

District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3744	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Plaintiffs: ROBERT LYNN CHAMBERS, JAMES MICHAEL JONES, GUNSPORT OF COLORADO, and COLORADO STATE SHOOTING ASSOCIATION,</p> <p>v.</p> <p>Defendant: THE CITY OF BOULDER</p>	
<p><i>Attorneys for Plaintiffs:</i> Richard A. Westfall, No. 15295 Peter J. Krumholz, No. 27741</p> <p><i>Attorneys for Defendants:</i> Timothy R. Macdonald, No. 29180 Evan M. Rothstein, No. 35990 Patrick B. Hall, No. 45317</p>	<p>Case Number: 2018CV30581</p> <p>Division 2 Courtroom Q</p>
<p>ORDER RE: DEFENDANTS' MOTION TO DISMISS CLAIMS 3 AND 4 FOR LACK OF STANDING</p>	

THIS MATTER comes before the Court on Defendant's August 13, 2018 Motion to Dismiss. Plaintiffs filed a Response on September 14, 2018, to which Defendant filed a Reply on October 3, 2018. The Motion to Dismiss raises issues regarding the standing of Plaintiff Gunsport of Colorado ("Gunsport") to assert claims regarding the age restriction provisions of Boulder City Council enacted Ordinance 8245 (the "Ordinance"). Defendant's Motion to Dismiss additionally asserts that all claims of Plaintiffs' Complaint should be dismissed for failure to state a claim for preemption. On December 6, 2018, the Court held a status conference in which the parties agreed that the Court should first determine issues related to standing only. In a separate Order that will issue after further proceedings¹, the Court will address the preemption issues.

The Court, having considered the pleadings and applicable case law, enters the following ruling and ORDER:

¹ The Court's Minute Order of December 6, 2018 describes the agreed upon procedure prior to the Court's consideration of the preemption issues.

I. BACKGROUND

Plaintiffs' Complaint seeks declaratory and injunctive relief from the operation of Boulder Ordinance 8245. The Ordinance, in relevant part, purports to regulate the possession of certain firearms and ammunition magazines in the City of Boulder, raises the age of majority for the purchase and possession of firearms to twenty-one years, and specifies a means by which certain firearms must be carried.

Plaintiff Gunsport is a Colorado entity with a principal place of business in Boulder, Colorado. Gunsport possesses a valid federal firearms license, which permits it to buy, sell, import, and manufacture firearms, magazines and ammunition within Colorado. Gunsport is the only named Plaintiff asserting standing to contest the Ordinance's age restrictions. Gunsport alleges that it will suffer a significant loss of income as a result of provisions in the Ordinance that raise the age of majority to twenty-one years. Gunsport alleges that a marked percentage of its customers are people between the ages of eighteen and twenty who wish to purchase firearms now proscribed for people within their age bracket.

This Order addresses Defendant's motion to dismiss a portion of the litigation on the grounds that Gunsport lacks standing to challenge the age restrictions of the Ordinance. Specifically, Defendant moves to dismiss Claim 3 (prohibiting possession of firearms by persons between eighteen and twenty years of age), and Claim 4 (prohibiting sales of firearms to those same individuals).

II. LEGAL STANDARD

A plaintiff must have standing to bring a case; standing must be satisfied prior to the Court determining the case on the merits. *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004).

"To establish standing, a plaintiff must demonstrate that (1) he suffered an injury in fact and (2) the injury was to a legally protected interest." *Wibby v. Boulder County Bd. of County Comm'rs*, 409 P.3d 516, 520 (Colo. App. 2016)(citing *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977)). "If the plaintiff cannot establish both, 'no relief can be afforded, and the case should be dismissed for lack of standing.'" *Id.* at 520 (quoting *Wimberly*, 570 P.2d at 539).

The first prong of the inquiry, referenced as the constitutional prong, ensures the existence of an actual controversy foundational to the Court's exercise of its power, as well as "requires a concrete adverseness that sharpens the presentation of issues before the courts." *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000).

The second prong of the inquiry, referenced as the prudential prong, requires the court to “determine whether a particular constitutional or statutory provision underlying the claim creates a right or interest in the plaintiff that has been arguably abridged by the challenged governmental action.” *State Bd. of Cmty. Colls. & Occupational Educ. v. Olson*, 687 P.2d 429, 435 (Colo. 1984).

III. ANALYSIS

Defendant asserts that Gunsport has failed to establish either prong of the standing test.

Plaintiffs assert that Gunsport has sufficiently alleged both an injury in fact and an injury to a legally protected interest. In support of its allegation of injury in fact, Gunsport cites a future economic injury resulting from loss of revenue from its eighteen to twenty year old customers, and a threat of prosecution from the Ordinance. In support of its allegation of a legally protected interest, Gunsport asserts both a protected right of its own, and an interest in securing the subsidiary rights of its potential customers.

The Court addresses each requirement of standing in turn.

A. Injury in Fact

The injury in fact requirement “ensures that an actual controversy exists so that the matter is a proper one for judicial resolution.” *Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.3d 1002, 1006 (Colo. 2014). The requirement is sufficiently broad as to recognize both tangible and intangible injuries, but “an injury that is overly ‘indirect and incidental’ to the defendant’s action” will not convey standing, nor will the remote possibility of a future injury.” *Id.* at 1007 (internal citation omitted). In determining whether standing has been established, all averments of material fact in a complaint must be accepted as true. *Board of County Com’rs of Adams County v. City of Thornton*, 629 P.2d 605 (Colo.1981).

Gunsport alleges that it will suffer a significant loss of income as a result of the Ordinance, which raises the age of majority to 21. Compl. at ¶5. It additionally alleges that a marked percentage of its customers are people between the ages of eighteen and twenty who wish to purchase firearms now proscribed for people within their age bracket. *Id.* In accordance with the Court’s obligation to accept as true all averments of material fact for the purpose of determining standing, the Court accepts these assertions as true.

Defendant argues that these assertions are nonetheless insufficient to establish an injury in fact because they amount to a speculative future injury, which is insufficient as a matter of law. Defendant asserts that Gunsport has failed

to quantify the amount of revenue at issue. Defendant further asserts that the Ordinance permits purchases by individuals under the defined age of majority who have the consent of their parents. Because Gunsport fails to allege that it has any customers who would not be eligible for this exception, Defendant asserts, Plaintiff Gunsport has not established an injury in fact.

The Court holds that Gunsport's averments are sufficient to satisfy the requirement of an injury in fact. "Present or threatened economic harm constitutes an injury in fact." *City of Northglenn v. Bd. of Cty. Comm'rs*, 411 P.3d 1139, 1142–43 (Colo. App. 2016) (citing *Ainscough*, 90 P.3d at 856) (emphasis added). The Court finds no support for Defendant's assertion that an economic injury must be either definite or specifically quantified in order to be cognizable. "Colorado courts provide for broad individual standing." *Hickenlooper*, 338 P.3d at 1008, (citing *Ainscough*, 90 P.3d at 856) (explaining that Colorado's test for standing "has traditionally been relatively easy to satisfy"). Here, Gunsport has alleged a direct economic injury by means of the Ordinance's constriction of its marketplace. This meets the requirement of an injury that is not "overly indirect and incidental to the defendant's action." *Wimberly*, 570 P.2d at 539. The Court holds that Plaintiff Gunsport's alleged economic injury is sufficient to constitute an injury in fact.

In accordance with the above analysis, the Court need not reach Gunsport's alternate theory that a threat of prosecution under the Ordinance is a sufficient injury in fact to satisfy the constitutional prong of the standing inquiry.

B. Injury to a Legally Protected Interest

"Prudential considerations are judicially self-imposed limits on the exercise of a court's jurisdiction. They recognize that unnecessary or premature decisions of constitutional questions should be avoided, and that parties actually protected by a statute or constitutional provision are generally best situated to vindicate their own rights." *City of Greenwood Vill.*, 3 P.3d at 437 (internal quotes and citation omitted).

Gunsport may satisfy the second prong of the standing inquiry by demonstrating its own legally protected interest. It may alternatively, under certain circumstances, assert a legally protected interest on behalf of a third party. In their Complaint, Plaintiffs assert Gunsport's intent to claim third-party standing on behalf of its potential customers. Compl. at ¶6 ("Plaintiff Gunsport can and does represent the interests of its customers and potential customers in the purchase and sale of previously lawful firearms").

The Court first examines whether Plaintiff Gunsport itself has a legally protected interest in the sale of firearms to individuals under the age of twenty-

one.² The Court holds that Gunsport does not. The Colorado Constitution provides individuals with a “right to keep and bear arms in defense of [their] home, person, and property.” Colo. Const. art. II, § 13. Plaintiffs cite no authority for the proposition that this right extends to the sale of firearms, and the Court finds no such extension inherent in the constitutional language. Accordingly Gunsport cannot, and does not in its Response, allege it has a legally protected interest in selling firearms the individuals in question.

Having concluded that Gunsport does not have a legally protected first-party interest in the sale of firearms to individuals between eighteen and twenty years of age, the Court turns to the question of whether Gunsport has third-party standing to assert the rights of its would-be underage customers.³ Consideration of this prudential question requires the Court to determine whether Gunsport is a proper proponent of the particular legal rights on which Plaintiffs base their suit.

Several principles, meticulously explained in federal precedent, urge restraint in the application of third party standing. *See Miller v. Albright*, 523 U.S. 420, 118 S.Ct. 1428 (1998) (O'Connor and Kennedy, JJ., concurring); *Singleton v. Wulff*, 428 U.S. 106, 113, 96 S.Ct. 2868, 2874 (1976); *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205 (1975); *Powers v. Ohio*, 499 U.S. 400, 411, 111 S.Ct. 1364, 1370–1371 (1991).

“First, the courts should not adjudicate [third party] rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of *stare decisis*.”

Singleton, 428 U.S. at 113 (internal quotes and citation omitted.)

In keeping with the rationales for restraint in the application of third-party standing, federal jurisprudence instructs careful consideration of the litigant's relationship to the third party and of whether there exists “some hindrance to the third party's ability to protect his or her own interests.” *Powers*, 499 U.S. at 411. According to the preference for direct participation from the holder of the asserted

² Such legally protected interest would be sufficient to confer standing upon Plaintiff Gunsport as to Claim 4 only.

³ Third-party standing of Gunsport to assert the interests of these customers would be sufficient to confer standing as to both Claim 3 and Claim 4.

right, federal precedent generally requires the presence of a significant barrier to the participation of the first party in the litigation. Examples of sufficient barriers have included: the death of the primary right-holder, the difficulty of identifying such individual right-holders, a significant privacy right destroyed by participation in litigation, or insurmountable procedural obstacles to the participation of the primary right-holder. *Miller*, 523 U.S. at 448-450. While Colorado law has not followed many federal courts in adopting an explicit requirement of a daunting barrier to the direct participation of the first party, it has articulated the same preference as for the direct participation of the right-holder and the same considerations regarding the ability of the third party to stand as an appropriate proxy. *Olson*, 687 P.2d at 435.⁴

The Court holds that Plaintiffs have failed to establish Gunsport's third-party standing to assert the rights of its eighteen to twenty year old customers. First, Plaintiff has not pled, and the Court does not find, a "substantial" relationship between Gunsport and a potential unidentified future purchaser. The relationship of a gun shop to its customer is much more attenuated than the intensely personal relationship between a pregnant woman and her doctor, or a student and her teacher, that have compelled other courts to accept the standing of the latter to assert the rights of the former. *See Singleton*, 428 U.S. at 117; *Olson*, 687 P.2d at 440. More significantly, the Court finds that Plaintiffs have pled no barriers to the direct participation of these would-be customers themselves, nor can the Court independently discern any such barriers. While the Court acknowledges that some potential plaintiffs might age out of the Ordinance restriction during the pendency of litigation, Plaintiffs have not asserted any such concern. Even if such concern did exist, an "aged-out" Plaintiff could argue for the retention of his right to litigate on the grounds that the deprivation is "capable of repetition yet evading review." *See Singleton*, 428 U.S. at 117 (citing *Roe v. Wade*, 410 U.S. 113, 124-125, 93 S.Ct. 705, 713).

Accordingly, the Court holds that Gunsport has failed to establish a legally protected interest of its own, or on behalf of its third-party would-be customers who are prohibited from firearm purchases under the age restriction in the Ordinance. Having found that Gunsport has failed to establish third-party standing, the Court declines to reach the question, asserted by Defendant in its Motion, of whether a putative eighteen to twenty year old firearm purchaser would himself have a legally

⁴ The Court acknowledges the existence of a disjunctive three-factor test in *Olsen*, directing trial courts to consider the presence of a substantial relationship between the plaintiff and the third party, the difficulty or improbability of the third party asserting its own rights, or the existence of some need to avoid dilution of third party rights in the event that standing is not permitted. *Olson*, 687 P.2d 435. Under *Olsen*, any of the three factors standing alone could be sufficient to confer third-party standing. The Court, however, finds that it is not bound by the disjunctive test articulated in *Olsen*, because *Olsen* concerned a First Amendment claim in which the Colorado Supreme Court specifically noted that "prudential limitations on third party standing have been even more relaxed" in accordance with the specific societal danger of chilling free speech. *Id.* at 436.

protected interest in firearm purchase or possession. *See, e.g., Horsley v. Trame*, 808 F.3d 1126, 1133-34 (7th Cir. 2015); *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 719 F.3d 185, 204 (5th Cir. 2013).

IV. CONCLUSION

For the foregoing reasons, the Court finds that Gunsport lacks standing to pursue Claims 3 and 4 of the Complaint. The Court therefore **GRANTS** Defendant's Motion to Dismiss Claims 3 and 4.

DATED: December 12, 2018

BY THE COURT

A handwritten signature in black ink, appearing to read 'N. Salomone', is written over a horizontal line.

Nancy W. Salomone
District Court Judge