "injury in fact" from the denial of their right to obtain a

firearm, and they and the members of RMGO will continue to be injured every time they seek to acquire a firearm in the State of Colorado. Defendant's arguments to the contrary are simply attempts to deprive Plaintiffs and other Coloradans of the ability to challenge the constitutionality of the Waiting Period Law.[2]

Beyond these analytical truisms, this Court has already held that the Waiting Period Law is a "burden on the right of armed self-defense." *Rocky Mountain Gun Owners v. Polis*, 701 F. Supp. 3d 1121, 1120 (D. Colo. 2023) ("But the Waiting-Period Act and the intoxication laws both work to prevent individuals in a temporary impulsive state from irresponsibly using a firearm. They 'impose a comparable burden on the right of armed self-defense.'") (internal citation omitted) (emphasis added). And both Plaintiff Garcia and Taylor Rhodes have repeatedly outlined the *specific burdens* that the Waiting Period Law has imposed on them—both at a personal and organizational level. *Accord Ortega v. Lujan Grisham*, 741 F. Supp. 3d 1027 (D.N.M. 2024) (denying preliminary injunction with respect to New Mexico's waiting period, but never questioning that plaintiffs had standing); *Beckwith v. Frey*, 766 F. Supp. 3d 123, 127 n.2 (D. Me. 2025) (holding that individual plaintiffs had standing to challenge a waiting period because they are "vindicating their own, ongoing, individual right to purchase a firearm without having the purchase subjected to the waiting period."); *Vermont Federation of Sportsmen's Clubs v. Birmingham*, 741 F. Supp. 3d 172, 182 (D. Vt. 2024) (rejecting challenge to waiting period law,

[2] Justice Alito recently warned against this practice: "[S]ome federal courts are succumbing to the temptation to use the doctrine of Article III standing as a way of avoiding some particularly contentious constitutional questions. While it is important that federal courts heed the limits of their constitutional authority, it is equally important that they carry out their 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Parents Protecting Our Child., UA v. Eau Clair Area Sch. Dist.*, 145 S. Ct. 14, 14-15 (2024) (Mem.) (Alito. J., dissenting from denial of certiorari) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

but never questioning standing, and emphasizing the traits of the individual plaintiffs: "Plaintiffs Paul Dame and Marsha Thompson are Vermont citizens. Thompson is a firearms instructor. Both Dame and Thompson state that they seek to acquire prohibited magazines and firearms without having to wait at least 72 hours."); *cf. Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96, 108-12 (10th Cir. 2024) (reaching merits of 18-20 year old regulation after finding that an individual plaintiff had standing); *Rocky Mountain Gun Owners v. Polis*, No. 23-cv-01077-PAB, 2025 WL 1591401, *5 (D. Colo. June 5, 2025) (18-20 year old plaintiffs had standing to challenge law that was found to be a commercial regulation, and Tenth Circuit ruling confirmed such a holding).

It is immaterial to the issue of standing that Plaintiff Garcia and Rhodes were ultimately able to acquire the firearms that they purchased, but were denied possession of for three days due to the Waiting Period Law.[3] That delay—no matter how "temporary"—still amounts to an infringement of their Second Amendment rights. And any time they or any other member of RMGO attempts to purchase a firearm in Colorado in the future, they will once again be denied possession of those firearms for another three days, even though they have cleared a background check and rendered full payment for the firearm.

It is simply irrelevant to the discussion of harm that the denial of this basic Constitutional right is temporary. Violation of constitutional rights of any length of time *per se* constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (loss of constitutional freedom "for even minimal periods of time" unquestionably constitutes irreparable injury)*; see also Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (applying principle in Second Amendment context).

[3] The degree and nature of the burden—as well as whether there is a historical analogue to support it—are matters to be addressed during the merits stage when considering the constitutionality of the Waiting Period Law.

a. Plaintiff Garcia has standing.

At the outset, Plaintiff Garcia has standing to challenge the Waiting Period Law. This Court has already determined that. [*See* ECF No. 32, Order Denying Motion for Preliminary Injunction, at 6 ("[Garcia] has shown an injury in fact that is fairly traceable to implementation of the Act and that would likely be redressed by a favorable decision here.").]

Despite that finding, the Defendant still tries to assert that Plaintiff Garcia lacks standing because she is not a "seller," and therefore not "subject to the Waiting Period law's requirements." [ECF No. 63, Def's. Mot. for Sum. Judg., at 9.] But "whether someone is in fact an object of a regulation is a flexible inquiry rooted in common sense." *Contender Farms, L.L.P. v. U.S. Dep't of Agric.,* 779 F.3d 258, 264–65 (5th Cir. 2015); *see also Lujan v. Defs. of Wildlife,* 504 U.S. 555, 561–62 (1992). And it defies common sense to conclude that Plaintiff Garcia and all others seeking to acquire firearms in Colorado are anything but the "regulated objects." The entire rationale for a cooling period law—as stated *ad nauseum* by Defendant and his experts—is to reduce the alleged impulsive gun violence of those seeking to acquire firearms, *not* those seeking to sell them. Sellers do not need to "cool off" from the experience of selling a firearm.

Defendant does not confront this inconvenient truth. Rather, the government suggests that because it is only a "temporary delay," and there are "numerous exceptions to the three-day requirement," Plaintiff Garcia has suffered no real injury. [ECF No. 63, Def's. Mot. for Sum. Judg., at 10.] But each time that she has attempted to acquire a firearm in the 20 months since the Waiting Period Law went into effect—and as a firearms instructor, range safety officer and online influencer on the topic of firearms, that is often—Plaintiff Garcia has continued to be impacted by the provisions of the Waiting Period Law. That is enough for this Court to exercise jurisdiction under Article III.

Moreover, Defendant asserts that because Plaintiff Garcia already has access to numerous firearms for purposes of self-defense, she has not been and will not be injured by the three-day delay imposed by the Waiting Period Law . . . because, according to the wisdom of the state, Plaintiff Garcia already has what they deem to be a sufficient number of guns. [ECF No. 63, Def's. Mot. for Sum. Judg., at 11.] But the Second Amendment does not establish some sort of magic number of firearms that a person may have before their right to keep and bear arms is satisfied, no more than the First Amendment proscribes how many opportunities someone should have to speak before their right to free speech is fulfilled, or how many churches one should be allowed to access before their exercise of faith is sufficiently quenched. *Cf. Snope v. Brown*, 605 U.S. —, — S. Ct. —, 2025 WL 1550126, *4 (2025) (Thomas, J., dissenting from denial of certiorari) ("[W]e have never relied on our own assessment of how useful an arm is for self-defense before deeming it protected.").

One firearm may be sufficient in one situation where self-defense is required, but not in another. As Plaintiff Garcia explained in her deposition, "not all guns are sufficient for self-defense" in a particular situation or setting; and "factors" like "effectiveness," "concealability," and Plaintiff Garcia's "familiarity" with the firearm often dictate which type of firearm she feels comfortable carrying with her on a particular day or to a particular environment. *See* Exhibit A, Garcia Deposition Transcript, at 48, lines 3-25.[4] The simple fact is that the Waiting Period Law has imposed a burden on Plaintiff Garcia's right of armed self-defense, and because of that she has standing to challenge the law.

[4] The pertinent parts of Alicia Garcia's Deposition Transcript have been attached to this Response to Defendant's Motion for Summary Judgement as Exhibit A.

b. Plaintiff Rocky Mountain Gun Owners has standing.

Defendant argues that Plaintiff RMGO lacks standing because the organization cannot establish harm. But "an association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth Inc. v. Laidlaw Env't Servs. (TOC) Inc.*, 528 U.S. 167, 181 (2000). To establish standing under this theory, an organization must "make specific allegations establishing that at least one identified member ha[s] suffered or [will] suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). Plaintiff RMGO has established this not only through Plaintiff Garcia, who is a member of RMGO, but also through Taylor Rhodes, another member of RMGO and the organization's current Vice President. During his deposition, Rhodes testified that since the Waiting Period Law went into effect, he has purchased "a few guns," but was unable to "leave with [his] property that same day." In each instance, Rhodes had to wait "between three to ten days" to take possession of his firearms (depending on his ability to travel back to the gun store where he had previously purchased the firearm). *See* Exhibit B, Rhodes Deposition Transcript at 76, lines 13-17 and 20-22, and at 77, lines 18-23.[5] And, like Plaintiff Garcia, this same unconstitutional burden will continue to fall on Rhodes time and again, with the future purchases of firearms that he intends to make.

And so, Defendant is therefore flatly incorrect that Plaintiff RMGO "has not demonstrated that any members would have standing to sue individually." [ECF No. 63, Def's. Mot. for Sum. Judg., at 14.] The Court's standing analysis can end with Plaintiff Garcia and Rhodes. There is no

[5] The pertinent parts of Taylor Rhodes' Deposition Transcript have been attached to this Response to Defendant's Motion for Summary Judgement as Exhibit B.

other necessary party or showing. And because both have standing and are also members of an organization whose purpose is related to their regulated conduct, that organization—Plaintiff RMGO—has organizational standing. *See Friends of the Earth Inc,* 528 U.S at 181.

Regardless, the Waiting Period Law also directly harms Plaintiff RMGO, so the organization also has independent standing. Rhodes, who in addition to being a member is also currently the Vice President of RMGO, testified at the Preliminary Injunction hearing that since the Waiting Period Law went into effect, RMGO, whose organizational mission is to defend the Second Amendment rights of its membership, has had to devote "a very high portion of [its] resources" to assist its approximately 16,000 members with understanding and navigating the new law. [ECF No. 30, Transcript of Preliminary Injunction Hearing, at 37.] This has placed an administrative burden on Plaintiff RMGO that continues to the present day.

If at least one Plaintiff has standing, this Court can and should proceed to the merits. *Am. Atheists, Inc. v. Davenport,* 637 F.3d 1095, 1114 (10th Cir. 2010). Since both do, this Court may reach the merits.

III. The Waiting Period Law Falls Squarely Within the Plain Text of the Second Amendment.

As the Tenth Circuit recently explained in *Rocky Mountain Gun Owners v. Polis ("RMGO")*, Plaintiffs admittedly bear the burden of "establishing that the Second Amendment's explicit text, 'as informed by history,' encompasses the conduct they seek to engage in." 121 F.4th 96 at 113-14 (10th Cir. 2024). In order to establish this, three questions must be asked and answered: (1) 'whether the challenger is part of the people whom the Second Amendment protects,' (2) 'whether the item at issue is an arm that is in common use today for self-defense,' and (3) 'whether the proposed course of conduct falls within the Second Amendment.'" *Id.* at 114 (quoting *United States v. Alaniz*, 69 F.4th 1124, 1128 (9th Cir.2023) (cleaned up) (emphasis added)). Here,

the first two questions are not disputed, so the threshold inquiry turns on whether Plaintiffs' "proposed course of conduct falls within the Second Amendment." *RMGO*, 121 F.4th at 114.

It does.

The proposed course of conduct in this case is purchasing and obtaining a firearm, such that the individual may keep and bear it for a lawful purpose, i.e. self-defense. Plaintiffs wish to keep and bear arms, and the Waiting Period Law restricts their ability to do so. *See Snope*, 2025 WL 1550126, *3 (Thomas, J., dissenting from denial of certiorari) ("A challenger need only show that 'the plain text' of the Second Amendment covers his conduct. … This burden is met if the law at issue 'regulates' Americans' 'arms-bearing conduct.'") (citing *Bruen* and *Rahimi*); *National Rifle Association v. Bondi*, 133 F.4th 1108, 1114 (11th Cir. 2025) (en banc) (identifying the following examples as regulations on "arms-bearing conduct": "prohibitions on gun use by drunken New Year's Eve revelers," "bans on 'dangerous and unusual weapons," and "restrictions on concealed carry.").

"'Keep' means to 'have weapons,'" *id.* at 117 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008)), and the Waiting Period Law prevents law-abiding citizens from having a firearm for three days. Likewise, "'bear' means to 'wear, bear, or carry … upon the person or in the clothing or in a pocket, for the purpose … of being armed and ready for offensive or defensive action in a case of conflict with another person,'" *RMGO*, 121 F.4th at 117 (quoting *Heller*, 554 U.S. at 584), and the Waiting Period law prevents law-abiding citizens from being armed and ready for three days. The Waiting Period Law thus plainly "regulates arms-bearing conduct." *United States v. Rahimi*, 602 U.S. 680, 691 (2024).

Moreover, Defendant's assertion that Plaintiffs' claim fails at the threshold of the *Bruen* analysis because the Second Amendment does not explicitly say "purchase" or "acquire" alongside

"keep" and "bear" misses the point. The conduct in which Plaintiffs seek to engage is keeping and bearing firearms, which the Waiting Period Law prevents them from doing for a period of three days. Indeed, that is the entire point of the law—to delay and prevent people from keeping and bearing arms for three days (because they may use those arms impulsively during that period). *See* Exhibit C, *Nguyen v. Bonta*, No. 24-2036, 12 (9th Cir. 2025) (concluding that where "delay *itself* is the purpose" of a regulation, a categorical prohibition against purchasing firearms is created thus implicating the plain text of the Second Amendment) (emphasis in original).[6] That the Waiting Period Law accomplishes this by prohibiting the transfer of an arm, rather than prohibiting its possession or carrying, makes no difference, as the textual inquiry focuses on Plaintiffs' "proposed course of conduct," *RMGO*, 121 F.4th at 113-14, not the means by which the state has frustrated it.

The Second Amendment would mean nothing if laws preventing people from acquiring arms they wish to keep and bear did not trigger any constitutional scrutiny. *Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc) ("[T]he core Second Amendment right to keep and bear arms for self-defense 'wouldn't mean much' without the ability to acquire arms.'" (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)). And recently, a growing cadre of district and appellate courts throughout the country have been reaching the same conclusion.

In *Beckwith v. Frey*, No. 1:24-cv-00384-LEW, 2025 WL 486830, (D. Me. Feb. 13, 2025), the district court held that a three-day "cooling off" waiting period in Maine violated the Second Amendment, and issued a preliminary injunction barring further enforcement of the law. In rejecting the state's argument that the Second Amendment's text does not protect the acquisition

[6] The opinion in *Nguyen v. Bonta* was released on June 20, 2025 (the same day as this filing). Because of that, and for the Court's convenience, we are attaching a copy of that filing to this Response as Exhibit C.

of firearms, the district court held that "[i]f a citizen cannot take possession of a firearm then his or her right to possess a firearm or to carry it away is indeed curtailed, even if, as [the state] claims, the curtailment is modest." *Id.* at *3.[7]

And in *Reese v. ATF*, 127 F.4th 583 (5th Cir. 2025), the Fifth Circuit similarly held that the Second Amendment's right to keep and bear arms includes the right to purchase arms. The court reasoned that "[b]ecause constitutional rights impliedly protect corollary acts necessary to their exercise," it follows that "the Second Amendment 'covers' the conduct (commercial purchases [of firearms]) to begin with." *Id.* at 590. The Court went on to emphasize that "constitutional rights impliedly protect corollary acts necessary to their exercise," and that "[t]o suggest otherwise proposes a world where citizens' constitutional right to 'keep and bear arms' excludes the most prevalent, accessible, and safe market used to exercise the right." *Id.*

And the length of the waiting period is irrelevant at this stage of the *Bruen* analysis. Defendant tries to emphasize that the delay in acquiring a firearm following purchase is only "a brief, three-day waiting period—the length of a holiday weekend," [ECF No. 63, Def's. Mot. for Sum. Judg., at 6], and because of that "brief" delay, the Waiting Period Law should therefore escape constitutional scrutiny. But the argument gives the game away. Not one word in *Heller*, *McDonald*, *Bruen*, or *Rahimi* even so much as hints that there is a secret sliding scale under which the degree of burden is relevant to Plaintiffs' threshold showing, let alone suggests that laws do not implicate the Second Amendment unless they foreclose the exercise of a right entirely.

Certainly, "*how* [a law] burdens the Second Amendment right" matters—but it does not matter until we progress to *Bruen* step two, and consider the historical-tradition inquiry. *See*

[7] In April, the First Circuit Court of Appeals denied a stay of the preliminary injunction in the *Beckwith* case, rejecting Maine's assertion that it had made a "strong showing" that it was likely to succeed on the merits.

Rahimi, 602 U.S. at 698 (emphasis added); *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 29 (2022). All that matters at *Bruen* step one is that the challenged law "regulates arms-bearing conduct." *Rahimi*, 602 U.S. at 691. Whether "at the time of the Founding there was no expectation of immediate acquisition of guns . . . [and d]elays [in firearms acquisition] were par for the course," [ECF No. 63, Def's. Mot. for Sum. Judg., at 16], is therefore beside the point at this stage of the analysis. That instead is truly an argument about whether the Waiting Period Law is consistent with "the historical tradition that delimits the outer bounds of the right to keep and bear arms," *Bruen,* 597 U.S. at 18-19, not about whether it "regulates arms-bearing conduct," *Rahimi,* 602 U.S. at 691.[8]

To the extent that Defendant relies on *McRorey v. Garland*, 99 F.4th 831 (5th Cir. 2024), *McRorey* is factually distinguishable from the current case. *McRorey* focused on an acquisition of a firearm when a background check remained uncompleted for a certain period of time, notably, ten days. But background checks are not cooling off periods, and end when their purpose—winnowing out dangerous people—ends, with a clean background check. The Waiting Period Law, by contrast, covers all acquisition of firearms, even when a background check has been successfully completed. The two provisions do not coincide in their application, and are therefore too dissimilar. To apply the Fifth Circuit's reasoning in *McRorey* to the case at hand, which is a

[8] To be sure—some courts have blended the inquiry at Step 2 with Step 1, to decide whether *Bruen* applies at all. (In other words, in these cases, the government escapes *Bruen* because the regulation at issue purportedly doesn't infringe on the Second Amendment.) *See, e.g.*, *Bianchi v. Brown*, 116 F.4th 211, 229 (4th Cir. 2024) (en banc) ("The plaintiffs have not met their burden to show that the HQL statute 'infringes' the Second Amendment right to keep and bear arms.").

But a concurrence in *Bianchi* demonstrates why this approach doesn't work: "The majority's new test is thus illogical, requiring plaintiffs to establish infringement before infringement can logically be determined. Not only does this analysis beg the ultimate question, it fails to recognize that *the scope of the Second Amendment right*—an antecedent to a finding of infringement—can only be determined by considering *both* the constitutional text *and* the historical tradition." *Id.* at 239 (Niemeyer, J., concurring in part) (original emphasis).

blanket restriction on the general population, is unwarranted. *See United States v. Rahimi*, 602 U.S. 680, 698 (2024) ("Unlike the regulation struck down in *Bruen*, Section 922(g)(8) does not restrict arms use by the public generally").

In conclusion, the Waiting Period Law falls squarely within the plain text of the Second Amendment. Plaintiffs wish to keep and bear arms, and the Waiting Period Law prevents them from doing so for three days. The notion that a law explicitly and exclusively designed to delay and prevent people from keeping and bearing arms does not even implicate the Second Amendment is impossible to square with the Supreme Court's repeated admonitions that the Second Amendment is not "a second-class right." *McDonald v. City of Chicago, Ill*, 561 U.S. 742 at 780 (plurality).

IV. The Waiting Period Law is Not A "Presumptively Lawful" Commercial Regulation.

Defendant asserts that the Waiting Period Law is a presumptively lawful condition and qualification on the sale of arms that does "not implicate the plain text of the Second Amendment." [ECF No. 63, Def's. Mot. for Sum. Judg., at 20.] For that reason, the government contends that the Waiting Period Law is immunized from historical-tradition scrutiny altogether. But this argument is flawed.

First, the Waiting Period Law is not a "law imposing conditions and qualifications on the commercial sales of arms." *Bruen*, 597 U.S. at 30 (rejecting state's "attempt to characterize New York's proper-cause requirement as a 'sensitive-place' law"). Indeed, by the time that the waiting period has begun, the commercial transaction is consummated and over: money has been exchanged, and ownership of a firearm has passed title. *See* C.R.S. § 18-12-115(1)(a)(I) (referring to a "background check of the purchaser," not at the previous point of sale) (emphasis added). Once a purchaser passes their background check and pays the Federal Firearms Licensee ("FFL")

the purchase price of the firearm, it becomes theirs. The FFL selling the firearm cannot sell it to anyone else without violating federal law. *See* 27 CFR § 478.124 (tying background check to serial number of the firearm). The FFL must retain the firearm for 72 hours from the initiation of the background check, but the firearm legally and truly belongs to the purchaser. As described in the Waiting Period Law itself, it imposes a restriction on the "receipt" of a firearm, not on the sale or ownership of a firearm. *See id*. ("It is unlawful for anyone who sells a firearm … to deliver the firearm to the purchaser until the later in time occurs …") (emphasis added).

While the Court has previously cited the Colorado Uniform Commercial Code in this context, respectfully, the fact that purchases often involve delivery under the CUCC does not undermine Plaintiff's argument here. *See* Colo. Rev. Stats. § 4-2-101 (Uniform Commercial Code—Sales) (Comment) ("The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor."). And the same section addresses that a sale may of course occur when something is intangible, and thus may never actually be physically delivered. *Id.* ("The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character."). And parties can of course fully agree that title passes before any physical delivery occurs. *See* Colo. Rev. Stats. § 4-2-401 (providing for explicit agreement that physical delivery is not necessary to finalize a sale). Here, a transaction to exchange money for a firearm is appropriately seen as such an agreement.

Second, even if the Court does construe the post-sale cooling off period as part of the sale, it would still not come close to being presumptively lawful. Conditions and qualifications are things that people can actually satisfy, like paying a licensing fee or undergoing a background

check. There is no way to satisfy the Waiting Period Law—all anyone can do is wait for the three days to pass. But simply waiting for time to pass is not a condition or qualification on the sale of firearms.

To be sure, the requirement to secure a background check is a condition precedent to the transfer of a firearm; but the waiting period at issue in this case exists independent of any such condition.

In every jurisdiction of this nation, before a firearms dealer can transfer a gun, they must first satisfy the condition of running a background check on the buyer. If the purchaser does not pass the background check, then the seller is prohibited from transferring the firearm, because it is unlawful to transfer a firearm to a prohibited person. *See* 18 U.S.C. §922(d). But the only part of that process that could be understood as a condition on sale is the requirement to obtain a background check before making a transfer, as that is the only thing that involves something a seller can actually do.

On the other hand, a waiting period that is completely unrelated to the completion of a background check is not a condition or qualification that one can "satisfy;" all one can do in that instance is wait for the clock to run. Arbitrarily requiring a purchaser to wait for a certain number of days to pass is a particularly dangerous requirement for someone in need of a firearm for personal protection (like a domestic violence victim, for example). No matter how many background checks that person passes, no matter how exigent their need for self-defense, there is absolutely nothing that person can do under the Waiting Period Law to acquire that firearm any sooner—because there simply is no condition precedent that could ever be satisfied.

Laws that simply prohibit the transfer of a firearm for a period of time—whether permanently or temporarily—do not in any way impose a condition on the sale of arms. In point

of fact, Black's Law Dictionary explicitly defines the term "condition precedent" *to exclude* "a lapse of time." Condition, *Black's Law Dictionary* (12th ed. 2024) ("An act or event, *other than a lapse of time*, that must exist or occur before a duty to perform something promised arises.") (emphasis added). In short, a law like the Waiting Period that outright forbids a law-abiding citizen from taking possession of a firearm is a prohibition of, not a condition on, sale, regardless of how long the prohibition lasts.[9]

Nevertheless, Defendant highlights the Tenth Circuit's recent decision in "*RMGO*." [ECF No. 63, Def's. Mot. for Sum. Judg., at 21.] But the *RMGO* case is not analogous to the present one, because it did not address the same argument that is at issue here. Instead, the plaintiffs in *RMGO* argued that Colorado's law prohibiting individuals under 21 years of age from purchasing firearms was "not a condition or qualification of '*sale*,'" but instead was a condition of purchase, because it turned on the *buyer's* characteristics. Brief for Plaintiffs-Appellees 19-20, *Rocky Mountain Gun Owners v. Polis*, No. 23-1251, 2024 WL 578692 (10th Cir. filed Feb. 7, 2024) (emphasis added). The Tenth Circuit rejected that argument, holding that "a presumption that laws imposing conditions and qualifications on the commercial sale of arms are lawful extends equally to laws imposing conditions and qualifications on the commercial *purchase* of arms." *RMGO*, 121 F.4th at 120. But not before the Court in *RMGO* was the argument that an age restriction isn't a condition of purchase at all (as Plaintiffs in the present case emphatically assert when it comes to the Waiting Period Law). And an opinion cannot "dispose of" an argument it never considered—especially when it begins by confirming that it is "follow[ing] the principle of party presentation." *Id.* at 113.

[9] Nor does it make intuitive sense to describe the passage of time—3 days or otherwise—as a "condition" on a sale. In contract law, a condition is generally a thing that might not happen. *See B-B Co. v. Piper Jaffray & Hopwood, Inc.*, 931 F.2d 675, 678 (1991) ("Non-occurrence of a condition precedent discharges the other party's duty of performance."). By contrast, the passage of time is (practically) guaranteed.

Third, even if assuming arguendo that the Waiting Period Law was a condition or qualification on the sale of firearms, it still would not be a "presumptively lawful" one. For one thing, *Heller* did not say that all "conditions and qualifications on the commercial sale of arms" are "presumptively lawful;" it included the critical caveat that it was talking only about "longstanding" laws. 554 U.S. at 626–27 & n.26. And there is nothing "longstanding" about "cooling off" style waiting periods—the first of which was not enacted until 1996 (less than 30 years ago). The Supreme Court made clear in *Bruen* that regulatory "innovations of the mid-to late-19th-century courts come too late to provide insight into the meaning of [the Constitution in 1787]." 597 U.S. at 36–37 (alteration in original) (quoting *Sprint Comm'cns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 312 (2008) (Roberts, C.J., dissenting)). Given this, the fact that the "regulatory invention" of cooling off style waiting periods barely occurred at the end of the twentieth century undermines any assertion that the law is longstanding.

It is also worth noting that the Waiting Period Law applies to all firearm sales—including both ordinary business and private sales between non-commercial entities. So even if Defendant could viably assert that every law that limits or imposes conditions on a commercial purchase is presumptively constitutional, this law is not merely a restriction on "commercial sale[s]," and thus far exceeds the scope of the regulations that *Heller* referred to. 554 U.S. at 627. Had *Heller* intended to carve out literally all sales from the protection of the Second Amendment, it would not have used the word "commercial" as a modifier to the word "sales."

Moreover, even commercial regulations are unconstitutional if they are "abusive." In *RMGO* the Tenth Circuit held that a law is "disqualif[ied] … from the presumption of lawfulness" if it "employ[s] 'abusive ends.'" 121 F.4th at 122; *see Bruen*, 597 U.S. at 38, n.9. And as *Rahimi* reiterated, there is a fundamental difference between laws that restrict the Second Amendment

rights of "citizens who have been found to pose a credible threat to the physical safety of others," and laws that "broadly restrict arms use by the public generally." 602 U.S. at 698, 700. Laws like Colorado's Waiting Period that simply "look with suspicion on citizens presumably exercising their Second Amendment rights in a lawful way," *United States v. Daniels,* 101 F.4th 770, 778 (10th Cir. 2024), are therefore the very definition of laws put toward "abusive ends."

Unlike the Waiting Period law, the minimum-age law that was at issue in *RMGO* does not broadly restrict arms use by the general public because it is "aimed at ensuring guns are held by law-abiding, responsible persons." *RMGO*, 121 F.4th at 122. The Waiting Period Law, by contrast, has nothing to do with keeping firearms out of the hands of felons, or the mentally ill, or people younger than 21. The law simply requires everyone to wait 3 days to exercise their right to keep and bear arms, no matter their age or their reason for wanting a firearm. And the Waiting Period Law cannot be justified as an effort to determine who is law-abiding and responsible, as it forces people to wait even after they pass a background check, while conversely requiring no investigation beyond that check during the "cooling-off" period. The state has just arbitrarily decided that it cannot trust anyone to exercise Second Amendment rights without being given three days to reconsider, on the apparent view that everyone who wants to purchase a firearm may be harboring murderous or suicidal intentions. If that is not a law that "look[s] with suspicion on citizens presumably exercising their Second Amendment rights in a lawful way," *Daniels*, 101 F.4th at 778, it is difficult to imagine what is.

Finally, Defendant highlights the irrelevant fact that "13 other states" have recently implemented similar cooling off style waiting periods, and that a "majority of [those states] have *longer* waiting periods" than Colorado. But these datapoints simply do not change anything under *Bruen*'s inquiry. [ECF No. 63, Def's. Mot. for Sum. Judg., at 23.] A vastly and intentionally

overinclusive law is abusive precisely because it is vastly and intentionally overinclusive—and it remains so, no matter how many states adopt it or where in the delay "pecking order" Colorado falls. *See, e.g.*, *McRorey*, 99 F.4th at 838 (noting that a vastly overinclusive "sensitive place" law would be "the quintessential example of putting a presumptively constitutional regulation 'toward abusive ends'"). The notion that such a law should escape constitutional scrutiny entirely is incompatible with the notion of fundamental rights.

V. The Waiting Period Law Does Not Comport With This Nation's Historical Tradition of Firearm Regulation.

Under the historical analogue prong, the Court in *Bruen* explained that "determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar.'" *Bruen*, 597 U.S. at 28. To this end, "*Heller* and *McDonald* point toward two metrics: how and why the regulation[] burden[s] a law-abiding citizen's right to armed self-defense." *Id.* at 29. The Court concluded "[therefore], whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are 'central' considerations when engaging in an analogical inquiry." *Id.* at 29 (quoting *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 (2010)) (emphasis added).

It is this comparison, focusing on "how" and "why" regulations burden the Second Amendment, that serves a court in finding a proper historical analogue in any given firearms regulation. The Court in *Bruen* looked to certain, implementation-based, "how" aspects of the challenged regulation, in addition to its more goal-oriented, "why" aspects, and directly compared them to the corresponding features of the purported historical analogue.

Defendant has repeatedly and emphatically stated that the purpose of the Waiting Period Law is to "prevent impulsive acts of firearm violence, including homicides and suicides." [ECF No. 63,

Def's. Mot. for Sum. Judg., at 28.] The purpose is not to conduct a background check; and the three day "cooling off" period has no connection to the time it takes to complete a background check. Even if (as is typically the case) the background check comes back clean instantly, the purchaser still must wait three days.

Colorado does not cite a single historical restriction that worked that way. That is because there are none. The first state law imposing a "cooling-off" style period—under which people had to wait a set period of time to acquire a firearm even after demonstrating that they were eligible to keep and bear arms—was not enacted until 1996 in California.

Nor does Defendant attempt to refute the fact that the few waiting period laws that existed in the early twentieth century were put in place simply to provide sufficient time for licensing authorities to conduct background checks before the dawn of computers and a centralized database system made that process nearly instantaneous. These laws were not implemented to "prevent impulsive acts of firearm violence" like the one at issue in this case. *Id.* The "why" of facilitating a background check is clearly and irrefutably different from the "why" of a "cooling-off" period. But even if these early-twentieth century waiting-period laws could be considered relevantly similar, they come far too late "given the *Rahimi* Court's focus on Founding-era sources" and "the *Bruen* Court's emphasis on Founding-and Reconstruction-era sources." *Range v. Att'y Gen.*, 124 F.4th 218, 229 (3d Cir. 2024) (en banc).

Defendant does try to offer Founding and Reconstruction era analogies to support the Waiting Period Law, but these too miss the mark.

The analogy to historical intoxication laws runs aground on the "how." America's "tradition of firearm regulation" allows "the Second Amendment right" to "be burdened once a defendant has been found to pose a credible threat to the physical safety of others" (as may be the

case for an intoxicated person), but it does not countenance laws "broadly restrict[ing] arms use by the public generally." *Rahimi*, 602 U.S. at 700. Defendant has not been able to identify an intoxication law (either from the Founding era or at *any* point thereafter) that restricted everyone's ability to carry a gun on the theory that some might carry while drunk. Because none exist. And yet, that is what the Waiting Period Law does . . . it looks with suspicion on everyone seeking to purchase a firearm based on the ridiculous assumption that all armed citizens pose a danger to society, regardless of if they actually do. By embracing that fallacy and using it as the rationale for the Waiting Period Law, the state flouts this Nation's historical tradition and ignores the command that the government "not look with suspicion on citizens presumably exercising their Second Amendment rights in a lawful way." *Daniels*, 101 F.4th at 778.

The analogy to licensing regimes runs aground on the "why." To be sure, it took time in the horse-and-buggy days to assess whether someone was law-abiding. But that was what the wait was for; "the officials of old" were looking into "each individual's specific characteristics." *United States v. Williams*, 113 F.4th 637, 657 (6th Cir. 2024). Under the Waiting Period Law, however, someone who has already proven their law-abiding character by passing a background check still must wait 3 days based on the state's view that making everyone "cool off" before taking possession is in the public good. The state cannot identify any historical tradition whatsoever of intentionally delaying the exercise of Second Amendment rights—or any fundamental right, for that matter—for the express purpose of delaying their exercise. That suffices to doom any claim that the Waiting Period Law is consistent with historical tradition no matter who bears the burden of proof on that question.

Conclusion

For the reasons provided above, Defendant's Motion for Summary Judgement should be denied.

Respectfully submitted this 20th day of June 2025.

/s/ Michael D. McCoy

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