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Tenth Circuit Holds That Seven-Day Waiting Period for Firearms Purchases Likely Violates the Second Amendment

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In *Ortega v. Grisham*, No. 24-2121, ___ F.4th ___ (10th Cir. Aug. 19, 2025), the U.S. Court of Appeals for the Tenth Circuit held that New Mexico's statutory seven-day "cooling-off" period before a consumer may obtain a firearm was likely an unconstitutional infringement of the Second Amendment right to bear arms. Judge Scott Matheson dissented, opining that the majority's analysis improperly sidestepped the framework established in the court's recent decision in *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96 (10th Cir. 2024) (RMGO).

The Second Amendment and the Framework for Analyzing Laws That Allegedly Infringe Upon It

In full, the Second Amendment reads: "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 be infringed." When considering whether a law unconstitutionally impinges upon the Second Amendment, a court must first assess whether the law implicates the plain text of the amendment. If it does, the court must then use originalism to analyze whether the challenged regulation is consistent with the principles that underpin the United States' regulatory tradition.

The Waiting Period Act

Ortega involved the constitutionality of the New Mexico's Waiting Period Act (WPA), which generally prohibits a gun seller from transferring possession of the gun to its buyer for seven days. New Mexico passed the WPA in response to high statewide rates of gun violence. State legislators hoped to reduce impulsive gun violence or suicide and to prevent gun purchasers from acquiring the gun if the background check process exceeds three days.

Plaintiffs Sue; the District Court Denies Preliminary Injunctive Relief

The plaintiffs attempted to purchase firearms shortly after the law went into effect. They both passed background checks but had to wait a week to

receive the gun they purchased due to the cooling off period.

The plaintiffs sued New Mexico's governor and attorney general to enjoin the WPA under the Second and Fourteenth Amendments. The district court denied their motion for preliminary injunction. It concluded that the right to "keep and bear" arms did not cover the right to acquire arms; the waiting period was a presumptively constitutional commercial condition on firearm sales; and, alternatively, the waiting period fit within historical traditions of regulating firearms.

The Court Majority Reverses, Concluding Plaintiffs Are Likely to Succeed on the Merits

On appeal, the majority disagreed with the district court.

First, grounding its decision in principles of "common sense," the majority opined that the right to acquire arms is included within the right to bear arms. It admonished the district court for engaging in "limited means-end scrutiny" when it apparently reached its conclusion by balancing the government's valid interest against the law's ostensibly minimal intrusion. Paternalistic instinct, the majority asserted, cannot overpower the right to bear arms.

Second, the majority declined to presume that the WPA was a constitutional condition or qualification on commercial gun sales. The majority reached this conclusion even in the wake of *RMGO*, which held that an age restriction on gun sales was a presumably constitutional regulation. It cited three reasons for doing so: the cooling-off period was not tailored to commercial sales; cooling-off periods are not conditions because they cannot be met by any action other than waiting, and they are not qualifications because they are universally applicable; and *RMGO* did not "grapple with the full scope of arguments defining conditions and qualifications" that *Ortega* presented.

Third, the majority rejected New Mexico's attempt to analogize the WPA with other "historically grounded" regulations. New Mexico initially posited that the law was similar to 18th century laws criminalizing gun-sporting while drunk. Not so, said the majority. Even though those intoxication laws are similar to the WPA because they burden Second Amendment rights only temporally, they are dissimilar in that the WPA applies a blanket burden across all of society instead of burdening only those who pose a credible threat. New Mexico next attempted to link the WPA to historic permitting and licensing regimes. This also failed to pass the majority's muster, again due to the breadth of the WPA. Finally, New Mexico argued that the WPA was similar to racist laws that banned certain racial or ethnic groups from firearm ownership. The majority found this argument the "least applicable" of the three. Relying on those regulations, the majority concluded, would commit the court to consider "a law trapped in amber—an amber formed in an era when blatant racism escaped constitutional scrutiny." It also (again) rejected this analogy on the grounds that the WPA sweeps across all of society, unlike the "repugnant" group bans.

Because the majority held that the plaintiffs were likely to succeed on the

merits, it reversed the district court's order denying their motion for preliminary injunction and remanded for the district court to determine the scope of the injunction.

Judge Matheson Dissents, Invoking 'RMGO'

In dissent, Matheson opined that *RMGO* should control. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the U.S. Supreme Court, in holding that a prohibition on the possession of a handgun in one's home was unconstitutional, noted that nothing in its decision should "be taken to cast doubt on ... laws imposing conditions and qualifications on the commercial sale of arms" because such regulations were "presumptively lawful." In *RMGO*, the Tenth Circuit interpreted that statement as creating a presumption that laws imposing conditions and qualifications on the sale and purchase of arms do not implicate the plain text of the Second Amendment. These presumptively lawful regulations remain outside the scope of the Second Amendment unless they are "employed for abusive ends."

Matheson applied *RMGO*'s framework to the WPA. In his view, the WPA imposed a condition or qualification that no firearm sale may be completed in fewer than seven days, which should have been upheld as presumptively constitutional. He rebuked the majority for "sidestepping" *RMGO* in ruling to the contrary, noting that the *RMGO* court did, in fact, grapple with "what defines a condition or qualification on commercial sale." Matheson pointed out that the Colorado age restriction upheld in *RMGO* was analogous in many respects to the WPA. Even though the Colorado law was universally applicable and could not be met by any action, the court nonetheless upheld it. Further, that law was not strictly limited to "commercial sales," yet it was still found presumptively reasonable.

Matheson completed his analysis by explaining that the WPA was not employed for abusive ends. Like the law upheld in *RMGO*, the WPA imposes a "nondiscretionary condition aimed at ensuring guns are held by law-abiding, responsible persons," which "sets a narrow, objective, and definite standard," and which applies uniformly across sellers and buyers. Addressing the majority's concern that the law sweeps too broadly, he replied that the WPA is narrowly tailored and seeks to keep guns from those who may act impulsively or illegally. He also relied on the district court's fact finding that waiting periods such as the one imposed by the WPA reduce gun homicides by 17% and have been shown to decrease suicides.

Because the WPA only "modestly delays" the commercial acquisition of arms, Matheson concluded it was not a meaningful constraint on the right to keep and bear arms and should be upheld.

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