

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

<p>SAMUEL ORTEGA and REBECCA SCOTT,</p> <p>Plaintiffs,</p> <p>v.</p> <p>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,</p> <p>Defendants.</p>	<p>No.</p>
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COMPLAINT

Plaintiffs Samuel Ortega and Rebecca Scott submit the following Complaint.

I. INTRODUCTION

This action challenges the constitutionality of N.M. Stat. § 30-7-7.3 (the “Unlawful Sale of a Firearm Before Required Waiting Period Ends Act” or the “Waiting Period Act”), enacted by the Legislature of the State of New Mexico, and signed into law by Governor Michelle Lujan Grisham on March 4, 2024.¹ The Waiting Period Act is effective as of May 15, 2024. With limited exceptions, the Waiting Period Act 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 seven calendar days after the sale has occurred, even if a clean background check comes back immediately.² Violation of the Waiting Period Act results in criminal charges being filed against both the seller and the

¹ House Bill 129 is the bill that became the Waiting Period Act, and it is attached to this filing as “Exhibit A”.

² The provisions of the Waiting Period Act do not apply to: (1) a buyer who holds a valid federal firearms license, (2) a buyer who holds a valid New Mexico concealed handgun license, (3) a law enforcement agency, (4) a transaction between two law enforcement officers; and (5) a transaction between immediate family members.

purchaser of the firearm. Because the Waiting Period Act burdens the right to keep and bear arms, and because the government could never meet its burden to establish a historical analogue to justify its regulation, it is unconstitutional under the Second Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment.

II. PARTIES

1. Paul Samuel Ortega (“Ortega”) is an adult resident of New Mexico who has been negatively impacted by the Waiting Period Act’s unconstitutional burden on the Second Amendment rights of law-abiding citizens who purchase firearms. On May 15, 2024, Mr. Ortega went to Calibers Shooting Sports Center for the purpose of acquiring a Glock 21 Gen4 .45 handgun. Mr. Ortega provided the information required for a federal background check. He passed the background check and paid the purchase price for the firearm. At this point, Mr. Ortega requested to take possession of the firearm that he had purchased so that he could remove it from the store and transport it to his residence. The Calibers employee who had been helping Mr. Ortega with this transaction, responded that due to the Waiting Period Act, the firearm had to remain in the custody of Calibers Shooting Sports Center for the next seven days. Mr. Ortega then asked the Calibers employee if there was any reason other than the requirements of the Waiting Period Act why he could not obtain the firearm and take it with him. The Calibers employee said there was none. The Waiting Period Act’s requirements were the only reason Calibers could not deliver the firearm to Mr. Ortega. In addition to this purchase, Mr. Ortega actively seeks to expand his ability to keep and bear arms through future firearms purchases. Accordingly, even if Mr. Ortega receives possession of the Glock 21 Gen4 .45 handgun while this action is pending, this matter will not be moot. Mr. Ortega will purchase another firearm soon and when he does, he will be subjected to the same unconstitutional burden. This suit satisfies one of the exceptions to the mootness doctrine.

2. Rebecca Scott (“Scott”) is an adult resident of New Mexico who has also been negatively impacted by the Waiting Period Act. On May 15, 2024, Ms. Scott went to Big R Store in Farmington, New Mexico, for the purpose of acquiring a Smith & Wesson M&P EZ Shield 380 handgun. Ms. Scott provided the information required for a federal background check. She passed the background check and attempted to pay the purchase price for her firearm so she could transport it back to her residence. At this point, the Big R Store employee who had been helping Ms. Scott with this transaction responded that due to the Waiting Period Act, the firearm had to remain in the custody of the Big R Store for the next seven days. Ms. Scott asked the Big R Store employee if there was any reason other than the requirements of the Waiting Period Act why she could not obtain the firearm and take it with her. The Big R store employee said there was none. The Waiting Period Act’s requirements were the only reason that the Big R Store could not deliver the firearm to Ms. Scott. In addition to this purchase, Ms. Scott actively seeks to expand her ability to keep and bear arms through future firearms purchases. Accordingly, even if Ms. Scott receives possession of the Smith & Wesson M&P EZ Shield 380 handgun while this action is pending, this matter will not be moot. Ms. Scott will purchase another firearm soon, and when she does, she will be subjected to the same unconstitutional burden. This suit satisfies one of the exceptions to the mootness doctrine.

3. Defendant Michelle Lujan Grisham is the Governor of the State of New Mexico. This action is brought against her in her official capacity. The New Mexico Constitution states that the “supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed.” M.M. Const. Art. V, § 4. Courts have long recognized the practice of naming the governor of a state, in their official role as the state’s chief executive, as the proper Defendant in cases where a party seeks to enjoin state enforcement of a statute, regulation,

ordinance, or policy that is violative of federal law. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011).

4. Defendant Raúl Torrez is the Attorney General of the State of New Mexico. This action is brought against him in his official capacity, to the extent that any injunction against the Waiting Period Act must include the Attorney General as a party to this matter.

5. Defendants are or will enforce the unconstitutional provisions of the Waiting Period Act against Plaintiffs under color of state law within the meaning of 42 U.S.C. § 1983.

III. JURISDICTION AND VENUE

6. The Court has original jurisdiction of this civil action under 28 U.S.C. § 1331, because the action arises under the Constitution and laws of the United States. The Court also has jurisdiction under 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 1983 since this action seeks to redress the deprivation, under color of the laws, ordinances, regulations, customs and usages of the State, of rights and privileges or immunities secured by the United States.

7. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, respectively, and a claim for related attorney fees is authorized by 42 U.S.C. § 1988.

8. Venue in this judicial district is proper under 28 U.S.C. § 1391(b)(2), because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this district.

IV. GENERAL ALLEGATIONS

9. The Second Amendment to the United States Constitution declares that “the right of the people to keep and bear arms shall not be infringed.” U.S. Const. amend. II; *see also District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); and *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022).

10. The right to keep and bear arms recognized in the Second Amendment is made applicable to the states by the Fourteenth Amendment. *McDonald*, 561 U.S. at 777.

11. The Waiting Period Act (N.M. Stat. § 30-7-7.3) states in relevant part:

- A. A waiting period of seven calendar days shall be required for the sale of a firearm and the transfer of the firearm to the buyer.
- B. The firearm shall remain in the custody of the seller or the federal firearms licensee performing the federal instant background check during the entirety of the waiting period.
- C. Unlawful sale of a firearm before the required waiting period ends consists of the transfer of ownership, possession or physical control of the firearm from the seller to the buyer before the end of the required seven-calendar-day waiting period[.]
- D. Each party to an unlawful sale of a firearm before the required waiting period ends is in violation of this section and may be separately charged for the same sale.
- G. Whoever violates the provisions of this section is guilty of a misdemeanor.

12. In *Bruen*, the Court held: “the standard for applying the Second Amendment is as follows: When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” 597 U.S. at 24.

13. Plaintiffs desire to obtain possession of firearms that they have purchased for lawful purposes—including self-defense in their homes. The Waiting Period Act prohibits Plaintiffs from doing so without being subjected to an arbitrary, unnecessary, burdensome, and useless delay.

14. The right to “keep” arms necessarily implies the right to obtain arms. After all, “keep” means to possess or “have weapons.” *Heller*, 554 U.S. 570, 582 (2008). By the Waiting Period Act’s very terms, it prevents individuals from taking “possession” of their firearms. N.M. Stat. § 30-7-7.3. Therefore, because the Second Amendment’s plain text covers Plaintiffs’ conduct – i.e.,

possessing bearable arms – “the Constitution *presumptively* protects that conduct.” *Bruen*, 597 U.S. at 24 (emphasis added). Plaintiffs have met their burden under *Bruen*, and the Waiting Period Act is presumptively unconstitutional.

15. Moreover, the Waiting Period Act is not a commercial regulation, such that it is directed at ensuring that sellers of firearms comply with the law. Indeed, the very purpose of the law is to limit the ability of a purchaser to *obtain* a firearm.

16. The fact that the Waiting Period Act contains exceptions for (1) buyers who hold a valid federal firearms license (2) buyers who have concealed handgun licenses; (3) law enforcement agencies; (4) two law enforcement officers under certain circumstances; and (5) between immediate family members, demonstrates that there are some classes of purchasers for which New Mexico does not think a seven-day waiting period is necessary. If the Waiting Period Act were a true commercial regulation, it would not maintain exceptions based on the category of purchaser.

17. Since the Second Amendment presumptively protects Plaintiffs’ conduct, the State must justify the Waiting Period Act by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.

18. It is impossible for the State to meet this burden because there is no historical tradition of firearms being regulated in this manner either at the time of our founding and the ratification of the Second Amendment, or during the Reconstruction era and the ratification of the Fourteenth Amendment.

19. In fact, the first waiting period law was not enacted until 1923, and involved a one-day waiting period for handgun sales in California. *See* Professor David B. Kopel’s Written Testimony on Colorado House Bill 23-1219, *To Delay the Acquisition of Firearms*.³ Under *Bruen*, analogies

³ <https://davekopel.org/Testimony/HB23-1219%20Kopel%20testimony%20on%20forced%20delays%20in%20gun%20acquisition-Mar6.pdf>

from the 1920s are far too late to offer a historical analogue to the issue of waiting periods. 597 U.S. at 66.

20. In summary, the plain text of the Second Amendment covers Plaintiffs' conduct. Therefore, the Waiting Period Act is presumptively unconstitutional. The State is unable to rebut this presumption because the Waiting Period Act is not consistent with the Nation's historical tradition of firearm regulation. Therefore, New Mexico's Waiting Period Act is unconstitutional.

V. FIRST CLAIM FOR RELIEF
Right to Keep and Bear Arms
U.S. Const., amends. II and XIV

21. Paragraphs 1–20 are re-alleged and incorporated by reference.

22. The Waiting Period Act burdens the right of residents of the State of New Mexico, including Plaintiffs, in exercising their right to keep and bear arms, a right which is explicitly protected by the Second Amendment.

23. There are significant criminal sanctions for violations of this unconstitutional law.

24. These restrictions infringe Plaintiffs' rights guaranteed by the Second Amendment, which is made applicable to New Mexico by the Fourteenth Amendment.

25. The Waiting Period Act's prohibitions arbitrarily delay the right of law-abiding citizens to obtain arms even if they immediately pass all required background checks, and even if they desire to obtain an arm for the purpose of self-defense in the home, where Second Amendment protections are at their zenith.

26. The Waiting Period Act contains no exception for exigent circumstances, imminent threat of bodily harm, or for situations where a purchaser has already obtained a domestic order against a former partner, and has actual knowledge that the partner owns a firearm.

27. The State cannot meet its burden of justifying these restrictions on the Second Amendment right of the People because they could never demonstrate that they are consistent with this Nation's historical tradition of firearm regulation.

VI. PRAYER FOR RELIEF

Plaintiffs pray that the Court:

28. Enter a declaratory judgment pursuant to 28 U.S.C. § 2201 that the Waiting Period Act is unconstitutional on its and face and as applied;

29. Enter a Temporary Restraining Order and preliminary and permanent injunctive relief enjoining Governor Michelle Lujan Grisham, and her officers, agents, and employees, and Attorney General Raúl Torrez, and his officers, agents, and employees, from enforcing the Waiting Period Act;

30. Award remedies available under 42 U.S.C. § 1983 and all reasonable attorney fees, costs, and expenses under 42 U.S.C. § 1988, or any other applicable law; and

31. Grant any such other and further relief as the Court may deem proper.

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JURY DEMAND

Plaintiffs invoke their right to jury, to the extent this matter goes to trial.

DATED: May 15, 2024

Respectfully submitted,

/s/ Carter B. Harrison IV
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Attorneys for Plaintiff

Exhibit A

House Bill 129

1 AN ACT

2 RELATING TO CRIME; CREATING THE CRIME OF UNLAWFUL SALE OF A
3 FIREARM BEFORE THE REQUIRED WAITING PERIOD ENDS; REQUIRING A
4 SEVEN-DAY WAITING PERIOD WHEN CONDUCTING THE SALE OF A
5 FIREARM; PROVIDING AN EXCEPTION; PRESCRIBING PENALTIES.

6
7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

8 SECTION 1. A new Section 30-7-7.3 NMSA 1978 is enacted
9 to read:

10 "30-7-7.3. UNLAWFUL SALE OF A FIREARM BEFORE REQUIRED
11 WAITING PERIOD ENDS.--

12 A. A waiting period of seven calendar days shall
13 be required for the sale of a firearm and the transfer of the
14 firearm to the buyer. The seven-calendar-day waiting period
15 shall include the period required to conduct a federal
16 instant background check; provided that, if the seven-
17 calendar-day waiting period has expired without the
18 completion of a required federal instant background check,
19 the seller shall not transfer the firearm to the buyer until
20 the federal instant background check is completed. If the
21 required federal instant background check has not been
22 completed within twenty days, the seller may transfer the
23 firearm to the buyer.

24 B. The firearm shall remain in the custody of the
25 seller or the federal firearms licensee performing the

1 federal instant background check during the entirety of the
2 waiting period.

3 C. Unlawful sale of a firearm before the required
4 waiting period ends consists of the transfer of ownership,
5 possession or physical control of the firearm from the seller
6 to the buyer before the end of the required seven-calendar-
7 day waiting period, but does not include temporary possession
8 or control of a firearm provided to a customer by the
9 proprietor of a licensed business in the conduct of that
10 business.

11 D. Each party to an unlawful sale of a firearm
12 before the required waiting period ends is in violation of
13 this section and may be separately charged for the same sale.

14 E. Each firearm sold contrary to the provisions of
15 this section constitutes a separate offense under Subsection
16 C of this section.

17 F. Two or more offenses may be charged in the same
18 complaint, information or indictment and shall be punished as
19 separate offenses.

20 G. Whoever violates the provisions of this section
21 is guilty of a misdemeanor.

22 H. The provisions of this section do not apply to
23 the sale of a firearm:

24 (1) to a buyer who holds a valid federal
25 firearms license;

1 (2) to a buyer who holds a valid New Mexico
2 concealed handgun license pursuant to the Concealed Handgun
3 Carry Act;

4 (3) to a law enforcement agency;

5 (4) between two law enforcement officers
6 authorized to carry a firearm and certified pursuant to
7 federal law or the Law Enforcement Training Act; or

8 (5) between immediate family members.

9 I. As used in this section:

10 (1) "firearm" means any weapon that will or
11 is designed to or may readily be converted to expel a
12 projectile by the action of an explosion; the frame or
13 receiver of any such weapon; and includes any handgun, rifle
14 or shotgun; but shall not include an antique firearm as
15 defined in 18 U.S.C. Section 921(16), a powder-actuated tool
16 or other device designed to be used for construction
17 purposes, an emergency flare or a firearm in permanently
18 inoperable condition; and

19 (2) "immediate family member" means a
20 spouse, a parent, a child, a sibling, a grandparent, a
21 grandchild, a great-grandchild, a niece, a nephew, a first
22 cousin, an aunt or an uncle."

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Samuel Ortega & Rebecca Scott

(b) County of Residence of First Listed Plaintiff Bernalillo County, NM (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Carter B. Harrison IV; Harrison & Hart, LLC; 924 Park Ave SW, Ste. E; Albuquerque, NM 87102; (505) 295-3261

DEFENDANTS

Michelle Lujan Grisham, in her official capacity as Governor of NM & Raul Torrez, in his official capacity as NMAG

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, 1 1, 2 2, 3 3, 4 4, 5 5, 6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Table with columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Personal Injury, Property Damage, Labor, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 42 U.S.C. 1983

Brief description of cause: Action to enjoin NMSA 30-7-7.3 as unconstitutional under the Second Amendment

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: [X] Yes [] No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE: May 15, 2024 SIGNATURE OF ATTORNEY OF RECORD: /s/ Carter B. Harrison IV

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related cases, if any. If there are related cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.