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Written by **Bob Adelmann** on November 16, 2023

Federal Judge Finds No Right to Purchase a Gun in Second Amendment

Just when gun owners and supporters of the Second Amendment were beginning to celebrate victories following *Bruen* (*New York State Rifle & Pistol Association, Inc. v. Bruen*), along comes a federal judge in Colorado to discover that the Second Amendment's guarantee of the God-given right to "keep" and "bear" arms doesn't include the right to timely "purchase" them.

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In a decision regarding Colorado's mandate "that sellers wait a minimum of three days between initiating a background check and delivering a firearm to a purchaser," U.S. District Court Judge John Kane wrote on Monday:

> After examining the language of the Second Amendment using the Supreme Court's analysis in *Heller* [*District of Columbia v. Heller,* decided in 2008], I find, for the purposes of Plaintiffs' Motion, that the plain text does not cover the waiting period required by the Act.

That's because, as even "expert witnesses" for the State of Colorado agreed, there were no such things as "waiting periods" demanded by governments at the time the Second Amendment was written. This is the key determinant underlying *Bruen* — that there had to be some "analog" existing at the time the Second Amendment was added to the U.S. Constitution in 1791 in order to justify current laws infringing that right.

No matter. Judge Kane went on:

> This conclusion is bolstered by the fact that the Act is a regulation on the commercial sale of firearms and thus is presumptively permissible.

Nothing in his entire 42-page opinion denying a temporary halt to Colorado's three-day waiting-period law refers to any "infringement" of the right, which is prohibited. Instead, he even admits that there was no such thing as a "waiting period" during Colonial times, or even at the time the 14th Amendment was added (1868). "However," wrote Kane,

> even if the waiting period implicated the plain text of the Second Amendment, the evidence before me establishes that the Act is consistent with the Nation's historical tradition of firearm regulation.

Since there were no waiting periods, the judge had to conjure the "evidence" to bolster his case and his decision upholding Colorado's waiting period.

He spills copious ink doing precisely what *Bruen* overturned: exploring the "means" and "ends" to justify an infringement: Does the infringement sufficiently offset or counterbalance the claim that somehow the infringement will result in a reduction in gun violence and an increase in public safety?

Radical anti-gun Governor Jared Polis and his attorneys found two "expert" witnesses to bolster the state's infringement. Remarkably, both of them — Randolph Roth (who sports degrees in history from Stanford and Yale and who teaches "social sciences" at Ohio State), and Robert Spitzer (who holds a doctorate in government from Cornell and taught for years at Cortland State University) — admitted in their testimonies before Kane that "waiting periods as they are understood and implemented today did not exist early in the country's history."

Kane himself wrote:

> Overall, the evidence shows that firearms were not as readily available for purchase and that impulsive gun homicides were much less prevalent at the time of the founding and in the century that followed.
>
> Thus, it is logical that waiting-period laws were not adopted during that period.

That should have been the end of the matter. Case closed. Temporary injunction (pending final decision against the waiting period) granted. Have a nice day.

But no. The anti-gun agenda is alive and well in Colorado and Kane — appointed to the position 46 years ago by then-President Jimmy Carter, a Democrat — had to find a way to rule against Rocky Mountain Gun Owners (RMGO), which brought the suit.

Along with testimonies by Roth and Spitzer, the court allowed as "evidence" an article by Christopher Poliquin titled "Handgun Waiting Periods Reduce Gun Deaths." Poliquin, to condense things here, claimed that he had uncovered proof that waiting periods saved lives; that, by extension, a three-day waiting period in Colorado would likely save 100 lives a year, and that that by itself is enough to justify the infringement.

Of course, Kane found Roth, Spitzer, and Poliquin compelling: "I find the opinions Professor Roth provided to be thoughtful and reliable," "I find [Professor Spitzer's] presentation … to be helpful," and "I find [Poliquin's] testimony … to be salient and completely credible."

On the other hand, he found the expert witness for the plaintiffs — RMGO and Alicia Garcia, who has already been harmed by the waiting period — worthless: "I do not give any weight to Professor [Clayton] Cramer's opinions regarding legal standards or application of the law, as he is not qualified to provide these opinions."

Kane concluded then that since "the plain text of the Second Amendment does not cover the conduct at issue … Plaintiffs have not demonstrated [that] they are likely to succeed on the merits of their claims."

Accordingly, "their motion for preliminary injunction [against the law] is therefore DENIED."

A spokesman for RMGO said that the group is mounting an appeal to a court which is expected to render a more favorable ruling on the matter — one that recognizes there is no "analogous" history for waiting periods, and that therefore Polis' anti-gun law is unconstitutional.