No. 24-2121

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SAMUEL ORTEGA and REBECCA SCOTT,

Plaintiffs-Appellants,

v.

MICHELLE LUJAN GRISHAM, in her official capacity as Governor of the State of New Mexico, and RAÚL TORREZ, in his official capacity as Attorney General of the State of New Mexico,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Mexico
No. 1:24-cv-00471
Hon. James O. Browning

BRIEF OF EVERYTOWN FOR GUN SAFETY AS AMICUS CURIAE IN SUPPORT OF APPELLEES' PETITION FOR REHEARING EN BANC

Janet Carter
William J. Taylor, Jr.
Erik P. Fredericksen
Everytown Law
450 Lexington Ave
P.O. Box 4184
New York, NY 10163

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INTEREST OF AMICUS CURIAE

Everytown for Gun Safety ("Everytown") is the nation's largest gun-violence-prevention organization, with nearly eleven million supporters across the country. Everytown was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed after a gunman murdered twenty children and six adults at an elementary school in Newtown, Connecticut.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Everytown agrees with New Mexico that this case should be reheard en banc, especially to reconcile the panel's decision and *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96 (10th Cir. 2024). Everytown submits this amicus brief to address two factors further supporting rehearing. *First*, this case concerns issues of exceptional importance, with consequences for Second Amendment doctrine even beyond life-saving waiting period laws like New Mexico's. *Second*, the

[1] No party's counsel authored this brief in whole or part and, apart from Everytown, no person contributed money to fund its preparation or submission.

panel's decision creates uncertainty over how to apply the Supreme Court's historical methodology in Second Amendment cases.

ARGUMENT

I. This Case Presents Exceptionally Important Issues

The panel's decision reaches fundamental Second Amendment issues, including how to apply the Supreme Court's instruction that certain regulations of commercial firearm sales are presumptively lawful and to what extent the Second Amendment right extends beyond "keeping" and "bearing" arms. For clarity and consistency, those issues should be settled by the full Court.

From *Heller* on, the Supreme Court has been clear that "laws imposing conditions and qualifications on the commercial sale of arms" are "presumptively lawful." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008); *see United States Rahimi*, 602 U.S. 680,735 (2024) (Kavanaugh, J., concurring); *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 80-81 (2022) (Kavanaugh, J., concurring); *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality op.). *Heller*'s assurance was "an important emphasis upon the narrowness of [its] holding," which the Court has "repeated … with forceful affirmation." *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1124 (10th Cir. 2015).

This aspect of Second Amendment doctrine is critical to ensuring that the Second Amendment does not become "a regulatory straightjacket." *Bruen*, 597 U.S. at 30. It allows for common-sense gun safety regulations like background checks, *see McRorey v. Garland*, 99 F.4th 831, 836-37 (5th Cir. 2024), and restrictions on the unlicensed interstate transfer of firearms, *see United States v. Vereen*, --- F.4th ----, 2025 WL 2394444, at *1, *4-6 (2d Cir. Aug. 19, 2025). And the panel's decision potentially has far-reaching implications limiting this doctrine.

For example, the panel faulted New Mexico's law for being insufficiently "tailored to commercial sales," without defining what makes a sale "commercial." *See* Dkt. 85-1 ("Op.") 18-19. The panel also appeared to limit what counts as a "condition" under the Supreme Court's Second Amendment decisions based on the specialized definition of the term "condition precedent" from contract law. *See id.* at 20.[2] The proper contours and limits of presumptively lawful conditions

[2] The panel cited the Black's Law Dictionary entry for "condition," but relied on the definition of the term "condition precedent," which is listed under the second definition of "condition," specific to "a contract, will, or other instrument." *See Condition*, Black's Law Dictionary (12th ed. 2024).

and qualifications should be addressed fully and clearly by this full Court.

The panel also addressed whether the Second Amendment's "plain text" covers the acquisition of firearms and how to evaluate purchase or sale restrictions under *Bruen* and *Rahimi*. *See id.* at 11-16. While the precise reach of the panel's reasoning is unclear, the idea that "limitations on firearm sales" always "implicate the Second Amendment's plain text," *id.* at 13, might be used to contend that even regulations imposing *no* burden on keeping or bearing arms are presumptively unconstitutional.

By contrast, other circuits have recognized that sales restrictions that do not constrain anyone's ability to keep and bear arms do not implicate the Second Amendment's text. The Second Circuit, for example, has rejected a challenge to safety-measure requirements at gun stores under that reasoning. *See Gazzola v. Hochul*, 88 F.4th 186, 195-98 (2d Cir. 2023) (per curiam). And the Ninth Circuit has done the same with a law prohibiting gun stores on state property (while leaving ample stores available "down the street"). *See B&L Productions, Inc. v.*

Newsom, 104 F.4th 108, 117-20 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 1958 (2025).

These are important Second Amendment issues with potentially far-reaching implications. The full Court should consider them en banc.

II. Rehearing En Banc Is Needed to Clarify Application of the *Bruen-Rahimi* Historical Analysis

Rehearing is also needed to clarify the proper application of the Second Amendment historical analysis after *Rahimi*. The panel's analysis deepens uncertainty by evaluating strands of historical laws in isolation and by insufficiently heeding *Bruen*'s guidance on the "more nuanced approach" to history. 597 U.S. at 27.

A. The Panel Did Not Consider Historical Laws "Taken Together"

The panel evaluated historical analogues individually in search of a "ringer" for New Mexico's law. Op. 24. That approach did not adhere to *Rahimi*'s instruction to extrapolate principles from historical laws "[t]aken together." 602 U.S. at 698.

Rahimi involved a Second Amendment challenge to the federal law prohibiting individuals subject to certain domestic violence restraining orders from possessing firearms. *See id.* at 688. The Supreme Court upheld the law, relying on two regulatory traditions

from the 18th and 19th centuries: affray laws (which prohibited "arming oneself to the Terror of the People," *id.* at 697-98 (cleaned up)), and surety laws (which "targeted the misuse of firearms" by requiring "individuals suspected of future misbehavior" to post a bond or else be incarcerated, *id.* at 695-97). Although neither of those traditions closely mirrored the modern domestic violence prohibitor, together they established a principle of disarming "individual[s] [who] pose[] a clear threat of physical violence to another," a principle also reflected in the modern law. *Id.* at 698-99.

In upholding the federal law, the Court clarified that "the appropriate analysis" is to ask "whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition." *Id.* at 692 (emphasis added); *see also id.* at 740 (Barrett, J., concurring) ("'Analogical reasoning' under *Bruen* demands a wider lens: Historical regulations reveal a principle, not a mold." (citing *Bruen*, 597 U.S. at 28-31)); *United States v. Ogilvie*, --- F.4th ----, 2025 WL 2525579, at *4 (10th Cir. Sept. 3, 2025) (emphasizing *Rahimi*'s focus on principles); *United States v. Harrison*, --- F.4th ----, 2025 WL 2452293, at *6, *22-23

(10th Cir. Aug. 26, 2025) (same); *United States v. Jackson*, 138 F.4th 1244, 1253-55 (10th Cir. 2025) (same).

Importantly, *Rahimi* confirms that different historical strands should be "[t]aken together" to identify the principles against which modern laws are judged. 602 U.S. at 698; *see also Jackson*, 138 F.4th at 1252. The majority did not discount surety laws for differing from the challenged modern law in some ways, and then discount affray laws for differing in other ways. Rather, the majority evaluated the modern law against "the tradition the surety and going armed laws represent." *Rahimi*, 602 U.S. at 698. Notably, Justice Thomas, the sole dissenter in *Rahimi,* did not persuade any of his colleagues that this "piecemeal approach" of "combining aspects of surety and affray laws" was problematic. *Id.* at 767 (Thomas, J., dissenting). As this Court has explained, *Rahimi* instructs that historical laws should be "group[ed] … together" to reveal a principle, rather than "pick[ed] off … one by one." *Harrison*, 2025 WL 2452293, at *21 (quoting *Rahimi*, 602 U.S. at 704 (Sotomayor, J., concurring)).

Courts of appeals have followed *Rahimi*'s approach in a range of Second Amendment cases. For example, in upholding the federal

prohibition on firearm possession by those convicted of felonies, the Fifth Circuit relied on different aspects of separate groups of historical laws, considered together. *See United States v. Diaz*, 116 F.4th 458, 471 n.5 (5th Cir. 2024) ("We focus on these [going armed] laws to address the 'how' of colonial-era firearm regulation, rather than the 'why,' which is supported by other evidence."), *cert. denied*, --- S. Ct. ----, 2025 WL 1727419 (June 23, 2025). Similarly, in analyzing assault weapon and large-capacity magazine restrictions, the First Circuit has first compared the modern laws' burdens to historical regulations, and then compared their justifications, both times considering the whole body of historical tradition together. *See Capen v. Campbell*, 134 F.4th 660, 670-74 (1st Cir. 2025); *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 45-50 (1st Cir. 2024), *cert. denied*, --- S. Ct. ----, 2025 WL 1549866 (June 2, 2025). And other circuits have offered similar methodological guidance. *See Pitsilides v. Barr*, 128 F.4th 203, 210 (3d Cir. 2025) ("[W]e must consider … principles embodied in different strands of historical firearm regulations, 'taken together,'" rather than "reduce historical analogizing to an exercise in matching elements of modern laws to those of their historical predecessors." (citation

omitted)); *United States v. Perez-Garcia*, 96 F.4th 1166, 1191 (9th Cir. 2024) (warning that a "divide-and-conquer approach to the historical evidence misses the forest for the trees."), *cert. denied*, --- S. Ct. ----, 2025 WL 1426701 (May 19, 2025).

The panel, however, analyzed New Mexico's analogues separately, searching for a "ringer" in the historical record. Op. 24. It first analyzed intoxication laws, concluding that they did not match New Mexico's law because they imposed individualized restrictions rather than delaying firearms access for large groups. *See id.* at 28-30. It then turned to licensing laws, concluding that they did not match New Mexico's law because they require persons to complete requirements such as a safety course rather than simply wait. *See id* at 31-32. Finally, the panel analyzed group-based historical restrictions, concluding that laws motivated by "discriminatory biases" could not serve as historical analogues. *See id.* at 32-34.[3]

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[3] By contrast, a different Tenth Circuit panel concluded that *Bruen* "*requires*" courts to "draw abstract principles" even from "offensive laws" of the past. *Harrison*, 2025 WL 2452293, at *20, n.23 (emphasis added); *see also, e.g.*, *Zherka v. Bondi*, 140 F.4th 68, 90 (2d Cir. 2025) (considering laws that "offend other constitutional provisions" in determining historical scope of Second Amendment); *United States v. Duarte*, 137 F.4th 743, 760 (9th Cir. 2025) (en banc)

But the panel did not consider whether New Mexico's law resembles licensing laws in some respects and intoxication laws in others. After all, New Mexico's law delays firearm access to prevent impulsive misuse, just like intoxication laws. And it does so by imposing a blanket delay on large groups of the population, just like licensing laws. New Mexico's law thus "regulates … for a permissible reason," and does not regulate "to an extent beyond what was done" historically. *Rahimi*, 602 U.S. at 692. "Taken together" in this way, *id.* at 698, historical intoxication and licensing laws reveal a principle: the government may temporarily delay access to new firearms to prevent their impulsive misuse. New Mexico's law is consistent with that principle.

B. The Panel Did Not Determine Whether the "More Nuanced Approach" Applies

The panel also did not address *Bruen*'s key instruction that cases implicating "unprecedented societal concerns or dramatic technological

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(reasoning that laws "unconstitutional today under *other* parts of the Constitution" still inform "American history and tradition" under Second Amendment); *see also Kanter v. Barr*, 919 F.3d 437, 458 & n.7 (7th Cir. 2019) (Barrett, J., dissenting) (relying on "race-based exclusions" as historically instructive even if "unconstitutional today").

changes" require "a more nuanced approach" to history. 597 U.S. at 27. This instruction requires an "even more flexible approach" to analogizing for such cases, as numerous courts have recognized. *Duncan v. Bonta*, 133 F.4th 852, 873-74 (9th Cir. 2025) (en banc), *petition for cert. filed*, No. 25-198 (U.S. Aug. 19, 2025); *see also, e.g., Schoenthal v. Raoul*, --- F.4th ----, 2025 WL 2504854, at *10 (7th Cir. Sept. 2, 2025); *Bianchi v. Brown*, 111 F.4th 438, 463-64 (4th Cir. 2024) (en banc), *cert. denied sub nom. Snope v. Brown*, 145 S. Ct. 1534 (2025); *Ocean State Tactical*, 95 F.4th at 44.

As New Mexico's experts explained, and as other courts have concluded, waiting period laws implicate several uniquely modern concerns and developments and so require *Bruen*'s more nuanced approach. *First*, for much of this nation's history, guns were simply not available for widespread immediate purchase. *See* App. 95-96, 126-27, ¶¶ 8-9, 100 (Spitzer Decl.). During that period, the impulsive purchase of firearms was not a societal problem requiring a regulatory response. *See Rocky Mountain Gun Owners v. Polis*, 701 F. Supp. 3d 1121, 1139-42 (D. Colo. 2023) (relying on Prof. Spitzer), *appeal dismissed*, No. 23-1380, 2024 WL 5010820 (10th Cir. Aug. 23, 2024); *Vt. Fed'n of*

Sportsmen's Clubs v. Birmingham, 741 F. Supp. 3d 172, 213 (D. Vt. 2024) (same), *appeal docketed*, No. 24-2026 (2d Cir. July 31, 2024).

Second, early firearms were generally stored unloaded, cumbersome to load, and liable to misfire. *See* App. 355-56, ¶ 7 (Roth Decl.). These technical limitations meant that firearms were not typically used in impulsive homicides and suicides as they are now. *See id.* at 351-56, ¶¶ 3, 6-8 (Roth Decl.); *id.* at 97, ¶ 13 (Spitzer Decl.); *Rocky Mountain Gun Owners*, 701 F. Supp. 3d at 1139-42 (relying on Prof. Roth); *Vt. Fed'n*, 741 F. Supp. 3d at 213 (relying on Profs. Roth and Spitzer).

Third, waiting periods arise from fundamentally modern understandings of suicide prevention, unthinkable to earlier generations. Early Americans often attributed suicide to the devil and responded to it with religious rituals—such as driving stakes through the hearts of those who died by suicide, to prevent the escape of evil spirits—as well as with incarceration. *See* App. 442-45; Eric Ruben, *Scientific Context, Suicide Prevention, and the Second Amendment After* Bruen, 108 Minn. L. Rev. 3121, 3130, 3159-64 (2024). Even when suicide was approached medically, doctors treated it as a blood-related

disorder that could be addressed through bloodletting, "purges" (induced diarrhea or vomiting), and ingesting toxic substances, including mercury. *See* App. 446-51; Ruben, 108 Minn. L. Rev. at 3130, 3168-72. Only in the mid- to late-20th century did researchers arrive at the modern understanding of means restriction—the idea that restricting the immediate availability of lethal means can effectively prevent, not merely delay, suicide. *See* App. 453-58; Ruben, 108 Minn. L. Rev. at 3139-44. Without the benefit of these scientific advances, earlier generations had no reason to think that a waiting period would be effective at preventing suicide.

The panel did not evaluate whether the "more nuanced approach" should apply in this case. Instead, it emphasized that waiting period laws exactly like New Mexico's did not appear until recently, without considering whether dramatic technological changes and unprecedented societal concerns explain why that is so. *See* Op. 25-26. The panel's examination of history without addressing *Bruen*'s "more nuanced approach" risks confusion and inconsistency in how this Circuit applies that important aspect of *Bruen*.

* * *

The panel's analysis creates uncertainty over how to apply the *Bruen-Rahimi* historical analysis—specifically the Supreme Court's instructions to consider historical laws "[t]aken together," *Rahimi*, 602 U.S. at 698, and to consider whether a law implicates "unprecedented societal concerns or dramatic technological changes," *Bruen*, 597 U.S. at 27. That uncertainty will hamper courts' ability to apply *Bruen* and *Rahimi* consistently in this Circuit. Rehearing en banc is needed to remedy that problem.

CONCLUSION

This Court should grant New Mexico's petition.

Dated: September 9, 2025

Respectfully submitted,

/s/ Erik P. Fredericksen

Janet Carter
William J. Taylor, Jr.
Erik P. Fredericksen
Everytown Law
450 Lexington Avenue, P.O. Box 4184
New York, NY 10163
(646) 324-8198
efredericksen@everytown.org

Counsel for amicus curiae
Everytown for Gun Safety

CERTIFICATE OF COMPLIANCE

This motion complies with the word limit of Federal Rule of Appellate Procedure 29(b)(4) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), it contains 2,590 words.

This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface (fourteen-point Century Schoolbook font) using Microsoft Word.

Respectfully submitted,

/s/ Erik P. Fredericksen
Erik P. Fredericksen

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2025, I electronically filed this amicus brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

Respectfully submitted,

/s/ Erik P. Fredericksen
Erik P. Fredericksen