

## Explanatory Case Brief

*Ortega, et al. v. Grisham, et al. (CIV 24-0471 JB/SCY)*

### **Instant Facts and Procedural Basis**

New Mexico residents Paul Samuel Ortega and Rebecca Scott ("Plaintiffs") both tried to purchase firearms on May 15, 2024, the day the provisions of House Bill 129 went into effect as Section 30-7-7.3 NMSA 1978 (Unlawful sale of a firearm before required waiting period ends) ("waiting period law"), and were told that they would have to wait seven days to take possession of the firearms. The Plaintiffs filed a complaint in federal district court ("the court") against the governor and attorney general, in their official capacities ("Defendants"), alleging that the waiting period law violates the Second Amendment of the United States Constitution, and also filed a motion for a temporary restraining order ("TRO") and preliminary injunction ("PI") to stop enforcement. The case remains in active litigation and the court's decision is not precedent, applies only to the parties and remains subject to appeal for 30 days from the date the order was filed.

### **Issue**

Based on United States Supreme Court case law regarding the Second Amendment, are the Plaintiffs entitled to a TRO or PI to stop the enforcement of the waiting period law?

### **Rules Applied by the Court\***

- For the court to order a PI or TRO:
  - The Plaintiffs are required to: (1) demonstrate a substantial likelihood of success on the merits; (2) make a clear and unequivocal showing that they will likely suffer irreparable harm absent preliminary relief; (3) show that the balance of the equities tips in their favor (that the likely harm they will suffer outweighs any harm to the non-movants caused by the PI); and (4) show that the PI is in the public interest.
  - The requirements for a TRO are essentially the same as those for a PI, but the Plaintiffs had to demonstrate that immediate and irreparable injury, loss or damage would result absent the order.
- To determine the constitutionality of a firearm regulation and the Plaintiffs' substantial likelihood of success on the merits:

- The court must first conduct a textual analysis to determine whether the plain text of the Second Amendment covers the conduct that the law regulates. This analysis is guided by a consideration of how ordinary citizens in the founding generation would have understood the normal meaning of the amendment's textual elements. If the conduct is not covered by the plain text, the challenge fails.
  - ▶ Additionally, the court fashioned an analysis to determine whether the waiting period law imposes conditions and qualifications on the commercial sale of firearms. Such a law is presumptively constitutional if it applies at the point of sale, does not asymmetrically burden buyers and is sufficiently longstanding, dating back to some point in the twentieth century.
- If the court determines that the regulated conduct is covered by the plain text of the Second Amendment, it holds the Defendants to the burden of demonstrating that the law in question is consistent with the historical tradition of firearm regulation in the United States. The Defendants need not prove that the waiting period law is a "dead ringer" or "historical twin" to a traditional regulation, but they do need to show that the law is relevantly similar to the traditional regulations. Why and how the regulation burdens Second Amendment rights are central to this part of the analysis.

## **Facts**

The waiting period law prohibits the transfer of a firearm from a seller to a buyer until seven calendar days pass after the date of the transaction and includes the period of time it takes to conduct a federal instant background check. As long as a buyer passes the background check, the firearm will be transferred when the seven-day period elapses. The law defers to federal regulations if the buyer fails the background check or if the background check is not completed within seven days. A buyer and seller who violate the waiting period requirement are guilty of a misdemeanor. After the law was enacted, the Plaintiffs (who already have firearms in their respective possessions) went to two different shops to purchase firearms. The Plaintiffs passed the federal instant background checks during their visits but were informed that they would be unable to gain possession of the firearms. Once the seven days had elapsed, the Plaintiffs did gain possession of the firearms they had purchased.

## **Decision and Analysis\*\***

The motion for the TRO and PI was denied primarily on the basis that the Plaintiffs did not demonstrate a likelihood of success on the merits. The court found that the Second Amendment's plain text does not cover the purchase of a firearm. The court further found that the waiting period law is a commercial regulation on firearms and is therefore presumptively constitutional. Even if the waiting period law had implicated the Second Amendment's plain text, it is consistent with the United States' tradition of restricting the sale of firearms to certain groups of people to protect from firearms being used against the public.

*1. The court determined that the Second Amendment's plain text does not cover the purchase or acquisition of firearms.*

The Second Amendment's operative clause provides that people have a "right[...] to keep and bear Arms". Currently only two circuit courts of appeals have ruled on whether this text encompasses the ability to obtain and acquire firearms. The Fifth Circuit held that "keep and bear" does not include purchase. Similarly, the Ninth Circuit held that "on its face", the Second Amendment "says nothing about commerce". However, both of these courts acknowledged that the right to "keep and bear" can implicate the right to purchase, but that such an implication is not the same thing as being "covered by the plain text", which is what the *Bruen* test requires. "Keep" means "have" and "bear" means "carry". Because "the text of the constitution always controls", the court held that the Second Amendment does not cover purchase and that the waiting period law falls outside of the amendment's scope.

*2. The court determined that the law was presumptively constitutional because it is a condition or qualification on the commercial sale of arms.*

Looking to guidance from the Fifth and Ninth Circuit Courts of Appeals and dicta in *Bruen* and *Rahimi*, the court determined that *Bruen* did not abrogate the part of the *Heller* opinion that recognizes categories of presumptively constitutional regulations that include commercial regulations. The court reasoned that this determination must be made during *Bruen*'s first step. First, the court held that the law is a commercial regulation because it clearly applies to the sale of firearms and, like background check requirements and licensing regimes, the waiting period law only imposes a brief delay to the buyer's acquisition of the firearm and does not amount to a functional prohibition on acquisition. Second, the court held that the such a commercial regulation is "longstanding", which is distinct from *Bruen*'s "historical tradition" standard. Specifically, the majority view of the courts of appeals is that a law can be deemed "longstanding" even if it cannot boast a precise founding-era analog and only needs a reasonably lengthy tradition of enforcement extending back to some point in the twentieth century, like laws prohibiting felons or the mentally ill from possessing firearms and laws requiring permits for handguns. Third, the court found that the Plaintiffs were unable to rebut the presumption because they could not show that the regulation had more than a de minimis effect on their right to keep and bear arms.

*3. The court found that, even if the law implicated the Second Amendment's plain text, the Defendants carried their burden to demonstrate that the law is consistent with the nation's historical tradition of firearm regulation.*

The law must comport with the principles underlying the Second Amendment but need not be a "dead ringer" or "historical twin". Instead, the court looked to whether the law is relevantly similar to historical or traditional firearm regulations and analyzed the "why" and "how" — why they were implemented and how they burden Second Amendment rights. The Defendants cited two types of historical laws that they argued were properly analogous to the waiting period law: laws involving sales to intoxicated persons and "licensing regimes". The court found that the waiting period law was relevantly similar to the historical licensing regimes that were generally prohibitions on the sale of firearms to Native Americans, enslaved people and people who expressed disfavored or seditious viewpoints. The court characterized these regulations as

demonstrating "a deeply rooted historical tradition of restricting and even outright prohibiting the sale of firearms to large groups out of fear that some among those groups might use those firearms to do harm in society". The "why" or reason for the waiting period was similar to these historical regulations, as both address the potential problem of the arms sold being used against the public. "How" the waiting period law addresses this problem is constitutionally appropriate because the burden it places on the Plaintiffs and similar buyers is significantly lesser than the complete ban on sales to the people subject to the historical regulations.

\*These are the United States District Court's interpretations of the black-letter law. Legal citations were omitted for clarity and concision. If you have questions about the relevant legal precedent, the Legislative Council Service can provide you with more detailed information.

\*\*This document was prepared to summarize an interlocutory order in ongoing litigation of a matter of interest to the Legislature and assumes general knowledge on the part of the reader as to relevant facts and law. *Heller*, *Bruen* and *Rahimi* refer to Supreme Court cases regarding the Second Amendment.