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.

PLAINTIFFS' MOTION FOR SUMMARY JUDGEMENT

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Introduction and Background

This action challenges the constitutionality of Colo. Rev. Stat. § 18-12-115 (the "Waiting Period for Firearms Sales" or the "Waiting Period Law"), which was enacted by the Legislature of the State of Colorado as House Bill 23-1219, and signed into law by Governor Jared Polis on April 28, 2023. The Waiting Period Law became effective on October 1, 2023. 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] There is no relevant historical analogue for the Waiting Period Law, either at the Founding, or at the time that the Fourteenth Amendment was ratified. As such, the Waiting Period Law is unconstitutional.

Plaintiffs Alicia Garcia and Rocky Mountain Gun Owners Association have been negatively impacted by the Waiting Period Law's unconstitutional burden on the Second Amendment rights of law-abiding Coloradans to purchase firearms. On at least two occasions since the Waiting Period Law went into effect, Ms. Garcia has been delayed from taking possession of firearms after she paid for them and was cleared by a background check. Because of this, Ms. Garcia's business as a firearms instructor, range safety officer, and social media personality who tests and instructs others on firearms has been injured, and will continue to be injured into the future. [ECF No. 30, Transcript of Preliminary Injunction Hearing Vol. 1 at 16, lines 4-17.] Similarly, members of Rocky Mountain Gun Owners Association, including Taylor Rhodes, have

[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).

been similarly burdened by the Waiting Period Law, and will be burdened into the future by the law. [Rhodes Deposition Transcript at 76, lines 13-17, and at 77, lines 18-23; ECF No. 30, Transcript of Preliminary Injunction Hearing, Vol. 1, 11/8/2023, at 29, lines 20-25, and at 30, lines 1-10.]

Procedural Posture

Before the Waiting-Period Law went into effect on October 1, 2023, Plaintiffs filed a separate case challenging the law. *See RMGO v. Polis*, No. 23-cv-01076-PAB-NRN (Filed Apr. 28, 2023). In ruling on the Motion for Preliminary Injunction in that case, Chief Judge Philip Brimmer held that Plaintiffs could not move to enjoin the Waiting Period Law before it was enforced. *See Rocky Mountain Gun Owners v. Polis*, No. 23-cv-01076-PAB-NRN, 2023 WL 5017257, at *5 (D. Colo. Aug. 7, 2023). Plaintiffs then diligently brought this challenge once the Waiting Period Law went into effect on October 1, 2023, seeking a temporary restraining order and preliminary injunction at that same time.

A preliminary injunction hearing was subsequently held on October 26 and 30, 2023. At the hearing, the defense and its experts conceded that there is no history or tradition of imposing arbitrary "cooling off" waiting periods—of any length—on the acquisition of firearms in the United States.[2] Instead, the defense relied on a historical practice of preventing sales of firearms to intoxicated individuals, and to licensing regimes generally, as potential historical analogues. [ECF No. 31, Transcript of Preliminary Injunction Hearing Vol. 2, 11/8/2023, at 228, lines 10-21, and at 230, lines 8-21.]

[2] Professor Randolph Roth, one of the defense experts called to testify at the preliminary injunction hearing, testified that "it wouldn't have crossed the minds of the Founders to pass such a law." (ECF No. 30 at 190, lines 18-22).

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 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, 11/13/2023, at 13, Section A "Likelihood of Success on the Merits".]

Statement of Undisputed Material Facts

1. On April 28, 2023, Governor Jared Polis signed into law House Bill 23-1219, entitled "An Act Concerning Establishing A Minimum Three-Day Waiting Period Prior to the Delivery of a Purchased Firearm" (the Waiting Period Law). [ECF No. 2, Motion for Temporary Restraining Order, Attach. #1 Ex A. Act, 10/1/2023, at 3].

2. With limited exceptions, the Waiting Period Law makes it unlawful for any person who sells a firearm to deliver it to the purchaser until three days after the seller has initiated a background check, even if a clean background check comes back sooner. The Waiting Period Law is triggered by the firearm seller's initiation of either a state or federal background check, and is unrelated to whether the individual who has purchased and acquired title to the firearm poses any individualized or genuine safety concerns. [*Id.* at SECTION 2 – C.R.S. § 18-12-115(1)(a)(I).]

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. [*Id.*] (referring to a "background check of the purchaser," not at the previous point of sale) (emphasis added).

4. The Waiting Period Law became effective on October 1, 2023. [*Id*. at SECTION 3.]

5. Plaintiff Alicia Garcia is an adult resident of Colorado, as well as a firearms instructor, range safety officer, and social media personality who reviews firearms and provides guidance and instruction to others on the safe and effective use of those firearms. [ECF No. 30 at 16, lines 4-10.]

6. Ms. Garcia regularly purchases firearms as part of her many business endeavors. [ECF No. 30 at 16, lines 16-17.]

7. On October 1, 2023, Ms. Garcia traveled to the Triple J Armory in Littleton, Colorado, for the purpose of acquiring a new Henry Big Boy brass lever action .357/.38 Special rifle. [ECF No. 30 at 16, lines 13-25.]

8. After completing the necessary paperwork for her background check and subsequently being informed that she had passed, Ms. Garcia paid the purchase price for her firearm. [ECF No. 2, Attach. #2 Garcia Declaration, ¶ 3]

9. However, when she requested that J.D. Murphree (the owner of Triple J Armory) deliver the firearm to her, Mr. Murphree refused to do so, explaining to Ms. Garcia that due to the Waiting Period Law she could not remove the firearm from the store for three days. [ECF No. 2, Attach. #2, ¶ 4.]

10. Ms. Garcia asked Mr. Murphree if there were any reason other than the requirements of the Waiting Period Law as to why she could not receive the firearm and take it

with her. Mr. Murphree said there was none. The Waiting Period Law's requirements were the only reason he would not deliver the firearm to Ms. Garcia. [ECF No. 2, Attach. #2, ¶ 4, and ECF No. 30 at 19, lines 2-4.]

11. On October 25, 2023, Ms. Garcia drove approximately five hours, roundtrip, to the Dragonman's gun store in Colorado Springs to purchase a shotgun. [ECF No. 30 at 20, lines 1-19.]

12. Ms. Garcia intended to acquire a shotgun from Dragonman's, so that she could attend a televised shotgun shooting event in Virginia later that week—an event which would likely have provided her with business opportunities. [ECF No. 30 at 21, lines 19-25, and at 22, lines 1-5.]

13. Unfortunately, even though Ms. Garcia passed her background check, she was unable to take possession of the shotgun on October 25 due to the requirements of the Waiting Period Law. [ECF No. 30 at 21, lines 12-19.]

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

15. Ms. Garcia intends on purchasing additional firearms in Colorado in the future. [ECF No. 30 at 20, lines 23-25.]

16. Plaintiff Rocky Mountain Gun Owners (RMGO) is a Colorado based nonprofit organization whose mission is to defend the right of all law-abiding individuals to keep and bear arms. [ECF No. 2, Attach. #3 Rhodes Declaration, paragraph 3]

17. RMGO has approximately 16,000 members—most of whom reside in Colorado. [ECF No. 30 at 29, lines 16-17.]

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.]

19. On October 1, 2023, Mr. Rhodes—who at the time was the Executive Director of RMGO—attempted to purchase a firearm from the Triple J Armory. [ECF No. 30 at 30, lines 7-8.]

20. Although Mr. Rhodes paid the purchase price for the firearm and passed his background check, he was unable to take possession of the firearm at that time. In fact, due to travel, he was unable to take possession of the firearm until eight days later. [ECF No. 30 at 30, lines 1-10, and at 33, lines 1-7.]

21. On the issue of standing, in its previous Order Denying Plaintiffs Motion for Preliminary Injunction, this Court held:

> Ms. Garcia testified that she has, on two occasions, had to make additional trips to obtain firearms and has missed out on business opportunities. .. She has been impacted by the Act's waiting period and will be in the near future. ... She 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. Therefore, Ms. Garcia has established that she has standing to seek the relief requested. Because I find Ms. Garcia has standing, I need not consider whether RMGO does.

[ECF No. 32 at 6, ¶ 2 and fn 3.]

22. In their effort to establish that the Waiting Period Law is in line with this nation's historical tradition of firearms regulation, the defense has offered the expert opinion of Professor Robert Spitzer. [ECF No. 18, Brief in Opposition to Motion for Temporary Restraining Order and for Preliminary Injunction, # 3 Exhibit 3, Spitzer Declaration, 10/17/2023.]

23. As outlined in his curriculum vitae and expanded on during his deposition testimony, Professor Spitzer has been previously retained to offer an expert opinion in over 50 firearms related cases. [Spitzer Deposition Transcript at 19, lines 18-24, and ECF No. 18, # 3, Ex. A to Spitzer Dec: CV.][3]

24. In all of these cases, Professor Spitzer worked on behalf of the proponent of the firearms regulation that was being challenged; and in every case, he concluded that there was an historical analogue to support the law. (Q. … Correct me if I'm wrong here, but in each and every one of those cases, you've been an expert witness on behalf of the government—or probably better said, you've been an expert witness on behalf of the proponent of the firearms regulation that was being challenged; is that correct? A. The defender of various firearms laws, yes. … Q. In any of those 50 cases that you've been asked to research or review historical gun laws, have you ever come up with the problem of saying there is no analogous historical gun law to support whatever the current regulation that's being challenged is? A. No.). [Spitzer Deposition Transcript at 20, lines 6-13, and at 21, lines 14-20.]

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

[3] The pertinent parts of Professor Spitzer's Deposition Transcript have been attached to this Motion for Summary Judgement as Exhibit A.

from any sort of government-based military or militia service activity. A. Yes.). [*Id.* at 45, lines 15-25, and at 46, line 1.]

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.]

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.][4]

28. The first law to impose any type of waiting period to acquire a firearm was not enacted until 1923 in California. In that instance, California imposed a one-day delay for retail handgun purchases, so that firearms dealers would have time to identify the purchaser to local law enforcement agencies for their record keeping. [ECF No. 30 at 39, lines 6-13.]

[4] Copies of Professor Lee Francis' Expert Report and Declaration and his curriculum vitae are attached to this Motion for Summary Judgement as Exhibit B.

29. Professor Spitzer asserts that there are two categories of Founding Era laws that are analogous to Colorado's three-day waiting period law: (1) laws pertaining to intoxication, and (2) laws pertaining to weapons licensing "[b]ecause both involved mechanisms or activities or things that, wrapped up within them, included delays with respect to a weapons use or obtaining or the like." [Spitzer Deposition Transcript, at 70, lines 19-25, and at 71, lines 1-5.]

30. In his Declaration, as well as in his deposed testimony, Professor Spitzer asserted that Founding Era intoxication laws are an analogous historical parallel to modern waiting period laws, since they prevented firearm acquisition or use only for a limited period of time—the period of actual intoxication. Sobriety usually lifted the barrier to gun access within a day or so, if not within a matter of hours. "Because intoxication is by its nature temporary, it interrupts gun access only temporarily, as is the case with waiting periods. Moreover, old intoxication laws avoided or thwarted 'heat of the moment' gun acquisition or use by the intoxicated, when they would be much more likely to act rashly, impulsively, and with diminished judgment. These purposes also mimic the purpose of modern waiting period." [ECF No. 18, Attach. #3 Exhibit 3, Spitzer Declaration at 6, Section III – "Guns and Intoxication."]

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.]

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 cited 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.]

33. Plaintiff expert Professor Francis offers expert testimony that, of the numerous intoxicated-related weapons laws enacted between the 1600s and the early 1900s that Professor Spitzer identified, only two states implemented laws which prohibited firearm sales to those who were intoxicated.[5][Francis Report and Declaration at 10, ¶ 27, and at 13, ¶ 37.]

[5] "The statutes referenced in Spitzer's report enacted between 1623-1750 clearly did not prohibit an individual from obtaining a firearm while intoxicated. The earliest statute that is even remotely supportive of the proponent's view was not enacted until 1878 and falls outside of the relevant historical period under Bruen." [Francis Report and Declaration at 13, para 37.]

34. 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. (Q. … So let me ask this question. As I'm looking at that table [in your report], of all these laws that are listed and the states that were passing intoxication-related laws, how many states prohibited firearm sales to those who were intoxicated? A. Well, … it's totaled at the bottom. … [I]t looks like just two states. I see Delaware and Mississippi. … Q. The only two states that passed laws that related to the status of the person who was purchasing the firearm, basically the status or condition of the person at the time they were trying to obtain the firearm originally, were Delaware and Mississippi; is that correct? A. With respect to sale, yes.). [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. 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.][6]

[6] "Our Founders were brilliant men. They knew the world and enjoyed many of its vices, including alcohol. Drunkenness was not foreign to them, nor did it elude them. When the Second Amendment was drafted and ratified, they simply did not consider alcohol or drunkenness to be a reason to deprive one of their rights to keep and bear arms." [*Francis Report and Declaration.* at 10, ¶ 26.]

36. In addition to intoxication laws, Professor Spitzer also proffered that Founding Era weapons licensing or permitting laws offer an analogous historical parallel to modern waiting period laws. In his Declaration, Professor Spitzer wrote:

> While different in its particulars, historical weapons licensing and permitting laws did, and do, operate in a manner similar to modern waiting periods, in that they are predicated on a process whereby a license applicant provides or submits some kind of information which is then judged to be acceptable or not. If the judgment is affirmative, the license is granted. By its nature, then, licensing contemplates the passage of some period of time (even if it be brief) between the time the application or permission to do something is submitted (such as a hunting license application) and the license or permission is granted.

[ECF No. 18, Attach. #3 Exhibit 3 at 20, ¶ 33.]

37. Professor Spitzer's expert opinion is that firearms licensing regimes, which typically include a separate administrative process, are sufficiently analogous to waiting period laws because they both impose some delay on the acquisition of a firearm. (Q. The waiting period law in this case requires no application process, correct? A. If you say so. But that's not the key fact. The key fact is the passage of time.) [Spitzer Deposition Transcript at 160, lines 15-18.]

38. Unlike the Waiting Period Law, licensing regimes generally involve a specific approval process that relates to an individual's circumstances. (Q. --But the weapons licensing laws, the ones you reference, required some sort of application process of some sort, correct? A. Right.) [*Id.* at 160, lines 10-14.]

39. 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. (Q. Well, to your last point, it appears, based on my scanning of the table, is that there's only one such law under that category of Seller Registers Buyer that occurred in the 19th century, in the late 19th century. That was

Illinois. It appears that all the other similar laws were passed in the 20th century, based on my review. Does that seem right? A. I believe that's right, yep.). [*Id.* at 167, lines 13-21.]

40. The vast majority of other licensing laws cited in Professor Spitzer's report related to individuals who already acquired a firearm, but who were seeking permission to carry or use the firearm in some unique or additional manner (e.g. concealed carry). (Q. … It seems like the vast majority of the laws under the Carry or Have category that you outlined in your report … [w]ith rare exception, they all appeared to be related to concealed carry permits of some sort. A. I think the majority of them are or were. I think that's right. I mean, I would want to, you know, parse that more specifically …. Q. So … In those situations, the person who's applying for that permit, they already have the firearm in their possession. A. Some of them were possession. I think the majority—I think the majority of the laws I examined here, they already had the weapons.) [*Id.* at 169, lines 20-25, and at 170, lines 1-11.]

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.]

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.]

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.[7] [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.]

44. Of the pre-Civil War examples included in Professor Spitzer's "Table of Weapons Licensing Laws," the weapons licensing laws directed at African Americans were solely concerned with the government controlling "when enslaved persons or free persons of color were allowed to have possession of weapons." [Spitzer Report and Declaration at 22, ¶¶ 36 and 37; ECF No. 18 at # 5 Exhibit 5, Ex. D to Spitzer Dec: Table of Weapons Licensing Laws.]

45. Such was also the case for licensing laws that pertained to other racial and ethnic minorities—both before and after the Civil War and Reconstruction Era:

> The fact that groups treated as marginalized in prior centuries—especially African Americans and Native Americans—were authorized to gain even limited access to dangerous weapons through licensing may seem incompatible with an otherwise racist tradition aimed at subjugating these groups, but such measures reflect the fact that it was in the interest of whites to allow weapons acquisition to these groups under limited circumstances.

[Spitzer Report and Declaration at 40-41, ¶ 65.]

46. Although these laws were "indisputably racist," proponents of these licensing regimes were able to legally justify them at that time on the basis that they were intended to keep firearms out of the hands of potentially "dangerous people." [Francis Report and Declaration at 22-23, ¶ 69.]

[7] Although paragraph 36 of Professor Spitzer's report mentions that 283 licensing laws were examined, the "Table of Weapons Licensing Laws" attached to the report as Exhibit D lists a total of 265 laws. [ECF No. 18 at # 5 Exhibit 5, Ex. D to Spitzer Dec: Table of Weapons Licensing Laws.]

47. Professor Christopher Poliquin, who has also been retained as an expert witness for the defense, has provided a declaration and testimony in this case related to a research study he conducted which analyzed the impact of waiting period policies that impose a delay between the purchase and receipt of a handgun on firearm violence, homicide, and suicide rates. The study reviewed 45 years (1970 to 2014) of relevant firearm violence data that had been collected from all 50 states and the District of Columbia. [ECF No. 31, Transcript of Preliminary Injunction Hearing, Vol. 2 at 200, lines 23-25, and at 201, lines 1-9.]

48. Professor Poliquin's study concluded that waiting period laws that delay the receipt of a purchased handgun may reduce gun-related homicides by as much as 17 percent and gun-related suicides by as much as 11 percent. [*Id.* at 201, lines 10-20.]

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:

a. The fluctuating crime rates and incarceration rates of the individual states over the 45-year study period were not used as control variables. (Q. … [D]id you include the overall crime rate of the individual states as one of the control variables in the study? A. No. Q. How about the incarceration rates in each of the states? A. No.) [Poliquin Deposition Transcript at 35, lines 19-25.][8]

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

[8] The pertinent parts of Professor Poliquin's Deposition Transcript have been attached to this Motion for Summary Judgement as Exhibit C.

of law enforcement officers in a given area or in a given state, whether urban or suburban or rural? A. No, no.) [*Id.* at 36, lines 1-4.]

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 control variable in the study, even though its crime-fighting provisions were implemented nationwide in the middle of the study period.[9] (Q. I just want to make it clear, though, that that piece of legislation or any specific piece of [federal crime] legislation was not used as a control variable in the study? A. Correct, not explicitly entered as a—as a variable.) [*Id.* at 48, lines 1-6.]

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. (Q. And were you aware that after California implemented the Three Strikes Law in 1994, 26 other states had passed and implemented similar tough-on-crime laws by 2004, 10 years later? A. I was not aware of that, no. Q. And that would be a period of time, 1994 to 2004, that fell right in between your study period, correct? A. That period overlaps in my study period, correct. Q. And these tough-on-crime initiatives that were passed by a

[9] The Violent Crime Control and Law Enforcement Act of 1994, signed by President Bill Clinton, is the largest-ever crime bill in the country's history. It provided for 100,000 new police officers and allocated $9.7 billion for prisons and $6.1 billion for prevention programs. The Crime Bill included the Violence Against Women Act, which created the Office on Violence Against Women, and establishes the Office of Community Oriented Policing Services, or COPS Office. [U.S. Department of Justice, Office of Justice Programs, https://www.ojp.gov/ojp50/1994-violent-crime-control-and-law-enforcement-act.]

majority of states in this country during that period … were … not a control variable that you considered, correct? A. Correct.) [*Id.* at 78, lines 4-18.]

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. (Q. And I know that the -- the Brady [Act] period that you were focused on was approximately four years, correct? A. Correct. Q. So '94 to '98, approximately. So let me ask this then: In the four years that followed—so now we're looking at 1999 to 2003, … did the study discover or notice a rebound … in gun homicides or gun-related suicides in the states that abandoned the waiting periods that had existed during Brady? A. We didn't specifically look at that.) [*Id.* at 93, lines 1-12.]

f. The study did not analyze or consider "time-to-crime" statistics as a control variable.[10] (Q. Okay. And . . . multiyear crime data show that the average is over six years between when a firearm is acquired and when it is used for criminal activity. Would—does that surprise you, hearing it's that length of time? A. A statistic of six years does not surprise me, no. Q. Were … these time-to-crime statistics or data related to the length of time between when a firearm is acquired

[10] "Time-to-crime" refers to the duration of time between when a firearm was first purchased from a retail dealer and when that firearm is recovered at a crime scene.

and when it is used, … for a criminal purpose, were they considered as part of your study, these statistics? A. We did not analyze time-to-crime in our study, no.) [*Id.* at 99, lines 13-25, and 100, lines 1-3.]

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.]

Discussion

I. Standard of Review

Summary judgment is appropriate where "the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is 'material' if it is essential to the proper disposition of the claim under the relevant substantive law." *Wright ex rel. Trust Co. of Kansas v. Abbott Laboratories, Inc.*, 259 F.3d 1226, 1231-32 (10th Cir.2001) (citing *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir.1998)). A dispute regarding a material fact is "'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Allen v. Muskogee, Okl.*, 119 F.3d 837, 839 (10th Cir.1997) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "[The Court construes] the factual record and reasonable inference therefrom in the light most favorable

to the nonmovant." *Id.* at 839-40 (citing *Gullickson v. Southwest Airlines Pilots' Assoc.*, 87 F.3d 1176, 1183 (10th Cir.1996)).

In this context, it is not clear what factual issues in dispute could go before a jury. The relevant questions in the case are legal ones, and Plaintiffs prevail as a matter of law, based on undisputed facts.

II. The Second Amendment's plain text covers the right to obtain possession of firearms.

In its Opinion denying the Plaintiffs' Motion for Preliminary Injunction, this court concluded that the Waiting Period Law was not presumptively unconstitutional under the first step enunciated by *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022). The Court held that "the relevant conduct impacted by the waiting period—the receipt of a paid-for firearm without delay—is not covered" by the plain text of the Second Amendment. (ECF No. 32 at 15.). In the context of the instant motion, Plaintiffs respectfully urge this Court to revisit that holding. Colorado's Waiting Period Law regulates acquiring a firearm, and the Second Amendment's text encompasses that conduct.

The text of the Second Amendment provides that: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not infringed." U.S. Const. amend. II. When considering a facial challenge to a firearm regulation, the Court must first determine whether the challenged law regulates conduct covered by the Second Amendment's plain text. *Bruen*, 597 U.S. at 17. This means that plaintiffs need only show three things: (1) The Waiting Period Law applies to "the people"; (2) it covers "arms"; and (3) it regulates the "keep[ing]" or "bear[ing]" of those arms. *Id*. at 31–33.

The Waiting Period Law regulates "arms," and very clearly applies to "the people's" ability to acquire them. *See District of Columbia v. Heller*, 554 U.S. 570, 580 (2008). Under the Waiting Period Law, for 72-hours after passing their background checks, law abiding Coloradans are prevented from taking possession of their own, already-purchased firearms, and therefore deprived of their ability to "keep and bear" those firearms. Any other conclusion is in deep tension with *Heller* and other precedent. *Cf. Rhode v. Bonta*, 713 F. Supp. 3d 865, 873 (S.D. Cal. 2024) ("[A]cquiring ammunition is conduct covered by the plain text of the Second Amendment.").

The *Heller* Court held that the Second Amendment's "textual elements": (1) "guarantee the individual right to possess and carry weapons," *id.* at 592 (emphasis added); (2) protect the rights of "all Americans," *id.* at 580; and (3) "extend[] prima facie, to all instruments that constitute bearable arms," *id.* at 582. Under *Heller*, therefore, the Plaintiffs' conduct is covered by the plain text. *Cf. United States v. Rahimi*, 602 U.S. 680, 691 (2024) ("[W]hen the Government regulates arms-bearing conduct, as when the Government regulates other constitutional rights, it bears the burden to justify its regulation.") (emphasis added). In order to avoid reaching *Bruen* Step 2, the Defendant bears the heavy burden of establishing that the Waiting Period Law—which regulates firearms—is paradoxically (1) not a "firearms regulation" and (2) not a regulation on "arms-bearing conduct." Neither is correct.

Nevertheless, the Defendant asserts that because the Waiting Period Law only "slightly delays the acquisition of new firearms," and does not directly prohibit anyone from keeping or bearing arms in the long term, its law does not interact with the plain text of the Second Amendment. (ECF No. 31 at 227-28).

But this line of thinking defies basic common sense. If someone does not already own a firearm, or does but wishes to purchase another, he can only "keep and bear" that firearm if he is first able to acquire it. And the Waiting Period Law cuts off all avenues of doing so unless he complies with its terms—a nearly universal mandatory three-day delay, completely unconnected to any individualized security concerns or case specific justification. Thus, the Waiting Period Law necessarily regulates conduct protected by the Second Amendment's plain text. *See, e.g.*, *United States v. McNulty*, 684 F. Supp. 3d 14, 20 (D. Mass. 2023) ("The text of the Second Amendment itself also suggests that the right to 'keep' firearms necessarily includes an ability to purchase, sell, or otherwise transfer firearms in order to keep oneself properly armed."); *Maryland Shall Issue, Inc. v. Moore*, 116 F.4th 211, 230 (4th Cir. 2024) (Rushing, J., concurring) ("Maryland's law regulates acquiring a handgun, and the Second Amendment's text encompasses that conduct."); *Andrews v. State*, 50 Tenn. 165, 178 (1871) ("The right to keep arms, necessarily involves the right to purchase them ... and to purchase and provide ammunition suitable for such arms."); *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)).[11]

Recently, the Fifth Circuit, as well as a district court in the First Circuit, reached a similar 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

[11] Nor is it clear how a "well-regulated militia" could ever survive if its members had to wait three days before obtaining a firearm. Certainly "one if by land, two if by sea" would hardly serve as much of a warning cry at Lexington and Concord, if militia members could not legally obtain their firearms for 72-hours (those battles would have turned out far differently in that scenario).

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 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. The court went on to note by way of example that in *Bruen*, the Supreme Court "did not … draw the obviously silly conclusion that the petitioners must lose because the Second Amendment does not expressly specify home use versus public use or open carry versus concealed carry. Instead, the Court looked to history to inform the meaning of the language of the Second Amendment, while also considering what the language must naturally mean in order for the Second Amendment to protect the right to keep and bear arms." *Id.* at *3, n. 4.

Just last month, 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.[12]

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

[12] A copy of the First Circuit Court of Appeal's Order in *Beckwith v. Frey,* No. 25-1160, dated April 10, 2025, is attached to this Motion for Summary Judgement as Exhibit D.

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.*

Defendant is wrong to suggest that the "slightness" of the delay imposed by the Waiting Period Law is somehow relevant to this analysis. The length of the delay—whether 1 day or 101 days—is *simply irrelevant* to this first step of the *Bruen* analysis. All that is relevant is that a person who has a right to keep and bear a firearm is prevented from doing so while he awaits the expiration of that time. *See also Maryland Shall Issue*, 116 F.4th at 234 ("[W]hether the delay is one day or thirty, a person entitled to a license will temporarily be prevented from exercising his rights while he awaits government approval."). Even before *Bruen*, the Ninth Circuit upheld a 10-day waiting period under intermediate scrutiny after recognizing that the waiting period burdened Second Amendment rights. *See Silvester v. Harris*, 843 F.3d 816, 827 (9th Cir. 2016). It is implausible that *Bruen*, despite broadly and robustly protecting Second Amendment rights, somehow weakened the relevant legal standard to provide blanket approval for waiting periods as long as the delay they impose is only "slight."

Indeed, if one were to apply this "a slight delay does not implicate a Constitutionally protected right" logic to any other fundamental right, it would never withstand scrutiny. For example, a mandatory three-day delay on offering a political stump speech—to prevent a candidate from engaging in "impulsive" rhetoric—would never pass muster. Even though this law would not "take away" anyone's right to speak—only "slightly delay" it—it would still clearly implicate the First Amendment. *Cf. Hill v. Colorado*, 530 U.S. 703, 745 (2000) (Scalia, J., dissenting) ("The strictures of the First Amendment cannot be avoided by regulating the act of moving one's lips;

and they cannot be avoided by regulating the act of extending one's arm to deliver a handbill, or peacefully approaching in order to speak.").

The plain text analysis is a binary one; it considers only whether the conduct is covered, yes or no. Any limitation on covered conduct is considered only in the historical survey conducted in Step 2 of *Bruen*; and it is the government that bears the burden of justifying the wait that it imposes at this second stage of the *Bruen* analysis.

In addition to the First Amendment right of free speech, the Plaintiffs can analogize to another right—the right under some state constitutions to have an abortion.

In the period since the United States Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), several states have ratified amendments to their constitutions securing a woman's ability to have an abortion. Not surprisingly, since these amendments were ratified, there has been a series of legislative efforts in many of these same states to either expand or limit that right—depending largely on the current political makeup of each state's legislature and governor's office.

In Ohio, for example, the state passed a law that mandated a 24-hour waiting period before a woman seeking an abortion could go forward with the procedure. A case challenging this law was subsequently filed, and a preliminary injunction was quickly issued. *See Preterm-Cleveland v. Yost*, No. 24 CV 2634, 2024 WL 3947516, *11 (Oh. Ct. of Common Pleas, Aug. 23, 2024) ("The 24-hour waiting period directly or indirectly burdens, penalizes, prohibits, interferes with, and discriminates against a pregnant patient's voluntary exercise of their reproductive rights."); *cf. City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 450-51 (1983) ("[I]f a woman, after appropriate counseling, is prepared to give her written informed consent and proceed with

the abortion, a State may not demand that she delay the effectuation of that decision.") (abrogated by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

And when imposing a preliminary injunction on a similar one-day waiting period in Michigan, the state court in that case held that "the waiting period force[d] needless delay on patients after they [we]re able to consent to a procedure, thus burdening and infringing upon [their] access to abortion care . . . and infring[ing] upon [their] freedom to make and effectuate decisions about abortion care." *Northland Family Planning Center v. Nessel*, No. 24-000011-MM, 2024 WL 5468617, *17-*18 (Mich. Ct. of Cl., June 24, 2024).

In both of these cases, the fact that a woman's right to have an abortion under the respective state constitutions was merely "slightly delayed" by 24 hours to ensure that she was not making an impulsive and potentially uninformed decision about terminating her pregnancy was *irrelevant* to these courts. The length of the delay in the exercise of the state constitutional right was immaterial. *Preterm-Cleveland*, 2024 WL 3947516, *12.

These abortion-related laws were enjoined because they prevented women from accessing resources and services to terminate a pregnancy under the state constitutions for a period of 24-hours. The Waiting Period Law at issue in this case similarly prevents the Plaintiffs—and all Coloradans—from accessing the resources (firearms) that they needed to exercise their constitutionally protected right to keep and bear arms for a period of 72-hours.

There is no shortage of other contexts where courts have held that a right delayed is a right denied. *See, e.g., Illinois v. Caballes*, 543 U.S. 405, 407 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."); *Elrod v. Burns*, 427 U.S. 347,

373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) ("We do not doubt that the one-year waiting period device is well suited to discourage the influx of poor families in need of assistance. … But the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible."); *Haynes v. State of Wash.*, 373 U.S. 503, 506 n.4 (1963) (confession was deemed involuntary where a defendant was denied right to counsel for 16 hours); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1060 (9th Cir. 1986) (striking down a 5-day waiting period between the filing of an exotic dancer's permit and the granting of a license); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (risk of being unlawfully detained based on immigration status was a deprivation of constitutional rights); *U.S. v. Dominguez-Maqueda*, No. CR 06–86 JB, 2006 WL 1308266, *6 (D.N.M. Mar. 7, 2006) (referring to "that ancient wisdom that justice delayed is justice denied.") (internal quotation marks omitted). But here, Plaintiffs do not even ask the Court to go that far, at this step. Plaintiffs ask the Court to hold merely that a right delayed implicates the Second Amendment, and triggers the historical analysis required by *Bruen*. *Cf. McDonald v. City of Chicago*, 561 U.S. 742, 778–79, 780 (2010) (The Second Amendment is not "a second-class right" to "be singled out for special—and specially unfavorable—treatment.").

Because the right to acquire arms is inherent to the right to possess arms—or at least a necessary component of that right—even if the Waiting Period Law is characterized as nothing more than a "slight" three-day delay, the plain text of the Second Amendment is implicated, and the State must therefore "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24; *cf. United States v. Chavira Ornelas*, No. 1:23-cr-01711-KWR-1, 2024 WL 3875796, *1 (D.N.M. Aug. 20, 2024)

(reaching *Bruen*'s historical inquiry where an illegal immigrant had possessed and received a firearm, and thus violated 18 U.S.C. § 922(g)(5)).

III. The waiting period law is not a commercial regulation, and there is nothing "presumptive" about its lawfulness.

In its Order Denying Plaintiffs' Motion for Preliminary Injunction, this Court held that the Waiting Period Law is a presumptively lawful commercial regulation because it "regulates only the sale, and specifically sellers, of firearms . . . [and] imposes a condition on the commercial sale of a firearm." [ECF No. 32 at 21.]; *Heller*, 554 U.S. at 626–27 ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms."). But the Waiting Period Law is not truly part of any commercial transaction. It is not a "condition" on whether a firearms dealer may sell a firearm. It has nothing to do with the "qualifications" of a firearms dealer to sell firearms. It serves no commercial purpose. The Waiting Period Law merely targets the "transfer" of a firearm to a customer after a purchase, not the underlying sale of that firearm. The proponents of the Waiting Period Law have and continue to emphasize that the benefit of the law is to reduce impulsive gun violence by the purchaser—not a need for merchants to have more time to conduct background checks or engage in other relevant *commercial activity*.

For this reason, the Waiting Period Law is nothing more than an overly broad and constitutionally infirm law masquerading as a commercial regulation. But what commercial purpose does it serve to force a gun dealer to wait three days to transfer a firearm to an individual who has already passed a background check and paid for the gun? None. Instead, this law is simply an effort to make an end-run around the Second Amendment.

In 2021, the Fourth Circuit rejected a similar effort by the federal government to portray prohibitions on the sale of handguns to 18–20-year-olds as being presumptively lawful conditions on commercial sales. "A condition or qualification on the sale of arms [by sellers] is a hoop someone must jump through to sell a gun, such as obtaining a license, establishing a lawful premise, or maintaining transfer records." *See Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 5 F.4th 407, 416 (4th Cir. 2021) (vacated as moot, 14 F.4th 322). By contrast, restrictions that operate as a flat bar on a purchaser's right to obtain a gun are not "conditions and qualifications on the sale of arms." This Court ought to reach the same conclusion here.

But even if the Waiting Period Law is determined to be a commercial regulation, it still must survive the *Bruen* analysis—the Defendant still must establish that the law is consistent with this Nation's historical tradition. *See Bruen*, 597 U.S. at 17, 24; *Rahimi*, 602 U.S. at 708. The Supreme Court has never articulated an exception to the requirement that an historical analogue be established for those regulations deemed "presumptively lawful" in *Heller*. Instead, the Court has expressly stated that "a court [may] conclude that the individual's conduct falls outside the Second Amendment's" scope "[o]nly if a firearm regulation is consistent with this Nation's historical tradition." *Bruen*, 597 U.S. at 17. This was reaffirmed in *Rahimi* without any categorical exceptions being listed. *Rahimi*, 602 U.S. at 689.

Heller, for instance, deemed three categories of "longstanding" laws "presumptively lawful": "prohibitions on the possession of firearms by felons and the mentally ill"; "laws imposing conditions and qualifications on the commercial sale of arms"; and "laws forbidding the carrying of firearms in sensitive places." *Id*. at 626–27 & n.26. In *Bruen*, the government "attempt[ed] to characterize New York's proper-cause requirement as a 'sensitive-place' law."

Bruen, 597 U.S. at 30. The Court consulted the historical record to conclude that "there is no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place' simply because it is crowded and protected generally by the New York City Police Department." *Id.* at 30–31. *Bruen* thus held the alleged "sensitive place" restriction to the same historical standard—"the standard for applying the Second Amendment," 597 U.S. at 24 (emphasis added)—that applies to all firearms regulations.

"Had the Court in *Bruen* endorsed simply deferring to *Heller's* 'presumptively lawful' footnote, the outcome of that case would have been much different." *United States v. Duarte*, 101 F.4th 657, 669 (9th Cir. 2024). Instead, "[a]s with any other firearm regulation challenged under the Second Amendment, *Bruen* clarified, courts must now analyze 'sensitive place' laws by analogizing them to a sufficiently comparable historical counterpart." *Id*. Thus, "[i]t would be fundamentally inconsistent with *Bruen*'s analytical framework to treat" commercial regulations "any differently, as nothing in the majority opinion implies that we can jettison *Bruen*'s test for one 'presumptively lawful' category of firearm regulations but not others (e.g., sensitive place regulations)." *Id*. (quotation marks omitted). Although the opinion in *Duarte* has been vacated for rehearing en banc, it maintains a persuasive posture by presenting a consistent application of the *Bruen* two-step framework to a challenged regulation without deferring to any of the presumptively lawful categories listed in *Heller*.

Bruen's treatment of the "presumptively lawful" sensitive-place regulation is consistent with *Heller*, which conveyed that those regulations must be historically justified. The *Heller* Court acknowledged that it did "not provid[e] extensive historical justification for those regulations," but asserted that "there will be time enough to expound upon *the historical justifications* for" the

regulations in a later case. *Heller,* 554 U.S. at 635 (emphasis added). Thus, any restriction on the commercial sale of arms must have "historical justifications," just like any other firearms regulations.

Both *Heller* and *Bruen* make clear that *Heller's* "presumptively lawful" language has no doctrinal significance. Consequently, the Ninth Circuit recently held—in a case now being considered en banc—that "[s]imply repeating *Heller's* language about the 'presumptive lawfulness' of felon firearm bans will no longer do after *Bruen*." *Duarte*, 101 F.4th at 668 (cleaned up). And the en banc Third Circuit declined to rely on *Heller's* "presumptively lawful" language when holding the federal firearms ban for felons unconstitutional as applied to a nonviolent felon and instead applied the historical analysis. *Range v. Att'y Gen. United States of Am.*, 69 F.4th 96 (3d Cir. 2023) (en banc), *cert. granted, judgment vacated sub nom*. *Garland, Atty Gen. v. Range, Bryan D.*, No. 23-374, 2024 WL 3259661 (U.S. July 2, 2024); *see also Nguyen v. Bonta*, No. 3:20-cv-02470-WQH-MMP, 2024 WL 1057241, at *6 (S.D. Cal. Mar. 11, 2024) ("*Bruen* suggests that the proper question in evaluating whether a regulation falls within the commercial sales category is not the extent of interference with the Second Amendment right, but instead whether the regulation historically would have been tolerated. In the wake of *Bruen*, several Courts of Appeals have conducted the full text-and-history analysis when confronted with a regulation that falls within one of *Heller's* enumerated categories.") (citations omitted).

In sum, the Waiting Period Law is not a presumptively lawful commercial regulation like maintaining purchase records or requiring certain storage facilities for gun dealers. Instead, it is an arbitrary limitation on Coloradans' right to keep and bear arms. Even if it were presumptively constitutional, however, that presumption has been rebutted because the regulation, to the extent

it regulates anything "commercial," operates solely as an impermissible restriction on an individual's right to keep and bear arms without a viable historical analogue to support it. As such, it runs afoul of the Second Amendment.

IV. The intoxication laws and licensing regimes are not "relevantly similar" historical analogues to the Waiting Period Law.

"When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct, [and] [t]he government must . . . justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24.

In the present case, the Defendant has proffered intoxication laws and licensing regimes as their historical analogues for the waiting period law. And in its Order Denying Plaintiffs' Motion for Preliminary Injunction, this Court agreed with the defense that these mostly 19th and early 20th century regulations provide a sufficient historical tradition to support the present law. [ECF No. 32 at 36.]. But in truth these laws fail to satisfy the requirements under *Bruen*'s second step because they are not "relevantly similar to laws that our tradition is understood to permit." *Bruen*, 597 U.S. at 29.

In *Bruen*, the Supreme Court explained that "determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation require[s] a determination of whether the two regulations are 'relevantly similar.'" *Id.* at 28. To this end, "*Heller* and *McDonald* point toward two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id*. at 29 (emphasis added). The Supreme Court concluded that "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.* (citing *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 historical firearms regulation. "Even when a law regulates arms-bearing for a permissible reason, . . . 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 691*.

The first part of this analysis is identifying the stated justification for the waiting period law, or the "why." *Id*. Defendants assert that the purpose of the Waiting Period Law is to help prevent impulsive gun violence. (ECF No. 18 at 16). And they contend that both intoxication laws and waiting periods are "aimed at the same evil"—because apparently just like drunks, law-abiding citizens seeking to purchase firearms are "much more likely to act rashly, impulsively and with diminished judgement." (*Id.* citing ECF No. 18, Attach. #3 Exhibit 3, Spitzer Declaration at 15). But there is simply nothing "relevantly similar" about the intoxication laws that Professor Spitzer references, the individuals impacted by them, or the underlying conduct that they were intended to control.

Drunks are dangerous. Law-abiding citizens who have passed background checks are not. *Cf. Rahimi*, 602 U.S. at 698 ("When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed."). And licensing regimes may be intended to vet purchasers, but not for the purpose of imposing a "cooling off" period on firearms owners. Time after time, the Defendant's experts conflate incidental similarities with actual relevant historical analogues that could suffice under *Bruen*. But the analogies fail because the "why" just isn't the same. *Cf. Beckwith*, *2 ("Maine's waiting period broadly restricts arms access by the

public generally, without attempting to calibrate the new access-to-arms restriction to history and tradition by limiting the law's application to members of the public who pose a credible threat to themselves or others.") (cleaned up).

Similarly, "How" these intoxication weapons laws burdened the Second Amendment right is too drastically dissimilar to the Waiting Period Law to be analogous. The intoxication laws applied only to those who were intoxicated, and only for as long as they were under the influence of alcohol. The Waiting Period Law, on the other hand, is indiscriminate in its application—there is no common condition that the firearms purchasers all share that would make them any more prone to acting impulsively than anyone else. By subjecting everyone to a waiting period, the Defendant indiscriminately prevents a much wider swath of people than necessary from acquiring firearms they wish to possess. *Cf. Rahimi*, 602 U.S. at 692 ("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.").

A targeted approach focused on determining who actually poses a real threat of impulsivity—a task more readily accomplished through the background checks that are already in place—would be more likely to survive constitutional review. *See Bruen*, 597 U.S. at 26 ("[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century[,] . . . [and] earlier generations addressed the societal problem ... through materially different means, that . . . could be evidence that a modern regulation is unconstitutional.").

Similarly, the 19th century licensing regimes that the Defendant offers also fail as a historical analogue. "There is no evidence that any jurisdiction before the late nineteenth century required all members of 'the people' to obtain a license, or anything like it, before keeping or

carrying firearms." *Maryland Shall Issue*, 116 F.3d at 251 (en banc) (Richardson, C.J., dissenting). Instead, licensing regimes—particularly the ones that required a license before a firearm could be simply acquired—applied almost exclusively to "slaves, free blacks, or Native Americans." *Id*. at 249. For this reason, these laws never underwent any serious constitutional review, and were upheld only for racially motivated and legally faulty reasons. *See* Robert Leider, *Our Non-Originalist Right to Bear Arms*, 89 Ind. L.J. 1587, 1611 (2014).

In fact, when reviewing one of these licensing regimes in 1824, the Virginia Supreme Court explained that firearm restrictions that would otherwise be "inconsistent with the letter and spirit of the Constitution . . . as respects the free whites" were constitutional when applied to other racial groups. *Aldridge v. Commonwealth*, 2 Va.Cas. 447, 449 (1824) (emphasis added); *see also Waters v. State*, 1 Gill. 302, 309 (Md. 1843) (describing free blacks as "a vicious and dangerous population," which is why laws "make it unlawful for them to bear arms"); *State v. Allmond*, 7 Del. 612, 641 (Gen. Sess. 1856) (explaining that states could disarm non-Caucasian individuals under the police power). So, these and other courts at the time openly admitted that these licensing regimes were inherently unconstitutional—they were allowed to stand only because they targeted individuals without recognized rights. For these reasons, it would be improper to use these racially motivated and wrongly upheld licensing regimes as historical analogues to a modern-day waiting period law.

Moreover, it is clear from Professor Spitzer's report, as well as his deposition testimony, that it was not until 1885—well beyond the period of Reconstruction—that the first licensing law that required individuals to obtain a permit *before acquiring* a firearm was enacted in the United States. [Spitzer Deposition Transcript, at 167.] The vast majority of the other licensing laws cited

by Professor Spitzer related to securing a license *after* the acquisition of a firearm—for some unique or additional purpose (like a concealed carry permit or hunting license). [*Id.* at 167.] The present case has nothing to do with the acquisition of a special use permit for a firearm *after the fact*—but simply with the basic acquisition of the firearm itself, so that it can be "kept and born" as protected under the Second Amendment. For this reason, as well, the licensing regimes cited by the Defendant are simply not relevantly similar to the Waiting Period Law.

CONCLUSION

For the reasons provided above, Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment.

Respectfully submitted this 8th day of May 2025.

/s/ Michael D. McCoy

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Ex. A: Pertinent Parts of Professor Spitzer's Deposition Transcript

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Court Address:
901 19th Street
Denver, Colorado 80294 ^ COURT USE ONLY ^

ROCKY MOUNTAIN GUN OWNERS,
and ALICIA GARCIA, Civil Action No. 23-cv-2563
Plaintiffs,
v.
JARED S. POLIS, in his official capacity as Governor of the State of Colorado,
Defendant.

REMOTE VIDEO DEPOSITION OF ROBERT J. SPITZER, PH.D.
January 24, 2025

REMOTE APPEARANCES:

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Also Present:

Mark Rogers, Videographer
Nicole Grunewald
Robert Welsh
William Trachman
Grady Block

to how many hours you've worked so far on this case? 09:17:38

A. That is written down somewhere, but I would have to dig that out. 09:17:43 09:17:45

Q. Okay. No worries right now on that. 09:17:47

Now, as you're aware, this case is challenging a firearms regulation, specifically the State of Colorado's three-day waiting period law, which was originally House Bill 23-1219, which established a three-day waiting period before a firearms seller could deliver a firearm to a purchaser. And that law went into effect in 2023. 09:17:51 09:17:57 09:18:00 09:18:04 09:18:10 09:18:14 09:18:17

And just so it's clear, you've been retained by the proponents of this firearm regulation, as you just mentioned, by the State of Colorado to offer your opinion about firearms' waiting periods and related restrictions in the United States, correct? 09:18:20 09:18:22 09:18:26 09:18:28 09:18:31

A. Historical laws, yes. 09:18:34

Q. Okay. In addition to the present case, how many other cases involving the regulation of firearms have you been retained to offer your opinion in, either through the submission of a declaration, like the one we just referenced, or through testimony or other work. 09:18:37 09:18:42 09:18:44 09:18:47 09:18:51 09:18:55

A. Probably over 50. 09:18:57

Q. Over 50 cases? 09:19:00

A. Yes. Some number like that. I've not counted them up. 09:19:03 09:19:06

Q. Yeah, I looked at your CV. It's -- I think it's extensive. But 50 sounds about right based on the amount of coverage in the CV. 09:19:07 09:19:10 09:19:13

Correct me if I'm wrong here, but in each and every one of those cases, you've been an expert witness on behalf of the government -- or probably better said, you've been an expert witness on behalf of the proponent of the firearms regulation that was being challenged; is that correct? 09:19:16 09:19:19 09:19:22 09:19:26 09:19:30 09:19:32

A. The defender of various firearms laws, yes. 09:19:34 09:19:39

Q. Okay. In any of the 50-or-so firearms-related cases that you have been retained in, have you ever concluded through your analysis that the law was unconstitutional or should not be allowed to stand for any other reason? 09:19:39 09:19:44 09:19:47 09:19:50 09:19:55

A. Well, of course, I'm not being retained to render a judgment about the constitutionality of these laws because that's up to the judge or magistrate. 09:19:56 09:19:59 09:20:03 09:20:06

But I began researching historical gun laws over ten years ago now. And at that time, I was dumbstruck by how many old gun laws there were, and I 09:20:07 09:20:10 09:20:14

continue to be startled by the sheer number and variety of early laws. 09:20:18 09:20:22

So when I'm approached to investigate, you know, current -- to see if there are historical weapons laws that might be relevant to a modern law, there's quite a pool of laws to parse. And I have, you know, found all kinds of laws that echo modern laws. 09:20:24 09:20:29 09:20:32 09:20:37 09:20:43 09:20:48

Q. So -- okay. So that's -- I think that answers the question. And I understand your point regarding the constitutionality, and I agree with that totally. 09:20:49 09:20:52 09:20:54 09:20:57

But so let me ask it slightly differently then. In any of those 50 cases that you've been asked to research or review historical gun laws, have you ever come up with the problem of saying there is no analogous historical gun law to support whatever the current regulation that's being challenged is? 09:20:57 09:20:59 09:21:02 09:21:07 09:21:12 09:21:16 09:21:18

A. No. 09:21:19

Q. So you've found a historical analog in all 50 cases? 09:21:21 09:21:24

A. I've offered laws -- bodies of laws that seem to me to logically be relevant to or similar to modern laws. But, again, that's a judgment call. 09:21:26 09:21:29 09:21:34

Q. (By Mr. McCoy) Dr. Spitzer, you're familiar with the Supreme Court's 2008 ruling in the case of District of Columbia v. Heller, correct? 09:52:16 09:52:18 09:52:21

A. Yes. 09:52:25

Q. And just by way of recap, the Supreme Court in that case held that private citizens have the right, under the Second Amendment, to possess an ordinary type of firearm and use it for lawful, historically established situations such as self-defense in a home, even when the individual has no relationship to a local militia. 09:52:28 09:52:32 09:52:36 09:52:41 09:52:43 09:52:47 09:52:50

Is that your -- do you agree with that sort of basic summary of the holding? 09:52:53 09:52:55

A. Yes. 09:52:58

Q. Okay. Would it be fair to say that you, at the time, disagreed with the Supreme Court's decision in this case? 09:52:58 09:53:02 09:53:05

A. Yes. 09:53:06

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. 09:53:09 09:53:12 09:53:15 09:53:19 09:53:21 09:53:24 09:53:28

A. Yes. 09:53:33

Q. Is that a fair summary of your position? 09:53:33

A. Yes, it does. 09:53:36

Q. And I'll let you at this point elaborate on that if you want to, or I can try to get that information out through questions. 09:53:36 09:53:39 09:53:41

A. Well, as you know, the Heller decision was based on the reading of history. In fact, Justice Scalia said it was the most history-driven decision he ever wrote. 09:53:44 09:53:49 09:53:53 09:53:56

And it was a question that I had been researching for the previous 20 years as well. I first got interested in this subject of gun policy back in the 1980s, including history of the Second Amendment, et cetera. 09:53:57 09:54:02 09:54:05 09:54:08 09:54:12

And the fundamental problem with Justice Scalia's conclusion is that it was an accurate reading of history only if you were standing on your head at the time. 09:54:13 09:54:16 09:54:22 09:54:24

The history of the Second Amendment, how and why it was written, what its purposes were, why it was added to the Constitution, how it was interpreted in the intervening almost 200 years was not the conclusion that Justice Scalia came to in his majority decision. 09:54:26 09:54:28 09:54:31 09:54:37 09:54:43 09:54:48

weapons licensing. Because both involved mechanisms or activities or things that, wrapped up within them, included delays with respect to a weapons use or obtaining or the like. That seemed an interesting parallel to modern waiting periods. 10:39:36 10:39:42 10:39:50 10:39:55 10:40:00

Q. And we have examples of both of those categories of laws that were in existence at the time of the founding? 10:40:04 10:40:06 10:40:09

A. Yes -- well, yeah, throughout history, but including the Founding period, yeah. 10:40:11 10:40:15

Q. And I know there's -- it's still -- I don't know if a point of contention is too harsh, but up for debate as to what eras the Supreme Court chooses to look at to try to find analogs; is that fair to say? 10:40:18 10:40:22 10:40:25 10:40:30 10:40:34

A. Yeah. There's three things to consider. Particular emphasis has been placed on the Founding period, which I have yet to see a precise definition of. I mean, we sort of know intuitively what we're talking about. But which years, which decades, there is no bright line that says 1810 counts and 1811 does not count, to my knowledge. Okay. So that's a side problem. 10:40:35 10:40:41 10:40:45 10:40:48 10:40:51 10:40:55 10:40:58 10:41:00

But the Founding era. The second, of course, the Reconstruction period, in particular -- 10:41:00 10:41:03

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But the Founding era. The second, of course, the Reconstruction period, in particular -- 10:41:00 10:41:03

those. 11:21:45

So if I remember -- if I'm understanding 11:21:46
correctly, the first reason why waiting periods were 11:21:49
not common, that you offered in your report, was the 11:21:52
assertion that founding -- during the Founding era, it 11:21:57
wasn't very easy to get your hands on a firearm in the 11:22:01
first place. 11:22:04

It's not like today where you have, you 11:22:05
know, sporting goods stores or a gun dealership or -- 11:22:07
I don't even know if Walmart sells guns anymore, but 11:22:11
Walmart to go down to and buy a gun if you want to, 11:22:11
right? It was a different era. 11:22:15

Am I understanding that correctly? 11:22:17

A. Yeah. I mean, there were guns around, 11:22:18
to be sure. But one might reasonably understand that 11:22:21
it would take some period of time to obtain a firearm. 11:22:24

Q. But fair to say that guns were common in 11:22:30
the United States at the founding? Firearms? 11:22:34

A. Yeah, common's kind of a vacuous term, 11:22:39
but certainly there were guns to be had. If you 11:22:43
wanted to have a gun, you could surely, you know, 11:22:46
obtain one. 11:22:49

Q. And there were -- although, obviously 11:22:50
more limited than we have today, there were gun 11:22:52
dealers, there were gun stores, gunsmiths, all 11:22:54

beginning of your report, I just want to confirm it one last time before we move on. 11:31:58 11:32:00

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? 11:32:02 11:32:05 11:32:09 11:32:13 11:32:16

A. No, not to my knowledge. 11:32:18

Q. Not a government-imposed waiting period. 11:32:21

A. It's a modern -- as I said, it's a modern public policy tool. 11:32:23 11:32:25

Q. Okay. So moving on to your second point as to why no waiting periods existed at the time of the founding, you argue that no organized system of gun waiting periods and background checks could feasibly have existed until the modern era; is that correct? 11:32:26 11:32:30 11:32:33 11:32:36 11:32:39 11:32:43

A. Yes. 11:32:43

Q. So I understand why conducting background checks, particularly instant background checks like we have to have today with computer systems, could not have existed until the modern era. 11:32:44 11:32:47 11:32:50 11:32:53

But I'm confused as to why waiting periods would have been -- have required some sort of modern-era advancement before being implemented, even 11:32:57 11:32:59 11:33:03

itself. 12:47:22

Q. Well, perhaps you do. I understand that you do. 12:47:22 12:47:26

But one required a condition. The intoxication laws require the person to be under what state or condition at the time that they were denied possession of the firearm? 12:47:26 12:47:29 12:47:31 12:47:34

A. Sorry, that's a -- 12:47:37

Q. It's a question. What condition were they under? 12:47:39 12:47:41

A. Well, you just answered the question. I mean, it was the -- it's the intoxication law. 12:47:42 12:47:45

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. 12:47:47 12:47:50 12:47:54 12:47:56

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. 12:47:57 12:47:59 12:48:03 12:48:05

A. Well, that's a condition, isn't it? 12:48:07

Q. It is a condition, but they've passed it. And even after they passed it -- 12:48:09 12:48:11

A. If they pass. 12:48:11

Q. -- that condition goes away. Even after 12:48:12

they've passed it, it's gone, that condition's gone. 12:48:14

What is the condition then that's in 12:48:18

place to prevent them from taking possession of the 12:48:19

firearm for three days? 12:48:21

A. Well, it's because state law stipulates 12:48:25

three -- 72 hours. 12:48:28

Q. Correct. But it's not based on any 12:48:30

specific condition of the person trying to purchase 12:48:32

the firearm. 12:48:35

A. Well, it's based on a public policy 12:48:35

goal. 12:48:38

Q. I understand that. It's not based on a 12:48:38

condition like the intoxication laws are, correct? 12:48:40

A. Well, I -- well, I would just say that 12:48:43

the definition of similar to is not identical. And I 12:48:47

think similar to is a reasonable metric, and I 12:48:53

think -- I mean, my argument is -- and people, you 12:48:57

know, could disagree, you would disagree, the mag -- 12:48:59

the judge might disagree, is that similar means 12:49:02

similar. 12:49:04

And the general purposes and goals and 12:49:04

functionality, I think, are similar between the 12:49:08

intoxication laws of old and the waiting period laws 12:49:11

of today or the Colorado law. 12:49:16

Q. Under the intoxication laws, if someone 12:49:23

Q. And so was it specific -- so was it specific -- I'm just curious on that one. It's not all that dispositive to our efforts here today. 12:57:11 12:57:13 12:57:13

But was that -- that the assumption with Native Americans in Arizona was that they were intoxicated, so therefore there was some sort of delay imposed? Or how did that work? 12:57:15 12:57:19 12:57:23 12:57:26

A. Well, I could go to the actual law. 12:57:27

Q. That's okay. That's just more out of curiosity that I'm asking the question because that sort of stands out, that that's only one group singled out by one state. 12:57:30 12:57:31 12:57:32 12:57:35

A. Right. 12:57:37

Q. Which is interesting. But, again, just interesting. You don't need to delve into it too much. 12:57:37 12:57:40 12:57:43

So let me ask this question. As I'm looking at that table, of all these laws that are listed and the states that were passing intoxication-related laws, how many states prohibited firearm sales to those who were intoxicated? 12:57:43 12:57:48 12:57:51 12:57:54 12:57:57

A. Well, that's -- let's see, that's the third column. So -- well, it's totaled at the bottom. Oh, let's see. 12:58:03 12:58:04 12:58:10

Yeah, it looks like just two states. I 12:58:10

see Delaware and Mississippi. 12:58:13

Q. So the first one, if I'm looking at the 12:58:15
table accurately, or how you've listed things, it 12:58:18
looks like the first state to do so was Mississippi 12:58:21
in 1878. 12:58:24

A. Right. 12:58:26

Q. When you see then 1880, 1908, is that 12:58:27
just that law being renewed or is that some new 12:58:31
version of the law or do you know? 12:58:34

A. It's not the same identical law, but it 12:58:36
was a new enactment. I mean, I'd have to go back and 12:58:39
look at the actual text. There would be 12:58:42
differences -- undoubtedly, differences in the wording 12:58:45
or -- but, I mean, they served the same public policy 12:58:48
purpose. 12:58:51

But not unusual for, you know, a state 12:58:52
legislature to enact similar kinds of laws over a 12:58:57
period of time, responding to public pressure, for 12:59:00
example, or responding to the emergence of different 12:59:03
kinds of problems, things like that. 12:59:05

Q. Okay. So the remaining intoxication 12:59:07
laws you've listed on this table, which, as we say, 12:59:10
are somewhere around 80, I guess, they concern the use 12:59:15
and carrying of firearms by intoxicated people, is 12:59:18
that correct, minus the last column which is singling 12:59:23

out Native Americans. 12:59:27

A. Well, the first column, in particular, 12:59:29
carry or use, yes. The others are a bit more 12:59:32
specific. I mean, bearing in mind that the overall 12:59:39
public policy purpose of all of these laws is to sort 12:59:42
of sever the link between guns and alcohol. Well -- 12:59:47

Q. Sure. Makes sense. So let me ask it a 12:59:55
little bit easier -- hopefully in a way that's easier 12:59:58
to answer. 13:00:01

The only two states that passed laws 13:00:01
that related to the status of the person who was 13:00:05
purchasing the firearm, basically the status or 13:00:08
condition of the person at the time they were trying 13:00:10
to obtain the firearm originally, were Delaware and 13:00:13
Mississippi; is that correct? 13:00:16

A. With respect to sale, yes. 13:00:19

Q. With respect to sales. 13:00:22

A. Yeah. 13:00:23

Q. All the other ones -- so those are the 13:00:24
only two that dealt specifically with selling a 13:00:26
firearm to a person who was suffering from 13:00:29
intoxication at the time. 13:00:31

A. Right. 13:00:32

Q. And if my eyesight is accurate and I'm 13:00:38
not missing something on the graph, it looks like none 13:00:42

laws said you had to complete it within 72 hours or any time frame. 13:18:41 13:18:47

But, again, it's the idea that you make application to some authority, some amount of time passes, and then you receive the okay. 13:18:49 13:18:52 13:18:57

So aside from the absence of a hard deadline of 72 hours, it seems to me the laws are pretty similar. In other words, you can't just obtain the okay to do something on demand. 13:18:59 13:19:04 13:19:07 13:19:12

Q. (By Mr. McCoy) Correct. But the weapons licensing laws, the ones you reference, required some sort of application process of some sort, correct? 13:19:17 13:19:18 13:19:22 13:19:25

A. Right. 13:19:26

Q. The waiting period law in this case requires no application process, correct? 13:19:27 13:19:30

A. If you say so. But that's not the key fact. The key fact is the passage of time. I mean, waiting period laws don't say you can't have a gun. It just says you have to wait three days. 13:19:33 13:19:37 13:19:41 13:19:43

Q. So any law -- and I would assume this would pertain to even things that don't specifically deal with firearms. Any law that imposes a delay in someone's ability to acquire something, under that theory, would be analogous to the waiting period law. 13:19:47 13:19:51 13:19:53 13:19:56 13:20:00

where they live, you know, other things, they required the sellers to do it. And subject to inspection, the records inspection, later on. 13:28:10 13:28:14 13:28:20

So that mimics, you know, very much what we have seen in the 20th century. But that was a new -- a relatively new development, and you couldn't really do it until you really had commercial weapons dealers operating in a business-like manner in the way you think of commercial dealing today. 13:28:21 13:28:24 13:28:27 13:28:30 13:28:33 13:28:37

You couldn't have had a system like this where you'd go to your local gunsmith and barter for a gun, let's say, in the 1700s. 13:28:41 13:28:42 13:28:46

Q. Well, to your last point, it appears, based on my scanning of the table, is that there's only one such law under that category of Seller Registers Buyer that occurred in the 19th century, in the late 19th century. That was Illinois. 13:28:51 13:28:53 13:28:55 13:29:00 13:29:03

It appears that all the other similar laws were passed in the 20th century, based on my review. Does that seem right? 13:29:05 13:29:07 13:29:11

A. I believe that's right, yep. 13:29:13

And, again, I would say this is -- I mean, this is another instance where the ability to implement that more complicated policy -- that more complicated public policy was only feasible when 13:29:15 13:29:19 13:29:24 13:29:30

I'm going to ask the same question. 13:30:55

So for category one -- or I guess it's 13:30:57
column two, but category one, the Carry or Have -- 13:31:01

A. Right. 13:31:01

Q. -- I'm assuming that's similar to your 13:31:05
situation, my situation, where we're applying for a 13:31:07
permit after the fact, right; in this case to -- for 13:31:09
example, a concealed carry, I'm assuming, permit would 13:31:11
fall under this category? 13:31:14

A. Well, carry or have. Concealed carry, 13:31:16
yes, but also to have a firearm. So some of the laws 13:31:19
were -- 13:31:22

Q. Both. 13:31:23

A. Two. 13:31:23

Q. Or one, yeah. 13:31:24

A. I mean, you know, we'd want to go back 13:31:26
and look at the text of the particular laws. But I do 13:31:27
talk about some of these in the text of my report. 13:31:31

Q. You do. And so that was the question I 13:31:34
had. It seems like the vast majority of the laws 13:31:36
under the Carry or Have category that you outlined in 13:31:40
your report -- and you went on for several pages 13:31:44
listing them. 13:31:46

With rare exception, they all appeared 13:31:47
to be related to concealed carry permits of some sort. 13:31:48

A. I think the majority of them are or were. I think that's right. I mean, I would want to, you know, parse that more specifically to -- let's see. 13:31:54 13:31:57 13:32:02 13:32:04

Q. So I -- just so I'm clear. In those situations, the person who's applying for that permit, they already have the firearm in their possession. 13:32:06 13:32:09 13:32:11

A. Some of them were possession. I think the majority -- I think the majority of the laws I examined here, they already had the weapons. Some of them, however, were possession laws. 13:32:16 13:32:19 13:32:23 13:32:28

Q. I'm just looking at -- on page 25 of your report. Again, hopefully, the page numbers line up. 13:32:36 13:32:39 13:32:43

A. Yep. 13:32:44

Q. This is under -- on paragraph 43. I'm just scanning, as you can do -- you scan it with me. 13:32:44 13:32:47

It says in paragraph 43: In 1871, Missouri enacted a measure to license the otherwise illegal practice of concealed carrying of handguns. 13:32:50 13:32:54 13:32:57

New Jersey enacted a licensing scheme in 1871 for concealed weapons carrying. 13:33:01 13:33:04

A. Right. 13:33:07

Q. Paragraph 45: Hyde Park, Illinois, enacted a similar licensing law for concealed weapons 13:33:07 13:33:10

REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
COUNTY OF JEFFERSON)

I, WENDY M. LIND, Registered Professional Reporter, do hereby certify that previous to the commencement of the examination, the said ROBERT J. SPITZER, PH.D. declared his testimony in this matter is under penalty of perjury; that the said examination was taken in machine shorthand by me remotely and was thereafter reduced to typewritten form; that the foregoing is a true transcript of the questions asked, testimony given, and proceedings had.

I further certify that I am not employed by, related to, nor of counsel for any of the parties herein, nor otherwise interested in the outcome of this litigation.

__X__ Reading and Signing was requested.
_____ Reading and Signing was waived.
_____ Reading and Signing is not required.

Wendy M. Lind
Registered Professional Reporter

Ex. B: Professor Lee Francis' Expert Report and Declaration and Curriculum Vitae

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ROCKY MOUNTAIN GUN OWNERS, and ALICIA GARCIA	)	
Plaintiffs,	)	**No. 23-cv-02563-JLK**
v.	)	
JARED S. POLIS, in his Official capacity as Governor of the State Of COLORADO,	)	

Defendants.

EXPERT REPORT AND DECLARATION
OF PROFESSOR F. LEE FRANCIS

I, F. Lee Francis, declare that the following is true and correct:

1. I have been asked to provide an expert opinion on the history of firearms waiting periods, their effectiveness, and to address the Declarations of Professors Robert Spitzer and Randolph Roth. My report below explores these issues in detail.

2. This declaration is based on my own knowledge and experience, and if I am called to testify as a witness, I could and would testify competently to the truth of the matters discussed in this declaration.

BACKGROUND AND QUALIFICATIONS

3. I am an Assistant Professor of Law at Widener Commonwealth

Law School. Prior to my appointment at Widener, I was an Assistant Professor of Law at Mississippi College School of Law in Jackson, Mississippi. I have a master's degree in English from the University of North Carolina at Greensboro, and a Juris Doctorate from the Maurice A. Deane School of Law at Hofstra University. At Widener University, my course load includes teaching courses in Constitutional Law, Criminal Procedure, and Evidence. Prior to my academic appointments as a professor, I served as a Special Assistant United States Attorney in the Eastern District of North Carolina where I prosecuted firearms related offenses. A copy of my complete curriculum vitae (CV) is attached to this declaration as Exhibit A.

4. My scholarship on the Second Amendment and the history of firearms regulation has been cited by federal courts.[1] I have published multiple articles on this topic that have appeared in leading law reviews.[2]

5. I have been invited to present lectures, papers at faculty workshops, and participated in conferences on the Second Amendment and the history of firearms regulation at Duke University Law School, Southern Methodist University

[1] For a complete list of court citations, see my CV attached as Exhibit A to this report.
[2] Particularly relevant publications include F. Lee Francis, *The Addiction Restriction: Addiction and the Right to Bear Arms,* WEST VIRGINIA LAW REVIEW *(Forthcoming 2025)*; F. Lee Francis, *Defining Dangerousness: When Disarmament is Appropriate*, TEXAS TECH LAW REVIEW (Forthcoming 2024). A full list of relevant publications is also included in my CV.

Dedman School of Law, and Mississippi College School of Law.

RETENTION AND COMPENSATION

6. I have been retained to render expert opinions in this case. I am being compensated for services performed in the above-entitled case at an hourly rate of $400 for reviewing materials, participating in meetings, and preparing reports, $400 for depositions and court appearances, and compensation for travel expenses. My compensation is not in any way dependent on the outcome of this or any related proceeding, or on the substance of my opinion.

BASIS FOR OPINION AND MATERIALS CONSIDERED

7. Counsel for Plaintiffs provided me with the operative Complaint, Answer, Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, Defendants' Response to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, and Statement Respecting Plaintiffs' Request for Temporary Restraining Order. Otherwise, my report is based on my independent research. In my report, I cite to a variety of scholarly articles, laws, cases, popular and learned constitutional commentaries, and various other related materials on which I based my opinions. The materials cited in this report are a subset of the relevant materials I have consulted to understand the contours of American constitutional history that are relevant to understanding the historical issues posed by this case.

I. FIREARM WAITING PERIODS

8. I agree with the proponents of the law when they confirm that waiting periods, as they are understood today, did not exist during the Founding Era. They are a wholly modern development and do not comport with the history and tradition standard established by the Supreme Court.

9. During the colonial period, firearms were an essential part of daily life. They were primarily used for hunting and for defending one's home or community.[3]

10. Spitzer emphasizes the large number of firearms dealers currently in the U.S. While I do not question the estimation, I am skeptical of the implication. For instance, in 1790, the U.S. population was just shy of 4 million people.[4] During the early colonial and early Republic periods, it would not be uncommon for individuals to make their own firearms.[5]

11. The U.S. population today is more than 335 million people.[6] That is

[3] Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 ST. MARY'S L.J. 35 (2023) ("Since the earliest colonial days, Americans have been busily manufacturing and repairing arms. In the colonies, the ability to defend one's home and community, hunt, fight wars, and ultimately win American independence depended largely on the ability to produce arms. For the newly independent nation, arms production was critical to repel invasions and insurrections, and eventually, to western expansion. The skill was always valued and in demand, and many Americans made their own arms rather than depend on others.").

[4] US Census data, https://www.census.gov/history/www/through_the_decades/fast_facts/1790_fast_facts.html

[5] *See supra note* 3.

[6] US Commerce Dept., https://www.commerce.gov/news/blog/2024/01/census-bureau-projects-us-and-world-populations-new-years-day

more than 80 times the population of 1790. Thus, it is not surprising that there are so many firearms dealers today. Rather than assume that the absence of historical waiting periods is due to a lack of demand or availability, a more plausible explanation is that at the time many citizens possessed skill that did not always require them to seek out retailers. Many citizens would make their own clothing, hunt for their own meat, and raise their own cattle.

12. While many did make their own firearms, this should not be understood to assert that firearms were not commonly available to the public. Historical sources including advertisement and state probate records clearly support the notion that firearms were generally available for purchase during the Founding period.

A. FIREARM AVAILABILITY DURING THE COLONIAL ERA

13. Spitzer's declaration concedes the fact that waiting periods "did not exist early in the country's history." However, to justify the waiting period in this case, he contends that such was not necessary because there was no "Guns-R-Us" retailers during the Founding Era:

> First, in the modern era, gun and ammunition purchases can be made easily and rapidly from tens of thousands of licensed gun dealers, private sales, gun shows, and through internet sales. This modern sales system was key to the enactment of waiting periods. No "Guns-R-Us" outlets existed in the 1600s, 1700s, or most of the 1800s. 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.

14. This point is misleading and not a complete depiction of the history. For example, probate records indicate that in more densely populated areas, firearm ownership was considerably high:

> Guns are found in 50- 73% of the male estates in each of the eight databases and in 6-38% of the female estates in each of the first four databases. Gun ownership is particularly high compared to other common items. For example, in 813 itemized male inventories from the 1774 Jones national database, guns are listed in 54% of estates, compared to only 30% of estates listing any cash, 14% listing swords or edged weapons, 25% listing Bibles, 62% listing any book, and 79% listing any clothes.[7]

15. While it may be difficult to accurately ascertain the number of gunsmiths and gun makers that existed during the Founding Era until the early nineteenth century, there are a large number of historical newspaper advertisements indicating that firearm sales were common and accessible.

16. During a search of historical newspaper advertisements in the *Pennsylvania Gazette* from 1728 through 1800, I found a great number of ads for firearms. One such ad was that of a merchant named Peter Turner who, in 1741, was liquidating his property before setting sail to London. Of the property he sought to relieve himself of items included "Rifle barrel Guns,… with several sorts of fowling

[7] James Lindgren and Justin L. Heather, *Counting Guns in Early America*, 43 WILLIAM AND MARY L. REV. 1777, 1778 (2002).

Pieces [akin to a shotgun]…."[8]

17. Indeed, even large quantities of firearms were available for purchase. For example, in 1745, a gentleman named Commissary Dart sold 300 muskets and bayonets out of his home.[9] Similarly, in 1748, "12 fine carriage guns, "12 swivels [akin to small cannons], a parcel [of] fine blunderbusses, muskets, [and] pistols" were auctioned during a sale in Pennsylvania.[10] Another ad in the 1748 newspaper offered for sale "a parcel of small arms, pistols, cutlasses, 16 fine cannon . . . swivel guns, grenadoes, and other warlike stores" and a notice of an upcoming auction where "10 carriage guns, and 6 swivel guns" would be sold.[11] A Connecticut newspaper featured an ad by a local store selling 26 Horsemen's Pistols [52 handguns].[12]

18. The common thread central to each of these examples is that while firearms were generally accessible and available to the public both in small individual sales and in bulk quantities, neither required a waiting period. There are numerous other similar ads, as well as many ads offering muskets, pistols, and gunpowder for sale, as well as parts for making guns.[13]

B. FIREARMS AND INTOXICATION LAWS

[8] *Pennsylvania Gazette*, July 30, 1741.
[9] *South Carolina Gazette*, June 1, 1745, at 2.
[10] *Pennsylvania Gazette*, Sep. 15, 1748.
[11] *Pennsylvania Gazette*, Mar. 29, 1748.
[12] *Connecticut Courant*, Mar. 7, 1797.
[13] *JUST imported from London*, PENNSYLVANIA GAZETTE, November 1, 1744, 4; Id., September 26, 1745.

19. Spitzer's report seemingly equates historical state laws regulating firearm use and intoxication laws with modern waiting period restrictions:

> An interesting, instructive, and analogous historical parallel to waiting periods is gun laws pertaining to alcohol use and intoxication. These measures mimicked waiting periods because, for the most part, they prevented gun acquisition or use only for the period of time of actual intoxication (leaving aside those individuals for which chronic intoxication was a more-or-less permanent condition). When a person became sober, the intoxication barrier disappeared.[14]

20. I contend that this is not the most natural or apt comparison for the following reasons.

21. A waiting period prevents someone from *obtaining* a firearm. None of the historical statutes from the Founding Era cited in 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. This is a separate consideration from those of *use* of a firearm while intoxicated. Of the few laws that did regulate drinking while shooting, the impact was de minimis at best:

> A trio of laws passed between 1761 and 1775 in New York and New Jersey restricted the discharge of firearms on certain occasions. These laws, however, did not prevent the carrying while intoxicated, nor was intoxication an element of the offense. What is more, the New York ordinance clearly permitted the use of a firearm while drinking, save for only two days out of the year. Therefore, there was a strong tradition of permitting drinking while shooting.[15]

[14] Spitzer's Declaration p. 7.

[15] F. Lee Francis, *Armed and Under the Influence: The Second Amendment and the Intoxicant*

22. It is true that excessive alcohol consumption and drunkenness was pervasive during the colonial period.[16] In the seventeenth and eighteenth centuries, it was commonplace:

> During the seventeenth and eighteenth centuries, habitual drunkenness was commonplace.[17] It is not unreasonable to think that individuals drank due to some hardship or other difficulties of the time, rather people drank simply because they wanted to, not out of necessity.[18]

23. Moreover, drinking did not occur silently in the privacy of one's home or during an occasional gathering at the local tavern. quite the contrary, people drank everywhere:

> [Alcohol] flowed freely at weddings, christenings and funerals, at the building of churches, the installation of pews and the ordination of ministers. For example, in 1678 at the funeral of a Boston minister's wife, mourners consumed 51 l/2 gallons of wine; at the ordination of

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Rule After Bruen, 107 Marq. L. Rev. 803 (2024).

[16] H.G. Levine, *The Discovery of Addiction Changing Conceptions of Habitual Drunkenness in America*, 39 Journal of Studies on Alcohol 143 (1978) ("Seventeenth century and especially eighteenth century America was notable for the amount of alcoholic beverages consumed, the universality of their use and the high esteem they were accorded. Liquor was food, medicine and social lubricant, and even such a Puritan divine as Cotton Mather called it the "good creature of God.").

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[18] F. Lee Francis, *The Addiction Restriction: Addiction and the Right to Bear Arms*, WEST VIRGINIA LAW REVIEW (Forthcoming 2025); *see also* H.G. Levine, *The Discovery of Addiction Changing Conceptions of Habitual Drunkenness in America*, 39 Journal of Studies on Alcohol 143 (1978) ("Seventeenth century and especially eighteenth century America was notable for the amount of alcoholic beverages consumed, the universality of their use and the high esteem they were accorded. Liquor was food, medicine and social lubricant, and even such a Puritan divine as Cotton Mather called it the "good creature of God.").

> Reverend Edwin Jackson of Woburn, Massachusetts, the guests drank 6 1/2 barrels of cider, along with 25 gallons of wine, 2 gallons of brandy and 4 gallons of rum. Heavy drinking was also part of special occasions like corn huskings, barn raisings, court and meeting days, and especially militia training days. Workers received a daily allotment of rum, and certain days were set aside for drunken bouts; in some cases, employers paid for the liquor.[19]

24. In the nineteenth century, drinking to excess continued, and age was no discriminator:

> White males were taught to drink as children, even as babies. As soon as a toddler was old enough to drink from a cup, he was coaxed to consume the sugary residue at the bottom of an adult's nearly empty glass of spirits. Adolescents perceived drinking at a public house to be a mark of manhood. Men encouraged this youthful drinking.[20]

25. Thus, when people drank, it was to get drunk.[21]

26. Our Founders were brilliant men. They knew the world and enjoyed many of its vices, including alcohol. Drunkenness was not foreign to them, nor did it elude them. When the Second Amendment was drafted and ratified, they simply did not consider alcohol or drunkenness to be a reason to deprive one of their rights to keep and bear arms.

27. However, as Spitzer notes, such was not a basis for prohibiting an individual from obtaining a firearm until the late nineteenth century, more than 100

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[19] H.G. Levine, *The Discovery of Addiction Changing Conceptions of Habitual Drunkenness in America*, 39 Journal of Studies on Alcohol 143 (1978).
[20] W.J. RORABAUGH, THE ALCOHOLIC REPUBLIC: AN AMERICAN TRADITION (1979).
[21] *Id*. ("Americans drank wine, beer, cider and distilled spirits, especially rum. They drank at home, at work and while traveling; they drank morning, noon and night. And they got drunk.").

years after the Founding.[22]

28. What is more, implicit in Spitzer's analysis of intoxicant laws is the fact that those laws did not prohibit an individual from simply carrying or possessing firearms.[23]

29. Further still, many, if not all, of the laws regulating firearm use or possession while intoxicated fall outside the relevant time period as explained by the Supreme Court in *Bruen*.[24]

30. What is more, many of the precedents surrounding these laws were decided before *Bruen* and many of those courts applied the now defunct two-step intermediate scrutiny approach rejected by the *Bruen* majority.[25]

31. These pre-*Bruen* precedents are ripe for challenge, and under the history and tradition standard articulated by the Supreme Court, these laws likely won't pass constitutional muster.[26]

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[22] See Spitzer Declaration at 11. ("In 1878, 1880, and 1908, Mississippi enacted laws that made it illegal "to sell to any minor or person intoxicated" any pistol or other named weapon.").
[23] State v. Christen, 2021 WI 39 (2021) (R.G. Bradley, J., dissenting) ("From before the enactment of the Second Amendment through the late-18th and early-19th centuries, legislatures did not limit the individual right to bear arms while under the influence of an intoxicant. Indeed, few colonial-era laws even regulated the use of firearms while consuming alcohol, and none dealt with carrying while intoxicated."); *see also* F. Lee Francis, *The Addiction Restriction: Addiction and the Right to Bear Arms*, WEST VIRGINIA LAW REVIEW (Forthcoming 2025).
[24] New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. ___ (2022) ("As we suggested in Heller, however, late-19th [and 20th] centur[ies] evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence.").
[25] *See* People v. Wilder, 861 N.W.2d 645 (Mich. Ct. App. 2014); *see also* State v. Christen, 2021 WI 39.
[26] See F. Lee Francis, *Armed and Under the Influence: The Second Amendment and the Intoxicant Rule After Bruen*, 107 Marq. L. Rev. 803 (2024) (arguing that laws restricting the

32. To test the point further, much like alcohol regulations, laws restricting drug use were not enacted until 1875.[27] Notably, this ordinance did not restrict an individual's right to keep and bear nor did it prevent individuals from obtaining firearms while under the influence. Such laws did not exist until the twentieth century.[28]

33. The 1655 Virginia statute referenced in Spitzer's report fails to provide the necessary context to the law. The law had a practical purpose, to prevent the false alarm of an Indian attack:

> [P]rior to the formation of the Republic, British colonies, such as those in Pennsylvania, Virginia, and Massachusetts, appear to have been predominantly concerned with what they perceived as defending themselves against unjustified attacks by Indians. Virginia, for instance, passed a statute in 1655–56 that outlawed the 'shoot[ing] of any gunns at drinkeing (marriages and ffuneralls onely excepted) [sic].' The reason for the law was that 'gunshots were the common alarm of Indian attack,' 'of which no certainty can be had in respect of the frequent shooting of guns in drinking.'[29]

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right to keep and bear arms due to intoxication are unconstitutional.).

[27] *See Order No*. 1254, S.F. EXAMINER, Nov. 24, 1875, at 2; see also James Baumohl, *The Dope Fiend's Paradise' Revisited: Notes from Research in Progress on Drug Law Enforcement in San Francisco*, 1875-1915, 24 THE SURVEYOR 3 (1992) ("[To] keep or maintain, or become an inmate of, or visit, or … in any way contribute to the support of any place, house or room, where opium is smoked, or where persons assemble for the purpose of moking opium, or inhaling the fumes of opium[.]").

[28] F. Lee Francis, *The Addiction Restriction: Addiction and the Right to Bear Arms*, WEST VIRGINIA LAW REVIEW (Forthcoming 2025) ("However, it would take Congress until the early twentieth century to pass significant legislation regulating the use of drugs. True, these laws were keen on regulating the use and distribution of drugs, but nowhere was a restriction on an individual's right to bear arms contemplated. Indeed, a prohibition of this sort did not become law until 1993.").

[29] Ann E. Tweedy, "*Hostile Indian Tribes . . . Outlaws, Wolves, . . . Bears . . . Grizzlies and Things Like That?" How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, 13 U. PA. J. CONST. L. 687, 698 (2011).

34. On page 11 of Spitzer's declaration, he quotes the 1636 Rhode Island statute:

> "In 1636 Rhode Island enacted a measure to punish any who would engage in 'shooting out any gun . . . drinking in any tavern alehouse . . . on the first day of the week more than necessity requireth.'"

35. The full text of the statute reads as follows:

> And bee it further enacted by the authority aforesaid, That any person or persons shall presume to sport, game or play at any manner of game or games, *or shooting on the first day of the weeke* as aforesaid, or shall sit tippling and drinking in any tavern, ale-house, ordinary or victualling house on the first day of the weeke, more than necessity requireth [emphasis added].[30]

36. This was likely a statute intending to preserve the Sabbath. In fact, it forbade all varieties of sport as well as drinking on the Sabbath. It did not, however, prohibit one from being armed while intoxicated.

37. The statutes referenced in Spitzer's report enacted between 1623-1750 clearly did not prohibit an individual from obtaining a firearm while intoxicated. The earliest statute that is even remotely supportive of the proponent's view was not enacted until 1878 and falls outside of the relevant historical period under *Bruen*.

[30] 3 RECORDS OF THE COLONY OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 31 (1858). https://books.google.com/books?id=ehxPAQAAMAAJ&newbks=1&newbks_redir=0&dq=%22That%20any%20person%20or%20persons%20shall%20presume%20to%20sport%2C%20game%20or%20play%20at%20any%20manner%20of%20game%20or%20games%22&pg=PA31#v=onepage&q=%22That%20any%20person%20or%20persons%20shall%20presume%20to%20sport,%20game%20or%20play%20at%20any%20manner%20of%20game%20or%20games%22&f=false.

Furthermore, restrictions on alcohol consumption are no justification for firearm waiting periods. Limiting where one may choose to imbibe is not tantamount to preventing one from obtaining a firearm.

II. THE PURPOSE OF WAITING PERIODS

38. Spitzer explains in his report that the purpose of waiting periods:

> "By its nature, a gun waiting period simply delays an otherwise lawful purchase for sound [sic] two reasons: to complete a proper background check to ensure that the individual is not among those not qualified to have a gun; and to provide a cooling off period for those who seek to obtain a gun impulsively for homicidal or suicidal reasons."

39. Notwithstanding the national background check system currently in place, the Colorado statute seemingly imposes a waiting period irrespective of whether the background check yields a clean result before the mandatory three-day period: "The waiting period is the later in time of 3 days after the initiation of a required background check of the purchaser or when the purchase is approved following any background check. Delivering a firearm prior to the expiration of the waiting period is a civil infraction, punishable by a $500 fine for a first offense and a $500 to $5,000 fine for a second or subsequent offense."[31]

40. If the purpose of the statute is to provide a "cooling off" period, then such is an unconstitutional end-means approach expressly rejected by *Bruen*:

> In the years since, the Courts of Appeals have coalesced around a "two-

[31] § 18-12-115. Waiting period for firearms sales - background check required - penalty - exceptions.

> step" framework for analyzing Second Amendment challenges that combines history with means-end scrutiny. Today, we decline to adopt that two-part approach. In keeping with Heller, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[32]

41. The government's policy concerns may be reasonable, but without a plausible showing that this regulatory scheme is consistent with our Nation's history and tradition, the law should be struck down under the *Bruen* Framework.

III. ROTH'S HOMICIDE RATES

42. Roth's homicide rates should not be confused with *murder* rates. Though, it seems the two are conflated in Spitzer's report:

> Third, as Randall Roth reports, homicide rates in the colonies and early Federal era were generally low, and when homicides occurred, guns were seldom used because of the time involved loading them, their unreliability, and (especially for pistols) their inaccuracy. More specifically, muzzle loading firearms were problematic as implements for murder: they did not lend themselves to impulsive use unless already loaded (and it was generally unwise to leave them loaded for extended periods because their firing reliability degraded over time). Nearly all firearms at the time were single shot weapons, meaning that reloading time rendered them all but useless if a second shot was needed in an interpersonal conflict.

[32] *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022).

43. Roth explains that he is focused on *homicide* rates that include "assaults that were legally justified or not meant to cause death." This catch-all category does not truly capture the data Spitzer implies.

44. If we are to consider today's murder rates, the essential question to be addressed is whether law-abiding individuals, subject to the waiting periods, who legally purchase firearms are likely to commit such violence.

45. Spitzer implies that a waiting period helps to reduce gun violence because it gives the individual time for "cooling off." However, the data suggests that law-abiding citizens subject to a waiting period are less likely to engage in intentional and unprovoked gun violence.

46. In fact, leading research studies suggest that "different types of access to firearms may have divergent effects on rates of violent crime, suggesting that all gun availability may not have the same effect on crime rates."[33]

47. Furthermore, scientists believe that legally acquired firearms are more likely to be used in a defensive situation, as in a justifiable homicide context, rather than used in a criminally offensive manner.[34] Most importantly, the data indicates that there is likely "no relationship to criminal violence" when firearms are obtained

[33] Daniel C. Semenza, et al., *Firearm Availability, Homicide, and the Context of Structural Disadvantage,* 27 Homicide Studies 2 (2021); see also Philip J. Cook, *The Effect of Gun Availability on Robbery and Robbery Murder: A Cross-Section Study of Fifty* Cities (1979).
[34] *Id*. ("More specifically, illegally obtained guns may be more likely to be used during the course of a violent crime, whereas legally obtained weapons may be more salient in a defensive context or have no relationship to criminal violence at all.").

through legal means.[35]

48. Scientists agree, as the data show, "that the availability of illegal guns influences violent crime rates" more than guns obtained legally.[36] In a study examining how guns come into police possession, experts found that 79 percent of perpetrators apprehended by police were carrying stolen firearms:

> Most cases involve a single perpetrator. Traffic stop and street patrol accounted for 31% of method of recovery. Most perpetrators (79%) were carrying a gun that did not belong to them.[37]

49. To be clear, this data is widely accepted across the political spectrum. Even progressive gun control groups such as Everytown for Gun Safety Support Fund agree that "the majority of homicides and assaults involve stolen or illegal guns."[38]

IV. SUICIDE RATES

50. It is true that suicide has plagued our society since the Colonial Era. Still today, the subject continues to perplex and elude experts in our advanced

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[35] *Id*. *See also* Lisa Stolzenberg and Stewart J. D'Alessio, *Gun Availability and Violent Crime: New Evidence from the National Incident-Based Reporting System*, SOCIAL FORCES, Volume 78, Issue 4, June 2000, Pages 1461–1482, https://doi.org/10.1093/sf/78.4.1461

[36] *Id*. See also

[37] Anthony Fabio, et al., *Gaps continue in firearm surveillance: Evidence from a large U.S. City Bureau of Police, Social Medicine*, Volume 10, Number 1, July 2016 ("Given that 79% of perpetrators are connected to firearms for which they are not the legal owner, it is highly likely that a significant amount of theft or trafficking is the source of perpetrators' firearms."), https://socialmedicine.info/index.php/socialmedicine/article/view/852/1649

[38] Jay Szkola, et al., "Gun Thefts from Cars: The Largest Source of Stolen Guns," Everytown Research and Policy, 5/9/2024, https://everytownresearch.org/report/gun-thefts-from-cars-the-largest-source-of-stolen-guns-2/

society. It is also true that firearms are one of the leading means of suicide today.

51. However, the data surrounding firearm related suicides are not as plain and clear as the proponents and its experts contend.

52. Like the data addressing homicide and murder statistics, the narrow question requiring redress in the context of firearm related suicide is whether those who lawfully obtain firearms are the primary victims of suicide. Upon further examination, the data seemingly indicates that the answer is no.

53. A recent study found that "The association between firearm ownership and suicide was approximately 2 times stronger among adolescents relative to adults."[39] Many states as well as federal firearms licensees prohibit individuals under the age of 21 from purchasing handgun.

54. According to data released from CDC, firearms were the leading cause of death for children and teens (ages 1-19) in the US for the fifth straight year.[40] Between 2013-2022, the gun death rate among children and teens has increased 87%.[41]

55. A waiting period simply does not reach those with an increased risk

[39] Kivisto AJ, Kivisto KL, Gurnell E, et al.. *Adolescent suicide, household firearm ownership, and the effects of child access prevention laws*. J AM ACAD CHILD ADOLESC PSYCHIATRY 2020 ("There were 37,652 suicides among adolescents aged 14 to 18 years during the study period (1991−2017), for an overall rate of 6.9 per 100,000. Slightly more than half of all adolescent suicides (51.5%, n = 19,402) were with a firearm, for a rate of 3.6 per 100,000. For comparison, 53.9% of adult suicides used a firearm during the same time period.").

[40] U.S. Gun Violence in 2021: An Accounting of a Public Health Crisis

[41] *Id.*

for suicide. This proves that the typical law-abiding citizen seeking to purchase firearms are not in the class of individuals who would use a firearm for self-harm. If the purpose of waiting periods is to reduce suicide rates, then such an aim is clearly overbroad.

56. The proponents of the waiting period system note on several occasions that the plan would provide a cooling off period which would limit "those who seek to obtain a gun impulsively for homicidal or suicidal reasons."[42] They also claim that the "purpose of a modern gun purchase waiting period is to provide a 'cooling off' period for the prospective purchaser—very much like a "sobering up" period for someone who is intoxicated."[43]

57. Again, the data does not support these claims. For example, more than 76 percent of suicide attempters "did not attempt impulsively."[44] This is also true within the adolescent population where "less than 10% of the adolescents who had attempted suicide in their sample had done so impulsively. Again, these findings are consistent with the idea that suicide attempts "on a whim" are quite rare."[45]

58. Thus, because most individuals who intend to commit suicide plan well in advance of the act itself, a waiting period would likely not impede their

[42] Spitzer Declaration at 6.
[43] Spitzer Declaration at 7.
[44] April R. Smith, et al., *Revisiting impulsivity in suicide: implications for civil liability of third parties*. 26 BEHAV SCI LAW 779 (2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2597102/.
[45] *Id*.

decision. As such, its utility has significantly less value than the proponents of the law claim. Therefore, this general prohibition on the right to keep and bear arms is again overbroad.

V. HISTORICAL LICENSING LAWS

59. Spitzer references several laws that he claims to be analogues to modern waiting period laws. This presumption is seriously flawed for two reasons.

60. First, nearly all of the statutes cited by Spitzer fall outside the relevant period determined by the *Bruen* majority.[46]

61. True, in a concurring opinion Justice Barrett inquired as to whether laws enacted around 1868 would be relevant for understanding the scope of the right to keep and bear arms following the passage of the Fourteenth Amendment:

> Second and relatedly, the Court avoids another "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868" or when the Bill of Rights was ratified in 1791.[47]

62. However, like the statute at issue in *Bruen*, the Colorado waiting period and the licensing laws referenced by Spitzer fail regardless of whether the proper period is the Founding Era or Reconstruction.

63. The New York statute required an applicant to prove "proper cause

[46] *See Supra* note 24.
[47] *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022) (Barrett, J., concurring).

exists" in order to carry a firearm in public. The Supreme Court struck down the 1913 statute finding that the law prevented an individual from exercising their constitutional right to keep and bear arms:

> Throughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms. But apart from a handful of late19th-century jurisdictions, the historical record compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense. Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense. We conclude that respondents have failed to meet their burden to identify an American tradition justifying New York's proper cause requirement. Under Heller's text-and-history standard, the proper-cause requirement is therefore unconstitutional.[48]

64. The proponents rightly concede that there is no historical tradition of requiring individuals to wait before acquiring firearms. Like the statute at issue in *Bruen*, requiring an individual to wait a period of time is tantamount to prohibiting an individual from exercising their constitutional right. Thus, because there is no historical tradition of requiring an individual to wait prior to taking possession of a firearm, the Colorado waiting period fails regardless of whether the relevant time period is 1791 or 1868.

65. Second, of the Founding Era statutes Spitzer cites none of them

[48] *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 29-30 (2022).

actually require one to postpone taking possession of a firearm. Even when a permit or license is 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.

66. Next, I turn to the historical licensing restrictions on minority populations—namely, Native Americans, slaves, and freed black people.

67. Spitzer identified a number of states that restricted firearm possession to minority populations:

> At least 15 states imposed licensing requirements on marginalized groups (variously including Native Americans, felons, non-citizens, non-state residents, or minors). In the pre-Civil War period before 1861, at least 11 states imposed licensing on enslaved persons or free Blacks. At least 6 states enacted some kind of regulatory tax.[49]

68. As Spitzer explains in this report, these laws were discriminatory and plainly racist.[50]

69. Although these laws are indisputably racist, they were justified, at the time, because they sought to prevent dangerous individuals from obtaining

[49] Spitzer Declaration at 18.

[50] *Id*. ("As for licensing related to enslaved persons and free persons of color (listed separately in Exhibit A-5), it is well understood that white racist regimes before the Civil War were frantic to keep weapons out of the hands of enslaved persons. The chief problem facing African Americans in a racist American society was not a singular deprivation of gun rights, but the deprivation of all rights.").

firearms.[51]

70. However, preventing dangerous individuals from obtaining firearms does not excuse and simply cannot justify, constitutionally speaking, such a denial based on racist and discriminatory laws.

71. The Supreme Court addressed this point in *Ramos v. Louisiana*.[52] There the Court struck down a Louisiana statue permitting convictions based on non-unanimous jury verdicts. The laws at issue in *Ramos* were racist:

> [At the 1898 state constitutional convention], the convention approved nonunanimous juries as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African Americans, especially in voting and jury service. [By enacting these laws], [t]he State wanted to diminish the influence of black jurors, who had won the right to serve on juries through the Fourteenth Amendment in 1868 and the Civil Rights Act of 1875. [T]he 1898 constitutional convention expressly sought to 'establish the supremacy of the white race.' [53]

72. The Supreme Court has made clear that historically racist laws have no place in the proper administration of justice:

> But the question at this point is not whether the Constitution prohibits non-unanimous juries. It does. Rather, the disputed question here is whether to overrule an erroneous constitutional precedent that allowed non-unanimous juries. And on that question—the question whether to overrule—the Jim Crow origins and racially discriminatory effects (and

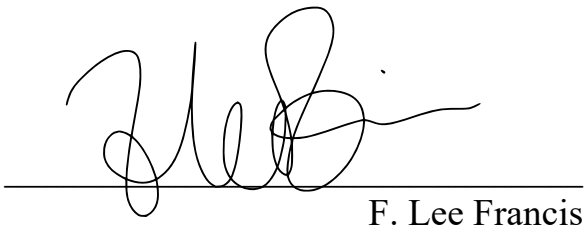
[51] *See* United States v. Jackson, 69 F.4th 495, 498 (8th Cir. 2023) ("Restrictions on the possession of firearms date to England in the late 1600s, when the government disarmed non-Anglican Protestants who refused to participate in the Church of England, and those who were "dangerous to the Peace of the Kingdom," Parliament later forbade ownership of firearms by Catholics who refused to renounce their faith….In colonial America, legislatures prohibited Native Americans from owning firearms.").
[52] 140 S. Ct. 1390 (2020).
[53] Ramos v. Louisiana, 140 S. Ct. 1390, 1418 (2020) (Kavanaugh, J., concurring).

> the perception thereof) of non-unanimous juries in Louisiana and Oregon should matter and should count heavily in favor of overruling, in my respectful view. After all, the non-unanimous jury 'is today the last of Louisiana's Jim Crow laws.' And this Court has emphasized time and again the imperative to purge racial prejudice from the administration of justice generally and from the jury system in particular.[54]

73. Like the racist and discriminatory laws at issue in *Ramos*, historical licensing scheme aimed at restricting the rights of minority populations to keep and bear arms cannot reasonably justify modern firearm waiting period regulations.[55]

I declare under penalty of perjury under the laws of the State of Colorado that the foregoing is true and correct.

Executed on August 28, 2024



F. Lee Francis

[54] *Id.*

[55] Id. (Kavanaugh, J., concurring) (quoting Pena-Rodriguez v. Colorado, 580 U.S. 206, 221 (2017)) ("[The] Court has emphasized time and again the 'imperative to purge racial prejudice from the administration of justice. Why stick by . . . a practice that is thoroughly racist in its origins and has continuing racially discriminatory effects?").

F. LEE FRANCIS

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ACADEMIC APPOINTMENTS

Widener University Commonwealth Law School
Assistant Professor of Law, July 2024
- Courses: Constitutional Law, Criminal Procedure, Evidence

Mississippi College School of Law
Assistant Professor of Law, August 2023 – June 2024
- Courses: Civil Procedure, Administrative Law

Director, Center for Litigation and Alternative Dispute Resolution

LEGAL EXPERIENCE

Special Assistant U. S. Attorney, EDNC, 2022-2023
- Prosecuted criminal cases in the US Court of Appeals for the Fourth Circuit.
- Prosecuted misdemeanors and felonies in the Eastern District of North Carolina.

Judge Advocate General Corps, US Army, 2021-2023
- Advised on employment and dozens of sexual harassment cases.
- Advised senior leaders on matter relating to employment law, ethics, and federal regulations.

ARTICLES

The Mutability of Dangerousness: Restoring the Second Amendment Rights of the Dangerous, SOUTHERN METHODIST UNIVERSITY LAW REVIEW (Forthcoming 2025) (Invited).

The Addiction Restriction: Addiction and the Right to Bear Arms, WEST VIRGINIA LAW REVIEW (Forthcoming 2025).

Defining Dangerousness: When Disarmament is Appropriate, 56 TEXAS TECH LAW REVIEW 593 (2024).

- Cited in *United States v. Duarte* (Court of Appeals for the Ninth Circuit, 2024) (Van Dyke, J., dissenting from the grant of rehearing en banc).

Of the Rights of Parents: Parental Authority and the Common Law, TEXAS REVIEW OF LAW AND POLITICS (2024) (Invited).

Armed and Under the Influence: The Second Amendment and the Intoxicant Rule After Bruen, MARQUETTE LAW REVIEW (Forthcoming 2024).

- Cited in SUPPLEMENT FOR FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY. Ed. Johnson, et al, 2023. (Casebook)

The History of Policing and the Impact on Minority Communities, MISSISSIPPI COLLEGE LAW REVIEW (Forthcoming 2024).

In Loco Parentis and the Fourth Amendment Rights of Minors in Public Schools, SOUTHERN UNIVERSITY LAW REVIEW (2022).

Who Decides: What the Constitution Says About Parental Authority and the Rights of Minor Children to Seek Gender Transition Treatment, SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL (2022).

- Mentioned on HealthLawProf Blog.
- Cited in the Journal of the American Academy of Matrimonial Lawyers (2022).
- Cited in *Kanuszewski v. Shah* (Eastern District of Michigan, 2023).

Remembering Congress and the Separation-of-Powers: The Case Against 'Judicial Updating' of Title VII of the Civil Rights Act of 1964 12 JOURNAL OF RACE, GENDER, & POVERTY (2021).

- Mentioned on Legal Theory Blog.

In Memoriam: The Republican Form and the Separation-of-Powers Among the Four Branches of Government Brazilian Journal of Public Policy (2020) (Peer-reviewed).

BOOK CHAPTERS

"A Sartorial Tapestry: The Rhetorical Shifts of Hillary Rodham Clinton." HILLARY RODHAM CLINTON AND THE 2016 ELECTION: HER POLITICAL AND SOCIAL DISCOURSE. Ed. Michele Lockhart and Kathleen Mollick. Lexington Books, 2015. (with Rochelle Gregory).

- Cited in THE DYNAMICS OF POLITICAL COMMUNICATION: MEDIA AND POLITICS IN A DIGITAL AGE (2017).

"Pardoning Marijuana Possession While Using Marijuana to Criminalize Firearm Ownership." SUPPLEMENT FOR FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY. Ed. Johnson, et al, 2023. (Casebook)

BOOK REVIEWS

RADICAL MOVES: CARIBBEAN MIGRANTS AND THE POLITICS OF RACE IN THE JAZZ AGE (Chapel Hill: The University of North Carolina Press, 2013. Pp. 336), 540-542.
CULTIVATION AND CATASTROPHE: THE LYRIC ECOLOGY OF MODERN BLACK LITERATURE (Baltimore, MD: Johns Hopkins University Press, 2017. Pp. 304), 719-721.

AMICUS BRIEFS

Brief of Amicus Curiae Scholars of Second Amendment Law and The Independence Institute in Support of Defendant-Appellant, *U.S. v. Daniels*, U.S. Court of Appeals for the Fifth Circuit (2023) (principal author of brief addressing the constitutionality of 18 U.S.C. §922(g)(3)).

- Cited in *United States v. Daniels* (US Court of Appeals for the Fifth Circuit, 2023).

PRESENTATIONS

The Addiction Restriction: Addiction and the Right to Bear Arms – Duke University (2024)

"Litigating the Second Amendment" – Miss. State Public Defenders Conf. (2023)

ADMISSIONS

State of New Jersey – Bar No. 387292021
United States District Court – Eastern District of North Carolina
United States District Court – Western District of Wisconsin
United States Court of Appeals – Fourth Circuit

EDUCATION

Maurice A. Deane School of Law at Hofstra University, J.D., 2020
- Associate Editor, Journal of Labor and Employment Law

University of North Carolina at Greensboro, M.A. (Rhetoric and Composition) 2015
Advanced Graduate Certificates (African American Studies, 2017, and Women and Gender Studies, 2014)

Campbell University, B.S., Social Science (Political Science and Humanities) 2013

Ex. C: Pertinent Parts of Professor Poliquin's Deposition Transcript

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF COLORADO

Civil Action No. 23-cv-2563

ROCKY MOUNTAIN GUN OWNERS, and
ALICIA GARCIA,
Plaintiffs,
vs.
JARED S. POLIS, in his official capacity as Governor of the State of Colorado,
Defendant.

REMOTE VIDEO DEPOSITION OF
CHRISTOPHER WILLIAM POLIQUIN, PH.D.
January 16, 2025

APPEARANCES:

ON BEHALF OF THE PLAINTIFFS:

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ON BEHALF OF THE DEFENDANT:

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ALSO PRESENT: Jerry DeBoer, Videographer
Nicole Grunewald, Paralegal

waiting periods -- what effect the waiting periods might have on gun-related homicides or gun-related suicides; is that correct?

MR. MICHAELS: Objection to form.

THE DEPONENT: I would not assume that there's higher rates of -- that there are necessarily higher rates of gun violence in urban areas, but the -- the rest of your statement that the analysis factors in the relationships between urbanization and gun violence into the -- the analysis, that is -- that is correct.

Q. (By Mr. McCoy) So then what is the relationship between urbanization and gun violence?

A. I don't recall what the, you know, precise correlation is between urbanization and gun violence. I -- I will -- I -- I -- you know, I can tell you that suicide tends to be more common in rural areas, and -- and so I would not assume, for example, that all forms of gun violence are positively correlated with urbanization.

Q. Did you -- did you include the overall crime rate of the individual states as one of the control variables in the study?

A. No.

Q. How about the incarceration rates in each of the states?

A. No.

Q. And did you control for the number of law enforcement officers in a given area or in a given state, whether urban or suburban or rural?

A. No, no.

Q. Okay. Now, the data that you used on firearms-related deaths that you used in the study, where did you acquire this data from?

A. Those data came from the CDC.

Q. And the data that you collected -- well, just so I'm clear and I'm not sure I asked this question. But your study period was from 1970 to 2014, correct?

A. Correct, yeah.

Q. Okay. And so for all that effectively 45-year history, were you -- the data used for those 45 years, you're acquiring from CDC records; is that correct?

A. Correct.

Q. Dr. Poliquin, are you familiar with the term "justifiable homicide"?

A. Not especially familiar with it, no.

Q. All right. So if -- if I were to tell you that it's, you know, a legal term, obviously, that is -- is usually applied when a person kills someone intentionally, but does it for a justifiable reason.

So, for example, someone acting in

being, correct?

A. Correct.

Q. But as I -- as I summarized earlier, a -- a big part of that bill was new federal funding for local law enforcement, and isn't it possible that -- and I'm sure it's just your basic understanding of federal legislation -- that oftentimes federal funding is not distributed equally amongst the 50 states.

Would that be fair to say?

A. Yes.

Q. So it's possible that some of the bigger states with higher crime rates in the 1990s at the time this law was passed, may have received the lion's share of the funding for additional law enforcement officers on the street; is that --

MR. MICHAELS: Objection --

Q. (By Mr. McCoy) -- possible?

MR. MICHAELS: Objection to form.

Q. (By Mr. McCoy) Is it possible, given your understanding of federal legislation that the funding may have been disparate in how it was applied to the individual 50 states?

A. Yes.

Q. So then given that, Dr. Poliquin, isn't -- the fixed effect may not be as fixed as we think, even

with federal legislation?

A. Correct. The fixed -- a -- the fixed effect approach cannot perfectly control for disparate distribution of federal funds across the states as a result of a change in federal policy.

Q. And obviously, the -- the fixed effect -- and I -- I -- I understand your point regarding the fixed effect within a state versus the fixed effect at -- at the federal or national level, but it's also true that, you know, states may implement or use federal funding, particularly when it comes to either running background checks, putting law enforcement officers on the street, in different ways than other states do. Oftentimes, based on our earlier conversation, based on the political composition of the legislature of each state.

Would -- would that be fair to say?

MR. MICHAELS: Objection to form.

THE DEPONENT: Sure. That sounds possible to me.

Q. (By Mr. McCoy) Okay. And so I just -- I want to kind of wrap up that -- our -- our conversation about that legislation just to make it clear. Again, I understand what's outlined on page 3 of Exhibit 3, and your explanation on the fixed effects is -- makes perfect sense to me.

I just want to make it clear, though, that that piece of legislation or any specific piece of legislation was not used as a control variable in the study?

A. Correct, not explicitly entered as a -- as a variable.

Q. Okay. On page 1 of your study, and still on -- we're going to be on Exhibit 3 for a while, so I'll just -- until I change exhibits, let's just assume it's -- we're still talking about Exhibit 3.

On page 1 of your study, you reference two articles from Lowenstein, if I'm remembering the name correctly; one written in 1996, and the other in 2002.

Do you see the area I'm referring to? He's referred -- basically Lowenstein's suggesting that delaying a gun purchase might create this, quote, unquote, "cooling-off period," and reduce what you -- what you refer to or the study refers to as, quote, temporary malevolence.

Do you see where I'm referring to that?

A. Yes, Lowenstein is -- is examining the effect of -- of visceral temporary emotions on decision-making.

Q. And I think you bring up some examples. For example, what happens after a football game where the

and other states did it only for dealership transactions, wouldn't that skew the results of the study?

A. I wouldn't -- I wouldn't use the word "skew," no.

Q. Well, what word would you use?

A. I would -- I would say that, to the extent that there's variation in the waiting period policies regarding the types of purchases it covers, the types of firearms it covers, who it applies to, those are reasons to potentially expect what, as researchers, we would call heterogenous treatment effects. So that's just, you know, a fancy way of saying the law might have -- you know, there might be variation in the effects of the law across states.

Q. Okay. But just so I'm clear, the -- the nature and the type of the waiting period -- and this gets back to our earlier conversation before the break.

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.

Q. Hold on. On page 1 of the study, still Exhibit 3, and it's still under the Data and Research Design section's the title. Let's see if I can find out where it is on this paragraph. The problem when you highlight too much is that everything's highlighted, so you can't -- you can't find what's important.

But it's -- it starts with the word, Compared changes -- or Compare changes in firearm-related deaths.

Do you see where I'm looking at?

A. Essentially, we compare changes in firearm-related deaths.

Q. Yes, exactly. So -- and I'll just read that section just for the sake of record.

You -- you wrote that -- and I'm past-tensing the first word -- you compared changes in firearm-related deaths within states that adopted waiting periods with changes in firearm-related deaths in other states. You controlled -- we controlled for changing economic and demographic factors that may be correlated with higher levels of gun violence or the decision of lawmakers to adopt policies that delay gun purchases.

system?

MR. MICHAELS: Objection to form.

THE DEPONENT: If that's true, it wouldn't surprise me.

Q. (By Mr. McCoy) Okay. And California is one of those states that around that same time implemented its own waiting period as well, correct?

A. I don't recall precisely when California implemented its current waiting period law. I will say that California had waiting period policies in place that predate 1994.

Q. But you don't know the nature of those waiting periods in California that predate 1994, do you?

A. California has updated the duration of its waiting period policy at several points in time. I don't recall the precise points in time at which they changed the length of their waiting period.

Q. I understand. But you don't know what the -- the reason for the waiting period was, I guess, is my question prior to 1994?

And by that, I mean you don't know if the waiting period in California -- that California imposed was to buy time for background checks or for permitting processes or some other licensing requirement, do you?

MR. MICHAELS: Objection to form.

THE DEPONENT: Correct. The reasons that legislatures implement waiting period policies, their motivations is outside the scope of my study.

Q. (By Mr. McCoy) And were you aware that, after California implemented the Three Strikes Law in 1994, 26 other states had passed and implemented similar tough-on-crime laws by 2004, 10 years later?

A. I was not aware of that, no.

Q. And that would be a period of time, 1994 to 2004, that fell right in between your study period, correct?

A. That period overlaps in my study period, correct.

Q. And these tough-on-crime initiatives that were passed by a majority of states in this country during that period -- during the study period were -- was not a control variable that you considered, correct?

A. Correct.

Q. Let me turn -- actually, I'm going to move -- jump from Exhibit 3, if we could, to Exhibit 4.

Dr. Poliquin, do you have a copy of that one, the supporting information document, in front of you too?

A. Yes.

MR. MCCOY: Okay. So -- and I --

the permanent provisions of the Brady Act took effect on November 30th, 1998, the federal waiting period requirement was replaced with an instant background check system (the National Instant Criminal Background Check System). As a result, many states discarded their waiting periods after 1998, because the NICS eliminated the need for a waiting period to investigate purchasers backgrounds. So let me ask you a few questions about this.

Once the NICS was in place at the end of 1998, how many states discarded their waiting periods?

A. Yeah. So for -- for the answer to that, we can look at, again, figure 1, which shows the increase and then subsequent decrease in waiting period policies around the enactment and expiration of the Brady interim period. And so, you know, just kind of eyeballing this, you know, we went from kind of high 30s in terms of states having waiting periods at the end of the Brady interim, to, you know, maybe roughly kind of 19 in the -- in the first year after the implementation of the NICS system. So, you know, what is that? That's maybe like 10 or 11 states discarded.

Q. So some number of states discarded their -- their waiting periods?

A. Yes.

Q. And I know that the -- the Brady period that you were focused on was approximately four years, correct?

A. Correct.

Q. So '94 to '98, approximately.

So let me ask this then: In the four years that followed -- so now we're looking at 1999 to 2003 -- did you -- did the study discover or notice a rebound in -- in -- in gun homicides or gun-related suicides in the states that abandoned the waiting periods that had existed during Brady?

A. We didn't specifically look at that.

Q. Also on page 4 of your study -- sorry -- I'm flipping back. I know we were just looking at table 2 again -- table -- figure 1.

You write that -- and this is the -- the beginning of the third paragraph of that page, it starts with, Although nine states... Are you there?

A. Yes, I can see that.

Q. All right, Although nine states have also had a waiting period on long guns, i.e., rifles and shotguns, sometime since 1970, we focus on handgun waiting periods, because handguns account for 70 to 80 percent of firearm homicides.

I'm jumping ahead a little bit, Because a

as part of your study, these statistics?

A. We did not analyze time-to-crime in our study, no.

Q. Since you -- you completed your study, and obviously, you've -- you've -- you've shown through your research that you've conducted in your publications that you have an interest in gun policy in the country.

So I'm assuming you've stayed somewhat up to date with current crime statistics that have been occurring in this country -- the crime statistics for homicides and suicides in the United States even after you completed this study; is that -- is that a fair assumption?

MR. MICHAELS: Objection to form.

THE DEPONENT: Your question is whether I follow kind of generally what's happening with crime statistics in the U.S.?

Q. (By Mr. McCoy) Yes. You say -- asked it much better than I did, yes. Exactly.

A. Yes, with the caveat that I would -- I would just -- I would just say I pay more attention to, you know, the homicide and suicide outcomes, I would say, than kind of outcomes for specific crimes, but sure, I mean, I guess you could say I -- you know, I -- I vaguely follow what's happening with crime statistics.

Q. And -- and focusing then on homicides, are you aware that -- that since, you know, approximately 2015, the homicide rate in this country's been steadily increasing?

MR. MICHAELS: Objection to form.

THE DEPONENT: It goes up some years. It goes down other years.

Q. (By Mr. McCoy) But -- but it's been generally higher over the last 10 years than it was in the preceding 10 years; is that fair to say?

MR. MICHAELS: Objection to form.

THE DEPONENT: I don't -- I don't recall exactly how the kind of recent rates compare to rates of the past 10 years. My understanding is there was an increase around the time of -- of COVID and, you know, rates have actually fallen a little bit maybe since kind the COVID period ended. But as to, you know, how rates currently compare to rates of any given 10-year period of the past, I -- I'm not sure.

Q. (By Mr. McCoy) You're not offering any opinion either in your study or through your testimony here today on whether there are historical analogues for waiting periods, are you?

A. No.

Q. And when I -- I should say, when I refer to

REPORTER'S CERTIFICATE

I, Laurel S. Tubbs, a Registered Professional Reporter and Notary Public within the State of Colorado, do hereby certify that previous to the commencement of the examination, the deponent was duly sworn by me to testify to the truth.

I further certify that this deposition was taken in shorthand by me at the time and place herein set forth and thereafter reduced to a typewritten form; that the foregoing constitutes a true and correct transcript.

I further certify that I am not related to, employed by, nor of counsel for any of the parties or attorneys herein, nor otherwise interested in the result of the within action.

My commission expires October 26, 2027.

LAUREL S. TUBBS
Registered Professional Reporter
Registered Merit Reporter
Certified Realtime Reporter
and Notary Public

Ex. D: First Circuit Court of Appeal's Order in *Beckwith v. Frey*, Case No. 25-1160, April 10, 2025

United States Court of Appeals
For the First Circuit

No. 25-1160

ANDREA BECKWITH; EAST COAST SCHOOL OF SAFETY; NANCY COSHOW; JAMES WHITE; J. WHITE GUNSMITHING; ADAM HENDSBEE; THOMAS COLE; TLC GUNSMITHING AND ARMORY; A&G SHOOTING,

Plaintiffs - Appellees,

v.

AARON M. FREY, in their personal capacity and in their official capacity as Attorney General of Maine,

Defendant - Appellant.

Before

Montecalvo, Rikelman and Aframe,
Circuit Judges.

ORDER OF COURT

Entered: April 10, 2025

Defendant-appellant Aaron Frey, the Attorney General of Maine, has filed a motion to stay pending appeal a preliminary injunction that bars enforcement of a Maine statute that imposes a 72-hour waiting period for certain sales of firearms. See 25 M.R.S. § 2016. In granting a preliminary injunction and denying a stay, the district court found that plaintiffs, a group of Maine citizens and business owners, including federally-licensed firearm dealers, were likely to succeed on the merits of their Second Amendment challenge to the statute. The Attorney General argues that the district court erred in applying the standard set forth in New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022), and maintains that allowing the injunction to remain in effect pending appeal will result in irreparable injury to the State's interest in enforcing a duly enacted law, and also may result in loss of life that could be avoided if the law were enforced. Plaintiff-appellees oppose, arguing that the district court was correct in concluding that the waiting period law is likely unconstitutional, and they maintain that allowing the law to be enforced pending appeal would result in the irremediable deprivation of their Second Amendment rights as well as economic loss to the plaintiffs who are gun dealers.

"In ruling on a motion for a stay pending appeal, we consider '(1) [w]hether the stay applicant has made a strong showing that it is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether [the] issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies.'" Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers Loc. Lodge 207 v. Raimondo, 18 F.4th 38, 42 (1st Cir. 2021) (quoting Common Cause R.I. v. Gorbea, 970 F.3d 11, 14 (1st Cir. 2020)) (alterations in original). In the usual case, the "sine qua non of [the] four-part inquiry is likelihood of success on the merits[.]" New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002). Moreover, "[a] stay 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" Does 1-3 v. Mills, 39 F.4th 20, 25 (1st Cir. 2022) (quoting Nken v. Holder, 556 U.S. 418, 427 (2009)).

Determining the likelihood of the Attorney General's success in this appeal requires us to determine the likelihood that the district court itself erred in issuing a preliminary injunction. Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers Loc. Lodge 207, 18 F.4th at 42-43. "We review the denial of a motion for preliminary injunctive relief for abuse of discretion, and we will 'reverse the denial only if the district court mistook the law, clearly erred in its factual assessments, or otherwise abused its discretion.'" González-Droz v. González-Colon, 573 F.3d 75, 79 (1st Cir. 2009) (quoting McClure v. Galvin, 386 F.3d 36, 41 (1st Cir. 2004)) (citation and alteration omitted).

Because the case presents questions of first impression in an emerging area of constitutional law involving a legal standard that is difficult to apply and subject to varying interpretations, we are not persuaded that the Attorney General has made a "strong showing" that he is likely to succeed in demonstrating that the district court abused its discretion in granting preliminary injunctive relief, and the case does not present unusual circumstances involving a "particularly severe and disproportionate" harm to one side, Cintron-Garcia v. Barcelo, 671 F.2d 1, 4 n.2 (1st Cir. 1982); cf. Providence J. Co. v. Fed. Bureau of Investigation, 595 F.2d 889, 890 (1st Cir. 1979). Moreover, the Attorney General's failure to seek expedited review of the stay motion or the appeal undercuts any claim that immediate relief from the injunction is required to prevent irreparable harm. Accordingly, we deny the request for a stay and reserve consideration of merits to the panel hearing the appeal.

By the Court:

Anastasia Dubrovsky, Clerk

cc:
Paul D Clement, Joshua A. Tardy, Erin E. Murphy, Matthew D. Rowen, Kevin Joseph Wynosky, Christopher C. Taub, Thomas A. Knowlton, Paul Suitter, Douglas Neal Letter, Julia Brennan MacDonald