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.

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Reply Concerning Undisputed Material Facts

Pursuant to the Court's Practice Standard N.6., Plaintiffs set forth the following factual replies to the Defendant's "Response to Plaintiffs' Statement of Undisputed Facts." These replies are numbered according to the Plaintiffs' original Motion for Summary Judgment, and the Defendant's corresponding responses are included for context.

3. By the time that the waiting period initiates, the commercial transaction has already been completed: money has been exchanged, and ownership of a firearm has passed to the purchaser. [ECF No. 2, Motion for Temporary Restraining Order, Attach. #1 Ex A. Act, 10/1/2023, at SECTION 2 – 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).

- **Defendant's Response**: Disputed. Plaintiffs incorrectly assert as fact that a commercial transaction is completed when money has been exchanged, and that is what passes ownership of the firearm to the purchaser. ECF No. 62, pp. 3-4, ¶ 3. This is incorrect as a matter of law. Colorado expressly provides that a sale is complete when title transfers from the seller to the buyer, which occurs at the time of physical delivery of the goods. See Colo. Rev. Stat. §§ 4-2-106(1); 4-2-401(2). A would-be purchaser does not take title—and thus ownership—of a firearm until the firearm has been physically delivered to the purchaser.
- **Plaintiffs' Reply**: Although under the Colorado Uniform Commercial Code (UCC) purchases typically involve delivery, delivery is not always required before title transfers. *See* Colo. Rev. Stat. § 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 of the UCC 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. Stat. § 4- 2-401 (providing for explicit agreement that physical delivery is not necessary to finalize a sale). Defendant's argument would create a fundamental flaw in the legislature's statute: a waiting period could never be imposed on a "purchaser" because, under their theory, the purchase is not actually complete until delivery has occurred.

14. Without this shotgun, Ms. Garcia was forced to cancel her appearance at the shotgun shooting event in Virginia. [ECF No. 30, Transcript of Preliminary Injunction Hearing at 21, lines 19-25, and at 22, lines 1-5.]

- **Defendant's Response**: Undisputed, insofar as Ms. Garcia elected to cancel her appearance. Disputed and argumentative as to the fact that Ms. Garcia was unable to timely purchase the shotgun and that "forced" her to cancel. ECF No. 63-3 at 97:14-98:3; id. at 95:9-97:25.
- **Plaintiffs' Reply**: Ms. Garcia did not learn of the shotgun shooting event in Virginia until the week of the event. *See* Exhibit A, Garcia Deposition Transcript,

at 96, lines 13-25, and at 97, lines 1-2. [1] Ms. Garcia subsequently made arrangements to acquire a shotgun from the Dragonmans gun store in Colorado Springs, located approximately two and a half hours from her home. *Id.* at 30, lines 6-25. Ms. Garcia purchased the shotgun "right before or around the first preliminary injunction hearing," which occurred on October 26, 2023. *Id.* Ms. Garcia cancelled her trip to Virginia because she was unable to take possession of her shotgun "upon payment and passing [her] background check" at Dragonmans. [ECF No. 30, Transcript of Preliminary Injunction Hearing, at 21.]

18. At least two RMGO members, Ms. Garcia and Taylor Rhodes, have been affected by the Waiting Period Law. [ECF No. 2, Attach. #3 Rhodes Declaration, and ECF No. 30 at 32, lines 13-25.]

- **Defendant's Response**: Undisputed as to Ms. Garcia. Disputed as to Mr. Rhodes: neither the Complaint nor Mr. Rhodes's Declaration, submitted on behalf of RMGO as an organization, identifies him either as being personally affected or as a representative RMGO member. See ECF No. 1, ¶ 1 (identifying other members); ECF No. 2-3, ¶ 4 (identifying other members). Mr. Rhodes did testify that he purchased a gun on October 1, 2023, and had to collect it three days later. ECF No. 30, at 32:21-25.
- **Plaintiffs' Reply**: At the preliminary injunction hearing, Taylor Rhodes testified that he is a "member of RMGO" who has been personally impacted by the Waiting Period Law. [ECF No. 30 at 35, lines 2-3.] Mr. Rhodes explained that on October

[1] The pertinent parts of Alicia Garcia's Deposition Transcript have been attached to this Reply in Support of Plaintiffs' Motion for Summary Judgment as Exhibit A.

1, 2023, he "attempted to buy a firearm" after passing his background check and paying the purchase price, but "did not leave [the gun store] with that firearm that day" due to the Waiting Period Law. [ECF No. 30 at 30, lines 1-6, and at 32, lines 2-4.] Mr. Rhodes further testified that on October 25, 2023, he purchased "another firearm," but was unable to take possession of it. [ECF No. 30 at 30, lines 1-6.] And at his deposition, in response to a question by defense counsel about how the Waiting Period Law had "injured" RMGO members, Mr. Rhodes responded, "I am an RMGO member. I have tried to purchase a firearm, paid the purchasing price, [but] did not leave with my property the same day." *See* Exhibit B, Rhodes Deposition Transcript, at 76, lines 13-17.[2] Mr. Rhodes went on to state that he had to wait "between three and 10 days" to acquire these firearms. *Id.* at 76 lines 20-22.

25. Professor Spitzer does not believe that the Second Amendment confers an individual right to bear arms aside from government-based military or state militia service activity. (Q. Would it be fair to say that you … disagreed with the Supreme Court's decision in [the *Heller*] case? A. Yes. Q. In fact—and I went through and reviewed some of your writings and work actually going back all the way to the 1990s, but it's clear that you have been consistent in your opinion that the Second Amendment does not confer an individual right to bear arms aside or apart from any sort of government-based military or militia service activity. A. Yes.). [Id. at 45, lines 15-25, and at 46, line 1.]

- **Defendant's Response**: Disputed and non-material. Plaintiffs assert as fact that Professor Spitzer does not believe the Second Amendment imparts a constitutional

[2] The pertinent parts of Taylor Rhodes's Deposition Transcript have been attached to this Reply in Support of Plaintiffs' Motion for Summary Judgment as Exhibit B.

right for citizens to keep and bear arms. ECF No. 62, p. 7, ¶ 25. That is not accurate. While Professor Spitzer noted his personal view, particularly pre-*Heller*, that he did not believe the Second Amendment provided such a broad right and that he personally disagreed with the holding, he unequivocally affirmed that that right is the law of the land. Ex. 11, Spitzer Dep. Tr. 67:7-16 ("[T]hat is what the law is today. That's what the law was as of 2008. So there's no dispute about that. I do not dispute that.")

- **Plaintiffs' Reply:** The fact asserted by Plaintiffs above relates to Professor Spitzer's personal view on the scope of the Second Amendment protected right to keep and bear arms, *not* what his understanding of the current law is – post *Heller*. To the extent that Professor Spitzer's personal view may influence his analysis of firearms regulations, it is material, and the Court may weigh that materiality.

26. During his deposition testimony, Professor Spitzer acknowledged that although firearms were readily available for individual acquisition and use during the Founding Era, government imposed waiting periods did not exist in the United States at that time or for the next 150 years. (Q. But fair to say that guns were common in the United States at the founding? [] A. Yeah, common's kind of a vacuous term, but certainly there were guns to be had. If you wanted to have a gun, you could surely, you know, obtain one. [Id. at 102.] (Q. … But regardless of how an American in 1790 acquired a firearm, you know, either from a gunsmith, from—imported from Europe, homemade, fill in the blank, there was no government-imposed waiting period at this time, correct? A. No, not to my knowledge.) [Id. at. 102, lines 17-22, and at 110, lines 3-8.]

- **Defendant's Response**: Disputed as to Plaintiffs' statement that "firearms were readily available for individual acquisition and use during the Founding Era." To the contrary, Professor Spitzer opined that "No 'Guns-R-Us' outlets existed in the 1600s, 1700s, or most of the 1800s" and that "Rapid, convenient gun sales processes did not exist in the U.S. until the end of the nineteenth century, when mass production techniques, improved technology and materials, and escalating marketing campaigns all made guns relatively cheap, prolific, reliable, and easy to get." ECF No. 63-5, Ex. 5, Report & Decl. of Spitzer ¶¶ 11- 12. Further, Professor Spitzer testified at his deposition, in response to questioning by Plaintiffs' counsel, that delays in acquiring a gun were inherent in the Founding era. And further, Professor Spitzer testified that while at times, "arms were certainly readily available, although we also know that there were chronic arms shortages as governmental leaders reported, from the revolutionary period up through the first part of the 19th century." Ex. 11 at 92:5-10. Undisputed that a government-imposed waiting period did not exist in the United States until 1923. ECF No. 30 at 39:8-13.
- **Plaintiffs' Reply**: During his deposition, and in response to a question about the availability of firearms during the Founding Era, Professor Spitzer stated, "there were guns to be had. If you wanted to have a gun, you could surely, you know, obtain one." [ECF No. 62-1, Ex. A, Pertinent Parts of Professor Spitzers Deposition Transcript at 102, lines 17-22.]

27. This fact was subsequently reiterated by the Plaintiffs' expert witness, Professor Lee Francis, who similarly asserted that "while firearms were generally accessible and

available to the public both in small and individual sales and in bulk quantities, neither required a waiting period." [Francis Report and Declaration at 7, ¶ 18.]

- **Defendant's Response**: Disputed for the reasons stated immediately above.
- **Plaintiffs' Reply**: Reasserted for the reasons stated immediately above, as well as on the basis of Professor Lee Francis's findings as outlined in his Report and Declaration [ECF No. 62-2, Ex. B, Professor Lee Francis Expert Report and Declaration at 7, ¶ 18.]

31. While there was a condition precedent that needed to be in place before the restrictions of firearms related intoxication laws would be triggered—namely, the inebriation of the person seeking to acquire, possess or use a firearm—there is no condition precedent required for Colorado's three-day waiting period. It applies universally, regardless of the physical state, mental state or personal history of the person seeking to acquire a firearm. ([Regarding the intoxication laws] Q. They were intoxicated. There was a condition that they could either avoid or cure through sobriety, and then they could take possession of the firearm. … What's the condition, though, for someone in Colorado who passes the background check? So we're not talking about waiting for --to determine if they're prohibited. A. Well, that's a condition, isn't it? Q. It is a condition, but they've passed it....What is the condition then that's in place to prevent them from taking possession of the firearm for three days? A. Well, it's because state law stipulates three—72 hours. Q. Correct. But it's not based on any specific condition of the person trying to purchase the firearm. A. Well, it's based on a public policy goal. Q. I understand that. It's not based on a condition like the intoxication laws are, correct? A. Well, I—well, I would just say that

the definition of similar to is not identical. And I think similar to is a reasonable metric). [Spitzer Deposition Transcript, at 135, lines 17-25, and at 136, lines 1-16.]

- **Defendant's Response**: Disputed and not a material fact. In the quoted portion of Professor Spitzer's testimony, Professor Spitzer testified that the condition precedent to the 72-hour waiting period is seeking to purchase a firearm. Ex. 11 at 129:19-22. Professor Spitzer did not agree with Plaintiffs' counsel's assertion, stated in Plaintiffs' Motion for Summary Judgment, that "there is no condition precedent required for Colorado's three-day waiting period." ECF No. 62, p. 14 ¶ 31. This "Statement of Undisputed Material Fact" is argument of counsel, not fact.
- **Plaintiffs' Reply**: This asserted fact is offered in response to the Defendant's contention that Founding and Reconstruction Era intoxication laws provide a suitable historical analogue to the Waiting Period Law. Although Professor Spitzer identified inebriation as a condition precedent with firearms related intoxication laws, when pressed, he failed to identify a similar condition precedent that could be avoided, satisfied, or overcome by the purchaser when it comes to the Waiting Period Law. [Spitzer Deposition Transcript, at 135, lines 17-25, and at 136, lines 1-16.]

32. Professor Spitzer was unable to identify any intoxication-related weapons laws from the Founding Era (or even during the Reconstruction Era) that prohibited the acquisition of a firearm by an intoxicated person; instead, the laws he cites dealt with the possession and use of an already acquired firearm while intoxicated. [ECF No. 18 at #5 Exhibit 5, Ex. B to Spitzer Dec: Table of Intoxication/Weapons Laws.]

- **Defendant's Response**: Disputed. Plaintiffs fail to cite to the final version of Professor Spitzer's report (which is found at ECF No. 63-5') and instead rely on a version produced in connection with the preliminary injunction hearing (i.e., ECF No. 18). Professor Spitzer's report identifies laws in Delaware (1911 and 1919) and Mississippi (1878, 1880, and 1908) that prohibited sales of guns to intoxicated individuals. Ex. 11 at 142:15-17 (explaining that at Exhibit B to his report, "[t]he third column is you can't sell guns to people who are drunk"); ECF No. 63-5, PDF pp. 95-97.
- **Plaintiffs' Reply**: Regardless of whether one refers to Professor Spitzer's "Table of Intoxication Weapons Laws" under Exhibit B of his original report [ECF No. 18] or under Exhibit B of his "final report" [ECF No. 63-5], the outcome is the same. Neither report includes any Founding or Reconstruction Era intoxication-related weapons laws that prohibited the acquisition of a firearm by an intoxicated person. [ECF No. 18 at #5 Exhibit 5, Ex. B to Spitzer Dec: Table of Intoxication/Weapons Laws; and ECF No. 63-5, Ex. B to Spitzer Dec: Table of Intoxication/Weapons Laws.] Defendant concedes that the earliest law that prohibited sales of guns to intoxicated individuals was enacted in Mississippi in 1878; but 1878 is outside the period of Reconstruction. [*Id.*]; *see also McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 771 (2010) (citing academic source identifying 1865-1877 as the Reconstruction Era); *id.* at 846 (Thomas, J., concurring) (citing a different academic source identifying 1865-1877 as the Reconstruction Era).

35. Based on his review of historical state laws regulating firearm use and intoxication, Professor Francis reached a similar conclusion. "None of the historical statutes from the

Founding Era cited in Professor Spitzer's report indicate a similar intrusion on the right to bear arms. To put it another way, merely being intoxicated during the Founding Era would not have prohibited an individual from obtaining a firearm . . . [only their] use of a firearm while intoxicated." [Francis Report and Declaration at 8, ¶ 21.]

- **Defense Response**: Disputed, but this is not a material fact. Professor Francis's evaluation of historical analogues identified by Professor Spitzer amounts to a legal opinion and/or argument. Further, Professor Francis admitted at his deposition that he never reviewed the final report submitted by Professor Spitzer. Ex. 12, Suppl. Francis Dep. Tr. 47:8-53:5) (Francis testified that he signed his expert report on August 28, 2024 and did not revise it thereafter; the Governor produced its expert reports to Plaintiffs on August 30, 2024); id. at 173:7-175:21 (Francis testified that he reviewed Professor Spitzer's report produced in connection with the motion for preliminary injunction).
- **Plaintiffs' Reply:** This fact is relevant to the legal issues at hand. The Waiting Period Law specifically implicates the acquisition of a firearm. The Founding and Reconstruction Era intoxication laws cited by Professor Spitzer deal with the use of firearms after they have already been acquired, not at the time of acquisition. [ECF No. 18 at #5 Exhibit 5, Ex. B to Spitzer Dec: Table of Intoxication/Weapons Laws; and ECF No. 63-5, Ex. B to Spitzer Dec: Table of Intoxication/Weapons Laws.] Moreover, the content of Professor Spitzer's Table of Intoxication/Weapons Laws in his original report is identical in every way to the content of Professor Spitzer's Table of Intoxication/Weapons Laws included in his final report. [*Id.*] Similarly, the text of Intoxication/Weapons Laws contained as Exhibit C in both of

Professor Spitzer's reports are identical in every way. So, it is immaterial which report Professor Francis reviewed in reaching the conclusion that "none of the historical statutes from the Founding Era cited in Professor Spitzer's report indicate a similar intrusion on the right to bear arms … [and] merely being intoxicated during the Founding Era would not have prohibited an individual from obtaining a firearm . . . [only their] use of a firearm while intoxicated." [Francis Report and Declaration at 8, ¶ 21.]

41. 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.]

- **Defense Response**: Disputed. Professor Spitzer explained that "By its nature, then, licensing contemplates the passage of some period of time (even if it be brief) between the time the application for permission to do something is submitted (such as a hunting license application) and the license or permission is granted . . . . In addition, licensing by its nature thwarts any unrestricted ability to acquire or use firearms on demand." ECF No. 63-5, ¶ 33.
- **Plaintiff's Reply**: The Defendant's response does not address the fact listed above. The fact listed above does not concern the issue of acquiring a license to use or carry a weapon in a certain manner after it has already been acquired. Rather, the fact listed above concerns the issue of whether during the Founding Era there were weapons licensing laws that required someone to delay taking possession of a firearm. Professor Spitzer made clear in his report that there were none. [ECF No.

63-5 at #5 Exhibit 5, Report & Declaration of Spitzer: Table of Weapons Licensing Laws; and Francis Report and Declaration at 21-22, ¶ 65.]

42. As Professor Francis noted, "[e]ven when a permit or license [was] required to hunt, Spitzer has shown no evidence that the individual would be required to wait for any period of time before taking possession of his firearm regardless of whether he'd be permitted to hunt." [Francis Report and Declaration at 21-22, ¶ 65.]

a. **Defense Response**: Disputed and not a material fact. Professor Francis's evaluation of historical analogues identified by Professor Spitzer is not a fact, it is legal opinion and argument. Further, Professor Francis admitted at his deposition that he never reviewed the final report submitted by Professor Spitzer. Ex. 12 at 47:8-53:5) (Professor Francis testified that he signed his expert report on August 28, 2024 and did not revise it thereafter; the Governor produced its expert reports to Plaintiffs on August 30, 2024); id. at 173:7- 175:21 (Francis testified that he reviewed Professor Spitzer's report produced in connection with the motion for preliminary injunction). Further, Professor Spitzer explained that "By its nature, then, licensing contemplates the passage of some period of time (even if it be brief) between the time the application for permission to do something is submitted (such as a hunting license application) and the license or permission is granted . . . . In addition, licensing by its nature thwarts any unrestricted ability to acquire or use firearms on demand." ECF No. 63-5, ¶ 33.

b. **Plaintiffs' Reply**: Although Professor Spitzer added additional statutes to the Table of Weapons Licensing Laws included in his final report, not one of those newly added laws undermines the fact listed above; specifically, that there were no

Founding Era licensing laws that required an individual to wait for any period of time before taking possession of a firearm. [ECF No. 63-5 at #5 Exhibit 5, Report & Declaration of Spitzer: Table of Weapons Licensing Laws.] Moreover, the Defendant's response does not address the fact listed above. The fact listed above does not concern the issue of acquiring a license to use or carry a weapon in a certain manner after it has already been acquired. Rather, the fact listed above concerns the issue of whether during the Founding Era there were weapons licensing laws that required someone to delay taking possession of a firearm. Once again, Professor Spitzer made clear in his report that there none. [*Id.*; and 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.]

43. Of the approximately 265 weapons licensing laws Professor Spitzer examined and included in his report, 41 of those laws were specifically targeted at either African Americans or other targeted groups. [ECF No. 18 at #5 Exhibit 5, Ex. D to Spitzer Dec: Table of Weapons Licensing Laws, and Spitzer Report and Declaration at 22, ¶¶ 36 and 37.]

a. **Defense Response**: Disputed. Plaintiffs cite to the version of Professor Spitzer's report produced in connection with the motion for preliminary injunction, i.e., ECF No. 18. Professor Spitzer's final report states:

> Of the 283 licensing laws examined here, at least 13 states enacted 19 laws pertaining to African Americans (all pre-Civil War), equaling just 6.7% of all licensing laws. Even though these few licensing laws were race-based, the point of these laws was to license or allow (not bar) the named groups to obtain access to weapons with the issuance of a license . . . . Aside from

laws pertaining to African Americans, at least 15 states imposed licensing requirements on other marginalized groups (labeled "Named Groups" in Exhibits H and I), variously including Native Americans, felons, non-citizens, non-state residents, or minors. Of these, five of those laws pertained to Indigenous people (Connecticut, Florida, Massachusetts, Missouri, and New York). ECF No. 63-5, ¶¶ 36-37.

- **Plaintiffs' Reply**: Plaintiffs correct their math error … of the **283** (not 265) weapons licensing laws Professor Spitzer examined and included in his report, **44 (**not 41) of those laws were specifically targeted at either African Americans or other disfavored groups. [ECF No. 63-5 at #5 Exhibit 5, Report & Declaration of Spitzer: Table of Weapons Licensing Laws, and Spitzer Report and Declaration at 22, ¶¶ 36 and 37.]

49. Although this was a quantitative, multivariable assessment of American handgun waiting period laws over a 45-year period, the effect of the following items were not considered or implemented as "control variables" as part of the study:[3]

a. The fluctuating crime rates and incarceration rates of the individual states over the 45-year study period were not used as control variables.

b. The overall number of law enforcement officers in each state over the 45-year study period was not used as a control variable.

c. The Violent Crime Control in Law Enforcement Act passed by Congress and signed into law by President Bill Clinton in 1994 was also not considered or used as a

[3] The facts listed under 49a-f, as well as the Defendant's responses to those facts, are being condensed since the Defendant is not disputing them, but is collectively challenging their materiality.

control variable in the study, even though its crime-fighting provisions were implemented nationwide in the middle of the study period.

d. California's 1994 "Three Strikes law", as well as similar "tough on crime" legislation passed by dozens of states between 1994 and 2004, was not used as a control variable in the study.

e. At the end of the Brady Act interim period in 1998, with the implementation of the NICS instant background check system, approximately 10 states abandoned the waiting periods that they had previously imposed to ensure sufficient time to conduct federally mandated background checks. The study did not analyze what impact, if any, the loss of those waiting periods had on the gun related homicide or suicide rates in those states.

f. The study did not analyze or consider "time-to-crime" statistics as a control variable.

- **Defense Response**: Undisputed and non-material.
- **Plaintiffs' Reply**: Plaintiffs agree that these are non-material facts, because *Bruen* does not permit this Court to consider the means-ends fit of the Waiting Period Law. However, to the extent that the Court opts to consider the testimony of Professor Poliquin, Plaintiffs contest Defendant's assertion that these are not relevant facts to the validity of his testimony. Control variables are used to ensure that the observed changes in the dependent variable are due to the independent variable, and not other factors. Consequently, the control variables used and not used as part of Professor Poliquin's study are material to determining the weight that should be afforded his conclusions about the impact of waiting periods on firearms related homicides and suicides.

50. Although 44 states and the District of Columbia had a waiting period of some type in place during the period of the study (1970 to 2014), the nature, purpose and/or length of each of those waiting periods was not considered by Professor Poliquin or his associates in their study. (Q. Okay. But just so I'm clear, the . . . nature and type of the waiting period was not a control variable in the study. A. No. Q. So, for example, we just spoke about whether the waiting period applies to all transactions or some was not considered, correct? A. Correct. Q. And whether the waiting period was related to permitting or licensing or some other delay requirement was not considered either, correct? A. Correct, no. That's right.) [Id. at 66, lines 15-25, and 67, lines 1-3.]

- **Defense Response:** Undisputed and non-material. Professor Poliquin's study employed a regression analysis and "time-varying state-level control variables that may influence rates of gun violence, including alcohol consumption, poverty, income, urbanization, black population, and seven age groups." ECF No. 63-1, PDF p. 15. The same control variables were used in related leading studies. Ex. 13 at 33:15-23.

- **Plaintiffs' Reply:** As stated above, Defendant is correct that these are non-material facts, because under *Bruen*, the Court may not consider them. However, to the extent that the Court weighs Professor Poliquin's testimony, Plaintiffs contest Defendant's assertion that this is not a relevant fact that undermines that testimony. Control variables are used to ensure that the observed changes in the dependent variable are due to the independent variable, and not other factors. Consequently, the control variables used and not used as part of Professor Poliquin's study are

material to determining the weight that should be afforded his conclusions about the impact of waiting periods on firearms related homicides and suicides.

Discussion

I. Defendant's Standing Arguments are Nothing More Than a Pointless Distraction.

In the section of their response dealing with standing, the government spends most of its time trying to convince the Court that because Taylor Rhodes is not a named plaintiff in this case, the personal injury he suffered from the denial of his right to obtain a firearm should not be considered when determining the standing of Plaintiff Rocky Mountain Gun Owners (RMGO)—an association Mr. Rhodes is not only a member of, but also its current Vice President. But this argument holds no weight. As repeatedly cited in past briefs, "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). There is simply no requirement that members of those associations be named plaintiffs, only that they are individually able to establish that they have personally suffered an actual "injury in fact" from the denial of their right—which Mr. Rhodes has been able to do repeatedly in testimony in front of this court and at his deposition. [ECF No. 30 at 35 lines 2-3; *see also* Exhibit B at 76, lines 13-17 and 20-22.] Moreover, Mr. Rhodes and Ms. Garcia—as members of RMGO—will continue to be injured every time they seek to acquire a firearm in the State of Colorado.

The government then goes on to rehash old arguments by stating that because the delay is "temporary" and Ms. Garcia and Mr. Rhodes were ultimately able to acquire the firearms they purchased, they really did not suffer a cognizable injury. [ECF No. 66, Def. Brief in Opposition to Motion for Summary Judgment at 3.] But, once again, it is immaterial to the issue of standing that

Plaintiff Garcia and Mr. 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.[4] That delay—no matter how "temporary"—still amounts to an infringement of their Second Amendment rights. 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).

The government then goes on to make the specious claim that Plaintiff Garcia and Mr. Rhodes lack standing because they already have a sufficient number of guns to use for their own self-defense. [ECF No. 66 at 3]. Apparently, the government "knows best" when it comes to the question of when a person is sufficiently armed.

This type of reasoning applied to any other fundamental right would fail right out of the gate. Imagine if the government's justification for shuddering a church was that the congregants had a myriad of other churches in the area where they could worship. Or if a newspaper columnist were silenced, but told he has sustained no injury since he still has a blog from which to exercise his right to free speech. It would be ludicrous if this logic was applied in these contexts to try to defeat standing. It is just as ludicrous when applied to the Second Amendment context for the same purpose. *Sedita v. United States, 763 F.Supp.3d 63, 79* (D.D.C. 2025) ("In other constitutional contexts, courts do not ask whether a regulation has fully prohibited an individual from exercising her right before acknowledging the right comes into play at all."); *Zbaraz v. Hartigan*, 763 F.2d 1532, 1537 (7th Cir. 1985) (Illinois law mandating 24-hour waiting period on minor abortion care

[4] 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.

was subject to strict scrutiny and unconstitutional); *cf. Planned Parenthood of Montana v. Montana*, 2025 MT 120, ¶85 (MT 2025) (24-hour waiting period and other mandatory delays on abortion care burdened the right to abortion under Montana state law); *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 21 (Tenn. 2000) (2-day waiting period for abortions burdened the state constitutional right to abortion where "the legislature clearly intended that the woman make two trips to the physician in order to fulfill the informed consent requirements.").

It is also worth reiterating that this court has already determined that Plaintiff Garcia has standing to challenge the Waiting Period Law. [*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.").] Since Plaintiff Garcia is a member of RMGO, the standing analysis can end there for both plaintiffs in this case. But Plaintiff RMGO acquires additional organizational standing through Taylor Rhodes.

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). This remains true after *Trump v. CASA, Inc.*, 606 U.S. --, 2025 WL 1773631, *11 (2025), which merely limited relief under equitable principles to parties directly before the Court. In addition to not affecting the standing inquiry whatsoever, Plaintiff Garcia and RMGO are properly before this Court, and possess standing both individually and as an Association. This Court may thus reach the merits.

II. Plaintiffs Satisfy *Bruen*'s Step One.

A. The Plain Text of the Second Amendment Covers the Plaintiffs' Conduct.

The right to "keep" arms necessarily implies the right to obtain them in the first place. After all, "keep" means to possess or "have weapons." *Heller*, 554 U.S. 570 at 582. By the Waiting Period Law's very terms, it prevents purchasers from taking "possession" of their firearms.

Therefore, because the Second Amendment's plain text covers Plaintiffs' conduct—i.e., possessing bearable arms—"the Constitution presumptively protects that conduct." *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 at 24; *United States v. Rahimi*, 602 U.S. 680 (2024) (reaching *Bruen* Step Two with respect to a statute, § 922(g), that prohibited *Rahimi* from "receiv[ing] any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."); *Yukutake v. Lopez*, 130 F.4th 1077, 1092 (9th Cir. 2025) ("Because § 134-2(e) regulates conduct—the acquisition of a firearm by an individual, through purchase or otherwise—that is covered by the plain text of the Second Amendment, the Second Amendment 'presumptively protects that conduct.'"); *Sedita*, 763 F.Supp.3d at 76 ("As a necessary ancillary to the right of possession, the right of acquisition is protected, too. If it were not, the letter of the Second Amendment would be stripped of all substance."); *cf. McDonald*, 561 U.S. at 894 (Stevens, J., dissenting) (arguing that "the substantive right at issue may be better viewed as a property right [because] Petitioners wish to *acquire* certain types of firearms…") (original emphasis). Plaintiffs have met their burden under *Bruen*.

B. Defendant Mis-Frames the Right at Issue as the "Immediate" Access to Firearms.

Defendant argues that the Waiting Period Law does not take away someone's ability to keep and bear arms—it simply delays it, and for that reason, the Second Amendment is not even implicated. But this sort of logic would never withstand scrutiny in the context of any other fundamental right. For example, a state imposed three-day waiting period in acquiring books purchased from bookstores would unquestionably implicate the First Amendment. *See New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 24 (2022) ("This Second Amendment standard accords with how we protect other constitutional rights.") (putting Second Amendment rights on equal footing with First Amendment and Sixth Amendment rights, by example); *id.* at 6

("The constitutional right to bear arms in public for self-defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.") (cleaned up).

The Defendant mis-frames the right at issue as one of "immediate acquisition." Not so. Plaintiffs do not challenge the time it takes for a Federal Firearms Licensee to conduct a background check to ensure that a purchaser is not a prohibited possessor. Plaintiffs instead challenge the imposition of an arbitrary cooling off delay in exercising their Second Amendment rights that continues *even after successfully completing a background check*. At a minimum, that delay burdens Plaintiffs' Second Amendment rights, and therefore implicates the Second Amendment's plain text. *Accord Hoffman v. Bonta*, No.: 3:24-cv-664-CAB-MMP, 2025 WL 1811853, *3 (S.D. Cal. Jul. 1, 2025) (rejecting the government's assertion that plaintiffs could not invoke the Second Amendment to achieve "[a] mandate that a traveler be allowed to use another state's license to carry in California."); *Sedita*, 763 F.Supp.3d at 79 ("Again, *Bruen* Step One does not focus on the degree of burden placed on an individual's desired course of conduct and use that metric to determine whether the plain text of the Second Amendment has been implicated. That is working backwards.").

But the government responds that there is no right to acquire, just a right to retain for purposes of self-defense. [ECF No. 66, Def's. Opp. Mot. for Sum. Judg., at 7.] And in support of this contention, the government references the "shot heard around the world," suggesting that because "the British governor dispatched soldiers to seize the local farmers' arms and powder stores" in Concord, that fact somehow "demonstrates why the Second Amendment's 'keep and bear' language focuses on *retention* rather than *acquisition* of arms." *Id.* (citing *Cf. United States v. Rahimi, 602 U.S. 680, 690 (2024)* and *Ortega v. Lujan Grisham,* 741 F. Supp. 3d 1027, 1073 (D.N.M. 2024)). But the arms our Patriots used to repel the British attack on April 19, 1775, did

not just magically appear behind every farmer's door. Once Paul Revere and William Dawes alerted the colonists of the British troop movement, any and all arms were quickly distributed to any and all men who were able to fight. There was no state-imposed delay in the distribution or acquisition of those firearms. And thank God there wasn't; because the opening battles of our Revolution would have certainly turned out differently if those who needed arms to fight the Red Coats had to wait three-days to obtain them.

The government then goes on to attempt to dismiss recent precedent out of the First and Fifth Circuits that has reaffirmed that the Second Amendment's right to keep and bear arms includes the right to acquire them in the first place. *Beckwith v. Frey*, No. 1:24-cv-00384-LEW, 2025 WL 486830, at *3 (D. Me. Feb. 13, 2025) ("If 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.") *Reese v. ATF*, 127 F.4th 583, 590 (5th Cir. 2025) ("Because 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.")

In their effort to distinguish the holding in *Beckwith* from the current matter, the government raises a red herring argument. It suggests that unlike with Maine's three-day waiting period, there is no concern in Colorado about individuals being "dispossessed" of their firearms, because title to those firearms does not transfer until the individual "takes physical delivery" of them, an event which does not occur in Colorado until the end of the three-day waiting period. [ECF No. 66 at 8.] The contortions the government has to go through to reach this sliver of a "distinction" are impressive, but they ultimately do nothing to undermine the central holding of *Beckwith* —that even a "modest" curtailment of an individual's ability to take possession of a

firearm is violative of the Second Amendment. *Beckwith* at *3. Regardless of when title transfers, those seeking to purchase firearms in Colorado are curtailed from doing so for three days.

The government then goes on to quickly dismiss the Fifth Circuit's recent holding in *Reese* by reminding the court that it is "bound to follow" the Tenth Circuit's holding in *Rocky Mountain Gun Owners v. Polis ("RMGO")*. [ECF No. 66 at 9.] But as Plaintiffs have explained in previous briefing, the minimum-age law at issue in *RMGO* is not analogous to the Waiting Period Law. Unlike the Waiting Period Law, Colorado's minimum-age law 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 96 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 three 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.

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

The Defendant argues that the Waiting Period Law is presumptively constitutional because it is a condition or qualification on the commercial sales of arms. [ECF No. 66 at 12.] It is not. Conditions and qualifications are things that people can satisfy. But no one can satisfy a waiting period; all one can do is wait it out. Laws that make people wait before they can take possession of their already-purchased firearm thus do not in any way impose a condition or qualification on the sale of arms, instead they impose a clear burden on the buyer's right of armed self-defense. *Cf. United States v. Price*, 635 F.Supp.3d 455, 460 (S.D. W.V. 2023) ("[A] blatant prohibition on possession" of a firearm is not a commercial regulation.); *United States v. Marique*, 647 F.Supp.3d

382, 385 (D. Md. 2022) (commercial regulations are those that do not intrinsically "implicate an individual's right of possession"). In short, a law like Colorado's 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.

Even if, assuming arguendo, the Waiting Period Law were a condition or qualification on the sale of firearms, it still would not be a "presumptively lawful" one. For one thing it is not "longstanding." *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. *District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008). The first cooling-off style waiting period, like the one at issue in this case, was not enacted until 1996, and the first waiting period of any sort was not implemented until 1923—46 years *after* the end of Reconstruction. [ECF No. 30 at 39, lines 8-13.]

The Waiting Period Law is also not "presumptively lawful" because it "employ[s] abusive ends."[5] *RMGO*, 121 F.4th 96 at 122. The Waiting Period Law does this by "look[ing] 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), which is the very definition of a law put toward "abusive ends." The Waiting Period Law makes no effort to be targeted in its approach. It is not focused on controlling access to firearms for select groups like minors, the mentally ill, or those "citizens who have been found to pose a credible threat to the physical safety of others." *Rahimi,* 602 U.S. at 698, 700. Instead, the Waiting Period law has near universal application and

[5] The government claims in their Response in Opposition to Plaintiffs' Motion for Summary Judgment that the "[p]laintiffs do not even argue that the Waiting Period is 'abusive.'" [ECF No. 66 at 14.] Not so. The Plaintiffs addressed the abusive nature of the Waiting Period Law in their Response in Opposition to Defendant's Motion for Summary Judgment. [ECF No. 67 at 25-26.]

"broadly restrict[s] arms use by the public generally." *Id.* In even the most dire of circumstances—suppose a domestic violence survivor who knows that their spouse will attack imminently—Colorado's law disarms that purchaser.

It is no answer that a handful of people do need to cool off, or that "13 other states" have embraced Colorado's approach. [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. *See, e.g., McRorey v. Garland*, 99 F.4th 831 at 838 (5th Cir. 2024) (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 any rigorous constitutional scrutiny at all entirely is fundamentally incompatible with the notion of fundamental rights.

IV. The Waiting Period Law is not in Line with the History and Tradition of Firearms Regulations.

In their Response in Opposition to Plaintiffs' Motion for Summary Judgment, the government argues that "the Waiting Period Law is relevantly similar to early firearms restrictions in 'why' and 'how' it burdens Second Amendment rights." [ECF No. 66 at 18.] It is not. As outlined in the Plaintiffs' previous briefs, there is simply no historical tradition of imposing arbitrary waiting periods like the one at issue here.[6] Realizing this, Defendant continues to turn to ill-fitting analogies, without ever advancing the argument, much less establishing it, that the Founders didn't know that people can be impulsive. *Bruen*, 597 U.S. 1 at 26 ("[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack

[6] In dissent in *Bruen*, Justice Breyer himself noted in frustration that it would often be difficult for the government to successfully draw analogies from the Founding era to modern times. *Bruen*, 597 U.S. 1 at 115 (Breyer, J., dissenting) ("[A]s technological progress pushes our society ever further beyond the bounds of the Framers' imaginations, attempts at 'analogical reasoning' will become increasingly tortured."). Defendant falls into exactly this trap here.

of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.").

A. Intoxication Laws are a Poor Analogy to the Waiting Period Law.

Defendants rely on pre-Founding and Founding Era laws regulating firearm usage by intoxicated persons. Those laws are particularly poor analogies because they did not, as the Waiting Period Law does, assume that everyone is always intoxicated, and require them to wait three days after passing a background check to sober up. [ECF No. 62-2, at #2 Exhibit B, Lee Francis Expert Report and Declaration at 8-9, ¶¶ 19-23.] In fact, the intoxicated individual could acquire the firearm as soon as they were no longer drunk—a case-by-case assessment for each individual.

Thus, the "how" of these Founding Era intoxication laws was different. They applied to inebriated individuals, not to the *entire* population of the colony or state that enforced them. And they did not impose three-day delays. Moreover, they did not actually attempt to control the acquisition of firearms by intoxicated individuals, but rather the use of already acquired firearms by intoxicated persons. [ECF No. 18 at #5 Exhibit 5, Ex. B to Spitzer Dec: Table of Intoxication/Weapons Laws; and ECF No. 63-5, Ex. B to Spitzer Dec: Table of Intoxication/Weapons Laws.] That is a critical distinction that undermines the government's assertion that the "how" of the intoxication laws was similar to the Waiting Period Law. [ECF No. 66 at 19-20.]

And what is true for drunk people is not true for those members of the general public who simply want to exercise their Second Amendment protected rights. Contrary to what anti-gun zealots would like us all to believe, Americans who acquire, keep and bear firearms are not *per se* more prone to impulsivity than any other Americans—and nothing in the reports the government relies on undermines that fact. So, while the intoxication laws cited by the government were

narrowly focused on a small and clearly defined segment of society suffering from a *transitory* condition, the Waiting Period Law takes an indiscriminate approach and proceeds on the assumption that everyone seeking to purchase a firearm is in a "temporary impulsive state." [ECF No. 66 at 19.]

The "why" for these historical firearm intoxication laws is also different. Yes – drunks and firearms don't mix well. Given this truism, there were undoubtedly numerous reasons "why" public officials would have wanted to prevent intoxicated individuals from using firearms—the likelihood of careless and negligent discharge, the suspicious nature of anyone becoming intoxicated and then seeking to fire a gun, and of course, that people often make bad decisions while intoxicated. But these reasons "why" drunks shouldn't use firearms are not truly or exclusively about impulsivity, qua impulsivity, and thus cannot serve as a proper analogy for the Waiting Period Law.

Put simply, the reasons for each law, and the approach that each law takes to accomplish those goals, are simply not analogous.

B. Licensing Regimes are not a Historical Analogue to the Waiting Period Law.

Similarly, licensing requirements do not provide a historical analogue to the Waiting Period Law. The first licensing regime in the United States was the 1911 Sullivan Act in New York, which is entirely too late to be an appropriate analogue. [ECF No. 63-5 at #5 Exhibit 5, Report & Declaration of Spitzer: Table of Weapons Licensing Laws.] Moreover, the Sullivan Act only required licensing for concealed carry. The first federal licensing was enacted in 1938, the National Firearms Act, which required sellers of firearms to receive a federal license.

While Defendants rely on a compilation of laws gathered by Professor Spitzer, it is clear that the "licensing" laws that Professor Spitzer collected are of a different kind than at issue here. For one, they were not universal licensing regimes, and many were rooted in racism and bias

regarding disfavored racial groups. *Id*. Nearly every true licensing system came into being in the twentieth century. As such, they are too distant from the Founding to be relevant to the analysis. Moreover, and as Professor Lee notes in his Report:

> [N]one of the [licensing regimes cited by Professor Spitzer] actually required one to postpone taking possession of a firearm. Even when a permit or license [was] required to hunt, Spitzer has shown no evidence that the individual would be required to wait for any period of time before taking possession of his firearm regardless of whether he'd be permitted to hunt. There is simply no historical basis to support this statute.

[ECF No. 62-2, at #2 Exhibit B, Lee Francis Expert Report and Declaration at 21-22, ¶ 65.]

C. Firearms Were Common at the Founding, Yet There Were No Waiting Period Laws

Defendants simply err by asserting that firearms—the obtaining or use of them—were not part of general American society at the time of the Founding. They were. [ECF No. 62-2, at #2 Exhibit B at 5-7, ¶¶ 13-18.] Firearms were freely available for purchase at shops. Indeed, virtually every able-bodied male during the Colonial and Founding Eras was required to acquire arms. *See Backgrounds of Selective Service: Military obligation: the American tradition, a compilation of the enactments of compulsion from the earliest settlements of the original thirteen colonies in 1607 though the Articles of Confederation, 1789*, Parts 2–14 (Arthur Vollmer ed., 1947) (providing hundreds of militia laws requiring all able-bodied males to acquire and possess arms). The federal Uniform Militia Act of 1792 required every "free able-bodied white male citizen" to be enrolled in the state militia. Those militiamen were required to acquire a firearm:

> That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each

> cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accoutred and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack.

Public Acts of the Second Congress, 1st Session, Chapter 33.

It cannot be true that nearly every adult male for roughly 200 years was required to possess firearms, and at the same time firearms were rare in that same place.

It is important to understand the historical context that led to the Uniform Militia Act of 1792. The Founders had just come out of the American Revolution, where militiamen had used their own firearms to engage in combat with the British Army. *See* Exhibit C, Spitzer Deposition Transcript, at 57, lines 1-15, and at 58, lines 1-25.[7] Even after the ultimate defeat of the British Empire, concern over maintaining a standing army led to the disbandment of most of the Continental Army in 1783. *Id.* In its place, the founding generation relied on militias for collective defense—as they always had. Imposing an arbitrary waiting period for those seeking to acquire firearms so that they could defend themselves, their states, and their country would have been seen as anathema to the Founders. *See McDonald*, 561 U.S. at 769 ("Thus, Antifederalists and Federalists alike agreed that the right to bear arms was fundamental to the newly formed system of government.").

Early America saw several armed rebellions: Shay's Rebellion, the Whiskey Rebellion, Fries's Rebellion, the 1838 Mormon War, Bleeding Kansas, Dorr's Rebellion, John Brown's Revolt, the Utah War, and multiple armed confrontations with Native Americans. All of these events occurred between the Founding and the ratification of the Fourteenth Amendment. The

[7] The pertinent parts of Professor Robert Spitzer's Deposition Transcript have been attached to this Reply in Support of Plaintiffs' Motion for Summary Judgment as Exhibit C.

Founders knew and understood that firearms could be used for violent purposes, yet they imposed no waiting period to acquire a firearm.

V. Plaintiffs Are Entitled to A Permanent Injunction and Have Successfully Demonstrated the Permanent Injunction Factors.

In their Response, the government claims that Plaintiff's did not address the permanent injunction factors, and therefore the request for such relief should be denied. [ECF No. 66 at 23-24.] However, the factors have been addressed throughout Plaintiff's Summary Judgment briefing, and even in the briefing accompanying the preliminary injunction hearing and the hearing itself. If the Court finds that Plaintiff's Motion for Summary Judgment should be granted, then a permanent injunction is warranted as a matter of law. Even if the Court agrees that Plaintiffs have not addressed the permanent injunction factors, Fed. R. Civ. P. 54(c) demands that "final Judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings" and should therefore grant the relief to which the Plaintiffs are entitled.

In order to obtain a permanent injunction, the party seeking such relief must show: "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Crandall v. City and Cnty. Of Denver, Colo.*, 594 F.3d 1231 (10th Cir. 2010) (citing *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180 (10th Cir. 2003); *see also Hoffman*, 2025 WL 1811853, *6 (imposing affirmative injunction requiring California to entertain concealed-carry permits from non-residents). "Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

In showing actual success on the merits, Plaintiffs have walked through both prongs of the *Bruen* analysis and have ample evidence revealing why the plain text of the Second Amendment is implicated and why the Waiting Period Act is inconsistent with this nation's history and tradition of firearms regulation. *See supra* Parts II, III, IV. Further, each of Defendant's arguments that, ostensibly, take the Waiting Period Act outside of the ambit of Second Amendment protections have been thoroughly addressed at not only the preliminary injunction hearing and accompanying briefing, but also in this Summary Judgment briefing. *See* [ECF No. 2, Motion for Temporary Restraining Order and for Preliminary Injunction]; [ECF No. 62, Plaintiff's Motion for Summary Judgment]; *see also supra* Parts II, III, IV.

The Supreme Court has long established that where there is a violation of constitutional rights, there is also irreparable injury. In *Elrod v. Burns*, 427 U.S. 347 (1976), the Court held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)). In the time since *Elrod*, the Supreme Court has had no issue equating all protections under the Constitution, especially between the First and Second Amendments. *Bruen*, 597 U.S. 1 at 24-25 ("This Second Amendment standard accords with how we protect other constitutional rights") (collecting cases); *see also Baird v. Bonta*, 81 F.4th 1036, 1040 (9th Cir. 2023) ("If a plaintiff in such a case shows he is likely to prevail on the merits, that showing usually demonstrates he is suffering irreparable harm no matter how brief the violation"). These cases further support our contention against the Government's claim with respect to the so-called minimal degree of burden that the Waiting Period Act allegedly imposes on the Second Amendment. The degree of burden imposed by the Waiting Period Act is irrelevant, regardless of how minimal the Government

claims it to be. It is for these reasons that Plaintiffs, in this case, have undoubtedly suffered irreparable harm.

In looking at the final two, merged factors, *Chamber of Commerce of U.S. v. Edmonson* is instructive. 594 F.3d 742, 771 (10th Cir. 2010). In that case, the Court found that the Government had no interest "in enforcing a law that is likely constitutionally infirm" simply because the law itself allegedly coincided with federal law. Likewise, here, just because the Colorado legislature may have enacted it for the purpose of reducing impulsive acts of violence with firearms, doesn't mean it can withstand constitutional scrutiny under the *Bruen* analysis. In fact, it doesn't. "Even when a law regulates arms-bearing for a permissible reason, though, it may not be compatible with the right if it does so to an extent beyond what was done at the founding." *Rahimi*, 602 U.S. at 692. The Waiting Period Act simply regulates far beyond what was conceived of at the time of the founding and there are no historical analogues to support it. It's an unconstitutional law. Moreover, the Supreme Court has disposed of the sort of means-end, public interest balancing inquiries exercised by pre-*Bruen* courts because "[t]he Second Amendment 'is the very *product* of an interest balancing by the people' and it 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense." *Bruen*, 597 U.S. 1 at 26 (citing *Heller*, 544 U.S. 570 at 635) (emphasis added). In other words, interest balancing by courts is not appropriate in the Second Amendment context because the people's interests are inherently protected by the Constitution. In the end, all of the permanent injunction factors weigh in favor of the Plaintiffs.

Conclusion

For the reasons provided above, Plaintiffs' Motion for Summary Judgment should be granted.

Respectfully submitted this 11th day of July 2025.

/s/ Michael D. McCoy

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