

**No. 24-2121**

**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 New Mexico, and RAUL TORREZ, in his official capacity as  
Attorney General of New Mexico,  
*Defendants-Appellees.*

On Appeal from the U.S. District Court for the District of  
New Mexico (No. 1:24-cv-00471)  
The Honorable James O. Browning

**BRIEF OF *AMICI CURIAE* BRADY CENTER TO PREVENT  
GUN VIOLENCE AND GIFFORDS LAW CENTER TO PREVENT  
GUN VIOLENCE IN SUPPORT OF APPELLEES' REQUEST  
FOR REHEARING EN BANC**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, amici curiae the Brady Center to Prevent Gun Violence (“Brady”) and Giffords Law Center to Prevent Gun Violence (“Giffords Law Center”) state that they are 501(c)(3) nonprofit organizations. Brady and Giffords Law Center do not have any parent corporations and no publicly traded stock. No publicly held corporation owns any part of amici curiae.

/s/ Scott L. Winkelman  
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## STATEMENT OF INTEREST

Amicus curiae Brady Center to Prevent Gun Violence (“Brady”) is a non-profit organization dedicated to reducing gun violence through education, research, legal advocacy, and political action. Brady has a substantial interest in ensuring that the Constitution is construed to allow democratically elected officials to address the Nation’s gun-violence epidemic, and to safeguard the interest of every American in living safe and secure lives in their homes and communities.

Amicus curiae Giffords Law Center to Prevent Gun Violence (“Giffords Law Center”) is a non-profit policy organization serving lawmakers, advocates, legal professionals, gun-violence survivors, and others who seek to reduce gun violence. Today, through partnerships with gun violence researchers, public health experts, and community organizations, Giffords Law Center researches, drafts, and defends laws, policies, and programs proven to reduce gun violence.<sup>1</sup>

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<sup>1</sup> Plaintiffs-Appellants and Defendants-Appellees have consented to amici filing this brief. *See* Fed. R. App. P. 29(a)(2). Giffords Law Center and Brady submit this brief in support of Defendants-Appellees. No counsel for a party authored this brief in whole or in part. No person other than amici or their counsel contributed money to fund this brief’s preparation or submission.

## ARGUMENT

Brady and Giffords Law Center support New Mexico’s petition for rehearing *en banc* of the panel’s divided opinion holding that “[c]ooling-off periods infringe on the Second Amendment by preventing the lawful acquisition of firearms.” Dkt. No. 85-1 at 3 (“Op.”). The Court should grant New Mexico’s petition because, in addition to satisfying the other criteria for *en banc* rehearing, the majority’s decision implicates several questions of exceptional public importance. *See* Fed. R. App. P. 40(b)(2)(D). These include:

1. Whether a state may constitutionally attempt to curb the public health crisis of gun violence by imposing a modest waiting period on commercial firearm sales, a condition that saves lives by preventing suicides and impulsive death by firearm; and
2. Whether the panel’s finding that an alleged Second Amendment violation automatically satisfies the preliminary injunction standard’s irreparable harm requirement conflicts with prior precedent in this Circuit and in sister circuits and should be reconsidered.

If left alone, the panel’s decision will allow avoidable gun-related deaths to continue. That impact will be felt in New Mexico and beyond. The panel’s decision will likely lead to confusion and conflicting decisions among the district courts and will thwart state legislatures considering democratic solutions to combat the modern plague of rising gun deaths,

a calamity not present, much less rampant, in the Founding era or for much of our nation's history, including Reconstruction.

### LEGAL STANDARD

The Tenth Circuit can—and should—guide the district courts and state legislatures within its bounds by resolving the intra- and inter-circuit disagreements the panel's split decision creates. Fed. R. App. P. 40 Committee note 1998 amendment, former Rule 35) (“An intercircuit conflict may present a question of ‘exceptional importance’ because of the costs that intercircuit conflicts impose on the system as a whole, in addition to the significance of the issues involved.”). *En banc* rehearing for decisions like this one is particularly vital given the relatively few cases the Supreme Court takes. *Id.* (“Given the increase in the number of cases decided by the federal courts and the limitation on the number of cases the Supreme Court can hear, conflicts between the circuits may remain unresolved by the Supreme Court for an extended period of time.”).

This Court has previously granted *en banc* rehearing in matters implicating a state's ability to regulate and act in the interest of its people. *See, e.g., Hydro Res., Inc. v. U.S. E.P.A.*, 577 F.3d 1254, 1255 (10th



Cir. 2009) (granting petition for rehearing *en banc* to resolve issue of state jurisdiction over certain land and whether panel’s decision conflicted with Supreme Court and prior Tenth Circuit precedent). And this Court has granted rehearing *en banc* where a panel’s decision diverged from others within the Tenth Circuit as well as other circuits. *See, e.g., United States v. Rentz*, 777 F.3d 1105, 1107 (10th Cir. 2015) (granting *en banc* rehearing given division among circuit courts as to interpretation of 18 U.S.C. § 924(c) because “[t]he answer is consequential”).

Ultimately, *en banc* rehearing is appropriate when a proceeding involves an issue of “exceptional public importance.” 10th Cir. R. 40.1(B); *see also* Fed. R. App. P. 40. The panel’s decision here, which casts considerable doubt and uncertainty upon the permissible means of confronting an enduring public health crisis,<sup>2</sup> fits that bill.

# **I. States’ Ability To Address The Gun Violence Epidemic Presents An Issue Of Exceptional Public Importance.**

Waiting-period laws, like New Mexico’s, save lives. The majority’s decision strips New Mexico of this constitutional and vital tool for

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<sup>2</sup> *See* U.S. Centers for Disease Control, Fast Facts: Firearm Injury and Death, July 5, 2024, <https://www.cdc.gov/firearm-violence/data-research/facts-stats/> (“Firearm injuries and deaths continue to be a significant public health problem in the United States.”).

combatting gun violence and protecting public safety. In 2022, there were more than 40,000 firearm-related deaths in the United States.<sup>3</sup> More than half were suicides.<sup>4</sup> In 2025 alone, the United States has endured 285 mass shootings, an average of more than one mass shooting a day.<sup>5</sup> Since 2020, gun violence has been the leading cause of death among children ages 1 to 17.<sup>6</sup>

The pain of the gun violence epidemic is particularly acute for New Mexicans. New Mexico's gun death rate is 84% higher than the national

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<sup>3</sup> U.S. Centers for Disease Control, Fast Facts: Firearm Injury and Death, <https://www.cdc.gov/firearm-violence/data-research/facts-stats/> (accessed Sep. 3, 2025).

<sup>4</sup> U.S. Centers for Disease Control, Fast Facts: Firearm Injury and Death, <https://www.cdc.gov/firearm-violence/data-research/facts-stats/> (accessed September 3, 2025).

<sup>5</sup> Gun Violence Archive, Mass Shootings in 2025, <https://www.gunviolencearchive.org/reports/mass-shooting> (accessed Aug. 29, 2025).

<sup>6</sup> Deaths from guns have increased in this age group by 106% since 2013. John Hopkins Bloomberg School of Public Health, New Report Highlights U.S. 2022 Gun-Related Deaths: Firearms Remain Leading Cause of Death for Children and Teens, and Disproportionately Affect People of Color, (Sep. 12, 2024), <https://publichealth.jhu.edu/2024/guns-remain-leading-cause-of-death-for-children-and-teens>.

average and the fourth highest in the country,<sup>7</sup> prompting one New Mexico lawmaker to remark that the state has reached “epidemic proportions when it comes to gun deaths.”<sup>8</sup> Between 2011 and 2023, New Mexico endured a shocking 71% increase in its firearm death rate.<sup>9</sup> More than half of those deaths were suicides; 40% were homicides.<sup>10</sup> In 2022, New Mexicans experienced the third-highest number of suicide deaths per capita in the United States.<sup>11</sup> Gun violence costs New Mexicans \$6.2 billion a year.<sup>12</sup>

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<sup>7</sup> Pew Research Center, *What the data says about gun deaths in the U.S.*, (Mar. 5, 2025), <https://www.pewresearch.org/short-reads/2025/03/05/what-the-data-says-about-gun-deaths-in-the-us/>.

<sup>8</sup> H.B. 129, House Floor Debate (statement of Rep. Andrea Romero) (Feb. 2, 2024).

<sup>9</sup> New Mexico Gun Violence Dashboard, <https://www.governor.state.nm.us/gun-violence-dashboard/> (accessed September 3, 2025); Pew Research Center, *What the data says about gun deaths in the U.S.*, (Mar. 5, 2025); see also <https://www.pewresearch.org/short-reads/2025/03/05/what-the-data-says-about-gun-deaths-in-the-us/>.

<sup>10</sup> U.S. Centers for Disease Control Suicide Prevention, *Suicide Rates by State*, [https://www.cdc.gov/suicide/facts/rates-by-state.html?CDC\\_AAref\\_Val=](https://www.cdc.gov/suicide/facts/rates-by-state.html?CDC_AAref_Val=) (accessed September 3, 2025).

<sup>11</sup> *Id.* [https://www.cdc.gov/suicide/facts/rates-by-state.html?CDC\\_AAref\\_Val=](https://www.cdc.gov/suicide/facts/rates-by-state.html?CDC_AAref_Val=) (accessed September 3, 2025).

<sup>12</sup> Johns Hopkins Bloomberg School of Public Health, *State Data – New Mexico*, <https://publichealth.jhu.edu/center-for-gun-violence->

Recognizing this ongoing public health crisis, New Mexico followed the lead of at least 22 other states<sup>13</sup> and implemented a waiting period before a firearm seller can turn over a firearm to a buyer. H.B. 129 (2024 Gen. Assemb., 2d. Sess. (N.M. 2024) ((N.M.S.A. § 30-7-7.3) (“Waiting Period Act” or “Act”)). This quintessentially commercial law, placing a condition on firearm sales, was intended explicitly to reduce firearm homicides and deaths by suicide, both of which have been proven to be lower in states with waiting periods.

According to the American Academy of Pediatrics, states with wait-period laws have 51% fewer firearm suicides than states without such

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solutions/gun-violence-data/state-gun-violence-data/new-mexico (accessed September 3, 2025).

<sup>13</sup> Brady United, Waiting Periods, <https://www.bradyunited.org/resources/issues/waiting-periods> (accessed September 3, 2025). Not all of these states require waiting periods for all firearms. For example, some states only impose waiting periods for handguns, while six states and the District of Columbia impose waiting periods for all purchases of firearms. American Academy of Pediatrics, Waiting Period for Firearms Purchases, <https://www.aap.org/en/advocacy/state-advocacy/waiting-periods-for-firearms-purchases/?srsltid=AfmBOoqsh4TUrOkYW9SsvOoEqsyHtKkt2qtqZixBCInZf9iAFkATGijP> (accessed September 3, 2025).

laws.<sup>14</sup> Similarly, a National Institutes of Health study determined that states with a waiting period for the completion of handgun sales had a lower overall suicide rate involving a firearm, and a lower proportion of suicide deaths resulting from firearms, even after controlling for the effects of poverty, population density, age, education, and race/ethnicity.<sup>15</sup>

Because waiting periods save lives, and because gun violence is an urgent public health crisis that states are charged with addressing under their traditional welfare and police powers, additional state legislatures are joining the fold. New York, North Carolina, and Georgia all have introduced legislation to establish waiting periods for the purchase or sale of firearms.<sup>16</sup>

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<sup>14</sup> American Academy of Pediatrics, *Waiting Period for Firearms Purchases*, <https://www.aap.org/en/advocacy/state-advocacy/waiting-periods-for-firearms-purchases/?srsltid=AfmBOoqsh4TUrOkYW9SsvOoEqsyHtKkt2qtqZixBCInZf9iAFkATGijP> (accessed September 3, 2025).

<sup>15</sup> National Institutes of Health's National Library of Medicine, Michael D. Anestis & Joye C. Anestis, *Suicide Rates and State Laws Regulating Access and Exposure to Handguns*, Am. J. Public Health (Oct. 2015).

<sup>16</sup> See e.g. NY Veh. & Traf. Law §1210 (2025) (proposes a ten business day waiting period from contact of the New York State National Instant Background Check System before a firearm, shotgun or rifle may be delivered to a person); WA H.B. 1872, 2025 Gen. Assemb., 2025 Reg. Sess.

The public safety goal of waiting-period laws is analogous to the issue presented in *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96, 104 (10th Cir. 2024) (“*RMGO*”). In *RMGO*, a unanimous panel of this Court upheld another commercial sales law—in that case, restricting firearms transfers for individuals under 21. Colorado enacted this law to “reduce youth suicide and accidental death, mass shootings, and overall gun violence.” Colo. Gen. Assemb. 23-169, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023). The *RMGO* panel found no Second Amendment violation, concluding that Colorado’s law was “an aged-based condition or qualification on the sale of arms,” and thus fell “outside of the scope of the Second Amendment’s right to ‘keep and bear’ arms.” *RMGO*, 121 F.4th at 119-20.

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(Wa. 2025) (assembly committee) (section 3(2)(a) establishes a 10 day waiting period between when a licensed dealer of firearms requested a background check and section 3 “deliver[y]” of that firearm to a purchaser or transferee); NC H.B. 732, 2025 Gen. Assemb., 2025 Reg. Sess., Common Sense Gun Regulations, (N.C. 2025) (passed the first reading) (requires a 72 hour waiting period before “a purchased firearm may be delivered or otherwise possessed.”); GA H.B. 601, Georgia 2025 Gen. Assemb., 2025 Reg. Sess., Gun Safe Act of 2025 (Ga. 2025) (passed second reading and pending in house committee) (requires “a five-day waiting period to complete transactions for firearms to individuals under the age of 27,” and requires new residents to the state to wait 90 days before purchasing a gun, with exceptions).

Left undisturbed, the panel's opinion will sow confusion because of its dissonance with *RMGO*, which as recently as last week was endorsed by a panel of this Court. *United States v. Morgan*, --- F.4th ---, No. 24-3141, 2025 WL 2502968, at \*4 (10th Cir. Sep. 2, 2025). Notably, *Morgan* made no mention of the panel's decision in this action. Legislatures and district courts should not be left in the untenable position of trying to reconcile potentially conflicting decisions, particularly given the stakes.

## **II. The Panel's Ruling Lowers The Bar For Showing Irreparable Harm Despite Conflicting Precedent.**

The panel's decision also appears to alter longstanding precedent concerning preliminary injunctions in cases potentially involving constitutional questions. This presents another question of exceptional public importance warranting *en banc* rehearing because it could distort the irreparable-harm analysis whenever a constitutional right is allegedly impinged.

A plaintiff seeking a preliminary injunction must establish, among other things, "that he is likely to suffer irreparable harm in the absence of preliminary relief." *Denver Homeless out Loud v. Denver*, 32 F.4th 1259, 1277 (10th Cir. 2022) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). In *RMGO*, they considered whether a preliminary

injunction of Colorado’s law prohibiting individuals under 21 years old from purchasing firearms was appropriate. Faithfully applying long-standing precedent, the panel ultimately concluded that appellants had not shown that enforcement of a minimum age requirement could meet the irreparable injury prong necessary to grant a preliminary injunction. *RMGO*, 121 F.4th at 127.

By contrast, the panel here appeared to dispense with traditional irreparable-harm analysis altogether. The majority reasoned that while “New Mexico has put forth evidence that waiting periods save lives and prevent impulsive violence, the countervailing injury to the Second Amendment across the entire state of New Mexico overbears that burden [and] ‘it is always in the public interest to prevent the violation of a party’s constitutional rights.’” Op. at 35 n.13 (citation omitted). It did so relying on the same precedent that the *RMGO* panel pointed to in reaching the opposite conclusion. See *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797 (10th Cir. 2019); compare Op. at 9 with *RMGO*, 121 F.4th at 127.

This Circuit has *never* before held that an alleged Second Amendment violation automatically qualifies as irreparable harm. To



the contrary, several panels and judges in this Circuit have recognized that an alleged constitutional violation is not *per se* an irreparable injury. *Leachco, Inc. v. Consumer Prod. Safety Comm’n*, 103 F.4th 748, 755 (10th Cir. 2024) (“Allowing *any* deprivation of *any* constitutional right to serve as *per se* irreparable harm is a far-too-powerful tool in most cases.”) (quoting *Aposhian v. Barr*, 958 F.3d 969, 1000 n.6 (10th Cir. 2020) (Carson, J., dissenting)); *Aposhian*, 958 F.3d at 990 (finding no irreparable harm based on alleged constitutional violation of separation of powers principles).<sup>17</sup>

Other circuits agree. For example, the Third Circuit recently affirmed the district court’s denial of a preliminary injunction in a challenge to Delaware’s newly enacted gun violence prevention laws. *Del. State Sportsmen’s Ass’n v. Del. Dep’t of Safety & Homeland Sec.*, 108 F.4th 194, 203 (3d Cir. 2024) (Bibas, J.). The court rejected the challengers’ argument that they could establish irreparable harm solely by alleging violation of their Second Amendment rights. As the court

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<sup>17</sup> See also *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016) (discussing how when considering an alleged violation of a constitutional right “we must nonetheless engage in our traditional equitable inquiry as to the presence of irreparable harm”).

explained, “[c]onstitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction.” *Id.* (alteration in original) (internal quotation marks and citation omitted). Likewise, the Second Circuit has found that presuming irreparable harm based solely on an alleged Second Amendment violation “would be the sort of ‘major departure from the long tradition of equity practice’ that ‘should not be lightly implied.’” *Nat’l Ass’n for Gun Rights v. Lamont*, --- F.4th ---, Nos. 23-1162, 23-1344, 2025 WL 2423599, at \*23 (2d Cir. Aug. 22, 2025) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982)).

A preliminary injunction is an extraordinary remedy that should be reserved for the rarest of circumstances. The allegation of a constitutional injury does not rescind or eclipse Federal Rule 65 and the traditional rules of equity. The majority’s conclusion that an alleged violation of the Second Amendment automatically creates irreparable injury threatens to sow yet more confusion, and incentivizes yet more litigation, as district courts are left to grapple with whether the conventional, historically tested standard for injunctive relief is now a

thing of the past in this Circuit. This, too, is a question of exceptional public importance.

### CONCLUSION

The Court should grant New Mexico's request to rehear this matter *en banc* to address several questions of exceptional public importance.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation contained in Fed. R. App. P. 29(b)(4) because, excluding the portions exempted by Rule 32(f), this brief contains 2,595 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Century Schoolbook.

/s/ Scott L. Winkelman  
Scott L. Winkelman

## **CERTIFICATE OF DIGITAL SUBMISSION**

I hereby certify that with respect to the foregoing brief:

- (1) all required privacy redactions have been made pursuant to 10th Cir. R. 25.5;
- (2) if required to file additional hardcopies, that this ECF submission is an exact copy of those documents;
- (3) this digital submission has been scanned for viruses with the most recent version of Microsoft Defender, and according to the program is free of viruses.

/s/ Scott L. Winkelman  
Scott L. Winkelman

### **CERTIFICATE OF SERVICE**

I certify that on September 9, 2025, I electronically filed the foregoing brief with the Clerk of Court for the U.S. Court of Appeals for the Tenth Circuit through the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Scott L. Winkelman  
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